

Opinion

Bioethics Research Notes 19(1): March 2007

Oh Baby Baby: The Problem of Surrogacy

By Matthew Tieu

*Oh baby baby, how was I supposed to know
That something wasn't right here
Oh baby baby, I shouldn't have let you go
And now you're out of sight, yeah
Show me how you want it to be
Tell me baby 'cause I need to know now, oh because
My loneliness is killing me, and I
I must confess I still believe (still believe)
When I'm not with you I lose my mind...*

(Spears, B. 1998)

Introduction

It is often a devastating and life changing experience for women to discover that for one reason or another they cannot become pregnant and have children of their own. In some cases, such as those involving repeated unsuccessful attempts at assisted reproductive technology (ART) or having a non-functional uterus, the remaining option (besides that of adoption) for these women and their partners is surrogacy. However, a major concern with surrogacy is the potential harm that may be inflicted upon the surrogate mother and the child. Therefore, any legislation like South Australia's recently proposed *Statutes Amendments (Surrogacy) Bill 2006*, drafted by the Honourable John Dawkins (MLC), which would permit altruistic surrogacy arrangements, must be considered in relation to the possibility that the commissioning couple's choices may harm the surrogate and the child she carries. Even if one were to take the liberal view that surrogacy should be presumptively allowed on the basis of autonomy, evidence of harm must be taken seriously. In addition to the ethically problematic nature of surrogacy in general, the *Statutes Amendments (Surrogacy) Bill 2006* places a disproportionate burden of the terms of the surrogacy arrangement onto a contractual agreement between surrogate and commissioning couple.

In this article I will discuss a few of the major concerns in relation to surrogacy, focusing on the importance of foetal-maternal bonding, the difficulty of a potential surrogate to give informed consent, and the contractual disputes that are likely to arise due to the logistical pitfalls of legislating for surrogacy. Furthermore, I will argue that there are good reasons, grounded in empirical evidence, to support the view that surrogacy objectifies and subordinates the welfare of both the child and surrogate mother.

Foetal – Maternal Bonding

Important biological bonds are established between the mother and her foetus during pregnancy. One of the most concrete examples of the importance of this bond comes from knowledge of foetal-maternal physiology. The hormone oxytocin plays a crucial role in priming the gestational mother to respond in accordance with her natural maternal instincts.

In a recent review of the importance of mother-infant bonding¹, the authors describe elements of the interaction between a mother and her newborn child, which include skin-to-skin contact, eye gazing, and breast-feeding. These actions initiate the simultaneous release of oxytocin, which facilitates important physiological processes that help the newborn to develop and the mother to recover. In addition to providing health benefits, this hormone-like substance promotes bonding patterns and creates desire for further contact with the individuals inciting its release.²

In addition to this biological bonding, the cognitive and developmental psychology literature indicates that there is a crucial window of time from the moment of birth onwards, whereby the baby begins to form cognitive attachments through inter-subjective interaction with the gestational mother^{3,4,5}. Rather than living in a buzz of ambivalence or confusion as envisaged by some, an infant's behaviour is innately fashioned to coordinate with the social behaviour of other people. This is because an infant already has the cognitive mechanisms and psychological capacities in place to influence as well as be influenced by other people, and in particular his or her birth mother⁶.

Therefore, at the very least, one ought to be especially concerned with any process that disrupts the important bond between mother and child, which derives from both biological and cognitive/psychological aspects of human nature, beginning during gestation and continuing after birth. Surrogacy ruptures this bond and such is the importance of the emotional attachment between the surrogate mother and the child she has carried, that it has led to many cases from around the world where surrogates have been unwilling to relinquish their child, such as the Baby M⁷ and Evelyn cases⁸. As evidenced in these much-publicised cases, having to relinquish a child can be wrenching, the end result being custody battles. Added to this is the evidence that

¹ Kennell and McGrath (2002) Starting the process of mother-infant bonding. *Acta Paediatrica*. 94(6):775-7

² Palmer (2002) Bonding Matters – The Chemistry of Attachment. *Attachment Parenting International News*. 5(2). Can be accessed online at <http://www.babyreference.com/BondingMatters.htm>

³ Gopnik, A & AN Meltzoff (1998) Infant cognition. In *The Encyclopedia of Philosophy*. Routledge

⁴ Meltzoff, AN & A Gopnik *Op. Cit.* (1993) Imitation, cultural learning and the origins of "theory of mind". *Commentary in Behavioral and Brain Sciences* 16(3):521-522.

⁵ Hobson, R. Peter (2002) *The Cradle of Thought: Exploring the Origins of Thinking*. Macmillan: London.

