Surrogate Motherhood and Its Human Costs

By Suzanne Rozell Scorsone, Ph.D

The increasing legal and moral dilemma of "surrogate motherhood" requires our society to consider its serious implications, and provide government and others an opportunity to act so that practices which threaten the priceless value of human life are not further encouraged in Canadian society.

The discussion of so-called "surrogate motherhood" has been in Canada for nearly a decade and a half. The term has been used in at least two senses. It may be used for arrangements in which the sperm of the male half of a contracting couple is utilized to fertilize the ovum of a contracted woman, who is paid to surrender custody of the child to him and to his wife at birth. The term "surrogate", in this sort of case, is actually a misnomer. A "surrogate" is a "delegate" or "proxy", whereas the contracted woman is, in fact, the genetic, biological mother of the child, and surrogate to no one. A newer form, gestational surrogacy, uses in vitro fertilization to implant an embryo conceived from the ovum and sperm of the contracting couple in a woman who carries and nourishes a child who is not genetically related to her, surrendering the baby to the contracting parents at birth.

Both forms, where they exist, are usually arranged by brokers, generally lawyers, and by physicians who carry out the donor insemination or IVF which brings about the pregnancy. It is worth noting that the payments to brokers and physicians for a few hours work tend roughly to equal or even exceed those to the contracted women for nine months and more, 24 hours per day. The remuneration per hour, if calculated, is a silent but eloquent comment on the value placed on each of them and on what they do. There are instances, perhaps involving relatives or friends, which have not involved payment but in the vast majority of cases the arrangement would not have taken place without it. The Royal Commission on New Reproductive Technologies (RCNRT) coined a new term, "preconception arrangement", to cover all forms of surrogacy.

The RCNRT found no evidence that any of 27 surveyed fertility clinics across Canada was involved in facilitating preconception arrangements at that time, although one was making plans to begin. There is, however, anecdotal evidence that a small number of Canadians have made use of such services in other countries such as the United States. They may also be doing so unreported in physicians' private offices or in arrangements facilitated by lawyers but utilizing sperm collected and transferred by very informal, low-tech means without recourse to a physician. It is now, before the practice becomes widespread or vested interests become established, that public discussion at all levels should occur and, on the basis of which, the government of Canada would be able to act in the window of opportunity that currently exists.

Yet in Canada the legal status of the practice is as unclear now as it was in the early 1980's. Only in Quebec has legislation been passed. Section 541 of the revised Civil Code renders all agreements for procreation or gestation for payment null and void. It may be that provisions in the family, contract and other forms of law of various Provinces and Territories would have implications for preconception arrangements, but since none has come before a court the status of the question is altogether murky.

For example, payment for adoption is, as the RCNRT points out, prohibited in Ontario. This could well cause a court to find some forms of surrogacy impermissible. Yet one may also point out that the contracting man who is the source of sperm is the genetic father of the child. In Ontario the category "illegitimate" has no legal existence. If the successor is the genetic mother of the child, and if she acknowledges his paternity of the child, in Ontario the child is legally also his child. Only if he were married and the contracting wife wished to adopt the child would prohibitions against adoption clearly apply.

Adoption by the contracting wife has, indeed, been the most common scenario. Yet, if the contracting man were single, or if he were a married man and his wife accepted having only a fostering or, as it were, stepmother status toward the child, any payment made to the genetic mother for surrender of her parental custodial rights to him would very possibly fall into a legal void. Then again, if the contracting couple were the source of both ovum and sperm, the surrogate supplying only gestation, then whether laws with respect to payment for adoption had any applicability would again be uncertain. This would depend on whether the genetic relationship or the act of birth were deemed by a court to determine who was the mother of the child, the contracting woman or the "surrogate". Where, as in a California decision, the contracted women were deemed to be a "generic stranger" to the child, the contracting woman and man would be declared parents. Laws prohibiting payment for adoption would have no bearing at all on the case.

Another among the many strong arguments presented by the RCNRT points to a fundamental principle of family law, the priority of the best interests of the child, which could render preconception arrangements contracts unenforceable. The argument would be that any contract formed before a conception would have been made in the interests of the adults, not in the interest of a child whose interests would be unknowable until he or she is born. Logically persuasive as this argument is, unfortunately it may not settle the question for a court presented with a concrete human situation.
Research has shown that most contracting couples are relatively highly educated and affluent, while most “surrogate mothers” are of modest or, more often, downright slender educational and financial means. Not to put too fine a point on it, they enter upon surrogacy contracts because they are presented with a source of money, they have relatively few alternative opportunities, and they do not have the skills to earn a higher income in some other way. Contracting couples have the capacity to offer a child educational and other advantages contracted women cannot (not to speak of the resources to hire a top-flight lawyer to beat a contracted woman in court). As we saw in the “Baby M” case in the United States, even if a court affirms the parental identity and rights of a genetically-linked surrogate, the financial and other resources of a contracting couple may be so much greater that the court may nonetheless award custody to them — in the pragmatically-assessed best interests of the child once born.

Infertility is a grievous thing. Those who would consider seeking a surrogate to bear a child must feel driven by a great and painful need. We can – we must – feel with them. Too much harm, however, although it is doubtless unintended, can come from this practice for society to accept it as a way of dealing with the painful reality of infertility. We on the RCNRT agreed unanimously that preconception arrangements are unacceptable. Preconception arrangements exploit the generative capacity of the mother, a fundamental and inalienable aspect of her humanity, taking advantage of her economic vulnerability. They dehumanize women by objectivizing the reproductive capacity which characterizes them as women.

In the vast majority of instances preconception arrangements commercialize reproduction, the coming into being of human life. They make the child himself or herself virtually an object of commerce. Even where they are not commercial, preconception arrangements may be the subject of subtle or overt forms of coercion and pressure, as when one family member may feel obligated to provide this “service” for another. Whatever the claims to apparent autonomy of the adult individuals entering into such a contract, the effect on the child cannot help but have a great cost in a ruptured relationship with the generic mother. In the psychological aftermath of having been “sold”, where this has occurred, and even in pressure of live up to “the price”. As great and important as the desire for a child unquestionably is, a good end does not justify means which bear such human costs.

Still other reasons, not raised in our report, also come readily in mind. Preconception arrangements wrongfully appear to define one of the most intimate and fundamental of human relationships, that between parent and child, as an impersonal contract which can be severed at will for compensation. Adoption does not provide a valid precedent. Adoption does sever that bond and reassign custody, but it does so in the best interests of an already-existing child under difficult or even tragic circumstances. It is no precedent for the deliberate creation of an impersonal, commercial contract to sever the parent-child bond from the very outset before any child has even been conceived.

The RCNRT recommended that the federal government prohibit acting as an intermediary, advertising, being paid for acting as an intermediary, or making a payment for a preconception arrangement, under threat of criminal sanction. Such legislation would present negligible cost to government. It involves no structures, programmes or expenditures. It requires only legislation and normal enforcement. Even were it the only governmental action taken, it would come close to ending a practice in which almost no suppliers, whether contracted women, brokers or physicians, would engage without the monetary incentive.

The final report of the Royal Commission was submitted on 15 November 1993. Since that time government has been examining the evidence and the arguments on this and many other issues. Of all the complex questions arising out of the field of reproductive technologies, however, this among the simplest to resolve.

The numbers involved are small, but the human stakes are very high. If children and the parent-child bond can be redefined as commodities, and if parenthood itself can be redefined as a contractual service which can be transferred for compensation, ultimately it touches all of us.

Endnotes
4. Ibid., p.666

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