

## Wombs for rent, outsourced pregnancies, baby farms - ethics and surrogate motherhood

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### ABSTRACT

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The history of surrogacy is composed of cases of happy solving family problems, but also of conflicts and lawsuits concerning a child and his welfare. In modern times it became the next to adoptions additional possibility of ensuring infertile individuals fulfillment of their dreams of posterity. It can also be used for comfort of a woman - to avoid the burdens of pregnancy and delivery, or for

a comfort of a man – to be a single father without a mother of a child, wife and family ties with her. Since its beginning in late 70-ties of XX century, legality and ethical aspects of surrogacy are lively discussed, as well in the court rooms, as in the doctrine. The following article is an attempt to deal with just some of the mentioned ethical problems.

**Key words:** Surrogacy, surrogate mother, child, welfare of a child, ethics.

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## INTRODUCTION

In 2007 the Yamadas, Japanese couple, traveled to India to hire a surrogate mother to bear a child for them. The surrogacy contract was concluded via the Akanksha Infertility Clinic with an Indian woman. As its consequence an embryo from Mr. Yamada's sperm and an egg harvested from an anonymous Indian woman was created and then implanted into surrogate mother's womb. Unfortunately even before a baby was born the Yamadas have divorced - baby Manji was born a month later, in July 2008. Mrs. Yamada, genetically unrelated to the child and divorced to her father, was not interested in raising the child - unlike Mr. Yamada. Baby Manji, although conceived of a desperate desire to parentage, seemed not to have any parent at all. The genetic relation with her father was medically granted, but unluckily for him Indian law did not address surrogacy and the only way to establish fatherhood was adoption - not allowed in a case of a single man and a baby girl. When it came to motherhood - the role of the donor was completed with the transfer of an egg, the contractual function of the surrogate mother - with giving birth to a child. Mr. Yamada's ex-wife did not even appear in India to have a child registered under her name [1-3].

This short true story shows almost every advantage and disadvantage of surrogacy, as the source of income and also a tool enabling the birth of a child to infertile people. The introduction of its legal regulation is usually accompanied by controversy of moral and ethical nature. Is it moral? Ethical? Whose interests should we protect? Should we take advantage of the achievements of medicine to manipulate matters previously reserved for nature and family? Obviously surrogacy can be harmful to women involved, both of them can suffer physical and emotional pain. Pregnancy is a huge effort for woman's body, the more if forced by the hormonal therapy. It is risky to remove eggs, to implement embryo into uterus, bear hormonal treatment and give birth to a child. The surrogate mother is at a higher risk for postpartum complications: hemorrhaging and exhaustion. The practice of implanting more than two (up to five) embryos may result in preeclampsia, gestational diabetes or blood clots [4]. It is likely that the surrogate mother will undergo stress, despair, desperation and longing after giving a child away, also the social stigma of surrogacy. Change of her mind will generate a desperation of the other woman. Common understanding of surrogacy involves threats to a surrogate mother and to a child, seeing a woman as a tool not a person, stereotype of exploitation of poor, young and uneducated surrogate mother by the rich, educated intended parents [5], a hidden child trafficking, excellent tool enabling a procreation of homosexuals, etc. Taking into account these opinions it seems reasonable to analyze some of the ethical issues surrounding surrogacy.

**Thesis 1:** Surrogacy is a new phenomenon, deconstructing motherhood and its role.

Regarding the novelty of the surrogacy, its origins are usually seen as documented in the ancient acts establishing the basis of religious beliefs. Admittedly and paradoxically, now it is religions that contest the acceptance of surrogacy, because it can be a form of adultery or at least lead to incest, unjust inheritance and manipulation of the God's will [6]. However, the Christians are confronted with at least two biblical stories of traditional surrogacy from the Old Testament. 'Abram's wife Sarai had borne him no child, but she had an Egyptian slave-girl called Hagar. So Sarai said to Abram, 'Listen, now! Since Yahweh has kept me from having children, go to my slave-girl. Perhaps I shall get children through her.' And Abram took Sarai's advice' [7]. 'Rachel, seeing that she herself gave Jacob no children, became jealous of her sister. And she said to Jacob, 'Give me children, or I shall die!' This made Jacob angry with Rachel, and he retorted, 'Am I in the position of God, who has denied you motherhood?' So she said, 'Here is my slave-girl, Bilhah. Sleep with her and let her give birth on my knees; through her, then, I too shall have children!' So she gave him her slave-girl Bilhah as concubine. Jacob slept with her, and Bilhah conceived and gave birth to a son by Jacob. Then Rachel said, 'God has done me justice; yes, he has heard my prayer and given me a son.' Accordingly she named him Dan. Again Rachel's slave-girl Bilhah conceived and gave birth to a second son by Jacob. Then Rachel said, 'I have fought a fateful battle with my sister, and I have won!' [8]. Another order from the Old Testament: 'Be fruitful, multiply, fill the earth and subdue it. Be masters of the fish of the sea, the birds of heaven and all the living creatures that move on earth'[9], can lead straight to the modern Israeli acceptance of almost any mode of procreation. In Hinduism, a woman named Yashoda raised Krishna and played a role of his mother in place of Devki, his biological mother, who, together with his father Vasudeva, was locked up in jail. According to Mahabharata, Dhritarashtra was the father of 100 children, although there was no biological relations between them and the conception was strongly mysterious[10]. All these texts in more or less mythical manner describe the historical events that supposedly should raise ethical objections in the modern era of rationalism. Probably there are two reasons why they are not surprising or repulsive:

- 1) although the stories are essential elements of religion, at the same time they are treated as unreal fairytales
- 2) what was allowed in the past is no longer accepted in presence.

Regarding the deconstruction of motherhood, the traditional concept of mother and father is accompanied by changing ideas concerning

family – its shape and role. As it was rightly pointed out in the literature, ‘the concept of family is more flexible than that of mother’, but also ‘natural motherhood is culturally perceived to be the most natural of all relationships, and is, therefore, resistant to social reconstruction’[11].

Using the word ‘deconstruction’ in 19th century original sense meaning ‘taking to pieces’[12], we will end up calling into question the traditional meaning of the term motherhood. But it does not lead to any revolution – the changing definition of the words ‘mother’ or ‘motherhood’ was emphasized by the legal dictionaries at the end of the twentieth century. The only revolutionary issue is the number of women to be treated as a mother of a child at the same time. Especially in lack of legal regulation of surrogacy, establishment of motherhood can be problematic. The problem can be much bigger – presumptions connect motherhood strongly with fatherhood. Instead one nuclear family consisting of a mother, a father and a child we will find a sort of brain teaser, a puzzle to solve: three women who can play a role of a mother, three men who can play a role of a father and one child. The easiest way to deal with the problem is to accept as a rule that always there is only one mother and the rest of the women can only play her part, never be the one. Even temporary assumption that a surrogate is a mother (biologically) only for nine months [6] is incorrect.

The next step leads to pointing out a criterion of indication of the right and one mother. According to traditional way, the criterion is biology, according to post in vitro method – biological relation understood as gestational, and genetic relations understood also as being a donor of an egg, according to the modern American judgments – biology, gens, the welfare of a child and the intent to have and bear a baby. According to one of them, blood test evidence, which establishes genetic relationship, is conclusively more persuasive than childbirth evidence, which establishes gestational relationship. The genetic mother inevitably prevails over the gestational mother as the natural parent of the child. The sine qua non of natural motherhood is the genetic aspect, which is the type of biological relationship which the natural father also shares with the child [13]. A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices. She agrees to provide a necessary and profoundly important service without any expectation that she will raise the resulting child as her own [13]. But also – ‘she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother’[13].

The problem with choosing the criterion is that until recently giving birth and being related by genes were impossible to separate. Today, when analyzing the legal norm stating that a mother of a

child is a woman who gave birth to him, we ask: are we sure that the legislator’s intention was to disregard genetic relation between them, especially when the rules regulating fatherhood demonstrate the importance of genetic ties?

**Thesis 2:** A mother cannot give her child away.

Emotional and sentimental connection between mother and a child is considered the strongest of family ties - incomparable even to relation with the father. As far as the abandonment of the child by the father is not a reason for him to be subjected to ostracism, the mother in the same situation will be unequivocally negatively judged, or even stigmatized. In most of the countries a mother abandoning her child is not allowed to decide about his future situation. Which means that she is not able to decide that someone else will execute her functions towards the child, she cannot pass the child to someone else together with all the parental responsibilities, duties and rights. It is not possible even if another person is willing and eager to accept them. A concept of carrying pregnancy and passing a child to someone else is regarded as incompatible with the nature, even if compatible with the development of medical knowledge. Analyzing the phenomenon from this angle, we should state that the term ‘surrogacy’ covers three different situations - three different types of surrogacy. ‘Giving *her* child away’ after the birth, common for all the types, means something else in each of them. In traditional surrogacy a woman carrying a pregnancy is genetically related to a child. She is giving a birth to her own child – she is at the same time surrogate mother, genetic mother and biological (gestational) mother. The term ‘giving a child away’ refers to her own child. In the remaining two types of phenomenon, the surrogate mother is not genetically related to a child. Both are called gestational surrogacy, the difference between them is the origin of an egg. In the first one the egg is taken from so called intended parent, the term means a woman who is usually a party of a surrogacy contract and who is willing to be a mother to a child. A woman wearing a pregnancy is the surrogate mother and biological (gestational) mother – she is not a genetic mother. If we accept the concept that motherhood is based on the genetic bond, surrogate mother gives away a child to his genetic mother. If we decide that the fact of giving birth to a child is the sufficient proof of being his mother, then a surrogate mother will be treated as his mother, regardless the lack of genetic ties between her and a child. In the third situation a woman carrying a pregnancy (surrogate mother and biological/gestational mother) is not related to a child and the egg comes from a donor (genetic mother). According to the genetic bond concept, one no-mother (surrogate mother) passes the child to another no-mother (intended parent). The role of the donor is limited to providing an egg, she does not

