

Surrogate Motherhood

談代理孕母

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摘要

代理孕母的意思是指一個女性替代別人懷孕、生產，但所生的孩子要歸還給委託者。這樣的記載在人類歷史中可追溯到很久遠以前。隨著生殖科技的進步，四十多年前開始有了人工授精的技術，此時期的代理孕母雖不必與委託人發生關係，但嬰兒的 DNA 有一半來自孕母的卵，一半來自委託男性的精子。二十年前試管嬰兒技術成熟，又轉入一個新的形勢。在這之後，委託方的夫妻可以先用自己的精子與卵子在體外〔試管中〕受精，再將受精卵植入代理孕母的體內。這時代理孕母與子宮內的胎兒完全無血緣關係，這種做法成為今天的主流，我們要思考代理孕母的做法是否合理。作者認為，代理孕母是一個剝削窮人，物化女性，販賣嬰兒的行為，即使在合法的國家，也是一種不智的做法。我國目前法令禁止代理孕母，個人十分贊同。新的科技本身是中性的，但若它將人的價值貶低了，我們就應審慎取捨，才不會本末倒置，失去了人性最寶貴的一面。

關鍵字：代理孕母，倫理，法律



ABSTRACT

A "surrogate mother" is a woman who, for financial or other reasons, agrees to bear a child for another woman who is incapable to conceive herself. In other words, she is a "substitute mother" that conceives, gestates and delivers a baby on behalf of another woman who is subsequently to be seen as the "real" (social and legal) mother of the child. Though the practice of surrogacy has already become a big market in western countries, it has also generated countless challenges for the law because it adds a third dimension to the meaning of motherhood. Like adoption, surrogacy separates the role of rearing mother from what the law has called the natural mother, but gestational surrogacy breaks the latter down into the roles of genetic mother and birth mother, leaving two women with biological connections to the child. Because surrogacy tends to commodify and dehumanize people, and because of all its legal, social, and psychological complications, it is obviously not wise to accept surrogacy as an alternative way of procreation.

Key words: surrogate mother, surrogacy, ethics, law



INTRODUCTION

Since the time of Abraham, Sarah and Hagar, one woman agreeing to bear a child for another has encountered problems. In the past, infertile couples have been able, with the aid of a surrogate mother, to have a child genetically related to the husband, even when the wife is unable to produce ova or carry to term.

The word "surrogate" literally means "substitute" or "replacement". A "surrogate mother" is therefore a substitute mother. She is a woman who, for financial or other reasons, agrees to bear a child for another woman who is incapable to conceive herself. In other words, she is a "substitute mother" that conceives, gestates and delivers a baby on behalf of another woman who is subsequently to be seen as the "real" (social and legal) mother of the child. In the past, the most common kind of surrogacy is where a woman's egg, through artificial insemination, is fertilized by the sperm of the male partner of the couple desiring a child. Here the surrogate is the genetic mother of the child that she promises to give up, while the role of social and legal mother is taken over by another woman. It is also possible, if the father is infertile or wishes not to pass on a defective gene, to fertilize the surrogate's egg with the sperm of a donor.

To give both partners a genetic link to the potential child, fertility centers over the past decade have increasingly turned to so-called gestational surrogacy, in which artificial insemination is replaced by transfer of an embryo produced through in vitro fertilization (IVF) using the egg and semen obtained from the commissioning couple. In this kind of surrogacy, the surrogate mother only performs the function of gestation for the commissioning couple, without having a genetic link with the child.

But what happens when the arrangement doesn't work, when, for example, the woman refuses to turn over the infant? To whom does the infant rightfully belong? Should the surrogate mother be legally bound by the contract she signed? In determining custody rights, does it matter whether or not she is the genetic "mother" of this infant? Is the relationship between the intending parents and the surrogate best understood in terms of family law or contract law? Does surrogacy involve buying and selling babies? Does surrogacy exploit women, especially poor women?

Surrogacy has already generated countless challenges for the law because it adds a third dimension to the meaning of motherhood. Like adoption, surrogacy separates the role of rearing mother from what the law has called the natural mother, but gestational surrogacy breaks the latter down into the roles of genetic mother and birth mother, leaving two women with biological connections to the child.

