

## Surrogacy: an International Phenomenon

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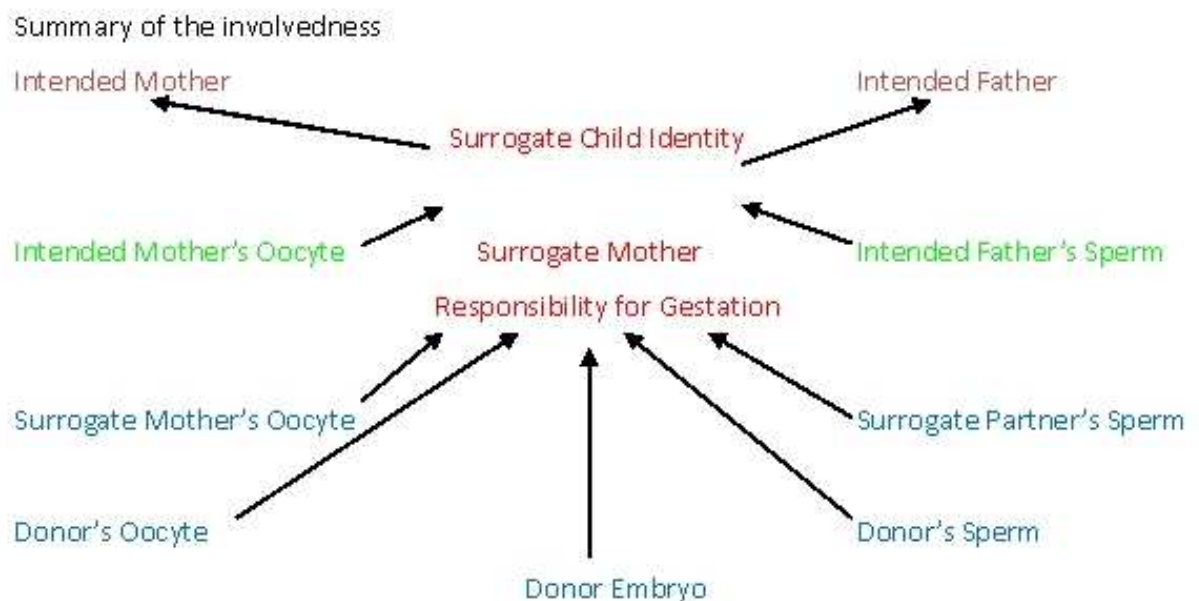
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### Abstract

This paper provides an overview of surrogacy and the potential complexities involved in commissioning a surrogate baby. It reflects on the lead author's previous surveys on this difficult topic that were conducted in 1997 and 2003. It offers an insight into the legal and ethical viewpoints on the matter that are held by various countries.

### Introduction: What is a Surrogate?

Van Den Akker (2010) defines a surrogate mother as a woman who carries a child for someone else, usually an infertile couple. Surrogacy can be defined either as Gestational, where the surrogate mother is artificially inseminated with the sperm of the intended father or sperm donor; and Genetic, where the surrogate mother is not genetically related to the child. Eggs are extracted from the intended mother or egg donor and mixed with sperm from the intended father or sperm donor, the embryos then being transferred into the surrogate's uterus. Figure 1 gives an overview of the potentially complex nature of commissioning a surrogate baby.



**Figure 1: The potentially complex nature of a commissioned surrogate baby – adapted from ‘Surrogate Mothers’ by Olga B A Van Den Akker.**

### Growth of Surrogacy

According to Van Den Akker (2010), however, these simple definitions betray the complex web of ethical, legal and practical considerations that must be untangled before the practice can be condoned. Surrogacy is not a new issue; there are examples of this practice going

back to the Roman Empire and beyond (Sills and Healy 2008). The much-quoted examples come from The Bible, where in the Old Testament, Sarah, the wife of Abraham, enlisted the help of Hagar, an Egyptian slave, who bore them a son, Ishmael (Genesis, Chapter 16). Later, Isaac and his barren wife Rachel relied on Rachel's servant Bilbah to enable them to have a child (Genesis, Chapter 30). McColley (2007), Spivack (2010) and Allen (2004) refer to African slave stories which tell of the practice. However, reactions are frequently stirred because the needs of the child are not met. Surrogacy foremost meets the needs of adults, which is why buying and selling come to mind.

