

The Surrogate in [commercial] Surrogacy Arrangements



Sonia Allan

*BA(Hons) LLB(Hons)
LLM (Dist) MPH (Merit)
PhD*

Commercial Surrogacy

2

- Commercial surrogacy involves **a transaction** between **commissioning person(s)** and a woman (directly/via a broker), in which it is intended that the **woman** will carry a pregnancy and bear a child/children, and then permanently **relinquish the child(ren)** to the commissioning person(s), in exchange **for a fee (*for profit*)**.

SNAPSHOT OF GLOBAL REGULATION

3

TRENDS IN THE REGULATION OF COMMERCIAL SURROGACY

Four broad approaches to the regulation of surrogacy

4

1: *Prohibit all surrogacy arrangements*

China (mainland), Finland, France, Germany, Iceland, Italy, Latvia, Mexico (Queretaro), Pakistan, Singapore, Slovenia, Sweden, Switzerland, Saudi Arabia, Serbia, Tunisia, Turkey, Vietnam*, and some jurisdictions within the United States of America (e.g., Arizona, District of Columbia, Michigan).

- The ethos underpinning such bans range from statements that surrogacy ‘is a violation of the child’s and surrogate’s human dignity’ to fear that if surrogacy is permitted legal, social and ethical chaos will ensue.
- France : “the human body is not lent out, is not rented out, and is not sold.”

Four broad approaches to the regulation of surrogacy

5

2. *Permit and regulate 'altruistic' surrogacy* *Prohibit commercial surrogacy*

- When States do regulate surrogacy the 'overwhelming trend' is to permit only altruistic surrogacy arrangements and to provide criminal sanctions regarding commercial surrogacy. Note
 - many states in this category allow payment of 'reasonable expenses'.
 - 'strong trend' to permit only surrogacy arrangements where at least one commissioning person is genetically related to the child;
 - in some States only gestational surrogacy is permitted;
 - in several jurisdictions women must meet certain criteria before being able to act as a surrogate (eg. age requirements; satisfactory completion of medical and psychological screening; having already had a living child and/or having completed her family; civil status; marital status; resident status; and having received independent legal advice.
- Examples include: Australian states and territories (except NT); Canada (Alberta, British Columbia); China (Hong Kong SAR), Greece, Israel, South Africa, United Kingdom.
[Thailand]

Four broad approaches to the regulation of surrogacy

6

3. *Surrogacy largely unregulated/lack of specific laws, but commercial surrogacy prohibited in some instances*

- No express regulations about how surrogacy may/may not occur. Some nevertheless ban *commercial* surrogacy via other laws (for eg. prohibitions on trafficking or adoption).
- Ban commercial surrogacy: Belgium; Canada; Denmark; Greece; Ireland; Japan; the Netherlands; and, to a certain degree, New Zealand (via adoption laws); some jurisdictions in the United States of America (e.g., Michigan, New York) and Venezuela.
- No policy: Argentina (case-by-case basis); Brazil; Columbia; Croatia; the Czech Republic; Egypt, Malaysia, Marrocco, Mexico (some regions); South Africa; South Korea; Uruguay
- In the majority of Sunni Islamic countries, surrogacy is not prohibited by law, but it is not admissible from the point of view of the religious authorities. The only Islamic country where surrogacy is practiced is Iran.
- No policy in African nations other than S.A. – some reports of women being forced into pregnancies (eg. Nigeria); some reports of women giving children to relatives (Kenya).

Four broad approaches to the regulation of surrogacy

7

4. *A permissive approach to surrogacy, including commercial surrogacy*

- In these jurisdictions:
 - commercial surrogacy is permitted and practiced;
 - following a surrogacy arrangement, in some places there are procedures which enable legal parentage to be granted to one or both of the intending parent(s); and
 - there is may not be any domicile or habitual residence requirement for intending parents.
- Georgia, Russia, Uganda, Ukraine, 18 jurisdictions in the United States of America; Armenia and Moldova.

GLOBAL COMMERCIAL SURROGACY

8

ETHICAL AND LEGAL ISSUES

EXPLOITATION?

REPRODUCTIVE AUTONOMY?

FREEDOM TO CONTRACT?

