

## Review

# Surrogacy: Whose child is it?

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**In the past, when a couple did not conceive a child on their own adoption was the only alternative option for them to achieve their parenthood dreams. There are now options, such as surrogacy, available for infertile couples, singles and same sex couples who can now achieve their parenthood dreams using reproductive technology. It is estimated that between 72 and 95% of couples experiencing fertility difficulty will seek medical treatment. The social elements associated with infertility, and the decline in adoption as an alternative to infertility, have fuelled the demand for investigation into and treatment of infertility. Surrogacy offers an opportunity to have children in circumstances where it would otherwise not be possible. However, the medical advances which have enabled infertile couples the opportunity to have children have greatly outpaced society's and consequently the law's ability to address the relationships and attendant rights and responsibilities which arise between the parties involved in the arrangements of surrogacy. This review aims at evaluating the current understanding of surrogacy, and discusses the role of reproductive technologies in challenging previously held definitions of parenthood. This review was therefore based on a computerised search of relevant papers from 2000 to 2006 in the EMBASE/Medline database.**

**Keywords:** Parenthood, surrogacy, assisted reproduction, Geneticists, Gestationalists, Intentionalists and medical technology

## INTRODUCTION

Surrogacy as an alternative to or 'treatment' for infertility has increased in the past two decades. By 1990, hundreds of children have been born through surrogacy arrangements in the USA and in the UK (Bartels, 1990). By 1998, up to 8000 women had approached surrogacy agencies in an attempt to have a child (BMA, 1996 William-Jones, 2002).

The Human Fertilisation and Embryology (HF&E) Act (HFEA, 1990) was passed in the UK in 1990 in response to the report of the Warnock (Warnock, 1984) committee six years earlier. This Act established the Human Fertilisation and Embryology Authority (HFEA) as the main mechanism for regulating the activities as set out in the Act. It is unlikely that members of both the Warnock committee and Parliament that subsequently debated the HF&E Bill could have anticipated the huge number of people seeking treatment with *In Vitro* Fertilisation (IVF), the huge explosion in public interest in practical procedures, and ethical dilemmas which have occurred in the last decade (BMA, 1996, COE, 1997).

For clarity, this review will be divided into three sections:

1. Surrogacy

2. Parenthood in the context of surrogacy
3. Legal implications of ownership of the child in surrogacy arrangements.

## Surrogacy

A surrogate mother is a woman who carries a foetus and bears a child on behalf of commissioning couples, having agreed to surrender the child to that person(s) at birth or shortly thereafter (Fasouliotis and Schenker, 2000, Wilson, 2003). She may use her own eggs, or eggs donated by the other woman through the IVF process. At birth, the baby should be handed over to the father and his partner. When the child is 6 weeks old, the commissioning couple will apply to the court for a Parental Order (RCM, 1997). If granted, the child is then legally the child of the commissioning couple (COTS, 1997, Reame and Parker, 2005, RCM, 1997, William-Jones, 2002).

The Surrogate Arrangement Act of 1985 (SAA, 1985) explicitly defines a surrogate mother as:

"A woman who carries a child in pursuance of an arrangement made:

Before she began to carry the child and With a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as is practicable) by another person or persons.”

Under this Act, the definition of the legal father depends upon other factors:

If the surrogate mother is married, then her husband is the legal father

If the surrogate mother has a partner then he is the legal father, unless he can prove that he did not consent to the treatment

If the surrogate mother is single and the treatment did not take place at a centre licensed by the HFEA, then the sperm donor is the intended father

If the surrogate mother is single and the treatment took place in a HFEA-licensed clinic, the child is legally fatherless.

Surrogacy itself is not new. Since the 1970's there have been more than 35,000 births attributed to surrogacy. Over the past decade, the public as well as the medical and the legal professions have witnessed the boom, as well as the dilemmas, that have arisen from surrogacy arrangements (Handel et al., 1993; BMA, 1996; Ciccarelli and Ciccarelli, 2005).

The question whether the concept of surrogacy in general is moral or legal took centre stage when the highly publicized 'Baby M' case went to court in New Jersey (TASC, 1988; Ciccarelli and Ciccarelli, 2005). During this lengthy sensationalised court battle, the public took stances on the debate over whether surrogacy was moral and should be legalised (Ciccarelli and Ciccarelli, 2005). These events rocked the surrogacy movement and tend to be the public's only frame of reference when they think about surrogacy.

