

“Bargaining about Birth”  
Rachel Reboche, 2022 Kidwell Lecture

Abstract: Surrogacy contracts depend on the exchange of information. Intended parents want information about the surrogate’s pregnancy in order to make decisions regarding prenatal care, during-pregnancy behavior, and birth. Contract provisions can cater to those desires and support the broader assumption that parents should seek as much prenatal information as possible. Yet surrogates have the right, by statute and as patients, to manage their prenatal care and thus control information about their pregnancies.

During the COVID-19 pandemic, travel restrictions, bans on hospital visits to birthing surrogates, and the threat of COVID-19 contraction – with evolving understanding of effects on pregnant people and resulting children – have upended the contractual expectations of intended parents and surrogates. If anything, the pandemic has encouraged intended parents to surveil the health of gestational surrogates because of the heightened threat of illness. The result has been a change in contracting practices that range from incentives, such as “stay-at-home” stipends for surrogates, to punitive measures, like the threat of liability under contract clauses governing prenatal behavior. More broadly, the pandemic has spotlighted the fragility of surrogacy arrangements and the surprising irrelevance of statutory protections when disputes about prenatal care and postnatal care arise.

This essay assesses the challenges of negotiating, drafting, and enforcing gestational surrogacy contracts as viewed in the aftermath of the pandemic. It argues that new legislation across a number of states, which attempts to protect the interests of intended parents and surrogates through rights to parentage and bodily autonomy, respectively, is likely to do little to change what happens on the ground. Indeed, when conflicts arise, parties have and will look to professionals, such as lawyers and fertility brokers, who in turn continue to rely on largely unenforceable contract provisions to diffuse conflict. These practices highlight the power of professionals and agencies – repeat players with their own agendas – in setting the terms of the surrogacy process and suggests that future regulation look less to parties’ rights and more to wholesale industry reform.