

Shifting Surrogacy Laws and Legal Parenthood

Katarina Lee

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INTRODUCTION

Both international and domestic surrogacy suffers from a vast lack of legal regulation. Looking abroad, most countries do not possess laws that address surrogacy and, domestically, there are huge variances amongst the states. This lack of legalization or criminalization has resulted in fertility clinics and practitioners setting up shop without any consistency, standards or protections. In recent history, surrogacy hot spots have included countries such as India, Thailand and Mexico. Why these countries? There are two reasons why intended parents typically procure a foreign surrogate: (1) reduced cost and/or (2) surrogacy is illegal in the home country of the intended parent(s). However, as recently portrayed in the media, going abroad to procure a surrogate can open up a plethora of legal issues when countries' laws conflict or new legislation is passed, most specifically with determining legal parenthood of the child.¹

ANALYSIS

One of the most public changes in surrogacy regulation was the recent decision in Thailand to prohibit international commercial surrogacy. The primary catalyst for the Thai government to act was the recent Baby Gammy case.² Baby Gammy is a child born to a Thai surrogate with Australian intended parents. She and her twin were born in Thailand, but when Baby Gammy's intended parents discovered that she was born with Down Syndrome, her parents abandoned her and took her "healthy" twin back to Australia. Further adding to the horror of the Baby Gammy case, was that the twins' intended father is a previously convicted child sex offender.³ Notably, commercial surrogacy is illegal in Australia, meaning that Baby Gammy's intended parents went to Thailand to circumvent Australian law.⁴ Under Australian law, when an intended parent uses a foreign paid surrogate they are not recognized as the legal parent of the child in Australia, regardless if the intended parent and child are genetically related.⁵ Furthermore, the intended parents risk potential criminal charges.⁶ These laws are in place to act as a deterrent for Australians wishing to use a commercial surrogate abroad.

The Baby Gammy scandal, along with other media exposes of surrogacy scandals in Thailand resulted in Thailand changing its law.⁷ As of July 30th 2015, Thailand will only permit "Thai heterosexual couples married for more than three years" to procure a surrogate.⁸ Those who violate the new law may be subject to "10 years in prison and a fine of up to 200,000 baht (\$6,200)."⁹ Notably, the new law also grants intended parents full parental rights of the child when the child is born.¹⁰ Determining parenthood is often the main legal

concern regarding surrogacy. Prior to the new law, the previous Thai law granted that the surrogate mother was the legal mother of the child, regardless of the genetic mother or intended parent(s).¹¹ This has left a male homosexual couple in Thailand unable to take their intended child out of Thailand because the Thai surrogate refuses to sign the necessary paperwork. The child was born to the surrogate under the old law granting her legal motherhood over the child.¹² Thailand is unlike many countries in that there is a clear ruling on who is the legal parent in surrogacy situations. However, the clear switch in granting legal parenthood evidences the difficulty in determining who the legal parent should be.

Regardless of how one views surrogacy from an ethical perspective, it is important to discuss who should be the legal parent of a child born through surrogacy. There are three scenarios with gestational surrogacy and legal parenthood: (1) the intended child is the full genetic child of the intended parents; (2) the intended child is created through the donation of a sperm or egg cell fused with a sperm or egg cell of an intended parent, thus the child is only genetically related to one of the intended parents or a single intended parent; or (3) the child is not genetically related to the intended parent(s) because both a sperm and egg donor were used. As a result there can be up to three different parties with “interests” in a child: (1) the intended parent(s); (2) the surrogate; and (3) the gamete donor(s). Weighing the interests of these parties is needed to determine what is in the best interest of the child.

In situations where the child is the full genetic child of the intended parents there are two parties who have an “interest” in the child: (1) the surrogate and (2) the intended parents who are also the genetic parents. Firstly, the intended parents have gone through the effort of contracting, paying for and using reproductive technologies because they intended to raise a child. This is not to diminish the importance and sacrifice of the surrogate, but given that the surrogate presumably did not intend to raise this child, as she consented to be a surrogate, the intended parents’ interest supersedes those of the surrogate. Secondly, in this scenario the child is also the genetic child of the intended parents, thus even if one wishes to argue that genetics supersedes intention, the legal parents of the child would be the intended parents.

