Received: 18 September 2022 | Revised: 25 May 2023 | Accepted: 23 June 2023

DOI: 10.1111/bioe.13204

SPECIAL ISSUE: REPRODUCTIVE TECHNOLOGIES & FAMILY TIES

bioethics WILEY

Double-donor surrogacy and the intention to parent

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Abstract

Assisted reproduction often involves biological contributions by third parties such as egg/sperm donors, mitochondrial DNA donors, and surrogate mothers. However, these arrangements are also characterised by a biological relationship between the child and at least one intending parent. For example, one or both intending parents might use their own eggs/sperm in surrogacy, or an intending mother might conceive using donor sperm or gestate a donor embryo. What happens when this relationship is absent, as in the case of 'double-donor surrogacy' arrangements (DDS)? Here, a child is conceived using both donor eggs and sperm, carried by a surrogate, and raised by the commissioning parents. In this paper, I critically examine proposals to allow DDS in the United Kingdom, and the intentionalist justification for treating this practice distinctly (morally and legally speaking) from private adoption. I argue that the intentionalist approach cannot plausibly justify such a distinction and that other approaches to moral parenthood are also unlikely to succeed.

KEYWORDS
assisted reproduction, family, intention, parents, surrogacy

1 | 'DOUBLE-DONOR SURROGACY': A RED HERRING?

A consultation paper called 'Building families through surrogacy: A new law' (hereafter BFTS), published jointly by the Law Commission of England and Wales and the Scottish Law Commission, sets out proposed reforms to laws governing surrogacy in the United Kingdom.[1] One of these proposed reforms applies to the provisions that currently prohibit surrogate pregnancies involving both donated sperm and donated eggs.[2] Under current legislation, at least one of the intended parents in a surrogacy arrangement must be genetically related to the child.[3] However, the authors of BFTS propose that 'double-donation' surrogacy (DDS) arrangements could be permitted under certain circumstances.[4] Permitting DDS would allow an individual or couple to arrange for a biologically unrelated child to be (re)produced for them to raise, by commissioning a surrogate mother to gestate and give birth to a child conceived using egg and sperm from (known or anonymous) donors.[5]

[1]Since this paper was submitted and revised, the Law Commission released their Draft Bill; the policy with which this paper is concerned was, in the end, not included. However, the debate concerning double-donor surrogacy remains relevant (the policy being legal in a small number of other countries) and offers an important lens through which to consider the acquisition of moral parental rights and the relationship between these rights and legal parenthood.

[2]Law Commission and Scottish Law Commission. (2019, June 6). *Building families through surrogacy: A joint consultation paper*. Consultation paper, para. 5.26.
[3]Human Fertilisation and Embryology Act 2008, ss. 54[4a], 54A[3a].
[4]Law Commission and Scottish Law Commission, op. cit. note 2, para. 12.58–12.59.
[5]The surrogate could also act as an egg donor by using her own egg and conceiving through artificial insemination, as permitted under current surrogacy law.

Whilst this would be new in the eyes of U.K. law, such a practice is not an entirely novel idea. Going back nearly four decades to 1985, we find that Page imagines an arrangement identical to this in all practically and morally relevant details, albeit under a slightly different name:

> In the simplest of all forms of surrogacy [...] one married couple enters into an agreement to have a child for another married couple who, let us assume, are themselves unable to have a child. No new techniques are needed for this form of surrogacy. We can assume that the child would be conceived naturally by sexual intercourse. The surrogate couple supply all the functions for producing the child and are thus complete substitutes for the commissioning couple. Therefore I shall call this 'total' surrogacy.[6]

Of course, surrogacy and other forms of assisted reproduction currently allowed in the United Kingdom usually involve some form of clinical intervention; our intuitions about parenthood in the scenario that Page describes might be swayed by this departure from the norm. Certainly, the BFTS proposal does not explicitly suggest that double donation could be combined with surrogacy through sexual intercourse. However, DDS is identical to Page's 'total surrogacy' in certain crucial, morally relevant aspects. Specifically, both would involve the planned procreation of a child and its transfer to biologically unrelated commissioning parents. The central problem with which this paper is concerned is that this arrangement (whether we call it DDS or 'total surrogacy', and whether conception takes place in a fertility clinic or in a couple's home) could also be described as a *planned private adoption*.

