

# *Nova Law Review*

---

*Volume 13, Issue 2*

1999

*Article 12*

---

## Perspectives on Surrogacy: Risks, Rewards and Personal Choices

Noel P. Keane\*

\*

Copyright ©1999 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

# Perspectives on Surrogacy: Risks, Rewards and Personal Choices

Noel P. Keane

## **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

## Perspectives on Surrogacy: Risks, Rewards and Personal Choices

Noel P. Keane\*

---

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 overcoming the wife's infertility and sought my advice on the legal possibility of having a child by artificial insemination of another woman. At first, the thought of such an arrangement seemed nothing less than incredible. 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 legislation or case law existed on the issue. Nonetheless, a Michigan probate judge with whom I inquired indicated that the husband would be considered the legal father of a child so conceived by an unmarried surrogate, 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 surrogacy arrangement by a California man, local newspaper advertisements for a volunteer surrogate were placed.

The placement of those first advertisements and the *later* conclusion that a fee for gestational services only was not contrary to existing law<sup>1</sup> have changed my practice to the point where hundreds of infertile

---

\* Attorney at Law, Law Offices of Noel P. Keane, P.C., Dearborn, Michigan. The author arranged for the surrogate parenting of *Baby M* and is the author of *THE SURROGATE MOTHER* (1981).

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 surrogacy 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 clearly delineate proscribed activity. *Doe v. Att'y Gen. of Mich.*, No. 88-819032 CZ (Wayne County Cir.



couples and potential surrogates have steadily and increasingly contacted 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 fact 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 another 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-present 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.

---

Ct. November 9, 1988) (rehearsing denied). In its opinion the court stated:

This Court finds that the Michigan legislature intended to prohibit all surrogate 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 medical expenses). All other situations must be decided on a case-by-case basis.



Nonetheless, no standard profile of an "ideal" surrogate mother can be absolutely relied upon by either party, and no degree of psychological 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.<sup>2</sup>

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 protection 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 misconception by surrogacy's critics that money is her greatest, if not only reward, and that as such she is a victim of her need for money.<sup>3</sup> On the contrary, it is my personal experience that while any particular wo-

---

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 criticisms that 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 heartfelt 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.



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.<sup>4</sup> 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 surrogate 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.

---

4. Many women are willing to provide infertile couples with the means of having a child, because of their sympathy and compassion for the infertile couple.