

# Controversial issues of maternity substitution

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**Abstract:** Substitute maternity consists in a woman carrying a pregnancy (the implant of an embryo), at the request of a sterile couple, most of the times in exchange of a sum of money, with her commitment to unconditionally give away the newborn after birth to the couple she concluded the agreement with. Many controversies emerged in what concerns the contract between the sterile couple and the carrying mother, especially when this contract is by onerous title, which happens in most of the cases. In that a civil contract? Is it a sales contract for the child? Is it a contract to provide services? Is it body marketing? Between total prohibition and excessive liberalism, the middle way, which is the regulation according to ethical religious, cultural and social norms of each community, represents a realistic solution.

**Keywords:** surrogate mother, maternity substitution, contract

## 1 Introduction

In the international legislation and the internal law, the concept of “carrying mother” (“substitute mother”, “surrogate mother”, “mere partnese”, “uterus rental”) describes the woman who accepts to carry a pregnancy (made possible by the implantation of an embryo, obtained in the laboratory from the couple’s gametes, or by the insemination of that woman with the husband’s sperm), instead of another woman and gives birth to her child instead.

Having another woman bear a child for a couple to raise, usually with the male half of the couple as the genetic father, is referred to in antiquity.<sup>1</sup> Attorney Noel Keane is generally recognized as the creator of the legal idea of surrogate motherhood. However, it was not until he developed an association with physician Warren J. Ringold in the city of Dearborn, Michigan that the idea became feasible.

There is a default legal assumption in most countries that the woman giving birth to a child is that child's legal mother. In some jurisdictions the possibility of surrogacy has been allowed and the intended parents may be recognized as the legal parents from birth. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others the possibility of surrogacy is either not recognized (all contracts specifying different legal parents are void), or is prohibited.

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<sup>1</sup> For example, chapter 16 of the Bible relates the story of Sarah's servant Hagar bearing a child to Abraham for Sarah and Abraham to raise.

It is obvious then that the substitute maternity was conceived as an unnatural way to allow a woman to become a mother. Resorting to a “carrying mother” is made when the impossibility of the egg cells donor to carry a pregnancy or her life it put at risk by it, is observed.

In case of substitute maternity, there are three subjects that participate: the husband, the wife and the carrying women who chooses to carry the pregnancy and to deliver for the couple and any convention that has as object the set up of the child’s maternity other than the one that gave birth to him is accordingly totally null.

The new Romanian Civil Code project prohibits any type of convention that could have as purpose the procreation or the carrying of a pregnancy for another person.<sup>1</sup> This legal provision - included in the Project for the new Civil Code - discards the fact that resorting to a “carrying mother” is a reality and it continues to be made, in absence of the law.

In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." This law made Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state (Teman, 2002). A state-appointed committee permits surrogacy arrangements to be filed only by Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates (Weisberg, 2005). The numerous restrictions on surrogacy under Israeli law have prompted some intended parents to turn to surrogates outside of the country. Some turn to India because of its low costs. Others use USA surrogates where an added bonus is an automatic USA citizenship for the newborn.

Commercial surrogacy has been legal in India since 2002. India is emerging as a leader in international surrogacy and a destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates.

In all states in Australia, the surrogate mother is deemed by the law to be the legal mother of the child as well, and any surrogacy agreement giving custody to others is void. In addition in many states arranging commercial surrogacy is a criminal offence, although the Northern Territory has no legislation governing surrogacy at all.

In France, since 1994, surrogacy, commercial or not is considered as unlawful and sanctioned by the law. In the province of Quebec, any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.

Since 1997 ovum and sperm donation and surrogacy is legal in Georgia. According to the law a donor or surrogate mother has no parental rights over the child born. In Georgia the compensation of the surrogate mother does not exceed EUR 9 000 during the pregnancy period and after the birth of a child (post-natal rehabilitation period). The major part of the surrogate mother's compensation shall be paid after the seventeenth week of pregnancy and in the post-natal rehabilitation period.

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<sup>1</sup> Article 461 of the Project on the new Civil Code states that: “Any convention whose purpose is the procreation or the carrying of a pregnancy for another person is null.”