### **The Surveys: 1997 and 2003**

In order to achieve a global picture of the situation, a direct stance was taken and the lead author conducted two surveys. The first survey was conducted in 1997 and the second one in 2003. The intention behind these surveys was to consider whether and what changes had occurred. Both surveys used the same format and questions (see Appendix 1). The short questionnaire that was devised used closed questions, since they were more likely to be completed (Parahoo 2014; Bowling, 2009). In this way the response was likely to be much higher and give a more complete global picture. Equally, some of the answers would possibly be similar, therefore adding credibility to the comments, as well as substantiating reliability and validity (Parahoo 2014).

Forty countries were selected to establish a global picture of attitudes to surrogacy and maternal involvement in adoptive procedures. The approach was twofold: firstly to write directly to the London Embassy of the Country concerned; then to approach the nursing organisations within that country. A very short deadline was given of one month, to enable a swift return; a longer time limit may have meant the request becoming mislaid, or delayed (Parahoo, 2014).

Argentina	France	Japan	Russia
America	Germany	Luxembourg	Saudi Arabia
Australia	Greece	Mexico	Singapore
Belgium	Hungary	Netherlands	South Africa
Brazil	Iceland	New Zealand	Spain
Canada	India	Nigeria	Sweden
China	Ireland	Norway	Switzerland

Despite concerns about this method of approach, replies were received quite promptly, including one from Turkey within three days. All Embassies had made contact with their Government's legislature. Some clarification was required which led to both national and international discussions; notable among these were the ones from the Indian High Commissioner, the American Ambassador, Icelandic Commissioner, and Finish Government Secretary. During many of the conversations, additional information was received which enabled a rounder picture to be established.

### **Discussion on the 1997- 2003 Results**

#### **Unacceptable on religious and cultural grounds**

Where countries exhibit strict religious or cultural observances, it is by nature of the strictness of their philosophies and doctrines that the practice of surrogacy is outlawed, rather than because of the imposition of relevant laws. For example, Roman Catholicism,

Greek, Eastern and Russian Orthodoxy, Muslimism, Sikh, Hinduism, and Buddhism are among the religions which are integral to people's lives and their countries' structures. The countries that hold a strong Roman Catholic or Greek Orthodox philosophy do not even agree with reproductive technologies, so surrogacy is definitely not acceptable. Russia, Pakistan and India are unable to enforce their philosophy due to their present unstable social systems, which are unable to prevent bribery and corruption. Equally, countries that have a strong Muslim faith and lifestyle are mainly to be found in the Middle East, and include Saudi Arabia, Yemen, Egypt, Jordan and Iran, where surrogacy is not allowed.

### **Can the system be circumvented?**

A system can be circumvented where the laws exist which might challenge aspects of a surrogate but which are not strictly adhered to. It can also happen if the people involved (as surrogates) are not of the commissioning parents' own nationality. This appeared to be the situation when a well-educated Russian surrogate went with the commissioning parents to a neighbouring country for the formal adoption procedure to be expedited.

A second way of circumventing the law is with the use of money. Whether we like it or not, bribery occurs under the guise of payment for expenses incurred. It has been observed in some of the old Eastern Bloc countries where the social structure remains unstable. These countries are not alone.

Another way is to have the child in another country and to complete the adoption procedure before the child is brought home. During the lead author's practice as a midwife, two cases are memorable. Firstly, a Belgium surrogate couple had a baby in Britain, and the formal adoption was completed in Belgium, which had been pre-arranged before the birth under the international adoption process. The biological parents were also from Belgium but to complete the arrangements in Belgium would have been difficult. A more dramatic method is for the surrogate woman to assume the identity of the commissioning mother. This saves any formal process after the child has been registered. Most midwives would not consider the name of the woman very important, and certainly not something that needed to be checked. It left the two people involved very concerned when the plan was revealed a year later.

When considering the fact that the system can be circumvented in this way, it makes one realise how desperate some people are to have a child.

