

## REPRODUCTIVE TECHNOLOGIES AND SURROGACY: LEGAL ISSUES

DR. MARTHA FIELD†

My task in this essay is to try to set out the issues as lawyers see them concerning reproductive technologies and surrogacy. Unlike some areas of the law in which society has had longer experience, the law in these areas is still in the process of formation. The law is not at all settled. Indeed, so far, at least in this country, the issues have been decided on a state level. So many different solutions may be adopted concurrently, and three quarters of the states in this country have yet to give any indication of what position they will take on the subject of surrogacy. As lawmakers think about and argue about what rules ought to be adopted, their guiding principles are fairness; how to treat the particular parties before them justly; and how the changes they are asked to legitimate will affect society. In many ways, these considerations, I believe, parallel religious considerations of the same issues. Although our reasoning processes differ and our cultures sometimes emphasize different values, we are all asking the same questions.

This essay begins with a discussion of surrogacy. Three salient legal issues warrant mentioning. The first issue is whether surrogacy contracts are enforceable. The second issue is whether gestational surrogacy should be treated differently from "traditional surrogacy." Finally, the third issue is even if a surrogacy contract is not enforced, who should receive custody of the child who is born of a surrogacy arrangement. After exploring these questions, this essay briefly discusses other reproductive technologies.

One of the most important issues lawmakers face on the question of surrogacy is the status of surrogacy contracts. Should surrogate contracts be enforceable like contracts for chattel or a house? Should surrogate contracts be unenforceable? Indeed, should entering into such an arrangement be considered a violation of the criminal law? The context in which the enforceability issue most frequently arises is when the birth mother decides — either during the pregnancy or a short time after the birth — that she wants to keep the baby, and the father sues to obtain the child. This was the story in the famous New Jersey case — the *Baby M* case — as well as in many others cases that have happened both before and since. In such a situation, should

---

† Professor of Law, Harvard Law School.

a judge enforce the contract and give the baby to the father because the mother had promised to do so? Or does some reason exist to say that this is not like a contract for a chattel or a house? Does some reason exist for the state not put its power behind compelling performance of the contract?

In my writings, I suggest a position of nonenforcement. I suggest that the surrogate mother has the right to back out of the arrangement if she changes her mind. Most, if not all, states that have actually taken a position on the enforceability of surrogacy contracts have agreed with this approach and have held that surrogacy contracts are not enforceable. A few states have gone further and described the entering into a surrogacy arrangement as criminal. A few of these states have even enacted criminal penalties — only for paid surrogacy, not for unpaid surrogacy. No state enforces surrogacy contracts, even though some lawyers and some academics have suggested that enforcement would be an appropriate position. Indeed, if one looks internationally, the same consensus exists that surrogacy contracts should not be enforceable. A number of foreign countries have taken a position on surrogacy contracts. The United Kingdom, the Netherlands, Germany, Israel, and two Australia states appear to have taken positions on the issue of surrogacy contracts and seem to have come out in favor of non-enforceability. There appears almost to be a consensus on this issue.

Now why shouldn't surrogacy contracts be enforced? Part of the idea is that nonenforceability will not encourage surrogacy. It is believed enforcement of surrogacy contracts would give surrogates the green light to enter into these agreements. If surrogates get into trouble, then the courts will help them out. Nonenforcement is a more take-it-easy approach. It is an approach that is designed to slow surrogacy down.

But, of course, we have to ask why it is bad to encourage surrogacy. First, concerns exist about exploitation of women, especially poor women. These are concerns that are not fanciful. The lure of a very large sum of money, perhaps larger than the woman could get any other way, may lead her to commit herself to a decision that afterwards she may very deeply regret. Possibilities of exploitation will increase if surrogacy becomes more widespread. For example, a fully developed surrogacy program would undoubtedly include shipments of frozen embryos and frozen sperm from around the world to be implanted in third-world women at bargain rates.

This would raise concerns rather similar to those we see today in newspaper articles talking about persons in Turkey who have been convinced to donate an organ, such as a kidney, to be implanted in

patients in England. Sometimes the consideration is as low as \$500. Sometimes considerable money changes hands. In either case, clear issues of exploitation exist.

Some consider it patronizing to raise these arguments about exploitation, saying that decisions by women to enter into these contracts ought to be respected. Nonenforcement is said to belittle women, to suggest that women are irrational, unchangeable, and unable to make binding contracts. The argument of exploitation does not suggest that women are weak but instead that certain subject matters exist that are so important, so deeply personal, that we as a society do not want the state to intervene to bind people, whether men or women, by their previous promises.