Even a cursory examination of DDS reveals clear similarities to both surrogacy and planned private adoption. DDS arrangements, like surrogacy arrangements, would be planned in advance, with the child's conception precipitated by the parties' shared intentions regarding the eventual parenting of the child; but like private adoption, DDS arrangements involve the transfer of a child to biologically unrelated prospective parents according to a private arrangement between the parties. Under current U.K. law, the birth mother and her spouse/civil partner (if applicable) are the legal parents of the child by default, and the commissioning couple would not be eligible for a parental order (used to process surrogacy arrangements) in the absence of any genetic link.[7] Transfer of the child to the commissioning couple according to the will of both parties *would* therefore be private adoption, albeit a private adoption planned in advance. As such, it would be prohibited. It is a criminal offence to '[ask] a person other than an adoption agency to provide a child for adoption', to offer a child for adoption 'to a person other than an adoption agency', or to enter an agreement to adopt a child or facilitate the adoption of a child, 'where no adoption agency is acting on behalf of the child in the adoption'.[8] There are no parallel restrictions on asking for (or offering) aid in having a child by means of surrogacy, this being understood as a form of *assistance* in producing 'one's own' child, rather than the private *transfer* of a child from one set of parents to another.

The removal of the requirement for a genetic link in surrogacy could therefore create a legal contradiction. The same practical arrangement would be legal according to one piece of legislation and a criminal offence according to another. It is straightforwardly problematic for something to be legal or illegal depending on what name we give to it, if the morally relevant features do not change. So: is the term 'double-donor surrogacy' a red herring? Or is there something about this practice that would justify our treating it differently from private adoption?

2 | MORAL AND LEGAL DISCREPANCY

For want of a neutral term, I will use the acronym 'DDS' to refer to arrangements in which a child is produced, by agreement between the intending parents and a surrogate, using egg and sperm from contributors other than the intending parents.[9]

In the United Kingdom, as in most countries, legal parental rights are currently determined primarily by the facts of (a) birth and (b) marriage or civil partnership. The birth mother of a child is a legal parent by default, and if she is married or in a civil partnership, then her spouse/CP will be a legal parent by virtue of this relationship (unless, in case of conception by fertility treatment, they did not give their consent). However, the genetic parental link is not without legal significance. If the birth mother is not married and does not name the genetic father as a legal parent herself, he may seek filiation on the basis of that genetic relationship within a certain timeframe. If the genetic father is somebody other than the spouse, then (again within a certain timeframe) the spouse may challenge the legal presumption of legitimacy using a DNA test. Finally, the genetic connection is a crucial element of surrogacy under current U.K. law, as a determinant of eligibility for a parental order.

The genetic parental link is also not without *moral* significance. Whilst surrogacy is not universally considered morally permissible, it is accepted in some countries as a way in which people may have 'their own' child. Many people would agree that those who contribute their genetic material and have a child with a surrogate mother have the same kind of independent moral claim over their children as genetic fathers in 'normal' procreation, regardless of their legal relationship with the birth mother.[10] Where surrogacy is seen as a form of assisted reproduction, legal accommodation of surrogacy has

[6]Page, E. (1985). Donation, surrogacy and adoption. *Journal of Applied Philosophy*, *2*(2), 166.

[7]In surrogacy arrangements under current U.K. law, the birth mother of the child is likewise the legal parent by default, and the parental order (transferring the relevant rights and duties to the commissioning parent/s) cannot be granted without her consent, 6 weeks following the birth. The rights of surrogate mothers are currently therefore equal to the rights of birth mothers who give up their child for adoption; the latter likewise have 6 weeks before they grant or withdraw consent to have their default parental rights terminated.

[8]Adoption and Children Act 2002, s.92[1-2]).

