

## Medicolegal Forum: Surrogacy

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Surrogacy is a contractual arrangement which is basically divided into two types.

The first is "traditional surrogacy." This first type is an arrangement where the woman is impregnated with the sperm of a married man. The understanding is that the offspring is to be legally the child of the married man and his infertile wife. The second type of surrogacy is labeled "gestational surrogacy" where the sperm of the married man is fertilized artificially with the egg of his wife and the resulting embryo is implanted in the surrogate woman.

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The surrogate mother is providing an important service without any expectation that the child will be "her own." The prepared contract seems simple, but the words on paper often cannot reflect the feelings of the surrogate mother. The environment of the fertilized egg, which is genetically programmed needs to be nutritious and toxic-free. After the contract is signed, what can the biological parents do if the mother decides to smoke, drink, or participate in other activity which may not be in the fetus's best interest?

Another potential but very real problem is separating the biological from the custodial. That is, the surrogate mother may bond with this growing fetus inside of her and not want to honor the existing contract.

The surrogate mother advises the parents regarding her feelings and what can the parents do?

They have paid the surrogate mother for this service and now are challenged in deciding how to proceed. If they hire an attorney to enforce this contract, the mother now facing financial loss, might create a "hostile" environment for the fetus.

Commercial surrogacy, for example, is legal in India and California, but it is illegal in most other states in this country. In fact, India is now promoting "fertility tourism." In theory, a mother who needs money achieves her goal. The infertile couple now has a biologically related child, but there are commercial agencies, minimal legislation, and poor transparency.

There are penalties in many states which need to be considered. For example, Michigan, New York, Indiana, and other states have declared traditional surrogacy agreements null, void and contrary to public policy. Often gestational surrogacy is not addressed. On the other hand, states like North Dakota and Washington generally allow surrogate contracts but within very strict parameters. Other states, (Arkansas, Florida, and Illinois) for example allow surrogacy with complicated design contracts which require interruption from a sophisticated legal

analysis.

In California, a very liberal state, some believe that the surrogacy law violates the 14th Amendment, which is the denial of due process and equal protection rights. Petitions have been filed with the Supreme Court. There is a generation of children that are severed from their biological parents. Are we responsible and turning these babies into "commodities"?

We have emphasized some of the ethical and emotional considerations. Unfortunately, financial issues must be considered, as well. The surrogate mother may ask the parents for extra funds to provide better nutrition and improved living arrangements. Does this include a new car or condominium in a fashionable area?

It is an ethical, legal, financial, and emotional "tug-of-war." What happens in this age of advanced technology if the fetus is not "perfect"? Do the parents get their money back? Frequently, the desire for a baby outweighs the future consideration of how this "special child" will affect the composition and structure of the entire family.

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A cottage industry was "born." But ... too many contingencies. Too many variations. There certainly is "contract law." Is there biological law? Is scientific technology interfering with the needs of society? Why are there so many different state laws regarding surrogacy?

We describe today "baby-friendly" hospitals in many states. Do agencies that market to individuals seeking surrogate mothers advertise in "surrogate friendly states"? We have yet to see an advertisement attempting to attract families to move to a specific state stating, "we have liberal surrogacy laws."

The poem below was written in 1987 and entitled "Ode to Surrogation." It seems quite appropriate to include this in this month's medicolegal forum.

*The United States of America,  
A proud progressive nation.  
Has become deeply involved,  
In maternal surrogation.*

*A contract was drawn up you see,  
In simple terms, to please.  
Now attorneys and magistrates,  
Have added LEGALEEZE.*

*This issue friends, is not that new,  
With no concern for libel.  
Hagar bore Abram a son,  
It says so in the Bible.*

*No notes were drawn, no cash did pass,  
The deal lacked compensation.  
Sarah was miffed however at Hagar's  
Successful incubation.*

*Centuries passed, the practice grew,  
With gold and diamond purses.  
In Dicken's day, infants were fed,  
By loving gals...wet nurses.*

*Governesses, adoptive parents,  
All have roles to play.  
It is no wonder, that we've reached,  
This quandary of today.*

*Renting space to nurture life,  
Artificial insemination.  
No different in a Petri dish,  
Or test-tube procreation.*

*Ethical considerations,  
Are legally complex.  
It's not surprising that these techniques,  
Obfuscated sex.*



*The agreement of the service type,  
Like one you'd buy at Sears.  
The contract not for Baby M,  
So why then all the tears?*

*The answer lies within emotions,  
The psyche that governs all.  
Separation after bonding,  
Mom hears her baby bawl.*

*This problem will not go away,  
Support groups now add style.  
They've made a biological process.  
Become quite mercantile.*

*Surrogate Mothers Limited,  
A business with a range.  
Has offered shares to new investors,  
On the OTC exchange.*

*First will come the legal statutes,  
Then full blown legislation.  
As supply and demand do flux,  
There will be regulation.*



*The industry will process, I'm sure,  
Profits and laissez-faire.  
Finally forced to de-regulate,  
The public will see air.*

*A cottage industry born in Genesis,  
Though technically, no sweat.  
Has now become child battering,  
Or, "whose kid will you get?"*

*We cannot separate human feelings,  
From contractual restitution.  
Back to basics...consultation,  
The U.S. Constitution.*

Where do we go from here? Ethical and Medicolegal issues abound.

*The authors have no conflicts of interests to disclose.*

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**Disclaimer:**

**This column does not give specific legal advice, but rather is intended to provide general information on medicolegal issues. As always, it is important to recognize that laws vary state-to-state and legal decisions are dependent on the particular facts at hand. It is important to consult a qualified attorney for legal issues affecting your practice.**

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