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Client Alert: Surrogacy-Global Health Challenges from California to Ukraine

Surrogacy refers to an arrangement whereby a woman agrees to carry a baby for another individual or couple who are unable to do so otherwise. There are two types of surrogate pregnancies: traditional surrogacy, where the surrogate is a genetic parent of the child, and gestational surrogacy, where (thanks to egg retrieval from the intended mother or other donor) the surrogate carrying the pregnancy has no genetic relationship to the child.

Surrogacy laws vary from state to state. Some restrict the practice altogether (*e.g.* Nebraska, Michigan, Louisiana). Other states permit altruistic surrogacy, but not commercial surrogacy agreements which furnish compensation for the surrogate. Several states have inconsistent laws which allow *surrogacy* but deem *surrogacy contracts* unenforceable, resulting in scenarios where the surrogate may decide to retain custody of the child, or conversely, the intended parents can refuse to take possession of the child. Most legal experts agree that California is the friendliest state for surrogacy. California's Uniform Parentage Act allows intended parents to rightfully claim parentage for a child they beget through surrogacy. In addition, state law allows commercial surrogacy, while California courts enforce surrogacy agreements.

Even California's system is imperfect. This past year has included a reminder of a history of instances of fertility clinics handling biological materials irresponsibly (misplacing biospecimens) and fertility doctors substituting their own reproductive material for anonymous donors. A lawsuit in Los Angeles last year highlights how two mothers became unwitting surrogates for each other when an IVF clinic mistakenly switched their embryos. The error was only discovered after birth when it became obvious that the infants did not resemble their purported genetic parents. After several months of raising the babies, both couples agreed to a "baby-swap" so each set of parents could raise their respective biological child. In response to these sort of disasters, in September 2021, the California legislature passed AB 556, a new law criminalizing the misuse "of sperm, ova, or embryos." No matter what impact the new law has, the regulatory environment for fertility clinics remains relatively lax.

When we look at the bigger picture, however, the United States, and especially California, are something of an outlier when it comes to surrogacy. Multiple countries prohibit any form of surrogacy, including China, Italy, Spain, France, Portugal, Bulgaria and Germany. Others, such as Ireland, Australia, Canada and the United Kingdom, will only allow surrogacy that is altruistic. Couples in these countries must look abroad if they want to contract a surrogate. And there are not many choices. Since 2015, when India, Thailand, and Nepal banned commercial surrogacy services for foreigners, the top two destinations are the **United States**, where surrogacy costs surpass $100,000, followed by **Ukraine**, where costs run about $40,000-$50,000.

With Russia's invasion of Ukraine, the country's surrogacy industry has become another facet of this unprecedented crisis. Every year, some 2,000 to 2,500 children are birthed by surrogate Ukrainian mothers. On February 21st, 2022, while the Russian military made final preparations for its attack of Ukraine, BioTexCom, a fertility clinic located in Kyiv, released a YouTube video depicting how it had prepared a bomb shelter to protect its surrogate mothers and infants. Images of staff, newborns, and expectant mothers shifted to footage of an underground shelter containing sleeping bags, cribs, crates of canned food and water, as well as gas masks. Many Ukrainian clinics obtained extra liquid nitrogen to keep bio-banks cool, or installed redundant back-up generators in anticipation of war-related power outages. Meanwhile, messages were sent to intended parents that their frozen embryos, gametes, or eggs, could potentially be evacuated to neighboring Georgia or Romania, if necessary.

The fertility industry contributes between $1-1.5 billion USD to Ukraine's GDP. It caters to parents around the globe, from Canada to China. On city busses and trains, it is common to see advertisements looking to recruit young women to consider surrogate pregnancy in exchange for financial compensation. There are some 33 private and 5 government-run fertility clinics operating throughout the country. Half of them are located in the nation's capital, which would make Kiev the unofficial international capital for commercial surrogacy.

While worldwide attention is focused on the terrible suffering inflicted on Ukrainians, the war is also causing immense angst for couples around the globe that have sent frozen eggs and embryos to clinics in Ukraine as part of a "last chance" attempt to have children. The cessation of flights to Ukraine also means that many parents cannot be present when their surrogate gives birth, and it is unknown when and if they will be able to collect their

biological children. Similarly, keeping in contact with surrogates has also been challenge, as many have taken flight to Poland, Hungary or Romania.

The surrogacy crisis resulting from Russia's invasion is just one example of the global impact of this deadly confrontation. As hostilities continue, Ukraine's role as a hub for surrogacy and alternative reproduction solutions will be severely challenged. It is difficult to predict the long-term effects this will have on surrogacy and its regulation around the globe. Even as our prayers are focused on the wellbeing of everyone impacted by this awful crisis, perhaps one positive outcome will be pressure on countries with unduly restrictive surrogacy laws, such as Canada, Ireland or France, to reconsider and loosen legal restrictions.

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