It is the second and third scenarios that are more open to debate. These situations require the procurement of donor gametes, usually anonymously “donated” gametes. Donated is in quotation marks as those who donate their gametes are typically financially compensated. Please also note that depending on the country or state, donating one’s gametes actually still grants legal parenthood to the donor, even if the gametes have been anonymously donated.¹³ This means that an individual who donates their sperm or eggs to a fertility clinic can still be the legal father or mother of a child that was created through artificial reproductive technologies. However, this is rarely enforced and thus the assumption in most surrogacy contracts is that the donors have rescinded their legal rights. Therefore, even though they have a genetic tie, these donors did not intend to raise the children resulting from their donations.

Those who support the practice of gestational surrogacy argue that the surrogate is financially compensated and is not genetically related to the child; therefore, the surrogate should rescind their legal rights to the child. This argument is less controversial in the second situation because one or the sole intended parent(s) is also the genetic parent. Therefore, the intended parent(s) also have a genetic tie to the child, in tandem with their intention to raise the child.

However, in the third scenario, where no known parties in the surrogacy arrangement are genetically related to the child it initially seems that all parties have a similar amount of “interest” in the child. The surrogate gestates and gives birth to the child, and she arguably has a more intimate relationship with the child at birth. However, similar to the other two scenarios, the intended parents agreed to financially compensate her to give them the child they intend to raise. Intended parents would not contract with surrogates that they believe would not allow them to be the legal parents of the child created. Therefore, the intended parents should be the legal parents of the child, regardless of the lack of genetic or biological tie.

CONCLUSION

The ethical and legal questions of surrogacy are two separate concerns. I am opposed to surrogacy in all situations due to ethical and health concerns of surrogates and children. However, given that surrogacy continues to be prevalent in today's society, children that result from surrogacy should be protected through legal recourses in order to grant them safety in surrogacy transactions. This safety includes allowing them to be raised by their intended parents. Note that these intended parents need to be appropriately vetted similarly to parents who adopt, in order to avoid any potential child abuse. Furthermore, in the situations where intended parents abandon their children, like Baby Gammy, intended parent(s) should be required to financially support their child, or provide recourses to place that child up for adoption. The responsibility of the child should not be left to the surrogate.

¹ <http://www.cnn.com/2015/05/08/americas/mexico-us-couple-surrogacy-snafu/>

² <http://www.independent.co.uk/news/world/australasia/baby-gammy-australian-father-who-abandoned-down-syndrome-surrogate-child-now-tries-to-access-funds-donated-for-his-care-10261916.html>

³ <http://www.independent.co.uk/news/world/australasia/husband-in-thai-surrogacy-row-served-jail-time-for-indecently-dealing-with-a-child-9648200.html>

⁴ <http://www.smh.com.au/comment/should-commercial-surrogacy-be-legal-in-australia-20150514-gh1lead.html>

⁵ <https://aifs.gov.au/publications/families-policy-and-law/8-use-surrogacy-australians-implications-policy-and-law-reform>

⁶ <https://aifs.gov.au/publications/families-policy-and-law/8-use-surrogacy-australians-implications-policy-and-law-reform>

⁷ <http://www.washingtontimes.com/news/2015/aug/7/thailand-bans-commercial-surrogacy-for-foreign-par/?page=all>

⁸ <http://www.lgbtqnation.com/2015/08/thailand-bans-commercial-surrogacy-for-lgbts-singles-foreigners/>

⁹ <http://www.lgbtqnation.com/2015/08/thailand-bans-commercial-surrogacy-for-lgbts-singles-foreigners/>

¹⁰ <http://www.washingtontimes.com/news/2015/aug/7/thailand-bans-commercial-surrogacy-for-foreign-par/?page=all>

¹¹ <http://uk.reuters.com/article/2015/07/24/uk-thailand-usa-baby-idUKKCN0PX13F20150724>

¹² <http://www.cnn.com/2015/07/22/asia/thailand-surrogacy-gay-couple/>

¹³ http://dlslibrary.state.md.us/publications/OPA/I/LICAR_2012.pdf