

Should surrogacy agreements be recognised by the Australian legal system?

by Greg Swensen (August 1992)

Introduction

As the Australian legal system owes much of its legal heritage to the British common law system, in particular sharing fundamental principles drawn from free market economists, it would be expected our legal system would be particularly adaptable in relation to the issue of adults entering into surrogacy agreements.

“Prima facie it would seem that surrogate parenting agreements benefit all the adults involved. Through a voluntary agreement an infertile couple gets a child and its surrogate mother gets a substantial sum of money.”¹

The classical hypothetical atomistic marketplace is constituted of independent buyers and sellers involved in discrete transactions, activities that Adam Smith refers to as the invisible hand of the market. It has been argued that as contemporary contract law has become “a relatively uniform code for business transactions that is predominantly defined not by the individualistic principle of unregulated free competition but by the more collective principle of competition regulated by trade custom,”² it has largely become a tool to effect the smooth running of a market economy, increasingly dominated by firms with significant market power.

The areas in which contract law has either failed or been poorly suited to regulating transactions, in domains where the interrelationships between parties are a mixture of social, economic and ethical components, and where the commercial dimension is only partially present, or largely obscured.³ We should not be surprised therefore, that surrogacy arrangements which involve the use of a woman’s uterus to bear a child for other parties for a fee, one or both of whom has provided the gametes that created the child, are poorly suited as means of regulating such a transaction.

Would Australian courts enforce surrogacy agreements?

It is assumed that the courts in this country would refuse, legislative prohibitions excepted, to enforce a surrogacy agreement on ethical grounds rather than whether such an arrangement met all the requirements of a freely negotiated contract. However, this may be an erroneous assumption, as an Australian court may be prepared to entertain the approach of the Supreme Court of New Jersey in the ‘Baby M’ case, where while the surrogacy agreement was upheld because there was a right to privacy that supported a right to procreate, the court also decided that the agreement was not automatically enforceable in regard to the custody of the child, which was a matter to be determined by what was in the best interests of the child.⁴

¹ Baber BE “For the legitimacy of surrogate contracts.” In Richardson H (ed.) On the problem of surrogate parenthood. Lewiston, Edwin Mellen Press, 1987 at p 36.

² Ellinghaus NT “Towards an Australian contract law.” In Ellinghaus UP, Bradbrook AJ, Duggan AJ (eds). The emergence of Australian law. Sydney, Butterworths, 1989, at p. 45.

³ Atiyah PS The rise and fall of freedom of contract. Oxford, Clarendon Press, 1988; Beale H, Dugdale T “Contracts between businessmen: planning and the use of contractual remedies.” (1975) 2 Journal of Law and Society 45; Collins H “Contract and legal theory.” In Twining W (ed.) Legal theory and common law. London, Basil Blackwell, 1986; MacAulay S “An empirical view of contract.” (1985) Wisconsin Law Review 465; MacNeil IR “Relational contract: what we do and do not know.” (1985) Wisconsin Law Review 483; Ramsey I “Contract law and modern society - book review of The Law of Contract by H Collins.” (1986) 24 Osgoode Hall Law Journal 449; Vincent-Jones P “Contract and business transactions: a socio-legal analysis.” (1989) 16 Journal of Law and Society 166.

⁴ The doctrine of the “best interests of the child” is enshrined in the Family Law Act as a principle in determining the custody of children.

It is suggested that such a possibility is a remote one, as the courts would not enforce conduct that in their view transgressed widely held community moral principles. When faced with a dispute involving a surrogacy agreement we would expect a court to ask itself the following question.

*“Should a contract, any contract, be legally or morally binding even when it is entered into voluntarily by both parties when and if it entails selling, renting, or indenturing a human being?”*⁵

An Australian court is likely to answer this question in the negative, as it would consider surrogacy to be baby selling and thereby strike down surrogacy agreements as contrary to public policy. Australian courts would also take notice of the recommendations of a number of recent inquiries into surrogacy in Australia by the New South Wales Law Reform Commission, which wanted total prohibition, and reports by the National Bioethics Consultative Committee, which wanted regulation. Surrogacy is also prohibited in a number of the Australian States

It is illuminating to note British judicial comment (cited in Morgan (1986: 362), from the High Court judgement in the 1978 unreported surrogacy case of A v C.⁶

*“Ormrod LJ: a bizarre and unnatural agreement... a sordid commercial bargain
Cumming-Bruce LJ: a baby farming operation of a wholly distasteful and lamentable kind
Stamp LJ: an ugly little drama”.*

There are three main objections that Baber⁷ indicates would need to be overcome in order to convince a court that it should legally enforce a surrogacy agreement:

- 1) because there is a right to control one's body no one can acquire a right to any part of another person's body;
- 2) it is detrimental to the interests of the child because it amounts to baby selling; and
- 3) it is exploitative of women.

The right to control one's body

If a mother of a child can relinquish her parental rights after the birth of her child by adoption why could she not also relinquish her parental rights before the birth of the child or even before it's conception? By this line of reasoning it is realistic to treat a surrogacy agreement as pre-natal adoption papers, by making the distinction between the time when the woman transferred her right and the time when the commissioning parties obtained that right.

By analogy it is quite possible to have an enforceable agreement to give someone the right to a crop of wheat in exchange for seed money, even though at the time of making the contract as the seed had not been planted there was nothing for which to the other party could acquire a right.

