

Interpretations, perspectives and intentions in surrogate motherhood

Anton van Niekerk and Liezl van Zyl

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Abstract:

Liberal supporters of surrogate motherhood typically argue that the freedom to contract includes the freedom to enter a contract to bear a child for an infertile couple. In response to the objection that such contracts are alienating or dehumanising since they require women to suppress their evolving perspective on their pregnancies, they reply that the surrogate may not be free to interpret her pregnancy as that of a non-surrogate mother, but add that there are more than one appropriate way of interpreting one's pregnancy. To restrict or ban surrogacy contracts would be to prohibit women from making other particular interpretations of their pregnancies they may wish to make, requiring them to live up to a culturally constituted image of ideal motherhood. In this paper we examine three interpretations of a "surrogate pregnancy" that are implicit in the views and arguments held forward by ethicists, surrogacy agencies, and surrogate mothers themselves. We hope to show that our concern in this regard goes beyond the view that surrogacy contracts deny or suppress the natural, instinctive or conventional interpretation of pregnancy.

Key words: Surrogate motherhood, Bioethics, Reproduction, Parental rights and responsibilities

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Introduction

Liberal individualists typically argue that the right to enter surrogacy arrangements is a part or natural extension of the right to personal autonomy. Prohibiting or invalidating such contracts would violate women's right to self-determination and reinforce the negative stereotype of women as incapable of full rational agency. In his response to our concern that surrogacy contracts deny the legitimacy of the surrogate's perspective on her pregnancy, [1] McLachlan argues that there need not be only one interpretation of one's pregnancy that is appropriate; people can value the same thing or activity in different ways. To make commercial surrogacy illegal would be "to prohibit mothers from making other particular interpretations of their pregnancies which they might (and sometimes do) want to make". [2]

Many objections to contract pregnancies, argues Laura Purdy, are based on an image of "ideal motherhood" that makes "disconcerting appeal to nature that ignores the efforts of the women's movement to transcend the identification of women with nature". She argues that there will always be women who love being pregnant but who do not particularly enjoy child rearing, and that it would be regrettable if social pressure to live up to the "idealized version of motherhood" prevented them from providing infertile women with babies they could not otherwise have. For some, she continues, pregnancy and childbirth are not only a route to a child, but a desired end in itself, and this desire must surely count for something with those who want to validate women's experiences of gestation and labour. [3] In a similar way Lori Andrews embraces surrogate motherhood as an outcome of the women's liberation movement. One of the hallmarks of feminism, she says, is the view that "biology is not destiny", that equal treatment of the sexes requires that decisions about men and women be made on other than biological grounds. For some women, the freedom gained from the knowledge that not all women relate to all pregnancies in the same way added up to the freedom to become surrogate mothers. [4]

In this view, the right to privacy and autonomy can only be legitimately curtailed if there is a significant risk that innocent third parties will be degraded or harmed. We agree that surrogacy does not necessarily constitute the commodification or degradation of children, [5] and that it is more likely that banning or criminalizing surrogacy would result in substantial harm to children. However, our moral concerns with contract pregnancy are not exhausted by a consideration of women's freedom to enter agreements, on the one hand, and the possible harm to children on the

other. We also need to examine the relationship between the pregnant woman and the child. The liberal individualist position tends to disregard the (to our mind) obvious fact that reproductive labour is not only a biological process that results in the production of an infant at the end of the process. Bearing a child is not simply an individualistic act, but also, and perhaps more importantly so, a social act. When a woman signs a surrogacy contract, she does not simply commit herself to undergoing certain procedures, performing certain actions and refraining from doing others. She commits herself to (trying to) conceive a child, to bear it and give birth to it, in other words, to form a certain relationship with another human being. The surrogate's perspective on her pregnancy at the same time constitutes an interpretation of her relationship with the child. And neither is this act of interpretation an entirely individual act. Because bearing a child is essentially a social act which presupposes and entails certain responsibilities and consequences, a woman's "interpretation" of her pregnancy cannot simply disregard the meanings attached to this act in the rest of society – even if those interpretations clash with her own. For example, if my marriage turns out to be a disaster and I have not yet attained a divorce, the fact that I may no longer think/regard myself married to a specific person in no way binds other people to still (and rightfully) regard me as married to that person.