⁶ *Ibid.* pg. 39.

⁷ Whitehead MB, Schwartz L. (1989) *A Mother's Story: The Truth About the Baby M Case*. St Martins Pr; 1st ed. New York.

⁸ "Re Evelyn" [1998] *Fam CA* 55 (15 May 1998)

surrogates may live with the psychological burden of giving up their gestational child for many years^{9,10,11}.

These matters reinforce the difficulty, if not impossibility for a surrogate mother to give informed consent. In relation to the difficulties with relinquishment, certain critical questions must be asked. What happens when there is a reluctance or refusal to stick to the original agreement? What if neither the surrogate nor the commissioning parents want the child? Should there be penalties if the agreement is not honoured? No legislation permitting surrogacy can accommodate such complications without leading to seriously undesirable consequences, and the onus rests with those who would permit surrogacy contracts to answer these questions adequately. Furthermore, because surrogacy results in the fragmentation of motherhood by separating the genetic, social and gestational components, the *Statutes Amendments (Surrogacy) Bill 2006* would therefore sanction this fragmentation and devalue the importance of the foetal-maternal relationship.

Contractual Disputes and Health Risks

A diagnosis of disability or disease, even if equivocal, could lead to serious problems with a surrogacy arrangement. For example, a prenatal diagnosis of disability or perceived imperfection could result in the commissioning couple renegeing. At least one such case has occurred in the US¹². In the case of a diagnosis of disability, depending on the circumstances and severity, the option of abortion could be considered by the surrogate; however, differing moral perspectives on abortion have the potential to result in an irresolvable stalemate. The surrogate may still wish to proceed with the birth; however, the commissioning couple may no longer want the child. Alternatively, the surrogate may choose an abortion contrary to the wishes of the commissioning couple, but presumably the surrogate's decision for abortion under law would prevail. The Dawkins Bill makes no provision for such disputes, and so any burden remains with the surrogate, commissioning couple and others involved.

Given that gestational surrogacy involves ART, the health risks in ART are pertinent to surrogacy. According to a recent review, ART is responsible for approximately 50% of all multiple births worldwide¹³, and about half of IVF pregnancies in the US result in multiple births, with a high risk of premature delivery¹⁴. One-third or even one-half of infant mortality is due to complications of prematurity, and a large contributor to prematurity is infertility treatment. In addition to these risks, there is a growing concern

⁹ *Ibid.*

¹⁰ Goleman, Daniel, Motivations of Surrogate Mothers, *The New York Times*, 20/1/1987: <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9B0DE3D81438F933A15752C0A961948260>

¹¹ Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. 61(1): 21-43.

¹² Spurned baby sparks action on surrogate births *The Australian*, 27 January 1983; also see Singer and Wells (1984) *The Re Production Revolution: New Ways of Making Babies*. Note 12, 118-119

¹³ Gurgan T and Demirel A (2007) Unresolved issues regarding assisted reproduction technology. *Reproductive Biomedicine Online*. 14 Suppl 1:40-3.

¹⁴ IVF may cause higher infant death rates - More money may lead to worse health, says doctor. BioEdge 241 -- Wednesday, 21 March 2007. (<http://www.slate.com/id/2161899/>)

that other risks to children born of ART may occur. The point here is that in gestational surrogacy, the contractual arrangement makes these problems more acute as it involves parties whose response to these issues cannot be predicted. Yet these matters have the potential to undermine the whole contract in seriously damaging ways. In a gestational surrogacy agreement, the increased chance of multiple births could lead to contractual disputes if the intention of the commissioning couple was to have only one baby. For example, a British woman pregnant with twins sued a California couple because they backed out of their surrogacy contract after she refused to abort one of the foetuses¹⁵.

There are also other significant health risks for surrogate mothers. Whilst pregnancy is natural, it is not without risk. Whereas a woman choosing to become pregnant and committed to raising her child is prepared to bear that risk, in surrogacy, the concern is that she bears the risk without the natural benefit of motherhood. There is therefore a sense of futility if something goes wrong for her.

If the Dawkins Bill is passed, it is hard to imagine how the contractual agreement between the surrogate and the commissioning couple can possibly protect either party. It appears that far too much is expected of the contractual agreement, and indeed it carries a disproportionate expectation compared to what the Bill itself provides. This is a limitation of the legislation in its current format, although it is difficult to see how it could be remedied.

