

Surrogate Motherhood and Children's Interests

An NCBA discussion paper

by Julie Martin

The issue of surrogacy has attracted spirited and concerned public and professional debate. For some commentators even the term itself is considered a misnomer. In the midst of forceful opposition from feminists, churches, and groups concerned with preserving the "traditional family", together with powerful support from sections of the medical establishment, certain academics and other high profile individuals, the future of surrogacy in Australia is uncertain. What is certain is that surrogacy challenges people's ideas about acceptable means of family formation both on a personal moral level and from the broader perspective of public policy.

This article provides a brief overview of most of the main arguments for and against surrogacy with a particular focus on issues of special relevance to children's interests. It is based on material reviewed as part of a policy development project conducted by the National Children's Bureau of Australia and many of the points raised concerning children's interests have been conveyed in the Bureau's submission to the National Bioethics Consultative Committee (NBCC). This Committee is currently looking at the issue of surrogacy on behalf of the Australian Health Ministers.

WHAT IS SURROGACY

A surrogate in everyday language is a substitute. Consequently it can be argued that in reality the woman who takes over the care of the child from the woman who gave the child birth is the surrogate mother. Notwithstanding the fact that the term is inappropriate, the definition adopted by the NSW Law Reform Commission appears to be fairly commonly used:-

"an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer custody at or shortly after birth" (1988 p6).

Surrogacy arrangements are not new and various state inquiries have identified informal arrangements in Australia dating back to last century.

Surrogacy found its way onto the Australian social and legal agenda and community debate in the 1980's with the advent of recent advances in reproductive technology, eg, IVF combined with donor insemination (AID). It is now possible to split (artificially, some would argue) the concept of motherhood into genetic, gestational and social/psychological aspects. However we do not have the concepts or terms to cover the full range of relationships possible as an outcome of surrogacy arrangements.

Surrogacy arrangements may be on a commercial basis where the birth mother is paid, or on an altruistic basis where, apart from possible expenses, no money is involved.

Sometimes a somewhat strained distinction may also be made between so called 'total' and 'partial' surrogacy with partial being used to describe a combination where the birth mother also contributes her ova.

It should be noted that debate around the acceptability or not of the potentially wide variety of surrogacy arrangements can be quite complex as illustrated in the diagram below.

The diagram demonstrates six basic types of surrogacy arrangements. However, when one considers the possibility of the birth mother's husband being the biological father or whether or not the identity of the donor is known, the potential combinations increase to eleven. These then increase to more than twenty-five when one takes into account additional factors such as whether the birth mother is married, whether her husband has consented to any of the arrangements, whether donor gametes (male or female) are involved, or whether the identity of the donor is known. Many of the various combinations could have

SURROGACY COMBINATIONS

Source of Gametes	Types of Combinations					
Birth Mother	x	x				
Commissioning Female			x		x	
Donor Female				x		x
Commissioning Male	x		x			x
Donor Male		x		x	x	

Note: For all these combinations, the birth mother may be married or unmarried and if married, may or may not have her husband's consent, which has legal implications for paternity.

potentially differing psychological meanings for the child and certain combinations have clear legal implications with respect to establishing paternity. The diagram focuses only upon the child and adults directly concerned. The range of potential genetic and social relationships is enormously magnified should one take into account siblings and other part relatives of the child (eg, the birth mother's existing children, if any, her parents and any existing children of the commissioning female or male together with the commissioning couple's parents).

There is no reliable Australian data on the number of children born through surrogacy arrangements though Charlesworth estimates that about 40 requests have been made through medical channels in the last decade (Charlesworth, 1990).

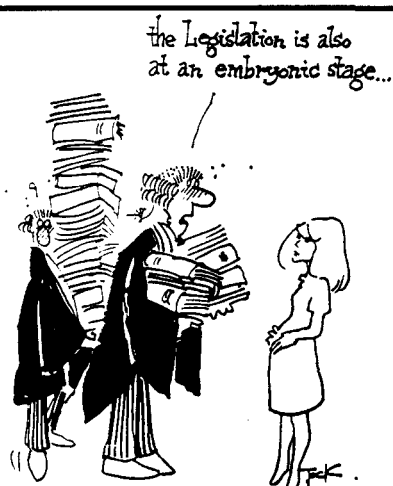
LEGAL CONTEXT

Currently, surrogacy contracts appear to be unenforceable throughout Australia. According to the National Bioethics Consultative Committee (NBCC), under the federal Family Law Act the commissioning couple, through reference to a provision in that Act, may be able to convince the court that they have an interest in the welfare of the child and institute proceedings for custody or access (1990a, p12). In a court the matter would be decided according to the child's best interests.