COMMERCIALIZATION: A NEW INDUSTRY

Commercial surrogacy is estimated a \$40 million industry now in the US. Professional baby brokers advertise for couples who want a child and for women willing to give birth-through artificial insemination-for pay. The broker draws up a contract specifying the payment to the birth mother, typically \$10,000 plus medical expenses, in exchange for which she agrees to be impregnated with the father's sperm, to carry the pregnancy to term, and to relinquish the child and all parental rights. For his efforts, the broker

collects a \$15,000 fee, bringing the cost per child to more than \$25,000.

Like all commercial advertisements, surrogacy brokers claim to benefit both parties: infertile couples can acquire a baby who bears the genetic imprint of them and raise it as their own; surrogate mothers, meanwhile, can earn \$10,000 for nine months' work and give a gift of life to a grateful couple.

SURROGACY MARKET

It was estimated that from 1977 to 1992, five thousand surrogate births have taken place in the US (Levitt 1992). Ragone found that gestational surrogacy had increased from 5 percent in 1988 to 50 percent in 1992. This shift, she surmises, is due to the increased success rate of IVF and the desire of parents to have a child that is genetically related to both of them (Ragone 1994). By now most surrogacy agencies have learned how to screen out surrogates who may change their minds after the birth. And potential surrogates have learned that no surrogate has ever gotten custody of her baby in American courts, though some have won visiting rights. Courts are unlikely to grant rights to surrogates who are not genetically related to the baby. In effect, surrogacy (including commercial, fee-for-service surrogacy) is legal in about half the states.

The United Kingdom, France, Germany, and Australia have all forbidden commercial surrogacy. Nevertheless, arrange-it-yourself surrogacy appears to be flourishing in the United Kingdom, with surrogates paid exorbitant living expenses (legal) instead of a fee (illegal). In U.K., Up to 100 babies a year are born to surrogate mothers, and there is evidence of women earning L10,000 to L15,000 (\$ 16,000 to \$24,000) by "renting" their wombs. The more lucrative the practice, the more women may be attracted to it. There is now a risk of women becoming professional surrogates and viewing surrogacy as a form of employment. Surrogacy is now legal in Israel, but geneticists claim that it is rare. (Dorothy 1998)

Changing attitudes within the medical profession have added to the respectability of surrogacy. In 1984 medical opinion veered against professional involvement. By 1990 the BMA had altered its stance, and in 1996 it set out guidance to health professionals endorsing surrogacy as an acceptable option of last resort. (Warden 1998)

Assessment

Legal Issues

IS THE CONTRACT VALID?

Many states' laws are silent on contract pregnancy, which arose in the 1980s as reproductive technology advanced and markets invaded realms of life. So judges are put in the awkward position of deciding a large moral question with little guidance from the law.

The California Supreme Court, has upheld a contract between a childless couple and the woman they hired to have their baby in 1993. The court ruled that Anna Johnson, the surrogate mother, has no parental rights to the child she bore for Mark and Crispina Calvert, the boy's genetic parents (Johnson v. Calvert, No. S023721).

However, a different decision was made by the New Jersey Supreme Court, which decided the so-called Baby M case in 1988, declared such contracts invalid.

Legal experts were divided over the ramifications of surrogacy legislation. Some believe it invites the exploitation of women, encourages the treatment of children as commodities, and creates new opportunities for fraud. But other experts said the risks of surrogate parenting have been overstated, while the obvious benefits of such arrangements virtually have been ignored. (Hansen 1993)

COMMODIFICATION OF BABIES

Most surrogacy contracts are structured around the "product", not the process or the service of surrogacy. In the Stern-Whitehead (Baby M) contract, only after Whitehead delivered a healthy baby to the Sterns would she be paid the entire \$10,000 fee. If she miscarried prior to the fifth month of pregnancy, she would receive no fee. If she miscarried after the fifth month, she would receive only \$1,000 of the fee.

The law prohibits baby selling, but birth mothers receive payment only after giving out the baby, which is actually baby selling, or at the very least, the sale of a mother's custody over her child.

