Surrogacy
Sold Before Conception

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“...surrogate mother and the couple that hired her make a painful discovery after an ultrasound: Their unborn child will have serious health problems and will possibly never have a “normal” life.... The biological parents, who say they cannot bring a child into the world to endure so much suffering, offer the surrogate, who is struggling to make ends meet, $10,000 to abort the baby.”

“Marie-Pier is pregnant with twins she doesn’t want.... Eight weeks after she got pregnant, the adoptive couple said they wanted out. Now she is stuck with twins she said she can’t care for.”

The media constantly report stories about the rich and famous using surrogacy to fulfill their lifelong dream of having a child. One commentator described the phenomenon as “almost a form of modern day wet-nursing.” The stories are close and personal, full of hope and joy. Yet, these news accounts, the first from 2013 and the second from 2012, tell a different story—not of hope and joy, but of despair and sorrow. They expose the raw truth about surrogacy, a reality many in legislatures, courts, and the media simply do not want to face.

Plainly stated, surrogacy is bad public policy. It commodifies women, whose wombs are rented, and treats children as objects who are bought and sold. It ignores the emotional costs to both the birth mother and the child. It exploits the poor for the sake of the rich. It allows birth mothers to traffic their own children before they are even conceived. It places the government in the role of deciding parenthood, rather than protecting it.

For the sake of poor women, children, and freedom, North Carolina should end this assault on women and children.

Surrogacy in General

Surrogacy Agreements are contractual agreements between a woman who will carry a child to term and the “intended” parent or “parents.” With the introduction of In Vitro Fertilization (IVF), two types of surrogacy exist: traditional surrogacy and gestational surrogacy. With traditional surrogacy, the woman is inseminated with sperm, possibly, but not necessarily, from one of the “intended” parents. Gestational surrogacy requires that an egg is fertil-
ized with sperm outside the womb and implanted in the woman. The egg and/or sperm can be those of the “intended parents,” but they may come from anonymous donors.

The Popularity of Surrogacy

First utilized in the 1970s, surrogacy has become increasingly popular in unrestricted countries, including the United States. In 1986, an estimated 500 children were born through surrogacy. By the mid-1990s, that total number rose to approximately 4,000. According to the Center for Bioethics and Culture Network, there were 1,059 surrogate births in 2006 alone, representing a 30 percent jump between 2004 and 2006. Overall, one surrogacy agency, Building Families, estimates that over 35,000 children have been born through surrogacy.

Commercial Surrogacy

While marketed as simply a gift of parenthood, surrogacy, in most cases, is a commercial enterprise, where the surrogate is paid a fee for her services. According to the surrogacy broker, ConceiveAbilities, women can be paid a baseline fee of $25,000 or $30,000 in Illinois. Experienced surrogates can receive even more. Additionally, the surrogate can receive a monthly maternity clothing allowance of $750.00 and $500-$1,000 in compensation for doctors’ visits or procedures, including $750.00 for “fetal reduction,” a polite term for killing embryos that are implanted but not wanted.

Surrogates, according to the ConceiveAbilities’ pricelist, are also compensated if things go awry: $2,000 for a miscarriage; $2,500 for the loss of a uterus; $5,000 for a hysterectomy; $1,000 for the loss of a fallopian tube; and $1,000 for an ectopic pregnancy.

Although media attention has focused on the fee paid to the surrogate, surrogate brokers, who connect “intended parents” with birth mothers, profit as well. The “intended parents” can pay the agency a “finder’s fee” as high as $20,000. ConceiveAbilities sets the total baseline cost of surrogacy at $59,500.

The Legal History of Surrogacy

Two cases, Baby M and Johnson v. Calvert, serve as landmark cases on the issue of surrogacy. The Baby M case, which was the first court ruling on surrogacy, involved commercial traditional surrogacy. Decided in 1988, it involved a married couple who used a surrogate, Mary Jo Whitehead. Mary Jo and her husband were of limited means. In contrast, the Sterns, were both professionals with combined assets worth approximately $89,500. For $10,000, Mary Jo Whitehead agreed to be artificially inseminated with Mr. Stern’s sperm.