What is happening regarding 'commercial' surrogacy

9

- the liberal approach of a minority, means that prospective intending parents may travel abroad to these jurisdictions to engage in practices not accepted or lawful in their home country.
- Other motivating factors may be lower costs or fewer perceived risks abroad...
- A further layer of complexity, however, is the fact that the growth of international surrogacy in some States also results from “the ready availability of poor surrogates”.

THE SURROGATE: AUTONOMY?

10

- **HUMAN TRAFFICKING**
- **SOCIAL AND FINANCIAL PRESSURES**
- **AUTONOMY RE PREGNANCY/BIRTH**
- **RACIAL AND CULTURAL DISPARITIES**

Extreme end: Human Trafficking

11

European Parliament's Joint Motion for a Resolution on Guatemala, July 2005:

- According to the Office of the Counsel for Human Rights, 'abuses occurring in Guatemala include forced or surrogate pregnancies, removal of children from their real mothers, substitution of documents, alteration of public records, and the existence of clandestine "nurseries" ...'.
- (NB. Such were the practices once for inter-country adoption including that women used are called 'breeders')

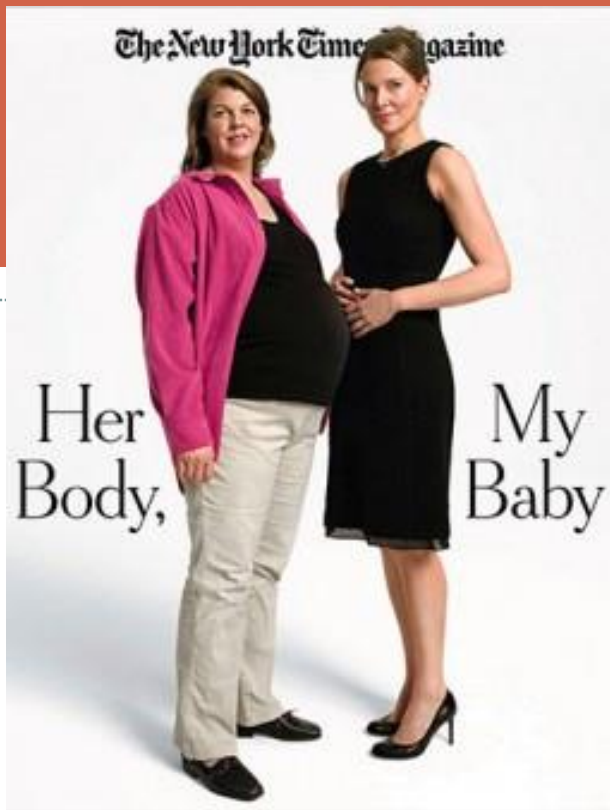
Official Journal of the European Union, 'Trafficking in children in Guatemala: European Parliament resolution on Guatemala' (P6_TA(2005)0304)

Extreme end: Human Trafficking

12

- 1995, young Polish women recruited to travel to Holland, Belgium and Germany to work as surrogates (illegally) .
- 2009, women from Myanmar were sold to Chinese men to work as surrogates.
 - The women 'had been lured to China in the hope of finding jobs' but were instead paid \$250.00 to act as surrogates.
- 2011, several Taiwanese, Chinese and Burmese people were arrested for allegedly running an illegal surrogacy ring in Thailand.
 - some of the 14 Vietnamese women being housed as surrogates, seven of whom were pregnant, had been tricked or forced into the arrangements and, according to the Public Health Minister, some had been raped.
- 2011 three individuals in the United States were convicted of criminal charges relating to paying 'surrogate' mothers to be sent to the Ukraine for implantation with embryos, without any surrogacy arrangements in place.
 - If the pregnancy continued into the second trimester, the unborn children were 'sold' to prospective parents under false representations that they were the result of legitimate surrogacy arrangements in which the original commissioning person(s) had 'backed out'.

Marketing: A happy-middle-class woman, just wanting to 'help'?