Genealogical Bewilderment

As discussed above in relation to the effect that surrogacy may have on the bonding between a surrogate mother and her child, deliberately creating family structures that are confused, as this Bill would allow, has the potential to produce genealogical bewilderment for the child and a desire to understand and restore relevant relational connections. In the context of ART, the idea of genealogical bewilderment is emerging in cases where donor sperm has been used. Aside from within ART - and the fact that genealogical bewilderment is a relatively new phenomenon and few studies have been undertaken in the area - there is ample evidence for genealogical bewilderment in adoption, which shares similarities with surrogacy.

Many studies have shown the long-term effects of adoption on those involved. David Kirschner, a clinical child psychologist, has coined the term "Adopted Child Syndrome".

In case after case, I have observed what I have come to call the Adopted Child Syndrome, which may include pathological lying, stealing, truancy, manipulation, shallowness of attachment, provocation of parents and other authorities, threatened or actual running away, promiscuity, learning problems, fire-setting, and increasingly serious antisocial behaviour, often leading to court custody. It may include an extremely

¹⁵ Surrogate mother sues California couple. August 14, 2001. CNN/Law Centre. (<http://archives.cnn.com/2001/LAW/08/13/surrogate.dispute/index.html>)

*negative or grandiose self-image, low frustration tolerance, and an absence of normal guilt or anxiety.*¹⁶

There is a well-established history of problems for an adoptee that are associated with not knowing origins because of secrecy. However, knowing genealogical origins does not necessarily alleviate an adoptee's sense of inner turmoil. On the contrary, in some extreme cases, an adoptee's awareness of origins has led to extremely antisocial behaviour¹⁷. However, this does not amount to an objection to adoption *per se*, since the crucial distinction between adoption and surrogacy is that the latter is an intentional decision to relinquish a child to a commissioning couple without the welfare of the child being paramount, whereas adoption is, in a sense, "rescuing" a child from difficult circumstances, in which case it is the child's welfare that is of primary concern. It might be expected that a child born of surrogacy would experience the difficulties experienced by an adoptee in addition to those unique to surrogacy.

Susan Golombok's Studies

Whilst there is little in the way of empirical studies into the long-term effects that surrogacy has on the surrogate, the child and the family of the commissioning couple, a search shows that the majority of studies that have been conducted are by Susan Golombok and her group. Hers is almost the only group that reports that the various procedures in ART and surrogacy do not have a negative impact on the social or emotional development of all parties involved^{18,19,20,21}.

However, there are a number of caveats to these studies that must be pointed out. First, the studies are limited in their longitudinal extent, in that analysis of the development of a child born from an ART procedure and/or surrogacy arrangement has only been studied up to the age of twelve. Second, the issue of disclosure versus non-disclosure is not controlled for in any of the studies. This is crucial because a child who does not know about their origins is unlikely to experience the full impact of genealogical bewilderment. Third, the participants in the studies were recruited from surrogacy agencies primarily in the UK and US, where selection criteria for surrogates may mask problems that may arise, such as exploitation of the surrogate^{22,23}. The counselling services and programs that these agencies provide for the participants of a surrogacy arrangement are an attempt to ensure the greatest likelihood of a successful outcome

¹⁶ Kirschner (1990) *The Adopted Child Syndrome: What Therapists Should Know, Psychotherapy in Private Practice*, 8(3), Hayworth Press.

¹⁷ <http://www.amfor.net/acs/> - This is a website called "Americans For Open Records" which has a section dedicated to the problems associated with adoption.

¹⁸ Golombok et al (2004) Families created through surrogacy arrangements: parent-child relationships in the 1st year of life. *Dev Psychol.* 40(3):400-11.

¹⁹ Golombok et al (2005) Families created by gamete donation: follow-up at age 2. *Hum Reprod.* 20(1):286-93.

²⁰ Murray et al (2006) Egg donation parents and their children: follow-up at age 12 years. *Fertil Steril* 85(3):610-8.

²¹ Golombok et al (2006) Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3. *Hum Reprod* 21(7):1918-24.

²² *Ibid.*

²³ Baslington (2002) The Social Organisation of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process. *Journal of Health Psychology*, 7(1); 57-71.

for all parties involved. This is especially the case with commercial surrogacy agencies in the US, where unsuccessful arrangements are detrimental for business²⁴. This is also a crucial point that is discussed below, because one of the psychological counselling strategies involves a deliberate effort to de-emphasise the significance of the gestational maternity of the surrogate, in order to encourage the surrogate to cope with relinquishing the child²⁵ (cognitive dissonance reduction). Further more there is some evidence to suggest that verbal self-reports of surrogates are scripted to reflect socially accepted reasons for surrogacy²⁶.

