



BASELINE GUIDING HUMAN RIGHTS-BASED PRINCIPLES ON COMPENSATED GESTATIONAL SURROGACY IN THE UNITED STATES

CENTER FOR REPRODUCTIVE RIGHTS

July 1, 2019

As the incidence of compensated gestational surrogacy (CGS) in the United States increases,¹ states are reconsidering their legal and policy approaches to the issue. The practice of CGS implicates core human rights of multiple stakeholders, including persons acting as surrogates, children born of such arrangements, and intended parents.² In many contexts, legislation regulating CGS has the potential to ensure legal certainty and the respect, protection, and fulfillment of the human rights of all stakeholders impacted. Such legislation also has the potential to recognize and address power dynamics in CGS arrangements that may be rooted in gender, economic, and structural inequalities.

These baseline human rights-based guiding principles on CGS were arrived at using a consultative process that drew on the expertise and experiences of persons acting as surrogates, as well as advocates, researchers, clinicians, attorneys, and third parties who have represented parties to a surrogacy arrangement. Additionally, we consulted with representatives of the reproductive and disability justice and LGBTQ communities who engage with surrogacy and are impacted by its legalization and regulation, or lack thereof. Critically, this process engaged with and centered the experiences of people who have acted as surrogates whose perspectives are often marginalized in policy conversations around surrogacy. We continue to seek and welcome feedback, including especially from groups who are traditionally marginalized in the discourse around CGS in the United States.

This document posits a set of considerations critical to ensuring that laws and policies on CGS in the United States protect, respect, and fulfill the rights of all stakeholders to a surrogacy arrangement. It is not meant to serve as a model act, though we urge lawmakers to take these considerations into account when developing authorizing legislation. It is important to note that although the scope of these baseline guiding principles is limited to addressing legislation and regulation on CGS, they may be useful to consider in developing legislation and regulation to legalize and regulate *any* form of surrogacy.

¹ Kiran Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, FERTILITY AND STERILITY (2016).

² Such human rights standards and considerations include: Personal and Bodily Integrity, Autonomy and Dignity, Privacy and Family Life, Equality and Non-Discrimination, Highest Attainable Standard of Health, Benefits of Scientific Progress, Informed Consent, Rights of Child, as well as the human rights principles of Inclusion and Participation of Perspectives of those Most Impacted, Accountability, and Best Interest of the Child.

DEFINITION OF TERMS

Compensated Gestational Surrogacy: The practice where an intended parent(s) contracts with a person acting as surrogate to attempt to become pregnant, carry to term, and deliver a child(-ren) for the intended parent(s) using embryo(s) created using IVF and receives payment beyond reimbursement for “reasonable” medical expenses. The person acting as surrogate does not contribute their own gametes to the creation of the embryo(s) with which they are implanted.

Person Acting as Gestational Surrogate: A person who contracts with an intended parent(s) to attempt to become pregnant, carry to term, and deliver a child for an intended parent(s) and does not intend to parent the child(-ren) born of the surrogacy arrangement. This person does not contribute their own gametes to the creation of the embryo(s) with which they are implanted.

Intended Parent(s): An individual or individuals who contract with a person acting as surrogate with the intent to parent the child(ren) born of a surrogacy arrangement. The individual or individuals may or may not contribute their own gametes to the creation of the embryo(s) with which the person acting as gestational surrogate is implanted.

Match/Matching: Refers to the process by which a person acting as surrogate is paired with an intended parent(s), often by a surrogacy agency. Although processes can vary, typically all parties are screened and interviewed by the surrogacy agency, and the would-be surrogate undergoes significant medical and psychological review. These steps take place before the parties officially enter into a surrogacy arrangement and sign a contract and before the person acting as surrogate begins the process to attempt to become pregnant.

Surrogacy Agency/Broker: A third-party business or individual who facilitates and coordinates a surrogacy arrangement between an intended parent(s) and a person acting as surrogate. Entities, including fertility clinics, may serve informally as surrogacy brokers or have trained professionals on staff or external collaborators who may likewise serve as brokers. There is currently no federal entity regulating or licensing surrogacy agencies or brokers and only one state, Washington, included language on this in its legislation.³

³ While not binding, the American Bar Association recently adopted the Model Act Governing Assisted Reproduction (2019), an update on the 2008 Model Act Governing Assisted Reproductive Technology, which provides guidance on a variety of assisted reproduction issues, including on surrogacy arrangements.

