

New surrogacy laws: We still haven't got it right

[André Picard](#)



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Ontario's [Bill 28](#), the All Families Are Equal Act, is a well-intentioned move to end discrimination against families – in particular, same-sex couples – who use donor embryos and donor eggs and/or sperm to conceive a child.

But the legislation, in an effort to remove roadblocks to parenthood for many who are desperate to have a child, risks undermining the legitimacy of surrogacy and creating a whole new set of problems for parents, surrogates and children.

That, in a nutshell, is the view of Toronto fertility lawyer Sara Cohen. She has identified five major problems with the law:

1) Bill 28 does not distinguish between gestational surrogacy (where the person carrying the fetus has no genetic connection to the fetus, so in vitro fertilization is required) and traditional surrogacy (where the person carrying the fetus has a genetic connection to the fetus, either through insemination or IVF using the surrogate's own egg). Almost all surrogacy is gestational, and the contracts are legally enforceable. Traditional surrogacy agreements are rarely upheld by the courts. The new law decrees that all surrogacy agreements are unenforceable. This is problematic for parents, who no longer have the security that they will get a child, as well as the surrogate, who can no longer enforce the agreement if parents-to-be change their minds.

2) The legislation would give the surrogate seven days to change her mind after birth, and require joint medical decision-making between the parents and the surrogate in the interim. This could prove nightmarish for hospitals and health-care providers if the child requires medical care.

3) The bill eliminates any judicial oversight of surrogacy. Currently, intended parents (regardless of sexual orientation, gender and number of parents) must be recognized as the legal parents of a child born through surrogacy, through a legal process. In other words, a judge has to legitimize the process, and often requires a DNA test to ensure that the woman who carried the child is not a legal parent. Ms. Cohen warns that the new law would “remove any checks and balances over surrogacy,” allowing parents to simply register the birth and declare parentage. This is problematic because, for example, parents could simply make a deal with an already-pregnant woman and avoid the adoption process. This could lead to fraud, coercion and even the “selling” of children. (Although, paying a surrogate for her services beyond basic expenses is illegal under federal law). While this rule is undoubtedly designed to cut legal expenses for would-be parents, it could prove costly in the long run.

4) In Ontario, adoptees have their records sealed to protect their privacy. Bill 28 does not automatically grant that same protection to children born through surrogacy, meaning parentage applications could be made public. Ms. Cohen argues that this is discriminatory.

5) The All Families Are Equal Act permits sperm donation through sex where there is a preconception written agreement making the donor not a parent. Ms. Cohen says this “seismic change” to the law is unnecessary and highly problematic. It essentially allows a man to contract out being a parent through sex; if that is the case, a woman should be able to do the same – and if both do so, that could leave a child with no legal parent.

This analysis is a reminder that there are many fascinating legal and ethical issues in the fertility field. More important, there are real people involved. While the sands are shifting, we owe it to them to get these laws right – or as right as possible.

That also goes for the federal government, which has promised to introduce new regulations to the Assisted Human Reproduction Act that will further restrict the ability of sperm and ova donors and surrogates to be paid for [their services](#). In other words, [onerous rules](#) are going to be made even more so. Surrogacy should not be criminalized. But nor should it be a free-for-all, where people desperate to be parents, or those who are in desperate need of money, can be taken advantage of.

The legislation of assisted human reproduction has a tortured [history](#) in this country. We still haven't got it right.

Government should be helping families – in all their glorious modern variations – to have children if they want. But it has to balance that with the need to protect surrogates, donors, parents and children from exploitation and heartbreak.

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