While it is true that contracts cannot prescribe or direct the parties' feelings and perspectives, they do affect what is considered an appropriate perspective within that context. An appropriate perspective would, at the least, be one that facilitates one's ability to honour the terms of the contract. As McLachlan writes, when a woman enters a surrogacy agreement "she is not 'free' to imagine that she has not become a commercial surrogate mother nor 'free' to interpret her pregnancy as the pregnancy of a non-surrogate mother. Such is the nature of contracts". Whereas the bond between a pregnant woman and her unborn child is usually an integral and appropriate part of her pregnancy, McLachlan argues that perhaps, in the case of commercial surrogate motherhood, "such a bond is not and should not be integral to the pregnancy"[6]. He does not say, however, what an appropriate interpretation of a contract pregnancy might involve. In this paper we examine some of the ways in which a surrogate mother may interpret her pregnancy and her relationship to the child she conceives, carries and gives birth to. Although it is most often overlooked, we need to examine ways of answering the question "what does/could it mean to become a surrogate mother?" before dealing with issues surrounding women's ability to enter into such contracts as autonomous agents.

Conception in the mind

In a sociological study conducted by Ragoné, surrogates are quoted as saying: “I never think of the child as mine. After I had the baby, the mother came into the room and held the baby. I couldn’t relate that it had any part of me”, “I don’t think of the baby as my child. I donated an egg I wasn’t going to be using”; “The baby isn’t mine. I am only carrying the baby” or “I am strictly the hotel”. Ragoné explains that they arrive at this idea by reasoning that intentionality or choice is involved, saying to herself that she would have had a child if she wanted one, but she did not want a child. In the same way the “initiating mother” uses the idea of intentionality to resolve her lack of genetic relatedness to the child, describing it as “conception in the heart”, and reasoning that her role takes precedence over the surrogate’s role since it was her desire for a child that facilitated the pregnancy [7].

A view that is becoming increasingly popular among legal scholars, feminists, surrogacy agencies and the general public is that parenthood should be established on the basis of intentions, rather than biology or genetics. The National Conference of Commissioners on Uniform State Laws Section 8a1 proposes that “[u]pon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not the parents of the child”. [8] While the term “parents” here clearly refers to *legal* parents, i.e. the set of parents who has the right and responsibility to raise the child, most surrogacy agencies encourage the view that the “intended parents” are the only real parents, whereas the surrogate is not a real mother because she did not conceive the child with that end in mind. She simply acts as a gestational host or temporary caregiver to the developing foetus which, from the moment of conception, belongs to the intending parents. Hence, we are made to believe, it would be inappropriate for the surrogate to see herself as pregnant with her child, since she has voluntarily relinquished or sold her parental rights to the intending couple.

Disregarding the question of who should be the legal parents of the child, we would argue that the perspective “I am pregnant with someone else’s child” is, quite simply, contradictory, constituting a form of self-deception that is both alienating and dehumanising. Parenthood is a relationship the existence of which cannot be made entirely contingent upon choice, however voluntary or informed that decision. This is shown by the simple fact that men and women may become parents without them ever, explicitly or implicitly, intending or agreeing to do so. If a woman only becomes aware

of her pregnancy when she goes into labour (as sometimes do happen), are we to believe that she does not thereby become a mother, that she gives birth to an orphan, because she never consented to becoming a mother? As the Nelsons put it: “To be someone’s parent, child, sibling or cousin is to be in a relationship founded in biology and history, not in contractual conventions. An individual’s decision can no more dissolve such relationships than it can negate any other historical fact”. [9]

While legal parenthood may, to a certain extent, be determined by agreements or contracts, the fact of parenthood is not contingent upon an agreement. One may lose parental rights if you are guilty of child neglect or abuse, for instance, but do not thereby become an “ex-parent”. One may also waive or transfer parental rights and responsibilities, as happens in the case of adoption, but do not thereby cease to be a parent. When a woman violates an agreement with her sexual partner to avoid pregnancy, he nevertheless becomes the father of that child. He might complain that he was tricked into fatherhood, but cannot deny his fatherhood. As Cahill states: “The immense interest of adopted children in discovering their biological ‘roots’, and the frequent reciprocation by birth parents ... testify to the fact that natural kinship bonds remain, whatever the intentions of individuals to step outside them”. [10] New parental bonds can be created, but their creation does not eliminate or cancel an already existing bond. To deny that the surrogate is the mother of the child does amount to viewing 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 its partly being the result of her physical labour. If I sell ownership rights to my car, it is no longer my car. But if I sell or lose parental rights, there remains a sense in which it remains my child, even if I have ceased acting as its parent. We agree that persons are not and can never become objects, but they can certainly be treated as such.