While the birth mother is clearly the legal mother, sometimes paternity and maintenance responsibility are unclear. For example, if the birth mother is married and her husband has consented to the arrangement, he will be regarded in law as the father of the child. Where the birth mother is unmarried and donor insemination is involved, the paternity of the child becomes most ambiguous because in all Australian jurisdictions donors are not, in law, the father of the child. In such a situation the child has no legal father.

If the commissioning male and female become legal guardians by adoption proceedings they will assume parental status and responsibilities. Currently there is a piecemeal and inconsistent

approach across state jurisdictions. At present only three states have specific legislation dealing with aspects of surrogacy. In Queensland surrogacy is totally prohibited and criminal penalties apply to all parties, in Victoria and South Australia advertising is prohibited and commercial contracts are clearly unenforceable.



The same inconsistent situation appears to apply with respect to the recording of and access to information. (See NBCC, 1989).

ARGUMENTS SUPPORTING SURROGACY

1. Personal autonomy or self determination

This argument takes the form that (a) couples should be free to make their own procreative arrangements so long as this does not involve demonstrable harm to others, and (b) a woman should be free to make decisions about her own body so long as this does no demonstrable harm to others. Essentially this position argues that in a liberal democratic society it is undesirable for the law to interfere in the private behaviour of individuals unless that behaviour involves concrete harm to others.

This argument appears to derive from an erroneous view that society is an accumulation of individual units which make up a whole. Dietrich suggests that "increasingly social analysis recognises the political, economic and social reality that we all exist in a system of interconnecting

lives, responsibilities and action" (1990, p.60). Thus it has been plainly put, "there seems to be a slippage in the argument from the desire for a child to the need for a child to the moral right to have a child to the legal right to be provided with a child by whatever means are necessary" (Albury, 1988). (See also Juliet Harper, in this issue).

The NBCC relied heavily on the principle of personal autonomy in its first report on surrogacy which, given its brief to consider ethical issues, appeared somewhat surprising. Many would argue, including this writer, that from an ethical perspective, in modern society arguments about personal autonomy are not as relevant as arguments concerning social responsibility.

2. Surrogacy does no harm in and of itself

Advocates point out that there is no conclusive research to demonstrate that surrogacy is harmful to the adults or children involved or that children born through surrogacy arrangements are at any disadvantage compared with children born through other modes of family formation. Indeed some say that, because the commissioning adults have gone to

inordinate lengths to form a family, the resultant child will be especially loved.

Whilst it is quite valid to indicate that there are no conclusive negative research findings, the corollary is also equally valid, that is, evidence is not yet available to support the assertion that surrogacy is **not** harmful to children.

There may be a distinction between the arguments used by those in favour of solely altruistic surrogacy and those used by proponents of both altruistic and commercial surrogacy. The main distinction is that commercial surrogacy is argued to be demonstrably harmful to children (treating them as commodities), to the woman (ie, the birth mother is exploited) and to society (social responsibility requires that the interests of the child are paramount and that family relations should be equitable). Altruistic surrogacy is then

argued as not harmful because the risks of exploitation inherent in commercial arrangements do not exist.

3. Principles of justice

Many proponents of surrogacy, either commercial and/or non commercial, state that justice to all must apply, but particularly to the child and the birth mother. Therefore the following guidelines are often suggested:

- contracts should not be enforceable, hence enabling the birth mother to keep the child should she wish
- regulation should be undertaken through licensed agencies (sometimes counselling of all parties prior to going ahead is seen as part of regulation)
- proper record keeping and access to information for the children and others (though proponents may vary in their views as to what information should be made available to the children).

Those favouring surrogacy in some form and those who do not favour surrogacy but are not prepared to argue for total legal bans, point out that in all Australian jurisdictions the best interests of the child are given priority. However, although this principle is enshrined in law, its application can leave much to be desired especially as most children and young people in Australia do not have access to separate legal representation.