[9]In Page's 'total surrogacy', the gestational mother is also the egg donor. There is also nothing in the BFTS paper that would preclude the surrogate mother from being the egg donor under the proposed legislation.

[10]In some cases, only one parent in a commissioning couple will contribute genetic material; the rights of the nongenetically related partner are understood by some as analogous to stepparent adoption (and are processed legally as such in some countries) and by some as analogous to the rights of nonprogenitor partners who acquire parental rights by virtue of their relationship with the child's birth parent.

been defended by appeal to the widely recognised importance (for many people) of genetic parenthood.

Private adoption, on the other hand, has been condemned explicitly by some philosophers of parenthood who argue that changes in custody are only justified if motivated primarily by the best interests of children. This parallels the reasoning behind the current (near-universal) *legal* prohibition of private adoption. For example, David Velleman notes, 'we regard parental obligations as transferable, morally speaking, only under exigencies that make their transfer beneficial for the child rather than convenient for the parents.'[11] Edgar Page, whose account I mentioned in Section 1, appeals similarly to the principle that 'children are not transferable by individual parents.'[12] Some argue that the very nature of the right to parent precludes its being privately transferred to others. According to Anca Gheaus, for example, parental rights are privileges to exercise control over one's child, and we simply lack normative power to alienate this right by privately giving it to others.[13]

Whether commissioning parents in DDS have independent moral rights to the child (and there is consequently no private transfer of rights at stake) is therefore crucial to this debate; a difference in the moral rights of prospective parents in DDS and private planned adoption could justify a parallel difference in their legal status.[14] The rest of this paper is therefore concerned with *moral parental rights*, and I will use 'original parenthood' to refer to the holding of independent moral rights to parent the child at birth, as opposed to acquisition of these rights by transfer. If DDS is legalised, then of course commissioning parents will be granted *legal* parental rights; my question is whether this change would be justified from the perspective of moral parenthood.

3 | OUTLINING THE OPTIONS

If commissioning parents in DDS have independent parental rights (such that DDS would be relevantly distinct from planned private adoption), these rights cannot be grounded in a biological link. If we are to characterise DDS as a form of *surrogacy*, we therefore have to accept an account of original parenthood according to which one may become a moral parent by virtue of factors independent of gestational or genetic contribution. In this section, I outline the intentionalist approach taken by the authors of BFTS and by other scholars who appeal to intention as characterising the distinction between adoption and surrogacy. I will argue over the next few sections that this approach is untenable and that we therefore ought to understand DDS as commissioned procreation and planned private adoption.

Page argues that original parental rights track ownership of gametes: biological parents have rights over their own offspring because they owned the sperm and eggs from which they were conceived. Those to whom gametes or embryos are donated are the moral parents of the resulting child. Page explicitly includes gametes/embryos donated in utero, in order to justify the 'total surrogacy' scenario quoted above, noting that 'acceptance of the principle that children *cannot* be transferred contrasts sharply with our acceptance of the principle that gametes and embryos can be transferred'.[15] There are various objections to be made in response to Page's account. One of these is the unwarranted focus on genetic parenthood and attendant disregard for the moral significance of pregnancy; another is the proprietary approach. Many would balk at the notion that parental rights are akin to, or have a root in, property rights. However, hidden inside this purportedly proprietary account is an appeal to the shared *intentions* of all those involved:

> If the commissioning parents have a claim to the child, in total surrogacy, it must be entirely because of the agreement drawn up between them and the surrogate couple. No other factors are relevant. Now the agreement is that when the child is born it will be handed over by its natural parents to the couple who want it. And the intention is that this would involve a transference of all the rights and duties of the natural parents in respect of the child to the commissioning parents.[16]

It is this idea that we find paralleled in discussions of DDS 40 years on, and it is therefore this that I will focus on. Can intentions, and their role in the orchestration of a child's conception, be determinative of original parenthood?