Prenatal adoption

A second possible interpretation of surrogate motherhood, suggested by the above arguments, would be to acknowledge the fact that the surrogate is or becomes a mother, but one who has no parental rights or responsibilities. What is being bought is therefore not the child itself, but the “preconception termination of the mother’s parental rights”. [11] From the moment of conception the foetus/child would therefore have two real mothers(-to-be), but only one legal mother(-to-be). In this sense the contract does not require the surrogate to *feel* in certain ways, i.e. to deny the fact

that she is or becomes a mother, but to *act* in certain ways, i.e. to hand over the child to the set of parents who has acquired the right to raise it.

Those who favour this interpretation typically appeal to the infertile couple's right to "noncoital reproduction", while at the same time acknowledging that the surrogate is *a* (if not *the*) mother of the child. To protect the child they deem it necessary to choose a primary family for the infant before its birth. If a conflict over parental *rights* arises, respect for the autonomy of couples and surrogates requires that the preconception agreement, which made the very existence of the child possible, should *prima facie* be determinative, just as it would be with sperm or egg donors. [12]

One can find support for the prenatal separation of the fact of parenthood and parental rights and responsibilities in the writings of many liberal scholars. Judith Jarvis Thomson for instance argues that we cannot have any special responsibilities towards someone unless we have voluntarily assumed them: A set of parents "do not simply by virtue of their biological relationship to the child who comes into existence have a special responsibility for it. They may wish to assume responsibility for it, or they may not wish to". The child therefore has no right against its mother for care and protection unless it be implicitly or voluntarily conferred upon it at some stage of its development: "If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it up for adoption, then they have assumed responsibility for it, have given it rights, so that they cannot now withdraw support from it at the cost of its life because they now find it difficult to go on providing for it".[13] This argument presupposes that moral requirements are either general duties which we have towards everyone impartially, or specific obligations which are only formed by voluntary agreements.

Applied to the surrogacy context, this would mean that, although the woman intentionally and voluntarily becomes and remains pregnant, she does not simply by virtue of her biological condition have any special responsibilities or rights towards it. Instead, she enters into a pre-conception agreement with a couple whereby she explicitly surrenders or transfers legal parenthood to them. The surrogate does retain certain obligations to the foetus during pregnancy, yet these are based not on her own independent relation to the foetus. Instead, they form an aspect of her contractual relation to the couple and the pregnancy she undertakes on their behalf. It is only as part of the surrogacy agreement that the foetus has acquired a right to the use or occupancy of the woman's body. As legal parents responsible for the welfare of the foetus, the commissioning couple may

therefore prescribe the surrogate's behaviour during pregnancy, including obstetrical care, abstinence from possibly harmful substances, amniocentesis and even abortion.

In this regard Cahill raises the objection that surrogacy contracts presuppose that a woman has no intrinsic moral responsibility for a child she conceives and no rights to a relationship with him or her. She argues that these arrangements insist on free choice about human relations to an extent that constitutes a virtual denial of important material and physical aspects of the relations of parenthood, and of moral obligation in general: "Individuals cannot choose in all cases whether they have a certain moral obligation. The mutual obligations of biological family members - children, parents, siblings - are a paradigmatic case of obligations that one cannot simply decide do not exist". [14] Similarly, the New York Task Force argues that "parents have a profound moral obligation to care for their offspring. Our legal and social norms affirm this obligation by requiring parents to care for their children's physical and emotional wellbeing. Surrogate parenting is premised on the ability and willingness of women to abrogate this responsibility without moral compunction or regret. It makes the obligations that accompany parenthood alienable and negotiable." [15]