4. In the public interest

Here it is argued that surrogacy has a legitimate place in family formation given that in today's society a range of modes of family formation are already accepted, or at least operating and it would be discriminatory to single out surrogacy for prohibition.

Supporting arguments may be put along the lines that surrogacy does not and cannot subvert 'the family' because there is no longer any such thing as 'the family' but rather a variety of family relationships and family formation patterns.

This argument is clearly specious. Whilst it is true that our society does have a number of modes of family formation and reformation and many would agree, including this writer,

that such diversity is acceptable, none of these modes involve the **deliberate** creation of children with the **intention** from conception to **transfer** custody at birth.

ARGUMENTS AGAINST SURROGACY

1. Against children's best interests

Several arguments used here derive from the basic claim that most surrogacy arrangements, if not all, have the intention of denying or minimising the circumstances of the child's birth. Many opponents cite the lessons to be learnt from secretive adoption practices and comment on some of the similarities between adoption and surrogacy. Such secrecy, it is argued, has major and adverse impacts on the child's development and functioning. Even where secretiveness is minimised it is proposed that there are still major psychological and/or legal difficulties for the child.

(i) Identity

The child will be adversely affected by confusion about her/his identity. The term '**genealogical bewilderment**' has been borrowed from the adoption field (Sants, 1964).



Self esteem - a critical aspect of identity, will be adversely affected by the knowledge of being created as an exchangeable commodity. Moreover the child will experience feelings of rejection and abandonment because of the separation from the birth mother.

Loss - children born through surrogacy arrangements will suffer a void in their identity coupled with feelings of an absence of continuity and connection with their origins.

Clinical and research evidence from the adoption realm is drawn on to support these propositions.

(ii) The child's psychological need to know her/his origins

The proposition here is that the child has a personal necessity to know the circumstances of her/his birth including the identity of all players. Surrogacy arrangements often act against the interests of the child in this respect. Moreover, even where there is no intention to deny the circumstances of the child's birth, where donor programs are used all jurisdictions in Australia guarantee anonymity to donors. Moreover records are not uniformly kept across Australia which would enable retrospective identification of donors even if the relevant laws were to change.

Those advancing the argument that surrogacy conflicts with the child's need to know cite a substantial body of clinical and research evidence from the adoption field and more recent evidence from studies of adults born through artificial insemination through donor (AID), plus a few case studies of adults born through surrogacy arrangements. A strong theme throughout these studies is the finding that many social parents have been reluctant to, or have actively avoided, explaining to the child the circumstances of her or his birth (Sants, 1964; Triseliotis, 1973; Snowden et al, 1983; Picton 1982; Leeton and Backwell, 1982; Toynbee, 1985; Muller, 1986; Humphrey and Humphrey, 1988; and Van Keppel, 1990).

(iii) Potential infringements of the child's human rights

Article 8 of the *UN Convention on the Rights of the Child* requires nations who sign and ratify the Convention to, "undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations". Australia has already signed and ratified this Convention. It is the view of this writer that the current AID practice of denying children access to information on donors, and the NBCC's proposals (1989) to limit birth mother access to adult offspring,

may well be at odds with the provisions of the Convention.

It also appears contrary to the child's human rights to be in an ambiguous situation both with respect to legal paternity and responsibility for maintenance as would currently be the case in Australia in some surrogacy arrangements involving single women. In Switzerland a child may be able to sue a doctor for an offence against her/his human rights constituted by being born through insemination that leaves her/him without a legal father: (Parsaval and Fagot, 1988).

In addition it has been argued that some existing arrangements about "birth" certificates are legal fictions and are active and collusive distortions of the circumstances of the child's birth, distortions which would not be acceptable on any other legal document and which probably derive from notions of the child as the property of adults.

(iv) Impact on half siblings

The experience of half siblings on seeing their mother carrying a child then relinquishing it will be upsetting and confusing. They may become anxious that they too will be given away and perhaps, in relation to altruistic surrogacy, have pressures placed on them to maintain family secrets. Half siblings, it has been argued, are also likely to experience loss.