even participate in the surrogacy contract. Finding the theory of the intent (to have and bear a baby) attractive and legally effective, leads to giving a child away to the other party of the contract – thus legitimizing surrogacy.

**Thesis 3:** Surrogacy is against the welfare of a child.

Assuming that the thesis is true we speculate about the non-existent child. We cannot assess the child's best interest until a child is born. As a matter of fact, the doctrinal discussion shows that 'no matter how maltreated or unwanted a child may be, he is better off than never having been born' [9]. In cases of surrogacy, in contrast to the traditional births, a child is always born because of evident and expressed wish of a person willing to have a baby. This person is ready to take over all the parental responsibilities and to raise a child. At first glance, it appears that there is a connection between the true intent and the welfare of a child. There is no legal definition of the welfare/best interest of a child or factors to be considered in Polish law. American statutory law prescribes these factors, the most common for state regulations are [14]:

- 1) the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers
- 2) the capacity of the parents to provide a safe home and adequate food, clothing, and medical care
- 3) the mental and physical health needs of the child
- 4) the mental and physical health of the parents.

The best interests test is applied in the court to help the child become a well-integrated person who might reasonably be expected to be happy with life [15-17]. There is no evidence that a child conceived as a result of surrogacy contract will be harmed more by his family, than any child born in regular way - will suffer more neglect, abandonment, physical abuse, receive less nurturing and love [15]. However, potential harm for child's welfare may accompany a situation when a newborn is handicapped, seriously sick, physically deformed or mentally retarded. It is probable that the intended parents will not wish to accept such a child, when they expected their own perfect one [15].

**Thesis 4:** Surrogacy brought the woman to the role of tool to bear children.

The stereotype of surrogacy provides exploitation of a poor surrogate mother by wealthy intended parents. At the same time it presents her as a toy and a desire to have a child as a whim or a fleeting caprice. Poor vs rich scheme was evident in the first American surrogacy case, *In Re Baby M*. The surrogate mother was obviously younger than intended parents (she was 29), less educated (she

finished education in the middle of tenth grade, they were educated professionals), poorer (filed for bankruptcy, married to a garbage truck driver having alcohol problems, with two children vs biochemist and pediatrician). The crack in this scheme was the fact of serious illness of one of the intended parents and a desperate will to rebuild the genetic family by the other one, because the family nearly had vanished during the Holocaust [16]. The question who is used as a tool will emerge in every case of surrogacy. Claiming that every time a poor, young and unexperienced girl is a victim of someone's caprice is an exaggeration. It seems that most of the contracts concluded in developed countries are motivated by money - the surrogate mothers are motivated by the possibility of income, being maintained during pregnancy or having compensation for unemployment during pregnancy. American literature shows a picture of rather mature, experienced, financially and emotionally stable women aware of decisions taken and their consequences [18]. Differently in poor countries, where surrogacy may be the only way to survive, women forced by economic necessity become a passive instrument in the hands of intermediaries and intended parents. It is doubtful whether they take decisions freely and voluntarily, while having very limited employment opportunities. They are unable to refuse an offer of inconceivably large sum of money 'just' for being pregnant, which is usual woman's task [4].

The other party of the contract is usually a person with health problems preventing her from giving birth to a child. In every attempt to define surrogacy or its parties there is a place to prescribe an intended parent as infertile (for example: a surrogate mother is a woman who carries and gives birth to the child of another woman, who is usually infertile, by way of a pre-arranged legal contract [19]). Each surrogacy most definitely refers to someone desperate or someone forced by situation, this is not always, however, surrogate mother. Also, usually interests of both parties of the surrogacy contract coincide, even though their objectives are different [15].

Suspicion of exploitation in conjunction with the emotional effects of giving a child away may lead to a prohibition or restrictions of surrogacy. But harm resulted by abortion, adoption or surrender of parental rights, in doctrine's opinion equal or exceed the one caused by surrogacy, is not enough to restrict them or dispose of them [20]. According to Gostin, the reproductive freedoms of unwed mothers or 'conventional' families with a history of child neglect, drug or alcohol abuse, or congenital disease such as AIDS are unrestricted and there is not enough evidence of potential harm to the children to justify banning commercial surrogacy [15].