A key feature shared by DDS and surrogacy, as noted above, is that both would involve advance planning. On the most common understanding of adoption, conversely, this is 'usually a *post facto* solution to the pressing problem of a child whose parents cannot or will not care for them'.[17] According to the authors of BFTS, a 'salient difference' between adoption and surrogacy is 'that the adoption process begins only after a child already exists'.[18] Page's earlier account similarly argues that the key conceptual difference between adoption and surrogacy is that 'adoption is concerned with arrangements for existing children who need parents whereas surrogacy is concerned with the production of children for parents, or prospective

[11]David Velleman, J. (2008). The gift of life. *Philosophy & Public Affairs*, *36*(3), 252.
[12]Page, op. cit. note 6, p. 167.
[13]Gheaus, A., & Straehle, C. (forthcoming). *Debating surrogacy*. Oxford University Press.
[14]It must be noted here that on some accounts, all surrogacy is characterised as a form of adoption involving the private transfer of a child. For the sake of this paper, I do not engage with this broader debate and focus on what (if any) morally relevant difference can be drawn between DDS and planned private adoption. See, for example, Robertson, J. A. (1983). Surrogate mothers: Not so novel after all. *The Hastings Center Report*, *13*(5), 28; Steinbock, B. (1988). Surrogate motherhood as prenatal adoption. *Law, Medicine and Health Care*, *16*(1–2), 44–50.
[15]Page, op. cit. note 6, p. 167. This contrast in moral acceptance continues to be formalised in law: gamete donation is legal across Europe, and the donation of surplus embryos is permitted in all but four European countries (Germany, Switzerland, Turkey, and Norway). Private adoption is, however, prohibited across the continent.
[16]Page, op. cit. note 6, p. 166.
[17]Weinberg, R. (2008). The moral complexity of sperm donation. *Bioethics*, *22*(3), 175.
[18]Law Commission and Scottish Law Commission, op. cit. note 2, para. 2.8.

parents, who want them'.[19] If adoption *necessarily* involves the transfer of parental rights regarding an existing child, as these characterisations would suggest, we cannot characterise DDS as adoption.

An upshot of this, however, is that planned adoption becomes a contradiction in terms. I would argue that this means that something has gone wrong in our reasoning. Clearly, if one can do something in the present, one can surely plan to do it in the future. We make plans concerning nonexistent things regularly—I can plan to bring a cake to my friend's party long before I have baked the cake. We can imagine a scenario (hereafter called *Planning*) in which Anna and Brian ask their friends Celia and Daniel to conceive and bear a child for Anna and Brian to adopt. The only difference between this planned private adoption scenario and the 'total surrogacy' scenario described by Page is the wording used to describe the arrangement. It is hard to distinguish *Planning* logically from DDS, given the congruent intentions for all parties before and after conception.

We should therefore not accept prima facie that planned adoption is impossible by definition. This would be deeply unintuitive and would also make as yet unjustified presuppositions about the nature of parental rights and their acquisition. The authors of BFTS are, of course, correct to point out that the *legal* adoption process begins only after a child has been born. However (assuming that we are not legalists), this is not relevant to an analysis of the acquisition of *moral* parental rights, or to the conceptual distinction between adoption and surrogacy on that basis.[20]

It might be argued that adoption of *some* indeterminate child produced by certain parents, or of a child that has already been conceived, can indeed be planned in advance, but that in DDS, the *specific* child's conception is precipitated by the agreement between the relevant parties. This collective intention and its relation to the child's conception might be considered a defining characteristic of surrogacy from the perspective of moral parenthood. The parental rights of the prospective parents are thus established prior to the child's conception by virtue of the consensus between the parties and the role of their shared intentions in bringing about the existence of the child. Perhaps this would allow us to separate DDS from planned adoption (without defining planned adoption out of existence), regardless of the biological relationship between the intending parents and the child. This is the intentionalist approach to moral parenthood, most notably defended by Hill.