2. *Against the birth mother's best interests*

The birth mother is at risk of significant psychological trauma in that a bond is established with the foetus while in utero. A significant body of research from the adoption field is cited here including the pioneering Australian study of Winkler and Van Keppel (1984) and a small number of published accounts from birth mothers who have either relinquished or refused to relinquish their child in surrogacy arrangements (eg, McFadden, 1988).

Opponents of surrogacy also state that the birth mother is devalued generally as a human being and specifically as a woman in that she is treated mechanistically as an incubator.

Excellent feminist critiques of surrogacy have been written including those by Australian authors Scutt (1988), Rowland (1989) Dietrich, (1990) and Meggitt, (1990).

It is also suggested that the practise exploits women economically in that, at least in commercial surrogacy arrangements, it tends to be women of low income who are commissioned to be birth mothers. (Charo 1988)

3. *Not in the public interest*

Arguments advanced here stem in part from broader ideological, theoretical or theological positions about the sort of society that is desirable in the future. In addition to the arguments advanced above the following points are put forward:

- surrogacy devalues children by turning them into marketable products and as such it is a form of slavery.
- surrogacy is a social unknown in our society. We are therefore conducting a social experiment and where medical technology is involved, we are engaging in medical experimentation. Consequently the ethics of experimentation should be applied - subjects should be guaranteed no harm, or at least informed of the full nature of risks. However, given the present state of knowledge, this is not possible.
- the consent of the children, who are the prime object of this experiment, by definition cannot be sought.
- surrogacy does pose a fundamental shift in values concerning the social construction of family and is therefore socially irresponsible.
- surrogacy arrangements are dominated by the medical profession which gives greater weight to the interests of the infertile couple and medical research than to the interests of children.
- surrogacy arrangements using largely unsuccessful and therefore inefficient reproductive technology are too costly.

4. *Against the interests of women*

Some opponents of surrogacy are particularly concerned about the broader social implications of surrogacy arrangements involving

reproductive technology, which can be seen as disempowering women to satisfy the quest for knowledge of the predominantly patriarchal medical establishment (see Scutt, 1988 and Rowland 1989).

It is also frequently argued that all forms of surrogacy arrangements are unacceptable because distinctions (as between commercial surrogacy and altruistic surrogacy for example) are artificial and that all surrogacy situations encourage the exploitation and coercion of women and have negative consequences for the children.

NATIONAL BIOETHICS CONSULTATIVE COMMITTEE ENQUIRIES

The issue of surrogacy was referred to the Committee in May 1988 by the Council of Social Welfare Ministers' Conference. Their first report was released in July 1989. The Committee confined themselves solely to consideration of surrogacy in the context of infertile heterosexual couples as the issue of access to reproductive technology is to be addressed in a separate report.

Three principles were used in the NBCC's deliberations. They were, in order of listing in the report, personal autonomy, justice and the common good.

In summary, the report came down in favour of strictly controlling surrogacy through uniform legislation across Australia rendering contracts unenforceable, prohibiting advertising and recommending regulation through surrogacy agencies.

Although discussed in the report, criminal sanctions against other aspects of surrogacy were not recommended as they would drive the practice underground and hence surrogacy could not be regulated. Therefore, the NBCC argued, there would be strong risks of injustice to the birth mother and the resultant children, including a lack of systematic and mandatory record keeping. Two dissenting views were recorded in the report (Dunne, 1990a and Dietrich, 1990b).

A second document in the form of a

discussion paper on implementation has just been released for public comment (1990b). It provides a detailed overview of Australian legislation and practices together with draft uniform legislation to set up licensed surrogacy agencies. A key legislative proposal is that, while contracts are to be unenforceable, if the birth mother does not object there will be provisions allowing automatic transfer of parentage after one month. Where the birth mother does not want to relinquish the child, current provisions with regard to legal parentage would apply.

A previous NBCC report on record keeping and access to information in reproductive technology is also relevant to some forms of surrogacy (1989). This report recommended a national standardised system in which parties entering gamete donation programs would agree either to identifying information being automatically available on the offspring's majority or to specific consent being sought at that time for its release. Whilst the NBCC clearly acknowledged that individuals have a right to explore their biological and/or genetic origins, two of the NBCC's operative principles are worrying in relation to children's interests. These are:

- (i) the state has responsibility to maintain records but not to initiate release of information
- (ii) the primary responsibility for choosing whether to tell children of their genetic background lies with the social parents.

