Contracts to bear children

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Author’s abstract

In the surrogate mother procreation can be divorced both from sex as well as any anticipation of child rearing. Often the risks of surrogate motherhood are presented in terms of alternative family structures and economic exploitation of women. Such possibilities must invite critical reflection in order for there to be legal reform. Of paramount importance is the child’s best interest and until the full psychological ramifications for the child, adoptive parents and natural mother are determined then the law’s role must be ambivalent. In this impasse the minority view of the Warnock Report has much to commend itself.

The use of modern reproductive techniques has effectively separated sex from reproduction. The Report of the Committee of Inquiry into Human Fertilisation and Embryology (1), under the chairmanship of Dame Mary Warnock recently discussed at length the issues posed by the process of in vitro (on a glass slide) fertilisation. One of the most contentious aspects of this report was the majority conclusion reached with regard to the ancient practice of surrogate motherhood (2). This lack of consensus reflects the measure of difficulties involved since through the surrogate mother, procreation may be divorced not only from sex but also from any anticipation of child rearing. It seems appropriate therefore to re-examine some of the problems which arise in this context.

What is surrogacy?

A ‘surrogate’ is a deputy or substitute; someone who takes the place of another. However, it is important to distinguish on the one hand ‘full’ from ‘partial’ surrogate motherhood. ‘Full’ surrogacy utilises the process of in vitro fertilisation where, for example, both egg and semen will come from the commissioning couple, the resultant embryo subsequently being implanted into a carrying mother (3). ‘Partial’ surrogacy is the most common form where the surrogate either through natural intercourse or artificial insemination is also the genetic mother of the child which she promises to give up.

Essentially the term ‘surrogacy’ here is a misnomer since the natural mother who contributes egg and uterus is not so much a substitute mother but a substitute spouse who carries a child for a man whose wife is infertile. It is the adoptive mother who is the surrogate since she, like the adoption mother, is a parent of a child borne by another (4).

Reasons for surrogacy

These can be considered to lie on a continuum between medical impairments which may be serious (for example risk to life) or minor (for example aggravating varicose veins) to seeking surrogacy because of the great inconvenience which pregnancy would entail (for example to career prospects). Any regulation of surrogacy would have to embrace the whole spectrum.

The whole point of the surrogacy procedure is that it operates as an alternative to adoption and circumvents the long queues waiting for healthy babies (5). It is a form of independent adoption controlled by the parties, planned before conception and involving a genetic link(s) with one (or both) parent(s).

The Warnock Committee approach

The surrogacy issue proved the most difficult to resolve (6). Indeed more time was spent on this topic than on any other part of the Report (7), and eventually the majority view was that the criminal law should be used against any agency or individual making surrogacy arrangements. Several arguments held sway with the committee and these were:

(a) Unforeseen events could occur between the moment of entering into the surrogacy agreement and the time for handing over the child (para 8:7). In particular there was the possibility of the child being born handicapped and then being rejected both by the contracting couple and the surrogate mother. However, such a problem is not necessarily unique to surrogate mothering. Indeed there have been several recent cases in a number of jurisdictions (8) which have dealt with the issue of withholding paediatric medical care from defective newborn infants. It follows that some parents will reject handicapped children and the

Key words

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proper question in this context concerns the extent to which parents should have autonomy over their childrens' lives (9).

Although 'partial' surrogate motherhood is a low-risk and medically uncomplicated procedure there does exist the possibility of complication arising during pregnancy which may result in serious illness requiring lengthy hospitalisation (10). This possibility by itself is not sufficiently compelling so as to outlaw surrogacy where there is fully informed consent since these risks are inherent in normal pregnancy which has been referred to as 'une maladie de neuf mois' (11). Rather this may be a case for the inclusion of a compulsory insurance scheme in the surrogate agreement covering costs of health care and loss of income during the period of hospitalisation.

(b) A child may suffer as a consequence of surrogacy psychological harm through confusing family lineage and personal identity (para 8:11 of the report). This approach outlawing surrogacy is difficult to sustain on at least three grounds. Firstly, many well-established procedures threaten such harm for example, adoption, artificial insemination by donor (AID) and 'blended families' where children of different marriages are raised together. The issue then revolves around the question whether all collaborative techniques which manipulate the natural process of child bearing should be treated equally? Secondly, the child has life which presumably he or she would not otherwise have had because unlike ordinary adoption the conception of the child occurs solely as a result of the surrogate agreement. Thirdly, the position of the surrogate child may be no different from that of the in vitro fertilisation child and the Warnock Report does not call for a moratorium here because of the possibility of such harm (12). Indeed, since Louise Brown, the first 'test tube' baby is only six years old, at least a decade will pass before scientists can fully assess her mental and psychological development.

