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CRITICAL PERSPECTIVES

Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model

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Abstract Surrogate motherhood is treated as a form of adoption in many countries: the birth mother and her partner are presumed to be the parents of the child, while the intended parents have to adopt the baby once it is born. Other than compensation for expenses related to the pregnancy, payment to surrogates is not permitted. We believe that the failure to compensate surrogate mothers for their labour as well as the significant risks they undertake is both unfair and exploitative. We accept that introducing payment for surrogates would create a significant tension in the adoption model. However, we recommend rejecting the adoption model altogether rather than continuing to prohibit compensation to surrogates.

Keywords Surrogate motherhood · Compensation · Adoption · Legal parentage · A professional model for surrogacy

In countries such as Australia, New Zealand, and the United Kingdom, surrogate motherhood is treated as a form of adoption. In Australia, for example, the birth mother and her husband (or partner) are presumed to be the parents of the child, while the intended parents have to apply for a parentage order from the courts in the state or territory in which they live. Only altruistic (unpaid) surrogacy is permitted. In order to be eligible for a parentage order, intended parents have to show, among other things, that the surrogate mother or her partner did not receive any material benefit or advantage from the arrangement (see Family Law Council 2013). Similarly, in New Zealand the transfer of parental rights from surrogate to intended parents is handled by adoption. The *Adoption Act 1955* provides the legal framework for this transfer, and the Act specifically prohibits payment to a birth mother by adoptive parents. Despite this, the view that surrogate mothers deserve some form of compensation beyond being reimbursed for expenses is becoming increasingly popular. As we argue elsewhere (Van Zyl and Walker 2013, 374–377), failure to compensate surrogate mothers for their labour and the significant risks they undertake is both unfair and exploitative.[1] However, we accept that introducing payment for surrogates would create a significant tension in the adoption model. We recommend rejecting the adoption model altogether rather than continuing to prohibit compensation to surrogates.

Commercial surrogacy, as practised in Thailand, India, and some parts of the United States, has been widely criticized as involving the commodification of women and children, and we accept much of this criticism. However, we think it is a mistake to reject all forms of paid surrogacy. We propose a professional

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[1] See Raymond (1990) and Narayan (1995), who argue that altruistic surrogacy can also involve the exploitation of women and objectification of children.

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model of surrogacy as an alternative to both altruistic and commercial surrogacy (see Van Zyl and Walker 2013 as well as Walker and Van Zyl 2015). In this model, the surrogate would be motivated by a desire to do something worthwhile while still expecting reasonable compensation for her service. We argue that surrogacy should be paid on a fee-for-service basis, with a professional regulatory body that oversees selection of surrogates, training, and ethical standards. This body would ensure fair payment and that the parties were fully informed of their rights and responsibilities, that consent was freely given, and that contractual constraints on the surrogate were legitimate. Exploitation and unreasonable demands by the intended parents would be precluded, thus minimizing the risk of harm.

In her recent paper, "Rethinking 'Commercial' Surrogacy in Australia," Jenni Millbank (2014) argues in favour of compensating surrogate mothers for their labour. She notes that criminalizing extraterritorial commercial arrangements have proved to be "spectacularly ineffective," with hundreds of Australians undertaking commercial surrogacy abroad every year.[2] Millbank thinks that there is a clear need to develop a more accessible model of domestic surrogacy. She argues that a rejection of commercial surrogacy, together with "unregulated fertility markets," does not necessitate a rejection of all forms of compensated surrogacy, for "the denial of any form of payment to surrogates is neither necessary nor sufficient for preventing exploitation in the domestic context" (2014, 2). Instead, she argues that it is the presence of professional assistance and intermediation that ensures the success of surrogacy arrangements. Millbank advocates a middle path between commercial and altruistic surrogacy that would allow the payment of set forms of compensation to surrogates as well as the operation of advertising and matching services and be overseen by a state agency and professional intermediaries who specialize in assisted reproductive issues. The agency would be responsible for psychological screening, matching, and counselling the parties and would provide oversight of payment, licencing, and monitoring to ensure ethical practice.

Millbank's model shares many of the features of our professional model (Van Zyl and Walker 2013; Walker and Van Zyl 2015). There is, however, one important point on which we disagree. Millbank is in favour of what she calls a "post-birth, consent-based parentage transfer process" (2011, 177). She argues that informed and continuing consent requires that the surrogate has full control of relinquishment of the baby with consensual transfer of parentage *after* birth (2014, 11). By contrast, we argue for a change in the legal framework to ensure that the intended parents are the legal parents *from* birth. Thus, there is no transfer of parental rights. That eliminates a significant and unnecessary cause of uncertainty and benefits all parties.[3]

An important feature of the professional model is that the surrogate retains all her rights as a pregnant woman. The intended parents cannot require her to undergo invasive medical procedures such as diagnostic tests, selective termination (in the case of multiples), or abortion for fetal abnormality. She also maintains the right to confidentiality, so the intended parents cannot demand that she share the results of tests with them. In the professional model, the surrogate's right to bodily integrity is rather better protected than it is in commercial surrogacy. Failure to respect her basic rights during pregnancy would objectify her and could be seen as instrumentalising childbirth through surrogacy. (We offer a detailed argument in favour of the surrogate's rights as a pregnant woman in Walker and Van Zyl 2015.)