PREAMBLE

A human rights-based approach to surrogacy recognizes, protects, and balances the rights of all parties to a compensated gestational surrogacy (CGS) arrangement. Such an approach also requires that the perspectives of communities and individuals directly impacted by surrogacy inform the laws and policies that govern them. Thus, to comport with human rights, laws and policies to legalize and regulate CGS should be developed with significant and authentic engagement with and input from people most impacted, including persons acting as gestational surrogates, children born of CGS arrangements, and intended parents. At the same time, such laws and policies must promote accountability and transparency in decision-making at all levels of government and by private actors. Thus, establishing an accountability mechanism to oversee and hold accountable the actions of third parties, including fertility clinics, surrogacy brokers and agencies, and escrow agents, and to establish best practices and licensing schemes for said actors should be part of any legislative and regulatory approach to legalize and regulate CGS in the U.S.

A person who chooses to enter into a contract to become pregnant with a future child for whom they did not provide their own gametes and then to provide that child to an intended parent(s) should be recognized as a full participant in the process and as a human with rights. Thus, the phrase “person acting as surrogate” is used throughout this document to both recognize their panoply of rights and to serve as a useful reminder of their need for human rights protections throughout the CGS arrangement.⁴

The goals of legislation authorizing and regulating CGS should be two-fold: (1) to provide legal clarity to the parties, and (2) to protect the rights of all stakeholders, including persons acting as surrogates, children born of such arrangements, and intended parents. To achieve this, the principles outlined below should be incorporated into any legislation, policy, and regulation on CGS in the U.S. and operationalized through oversight and enforcement mechanisms.

⁴ Although discussions around surrogacy often centers the experience of cisgender women, we recognize that transgender men and gender non-conforming people can also become pregnant. Additionally, different actors use “surrogate” over “carrier” or vice versa. We believe “surrogate” better captures the humanity of the pregnant person and personal nature of the reproductive labor they contribute in surrogacy arrangements. Thus, this memo primarily uses the terms “person acting as gestational surrogate”/“persons acting as gestational surrogates” to acknowledge that people with a range of gender identities may act as gestational surrogates. This term is shortened to “gestational surrogate” or “surrogate” in a few instances but should be read to be gender neutral and to recognize the full humanity and rights of persons acting as gestational surrogates.

BASELINE HUMAN RIGHTS-BASED GUIDING PRINCIPLES

Personal and Bodily Autonomy

1. **Every person has the right to make decisions about their reproductive life.** As is consistent with human and constitutional rights, a person acting as gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum. Although a person acting as gestational surrogate may, and typically does, strongly consider the stated preferences (before or during the pregnancy) of the intended parent(s), this right cannot be waived, should be affirmatively acknowledged by all parties from the beginning of a matching process, and must be expressly included in any contract governing a compensated gestational surrogacy arrangement. The potential for a breach of contract, unique to this circumstance, is a separate issue and its potentiality should not override the gestational surrogate's fundamental right to reproductive decision-making authority.

Equality and Non-Discrimination

2. **Laws and policies regarding compensated gestational surrogacy must not discriminate against people on prohibited grounds, such as race/ethnicity, gender, sex (including sex stereotypes, gender identity, gender expression, and sexual orientation), marital status, nationality, religion, and/or disability.** Additionally, laws and policies must not result in differential treatment based on such distinctions or reflect particular beliefs about motherhood or parenthood that exclude or discriminate against individuals seeking to enter into a compensated gestational surrogacy arrangement, particularly with regards to single individuals, same-sex couples, people who are transgender, and people with disabilities.

Highest Attainable Standard of Health

3. **Governments must ensure that reproductive healthcare information and services are available, accessible, acceptable, and of good quality on a non-discriminatory basis.** All pregnant persons, including persons acting as gestational surrogates, are entitled to dignified, safe, respectful, affordable, and accessible reproductive health care from health professionals of their choice during all stages of pregnancy, including during attempts to become pregnant, pregnancy, delivery, and post-partum. Additionally, both persons acting as gestational surrogates and intended parents, and where appropriate their families, should have access to mental health and psychological care, education, and support/counselling from the moment a match is made and throughout a compensated gestational surrogacy arrangement.
4. **The right to the highest attainable standard of health includes the right to make and exercise decisions regarding matters concerning one's body and sexual and reproductive health free of violence, coercion, and discrimination.** Thus, the person acting as gestational surrogate must be able to exercise this right at each stage of the process, including birth, without fear of violence, coercion, discrimination or undue pressure and with the confidence that their decision will be respected. Health care professionals providing care to the person acting as gestational surrogate must consider that person as their patient to whom they owe a duty of care and that person's physical and mental health must be a primary consideration throughout a compensated gestational surrogacy arrangement. Additionally, professionals involved in such arrangements, including medical and mental health care providers and assisted reproduction clinicians, should use their professional judgement to guard against violations of this right.