The analysis Parliamentary Commission of the new Romanian Civil Code decided that the families that cannot have children should be allowed to resort to a surrogate mother, who can carry the pregnancy that will result in the birth of the child wanted by the infertile couple.

During the pregnancy, the mother can modify the agreement because she is the legal mother and taking into account the fact that in most countries, the genetic filiations is complemented by the gestation. Substitute maternity is contested in virtue of the intangibility of the human body, as an affront to dignity. Resorting to a substitute mother can be caused by human solidarity, varying in fact between the two types: solidarity and body marketing.

## **2 Ethical issues**

A study by the Family and Child Psychology Research Centre at City University, London, UK in 2002 concluded that surrogate mothers rarely had difficulty relinquishing rights to a surrogate child and that the intended mothers showed greater warmth to the child than mothers conceiving naturally (MacCallum, 2003). Anthropological studies of surrogates have shown that surrogates engage in various distancing techniques throughout the surrogate pregnancy so as to ensure that they do not become emotionally attached to the baby. Many surrogates intentionally try to foster the development of emotional attachment between the intended mother and the surrogate child. Instead of the popular expectation that surrogates feel traumatized after relinquishment, an overwhelming majority describe feeling empowered by their surrogacy experience (Ragone, 2001).

In fact, quantitative and qualitative studies of surrogates over the past twenty years, mostly from a psychological or social work perspective, have confirmed that the majority of surrogates are satisfied with their surrogacy experience, do not experience "bonding" with the child they birth, and feel positively about surrogacy even a decade after the birth. Assessing such studies from a social constructionist perspective reveals that the expectation that surrogates are somehow "different" from the majority of women and that they necessarily suffer as a consequence of relinquishing the child have little basis in reality and are instead based on cultural conventions and gendered assumptions. Still, surrogacy continues to be a widely debated subject which has been widely criticised by feminists, who claim that surrogate motherhood is a form of commodifying and dismembering the female body and thus a patriarchal form of violence, not unlike prostitution.

Human life begins with the fecundated cell and there is no stage in which one can have the right to interrupt it. Which is the middle way and who is right? The attempt to assist God in the human creation puts us on a road full of ethical difficulties. The same thing can be said about the attempt to save God's creation, using the other people's vulnerability that cannot fight back: the embryos.

Pope John Paul the Second (24 May 1996) called the doctors to stop these procedures: "I appeal to the world's scientific authority's conscience and most of all the doctor's conscience that the embryo production be stopped, bearing in mind that this is not a moral or legal solution for the destiny of thousands of frozen embryos, that should be legally protected as human beings."

The European Council's Parliamentary Assembly, through Recommendation 1046 (1986), on the use of embryos and human fetus in diagnostic, therapeutic, scientific, industrial and commercial purposes,

provides inquiries on reports related to embryo and dead fetus marketing, publishing the results, constraints in the industrial use of human fetus as well as tissues and their products, sanction provisions in order to ensure the laws applied in the aforementioned recommendation, facilitation and encouragement for establishing committees or national multidisciplinary commissions on artificial techniques of human reproduction and scientific activities on genetic material, embryos and human fetus. Continuing and studying the issues related to the use of embryo tissues and human fetus in scientific purposes and elaborating a European convention or any other judicial instrument open to all non member countries of the European Council is also mentioned.

The recommendation also commissions the competent commissions to prepare a report on the use of embryo and human fetus in scientific purposes, taking into account the necessity to establish a balance between the principle of freedom of scientific research and the principle of respecting the human dignity, as well as on other issues that concern human rights protection.

The Assembly states that science and technology and most of all biomedical science and biotechnology continue to make progress and that their freedom of action cannot be limited, but only by dedication, judicial, ethical, cultural and social principles, that aim at protecting the human rights and freedoms, the individual and social human being.