Surrogacy would not be the only thing to be treated in this way; our law also treats other decisions as inherently not binding — decisions that are sometimes made by men as well as women. Take, for example, a promise to donate an organ. It may be perfectly legal to promise to donate an organ to someone, but if the donor changes his mind before the operation is performed, then no court would enforce that promise. Similarly, a promise to have sex is perfectly legal, but it is not enforceable in court if one of the parties changes his mind. Another example is a promise to marry. The fiancée may have relied upon this promise and may suffer greatly because of the change of heart of the other partner, but the promise to marry will not be enforced in court. And, finally, a promise to give up one's child for adoption is not a binding promise. It is not a binding promise in any state in this country. A promisor who changes her mind will not be made to give up the child. This is a rather frequent scenario. The planned adopters may have relied on the birth mother's promise to give up the child for adoption. The adopting couple may even have paid for the birth mother's medical expenses, but it is clear that if the birth mother changes her mind during pregnancy or before the child is turned over to the adopting couple, then they will not obtain any parental rights to the child. Surrogacy should be treated the same way as a promise to give up a child for adoption and should not be an enforceable promise.

Society also has an interest in keeping certain subjects outside of the market economy. The transfer of children is one of these subjects. For this reason, every state has laws prohibiting baby selling. Sometimes this objection is called an objection to commodifying children, to treating children as objects subject to barter and exchange. Those who raise this argument refer to several different possibilities. Sometimes they are talking about the tangible risks to children that may result. For example, one fear is that when couples can bargain

to produce a child they will feel they have a right to reject an imperfect child, such as a child who has a handicap or is HIV positive or who has any other characteristics that the contracting parents do not like. If couples react in this way, then children will start out life without any family to take responsibility for them. In *Baby M*, the New Jersey Supreme Court said that in a civilized society there are some things that money cannot buy. The court was alluding not just to the tangible harms that may flow from paid surrogacy, but also to the changes in the tone of society that commodification of children would entail.

Surrogacy and, to some extent, other new reproductive technologies raise serious questions about whether we want a world in which we can buy pre-fabricated embryos; a world in which we can mix and match genetic specimens from various celebrities and then gestate them on our own; or a world in which career women who want to be mothers have the option of hiring another woman to gestate their child even if they themselves are fertile. Indeed, employers may put pressure on career women to adopt such a course so that such a course becomes more of a norm.

A final and very serious societal objection against surrogacy is its potential effect upon adoption. Both a theoretical and a practical dimension exists to this argument. On the theoretical level, it would be destructive to adoption to over-emphasize the importance of the genetic tie at the expense of nurturance as a system of enforcing surrogacy contracts would do. On a practical level, all agree that when surrogacy catches on, it will greatly decrease the numbers of available adoptive homes. Noel King, a famous lawyer and promoter of surrogacy, brags that surrogacy will come to replace adoption. The National Committee for Adoption agrees, and it opposes surrogacy on this basis. Reasons exist why, given the choice, couples seeking a child may prefer surrogacy to adoption. For one thing, surrogacy makes it much more likely that couples will obtain a child as a newborn, which is increasingly difficult in today's adoption market. And, of course, surrogacy enables couples to have a genetic connection to the child who they will raise.

It would be a real societal harm for surrogacy to become a substitute for adoption. Surrogacy allows for the creation of new, made-to-order babies but only at the expense of babies who already exist and who need homes. Some answer that it is hard to adopt, at least to adopt healthy, white infants. But the shortage has resulted in many children being placed who once would have been hard to place. Children once considered to be unadoptable in this country are finding adoptive homes these days, and the surrogacy system threatens to re-

verse that trend. This would be a real social cost of promoting surrogacy.

Instead, we should adopt a go slow policy — one of nonenforcement. Most states are now taking that course. An advantage of simple nonenforcement, in comparison with criminalization of surrogacy arrangements, is that nonenforcement respects the right of women to do what they wish with their bodies. In a sense, nonenforcement represents a compromise on the debate as to whether surrogacy is demeaning to women or whether it is liberating for them — an issue on which feminists are divided. The nonenforcement option allows women to sell their reproductive capacity. It allows them to enter surrogacy arrangements and to be paid for them. It does not follow the tradition in our country of making women's choices for them, of regulating what they can do with their work life and what they can do with their reproductive life. Nonenforcement allows women to enter into these arrangements and to go through with them on whatever terms they choose. But it does protect the woman who herself decides she does not want to go through with the arrangement after all. Because the choices remain with the woman, it is hard to see how such a proposal can be considered anti-feminist.

These arguments of public policy, exploitation, commodification, and needs of existing children, have resulted in all jurisdictions holding surrogacy contracts nonenforceable with a division of opinion coming on the issue of whether paid surrogacy is criminal. These positions have developed with respect to traditional surrogacy like that involved in the New Jersey case of Maribeth Whitehead and Baby M, in which the surrogate mother is also the genetic mother of the child.