(c) The surrogacy agreement was considered degrading to the child since 'for all practical purposes, the child will have been bought for money' (para 8:11 of the report). It is contended however, that an agreement to have a baby for the purpose of giving it up for adoption is functionally different from selling babies already conceived. What the couple are doing is buying the right to rear a child by paying the 'mother'. The 'purchasers' do not buy the right to treat the child as a commodity since the child abuse and neglect laws still apply (13).

(d) The cornerstone of the majority view was that surrogacy threatened economic exploitation of women through people treating others as means to their own ends (para 8:17 of the report). Nevertheless, as was pointed out in the expression of dissent signed by Dr Greengross and Dr Davies (Appendix A para 3) this objection is not as clear-cut as was supposed. The main difficulty with this philosophical perspective is that of supplying proof that IN FACT persons are ends in themselves. Intuition or experience alone does not constitute proof of value or determine, especially in a pluralistic society, moral duties (14). Furthermore, the majority deontological approach in this context may be considered inconsistent with the broadly utilitarian approach adopted by the committee in relation to embryological experimentation (15).

The question of economic exploitation of women is a pertinent one. In a United States survey carried out by Winslade in 1981 (16), it was found that 40 per cent of volunteer surrogate mothers were unemployed or in receipt of welfare. These facts by themselves do not necessarily entail economic exploitation since it is doubtful, as will be considered below, that such a contract is legally enforceable thereby forcing the surrogate to give up the child. Moreover, as is evident in the minority opinion expressed by the Warnock Committee (Appendix B para 7), some compensation for the inconvenience and risks of insemination, pregnancy and childbirth may be necessary precisely in order to avoid the charge of economic exploitation. Interestingly Parker has deduced from a survey of over 275 surrogate applicants (17) that the decision to be a surrogate springs from several motives which are not solely pecuniary. For example some women 'enjoy' being pregnant whilst for others it may be a way of relieving guilt felt from past pregnancies that ended in abortion or adoption; whilst yet some others consider themselves as 'organ donors' as they are bestowing the 'gift of life' to another couple.

Clearly, these arguments prohibiting surrogacy are not insuperable. Indeed, it could be contended that there are good grounds for the belief that people who are desperate enough in their desire to have a child will not obey such a proscription. As Rassaby has pointed out (18):

'... to proscribe surrogacy, would be only to force the practice "underground", and to deny ourselves the opportunity to regulate the procedure to the benefit of both parties, the child and society. In this sense an interdiction of surrogacy may be likened to a prohibition of alcohol.'

Since 'partial' surrogacy is such an uncomplicated procedure it may be that only 'full' surrogacy can be effectively proscribed. This form of surrogacy involves complex procedures and because of its limited availability will always (19) form only a relatively small part of the practice. It seems therefore, that the quest for lawmakers is to discover appropriate methods of regulating his practice.

Legal issues

It is possible for the law to take at least four approaches to surrogacy and these will now be considered in turn.

1: DECLARE IT A CRIMINAL ACT FOR THOSE ACTIVELY ENGAGED

This was the approach favoured by the majority in the Warnock Committee Report (para 8:18) (20). Such an
uncompromising position would deny professional assistance and as Dr Davies has said (7):

‘...condemns childless couples to more unhappiness, more physical risk in some cases [eg miscarriages], and more temptation to seek some unsatisfactory solution such as domestic surrogacy or going underground.’

As has been shown, by itself it is unlikely that surrogacy as a practice threatens the fabric of our society or any individual members of it. Also it does seem anomalous that those women born without functioning ovaries can benefit from ovum donation (para 6:8 of the Warnock Report) whereas those born without a womb would be denied this prospect if the Warnock proposals were implemented.

