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Ethics of Surrogacy During COVID-19 Pandemic

by: Cathy Sakimura, Emily Galpern

The COVID pandemic has placed new hurdles to having a child through surrogacy, complicating international surrogacy in particular by restricting travel, delaying birth certificates and visas, and introducing specific considerations about safety and well-being. In addition, the pandemic has created new challenges to engaging in international surrogacy ethically due to changes in how healthcare is administered, limiting face-to-face interactions, and of course, increasing the health risks for everyone involved – women and other people acting as surrogates and egg donors, genetic intended parents undergoing medical procedures, and babies born through surrogacy. These challenges continue even as the landscape of the pandemic changes, given variation between countries in vaccination access.

What does it mean to approach international surrogacy ethically? An ethical approach strives to minimize the effects of gender, economic, global, and racial inequities that impact the bargaining power of people acting as surrogate or egg donors. The vast majority of people acting as surrogates and egg donors are women, and addressing the impact of gender inequality and the control and regulation of women's bodies are core aspects of an ethical approach to surrogacy. This approach strives to ensure that their basic rights and ability to achieve a just contract are respected, including the right to self-determination and complete decision making over their own bodies and conditions, ones that protect their physical, emotional, and mental health. This approach also recognizes the rights of people born through surrogacy to legal security and knowledge about their origins. Finally, it strives to allow intended parents to enter into surrogacy arrangements regardless of sex, sexual orientation, gender identity, or marital status.

It is important for intended parents contemplating surrogacy at any time to consider how to do so ethically, but even more imperative during the pandemic due to heightened health risks and a new environment related to COVID precautions. The focus of this article is on international surrogacy arrangements, in which intended parents and the person acting as surrogate live in different countries. In many countries and contexts, people acting as surrogates have little bargaining power and few protections for their basic health and rights. Communication can be limited or restricted altogether. Here are some key considerations for intended parents considering entering into an international surrogacy arrangement during the pandemic; many apply to domestic arrangements as well, where the intended parents and person acting as surrogate live in the same country. Some of these recommendations are less applicable in the United States, where the authors of this blog live, but many are still relevant. We understand that the experiences of women and other people acting as surrogates vary widely in both international and domestic arrangements, including in the U.S.

1. Consider waiting to enter into an international arrangement until the pandemic is more under control or entering a domestic surrogacy arrangement.

With the vaccine rollout in many countries is reaching significant levels, it finally appears possible that control of the spread of COVID is within reach. Because women and other pregnant people are at higher risk of serious disease, waiting until infection rates are lower or there is greater vaccine access would reduce the risk. Another option would be to consider a local surrogacy arrangement if such arrangements are permitted where you live. At a minimum, it is helpful to reduce the need to travel by having all procedures occur near where people acting as surrogates and egg donors or genetic intended parents reside.

Additionally, certain international arrangements are never advisable. For example, United States family law attorneys generally advise against intended parents in the United States entering into international surrogacy arrangements, primarily due to the risk of being

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unable to establish citizenship for their child and return to the U.S. This risk is heightened for LGBTQ intended parents due to discrimination.

In the US, surrogacy laws vary across US states and some have no regulation. If you live in the US, be sure to thoroughly investigate the laws of your state to determine whether surrogacy contracts are enforceable, and to understand other policies: whether the law excludes same sex or unmarried couples or single people; if compensation is permitted; and if there is a residency requirement for intended parents and/or the person acting as surrogate.

2. Openly discuss attitudes toward health and medical decisions and daily living practices before entering into a contract.

Open communication between the intended parents and person acting as a surrogate is essential in building a trusting relationship and fostering a healthy pregnancy. It is important for you and the person acting as a surrogate to feel comfortable with each other's attitudes and approaches to key questions such as vaccinations, medical treatment choices, and lifestyle choices. In the contract, it is crucial that the woman or other person acting as a surrogate maintain all rights to health and welfare decision-making during pregnancy and delivery. Because of the inherent difference in bargaining power and her basic right to bodily autonomy, a person acting as a surrogate should not be asked to agree in advance to make certain decisions or to allow the intended parents to make or approve decisions that impact her body. This includes decisions around COVID vaccination or treatment and day-to-day behaviors to minimize COVID risks, as well as decisions around embryo transfer, termination, selective reduction, and cesarean section.

