

## The Linacre Quarterly

---

Volume 55 | Number 4

Article 13

---

November 1988

# Surrogate Motherhood: Legal Issues Concerning 'Vanity Children'

James Michael Thunder

Follow this and additional works at: <http://epublications.marquette.edu/lnq>

---

### Recommended Citation

Thunder, James Michael (1988) "Surrogate Motherhood: Legal Issues Concerning 'Vanity Children'," *The Linacre Quarterly*: Vol. 55: No. 4, Article 13.

Available at: <http://epublications.marquette.edu/lnq/vol55/iss4/13>

# Surrogate Motherhood: Legal Issues Concerning 'Vanity Children'

James Michael Thunder

*Mr. Thunder is the general counsel of the Americans United for Life Legal Defense Fund, Chicago, Illinois. This paper was presented to the Department of Pediatrics of the Loyola University Stritch School of Medicine in April of 1988.*

---

Americans United for Life Legal Defense Fund (AUL), for whom I am general counsel, has a limited institutional interest in the practice of surrogate motherhood. AUL is the legal arm of the pro-life movement in the United States and has institutional positions on abortion, euthanasia, fetal experimentation and infanticide. With respect to surrogacy, AUL opposes any agreement, or any law which would recognize any agreement, that would require abortion by the surrogate mother. Everything else I present here is my personal view.

My background on this issue includes my experience as an assistant state's attorney for Cook County in the Child Abuse and Neglect Unit of the Juvenile Division of Circuit Court where I participated in cases in which parental rights were terminated. It also includes the publication of an essay in *The Chicago Daily Law Bulletin* in August, 1987, testifying at the Illinois Senate committee hearings last fall, and attending the deliberations of a committee of the National Conference of Commissioners on Uniform State Laws this past February.

First, let me define surrogate motherhood. It is an agreement by a woman made *before conception* to give birth to a child and to terminate her maternal rights in favor of another person (probably a woman) at, or soon after, birth. Since it is an agreement made *before*, rather than after, conception, it is materially different from the typical situation of an unwed mother who wishes to place her unborn child for adoption. Now, let us look at the issues such an arrangement poses.

## Who is the Mother Legally

The law provides that the mother of a child is the woman who gave birth to the child. (Moreover, if the mother is married, the father is presumed to

be her husband. The presumption can be rebutted — as it would be in the case of artificial insemination of the woman by a man not her husband.) A contract for surrogacy seeks to change what the law would normally provide. Of course, the law recognizes that agreements can change what would otherwise be provided by the law in numerous fields of endeavor. Thus, commercial contracts can vary what would otherwise be provided by the Uniform Commercial Code, and wills can vary what the law would otherwise provide in cases of intestacy. There are, however, limits to these arrangements. Certain arrangements can be determined to be contrary to statute or to public policy.

So it is that surrogacy contracts have been ruled invalid and unenforceable — by a trial court in Michigan and, in the case of *Baby M*, by the highest court in New Jersey. (*In re Baby M*, Feb. 3, 1988). Where the surrogacy contract is unenforceable, the result is that a court must determine the identity of the mother (an easy matter) and the identity of the father (the husband of the mother or perhaps the donor of semen). The court must then adjudicate the matter of custody between mother and father. If, as in the *Baby M* case, there is a woman who desired to be the child's mother, the woman's role in the custody dispute is simply as a prospective stepmother.

In the *Baby M* case, the New Jersey Supreme Court determined that a surrogacy contract violated *three* New Jersey statutes. It violated

- statutes which prohibit the use of money in connection with adoption;

- statutes which limit termination of parental rights to situations in which there has been a valid surrender of the child to an appropriate agency or in which there has been a showing of parental unfitness or abandonment of the child; and

- statutes which allow the revocation of a mother's consent to surrender her child in a private placement adoption.

The court further found that the surrogacy contract violated *five* public policies of New Jersey, namely:

- the policy that custody be awarded in accordance with the best interests of the child, whereas the surrogacy contract made that determination before the child was born;

- the policy that children be brought up by their natural parents, whereas the surrogacy contract guaranteed the separation of the child from his or her natural mother;

- the policy that the rights of the natural father and natural mother are equal, whereas the surrogacy contract enhanced the natural father's right by destroying the natural mother's right;

- the policy that a natural mother receive counseling before consenting to surrender her child, whereas the surrogacy contract made no such provision; and

- the policy that adoptions not be influenced by the payment of money, whereas the surrogacy contract was based on such payment.