### **Regulations**

The regulation of surrogacy differs widely. The UK could follow the USA, but possibly would be better considering a more woman-centred approach than the liberal approach, which is frequently altered by case law. The Brazier Report (1998) reviewed the arrangements of payments and regulations. The recommendations were that guidelines should be drawn up in relation to what would constitute reasonable expenses. The committee called for a memorandum of understanding to be used between the couples so that expectations were clearly understood. At the time the Public Health Minister said the recommendations were pragmatic and sensible.

### **Countries with Babies for Adoption**

Countries that have children available for adoption are countries where over-population is a problem and those where there is violence and wars. Children are available for adoption in China, India and Pakistan; therefore, women who find themselves infertile can adopt a

child easily. Adoption has been an acceptable means of caring for children who have lost parents, or who had parents that have chosen not to care for them for a variety of reasons. As children's rights have come to the fore in current society, surrogacy has not been seen as necessarily acting in the best interests of the child. It could be argued that adoption does not always meet the needs of the child, but current legislation in the majority of countries is structured in such a way as to protect the child. Child trafficking in any form has great stigma today.

### **What Drives Surrogacy?**

The reasons for potential parents using surrogacy as opposed to adoption are varied and different. Among these reasons might be:

- *Infertility over 35*
- *Medical conditions*
- *Genetic diseases*
- *Social aspects*

Surrogacy might also be driven by the fact that it involves a genetic link that will bind the family unit together (there is a known bio- and psycho-social history at least on the part of one parent), whereas with adoption the child is potentially of unknown genetic origin. The most recent focus for this issue has been the debates surrounding infertility and its problems (Peris 2011). Infertility could be a result of an absent or diseased uterus, ovarian compromise or following failed pregnancies or repeated IVF failures (Roupa *et al.* 2009). Medical conditions associated with renal disease, unstable diabetes, or severe conditions of the central nervous system or respiratory tract. Genetic disorders may be autosomal dominant, as in Huntington's chore, autosomal recessive, as in Thalassaemia, or X-linked as in Haemophilia. Other, more rare conditions have been cited, for example, Rokitansky Syndrome and Mayer-Rokitansky-Kustner-Hausner-Syndrome (Roupa *et al.* 2009). Social reasons may range from the inability to adopt a child or the avoidance of pregnancy due to discomfort, inconvenience or for career or aesthetic reasons.

### **21<sup>st</sup> Century**

The last two decades have seen a reawakening in modern society for surrogacy – a reawakening that has been assisted by the growth of technologies. Changes in family structure, in which partnerships differ from a man and a woman, has increased the demand for children. Well known persons have acquired their families by surrogacy, as evidenced by Elton John, Michael Jackson and Nicole Kidman, to name but a few. The use of technology has made the practice easier; many sites are to be found on the internet. These sites advertise how to take a couple through the system and which legal organisations will smooth the pathway. Sperm and ova can be sent internationally, so meetings between couples have been reduced. Where there are difficulties, meetings can be planned by phone, email or blog so that the correct circumstances can be achieved in order for child transfer without interference, or ensuring that the correct officials are on duty and can be paid off with no questions asked. Russia and India fall into these categories, as bribery is commonplace in both countries.

Adverse situations have not put couples off. We can think back to the Baby M case in 1986 where the mother, Mary Beth Whitehead, reneged on her contract to Elizabeth and William Stern. Then there is the Baby Cotton case (1985), where Kin Cotton received payment, and where there have been several court cases as a result. However, the matter in India with

regard to Baby Maniji (2008) introduced another aspect: that of a stateless person (Parks 2010).

### **International Picture**

Today, while looking at Europe it can be seen that the picture is mixed. In Norway, Sweden and France, surrogacy is officially forbidden, and in Germany surrogacy is illegal, with potential offenders receiving a significant penalty and a custodial sentence of up to three years. As would be expected in both Italy and Poland, surrogacy is illegal: these countries are strictly Roman Catholic. The Roman Catholic Church opposes all kinds of assisted reproductive technologies in humans. It is known that childless Italian couples participate in surrogacy programmes in other countries where surrogacy is legally allowed. Ideally perhaps, a surrogate mother's contract would be approved by a special committee that included social workers, physicians and clergymen; unfortunately this does not occur in the UK.