On Hill's account, the original parents of a child are those who formed an intention to raise the child, prior to its conception, who made use of morally permissible methods in orchestrating the child's procreation, and who meet certain minimally adequate conditions to be able to parent the child.[21] A similar approach has been taken by others in justifying an adoption/surrogacy distinction that places DDS on the 'surrogacy' side of this distinction. For example, Flowers et al. suggest that a key difference between adoption and surrogacy 'lies in the circumstances of the conception. A surrogate becomes pregnant with the intention of conceiving and carrying a child that will belong to someone else'.[22] The authors of BFTS also hold that 'the intention to bring the child into the world as the child of the intended parents is what characterises a surrogacy arrangement'.[23] In a DDS arrangement, as in any 'ordinary' surrogacy arrangement, the surrogate conceives a child *because* of her shared intention with the prospective parent(s) that the latter will raise the child.

We may note, however, that identical shared intentions, precipitating conception, are present in *Planning*. So: can we really use the intentionalist approach to make a distinction between DDS and planned private adoption? Must we accept that *Planning* is not a planned private adoption case at all, but simply an instance of 'double-donor surrogacy'? In the next section, I argue that consideration of hypothetical (or 'conditional') intentions undermines the intentionalist approach.

4 | TWO KINDS OF INTENTIONS

The intentionalist claim is that we can draw a moral distinction between surrogacy (where this includes DDS) and planned adoption on the grounds that only surrogacy involves the kind of shared intentions that give the commissioning parents an independent claim to parental rights. Crucially, these shared intentions must be instrumental in bringing about the child's conception. In this section, I compare *Planning*, and DDS in the abstract, with another scenario. I aim to show that the appeal to intentions as determinative of original parenthood, in a way that allows a clear distinction between surrogacy and planned adoption, is on shaky ground.

Consider the case (hereafter referred to as *Contingency Planning*) of Adam and Ben, who want children, and their friends Cora and David, who have had enough children and are now using contraception. However, considering (a) Adam and Ben's desire for children and (b) Cora and David's knowledge that they do not always use the contraceptives reliably, they make an agreement with Adam and Ben: if they conceive, Cora will carry the pregnancy to term, and Adam and Ben will raise the child.

On the intention-based approach suggested above, it seems at first that *Contingency Planning* cannot be described as anything but a planned private adoption. The agreement regarding the child's raising may precede conception, but it is not the reason for conceiving the child. In fact, whilst the parties' shared intentions cause the child to be carried to term, Adam and Ben have nothing to do with the child's *conception* at all. If private adoption is a morally impermissible transfer of a child, primarily for reasons of the parents' interests rather than the child's, then it is reasonable to assume that *planned*

[19]Page, op. cit. note 6, p. 170.

[20]It is also worth noting here that the United Kingdom ban on prebirth adoption contracts relies on the assumption that one can, in fact, plan adoption in advance.

[21]Hill, J. (1991). "What does it mean to be a parent?" The claims of biology as the basis for parental rights. *New York University Law Review*, *66*, 356.

[22]Flowers, V., Cabeza, R., Pierrot, E., Rao, A., O'Leary, B., & Odze, L. (2018). Surrogacy: Law, Practice and Policy in England and Wales (Family Law, 2018), para. 9.36.

[23]Law Commission and Scottish Law Commission, op. cit. note 2, para. 10.126.

private adoption of the kind described in this case must be likewise impermissible. To think otherwise is once again to presuppose that planning the arrangement in advance, even hypothetically, changes the distribution of parental rights and obligations.[24]

A closer look at what is going on in *Contingency Planning* highlights morally relevant equivalencies with DDS in the abstract and with *Planning*. Cora and David may not be aiming to conceive, but their hypothetical agreement with Adam and Ben indicates that they have clear shared intentions about who will parent any child they *do* produce. What is the nature of these intentions?

A hypothetical intention (hereafter an intention$_H$) is an intention applying to some state of affairs that might, at some point, come to pass. For example, Katrin carries a card listing her basic rights and the phone number of a lawyer when she attends demonstrations, with the intention$_H$ of exercising those rights *if* detained by the police. In *Contingency Planning*, Cora and David do not have sex with the intention of conceiving a child for Adam and Ben to raise; in fact, their use of contraceptives indicates that their intention is to prevent conception. However, they do have sex with the intention$_H$ of giving up any offspring that *does* result to Adam and Ben to raise. Is the difference between intention and intention$_H$ relevant to moral parenthood in a way that distinguishes DDS from planned private adoption?