To some extent the NBCC's national inquiry follows up on a number of significant inquiries at a state level during the 1980's that have addressed the issue of surrogacy.

All state inquiries have generally found surrogacy to be undesirable although, apart from Queensland, no state inquiry has resulted in the enactment of total bans on all surrogacy arrangements. There have also been inquiries in other countries but specific details of findings from state and overseas inquiries are beyond the scope of this article.

Perhaps the most reliable indicator so far of community attitudes in

Australia is a national Saulwick poll carried out in July 1990 after there had been dramatic publicity about the NBCC's recommendations. Respondents were more or less evenly divided for and against with those in favour mostly agreeing with some form of payment (Saulwick, 1990).

COMMENTS

On a number of grounds this writer is uneasy about surrogacy arrangements. Clearly surrogacy involves engaging in a social experiment in which the long term consequences, either positive or negative, for the children and adults concerned are largely unknown. Surrogacy contracts should continue to be unenforceable as this is obviously in the child's as well as the birth mother's best interest. In light of our limited state of knowledge, however, it does not appear at all appropriate at this stage to develop comprehensive legislation which either actively prohibits or facilitates surrogacy arrangements except insofar as legal controls on the commercial arrangements, including advertising, are essential.

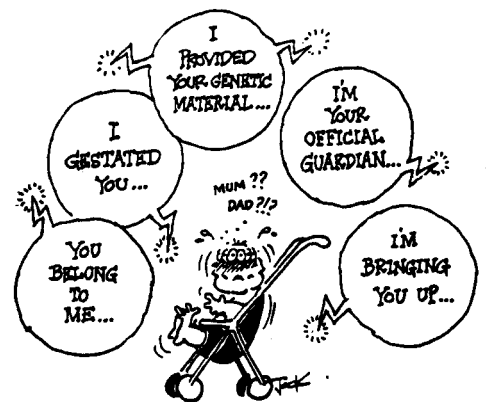
Criminal sanctions, ranging from fines to jail sentences, against those adults directly involved in surrogacy arrangements as a means of alleviating the pain and distress of infertility appear prematurely punitive. Nevertheless such measures are the likely outcomes if total legal prohibitions were implemented nationally.

Moreover a total ban on all forms of surrogacy runs the risk of driving the practice underground. Such an occurrence would seriously disadvantage children so born, not only as regards the keeping of systematic and accurate information, but also with respect to medical screening of donors and of the pregnancy. Constraints would also be created for subsequent open and honest counselling should the new family find themselves experiencing adjustment difficulties. Some surrogacy arrangements have already occurred and others will occur whatever decisions are made by governments.

Schuker (1987) suggests four psychological principles to help understand "alternative" modes of

family formation. These are:

- (i) Special circumstances of parenting will stimulate fantasies in parents and children which in turn influence the child's personality and identity.
- (ii) Human parenting does not require a biological connection, non biological parents can be equally effective nurturers.
- (iii) Good parenting involves a psychological interaction beginning at birth to provide early opportunity for attachment which in turn is important for the child's normal psychological development.
- (iv) New technologies relieve the psychological pain of infertility and give some individuals the opportunity to be parents.



In relation to the first principle, there is already clinical and research information available to demonstrate the range of fantasies both parents and children may have in relation to adoption and donor insemination modes of family formation.

Children's fantasies may include negative ideas of abandonment and/or sexual promiscuity by the birth mother in the case of adoption, notions of not being normal and either hostile or altruistic fantasies about anonymous male donors in the case of artificial insemination by donor. From the parental perspective there may be negative fantasies that include the invalid notion that the child has "bad blood". On the other hand the adopted child may come to idealise her or his birth mother attributing all sorts of positive qualities to her. (Sants, 1964; Triseliotis, 1973; Snowden et al, 1983; Learner, 1986; Winkler and Midford, 1986; Schuker, 1987;

Richardson, 1987; Van Keppel, 1990). As regards the second and third principles these also are in line with current knowledge though there may be future developments that challenge these understandings. While it is well known that parents can and do bond to an infant *in utero*, Piontelli's work, for example, may eventually show that the attachment that occurs before birth is significant for the development of the child. (1989)

In keeping with the findings of many authors in relation to the harmful effects on children of secrecy, a fifth psychological principle in regard to alternative modes of family formation can now be proposed:

(v) children have a psychological need to know and explore their origins and will be psychologically disadvantaged when a veil of secrecy is maintained about the special circumstances of their birth.

