

Surrogate Motherhood: A New Option for Parenting?

by Barry R. Furrow, J.D.

In this issue, we present two viewpoints on surrogate motherhood, the controversial procedure whereby a couple contracts with a woman to conceive and carry a child for them. This relatively new phenomenon is spurred by a number of forces. First, people want children, and are too often unable to produce their own. By some current estimates, fifteen percent of all married couples are infertile; other estimates are much higher.¹ Second, adoption may not be a viable alternative: fewer unwed mothers now give up their children for adoption; even when children are available, adoption is slow and unpredictable; and the adopted child will be genetically related to neither parent. The prospects of childlessness are painful for infertile couples, who often turn to their doctors and others for help. Surrogate mothering, in proper perspective, is only one example of what John Robertson has felicitously termed "collaborative reproduction."² Such collaborative efforts (others include artificial insemination by donor and embryo transfer) allow an otherwise infertile couple to bear a child with a third party's provision of sperm, egg, or uterus. Such new techniques involve the separation of traditional reproduction's intertwined elements: conception, gestation, and child-rearing. Surrogate motherhood separates conception and gestation from childrearing; other techniques may allow more complex permutations.³

We should remember that our society has already faced the separation of biological and social parenting through widespread adoption,

Mr. Furrow, Editor-in-Chief of Law, Medicine & Health Care, is Associate Professor at University of Detroit School of Law in Detroit, Michigan.

through blended families of two divorces, and through artificial insemination by donor. Surrogate motherhood can be viewed as a short step beyond these.

Surrogate mother arrangements uniquely serve the needs of some infertile couples. Why then are the critics so concerned? First, to some, the payment of money for producing a child is morally offensive. Second, the stress of a complex relationship with a stranger in such an intimate context may be entangling and disturbing to the parties. For example, the surrogate mother may experience severe depression after giving up the child, or the couple may feel tempted to continue the relation with the surrogate mother. Third, the lineage of children may be confused, and the very fabric of the family may be damaged. Many of these concerns are legitimate, and they must be balanced against the deeply felt desires of infertile couples to have children. As John Robertson has argued, "a harm greater than moral distaste is necessary" to justify prohibition.⁵

The law has lagged behind social change,⁶ leaving the legality of surrogate motherhood arrangements uncertain, and raising remedial questions when the contract is breached. In this issue of *Law, Medicine & Health Care*, Steven R. Gersz, who favors this reproductive option, suggests that a carefully drafted contract may obviate some of the difficulties of the relationship between a couple and the surrogate mother. In contrast, Angela R. Holder, in her article, brings a critical perspective to the issue. She is worried about the tough cases where no one wants the child born with impairments, or where the surrogate mother, having developed strong feelings during pregnancy, is reluctant to surrender the child. If society decides

that the surrogate mother process should be available, then Holder reluctantly suggests that legislation is needed to avert this potential parade of horrors.

Ironically, many of the social and legal dilemmas posed by surrogate motherhood may themselves be resolved by medical technology. The development of an artificial uterus for humans may eliminate the need for a third party—at least for couples. Until such technologies are perfected,⁷ however, we should design legal methods to facilitate reproductive options for the substantial percentage of marriages that are infertile.

References

1. L. ANDREWS, *NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS, INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD* (St. Martin's Press, New York, N.Y.) (1984).
2. Robertson, J.A., *Surrogate Mothers: Not So Novel After All*, *HASTINGS CENTER REPORT* 13(5): 28, 28 (October 1983).
3. See Robertson, J. A., *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, *VIRGINIA LAW REVIEW* 69(3): 405 (1983).
4. For further arguments against surrogate parenting, see Krimmel, H. T., *The Case Against Surrogate Parenting*, *HASTINGS CENTER REPORT* 13(5): 35 (October 1983).
5. *Surrogate Mothers: Not So Novel After All*, *supra* note 2, at 33.
6. Legislative proposals have spanned the spectrum from prohibiting surrogate arrangements to facilitating them. New Jersey A. 3139 would make it a crime to participate in a surrogate mother arrangement. California, in A.B. 3771, aims to "facilitate the ability of infertile couples; to become parents through the employment of the services of a surrogate," and allows reasonable compensation. H.B. 4114, in Michigan, aims to screen the surrogate and parents, to protect the natural mother's health, to spell out the contractual obligations of the parties, and to permit payment only of medical expenses and lost wages for the surrogate.