Millbank's proposal (that surrogacy be overseen by a state agency and professional intermediaries) will certainly contribute to minimization of harm, but it fails to address a fundamental flaw in the way in which surrogacy is perceived. Millbank acknowledges that the adoption model is "arguably inappropriate" and, as noted above, favours a post-birth parental transfer system, but her approach still shares with the adoption model the view that the intended parents are not parents until the state says so and that if the surrogate undergoes a change of heart, her gestational labour trumps intention and/or genetics of the intended parents. In our view, this approach is inconsistent with the goal of making surrogacy safer for all parties, in

[2] This view is supported by a recent survey of Australian intended parents via surrogacy, which found that laws banning compensated surrogacy do not appear to deter those seeking surrogacy arrangements—most Australian intended parents consider or use overseas compensated arrangements. See Everingham, Stafford-Bell, and Hammarberg (2014).

[3] In New Zealand, the Advisory Committee on Assisted Reproductive Technology (ACART) accepts that the major risk involved in surrogacy for the surrogate, the intended parents, as well as the resulting child is that one of the parties may change their mind about relinquishing or adopting the child. See ACART (2013) and Henderson (2013) for discussion of the New Zealand legal framework.

particular the intended baby. The assumption underlying Millbank's model is that the surrogate, as the woman who gives birth to the baby, is correctly regarded as the legal mother of that baby if that is what she wants. Yet the fundamental concept of surrogacy is that the intended parents and the surrogate are creating a child with the sole intention of forming a family for the intended parents. Surrogacy is best understood as a commissioned pregnancy, rather than a form of adoption. The baby would not be conceived otherwise, no matter who provides the gametes or gestates the fetus. Unless this fact is fully embraced in the regulation of surrogacy, there is no certainty for any of the parties involved. The surrogate can change her mind and keep "her" baby, the intended parents can refuse to accept the baby, and the baby itself is always born with an identity still to be determined. If states such as Australia (or New Zealand and the United Kingdom) seriously wish to provide an alternative to international surrogacy, then they must address the central ethical and legal problems with current regulations. It is not enough for the state to say to intended parents that it has reduced the risks so that it is very unlikely that the surrogate will refuse to relinquish the child or that it will decline their application for legal parentage. The regulatory framework has to make it impossible for a legal surrogacy agreement to fail in this regard.

It is clear that the intended parents suffer if the surrogate changes her mind, but the surrogate herself also has a great deal at stake. If the intended parents opt out of the arrangement, the current system, even if reformed on Millbank's lines, leaves the surrogate as the legal mother when she had no intention of becoming a mother to this child. She and her partner then have to decide whether to raise the child themselves or give it up for adoption. It is an appalling predicament for them, especially if the baby has been rejected because it is disabled. The financial cost is considerable, and most surrogates are not affluent. But the emotional cost of being responsible for deciding the child's fate also is something that simply shouldn't be imposed on them. That is one reason why the professional model we suggest mandates legal parentage for the intended parents from birth. If the intended parents cannot raise the child themselves, then it is their responsibility to give the child up for adoption, and it is the state's duty to find suitable adoptive parents. The surrogate and her partner could apply to adopt the child, if they so wished, but it would be a voluntary decision rather than an expectation. What appears to be a safeguard for the surrogate—"consensual relinquishment after birth"—in fact makes her vulnerable. The intended parents should be the legal parents from birth, and the surrogate should not be able to renege on the agreement at that point. As Margalit notes:

> The huge emotional, physical, and economic efforts and investments that are involved in the surrogacy agreement justify the understanding that the contract will be eventually enforced (2014, 451).

Retaining the adoption model has other undesirable consequences, both conceptual and practical, that no amount of revision can overcome. One is the lack of procreative privacy granted to intended parents. For natural conception as well as IVF and other forms of assisted reproductive technology (ART), people embark on pregnancy without any state involvement or consent in the decision. They are not assessed or approved as suitable parents and hence are granted a right to procreative privacy. By contrast, where people become parents through adoption, their right to procreative privacy is overridden by the interests of children. Adoptive parents have to be assessed as suitable parents by a state agency, and this is entirely appropriate given that there is an existing child in need of new parents. Surrogacy resembles natural conception and assisted reproduction in that the baby has intended parents from the outset. Where people become parents through the use of ART, the concept of "intentional and functional parenthood" can be used to create the relationship necessary for legal parentage (see Jacobs 2006–2007, 399). By extension, the intended parents and surrogate create the relationship the same way when they establish a pregnancy. There is thus no reason why intended parents whose arrangements are made under the professional model (or Millbank's proposals) should not have procreative privacy as well. In a system that treats surrogacy as a form of adoption, intended parents' right to procreative privacy is breached for no good reason. Instead, intended parents are forced into the most public way of becoming parents: permitted by the state to adopt their intended baby, following suitability tests that assume the child is not theirs. One judge described that reasoning as circular (Jacobs 2006–2007, 405), but we think it perverse. Intended parents must participate in the fiction that the baby is not their child, even if they are its genetic parents, unless the state says it is. The state can only grant them parental status if the surrogate relinquishes a