The literature abounds with research and clinical experience of children who have not been informed of their origins by their adopting parents. There is now a substantial body of literature suggesting that a similar situation has occurred with children born through AID, and some anecdotal evidence indicates that evidence that children born through surrogacy arrangements are likewise left uninformed. (Van Keppel, 1990)

With all the goodwill in the world, it is unlikely that the adopting parents in surrogacy arrangements will be any more inclined to be open with the child about their origins than adopting parents have been in the past. Consequently, there is much cause for concern when groups such as the NBCC now advance the discredited idea that it ought to be the social parent's decision to determine what a child is told about their origins. In the past, this approach to the provision of personal information has distressed and disadvantaged many adopted children.

With the above comments in mind, the following observations and suggestions are highlighted as matters that should be given high priority in addressing surrogacy in the Australian context:

1. National legislation allowing for the establishment of surrogacy placement agencies appears to be premature. However amendments to existing legislation would seem to be required to protect the interests of children born through alternative means of family formation. In particular, uniformity needs to be established with respect to paternity and responsibility for maintenance.

2. The interests of children have not been given appropriate weight nor rigorously addressed. The first report of the NBCC example had only two pages devoted to a discussion of children's interests – which were not given the status of a separate principle. The personal autonomy of adults, in contrast, was given twice the space, and the status of a guiding principle for policy development. The Committee seems to be lacking membership of persons whose sole mandate is to represent the interests of children in terms of their developmental needs and associated human rights.

3. The process of the NBCC's deliberations seems unduly hasty. On what is clearly an extremely complex and vexed issue from moral, practice, policy and legislative perspectives, little time was allowed for public input.

4. There is a strong need for Australian research on the impact of surrogacy on the emotional, social and intellectual development of children.

5. Article 8 of the *UN Convention on the Rights of the Child* enshrines the child's right "to preserve her/his identity and family relations" and where a child is "deprived of some or all elements of his or her identity, to provide appropriate assistance". Four suggestions follow from this article:

- Information on all birth certificates should include at least the names of any gamete donors, the name of the birth mother as well as the names of social parents.

Professor Helen Gamble (1990) in making this recommendation, has argued that donors could be named on the birth certificate without creating legal obligations for maintenance.

- Children and young people under the age of 18 should be able to have access to information about their genetic/ biological parents under supervision of a counsellor with or without the final consent of their social parents.

The UN Convention places the issue of parental direction and guidance as occurring within the context of the "evolving capacity of the child" (article 5). Recent common law decisions appear to suggest that the older the child the more the parental role is that of advisor to the child in the exercising of his/her rights (Wade, 1989).

- The onus should be on governments and their associated agencies to actively facilitate the child's or young person's access to information about their origins.

Further, as per article 12 of the Convention, in any dispute regarding the child's access to information she/he has a right to separate legal representation.

- Social parents should be actively encouraged, through legislation and practice, to inform the child about her/his origins.

6. The State and society have special obligations to children born through surrogacy arrangements.

Implementation of the preceding suggestions will create disincentives and barriers for adults who wish to maintain secrecy about children's origins. The disadvantages that will flow to the adults engaged in alternative modes of family formation appear to be far out-weighted by the advantages that should flow to future children in terms of creating an environment which facilitates the meeting of their psychological needs as well as ensuring preservation of their basic human rights.

Where children are intentionally conceived with the specific aim of transferring custody shortly after birth, the state and society have special obligations to those children. Paying lip service to the best interests of the child is not sufficient – concrete measures could be put in place at this stage without actually giving surrogacy any official go ahead.

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Royal Children's Hospital : Child Protection Team

Following publication of the list of emergency numbers on the back of *Children Australia*, Vol.15, No.3, attention was drawn to the availability of the Victorian RCH team, who may be contacted as follows:-

During office hours, (03) 345 6391

Outside office hours, (03) 345 5522