This decision only voided the surrogacy contract in this case and ones similar to it in New Jersey. It remains possible for the New Jersey legislature, as well as legislatures in other states, to pass laws that would allow surrogacy. A number of legislatures, including Illinois, have bills before them which would make certain, well-defined surrogacy contracts enforceable. The National Conference of Commissioners on Uniform State Laws is drafting "model" legislation, as is the American Bar Association. In addition, proponents of surrogacy may amend their form surrogacy contracts to meet at least some of the objections of the New Jersey Supreme Court — to render them less obnoxious in the view of other courts around the country.

### A Policy and Moral Question

The very first question is not a legal question at all, but a policy and moral question: Why should we allow *any* surrogacy arrangements? The argument in favor is that there is a "market demand" for the arrangement. The argument is as follows: There are infertile couples. These couples desire to have children, and surrogacy is the only way they can have children. Let's examine this argument for a minute.

Of course there are infertile couples. And I sympathize with them. As I stated to the Illinois Senate subcommittee considering surrogacy bills, I know their plight — and I know the joy of having children. Yet, there have always been infertile couples, so what is new? Certainly, there is no new technological advance involved in surrogacy arrangements. The technological means is artificial insemination — but that method of achieving pregnancy has been around for at least three decades.

What is new is the "short supply" of children available for adoption. Yet, it is not that there are *no* children available for adoption. What is new is that there are so few children who are infants, healthy and white who are available for adoption. This, too, is not due to any technological change, but rather to a change in the law on abortion — perhaps a foreseeable effect of *Roe v. Wade*, the 1973 Supreme Court decision outlawing criminal prohibitions by the states of all abortions throughout all nine months of pregnancy. There are, in fact, many children who are handicapped or non-white or not infants or who belong to sibling groups available for adoption. Indeed, I have a friend who just adopted four brothers and sisters between the ages of 5 and 12.

Besides the prevalence of abortion, what is new today is that infertile couples want what I call a "vanity child". I do not employ this term to shame the child born of such an arrangement. I use it as a shorthand expression to describe the kind of couple who would use surrogacy to get what they want. This kind of couple does not simply want a child. The child this couple seeks *must* be genetically linked to them; the couple places an extremely high value on *their* genes. Moreover, this couple would attempt to utilize whatever devices were available to ensure that a

surrogate arrangement resulted only in a child they wanted, that is, a healthy child. Thus arises the spectre of compelling abortion of undesirable children conceived through surrogacy.

The desire of an infertile couple to obtain a child through surrogacy springs from the same desire of a woman to abort her unborn child. These people all have needs which they want met regardless of the consequences to them, to the children and to society.

### **Surrogacy and Christian Principles**

Since I am writing for a publication of Catholic physicians, permit me to reflect on surrogacy in light of Christian principles. Christians can never place the human desire to rear genetically linked children on the highest of planes. First, we ourselves are *adopted* sons and daughters of God. We therefore recognize the importance of adoption in our own lives. Second, our fathers and mothers in Faith are not all genetically linked to us. We owe a huge debt to all predecessors be they mothers, fathers, godparents, confessors, or Abraham and Sarah. Third, Catholics place a high value on celibacy, that is, the grace to renounce the human desire to have genetically linked children in favor of doing the Lord's work. Fourth, we know what societal disruption can result when the human desire to have genetically linked children is given too high a value. It was, if you will recall, the cause of Henry VIII seeking a divorce. This led, in turn, to the martyrdom of St. Thomas More and the schism between the Anglican and Catholic Churches.

Father Clements's adoption of three boys is not merely a great charitable act. He has given witness to the value of adoption in the life of every Christian.

Now I will return to my worldly analysis of surrogacy.

What is the urgency of this legislation? With all of the other problems besetting this country, why must grown men and women spend hours debating this issue and the precise terms of legislation? Is it that legislators are particularly keen about ensuring legislative regulation in advance of any judicial rulings? (If so, there are numerous areas warranting such legislative attention.) I hypothesize that legislators just want to be viewed as liberal and compassionate.