HEALTH CONCERNS

The agency making the surrogacy arrangements could be sued for malpractice if it does not adequately screen the surrogate mother or the donor. In *Stiver v. Parker*, a woman who contracted to be a surrogate mother was unaware that she was already pregnant with her husband's child when she was artificially inseminated in 1982. The baby was born with cytomegalovirus, causing grave birth defects that led the contracting father to back out of the agreement. In a suit against the lawyer and his medical associates, the woman alleged that the virus was transmitted during insemination. The Sixth Circuit ruled that private artificial insemination clinics owe a special duty to screen donors for diseases. (*Stiver v. Parker* 1992)

According to Goldberg, as many as 30,000 babies are born annually through artificial insemination processes. Even though the American Fertility Society formulated testing standards in 1986, the degree to which clinics subscribe to them varies substantially. A 1988 study by the Office of Technology of the practices of 1,058 physicians conducting donor inseminations and 30 U.S. commercial sperm banks. The study found that 44 percent tested for AIDS, 28 percent for syphilis, 26 percent for hepatitis, 12 percent for CMV and 6 percent for herpes (Goldberg 1992). These conditions can all complicate lawsuits.

CUSTODY FIGHTS

To illustrate the complexity and unpredictability of the social and legal consequences of surrogacy, we can take a look at a real case in California in which a baby girl, named Jaycee Buzzanca, with eight people who could arguably be called her parents, was actually parentless (Capron 1998).

This case exposed the complexity and unpredictability of the legal sequelae of contracts of surrogacy.

OTHER LEGAL PRECEDENTS

There are still other legal complications. For example, a surrogate might adopt a lifestyle likely to damage the embryo or fetus. If the baby is harmed, she could be sued. Even if the baby is unharmed, the contracting couple might still bring legal pressure to curb her lifestyle. In addition,

a contracting couple might require amniocentesis, and even abortion had they found any genetic defect of the fetus. Does the surrogate have the right to refuse abortion? Moreover, if the baby is born defective, who is legally liable? (Feinberg 1993)

Moral Concerns

IS SURROGACY IDENTICAL WITH ADULTERY?

As mentioned above, in most surrogate agencies, artificial insemination is progressively replaced by transfer of an embryo produced through IVF. This technology creates a double separation. First, the act of creating a human life is separated from sexual intercourse. Second, the embryo itself is separate from the mother. The embryo is then implanted in surrogate mother's womb who has no genetic relationship with the baby.

Let's first discuss the condition in IVF, the so-called gestational surrogacy. Physically, the husband has no sexual contact with the surrogate woman. Emotionally, the surrogate has a contract with the commissioning couple and the agency, so that she may have very little chance to breed affectional relationship with the husband by the arrangement. It is hard to say that IVF surrogacy is adultery in this sense.

However, in traditional surrogacy using artificial insemination, with the husband's semen artificially injected

in the surrogate's body, is emotionally, if not morally, problematic. Improper emotional ties easily develop between the husband and surrogate—at least in the mind of the wife.

And the resulting child would be the product of another union that is not sanctioned by the marriage vows and commitments. (Stewart 1998)

In either case, surrogacy allows a third party to intrude the close relationship between husband and wife. Though the contract maybe merely financial and temporary, it still stirs potential tension in the kinetic relationship between the intentional couple.

COMMERCIAL SURROGACY AND PROSTITUTION

A similarity seems to exist between commercial surrogacy and prostitution. Andrea Dworkin, the well-known American feminist, states that:

Motherhood is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power ... Women can sell reproductive capacities the same way old-time prostitutes sold sexual ones but without the stigma of

whoring because there is no penile intrusion. It is the womb, not the vagina, that is being bought. (Dworkin 1983)

It is not difficult to detect certain similarities between prostitution and surrogacy. Prokopijevic notices the following:

In both cases one's physical service is being offered, in both instances a deep personal or emotional relationship is not required for the transaction to be completed, in both cases material compensation is offered for the physical services provided. In both cases a physical capacity (sexual intercourse and gestation) that should be afforded special respect is degraded to a form of alienated labor. (Prokopijevic, 1990)

THE LINK BETWEEN MOTHER AND HER BABY

Instead of saying that reproductive ability is the most integral part of the female identity, one can rather claim that the bond between a pregnant woman and her child is usually an integral part of her pregnancy. Surrogate mothers have a nine-month relationship with the child they are carrying and which they eventually bear. This is an intimate and emotionally-charged relationship, and it is understandable if unanticipated feelings of attachment develop during it.