Recently, a new issue has emerged with the appearance of gestational surrogacy. A gestational surrogate is a woman who agrees to serve as an incubator for the sperm and egg of a couple who wish to have the child. Should the same rule of nonenforcement apply in this situation? So far, only one case has arisen. Thus, resolution of the legal issue remains wide open. The one case, *Calvert v. Johnson*, was a California case. About a year ago, the trial court decided the case, and the case has now gone through the California appellate court. The case has not yet been heard by the Supreme Court of California. In that case, the trial and appellate courts have crafted different approaches to gestational surrogacy and traditional surrogacy.

In the case, a couple named Mark and Kristina Calvert, a couple in their thirties, were unable to have children because Ms. Calvert had had a hysterectomy. Therefore, the couple hired Anna Johnson, a single mother with a three-year-old daughter, to be the bearer of their child. The Calvert's egg and sperm were joined in a petri dish

and then *in vitro* fertilization was employed to impregnate Anna Johnson. Against all odds, Ms. Johnson became pregnant on the first try and all went according to plan until in the middle of her pregnancy when Ms. Johnson decided that she wanted to keep the child. The media reaction to her decision mirrored that of the trial court and the appellate court. The media reaction was: How could anyone possibly question the parenthood of the couple who had contributed all of the child's genetic material? The media seemed to think it was a clear case for the Calverts. Indeed, Judge Parslow, the trial judge, stated that his task was to select between the gestational and the genetic contributions of the mother, contributions which had never been separated before. Judge Parslow declared that it was the genetic link that was the important one.

This approach of creating a different set of tools of analysis for gestational surrogacy is one with which I disagree. Instead, the same rules ought to apply whether or not the birth mother is the genetic parent of the child. This is an issue on which I think we can expect to see lively debate and a good many legal cases in the decade to come. It would be a mistake to alter all the rules of surrogacy to follow the genetic link, as having a different set of rules for gestational surrogacy would do. This approach really would say that genes rather than nurturance are the defining characteristic of parenthood. The birth mother has nurtured the infant during pregnancy. The birth mother has also undergone childbirth, not an inconsiderable contribution. At the time of birth, she knows the infant as no one else can, and she is far more familiar to the infant than is any other person. She also has the capacity to breast feed the infant which the genetic parents generally do not.

Basically, gestational surrogacy seems to be both potentially more popular than traditional surrogacy and potentially more exploited than traditional surrogacy. Gestational surrogacy, may, for example, make it more likely that those who hire surrogates will use women of other races to have their children. Indeed, that was the situation in the *Calvert v. Johnson* case. The genetic material of the so-called surrogate is much less relevant with gestational surrogacy for obvious reasons, and that is why this extra element of exploitation might come in. None of the differences between traditional and gestational surrogacy would tend to make us want gestational surrogacy to be encouraged while the brakes are put on traditional surrogacy. This is the main reason that the courts should apply the same rules for gestational surrogacy — the nonenforcement rule — that courts are applying for traditional surrogacy. However, a wide open question exists whether the law will go in this direction.

A final legislative issue surrounding surrogacy exists in which there is far less agreement than whether surrogacy contracts ought to be enforced. Who will actually get custody of a child born of a surrogacy arrangement? Will the child remain with the birth mother or will custody be subject to determination in a court of law according to the so-called "best interests of the child" as the court sees them? Even if the surrogacy contract is not enforced, that does not really tell us what the arrangement is going to be. A good many jurisdictions seem to think that the appropriate approach at that time is to have a "best interests of the child" custody contest in which a judge decides whether the father and his wife would make a better family or whether the so-called surrogate would make a better family for the child. It is worth noting that if this approach is adopted, then the father who contracted for surrogacy will sometimes, indeed very often, get custody of the child even though the contract is not enforced. The father will often get custody simply because factors such as the educational level of the parents and the wealth of the parents, are typically factored into this best interest calculus. After all, the judge does not know the parties very well and cannot really tell who would make the better parent. Therefore, these outward material factors tend to play a fairly large role. It seems rather pointless to reject the surrogacy contract just to have the father and his wife win custody in a custody proceeding. Some states and some countries have noticed that and do not follow this best interests approach. Instead, these jurisdictions think there ought to be a presumption for the birth mother as the custodian of the child. Personally, I take the position that the birth mother should have the right not only to renounce the contract but also to keep custody of the child. I think the right to renounce a surrogacy contract would be meaningless without this presumption for custody on the part of the birth mother.