Since 2002, surrogacy in Estonia has been banned and would prosecute both couples. Similar to the UK, surrogacy in Belgium, Greece, Ireland and the Czech Republic is not regulated by the law. A system as unsatisfactory as it is in the UK is mirrored by that in place in Finland, where the services of surrogate mothers are available; this means that it is not prohibited and at the same time not regulated, as far as the current legislation is concerned. Outside Europe, surrogacy in Israel is legally permitted; however, the surrogate mother must have a single mother status. Reilly (2007) describes when Canada permits surrogacy, which is similar to some states in the USA. Meanwhile, in Russia, India and the Ukraine, surrogacy is commonly seen as a commercial undertaking to the betterment of the surrogate's family.

Ramskold and Posner (2013) write that advances in reproductive technologies have opened up a whole new range of possibilities for couples to investigate surrogacy as a means of having a family. They cite the ease of travel and direct remuneration in the form of money, holidays or education as having increased inter-country surrogacy. Scott (2013) has observed the growth in marketing to international couples, referring to it as similar to a holiday, and calls it a 'reproductive' or 'medical' holiday, so enticement is rife on the web, particularly to same sex couples. Even when countries have regulations, these appear to be easily circumvented by loop holes pointed out by web pages, leading to conflict with national laws.

The Hague Convention is supposed to be developing inter-country agreements to resolve today's bewildering situation. This was first considered under the title of *Fair Trade International Surrogacy*, taking on similar principles to Fair Trade food (Humbyrd 2009). This is much needed because commercial surrogacy is on the increase in India, Russia and China. India is seen as fast becoming a very prominent player in the global industry of surrogacy, which has grown up around tourist-friendly locations, according to Deonandan (2012). The World Bank predicts Indian surrogacy alone will be a US\$2.5 billion industry by the year 2020 (Hyder 2011; Ware 2012; Carr 2013). Crockin (2013 p.733) states that:

*Cross-border gestational surrogacy is one form of family building that challenges legal, policy and ethical norms between countries and puts both intended parents and gestational surrogates at risk, and can leave the offspring of these arrangements vulnerable in a variety of ways, including parent-child, immigration and citizenship status.*

## **Ethical Issues**

To what extent should we be concerned about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates, as found for example in Russia, India and China?

- Does society have rights over women? If so, where are a woman's human rights?
- Should surrogacy be seen as a contract just like any other contract? If so, should it be enforceable? Consider, for example, the situation in which the surrogate mother wants abort a foetus that shows signs of Downs Syndrome.
- Do we need to redefine motherhood? How should the relationship be expressed as a genetic motherhood, gestational motherhood, and social motherhood?
- What are the legal and social implications of a person who acts as a surrogate mother many times?
- To whom should the child 'belong'? What happens if the baby is damaged at birth?

## **Conclusion**

The world picture can now be drawn, but what of the future? Can it be considered that surrogacy has become a form of Malthusian cycle, another form of restricting the population? Will it stop or continue? Some of the problems which occur to the women cannot be removed, such as the congenital absence of a uterus. Nor will all the population ever find surrogacy acceptable (Wilkinson 2013; Sperling-Newton 2013). The considerable number of countries that engage in the activity (either legally or illegally) suggests that it is something that is here to stay. Back in 2003, Tessa Jowell said that this was a fraught area and that there was no way of realistically banning surrogacy. It is estimated that at least one child per week in the UK is born to a surrogate mother. So is it here to stay? Surrogacy will continue to exist, despite reservations, and despite being imperfectly managed, or where the system can be circumvented.

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## **Appendix 1**

An explanatory letter, including the definitions that I had used accompanied the questionnaire. The questionnaire contained the following questions:

- 1 Within your Country's Legal System is the practice of 'Surrogacy' legal?
- 2 If no, is it possible that 'Surrogacy' occurs in an illegal way?
- 3 If it is anticipated that 'Surrogacy' is practised illegally, is your Country considering changing the law to enable 'Surrogacy' to be legally practised?
- 4 Within your Country would 'Surrogacy' be socially acceptable?
- 5 Could the practice of 'Surrogacy' be openly discussed in the media, in national newspapers, journals or books?
- 6 If a couple seek to make a surrogate arrangement, what information is available?
- 7 Within your legal system, can the mother of a baby for adoption choose or be involved in the choice of adoptive parents?
- 8 Does your Country allow couples to adopt children from another Country, where the race or culture may differ?