The problem with surrogacy arrangements is therefore that it causes a woman to be pregnant while expecting her not to acknowledge the fact that she is expecting her child. It tries to divorce pregnancy from the conscious knowledge that you are going to give birth to your child. In this way the surrogate becomes a mere "environment" or "human incubator" for someone else's child. (van Niekerk et al, 1995)

Many of these situations become more complicated when a surrogate is at the same time the genetic mother.

Rae argues that gestation should take priority over genetics in the determination of rightful motherhood and that the right to associate with one's children is a fundamental right, voiding prebirth waivers of parental rights. (Rae 1994)

COMMERCIALIZED WOMB

A commercial surrogate is a woman hired for profit to carry out someone's procreation intention. She may agree to be artificially inseminated, in which case her contribution is both genetic and gestational. Or she may agree to receive the couple's embryo, to act as their "host womb". When the arrangement works, she gives birth, turns over the infant, and receives payment for her services.

According to Rae, commercial surrogacy will flourish as an attractive option for the infertile only if surrogates can be paid, if intent to parent has determinative weight in a contract dispute, and if genetics overrides gestation in designating motherhood (Rae 1994). He further states that the

long tradition of procreative liberty in the United States protects noncommercial surrogacy. However, special characteristics set reproductive arrangements involving a commercial exchange outside Constitutional protection. (Rae 1994)

Margaret Brazier, professor of law at the University of Manchester, notes that in Britain bodily parts may be donated only as a gift for which no payments are allowed. The judgment is that the good to the recipient does not justify trade in bodily parts. Surrogacy should be informed by the same values. Renting one's womb for profit is ethically objectionable.

A FORM OF ALIENATED LABOR

Alienated labor the situation when the product of labor is separated from its producer. Women's reproductive labor is a special form of labor and should not become an act of alienated labor. The distinguishing feature of human pregnancies is that they may also entail a conscious knowledge of the significance of this physiological state and an active expectation of, and preparation for, the birth of a child.

Unless one can ensure the legitimacy of the surrogate's bond with the child and her perspective on her pregnancy without thereby denying that of the commissioning couple, the surrogacy arrangement can always be said to be dehumanizing or alienating. (van Niekerk 1995)

The application of economic norms to the realm of



women's pregnancy violates their claim to respect and consideration. First, by requiring the surrogate mother to repress whatever parental love she feels for the child, these norms convert women's labor into a form of alienated labor. Second, by manipulating and denying legitimacy to the surrogate mother's evolving perspective on her own pregnancy, the norms of the market degrade her. (Anderson, 1990)

WHEN A SURROGATE MOTHER CHANGES HER MIND

Many surrogates experience a change of mind as their pregnancy develops. At the beginning they might feel that pregnancy is simply a form of physical labor, and they will have no difficulty giving up the child, and that they are

simply performing a service for an infertile couple. These women often realize as the time of delivery nears, that they are expecting a child, in the full social and psychological sense of knowing that they are going to give birth to a human being that is closely tied to themselves. The interests of the surrogate seem strongest in one who is also the genetic

mother of the baby. The surrogate may well have strong feelings of bonding which she had not, in all good faith, anticipated.

If the surrogate is forced to hand over the child against her will, her labor would turn out to be alienated labor, since she is asked to separate herself from the fruit of her womb and to surrender that fruit to someone else. In cases where the surrogate decided to keep the child, surrogacy

could therefore be said to be immoral, since whatever happens, some moral and psychological harm (or at least disappointment) may come to one of the parties.

But what if the surrogate does not change her mind about handing over the child? Some surrogacy agencies have reported a high percentage of successful transactions. Does any moral harm result from these instances of surrogacy?

In screening women to select the most appropriate surrogates, the brokers look for the woman's ability to give up the child she is carrying easily. Normally the less attached the woman is to the child the easier it is to complete the arrangement. But this is hardly the ideal setting of pregnancy

(Kilner et al, 1995). As bioethicist Daniel Callahan of the Hasting Center describes,

We will be forced to cultivate the services of women with
the hardly desirable trait of being willing to gestate and

then give up their own children. This is not a psychological trait we should want to foster, even in the name of altruism. (Callahan, 1987)

ISSUE OF EXPLOITING WOMEN

Commercial surrogacy is held to harm surrogates by exploiting women who are economically and socially less advantaged, reducing the autonomy of gestational mothers with regard to their own pregnancies, and subordinating them to the wishes of infertile couples and to objectionable practices of overmedicalization. Many of the phases of the reproductive process are involuntary. It extends over a period of approximately nine months, and involves significant restrictions of a woman's behavior during pregnancy.