The significance of the caveats mentioned thus far brings into question the representativeness of the participants in these studies and demonstrates flaws in the experimental design, in particular the absence of necessary experimental controls. Needless to say, much more research is required to determine what are the psychological ramifications for all participants of a surrogacy arrangement, and in particular the child, whose welfare ought to be of primary concern. The burden of proof for the legitimacy of surrogacy is upon those who would permit it. Some researchers in this field would welcome experimental legislation permitting surrogacy, such as this Bill, as it could increase the opportunity of access to data about the participants in surrogacy.

Objectification and Exploitation of Surrogate Mother

Is parenthood grounded in biology or in an agreement? It is counterintuitive to consciously decide to terminate one's parental rights and duties prior to conception. Legal norms typically affirm rather than confer parental duties and the existing moral obligations that come with it, for there is a sense in which even though a gestational mother has decided to relinquish her child (parenthood rooted in an agreement) she is still the child's mother²⁷ (parenthood rooted in biology). Therefore, one can make the a *priori* conclusion that there is a sense in which self-deception is required on the part of the surrogate in order to break this natural maternal bond she has with her child so as to make it easier to relinquish the child she has nurtured in her womb. In addition, there is also empirical evidence to support this conclusion, that transferring parental rights does not annul but rather it conceals the existing parental bonds between the gestational mother and her child.

Treating both the surrogate and child as mere means to an end may be a method by which some attempt to deal with the damage to relationships that surrogacy is likely to

²⁴ <http://www.growinggenerations.com/program?GGID=c6c1a88a9db956eb73f8c40be16fc815>

²⁵ "Cognitive Dissonance" is a communication theory adopted from social psychology. "Cognitive" refers to the act of thinking and "Dissonance" refers to inconsistency or conflict. "cognitive dissonance reduction" is therefore the aimed at reducing or eliminating the psychological conflict that arises from holding two or more incompatible beliefs simultaneously.

²⁶ Ragone (1994) *Surrogate Motherhood: Conception in the Heart*. Boulder, San Francisco, Oxford: Westview Press, 74-78.

²⁷ Van Zyl and Van Nierkerk (2000) Interpretations, Perspectives and Intentions in Surrogate Motherhood. *Journal of Medical Ethics*, 26:404-409.

entail. Such objectification opens the surrogate in particular to exploitation²⁸. Is there any empirical evidence of the attempt by the surrogate mother to reconcile the circumstances of the surrogacy arrangement with the norms of maternal-foetal relationships? And does the attempted reconciliation proceed in a manner that is deceptive or underhanded? There is fairly sound evidence of this approach by the surrogate. In order to make it easier for her to relinquish the child, she must invoke a number of “cognitive dissonance reduction strategies”²⁹, which in the case of surrogacy, it will be argued, amounts to a form of objectification via self-deception, affirming the conclusion that one cannot annul the natural maternal bond between child and gestational mother.

In a study by Ciccarelli³⁰, fourteen surrogate mothers were asked to report their feelings or concerns about relinquishing the child. One mother reported emotional distress over the relinquishment and two others reported a strong instinctual urge to bond with the child. The remaining eleven did not feel bonded with the child, which may seem to indicate that for the majority of surrogates the issue of having to relinquish the child did not appear to be a problem. However, surrogates employ cognitive dissonance reduction strategies to cope with their loss, implying that the issue is much more deep seated, which accords with knowledge about the strength of the bond between gestational mother and child. So why did it seem relatively easy for eleven out of fourteen mothers to relinquish the child in this study? The typical response given was that “I had it in my mind from the beginning that it was not my child, I didn’t feel bonded”, or “I almost felt guilty for not feeling bad about giving up the baby”³¹.

In another study by Van Zyl and Van Nierkerk³² the typical responses given by surrogate mothers, with regard to how they felt about their relationship with the foetus, were as follows, “I don’t think of the baby as mine. I donated an egg I wasn’t going to be using”; “The baby isn’t mine. I am only carrying the baby”; and “I am strictly a hotel”. Hence, having effectively denied that the surrogate is the mother of the child, the only logical outcome is to view the relationship as one of ownership, the surrogate as a “human incubator” and the child as the “product” who bears no relationship to her other than partly being the result of her physical labour³³.