Perhaps underlying these objections is the fear that parental responsibilities would be assumed, transferred, reclaimed, retransferred at the whim of people who cannot quite make up their minds. After all, if parental rights and duties are contingent upon a decision, there seems to be no reason why the parties cannot change their minds. To discard this fear, and following Thomson's reasoning quoted above, we could simply insist that the original contract be binding, that the parties be held to their contractually stated intentions. Yet we would argue that there is a more intimate way in which parenthood and parental rights and obligations are connected, regardless of intentions, so that the notion of "preconception termination of parental rights and duties" makes no sense. Legal norms relating to parental duties *affirm*, rather than *create*, already existing moral obligations. Here we are faced with the difficult question as to the origin or foundation of parental obligations, which liberal individualists - utilitarians and deontologists alike - have much difficulty accounting for or even recognising. We will not attempt to devise some essentialist account of the origin of parental obligations, and will suffice with the statement that Western societies have for a long time embraced the notion that parents have a profound moral obligation to care for their offspring, an obligation which commences well before birth. The question to be asked is therefore whether we,

as a society, are ready to discard these conventions, to view family relationships as morally irrelevant, with rights and duties instead being conferred or assumed by mutual agreements.

One of the implications of accepting the separation of parenthood (as a relationship rooted in biology or genetics) and parental rights and obligations (as a relationship based on voluntary agreements), is that we could not expect a father to fulfil certain obligations if he never consented to do so. Surely, he would not be able to demand an abortion, and neither is his status as a parent contingent upon a decision. But one can, along “biology is not destiny” lines, argue that he should not be expected to assume parental responsibilities simply by virtue of a biological relationship. Because the woman decided not to abort, she is responsible for the child.

The prenatal separation of motherhood and parental rights and duties also places the surrogate in a highly ambiguous relationship to the foetus. As a *woman* who has a right to bodily integrity, she would have a right to an abortion, but as a *surrogate*, she has no right to determine the destiny of the foetus. Indeed, through entering the contract she has given the foetus a right to inhabit her body, which she cannot withdraw without the couple’s consent. Ragoné questioned a number of surrogates who were “opposed to abortion for themselves”, but who acknowledged that they would undergo an abortion if that was the couple’s decision. [16] Although surrogacy contracts usually make it clear that the stipulation regarding abortion is unenforceable, her having (or not having) an abortion against the couple’s wishes would still constitute breach of contract. Furthermore, if the pregnant woman does engage in behaviour that is potentially harmful to the child, it would not involve a neglect of parental responsibilities (since she has none), but would constitute a violation of the legal agreement between her and the intending parents. (One can only wonder what the appropriate penalty for such a breach would be.)

Against this we would argue that the surrogate has, by virtue of her being the gestational mother, certain moral responsibilities to the foetus, and that these can only be affirmed by any legal contract she may enter into. In other words, her obligation is directly to the foetus, not indirectly through an agreement with the intending parents. Surrogacy is not analogous to child-caring services; it is nonsensical to say that she is being paid “for her services in, say, carrying a foetus”[17] since, once she has conceived, she finds herself in a for all practical purposes irreplaceable, intimate relationship with someone who is totally dependent on her for its well-being. Unless she has an abortion or miscarriage, this link cannot be severed nor these duties be relinquished prenatally,

simply because there is no one else who could take over responsibility for the welfare of the developing foetus (and this remains true whether or not she is the genetic mother). Her responsibilities during pregnancy are therefore not contingent upon an agreement with the commissioning couple; the surrogate cannot choose not to be morally responsible for the foetus while it remains in her womb. In this sense, biology certainly is destiny.

Commissioned adoption

This leads us to a third possible interpretation of surrogacy, where contractually stated intentions only determine who the social parents of the child would be. What is being paid for or transferred is therefore not motherhood, nor preconception termination of parental rights, but the right and responsibility to rear the child. The surrogate would be registered on the birth certificate, with the child subsequently being adopted by the intending parents. The surrogate's perspective on her pregnancy could therefore be: "I am expecting my child, and am both morally and legally responsible for its welfare, although I intend to relinquish parental rights to the adopting couple immediately after birth", or simply: "I do not intend to raise my child".

This interpretation is in line with the provisions of English law. According to the *Human Fertilization and Embryology Act* the birth mother, whether or not she is the genetic mother, is the legal mother until and unless an adoption procedure is undertaken. It is, however, quite far removed from the way in which surrogacy agencies encourage women to interpret their pregnancies. Ragoné found that the surrogate's perception that the child is not her own tends to shape her entire experience of surrogacy. Her ability to separate herself from her pregnancy and child is also reinforced by psychologists employed by these agencies. In one instance where therapy designed to maintain the "desired state of mind" was withdrawn after the agency went bankrupt, all three surrogates expressed intense separation anxiety: "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". [18] The very success of surrogacy arrangements therefore depends on how well the surrogate can deceive herself into believing that she is not a mother but simply a temporary care-giver. Ironically, therefore, while the surrogate's belief that she is not pregnant with her child is a clear form of self-deception, unveiling it as such almost certainly

would give rise to greater distress and alienation at having to relinquish a child she knows to be hers.