3. Ensure that the contract requires that the agency, clinic, or primary intermediary allow you and the person acting as a surrogate to communicate throughout the arrangement.

It is important that intended parents and the person acting as a surrogate be allowed to freely communicate throughout the entire process (embryo transfer, pregnancy, delivery, postpartum). This is the only way that intended parents can know what is actually happening on the ground and can advocate for the person acting as a surrogate if the agency or clinic violates her rights or if there are challenges or complications, including those due to COVID. Any limits on communication should be determined by the person acting as a surrogate rather than by intermediaries. International arrangements where the surrogate lives outside of the U.S. often involve intermediaries who prohibit communication; this is another reason for U.S. intended parents to choose domestic arrangements.

4. Create a plan about who will care for the baby if you are not able to arrive in time for the birth; do not expect or ask the person acting as a surrogate to be the caregiver.

It is impossible to know if travel restrictions will prevent you from arriving before or immediately after your child is born. This delay could be short or substantial. It is important to be clear in the contract who will care for the baby if you are delayed, and to ensure that the person acting as a surrogate will not be the caregiver. Involving her in care after birth can create uncertainty about her role and goes beyond the scope of what she has agreed to do. Everyone involved benefits from the certainty of knowing what roles each person will play.

5. Avoid higher risk medical procedures. Especially while health risks due to COVID remain a concern, higher-risk medical procedures that raise the potential for pregnancy, childbirth, or other complications should be avoided.

This includes procedures such as multiple embryo transfer and anything other than mild stimulation for egg retrieval from egg donors. The person acting as surrogate should also not be required to undergo a medically unnecessary c-section. Avoiding these procedures is essential in any surrogacy arrangement, but they are an even greater concern during the pandemic.

6. Engage legal counsel who is committed to an ethical approach to surrogacy and ask questions about the ability of the person acting as a surrogate to choose her attorney.

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Before entering into a contract, engage legal counsel who can help you navigate any challenges that arise for you, the person acting as a surrogate, or your newborn with integrity for all involved. The agency may provide you with a list of possible attorneys to represent you. It is important to ask questions of your potential attorney before retaining them about their approach and values, how they will communicate with you, and what their experience is with international surrogacy. Engage an attorney who you feel you can trust and who will listen to you and your concerns.

The person acting as a surrogate should be represented by independent counsel of her choosing, and that choice should be freely made. Ask the agency whether she is able to talk with the attorney before deciding to enter into an attorney-client relationship and if she is offered more than one choice for representation.

Conclusion

Other than considering delay, all these recommendations are best practices that should be followed in all international surrogacy arrangements, including after the pandemic ends. Most of these recommendations apply to domestic situations as well. There have always been and will continue to be challenges to creating ethical surrogacy arrangements. These challenges are exacerbated by the pandemic. Even taking these measures, there is still potential for exploitation of women and other people acting as surrogates and egg donors. However, we feel that these steps are crucial for creating conditions to better ensure the health, well-being, rights, and dignity of women and other people working as surrogates and egg donors, and to ensure rights and respect toward all intended parents.

For additional recommendations beyond COVID-related issues, see [Surrogacy360's Recommended Principles and Standards for Engaging in International Surrogacy Arrangements](https://surrogacy360.org/considering-surrogacy/principles-and-standards/).

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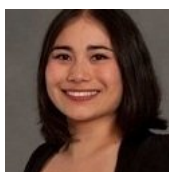
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Emily Galpern, MPH, is a consultant for the Center for Genetics and Society (CGS) and Pro-Choice Alliance for Responsible Research (PCARR). She manages CGS' Surrogacy360 project, a website providing factual information and resources about the health, legal, and ethical issues surrounding surrogacy. She also coordinates the ART Working Group, an international network co-hosted by CGS and PCARR. Emily works closely with organizations and scholars in the US and internationally and specializes in policy advocacy, capacity building, and education in relation to the intersection of assisted reproduction and reproductive justice.



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Cathy Sakimura is the Deputy Director and Family Law Director at the National Center for Lesbian Rights. Cathy also founded and oversees NCLR's Family Protection Project, which improves access to family law services for low-income LGBT parents and their children, with a focus on increasing services to families of color. She serves on the International Advisory Board of Surrogacy360. Cathy received her J.D. from UC

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