A study by Ragone³⁴ found that when therapy designed to maintain the “desired state of mind” of the surrogate was withdrawn, due to the surrogacy agency becoming bankrupt,

²⁸ Ozolins (1998) Surrogacy: Exploitation or Violation of Intimacy? Twentieth World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998. <http://www.bu.edu/wcp/Papers/OApp/OAppOzol.htm>

²⁹ “Cognitive Dissonance” is a communication theory adopted from social psychology. “Cognitive” refers to the act of thinking and “Dissonance” refers to inconsistency or conflict. “Cognitive Dissonance” is therefore the psychological conflict that arises from holding two or more incompatible beliefs simultaneously.

³⁰ Ciccarelli (1997) The Surrogate Mother: A Post-birth Follow-up. PhD dissertation, California School of Professional Psychology, Los Angeles, C.A. *Dissertation Abstracts International*, 58(3), 1522B

³¹ *Ibid*, 56.

³² Van Zyl and VanNierkerk, *Op. Cit.* (2000)

³³ *Ibid.*, 406.

³⁴ Ragone (1994) Surrogate Motherhood: Conception in the Heart. Boulder, San Francisco, Oxford: Westview Press; pg. 74-78, Quoted in van Zyl and Nierkerk (2000) Interpretations, Perspectives and Intentions in Surrogate Motherhood. *Journal of Medical Ethics*, 26: pg. 407-408.

all of the surrogates involved subsequently expressed intense separation anxiety, as Ragone states:

When the support services are removed and the structure of the program dissolves, it is difficult, if not impossible to maintain the prescribed and desired boundaries between the surrogate and her child: hence, surrogates report feelings of loss, pain, and despair when parting with the child.

This entirely unnatural ongoing effort to deal with a surrogacy arrangement, and the subsequent relinquishment, underscores the damage that the surrogate undergoes, even though in this case masked at least temporarily by considerable cognitive dissonance reduction techniques. Thus a woman's natural intuitions are being subverted by cognitive dissonance reduction strategies. It is clear from these studies and the statements by surrogates, that the nature of such strategies requires the surrogate to view herself as an object or as mere means.

In a study by Baslington, the majority (ten out of fourteen) of the surrogates reported that they were able to cope well with the relinquishment, though the general experience was to feel unhappy in the short term and if a good relationship was forged with the commissioning couple then this also eased the burden of relinquishment. What this indicates is a concern on the part of the surrogate to develop a relationship with the commissioning parents that actually goes beyond the surrogacy arrangement, and beyond the mere utilisation of a functional womb. Surrogates want to be more than just a "womb for rent". They do not want to feel used but rather they wanted to be a part of the commissioning couple's lives. As van den Akker comments³⁵

...it is seen as a betrayal when the intended couple with the surrogate baby disappears from the surrogate and her children's lives.

Hence there is an objectification of the surrogate mother, which is maintained by cognitive dissonance reduction, and which is assisted by a good relationship with the commissioning couple. These and other studies highlight recurring themes such as self-denial, objectification and the need for subverting natural intuitions for the sake of the surrogacy arrangement. The Bill is silent on the ongoing relationship between surrogate and commissioning parents and it would be hard to imagine that commissioning couples could be forced into a long-term relationship with the surrogate, even though she might suffer without that relationship.

In relation to cognitive dissonance reduction, the principle of not using people as "means to an end" is deliberately undermined in an attempt to uphold the principle "do no harm". In attempting to reduce her own psychological pain from relinquishing her baby, the surrogate has to think of herself as an object. The studies cited in the above sections show that this is not necessarily a very successful strategy. Furthermore, perhaps the strategies not only objectify surrogates but also act to deny the reality that a

³⁵ Van den Akker (2007) Psychosocial Aspects of Surrogate Motherhood. *Human Reproduction Update* 13(1):57.

problem exists, and in doing so only serve to bury the problem which may then emerge later with significantly increased power to harm the surrogate.

Conclusion

Surrogacy fails to respect the dignity or primacy of the welfare of the child. It involves the subordination of the welfare the child and surrogate in favour of the commissioning parents desires to have a child. As Rosalie Ber states:

The question of whether the suffering of a childless woman is greater than that of the gestational surrogate, who 'abandons' her baby, is 'solved' when the surrogate mother is de-personalised, and looked upon solely as a 'womb for rent' ³⁶.

Furthermore, surrogacy ignores the fact that foetal/early infant development is a critical determinant of a child's welfare, whereby the biological and psychological bond between the surrogate and her child is of crucial significance for this development. Moreover, it is likely that the various specific failings in the *Statutes Amendments (Surrogacy) Bill 2006* will lead to further complications causing additional distress and harm for all parties involved, along with the litigation that is likely to result.

³⁶ Ber, R. (2000) Ethical Issues in Gestational Surrogacy. *Theoretical Medicine and Bioethics*, 21:153-169.