For the commissioning parents, on the other hand, thinking of surrogacy as analogous to adoption has the disadvantage that they cannot view the surrogate simply as ‘the kind woman who made it possible for them to have their own family’. Even to acknowledge that they would forever be indebted to her, or that money cannot compensate her for this great service would still be to deny the fact that (there will always be a sense in which) *she is a mother of their child*. While surrogacy arrangements give rise to more than one maternal bond or real mother, participants subsequently seek to deny this by insisting upon modelling their households directly along the lines of the nuclear family - perhaps best symbolised by the infertile woman who wore a little pillow under a maternity gown when she visited her husband’s family, while not letting their Mexican surrogate leave the house. The very point of surrogacy is usually to receive the child unencumbered by any on-going relationship with the woman who “produced” it.

Thinking of contract pregnancies as commissioned adoptions requires that both parties acknowledge the surrogate’s motherhood. If, as we argued above, the parent-child relationship constitutes more than can be captured in the language of legal rights and responsibilities, and deserves respect beyond the artificial confines of a sterile contract, the social parents should recognise the surrogate’s role by including her in the child’s life in an ongoing and intimate way. We cannot insist on traditional ends if we use non-traditional means. Because parenthood is not equivalent to ownership, transferring parental rights can only create more parents; it cannot annul an already existing bond.

On the other hand, the surrogate can only take her own moral responsibilities towards the child seriously if she is well acquainted with the intending parents before entering the agreement. In the adoption context, circumstances prevent those morally responsible for the child from rearing it themselves. Finding suitable parents among the many people wanting to adopt a child, is a way of taking their responsibility for the child’s welfare seriously. In contrast, the Nelsons argue, surrogacy is an instance of “bad faith” of “disowning the child” because a situation is deliberately engineered that strips those responsible for the child’s needs of the power to meet them. Due to her contractually stated promise - which gave rise to the formation of a specific set of expecting parents - the surrogate is not in a position to refuse transfer of legal parenthood if she discovered that the intending parents are not to suitable for raising the child [19]. The only way in which a surrogate

mother can take her moral obligation seriously, we believe, is therefore by ensuring before conception that the intending parents are both willing and capable of caring for the child.

Conclusion

One may agree with the liberal view that women may interpret their pregnancies and their relationship with the foetus in different ways. A pregnant woman cannot, however, deny that she finds herself in such a relationship, and neither should she deny her moral responsibility for the foetus' welfare. Pregnancy is a part of motherhood. Contractually stated intentions cannot determine who the 'real mother' is or whether the birthmother has any moral responsibilities towards her foetus. Affirming the surrogate's motherhood does not however require a denial of the intending parents' bond with their child. Parental bonds are not mutually exclusive, so that we should not attempt to isolate the essence or definitive aspect of parenthood. To be a parent, one must possess some or other of the defining features of parenthood and these features need not be common to all parents. Acknowledging the possibility of multiple parenthood has as its implication that the adoptive or intending parents cannot insist on modelling their family directly along the lines of the nuclear family. Having reinterpreted parenthood, we should also be prepared to reinterpret the family.

References

Voeg by [2]: In this article, McLachlan gives a detailed explanation of the relation between morality and the law, arguing that the possible immorality of surrogacy arrangements does not constitute good reason for prohibiting them. However illuminating this explanation, we have to be point out that it is prompted by his incorrect assumption that we implicitly presented a case for legislation affecting others who might not share our personal moral convictions. Regardless of the fact that we never raised the issue of whether surrogacy arrangements should be prohibited, criminalized or enforced, his assumption is perhaps understandable given the general form that literature in this field usually take: focusing on the concerns surrounding women's autonomy and exploitation and possible harm to children in an attempt to establish whether and to what extent the state may interfere in individuals' right enter into contracts in pursuit of their own perceived interests.

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15 See reference 4: Gostin L, ed: 318.

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18 See reference 7: 78-80.

19 See reference 8: 164.