Most people who are trying for a baby will intend to parent any child resulting from their efforts, but even the young and fertile cannot know that they *will* conceive as a result of any given attempt to do so. As Ferrerò notes, 'Most intentions appear to be conditional in their 'deep structure' even when the conditions are not explicitly stated'.[25] With this in mind, we may imagine a DDS case in which the surrogate mother attends a fertility clinic with the intention of conceiving (using her own eggs and donor sperm). She might conceive at the first attempt or it may take multiple rounds of artificial insemination. For any (as yet indeterminate) child that she does conceive, we can reasonably say that her intention that the commissioning parents will raise *that* child is an intention$_H$: if she conceives, she will carry that child to term and give it to them to raise.

It may therefore be true that the surrogate in a DDS case has different immediate intentions to Cora and David in *Contingency Planning*—specifically, she aims to conceive, whilst in *Contingency Planning*, Cora and David aim to avoid conception. However, they have identical intentions$_H$ regarding any hypothetical children they *do* conceive: that they will be carried to term and transferred to someone specific to raise. The shared intention$_H$ of the parties (that Adam and Ben will raise any potential child that Cora and David produce) is made clear by their agreement in *Contingency Planning*. The only difference between *Contingency Planning* and DDS/*Planning* is in the steps taken (or not taken) to bring about the circumstances to which their intention$_H$ applies.

Roberts notes that a problem for intentionalism lies in explaining why intentions at one moment in time can determine the acquisition of parental rights/obligations when those intentions could be completely different later in time.[26] Her concern is more specifically with cases in which a surrogate mother intends to give up the baby at time A and intends to keep it at time B. However, the intentionalist must further explain why the intention to try and conceive has a monopoly on determining moral parenthood, rather than intentions$_H$ about parenthood.

In the case that Katrin *is* arrested, it seems clear that her intention$_H$ to exercise her rights if arrested is now more relevant and important than her original intention to avoid arrest. Analogously, if prospective parents in DDS do have parental rights in the first instance, these rights can only be acquired *after* the specific child is conceived. At this point, though, it seems clear that the relevant intentions$_H$ about the rearing of any children conceived (and not the original intentions regarding conception) are in play. In order for the proposed distinction between DDS and planned adoption to be plausible, we must therefore show both (a) that intentions and intentions$_H$ have differing moral significance and (b) that intentions regarding conception, and not intentions$_H$ regarding parenthood itself, are determinative of parenthood in surrogacy arrangements, such that they support a distinction between DDS and planned adoption.

5 | ORCHESTRATING CONCEPTION

It might be argued that (contra my claims above) the parties in our two cases do *not* have the same kinds of shared intentions and that a relevant distinction can be made between DDS arrangements and *Contingency Planning*-type cases because of this. There are two possible ways in which to parse Cora and David's intention$_H$ in *Contingency Planning*. Ferrerò distinguishes between an internal reading and an external reading of such intentions:

> If we consider a first person conditional profession of intention, 'I will **φ** if C,' the internal reading stands for an avowal of intention, 'I hereby undertake the intention to: **φ** if C;' the external reading stands for a prediction of one's future undertakings, 'I predict that, if C, I will undertake the intention to **φ** simpliciter'.[27]

In *Contingency Planning*, our two couples form the shared intention that Adam and Ben raise the child (here **φ**) if Cora and

[24]We may note here that under current U.K. law, in both the *Planning* and *Contingency Planning* cases, the birth parents of the child would have the right to change their minds and keep their default parental rights up to 6 weeks following the birth, whether the case were treated legally as surrogacy or adoption (see note 6). The question at stake is whether there is a relevant difference between the cases that would change the distribution of moral parental rights, such that we could justify treating these sets of parents differently following legal reform.

[25]Ferrerò, L. (2009). Conditional intentions. *Noûs*, *43*(4), 700.

[26]Roberts, M. A. (1993). Good intentions and a great divide: Having babies by intending them. *Law and Philosophy*, *12*(3), 287.