A couple usually prefer a surrogate who is (and will remain) a total stranger to them, for the very reason that they do not want a "second mother" to interfere with the upbringing of their child. Thus, a surrogate is usually treated as means to others rather than an end itself. This is harmful for a woman's respected role of gestation and procreation.

THE MORALITY OF SURROGACY CONTRACTS

Contractual surrogacy arrangements are rejected because they are potentially coercive and exploitative, and wrongly require the gestational mother to give up certain legitimate moral claims in relation to her pregnancy and prospective child, in addition to some of the reasons given above. Far from justifying the sale of babies, the deliberate, voluntary character of contract pregnancy heightens the moral wrong. As Sandel says,

the surrogacy contracts are not truly voluntary because no such agreement can be fully informed. Since the birth mother cannot be expected to know in advance the strength of the bond she will develop with her child during pregnancy, it is unfair to hold her to her bargain once the baby is born. (Sandel, 1997)

Contract surrogacy also degrades women by treating their bodies as factories and paying them not to bond with the children they bear. As mentioned above, such contracts are objectionable because they involve "selling babies" and that they are exploitative of women, especially poor women.

Social-Psychological Effects

IMPACT ON SURROGATES' FAMILY

Surrogate usually find that her role and duties within the household changes after a contract. In effect, the gestational carrier status will affect everything from her sex life to her travel plans.

This issue can emerge very strongly with regard to the potential effects on the children. There is some evidence of the effect of surrogacy on the other children of the surrogate mother. One woman reported that her 17-year-old daughter, who was 11 at the time of the surrogate birth

is still having problems with what I did, and as a result is still angry at me. Nobody told me that a child could bond with a baby while you're still pregnant. I didn't realized then that all the times she listened to his heartbeat and felt his legs kick that she was becoming attached to him.(New York Times 1987)

The children of some other surrogate mothers have reported their fears that they may be sold like their half-brother or half-sister, and express a sense of loss at being deprived of a sibling.

Furthermore, the widespread acceptance of surrogacy would psychologically threaten all children. (Munson, 1996)

WELFARE OF THE "SURROGATE CHILD"

Jenet McDowell thinks even surrogacy without fee is wrong because it dose not involve any loving intention to take care for the child by a surrogate mother (Feinberg 1993). Children should not be means, but ends in the relationships with their mothers.

We do not yet have solid data on the effect of being a "surrogate child".However, as we've noticed, a surrogacy arrangement seldom contemplates the welfare of its product, the children. Psychological problems for the child may arise if she or he learns of the surrogacy arrangement but can never contact the genetic mother. It might be heart breaking to learn that one's genetic mother was paid to sell him or her out. Feeling of unworthiness may appear and become harmful to the child's psychological development. The child may also have a confused or nonexistent relationship with its genetic mother. It

may have some interest in knowing and being reared by its genetic mother. This may also cut off the important source of medical information about his or her genetic profile.

The other conditions maybe that the child being reared by a homosexual or by a single father who wants children but not marriage. Few think being raised by only one parent is in the child's best interest. (Feinberg 1993)

CONCLUSION

One of the principal dangers of contemporary capitalistic, technological society is that it turns people into commodities. The danger we face with the development of reproductive technologies and surrogacy is that this tendency to turn everything into a commodity will only increase.

LeRoy Walter's study of committee reports on reproductive technologies notes a generally negative attitude toward surrogate motherhood. Only three of fifteen statements approved surrogate arrangements when a fee was involved, but all three strongly urged careful regulation of such arrangements. Even for noncommercial surrogacy, only four committees approved it. (Feinberg 1993)

Because surrogacy tends to commodify and dehumanize people, and because of all its legal, social, and psychological complications, it is obviously not wise to accept surrogacy as an alternative way of procreation.

The only exception would be the condition that a woman who, out of the love of life, volunteers her womb to save a frozen embryo chosen for destruction. If her motive is pure, the donation of her womb is a sacrificial act of love. (Steward 1998)

p.s. The content is the author's personal view and does not represent the employer's point of view.

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