13



Surrogate mothers eating lunch (indiadaily.org)



Social and Financial Pressures

14

- Sociological studies of surrogates suggest that ‘because of their financial status, commercial surrogates are susceptible to financial inducement and vulnerable to exploitation’
- “The rhetoric that portrays the surrogate as a reasonably well-educated, financially stable woman motivated by altruism stands in contrast to reality.”
- This is true in *both* developed and developing countries that permit commercial surrogacy or ‘payment of some kind of compensatory fee’.

Social and Financial Pressures

15

Center for Social Research (CSR) in India interviewed over 100 surrogates, as well as their families, commissioning person(s), clinics, agents, and other stakeholders

- overwhelming majority of surrogates had become a surrogate due to 'poverty';
- concerns about pressure from others (e.g., brokers, husbands);
- lack of transparency regarding the fees paid to surrogates;
- disparity between what the commissioning person(s) believe the surrogate is paid and what she is actually paid;
- Payment arbitrarily decided by the infertility physician of the clinic or hospital (generally range from 2 to 3.99 Lakhs (approximately US\$3800-\$5700));
- money often paid to the surrogates while housed in a shelter during the surrogacy period; spent by husband on alcohol or setting up businesses that fail; most money is gone when she gets home;
- India a country with a comparatively high maternal mortality rate.
- **Commercial surrogacy subsequently prohibited for foreigners.

Autonomy of person (liberty)?

16

- European Parliament study into commercial surrogacy practices noted
- the autonomy of the surrogate mother can be compromised throughout the process by her being forced by the commissioning person(s) and/or physicians to
 - undergo sampling tests, amniocentesis or vaginal ultra-sound;
 - receive pressures to change her diet or lifestyle;
 - terminate the pregnancy in case of a defective foetus; and/or
 - undergo a particular birth process.

Sale of Children?

17

Commercial Surrogacy: Equated to Sale of Children

18

- The United Nations Convention on the Rights of the Child (UNCRC) requires states parties to take ‘all appropriate national, bilateral and multilateral measures to prevent the...sale of or traffic in children for any purpose or in any form’.
- Article 2 of the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography (OPCC) defines the sale of children as ‘*any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*’.

Commercial Surrogacy: Equated to Sale of Children

19

- Commercial surrogacy involves **a transaction** between **commissioning person(s)** and a woman (directly/via a broker), in which it is intended that the **woman** will carry a pregnancy and bear a child/children, and then permanently **relinquish the child(ren)** to the commissioning person(s), in exchange **for a fee (*for profit*)**.

‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’

Commercial Surrogacy: Equated to Sale of Children

20

The nature of the contract – sale of children?

- **Note, at a domestic level, NSW laws prohibiting commercial surrogacy are listed by the Australian government as being ‘an explicit prohibition of the sale of children’ pursuant to Australia’s obligations under the OPCC.**
- *Surrogacy Act 2010 (NSW), s 8*
- Attorney-General’s Department (Commonwealth), Australia’s response to the List of Issues – *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 4-5 June 2012.

Freedom to Contract?

21



Commercial Surrogacy: The Surrogate: Freedom to contract?

22

- On the other hand, advocates for commercial surrogacy state the payment is actually for ‘*services*’ rendered by the surrogate and that she is simply ‘*hiring out*’ her womb.
- This argument is made particularly when the arrangement is one in which the surrogate is not genetically related to the child.

Commercial Surrogacy: The Surrogate: Freedom to contract?

23

- Such arguments often:
 - Deny biological connection
 - Deny status of woman as ‘mother’ (assumption that the baby is not hers particularly when she is not genetically connected to child)
 - Use language to deny nature of transaction

Commercial Surrogacy: The Surrogate: Freedom to contract?

24

It is the rendering of pregnancy and birth, and the delivery of a child to others for *financial profit*, that is of concern.

- ✦ This is so whether the surrogate is wholly autonomous and a willing party to the ‘contract’ or whether she is herself exploited

Commercial Surrogacy: The Surrogate: Freedom to contract?

25

- Many nations have taken the view therefore that,
 - whatever the ‘intent’ of the parties;
 - the freedom or otherwise of the surrogate to contract generally;
 - the touted ‘win-win’ situation for surrogates and commissioning person(s); or
 - the difficulties now faced in regard to cross-border surrogacy and legal parentage,

the creation and birth of a child, and the subsequent rearing of that child, should not be determined by the terms of a private commercial transaction based upon a commercial contract.