II: ENFORCE SURROGATE CONTRACTS

The law of contract is too blunt an instrument effectively to regulate this area. Thus it is unlikely that an English court would order a decree of specific performance of what is essentially a contract for personal services (21). This approach avoids the dilemma of a contractual provision which could for example require a mother to abort, to refrain from a desired abortion or to submit to intrusive medical procedures. However, even in this context one could argue by analogy with *Paton v BPAS* (22), that the consent of the biological mother or otherwise is as much an irrelevance as the consent of the father (23) whilst s1(1) of the Abortion Act 1967 provides that a pregnancy may be terminated if its continuance would involve a risk of injury to the physical or mental health ‘of the pregnant woman’. The Act seems to concentrate on the welfare of the *pregnant woman* and the interests of any other persons including the genetic mother are irrelevant.

Awarding damages for breach of a surrogate contract would prove particularly problematic. This could have a significant effect on the surrogate’s family resources as well as occasioning great harm to the child whose birth would be tainted by illegality in the sense that it would have to grow up in a home soured by litigation (24). Moreover an award of damages does not minimise the obligation of the genetic father in relation to an affiliation order under s 1 of the Affiliation Proceedings Act 1957. In order to apply for such an order the mother must prove that she is a ‘single mother’ (25) and this effectively excludes happily married women. Although the Law Commission Report on Illegitimacy (Law Com 118) does away with this restriction the AID child would be considered the legitimate child of the woman’s husband (26) if she was married at the time of the insemination unless the husband could satisfy the court that he did not consent to the procedure.

III: DECLARE SUCH CONTRACTS AS BEING CONTRARY TO PUBLIC POLICY

This is undoubtedly the current legal position (27). Thus s 57 of the Adoption Act makes it a criminal offence for any persons to pay or receive money to persuade another person to consent to the adoption of their child or to transfer a child with a view to adoption. Moreover, s 85(2) of the Children Act 1975 provides:

‘Subject to section 1(2) of the Guardianship Act 1973 (which relates to separation agreements between husband and wife) a person cannot surrender or transfer to another any parental right or duty he has as respects a child.’

It is almost inconceivable as Parker has pointed out (28) that an English Court in applying the welfare of the child test as its first and paramount consideration in a custody dispute would favour the donor father as against the surrogate mother (29).

Essentially what is involved here is an aspect of the doctrine of risk or *caveat emptor*. The application of this doctrine in this context is inappropriate since it fails to take fully into account the despair of childlessness. Indeed the United States experience shows that some surrogates will take the money and then run to an abortionist whereas some others will ‘gradually turn the screw on the adoptive couple as their longed-for baby comes closer to its time of delivery’ (30).

A better approach would involve a *via media* which avoids the draconian remedy of forcing an unwilling surrogate to hand over the baby whilst at the same time protecting the adoptive couple from a surrogate who may ‘exploit’ them (31). One way of achieving this goal is through a system or regulations designed not necessarily to solve the problems that arise but rather to minimise them through careful supervision of the surrogacy procedure.

IV: REGULATE SURROGACY

A common thread runs through the Warnock Committee Report namely, the importance of establishing a licensing authority to oversee fertility treatments and experimentation (para 13:3). It is a pity that the majority view in the report favoured legislation to render criminally liable the actions of professionals who assist in the establishment even of a non-commercial surrogate pregnancy (para 8:18). Such an approach curbs clinical judgement and does not admit the possibility of deserving cases (32).

In contrast, the minority Warnock Committee view was that the surrogacy procedure should be available as a ‘last resort’ when approached by the licensing authority (Appendix A, paras 5–9). Here the State has an interest in providing for the welfare of the child to the extent of assuring it a suitable home environment and to this end a programme of investigation as in adoption to ensure the suitability of all the ‘parents’ was recommended. The screening of surrogates would avoid risks from alcoholics and drug addicts (33) as well as assessing whether the woman was likely to change her mind about giving up the baby or suffer adversely psychologically (34). Furthermore, the
licensing authority could fix a sum of money considered to be adequate compensation payable to the surrogate.

Conclusion
The risks of surrogate motherhood are often presented in terms of alternative family structures such as single men and lesbian women having children. Obviously such possibilities must invite critical reflection in order for there to be legal reform. However, at the same time it cannot be denied that surrogacy does respond to a genuine need for childless and desperate couples and as such should be treated with respect.