**Thesis 5:** Surrogacy competes with adoption.

Treating surrogacy as a threat to adoption is correct, but due to the lack of reliable data on the scale of surrogacies it is difficult to assess the degree of risk. The surrogacy contracts are easier to implement than adoptions, the latter are subject to prerequisites and requirements limiting the number of adoptive parents and children. Both national and intercountry procedures of adoption are long, also consuming money. Some of the potential adopters are not allowed to apply – homosexuals, singles, single men willing to adopt baby girls, persons over certain age. The most important factor making surrogacy more attractive than adoption is the possibility to have a newborn child genetically related to at least one of the intended parents. Repeating after J. Hill ‘while adoption may satisfy one's desire to provide nurturance for a child, adoption cannot satisfy the yearning to create the child and to watch as a version of oneself unfolds and develops’ [21]. Following this path leads to conclusion: we do not need adoptions while we have surrogacy.

As to the facts and figures published by state institutions, American Centers for Disease Control initiated in 1996 data collection regarding ART procedures performed in the United States including those infertility treatments in which both eggs and sperm are handled in the laboratory for the purpose of establishing a pregnancy (in vitro fertilization and related procedures) (Table 1). More than 326 thousand children were born as a result of ART procedure during period 2000-2006, while over 203,5 thousand – between 2012 and 2014. Their data shows steady increase in the number, for instance the number of ART cycles performed in the United States from 2003 to 2013 has increased 28%, from 122,872 cycles in 2003 to 157,662 in 2012, the number of children born in 2014 is twice higher than in 2000 [22]. They do not show the number of cycles performed with the involvement of surrogate and intended mothers. However, we can presume that this number is growing- because of steadily decreasing number of intercountry adoptions with a constant percentage of infertility.

**Table 1.** ART procedures in numbers

Year	Number of procedures started	Number of live birth deliveries	Number of live born infants
2000	99,629	30,557	35,025
2001	107,587	35,726	40,687
2002	115,392	40,046	45,751
2003	122,872	43,503	48,756
2004	127,977	44,774	49,458
2005	134,260	47,651	52,041
2006	138,198	50,571	54,656
2007	142,435	43,412	57,569
2008	148,055	46,326	61,426
2009	146,244	45,870	60,190
2012	157,662	51,267	65,160
2013	163,209	54,323	67,996
2014	208,786	57,332	70,352

The most reliable source of information on the biggest market of intercountry adoptions shows the instant decrease of their number in US since 2004. There were over 242 thousands adoptions between 1999 and 2012. In 2004 and 2005 the Americans adopted nearly 23 thousand children a year. In recent years numbers are significantly distinct - 8 668 (2012), 7092 (2013), 6438 (2014) and 5647 adoptions in 2015. This is the lowest number recorded by the US Department of State [23].

## CONCLUSIONS

Surrogacy is a complex phenomenon. It can certainly be a source of deception of the child's origin and of a conflict between persons willing to be mothers and fathers of a child. But not mentioning the most controversial issue of procreation of homosexuals, we still can ask if infertile people should have the possibility to have children? [24].

Surrogacy is an extreme solution that should be applied exceptionally. Its nature is to create a socially unacceptable situation – in the frame of half natural half artificial family. Conflicts between individuals willing to be parents concerning a child do not astonish, while the consent to give a child away after pregnancy provokes the opposition. Generally the behavior of surrogate mother surprises. Although it is usually assumed that her conduct is commercially motivated, she, in general, can hardly be judged or condemned. An attempt of explaining the psychological motivations and intentions of the surrogate mother shows that ‘all parties concede that it is unlikely that surrogacy will survive without money’ [16], but also ‘the surrogate's act as altruistic and rewarding in and of itself’ [25]. She connects her ‘domestic sphere to the public world of paid employment while reinforcing her own self-definition of being a female, a wife, and a mother’ - she ‘chooses pregnancy because she is confident it is a skill she possesses’. Also, ‘the act of

surrogacy allows surrogates to elevate the traditionally devalued reproductive parts of their identity and be conferred a special status' [25].

Surrogacy, practiced for a long time but probably not very frequently, acquired a new character with the development of artificial procreation. Now it is performed more often with the awareness of the changing meaning and definition of family. Persons concluding the surrogacy contract are determined to have its effects legally recognized. Taking into account the above, suitable summary of ethical approach to surrogacy is the opinion of E. S. Scott. Well-designed regulation can significantly mitigate the potentially most tangible damage that the surrogacy may cause. This seems to be an appropriate function of the law in a liberal society, in response to the issue as to which there is no social consensus [26].

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