OTHER ISSUES

26

OTHER MATTERS

27

- Worse case scenarios
- Disturbing examples of child sex offenders using commercial surrogacy in attempts to/as a means to access children
 - Mark Newton (US) and Peter Truong (Australian) – numerous surrogacy attempts in Russia (but failed IVF); finally bought a boy off an already pregnant Russian woman; sexually abused from 2 wks – 6 years old;
 - Known paedophile in Israel, now ‘legal parent’ of girl obtained through commercial surrogacy;
 - US national marries Australian woman; they enter commercial surrogacy arrangement → twins, later children are removed when ‘father’ linked to sex abuse ring

OTHER MATTERS

28

- Other people/couples who want to be parents:
 - People going overseas to engage in practices not permitted in their home country:
 - ✦ Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights;

WHAT TO DO?

29

AN INTERNATIONAL CONVENTION ON SURROGACY?

International Convention

30

- Some argue there is an urgent need for a multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy'

International Convention

31

- **Would need to consider the focus of such a convention.**
 - Protecting women?
 - Protecting children?
 - Need care not to facilitate/perpetuate disparities discussed above.
 - Why have a convention when the majority of countries prohibit commercial surrogacy?
 - Would convention provide for prohibitions on brokerage; payments; etc?

Still need domestic laws...

Minimum Standards

32

- Jurisdictions that do not wish to permit commercial surrogacy must be able to continue to prohibit such practices.
- Extraterritorial prohibitions (Eg. NSW, ACT, Qld) need to be enforced.
 - (NB. Legal-parentage/citizenship applications should not be a ‘back-door’).
- Human trafficking concerns need to be addressed
- Laws are needed regarding information about, and contact with, surrogates, egg providers, and the children born as a result
- Consideration should be given to prohibiting profit by lawyers, brokers, clinicians.

Minimum Standards

33

- Re the minority of countries that choose to permit commercial surrogacy they might explore possibility of limiting permissions to people who are permanently domiciled in those countries.
- They too need laws to protect women and children; for example:
 - Independent counselling
 - Independent legal advice
 - Prohibitions on brokers, limits on legal fees, limits on fees/charges clinics/doctors?
 - Information exchange; contact with children
 -

WHAT TO DO IN AUSTRALIA?

34

**BETTER IN OUR OWN
BACKYARD?**

Commercial Surrogacy

35

- Permitting CS would be contrary to Australia's obligations under CRC and OPIC, and its own declared recognition of prohibitions on commercial surrogacy as being a direct satisfaction of such obligations.
- A fallacy to use the argument that 'everything would be OK if we did it here...'

Commercial Surrogacy

36

- Caution should be had regarding who is making calls for commercial surrogacy:
 - Doctors (who would profit)
 - Lawyers (who would profit)
 - People who have engaged in commercial surrogacy abroad
 - Some academics (some who are parents of children born as a result of assisted reproduction or who have sought surrogacy services themselves)
 - ✦ cf other academics who are concerned about human trafficking; the exploitation of women; social and economic disparities b/w commissioning person(s) and surrogates; and commodification of women and children.

Commercial Surrogacy

37

- If people engage in surrogacy overseas, there is a need to determine what to do about status of children. But, issues concerning 'legal parentage' are not in themselves a reason to permit commercial surrogacy.

Commercial Surrogacy

38

NHMRC Guidelines:

It is ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes.

Clinics must not undertake or facilitate commercial surrogacy arrangements.

Commercial trading in human gametes and/or the use of direct or indirect inducements, must not be undertaken

Current law and policy

39

- 2009 Standing Committee Attorneys-General Australian Health Ministers' Conference Community And Disability Services Ministers' Conference Joint Working Group A Proposal For A National Model To Harmonise Regulation Of Surrogacy:
- *The proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia.*

It is judged that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones.

Commercial Surrogacy

40

- **My conclusion:**
 - Australia should not join the ranks of Georgia, Russia, Ukraine, Mexico, and some U.S. States (the minority).... in permitting commercial surrogacy (including by any other name – aka ‘compensated’ or ‘for-profit’ surrogacy)