[27]Ferrerò, op. cit. note 25, 702.

David conceive (here C). In theory, we may either understand this as the intention, formed prior to conception, that Adam and Ben will raise any child that Cora and David conceive *or* as the prediction that, if Cora and David conceive, the two couples will form the intention that Adam and Ben raise the child. The advocate for DDS might argue that there is still a morally significant distinction between DDS and *Contingency Planning* because the relevant intention is not genuinely formed in the latter case; instead, it is simply predicted. Therefore (since the relevant intention is then only formed post-conception), *Contingency Planning* is straightforwardly a private adoption case. My response to this line of argument, however, is that we have no clear reason to favour an external reading over an internal reading of the couples' agreement in this case (except that this presupposition is convenient for the DDS advocate). Further, we could just as easily interpret the agreement regarding parenthood in a DDS case in the same way. The intentionalist must therefore demonstrate that it is the presence of the intention *to conceive*, rather than the couples' intentions$_H$ regarding *parenthood*, that makes the difference between adoption and surrogacy and places DDS in the surrogacy camp.

Here, we return to the proposal that what distinguishes surrogacy (including DDS) from planned adoption is that in surrogacy, the relevant intentions precipitate the child's conception. Absent the biological parents' (or at least the gestational mother's) intention to try and conceive the child, Hill's requirement that the *intending* parents 'orchestrate' the child's birth cannot be fulfilled. On his account, and on the views expressed by the authors of BFTS, the intention 'I will **φ** if C' must be accompanied by the intention 'I will bring about C' in order for the arrangement in question to be surrogacy, rather than planned adoption.

However, the intention 'I will bring about C' is exactly the condition that exists in *Planning*. Assuming that we are not willing to define planned adoption out of existence, and that it is therefore logically possible to ask others to conceive children for us to adopt, 'orchestration' of attempted conception may be a feature of both planned private adoption and DDS. Further, it seems implausible that the presence of the firm intention to conceive (as opposed to, say, openness to the possibility of conception) makes the difference between some third party being original parents and their being adoptive parents.[28] This is more implausible still when we consider again the limited control that one has over conception—the intention to conceive does not result in conception with anywhere near the certainty that the intention to walk through a door or to tell a lie results in these things occurring. Depending on various physiological factors, one couple intending to conceive might have the same (or even lower) chances of *actually* conceiving than another couple who simply use contraceptives ineffectively.

A final problem for the intentionalist lies in Hill's requirement that the prospective parents use morally permissible means in orchestrating the child's birth. Not all formulations of intentionalism necessarily include this caveat, but other philosophers of parenthood have argued (and it seems like an uncontroversial claim to make generally) that having moral parental rights over a child depends on acquiring that child in a morally permissible way. If private adoption is morally impermissible, then it seems to follow that commissioning others to produce a child for the purpose of private adoption is morally impermissible. On the other hand, if DDS is a legitimate way to become a parent in the first instance, commissioning others to produce a chid for this purpose would theoretically be permissible, since there would be no private transfer of a child involved here; the prospective parents would have an independent moral claim. But the parental claim of those prospective parents *itself depends* on their orchestrating conception in a morally permissible way. We have a catch-22: they have parental rights only if they were morally permitted to commission the child, but they are morally permitted to commission the child only if they *will have* independent parental rights.

6 | CONCLUSIONS

Bluntly speaking: whatever way we slice it, it seems that planned private adoption and 'double-donor surrogacy' are simply different terms for morally, socially, and practically equivalent arrangements. Appeal to the intentions of the parties involved cannot plausibly produce a morally relevant distinction between these purportedly distinct practices. If we remain committed to the view that private adoption is morally impermissible, then we cannot reasonably defend practically equivalent arrangements under a different name, mobilising the connotations of the term 'surrogacy' to present this as another form of assisted reproduction—at least, not by means of intentionalism. Likewise, lawmakers in favour of the proposed reforms must consider carefully the potential contradiction between maintaining the criminal status of private adoption and allowing equivalent arrangements under the label 'double-donor surrogacy'.[29] At the very least, they must re-examine the notion that intention characterises surrogacy in a way that justifies a distinction between DDS and planned private adoption.