Let's take a look at the issues that consume these legislative drafting committees. They are too numerous to admit of extended discussion today. So I will just raise the issues for you.

#### **Eligibility**

##### **—of the Intended Parent(s)**

First, who can avail themselves of the surrogacy arrangement?

Could a single man? Could a single woman? If it is limited to couples, is there a constitutional violation of a single person's right to procreate? After all, a single woman can be artificially inseminated and single people can adopt.

Must the single person or couple be infertile? If so, has not an alleged constitutional right of *fertile* couples to procreate by any means technologically possible been denied them?

How should infertility be defined? According to one Illinois bill, it would be enough to allege that a couple has attempted to establish pregnancy for one year or more. (According to those drafting the uniform state law on surrogacy, more than 10% of all couples would meet this definition of infertility.) How would a couple establish in a verifiable way which protected their privacy that they had tried to establish pregnancy for a period of at least a year?

Could the couple be said to be infertile where the man or woman had been voluntarily sterilized at one time, but now wish to have a child?

Would it be enough for the woman to show that she could bear a child, but that such a child would probably have a genetic deformity, or that bearing a child would harm her mental health? How would such harm be established?

Would the couple have to establish that they were using surrogacy only as a last resort, that is, that they had tried unsuccessfully other means of procreation or that, within a reasonable degree of medical certainty, such other means would be unsuccessful?

Would an older couple be able to qualify on the basis that the woman is past menopause? Would it make a difference if the couple had never tried to have children when the woman was younger?

Must the couple be genetically linked to the child? That is, must either the man donate his sperm (as in the *Baby M* case) or the woman donate her egg? Couldn't the egg come from one person, the sperm from another, the baby from the surrogate's womb, and then have custody of the baby given to a fourth person?

Should the couple be screened for genetic deformities, and evaluated for fitness as parents?

## **Eligibility**

### **—of the Surrogate**

Second, how would a woman qualify to be a surrogate?

Must the surrogate have demonstrated the ability to conceive and bear a child — a healthy child, without complications during the pregnancy?

Must the surrogate have demonstrated her ability to detach herself emotionally from her child by perhaps having placed a child for adoption once before? Or could she prove it through a psychological examination?

Must the surrogate have demonstrated that there would be no harmful impact on her husband or her children? What provision should be made for her husband and children if there are complications, indeed if permanent disability or death results? Should the surrogate be given health insurance, life insurance, disability insurance? What is the effect on her children if she is pregnant for nine months and does not bring the baby home or brings it home and then releases it?

Must the surrogate be of a certain age to ensure she understands the arrangement? Must she be of a minimum and maximum age to ensure a healthy pregnancy and child?

### Other Issues

Once it is established that the parties are qualified to enter into a surrogacy arrangement, there are other issues.

1. Can the surrogate recant and reclaim her child? When can she do so — only before birth? For a limited time after birth?

2. Can the surrogate be paid? Should there be a minimum or a maximum fee? How should it be paid — in installments? What conditions must be met by the surrogate, or the unborn child, before any payments are made? Should the payments be made directly to the surrogate, or held in escrow until “title” to the child has passed?

3. To what extent can the intended parents manage the pregnancy of the surrogate? Can she be prevented from skiing? from smoking? from aborting?

4. Who has parental responsibility if the child dies before birth, or is born handicapped, or if one or both of the intended parents should die or become incapacitated, or if the intended parents should divorce during the surrogate’s pregnancy? One lawyer suggests making *all* parties involved in non-natural reproductions liable as parents — including medical personnel.

5. And now a true legal question: What state’s laws apply to the issues if the surrogacy contract was in one state, but the intended parents live in a second state and the surrogate lives in a third?

6. Which of these problems should be addressed by the legislature in a statute — and which should be left for the parties to decide?

7. Must health insurers pay for surrogate arrangements as they do for medical procedures to correct infertility? Must health insurance subscribers pay for other subscribers’ surrogate arrangements?