baby that is not hers. We do not object to suitability tests in themselves and support some screening of intended parents as well as surrogates, but it should be done before any surrogacy arrangement is validated. Once the agreement is confirmed, the state should not play a role in the fate of the child.

In his paper, "In Defense of Surrogacy Agreements: A Modern Contract Law Perspective," Yehezkel Margalit (2014) takes a similar approach to Millbank, arguing for robust judicial oversight of contracts. He emphasizes that it is the surrogate's responsibility not to enter into arrangements that she will regret and argues that only the surrogate has the requisite information about herself to make that judgement. Once she commits to the pregnancy, she must understand that it is too late to change her mind (Margalit 2014, 450). However, Margalit does not follow this reasoning consistently. Like Millbank, he puts all his faith in better contracts and retains the intuition that the surrogate is possibly the "real" parent. It inevitably leads back to the adoption model. The most troubling feature of this is that all the risks to the birth mother that arise in adoption, particularly the possibility of forced relinquishment or change of mind after it is too late, are assumed to be present in surrogacy. The deeply entrenched view that the woman who gives birth must be the mother does not take into account the nature of surrogacy and how surrogates regard themselves in relation to the intended baby. All of the evidence shows that relinquishment is straightforward in the vast majority of cases; the surrogates do not form a maternal bond with the intended baby (see Imrie and Jadva 2014, 424–435; Jadva, Imrie, and Golombok 2015, 373–379; Van den Akker 2007, 2287–2295). If she begins the process knowing that she does not have the option of keeping the baby, then the problem of forced relinquishment does not arise. If, however, she can change her mind, then forced relinquishment does occur: the intended parents are forced to relinquish their baby.

Margalit (2014) applies modern contract theory, particularly relational contract theory, and is undoubtedly correct that it provides a better model for the long-term, intimate contracts of surrogacy than classical contract theory. However, the way he applies relational theory to surrogacy weakens rather than strengthens the certainty intended parents can hope for. He depends on robust "administrative mechanisms" to ensure that the contracts are fair and reasonable, most of which are common to Millbank. These are intended to minimize problems of unequal power, change of heart, and change in circumstances. The contracts can be renegotiated, and parties can, under some circumstances and with judicial approval, resign from some or all of their obligations. For surrogacy arrangements, the obvious benefit is that relational contracts can accommodate the uncertainties of pregnancy without the need for an impossible list of all that might go wrong. The parties are expected to collaborate and be flexible in order to meet each other's needs. That seems right to us, but his application of the principles to parentage is troubling for anyone seeking certainty.

Margalit argues that parental rights and obligations can be created by the contract and, because it is flexible, these can be altered if the parties agree to do so. Instead of coping with extreme changes in circumstances through relevant state agencies, he thinks these should be accommodated by changes to the contract, which would then be judicially approved. Death or divorce, financial hardship, or illness, for example, would all be managed through renegotiation of the contract. In his view, "legal parentage (in whole or in part) should be given to every individual who intends, wishes and agrees to become a legal parent of the child" (Margalit 2014, 456). In his example, the gestational surrogate could be granted some parental rights (such as visitation rights) if she "fulfills, de facto, the various parental obligations towards that child" (Margalit 2014, 456). (These are never specified, but we wonder if the gestation itself could count as a parental obligation.) The implication of this is that intended parents can opt out entirely and surrogates can opt in partly or fully if the court agrees. While this would happen only rarely, given that the courts would have to agree to set aside a contract they had already approved, it could happen, and intended parents and surrogates entering an agreement could never be sure it wouldn't happen to them.

Whereas Millbank's only solution is to offer only full information to the surrogate and her partner about the risk of being left with the baby, Margalit offers only the administrative mechanisms to minimize the risk for all parties. Without changing the legal framework, intended parents can have no certainty regarding their legal status, and surrogates face undue risk. However good a contract is, however impeccable the professional support and advice that goes into it, the fundamental flaw remains because it rests on the adoption model. We suggest that it is time for surrogacy specialists to accept that the surrogate cannot be a presumed parent legally or ethically if domestic surrogacy arrangements are to

provide intended parents with the certainty they are entitled to in this respect. Pregnancy and childbirth are inherently uncertain. Where we can provide certainty, we should.

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