The solution of joint custody which is being tried increasingly in this country should not be carried over to the surrogacy situation. Splitting the child in this way between two parents who do not live together, who never lived together during the child's life, seems to place equality between the parents above the best interests of the child. This approach should be avoided, not only in surrogacy arrangements in which the contract is not enforced but, indeed, in all custody contests involving newborns. Such a rule of law, a presumption for the birth mother, may serve to discourage surrogacy. However, if it does, then so be it.

Surrogacy is not the only new reproductive technology, although it is the one reproductive technology that has been the most discussed in recent times. Salient legal issues are also present around other new reproductive techniques. Actually, artificial insemination

is not a new reproductive technique. Artificial insemination, including artificial insemination by donor, has existed in this country for quite some time, and artificial insemination is not a very involved technological procedure either. Some interesting legal issues arise around artificial insemination by donor. The most notable legal issue is the question of the anonymity of the sperm donor. In this country, it is well established that the sperm donor will not be known to the woman who is inseminated or to the offspring. It is also well established that the sperm donor has no visitation rights and also has no duty to contribute to the child through child support. However, the American system has come under attack for not allowing the child to know who the sperm donor is. International legal commentators have criticized the American system as being inconsistent and out of step with the modern movement towards allowing adoptees to find their parents. Indeed, in the international statement of human rights, one of the rights of the child is deemed to be to know who her parents are. This is an issue that will arise as our discussions of family law become more international in scope. A traditional and established legal rule exists that the sperm donor will remain anonymous. This rule, however, is not followed in many European countries, and the rule is likely to come under further attack in the United States.

*In vitro* fertilization ("IVF") is a newer, more adventuresome reproductive technology. There are problems around *in vitro* fertilization. The problems are largely ones of overuse, including the use of this procedure when it really is not in the best interest of the patient. IVF should be tolerated but not encouraged. At least, this reproductive procedure should not be over encouraged. When we look at what is going on with IVF today, we see over-encouragement of this process.

Two types of problems exist with IVF. The first can be considered under the rubric of informed consent. It is not clear that patients who are receiving IVF are fully informed about the prospects of this procedure and fully informed about whether they need the procedure. Two examples will suffice to illustrate this first problem. First, women may be turned in the direction of IVF too early. We read a lot these days about how infertility has been reduced. One reason infertility has been reduced is because the definition of infertility has changed. The definition of infertility has changed from one year to six months of unprotected intercourse without pregnancy. Naturally, if infertility is measured by a period of six months rather than by one year as it used to be or two years as it might quite reasonably be, then we would expect to find that a lot less people are infertile. In many instances, if women just kept trying to become



pregnant, then the problem of infertility would be taken care of by itself.

Another area in which women are not well informed is that the success rates of the various clinics are very often overplayed. For example, if a woman becomes pregnant and remains pregnant for two days before having a miscarriage, then that is very frequently counted as a success by the IVF center. To the patient, however, the IVF procedure is likely to seem a success only if the patient gets a baby to take home. These problems suggest that before women use IVF, they ought to get counseling, good counseling, counseling about how expensive the procedure is, how low the success rate is (certainly less than ten percent), how psychologically stressful the procedure is for many patients, and the other alternatives that are available, including the alternative of adoption. Only after the patient receives thorough counseling should IVF be pursued.

Now there still is a societal problem apart from the interest of the patient: How much of our medical resources does society want to invest in IVF clinics? IVF is exciting medicine for the people who are practicing it. IVF is also very remunerative for the clinics, so some impetus exists to have IVF available on a wide scale, but IVF does involve using medical resources that we otherwise might be able to use for people who are ill. To some extent, this dilemma is now resolved in most states because people must pay for IVF, and it is very expensive. But if insurance starts to take over this procedure as it did for awhile in Massachusetts, then society needs some other way of cutting off the number of IVF treatments as well as some way of sorting out those persons who will receive IVF and those who will not. Obviously, one possibility is a first-come basis: the first in time to sign up will receive IVF. Another possibility is to have some board choose who the best parents are based on all available information.

I think lawyers are skeptical about any outside person having control over choosing who should be able to parent and who should not. Lawyers think that decision makers do not make good judgments here and that their own prejudices and value judgments inevitably control. Lawyers also think that it is essential to our system to have a diversity of views and experiences in such an important area as child bearing. Indeed, it is almost a First Amendment requirement, an issue of free speech or freedom of lifestyle. Lawyers feel that an orthodox approach, even if the best, could be stifling to society. In a way, this really ties in with the basic constitutional and political principle — the right to be let alone by government to the greatest extent possible. While lawyers may not be the best ethicists, it is essentially ethical principles that lawyers are attempting to em-

ploy in crafting legal rules in this area. In this regard, the teachings and perspectives of the world's great religions become very relevant.