Perspectives on Surrogacy: Risks, Rewards and Personal Choices

Noel P. Keane*
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Abstract

A little more than twelve years ago I was introduced to the concept of surrogate parenting, not by an attorney, a doctor or media event, but by a married couple who exhausted other avenues of over-coming the wife’s infertility and sought my advice on the legal possibility of having a child by artificial insemination of another woman.

KEYWORDS: surrogacy, risks, rewards
pushing white babies in strollers, white old folks in wheelchairs, can be carrying white babies in their bellies. Poor, uneducated, third world
women and women of color from the United States and elsewhere, with
fewer economic alternatives, can be hired more cheaply. They can also
be controlled more tightly. With a legally supported surrogate mother-
hood contract, and with new technology, the marketing possibilities are
ever—-and terrifying. Just as Perdue and Holly Farms advertise
their chickens based on superior breeding and feeding, the baby bro-
kers could begin to advertise their babies: brand-name, state-of-the-art
babies, produced from the "finest" of genetic materials and an all-natu-
ral, vitamin- enriched diet.

In Sum: Beyond Paternity

We cannot allow the law to inch along, extending to women some
of the privileges of patriarchy, but understanding the experiences of
women only as they are analogous to those of men. What is needed is
to move beyond the principles of patriarchy and beyond its modifica-
tions, to an explicit recognition of motherhood. Women are not, and
must not be thought of as, incubators, bearing the children of others—not the children of men, and not the children of other women.
Every woman is the mother of the child she bears, regardless of the
source of the sperm, and regardless of the source of the egg. The law
must come to such an explicit recognition of the maternity relationship.

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A little more than twelve years ago I was introduced to the con-
cept of surrogate parenting, not by an attorney, a doctor or media
event, but by a married couple who exhausted other avenues of over-
coming the wife’s infertility and sought my advice on the legal possibil-
ity of having a child by artificial insemination of another woman. At
first, the thought of such an arrangement seemed nothing less than in-
credible. I was not aware of the alarming percentage of married
couples who suffered from infertility and the disparate treatment that
these couples received.

A Not So Incredible Solution

After accepting the couple's challenge, I realized that no legisla-
tion or case law existed on the issue. Nonetheless, a Michigan probate
judge with whom I inquired indicated that the husband would be con-
sidered the legal father of a child so conceived by an unmarried surro-
gate, and the father's wife could later adopt the child. The same judge
opined that a fee payment would not be possible, but expenses incurred
by the surrogate would be approved. Encouraged by the judge's opinion
and by a subsequent news report of a surrogate arrangement by a Cali-
ifornia man, local newspaper advertisements for a volunteer surrogate
were placed.

The placement of those first advertisements and the later conclu-
sion that a fee for gestational services only was not contrary to existing
law have changed my practice to the point where hundreds of infertile


The author arranged for the surrogate parenting of Baby M and is the author of The
SURROGATE MOTHER (1983).

1. It should be noted that by its definition of "surrogate parentage contract",
Michigan's recently enacted Surrogate Parenting Act, P.A. No. 199 of 1988, Mich. Comp. Laws 722.851, does not on its face void those surrogate arrangements where the
surrogate is paid for gestational services only. The scope of this act's prohibitions is the
subject of recent litigation resulting in an opinion that failed to clarify delineate pro-
scribed activity. Doe v. Alt'y Gen. of Mich., No. 88-690032 CZ (Wayne County Cir.

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couples and potential surrogates have steadily and increasingly con-
tacted me in the years since. Indeed, my offices have arranged over 270
surrogate births. There are presently greater than 40 pregnancies, and
over 120 couples who have either entered into an agreement with a
surrogate or are seeking to do so.

The sheer magnitude of the practice has prompted some to conjure
up the derogatory label of "baby broker." The facts remains, however,
that my clients are individuals with desires and personal problems that
cannot be effectively addressed by other means. Moreover, the potential
surrogates who contact my office are endowed with the same human
dignity and individual rights of choice that are common to us all.

Many jurisdictions have legislation pursuant to which a woman's
husband is legally presumed to be the father of a child conceived by
artificial insemination with semen donated by or purchased from an-
other man. No written agreement, legal consultation, adoption or court
review is required. While this unequal treatment of married couples,
semen donors and surrogate mothers appears offensive to constitutional
principles, the basic concept of a third party providing the means for
procreation is not new at all.

Incredible Risks

Beyond the medical risks attendant to conception and child birth,
the greatest risk to both the surrogate and the couple is the ever-pres-
ent possibility that the surrogate may have a change of heart and be
unwilling to voluntarily relinquish custody or her parental rights.
For this reason, in the majority of cases, couples seeking a surrogate
mother enter agreements with women who have already fulfilled their
own desires of marrying, and having children of their own. Some form
of psychological screening, and independent legal consultation for the
potential surrogate is desirable for both herself and the couple.

2. Although statistics may be of little consequence to those few individuals who
find themselves involved in a surrogacy conflict, they do provide a powerful indicia of
the practice’s viability, and are an effective rebuttal for many of the critics who
have been made. All too often the focus of public debate has centered exclusively
around the extreme minority of "problem" cases with little recognition given to the
hundreds of surrogates who have found the experience satisfying and personally
rewarding.