Everything went as planned until shortly after the child’s birth. Mary Jo delivered the baby, and she gave the baby to the Sterns as agreed. She then convinced them to allow her to keep the child, and then refused to return Baby M to the Sterns. A court battle ensued. Ultimately finding surrogacy agreements in violation of public policy, the Court concluded that the best interest of the child justified awarding custody to the biological father and his wife. Mary Jo Whitehead was awarded visitation rights.

A second case, Johnson v. Calvert, involved commercial gestational surrogacy. The Calverts contracted with Anna Johnson to carry their baby, who was conceived through IVF, paying Anna $10,000 for her services. Unlike the facts in the Baby M case, the relationship between the surrogate and the “intended parents” began to deteriorate before the child’s birth. Six months pregnant, Johnson demanded full payment or she would not give the child to the Calverts. The Calverts responded with a lawsuit. Upon her birth, the child was placed in the custody of the State, pending the Court’s decision on who was the parent. Decided five years after the Baby M case, and by a California court rather than a New Jersey court, the Court upheld the agreement, finding that parenthood can be defined by the “intent” of the parties prior to conception rather than gestation.

State Responses

States have had a mixed reaction to surrogacy. Through legislative and/or court action, some have restricted it by banning commercial surrogacy but recognizing altruistic surrogacy and/or restricting surrogacy agreements to “intended parents” who are married. A few states, including Arizona, Indiana, Michigan, New York, and the District of Columbia, have specific statutes that have
declared all surrogacy agreements—traditional and gestational, commercial and altruistic—unenforceable. A few states, including Arkansas and California, legally recognize surrogacy agreements by statute or case law. Other states, including North Carolina, have failed to address surrogacy in either legislative or judicial action.

Research has indicated, however, that laws that simply make surrogacy agreements unenforceable have had minimal effect on curbing the practice. According to the Council for Responsible Genetics, in New York (a state where surrogacy agreements are unenforceable) over five percent of gestational surrogacy IVF procedures are conducted within the state. According to one report by the Council for Responsible Genetics, in Michigan, which has one of the strongest anti-enforceability laws, IVF clinics are performing IVF procedures on patients who intend to use gestational surrogates.

**International Surrogacy**

Surrogacy laws vary by country. Germany, China, Italy, Norway, Sweden, and France, for example, forbid surrogacy agreements. Although surrogacy is illegal in these countries, “intended parents” from these countries can contract elsewhere for surrogacy services. A number of countries, including Finland, Spain, the Netherlands, Canada, and India allow surrogacy. In the U.K., it is allowed, but the surrogate must be pre-approved by a government agency.

Where the “intended parents” live in one country and the surrogate in the U.S., the “intended parents” come away with two prizes—a baby and citizenship. Dubbed “million dollar babies,” Chinese couples are using American women to bear their children, not only to maneuver around China’s ban on surrogacy, but to gain citizenship. To guarantee the dual prize, as part of its “no risk” money-back guarantee, complete with citizenship, a Chinese surrogacy brokerage agency called Yulane Fertility Services, with offices in China and the U.S., will implant an embryo into two women at the same time. It is unclear what happens if both embryos implant in the surrogates’ wombs.

Exploiting women through surrogacy in third world countries, such as India, has become big business. As part of a $2 billion industry there, dozens of clinics house women who serve as surrogates for foreign couples. In one report, the surrogate was housed with over 100 women providing surrogacy services for foreign couples and paid $6,000 for her services, almost six times the national per capita income but only about one fifth of the fee received by her American counterpart.

**Surrogacy’s Link to Abortion**

Most surrogacy agreements contain “boiler plate” language that contractually gives to the “intended parents” the sole authority to decide whether the surrogate should abort due to “fetal abnormality.” A surrogacy agreement provided by Surrogacy911.com reads as follows:

In case if the fetus/fetuses has/have been determined by either an independent physician or by the physician of the surrogate mother and/or the physician of the genetic father and/or the intended mother to be either physically or psychologically abnormal, the decision about whether the surrogate mother should do abortion or not becomes the sole decision of the genetic father and the intended mother.

In some cases, such as the one mentioned at the outset of this article, the surrogate will be paid an additional fee to abort the child. If she does not, the surrogate has breached the surrogacy agreement and must return everything she obtained from the “intended parents”—except the child. The baby stays with the surrogate.