Is there an alternative to intentionalism that might justify this distinction? As noted in Section 3, DDS will come out as a form of

[28]It might be argued that, precisely because of this problem, DDS should only be allowed using anonymous gamete donors and artificial insemination/IVF, rather than by means of the informal arrangements described here. However, issues of cost in assisted reproduction might then give rise to a problem of unequal access. The requirement for clinical intervention would also not answer the question of why the intending parents in DDS are not adoptive parents—after all, a child conceived by means of ARTs could still be adopted.

[29]One way to overcome the moral and legal contradiction here might be to re-evaluate our stance against private adoption; however, this will require not only reconsideration of how parental rights are acquired but also of widely accepted principles regarding children's rights and interests in changes of custody. It might also be noted here (and I thank an anonymous reviewer for *Bioethics* for pushing me on this) that an extension of these arguments to ordinary surrogacy arrangements might suggest that these should also be outlawed. As stated before, such extensions go beyond the scope of this paper; however, it is worth observing that this would require us to reject entirely the moral or legal significance of genetic parenthood, something that would then conflict strongly with existing policies allowing (for example) unmarried genetic fathers to assert parental claims. See, for example, Black, G. (2018). Identifying the legal parent/child relationship and the biological prerogative: Who then is my parent? *Juridical Review*, *1*, 22–41.

adoption on any account of moral parenthood that makes independent parental rights conditional on reproductive contribution. There are approaches to parental rights that do not appeal directly to gestation or genetic connection, but they are unlikely to yield fruit here, given the practical equivalencies between DDS and planned private adoption. Consider, for example, Millum's 'investment' approach: parents acquire moral rights over their children by virtue of the labour that they expend in parenting, including prebirth parental work (e.g., gestation, taking parenting classes, preparing a nursery, and so on).[30] Neither the prospective parents in DDS nor in private adoption can acquire parental rights through the biological labour of procreation, but both may acquire the same rights over the child by preparing for parenthood. Both can paint a nursery, build a crib, stock up on formula, and so on. Whilst Millum suggests that the labour of the gestational mother may count towards the stake of the prospective parents, he argues that 'this will be true only if the surrogate mother really is working on behalf of the commissioning parents, and this requires that the surrogacy contract must be valid'.[31] Prebirth adoption contracts are currently illegal, as is DDS. As the law stands, then, there is no valid contract that would allow a distinction between planned private adoption and DDS. Other approaches to moral parenthood are likely to stumble upon similar problems in trying to justify this distinction.

Therefore, whilst I leave open the possibility that some approach to parental rights could allow a morally relevant distinction to be made between planned private adoption and DDS, my conclusion for now is that these are different names for the same practice. Terms like 'double- donor surrogacy' and 'total surrogacy' present a conceptual red herring from the perspective of moral parenthood. We can reasonably characterise these arrangements as *surrogacy* rather than *adoption* only if the prospective parents have independently grounded parental rights to the resulting child. In this paper, I have considered the intentionalist approach to justifying this view. This depends on our accepting a notion of parenthood according to which intentions (and only *certain* intentions held at *certain* times) ground the independent parental rights of commissioning parents in DDS arrangements. I have raised significant difficulties in this paper for the intentionalist—in particular, showing that this approach relies on an implausible distinction between the moral significance of different kinds of intentions—and leave the burden of proof with them as regards the acquisition of parental rights in DDS. If grounds for independent parental rights cannot be established, then as far as moral parenthood is concerned, we must understand these arrangements as equivalent to commissioned procreation and planned private adoption.

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How to cite this article: Baron, T. (2023). Double-donor surrogacy and the intention to parent. *Bioethics*, 1–7. https://doi.org/10.1111/bioe.13204

[30]Millum, J. (2010). How do we acquire parental rights? *Social Theory and Practice*, *36*(1), 112.
[31]Ibid: 121.