The wider issues encompass such questions as whether surrogate motherhood violates some fundamental principles of morality or alternatively whether the practice promotes certain moral values such as personal happiness where this is at little or no cost to others. These issues are not easily resolvable. Nevertheless, of paramount importance is the child's best interest and until the full psychological ramifications for the child/adoptive parents/"natural" mother are determined then the law's role must be ambivalent. In this impasse the minority view of the Warnock Report has much to commend itself.

References and notes
(2) In the Old Testament it was acceptable for a woman other than the wife to bear the couple's child as in the case related in Genesis 30 Vs i–vi of Rachel's maid bearing her husband Jacob's child.
(3) See Warnock Committee Report reference (1) para 8.1. This may take other forms, for example, a few days after the publication of the Warnock Committee Report Drs Steptoe and Edwards called for women to donate eggs to patients at their Bourn Hall clinic who would otherwise be infertile. See also Veitch A. Steptoe in call for women donors. The Guardian 1984 Jul 24.
(5) In fact the total number of adoptions has increased especially in the adolescent age group of 15–17 years. The only category of children which registered a fall was in young babies and toddlers. See Office of Population Censuses and Surveys. London: HMSO, 1982.
(6) See also Expression of Dissent in the Warnock Committee Report reference (1) Appendix B and C.
(8) See especially R v Arthur, The Times 1981 Nov 6 1981, re B (A Minor), 1981, 1 WLR 1421. In the USA the 'Baby Doe' case caused controversy as the Indiana Supreme Court allowed parents to withhold food and corrective surgery from their week-old child affected by Down's Syndrome. The Indiana Supreme Court does not make available the records of cases of this nature but the medical facts of the case are given by Pless J E. The study of baby doe (Letter) New England journal of medicine 1983; 309: 664. The Canadian cases are discussed by Magnet J E. Withholding treatment from defective newborns: legal aspects. Revue du Barreau 1982; 42: 187.
(10) The maternal mortality rate in the USA is 21.5 per 100,000 births. See Hern W M. The illness parameters of pregnancy. Social science and medicine 1975; 9: 365.
(12) In its treatment of eligibility for infertility treatment the Warnock Committee reference (1) para 2: 11 considered that: '... as a general rule it is better for children to be born into a two parent family with both father and mother although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be.'
(13) Compare Landes E M and Posner R A. The economics of the baby shortage. Journal of legal studies 1978; 7: 323 who argue that women have little or no incentive to put a child up for adoption since even in the USA abortions are inexpensive and public assistance is ordinarily available to cover medical expenses. This approach is criticised by Pritchard J R S. A market for babies? University of Toronto law journal 1984; 34: 341.
(19) Compare the Warnock Committee Report reference (1) para 2: 16.
(20) The Family Law Committee of the Law Society in evidence to the Warnock Committee suggested that it should become a criminal offence for a woman to offer for reward or a man to offer such reward or for a party to act as intermediary in such a transaction to bear a child.
(21) This is clear from A v C (1978) 8 Family Law 170. But see now the Baby C controversy The Times 1985 Jan 8.
(22) [1978] 3 WLR 187.
(24) This may be pertinent in the context of wrongful birth actions for failed sterility operations. See Scoura v Powell [1980] CA Transcript 597; Thake v Maurice [1984] 2 A11 514; Emeh v Kensington and Chelsea and Westminster Area Health Authority The Times 1984 Jul 26. Cf Udale v Bloomsbury Area Health Authority [1983] 2 A11 ER 522. These cases will be discussed by the author in an article to appear elsewhere.
(26) This approach was specifically endorsed by the Warnock Committee Report reference (1) para 4: 24.
(27) Of the draft surrogacy bill.
(29) There is now a developing line of case law where custody has been granted to a lesbian mother. See Knott P M. Homosexual parents: custody and access. *Trent law journal* 1983; 7: 55.


(32) Already Mr Winston, a distinguished specialist in IVF has objected to the majority Warnock Committee approach on this ground. See Prentice T. Test-tube expert to challenge surrogate mother ban. *The Times* 1984 Jul 30.

(33) Keane N, Breo D. Reference (31) 109 have referred to problems such as lesbianism and drug abuse by surrogates.

(34) Compare the recent disclosure of a New South Wales woman who having agreed to act as a surrogate mother for a childless couple, declined to give up the child. See Duboudin T. Surrogate mother will not give up baby. *The Times* 1984 Aug 3.

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