

### The Prevalent Issues of Surrogate Parenting

Surrogate parenting refers to an arrangement between a married couple who is unable to have a child because of the wife's infertility and a fertile woman who agrees to conceive the husband's child through artificial insemination, carry it to term, then surrender all parental rights in the child. Often, the surrogate mother receives compensation for her services. The final step in the process is typically the father's acknowledgment of paternity and adoption, with his wife, of the child. Through surrogate motherhood, a couple desiring a child need not wait an indefinite number of years for an adoptable baby, as generally happens at the present time. The married couple obtains a child who is the husband's biological offspring- a child for whose existence both husband and wife can feel responsible.

Surrogate parenting is highly controversial by its very nature. Nevertheless, surrogate parenting is attracting wide spread attention as a viable alternative for infertile couples intent on having a child. Contract surrogacy is officially little more than ten years old, although surrogate mothering is a practice that has been known since biblical times. In 1986 alone 500 babies had been born to mothers who gave them up to sperm donor fathers for a fee, and the practice is growing rapidly.

For this reason there are many questions and doubts that arise from this subject. Often there are many legal difficulties that come about with surrogate parenting. In some states the contracts that insure the infertile couple the baby of the surrogate mother mean nothing. This, in turn, can cause huge problems if the surrogate mother were to change her mind about giving up her child. Who has the rights to the child in this awful situation? Surrogate parenting is a wonderful alternative for infertile couples as long as all party's involved are educated on the subject and are fully aware of the pros and cons of this risky business transaction.

Unfortunately laws on surrogate parenting aren't very helpful. Increasing numbers of surrogate custody cases are finding their way into the courtrooms. The most dramatic problem arises when the surrogate mother decides she wants to keep the baby. Whether she decides early or late in the pregnancy, at birth, or after the child is born, the ultimate issue is whether she or the infertile couple have parental rights.

How is the law to respond to this kind of problem? Normally people would agree that a contract is a contract and therefore the infertile couple should be the ones to receive the baby. Unfortunately for some of us more sympathetic people this decision is not that simple. By changing her mind the surrogate mother is showing maternal feelings that are surely not reprehensible. Although she has promised to give up the baby her change of heart seems more understandable than dishonorable. After all how can a woman truly be expected to know how it will feel to give birth to a child and then have to give it up? These are very good questions that tend to leave one undecided as to which party's demand is justifiable and should be upheld.

Instead of deciding surrogacy issues on the basis of the law and policy of the states, judges could look for guidance from the U.S. Constitution. Constitutional arguments can be made on both sides of the classic surrogacy dispute involving the mother who changes her mind about giving up her child. Resolution of the constitutional issues will depend ultimately upon assessing and weighing the various factors at stake. Like decisions based on contract and criminal law, constitutional decisions will take account of the party's interests, the child's interests, society's interests, and the effectiveness of legalization and regulation as opposed to prohibition.

Many Americans remained unaware of these dramas, but virtually everyone in the United States became acquainted during 1987 with the plight of Mary Beth Whitehead and "Baby M". Mrs. Whitehead was a twenty-nine year old house wife. She already had two children, and decided she would be the surrogate mother for a couple by the name of Mr. and Mrs. William and Elizabeth Stern. The Sterns were 40

and 41 years old. They had been married for 12 years and were childless. Mrs. Stern had a mild case of multiple sclerosis and was unable to bare any children.

Although Whitehead promised in the contract that she would form no bond with the baby, she knew in the delivery room she could not give up her child. Whitehead ended up kidnapping the new born. The case proceeded to a much-publicized trial entailing six weeks of testimony and half a million dollars in legal bills.

Unfortunately many surrogate agreements end with a tragic conclusion similar to this one. These awful outcomes could be completely avoided if the law would include in its many clauses, unconditional protection against any infringement upon the contract between the surrogate mother and the infertile parents.