3. It is my personal experience that surrogate mothers have a genuine and heart-
ful desire to aid an infertile couple in having a child. That they should also receive
some form of material compensation of carrying and giving birth to that child is hardly
a matter of just criticism.
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Cf. November 9, 1988) (rehearsal denied). In its opinion the court stated:
This Court finds that the Michigan legislature intended to prohibit all sur-
rogate arrangements where the surrogate mother is compensated (other
than actual medical expenses as a result of the pregnancy) and agrees to
voluntarily relinquish her parental rights to the child. It is important to
note that individuals may still legally enter into surrogate arrangements
where there is no compensation paid to the mother (other than actual med-
ical expenses). All other situations must be decided on a case-by-case
basis.

Id. (emphasis in original).

Nonetheless, no standard profile of an "ideal" surrogate mother
may be absolutely relied upon by either party, and no degree of psycho-
logical evaluation or legal consultation can remove the possibility that
she may change her mind after achieving a pregnancy or childbirth. In
over 270 surrogate births that I have been involved with, however,
there are only three instances where a legal conflict has arisen with
regard to child custody or adoption by the intended mother. The risk of
potential conflict must be considered in light of the free, informed and
voluntarily exercised choices made by both the couple and the surrogate.
The right of individual choice in matters of procreation is so highly regarded as to mandate constitutional protec-
tion under the right of privacy. It is particularly repugnant when a self-
appointed Chicken Little cries out to prohibit the exercise of that right
in order to protect the surrogate from herself.

In the final analysis, whatever the risks to the surrogate and couple
may be, these are risks that they have a right to incur.

Priceless Rewards

In spite of well publicized disputes and the virtual legal vacuum in
this area, the very number of couples who have accepted the risks of
surrogacy throughout the years is perhaps the best measure of both
their frustration with infertility and the magnitude of their reward.
What for most married couples is an easily accomplished decision to
have a child is to many others a nightmare of first discovering and then
attempting to treat or overcome infertility.

For the surrogate mother, it is a popular assertion and misconcep-
tion by surrogacy's critics that money is her greatest, if not only re-
ward, and that as such she is a victim of her need for money. On the
contrary, it is my personal experience that while any particular wo-

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man's willingness to become a surrogate results from a variety of personal motivations, money alone is not a sufficient or overriding cause for their actions. Monetary compensation to surrogates I have dealt with typically comes only after termination of the pregnancy, by miscarriage or birth, many months after forming the surrogacy agreement.

Personal Choices

This writer has discovered that it is not a difficult task to draft a written surrogacy parenting agreement, to ensure an informed decision by securing independent legal and psychological counseling for the surrogate or couple or to adapt and respond to the ever-changing semantics of the debate on surrogacy. While written agreements reduce the potential for conflict and misunderstanding and force a more introspective search of the participant's motivations and expectations, entering into such an arrangement relying solely on contractual terms is not enough. The fundamental nature of these arrangements are intensely personal endeavors for both the surrogate and couple, and whatever legal trappings are employed, the relationship between the surrogate and the couple is at its core a matter of trust and understanding.

To the extent that legislative enactments permit all parties to freely exercise informed choices and respect the individual's fundamental right of choice, these are welcome intrusions. When they prohibit or create uncertainty in the relationship, they unduly impinge upon that right.

It is my sincere hope that as the debate continues, the legal scholars, jurists and legislators faced with the issues of surrogacy will not be so short sighted as to deny its willing participants the right to share in the joy of a child.

Uniform Status of Children of Assisted Conception Act: A View from the Drafting Committee*

Robert C. Robinson** and Paul M. Kurtz***

I. Preface

Nuclear energy was at once a breakthrough into untold wonders, yet its use and development has been resisted by some as an uncontrollable force which threatens incomprehensible destruction. Nuclear energy, a force like many others, can be used for good and for evil, but once created, it remains for the prudence of folly of mankind to direct its course. It is not likely ever to be eradicated.

Medical technology has produced many miracles that have been feared and rejected at first: genetic engineers contemplate the perfect human, modern respirators sustain life, babies are produced in test tubes. Nuclear energy, genetic engineering, respirators, petri dishes and other advances developed by human ingenuity are here to stay. Once out, the genie never returns to the bottle. Our responsibility is to acknowledge the reality of these forces, and with wisdom and prudence, order and design their use for the good of humanity.

We are faced with the birth of many beautiful, innocent children brought into the world through extra-ordinary procedures which ultimately require regulation. The legal status of these children demands

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* Drafted by the National Conference of Commissioners on Uniform State Laws, adopted by that body August 1988 and adopted by the ABA at its meeting in February 1989.

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1. This article, as well as the Act itself, targets the children resulting from traditional artificial insemination, in vitro fertilization, and surrogacy arrangements. For definitions of these terms, see infra section 1 of the Act and its commentary. Legal status of children produced through other means is outside the scope of this article.