The immediate establishment of national or regional multidisciplinary courts (mentioned in Recommendations 934 (1982) and 1046 (1986)) is necessary and these courts will have the duty to inform the community and the public organs on the scientific and technical progress accomplished in embryology and in biological research and experiment, to orientate and control the application possibilities, to evaluate the results, the advantages and inconveniences, including dimension represented by the human rights, human dignity and other ethical values and authorize, in virtue of an existent regulation or a delegation system, the empowerment, with this effect, of the scientific, research or scientific experiments projects in these fields. What is also mentioned is the examination of recommendations, in virtue of the considerations contained in the annex of the present recommendation and provide sanctions for its breach; the analysis and inventory of all the legal knowledge related to human reproduction and biomedicine and create the proper conditions for all the member and non member states of the Europe's Council to contribute, through national initiatives, to the elaboration of a common judicial instrument, such as a European Convention on Human Biomedicine and Biotechnology, which will be open for all the non member states of the Organization.

Research on dead embryos, in scientific, diagnostic or therapeutic purposes must be prior authorized. The prelevation of cells, tissue or embryo or fetus organs, placenta or membrane should be prohibited, if they are viable for any type of research that doesn't have a diagnostic purpose and a prevention or therapeutic purpose. Those who have extracted an embryo out of the uterus, fetus or one of their components must be rigorously punished, without clinical or judicial justification or without prior consent of the pregnant woman or her husband or partner; the same sanctions must be applied to the people who used this embryo material without complying with the legislation.

The donation of human embryo material must be authorized only if its purpose is the scientific research in diagnostic, prevention or therapeutic purpose, and its sell is prohibited. Buying and selling embryos, fetus or their components by the genitors or third parties, as well as importation or exportation of such products must be prohibited.

In what concerns substitute maternity, we are witnessing a clear dissociation between pregnancy and maternity as well as a pre-birth adoption. If, in a case in which the egg cell and the sperm come from a sterile couple, the social and legal equivalence with the birth and even with the biological filiations can be accepted, in other cases, the child's situation is more complicated. The egg cell can belong to another woman or even the carrying mother. In order to accept the adoption, isn't the mother's consent necessary? Which one is the mother?

If maternity is proved by the act of birth, the newborn is ab initio the carrying mother's child. In order to be "delivered" to the couple that ordered it her consent is needed, outside the contract. We can witness the dissociation between the biologic and sociologic paternity, when an artificial insemination (or in vitro fertilization) has an anonymous donor (Bernard, 2002).

The situation can become even more complex if the carrying mother is married and her husband has paternity claims when the child is born. It can get to a case in which six parents dispute a child and each one of them has ethical, psychological and legal arguments to justify the paternity. What has to be clarified is which one of the maternities/ paternities should be accepted: the genetic, legal and sociological one, or the intentional one.

### **3 Legal issues**

There are many controversies in what concerns the contract concluded between the carrying mother and the sterile couple, most of all when this contract is by onerous title, which is in most of the cases.

Is it a civil contract? Is it a child selling contract? In this case, the contract is null because most of the civil codes (including the Romanian Civil Code- article 998-999) declares as being null all the contracts that have as object commodities that are excluded from the civil circuit, and life is part of this commodities.

Is it a contract to provide services, a contract to carry a child, inside the uterus, a price of the uterus or an anticipated renunciation of parental rights?

It is very hard to admit the fact that is a contract for providing services, because in case on substitute maternity, it can be finalized or not, without the possibility to impose its compliance. Nothing can oblige the carrying mother to deliver the child to the sterile couple, without a court order. She can modify the agreement in any stage of the pregnancy. She is the legal mother because of the genetic filiations complemented by gestation in most of the countries, and this varies according to the judicial decision.

The New Jersey Tribunal, in the case Baby M. in 1998, made an appeal to the child's interest argument, when it accepted the sterile couple's request to be given the child retained by the carrying mother and not to the genetic filiations or to the execution of the contract.

Is it a marketing of the body? Then the contract breaks the principle of non- marketing the human body or not?

When made in exchange of money, there is no doubt that we are witnessing this type of situation. That is why the substitute maternity is contested in the name on the intangibility of the human body, as an affront to dignity. The risk of women exploitation is real and it has to be taken into consideration and prevented.

But there can be the case in which the substitute maternity has human solidarity reasons. In reality, substitute maternity oscillates between the two types: solidarity and human marketing. That is why a complex solution is necessary to solve a complex problem.