8. To what extent do we want judicial involvement in this arrangement? Do we want a judge to review the surrogacy contract and advise a surrogate in open court of her duties and rights? Do we want a judge to get involved only when there is a dispute? Do we understand that society pays the costs of any judicial involvement?

You will note how few of these issues are strictly legal ones. The particular issues, just like the issue of surrogacy in general, are principally moral and policy questions.

You may also observe that only the very rich could take advantage of surrogate arrangements. They cost over \$25,000 — many times the costs associated with an adoption. Yet it will be mostly the poor who will offer their wombs as surrogates. When liberal-minded legislators say they feel compassion for infertile couples, where is their compassion for the prospective surrogate women?

There are numerous instances where our laws serve to protect people



from unwittingly consenting to harmful activity. So, even if a woman wants to act as a surrogate, and wants to do so for altruistic purposes rather than financial gain, should we let her? We don't allow girls to consent to intercourse. We don't let people take certain drugs. We don't let women perform intercourse for money. Should we not say, as a matter of law, that a woman cannot consent to letting her body be used to *conceive* a child for someone other than herself and her spouse?

Where, too, is the legislators' compassion for the child born of such an arrangement? Of course there are problems which inevitably arise with children and their parents. Our laws and courts handle them every day *as best they can*. Neither the laws nor the courts can render less-than-perfect situations perfect. For example, divorces will occur, there will be children involved, and the judges must do the best they can to resolve custody issues.

Yet, why should the law provide for surrogacy? Why place *any* child at risk solely to satisfy the vanities of adults — the risk of having a contested identity? the risk of having a contested custody hearing? the risk inherent in finding out the identities of one's natural parents and the arrangement by which one was conceived and born? the risk of being rejected by all the parties involved?

Why should we emasculate our present laws, which clearly serve the best interests of children, in order to serve the selfish interests of an infertile couple? Why should we help the rich at the expense of the bodies of the poor?

Must the law accommodate our every desire? Legislators restrict our selfishness in many varied ways. Let me cite environmental regulations just as one example. Why is it that the law should accommodate this particular desire and this specific mode of satisfying the desire?

Some say it is because people have a constitutional right to privacy and this right encompasses the *constitutional* right to procreate by *any* means, including surrogacy.

### **Only Married Have Right to Procreate**

I respond, first, that only *married* couples have the constitutional right to procreate. No one else, as a matter of *constitutional law*, has or should have the right to engage in procreative activity. Thus, the states *may* proscribe premarital sexual relations (that is, fornication) and extramarital sexual relations (that is, adultery). This view is supported by the history and traditions of the American people — one of the criteria used by the Supreme Court in determining the parameters of the constitutional right to privacy.

Second, married couples have the constitutional right to procreate solely by *natural coitus*. This method of procreation is grounded in this history and traditions of our people and no doubt is protected by the constitutional right to privacy. This method is eminently private, since no



third person is a party to the act. *Any* other means, including artificial insemination, is not grounded in the history and traditions of our people and, inasmuch as it requires a third party, is most definitely not private. So, in my view, a legislature *could* ban any non-natural method of reproduction. (I am mindful that, with respect to married persons, it is extremely unlikely that any such statutory prohibition would be enacted.)

Whatever one's views on the *constitutional* right of non-married persons to procreate or the right to utilize non-natural means of reproduction, they ought not to form the basis for a constitutional analysis of surrogacy. This is because surrogacy, as recognized by the New Jersey Supreme Court, is *not* a means of procreation. The aspects of surrogacy arrangements concerning coitus or artificial insemination and the resulting pregnancy are indeed activities of procreation. Yet surrogacy arrangements are first and foremost arrangements for the *pre-conception* termination of parental rights and the *pre-conception* adoption of a child by one who is not his or her natural parent. Thus, surrogacy arrangements are arrangements of adoption, not procreation.

Adoptions, as we all know, are not provided by constitutional right, but through legislative privilege. So, surrogacy arrangements are not required to be enforced as a matter of constitutional law, but may be allowed as a matter of legislative grace. If adoption were a matter of constitutional right, then one could be *entitled* to a child. The child becomes an *object* to which one is entitled. Such a view contradicts the human dignity of children as persons.

In sum, legislators can constitutionally prohibit surrogacy arrangements. They should do so.

---