In order for surrogacy to work with its initial intent, there can be no exceptions to this law. Although there will be cases in which the enforcement of these laws may be seemingly harsh and apathetic, it is the only way that this wonderful alternative for infertile parents can rightfully continue, without potentially ruining the lives of all parties involved, most importantly the child's.

Although the rights of the infertile couple should be first and foremost, it is important not to overlook the grievances of the surrogate mother. Preparation via support groups and individual therapy should be offered to the surrogate mother before the birth, not only to inform her of the enormous feat that lay ahead of her, but also to prepare her to deal with the traumas that can accompany the loss of a child. The importance of informing the surrogate mother in full that the contract she is to agree to is not reversible, is immense.

Not all cases involving surrogate parenting result in battles for custody. Ironically, in some cases the battle is to decide which party will be forced to take the child as their own.

One example of this unusual incidence occurred in 1982. Judy Stiver, a twenty-six year old house wife agreed to bare a child for forty-six year old Alexander Malahoff and his wife for a fee of \$10,000 dollars. The Malahoffs had wanted a child to strengthen their marriage, but the couple separated during the pregnancy. It was then found that the baby would be born with microcephaly- a handicap that not only left the child with an abnormally small head (which is usually indicative of retardation), but the infant was also left without a home to be released into. The natural mother said that she felt no maternal bond with the baby but she agreed to the intravenous antibiotics to combat the baby's life-threatening infection. Malahoff, however, instructed the medical staff to take no steps or measures to treat the strep infection or otherwise care for the infant. Both sets of parents then went on to renounce their responsibility for the child. The hospital obtained a court order authorizing doctors to treat the baby, and the infection was cured. The baby, however, had no home to be released into from the hospital and was consequently placed in foster care. The case became an example of the horrible possibilities such arrangements can entail when a baby is born with a handicap. This type of incident should be avoided by making it infinitely clear in the beginning of the process of the surrogacy agreement that, under no condition will there be a breach of contract.

Although it may seem that all cases end in tragedy, there are in fact many cases in which the end result is precisely the way all deciding parties had intended it to be, with the child being placed in a happy and loving environment. However, despite these many success stories, there are still groups that advocate the prohibition of surrogacy. One such group is the National Committee for Adoption. The NCA has been a consistent and outspoken critic of surrogacy and wants it to be outlawed. They argue that the availability of surrogacy would cut back on the adoption of existing babies. Perhaps if infertile couples were unable to employ a surrogate to have a child for them, they would go about getting a child in some other way, one that would be much more beneficial to society. They might decide to adopt a child already in existence, or a child who will be born in any event and who is in need of a home and family. Fulfilling their parental urges in that way, they would perform an important service to the child and to society.

Although this is a valid argument, for some couples adoption seems

unavailable. Many couples today are waiting longer before attempting to conceive and thus are older when they discover that they have a problem. Especially if they take time to undergo fertility treatments before turning to adoption, they may find that they are too old to be acceptable to conventional adoption agencies, which prefer couples under the age of thirty-five. Moreover, adoption is not as easy today as it has been in the past, and there is a definite shortage of healthy newborns available for adoption in this country.

Infertile couples would argue that the chance to have a "normal" child, and a child as biologically connected to them as possible, is not afforded by special needs adoption or even the adoption of healthy newborns, and that although it benefits society more for them to adopt an existing child than to conceive a new one, the same is true for fertile couples, who nonetheless are permitted to reproduce without any restriction by the state.

Surrogate motherhood is growing in popularity because it meets the urgently felt needs of those who resort to it better than any of the alternatives as they see them. As a consensual arrangement it is as worthy of legal protection as many others which, formerly suspect, are now taken for granted. Subject to reasonable regulation, it deserves to take a place among the growing array of methods available to individuals for the ordering of their own marital and reproductive lives. Doctrines fitted to other circumstances should not be allowed to bar the legality or enforcement of surrogate motherhood agreements.

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