Between the total prohibition and an excessive liberalism, the middle way, the regulation according to ethical, religious, cultural and social norms of each community is a realistic solution.

In what concerns the child's paternity, it must be showed that the carrying mother is married or will be married until the child's birth, her husband becomes the child's father, in virtue of the paternity presumption, and in case the woman is single, the paternity of the child will be established and he can be recognized by any man, including the third donor.

#### **4 Conclusions**

We all saw at least a movie in which, after birth, the carrying mother or the surrogate mother did not want to give away the baby to the biological parents, justified by the attachment to the human being that evolved in her uterus.

In order to prevent these situations from happening, the future law should comprise more safety measures. We refer to a series of documents that will be concluded before starting the medically assisted human reproduction procedures, between the assisted couple and the carrying mother, if she is not married, documents that will be legalized by a Public Notary's Office:

The consent of the carrying mother, to help the reproductive couple, to have one or more children, by participating to the in vitro fertilization, pregnancy and birth.

The carrying mother's declaration concerning the cession of parental rights to the assisted couple and the agreement to entrust the child after birth.

The consent of the carrying mother in case of abortion in the first three months of pregnancy, at the assisted couple's request and only under medical supervision.

The carrying mother's consent, if she is married, in what concerns the in vitro fertilization procedure, keeping the pregnancy resulted after the in vitro fertilization with genetic material donated by third parties, selective abortion at the beneficiary couple's request and the cession of the parental rights and obligations, including her registration in the child's birth certificate and the agreement to entrust the child after birth to the assisted couple.

The assisted couple's consent to be entrusted with the child after his birth, regardless of his/hers health condition.

The contract that must state the carrying mother's prohibition to abort the pregnancy in absence of medical indications and without the assisted couple's approval, the medical obligations (treatment, periodical internment), the life regime of the carrying mother or surrogate mother in order that the pregnancy has a good evolution and development of the fetus, as well as the assisted couple's obligations to pay the expenditures related to the pregnancy.

Legally, those that have the right to use the carrying mother are the women that cannot have children because of physical inability or the ones that haven't been successful after the "in vitro fertilization". There must be a series of restrictions in order not to transform women into surrogate mothers only for the sake of material gain or the general trend.

The couple's embryo, fecundated in vitro, could be carried for nine months by another woman. She must be paid, legally, in order to complete the pregnancy and give birth to the child. The skeptical, representatives of the Medical College, say that in Romania there is no chance for a trend in "incubator-woman".

Scientific research in the medical field, as well as in other fields, cannot be stopped. Neither the Church nor the representatives of organizations that protect woman's and embryo's right, won't be able to oppose the explosion of information that assails us. As a response to the vehement attacks and critique, the researchers motivate their position by saying that they are doing all these things for the people. In order to interrupt an embryo's evolution with a chromosome anomaly - trisomie 211 for example is a social necessity? But can social necessity represent a moral reason? Can the attempt to create a perfect human being by manipulating embryo's genes be justified? What could it be used for and what would be the consequences of such an intervention?

The Romanian Civil Code project which contains the article that allows the legality of the surrogate mother will be discussed in the Parliament in May.

## 5 References

- Weisberg, K. (2005). *The Birth of Surrogacy*. Florida: University of Florida Press.
- Birenbaum - Carmeli, D. (2001). *Reproductive Technology among Jewish Israelis*. Oxford: Berghahn Books.
- MacCallum, F. (2003). *Surrogacy: The experience of commissioning couples Human Reproduction*.
- Ragone, H. (2001). *Surrogate Motherhood: Conception in the Heart*. Westview Books.
- Bernard, M. (2002). *The baby is a person*. Bucharest: Humanitas Publishing House.
- Beauchamp, T., & Walters, L. (2003). *Contemporary issues in bioethics*. Wadsworth Thompson Learning.
- Ennenga, G. (2008). *Gene Game: The New Laws of Evolution*. AuthorHouse.
- Evans, J. (2002). *Playing God? Human Genetic Engineering and the Rationalization of Public Bioethical Debate*. Chicago: University of Chocago Press.

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<sup>1</sup> It is a chromosome mutation which consists in mental handicap and characteristic physical appearance.