“Fetal reduction” can be an issue with gestational surrogacy. With IVF, more than one embryo is implanted into the surrogate’s womb in order to insure implantation of at least one unborn child. If more than one survives, the surrogate may have a problem. Such was the case for Helen Beasley, age 26, a British surrogate who announced to her California “intended parents” that they would be the proud parents of twins. Rather than joyfully accepting the news, the couple insisted that the surrogate have an abortion—they only ordered one child. When Beasley refused, the couple reneged on the contract. The innocent twins, conceived by a woman who never wanted them and a couple who rejected them, were born and put up for adoption.
Surrogacy Legitimizes Human Trafficking

In a free society, when the ethics of surrogacy and other reproductive aids are questioned, the proponents of these reproductive aids quickly arm themselves with the sword of “freedom” and the shield of “rights.” A surrogate should have the “right” to do with her body what she wants, they say. The purchasing couple has a “right” to a child.

This argument redefines “rights,” and misconstrues “freedom.” Because of man’s special relationship with God, he is given special freedoms not enjoyed by others within creation—the right to life, the right to liberty, the right to property, etc. In essence, a “right” is a “gift from God that extends from humanity.” In a free society, the government bears the primary responsibility of protecting those rights, not creating them and, certainly not extinguishing them.

Freedom, according to the founders, was not synonymous with unrestrained liberty. Rather, true freedom, in their minds was “certain old and valuable securities against having things done to them by the state or by powerful men.” It is “not liberation from moral obligations.”

The claim of freedom cannot justify every contractual arrangement, even if voluntary. If a person wants to become a slave and sells himself into slavery, the law would nullify the arrangement as contrary to public policy. Certain contractual arrangements that commodify life affront human dignity and should not fall within the protection of “freedom.”

Surrogacy has nothing to do with rights to a child and little to do with freedom. A “right” to be an adoptive parent has never been recognized in natural law or common law. Even assuming there was a “right,” that right would never survive its conflict with a right against the sale of a human being, which is what commercial surrogacy entails. Freedom would not absolve this trafficking of human life.

Surrogacy Hurts Surrogates

“Help Create a Miracle for a Waiting Family!”

The words splash across the front page of a surrogacy broker’s website. Among the benefits of surrogacy listed in the ad: “Gain an incredible sense of self-fulfillment from giving the greatest gift humanly possible to another family. Build a life-long relationship with forever-grateful intended parents. Receive up to $45,000.” Not a single word is mentioned about the risks the surrogate assumes for “one of the most rewarding experiences of her life” and the $45,000 she will receive for her “altruistic” act.

Physical Harm. The risks are real, physical, and emotional. In traditional surrogacy, the surrogate is inseminated with the sperm of the “intended father” or an anonymous donor. One of two procedures is used—intracervical insemination or intravaginal insemination. With either procedure, sperm is inserted into the cervix or uterus with a catheter. Risks include “infection, multiple pregnancies, STI infection from the sperm and any risks associated with fertility drugs prescribed.” For artificial insemination, the most commonly prescribed drug is Clomid, which carries the risk of ovarian hyperstimulation, which in rare cases can be life-threatening. Other serious side effects of Clomid include shortness of breath, seizures, stroke, chest pain, vision changes, GI symptoms of pain, and swelling.

Gestational surrogacy, surrogacy where the embryo is created outside the womb and implanted in the surrogate, imposes on the surrogate even greater risk. Medications to control the surrogate’s menstrual cycle, including Lupron and Synarel, expose women to risks of fatigue, headaches, nausea, hot flashes, infection, bleeding, and allergic reactions, just to name a few.

Medications given to thicken the inner wall of the uterus carry additional risks, including from long term use: hyperplasia, a risk factor for uterine cancer, and increased risk for heart attack, stroke, blood clots, and breast cancer. Drugs used to prevent the surrogate’s rejection of the embryo may include Doxycycline and Methylprednisone. The latter, a type of steroid, carries with it “the risk of high blood pressure, glaucoma, cataracts, peptic ulceration and ‘major psychotic disturbances.’”

Although very few long-term studies have been conducted on the health effects on surrogates carrying babies “conceived” using IVF, the research that has been conducted is noteworthy. On October 21, 2011, BioNews.com reported that American researchers have found that women receiving IVF treatments face a 40 percent greater chance of preeclampsia than women who do not undergo IVF treatments. This finding mirrors a 2011 Dutch study.