The argument that a woman has a right to control her own body and that no one can have a right over her body or any part of it, contains the proposition that because the foetus is part of her body no one but her may have any right over it. This means that it is possible to

*“transfer parental rights to a child to you when you are not in any position to acquire such rights, either because the child in question is still ... a part of the body or because the child in question does not yet exist.”*⁸

⁵ Werhane PH “Against the legitimacy of surrogate contracts.” In Richardson H (ed) On the problem of surrogate parenthood Lewiston, Edwin Mellen Press, 1987 at p. 24.

⁶ Morgan D “Who is to be or not to be: the surrogacy story.” (1986) 49 Modern Law Review 358, 362.

⁷ Baber BE “For the legitimacy of surrogate contracts.” In Richardson H (ed.) On the problem of surrogate parenthood Lewiston, Edwin Mellen Press, 1987

⁸ op cit 34.

Surrogacy is baby selling

This argument relies on the proposition that it is a child's best interest to be raised by its mother because she is its natural mother. However, there appears to be a lack of empirical evidence to support this proposition; rather it rests on an untestable proposition that all women possess "maternal instinct" which produces the bond between mother and child and which constitutes the foundation for the optimal nurturing of a child.

There is a widely held belief "*that biological parenthood is assumed as the template for the emotional maturity necessary to promote a caring home.*"⁹ This proposition also fails to account for that frequently children are conceived by their parents for ulterior ends, yet this is not condemned. "*If it is not morally wrong to conceive a child for further some ulterior end, then conceiving a child in fulfilment of a surrogate parenting contract is not on these grounds objectionable.*"¹⁰

Surrogacy is exploitative of women

This proposition is derived from the belief that as women who may be most likely to become surrogates are those most powerless and in straightened economic circumstances, who are forced by necessity to earn money by selling their services to more affluent persons.

This proposition may be difficult to sustain as it depends on the definition of exploitation. If exploitation occurs when any poor person sells goods or services to a more affluent person, then the argument is principally one about capitalism rather than one about unequal status between men and women.

While the courts may strike down surrogacy agreements on one or more of the three previous grounds there are wider concerns about the issue of infertility not acknowledged which are illustrated in the Baby M case, involving Dr Elizabeth Stem, the wife of the man of whose sperm was used to inseminate Mary Whitehead, the surrogate.¹¹

In the case of the Sterns their reproductive choices were made more difficult because of their careers. It is argued that if medical schools were more flexible and accommodative of family needs, then the Sterns would have had more options to have had children at a much earlier time in their careers. The initial delay in childbearing by Dr Stern was due to the need to reconcile both educational and career responsibilities, and this meant that she faced an increased risk of infertility because of her age.¹²

It is argued that this is a problem not peculiar to the Sterns, but part of a larger workplace problem. In addition to increased infertility due to delayed childbearing, a 1985 study by the American Centre for Disease Control stated that reproductive failure was the tenth most prevalent work-related disease.¹³

In the instance of the Sterns clearly a number of policy issues were also treated as peripheral in the court case, eg improved sexual education, better enforcement of occupational health and welfare legislation, increased high quality day care and mandatory parent leave, which if implemented would reduce many couple's infertility problems.

⁹ Morgan D "Who is to be or not to be: the surrogacy story." (1986) 49 Modern Law Review 358, 366.

¹⁰ Baber BE "For the legitimacy of surrogate contracts." In Richardson H (ed.) On the problem of surrogate parenthood. Lewiston, Edwin Mellen Press, 1987 at p 34.

¹¹ Andolsen BH "Why a surrogate mother should have the right to change her mind: a feminist analysis of the changes in motherhood today." In Richardson H (ed) On the problem of surrogate parenthood. Lewiston, Edwin Mellen Press, 1987.

¹² It was subsequently discovered that another factor in Dr Stern's increased risk of infertility through delayed child bearing was that she had an inheritable medical condition that only appeared as she got older.

¹³ Andolsen BH "Why a surrogate mother should have the right to change her mind: a feminist analysis of the changes in motherhood today." In Richardson H (ed) On the problem of surrogate parenthood. Lewiston, Edwin Mellen Press, 1987, at p 52.

Conclusion

Those forms of female infertility which results in some couples seeking surrogacy as a solution to having a child is indicative of the severely constrained range of reproductive choices for couples in this position. Whereas society has paid scant regard to moral and ethical issues of tens of thousands of men who have sold sperm to assist infertile couples, there seems to be excessive concern has been aroused by the right or otherwise of the very small number of women who have become involved in commercial arrangements to provide a service to those unable to have a child.

“There are many people who very much want to believe that women bond to their babies since many people have a vested interest in believing that women are very different from men psychologically and emotionally, that these differences are innate and that they include a much greater stake in matters related to reproduction and child rearing.”¹⁴ (Baber, 1987: 39).

If the courts to enforce commercial surrogacy agreements and governments seek to prohibit them will this result in an informal unregulated market which may be even more exploitative of weaker parties? Is it preferable to treat such agreements as a kind of pre-adoption agreement?

Note: This paper was written in 1992 and accordingly reflects laws and principles extant at that time.

¹⁴ Baber BE “For the legitimacy of surrogate contracts.” In Richardson H (ed.) On the problem of surrogate parenthood. Lewiston, Edwin Mellen Press, 1987 at p 39.