### Parenthood in the context of surrogacy

In the past, when a couple did not conceive a child on their own adoption was the only alternative option for them to achieve their parenthood dreams. There are now options, such as surrogacy, available for infertile couples, singles and same sex couples who can now achieve their parenthood dreams using reproductive technology (Ciccarelli and Ciccarelli, 2005, van Zyl and van Niekerk, 2000).

Reproductive technologies by assisting the natural process of reproduction have interfered with the "naturalness" of the reproductive process (Annas, 1984; Narayan, 1999; Wallbank, 2002). In 1992, Strathern opined that reproductive technologies did not only introduce a third person into the hitherto two-party parenthood but have also invariably introduced the distinction between social and biological parenthood. Prior to the development of reproductive technologies, gestation and births were not separated (Strathern, 1992).

Reproductive technologies have separated conception from birth creating three separate elements, namely;

The genetic,  
The gestational and  
The social aspects to parenthood.

Motherhood, which was once a unitary role, is now seen as three distinct roles: genetic, gestatory and social. Similarly, fatherhood is now defined as two separate roles, namely the genetic and the social (Rothman, 1989, Taylor, 2005). Currently, both under English Law and the Irish Commission on Assisted Human Reproduction (DOHC, 2005), the woman who gives birth to a child is the legal mother, whether or not she is genetically related to the child. This is further affirmed by the Council of Europe which asserts, "maternity should be determined by the fact of giving birth rather than genetics (origin of ova)" (COE, 1997). The commissioning couple never automatically acquires legal responsibility for a child born under surrogacy agreement. To be treated as legal parents to the child, they have either adopt the child or apply for Parental Order under Section 30 of the HF&E (1990) Act.

For clarity, I will summarise the various theories/arguments put forward by various authors (Bayne and Kolers, 2003, Kolers and Bayne, 2001, Krimmel, 1998, Narayan, 1999, van Zyl and van Niekerk, 2000) to define what makes someone a parent in the context of surrogacy. Three arguments have generally been used to answer this pertinent question. These are:

*Geneticists* view which claim that parenthood arises from genetic derivation

*Gestationalists* view which premise parenthood as arising from gestation and childbirth; and

*Intentionalists* view that submits that parenthood arises from intentions to create, nurture and rear.

Geneticists differ in their view as to whether having passed on one's genes is *necessary*, *sufficient* or both for parenthood. Bigelow et al., (1988) explained that *strong* Geneticists view genetic derivation as *necessary* and *sufficient* for parenthood, and *sufficiency* Geneticists view genetic derivation as sufficient but not necessary while *necessity* Geneticists accept the *necessary* claim but deny the *sufficiency* argument. These three forms of geneticism parallel the three forms of gestationalism.

*Strong* Geneticists (Krimmer, 1998; Hall, 1999) endorse the "nanny defence" to oppose gestational surrogacy and regard gestational surrogacy as synonymous to a foster mother or wet-nurse.

Using the "nanny defence", Krimmel (1998) submits that "using a gestational surrogate mother as a host for the foetus when the biological (i.e. genetic) mother cannot bear the child is no more morally objectionable than employing others to help educate, train or otherwise care for a child". Hall (1999) used the principle of ownership to support geneticists view on parenthood. In

his opinion, there is a relationship of material constitution between the parents' gametes and the child and since the parents own their gametes, they own the child. He concludes that genetic connections are not only sufficient but also necessary for parenthood. Kolers and Bayne in 2001 echo Hall's (1999) argument by asserting that the genetic constitution view has the propensity of ascribing grandparenthood and other kinship relations and that parenthood should track genetic derivation rather than material derivation.