Informed Consent

5. **Every person has the right to comprehensive, unbiased, and evidence-based information and services and to consent to or refuse treatment.** Informed consent based on comprehensive, unbiased, and evidence-based information and services is critical to respecting a person's rights to autonomy, self-determination, and the highest attainable standard of physical and mental health. The technologies and processes involved in gestational surrogacy change over time and research about their safety and risk is ongoing. Thus, it is important that all parties to a compensated gestational surrogacy arrangement be informed about all known short- and long-term risks specific to medical procedures involved in gestational surrogacy arrangements and about the state of existing research on the same when providing informed consent. Additionally, persons acting as gestational surrogates should be well-informed about the risks associated with pregnancy and childbirth. Informed consent must be given orally and in writing in advance of and throughout a compensated gestational surrogacy arrangement whenever there is a decision point or question about medical treatment so as to ensure that all parties continue to consent to or refuse treatment and participation in the arrangement.

Rights of the Child

6. **Rights protections adhere at birth.** Human rights do not apply prior to birth and laws and policies concerning compensated gestational surrogacy do not grant pre-natal rights protections to an embryo or fetus. States may not use the regulation of compensated gestational surrogacy as a mechanism by which to apply human rights protections to an embryo or a fetus.
7. **States must ensure that laws, policies, and practices guarantee the rights of all children, including, but not limited to, a name, to be registered at birth, and to a nationality.** Laws and policies concerning parental recognition, guardianship, and adoption must guarantee the rights of children born via compensated gestational surrogacy and must place the principle of the best interest of the child at their center.

Privacy and Family Life

8. **The right to private and family life includes the right to decide whether or not to become a parent.** Pre-birth parentage orders in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child's legal parents will be if and *once the child is born*. The process to petition for and to receive a judicial pre-birth parentage order must include affirmative participation by the person acting as gestational surrogate or their independent legal representation and by the intended parent(s). Pre-birth parentage orders neither grant fertilized eggs, embryos or fetuses the status of persons under the law nor grant any party parental rights over them.

Right to Benefit from Scientific Progress

9. **An intended parent(s) wishing to have a child via compensated gestational surrogacy has a right to benefit from scientific advancements.** This right has been recognized as inherently linked to the right to participate freely in the cultural life of the community and interpreted to include access by everyone without discrimination to the benefits of science and its applications, including to scientific information, processes, and products. Thus, states must ensure that scientific benefits be made physically available and economically affordable on a non-discriminatory basis, particularly for marginalized communities.

This right in no way obliges a state to provide intended parents with access to a gestational surrogate for the purposes of having a child via compensated gestational surrogacy. This right also does not provide a guarantee or assurance that intended parents who contract with a gestational surrogate will ultimately have a child.

Inclusion and Participation

10. **States should ensure that persons directly impacted can effectively and meaningfully participate in the development, adoption, and implementation of laws and policies that impact them.** Legal representation is often an essential precondition for the meaningful participation of all rightsholders and to the exercise and enjoyment of rights. Persons acting as gestational surrogates and intended parents must have access to full, independent, effective legal representation of their own choosing from the time a match is established, through birth, and during legal parentage determination. To protect against any undue influence, intended parents must pay for the gestational surrogate's counsel of choice, unless the gestational surrogate chooses to pay for independent counsel, and all funds for the gestational surrogate's independent legal representation as well as all other expenses associated with the compensated gestational surrogacy arrangement, including reasonable estimates for variable expenses, must be held in escrow by an independent escrow agent before a contract is drafted and throughout the entirety of the compensated gestational surrogacy arrangement.

Accountability

11. **Public and private actors have a responsibility to respect the human rights of all stakeholders.** Thus, states must ensure that laws, policies, and practices on compensated gestational surrogacy arrangements promote accountability and transparency in decision-making at the local, state, and federal level and by private actors. Establishing an accountability mechanism to oversee and hold accountable the actions of third parties, including fertility clinics, surrogacy brokers and agencies, and escrow agents, and best practices and licensing schemes for said actors should be part of any legislative and regulatory approach to legalize and regulate compensated gestational surrogacy in the U.S.