Additionally, IVF carries a greater risk of multiple pregnancies. With IVF, a doctor will implant in the surrogate multiple embryos to improve the chances of implantation. Multiple pregnancies pose an increased risk of anemia, urinary tract infections, high blood pressure, and organ damage.

Psychological Harm. Very little research has been publicized about the psychological impact of surrogacy on surrogates. In 2007, the Southern Cross Bioethics Institute published an article entitled, “Oh Baby, Baby: The Problem with Surrogacy.” In that article, author Matthew Tieu, discussed the natural maternal instinct women
have to their natural children. Surrogacy, according to Tieu, requires a suppression or deflection of those feelings. In some cases, in order not to become attached to the child growing inside them, some women deflected their emotions on the “intended parents” and became upset if the intended parents moved on with their lives, taking the child and leaving the surrogate behind. Other surrogates, to break the natural bond with the child, emotionally detached from the child from the moment of conception claiming to be “simply a hotel.” Terming it “cognitive dissonance reduction strategies,” this type of brain-washing, according to Tieu, plays a critical role in successful surrogacy. Citing a study where women did not receive this ongoing therapy due to the bankruptcy of the surrogate broker, altruistic feelings are replaced with “loss, pain and despair when parting with their child.”

Surrogacy Hurts Children

“It looks to me like I was bought and sold,” writes a blogger on the website theothersideofsurrogacy.com. “You can dress it up…. You can pretend these are not your children…. The fact is that someone has contracted you to make a child, give up your parental rights and hand over your flesh and blood child.” Very few, if any, studies have been conducted on the psychological impact of surrogacy on the child “produced” by the technique. If this blog entry, however, even remotely reflects its negative impact on the children, it could prove to bear consequences far more dangerous than ever imagined.

Physical Harm. Evidence showing the physical harm of gestational surrogacy brings cause for alarm as well. Children produced by IVF are 20-30 percent more likely to suffer birth defects, according to a 2012 report published in *Fertility and Sterility.* Furthermore, these physical disabilities may not be realized at birth. IVF can produce abnormalities in the blood vessels, leading to an increased risk of heart attacks and strokes. A 2010 report found that IVF may increase the risk of diabetes, certain cancers, and the onset of high blood pressure in an IVF child before the age of 50.

Surrogacy Weakens Parental Rights

Parental rights are an essential part of parenthood. In a free society, they provide the legal shield to allow parents to rear children as they deem appropriate. Under John Locke’s view, the right, recognized in English common law, emanates from the obligations parents assume with parenthood. Throughout American history, parental rights were considered a fundamental liberty and were protected by government. Because of the natural bond with their children, parents were assumed better equipped than government to act in the child’s best interest.

Surrogacy agreements fundamentally change the character of parental rights and the role of government to protect them. As a result of denying parenthood as a relationship based on altruism, parental rights are transformed into property rights that can be sold to the highest bidder. Government’s involvement changes from the protector of parental rights of natural/adoptive parents to the referee between the aggrieved buyer-“parent” and the seller-“parent.”

Conclusion

Throughout history, man has succumbed to the temptation to commodify human life. The Prophet Amos in the Old Testament, quoting Yahweh, chastised the Israelites, “I … will not relent: Because they have sold the upright for silver and the poor for a pair of sandals.” (Amos 2:6) For centuries, man has bought and sold human beings for political and financial gain. Now history is repeating itself with surrogacy, where women are treated, solely, as wombs to be “rented” for the production of children, sold before conception, that they do not want.

A diagnosis of infertility can be the most devastating news a woman can ever hear. Many times, this news comes after years of fertility treatments. A couple turns to surrogacy as a last resort.

Yet, the ends never justify the means. In a free society, the government’s primary obligation is to protect inherent rights and to serve the people. Consequently, the government should never allow the rich to exploit the poor or allow the strong to dominate the weak. Furthermore, that same government should never allow the commodification of women or the sale of innocent children, despite the desperate circumstances used to justify it.

The issue of surrogacy challenges everyone to see what the media disguises and the politicians ignore. North Carolinians should demand that surrogacy be banned in this State for the sake of the poor and innocent.
Surrogacy

Endnotes


5. Browne-Barbour, id. 438

9. id.


13. “Surrogate Compensation.” Id.


15. 5 Cal 4th 84, 851 P.2d 776 (1993)

16. id. 25.


29. Carzano, id.