Conversely, Bayne and Kolers (2003) reject both the *strong* and *necessity* Geneticists view as insufficient determinant of parenthood but support what they call "pluralism"; the view that one or more of the genetic, gestational or intentional relations are *necessary* for parenthood. A pluralist account of parenthood according to Bayne and Kolers (2003) will better ensure that children have adequate protection right from birth. They assert that "one wouldn't want to endorse the monistic gestationalism if one wanted to ensure that children enter the world with a network of people who have an interest in and responsibilities for their welfare". Narayan (1999) endorses both the *sufficiency* geneticism and gestationalism even though he views surrogacy as part of a broader endorsement of non-standard forms of family organisation. Annas (1984) based his argument on parenthood on the monistic gestationalism claim that gestation uniquely grounds parenthood. The Council of Europe (1997) used the identifiability argument to defend monistic gestationalism. They argued that the gestational mother, unlike the genetic parents, is guaranteed to be identifiable at birth. Bayne and Kolers (2001) however accept this argument only as having a role in custody decisions and not a central role in grounding natural parenthood. Although the gestating woman makes an essential contribution to the child's existence, this role is not necessarily equal to being a mother as the distinction between maternity (reflecting the birthing role) and motherhood (reflecting the social rearing role) is important (Bayne and Kolers, 2001; Wallbank, 2002). These endorse a pluralist account of parenthood, which ensures that gestational and genetic relatedness are individually sufficient for parenthood. Some gestationalists have used the *incorporation* argument to support gestationalism and ascribe parenthood. In endorsing the *incorporation* argument, Rothman (1989) explained that the physical relationship between the foetus and the gestational mother during pregnancy is unique not only because the foetus is *physically contained* within its gestational mother but also because the foetus is *physiologically integrated* and *materially derived* from the mother's body. Given these three considerations, Rothman (1989) concludes that, "it is plausible to view the embryo-foetus as part of the woman's body regardless of the source of the egg and the sperm". Kolers and Bayne (2001) concur with Rothman (1989) only to the extent that a foetus is

materially derived from its gestational mother but affirms that it is genetically derived from its genetic 'parents'.

Although the *identifiability* and *incorporation* arguments each supports *sufficiency* gestationalism, Bayne and Kolers (2003) opined that neither stands up as a defence of the claim that gestation is *necessary* for parenthood.

Recently some legal minds have extended the argument of parenthood in surrogacy arrangement by exploring the *intentionalism* approach to parenthood. This argument that parenthood should be grounded on the basis of contractually stated intention instead of a biological relationship is becoming popular among legal scholars, feminists, surrogacy agencies and the general public (van Zyl & van Niekerk, 2000). The National Conference on Uniform State Laws drafted an Act in 1998 and recommended it for enactment in the United States. In the Act, it is stated that: "upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married are not the parents of the child" (NCUSLA, 1998). Similarly, the 2005 Irish Commission Report on Assisted Human Reproduction states that, "the Commission is of the opinion that rights based on the "intent of reproduction". In other words what all parties intended from the outset of the arrangement should form the basis for legal parentage in cases of surrogacy'. This notion is based on the intentions to nurture (*intentionality*). They view these as *necessary, sufficient* or both for grounding parenthood. As Hill (1991), puts it "it is the procreators - the party or parties responsible for bringing the child into the world with the intention of raising it... -who are the parents of the child at birth".

Bayne and Kolers (2003) agree with Hill (1991) that *sufficiency intentionalism* is plausible however they disagree with Hill (1991) that preconception intentions to nurture are *necessary* for parenthood. They defend their argument on the premise that many people become pregnant unintentionally and this does not make them any less parents of the child, than if they had planned the pregnancy.

Van Zyl and Niekerk (2000) find the argument that *intentionalism* grounds parenthood morally unacceptable. In their view, to deny that the surrogate is the mother of the child is synonymous to viewing the foetus-surrogate mother relationship as one of ownership, the surrogate as a "human incubator" and the child as the "product" whose link to her is partly being the result of her physical labour.

### Legal Implications

The answer to the question 'whose baby is it?' or rather, "who are the legal father and mother of a child born through surrogacy arrangement?" is not clear-cut. The answer to the various dilemmas varies from jurisdiction to jurisdiction and is also largely dependent upon the state or country where the child is born. Even in jurisdictions

that have dealt with some of the dilemmas arising from surrogacy arrangements, there has been no clear consensus as to what framework to apply to reach the ultimate decision (Fasouliotis and Schenker, 2000; Ciccarelli and Ciccarelli, 2005; Sharma, 2006).

The *best interest* of the child is considered a strong reason for reaching a decision, if a child is born as a result of artificial insemination and has universally applied the adoption law to resolve the dispute (TASC, 1988; Ciccarelli and Ciccarelli, 2005). In such situations, since the surrogate is both genetically connected to the child as well as actually carrying the pregnancy, the courts had little trouble reaching the conclusion that she is the legal mother of the child. This means the surrogate must relinquish her parental rights in order for the intended parents, specifically the intended mother, to finalise her parental rights (TASC, 1988; Ciccarelli and Ciccarelli, 2005).

In a situation where the arrangement goes right, the surrogate relinquishes her parental rights; the intended father is entitled to a judgment of paternity either prior to or after the baby is born (Ciccarelli and Ciccarelli, 2005). The intended mother, since she is legally married to the intended and biological father, will however have to apply for and undertake the stepparent adoption. The other possibility that could occur is when the surrogate mother refuses to relinquish her parental rights. This will usually lead to litigation. The more common result is for the court to find that the intended father and the surrogate are the "parents" of the child and treat the matter as a custody and visitation issue. The best interest of the child principle is applied in such instances. The intended mother will *only* be able to finalise her parental rights if the surrogate consents and cooperates (Ciccarelli and Ciccarelli, 2005).

In the case of a child conceived through IVF in surrogacy arrangement, depending on the jurisdiction, the court will use the contract principle in considering the matter. Using this analysis, the Court does not inquire into the best interest of the child (*Johnson v. Calvert, 1993*). The advantage to this is that in gestational surrogacy, it allows the intended parents to obtain a pre-birth order declaring them the legal parents of the child (*Johnson v. Calvert, 1993*).

Nevertheless, because the legal outcomes depend on where the child was born, it is common for various courts to reach different outcomes on the same case.

In 2001, a different twist and possibility to the legal aspect of surrogacy arrangement came to light in the UK involving a surrogate mother, Helen Beasley. Helen Beasley is taking American couple Charles Wheeler and Martha Berman to court after they allegedly backed out of the contract when they discovered she was carrying twins and not the one baby they had agreed. Under California law, all rights to the future of the twins lie with the intended parents, not the surrogate mother. In Britain, however, the would-be parents have no rights even if the

child is genetically related to both of them. The surrogate mother is the legal parent and six weeks after birth, the new parents applied for a Parental Order to give them full and permanent rights over the child. To find new parents for the twins, Ms Beasley took Mr. Wheeler and Ms Berman to court to have their legal rights quashed (BBC TV, 2001). The twins have successfully been adopted.

## CONCLUSION

Infertility has always put pressure on couples, causing them much anxiety. With developments in medical technology, solutions to the dilemma of infertility have changed. The concept of surrogacy arrangements has shaken the foundations of predetermined parental roles and responsibilities. As we have seen from the above arguments, neither *geneticists* nor *gestationalists* and *intentionalists* speak with one voice about the parenthood of a child in surrogacy arrangements.

Against those who view the genetic relationship as the essence of parenthood, as well as those who propose that *intention* be recognised as the essence of parenthood, I believe that to be a parent one must possess some of the defining features of parenthood such as a genetic, gestational, intentional or social relationship. Nonetheless, all of these features need not be common to all parents. This is why I am inclined to accept the pluralist account of parenthood in surrogacy, as this will ensure the participation and involvement of all parties in the process of raising the child. This arrangement will promote an 'extended' family structure and a network of interested people in the welfare of the child. Having reinterpreted parenthood, we should be prepared to reinterpret the family structure.

While I am sympathetic towards altruistic surrogacy and the pluralist argument as a premise of parentage in surrogacy arrangements, the challenges of commercialisation, forced surrogacy and same-sex parenting appear to outweigh the possible benefits when things go wrong.

Despite the landmark achievements human reproductive biology, assisted human reproduction technologies have engendered a wide variety of moral and ethical concerns, as they have introduced new ethical and legal dilemmas hitherto unknown to the public and the legal profession. Surrogacy is here to stay as an acceptable option for individuals who are biologically unable to bear children, however, a number of moral, ethical and legal issues still remain unresolved. Greater focus on the prevention and early treatment of causes of infertility such as sexually transmitted diseases may reduce the need for surrogacy.

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