Surrogacy and the State: A Questionable Intervention

Post Date: 10/06/2003
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Issues:
Public Policy
Reproductive Ethics

In an odd case involving surrogate motherhood arrangements, a Utah couple challenged the state's law that renders surrogacy contracts unenforceable. The state passed the law in the late 1980's, actually following the pattern set by the majority of states that have laws on the books regulating surrogacy. The law made it illegal to pay surrogates a fee beyond reasonable expenses because payment of a fee for the waiver of parental rights constitutes the purchase and sale of children, violating the 13th amendment to the Constitution. (This is analogous to the way the law treats adoption cases, in which it is illegal to pay birth mothers to give up their children for adoption.) The law further made surrogacy contracts, which force a woman to give up her child against her will simply by force of contract, void and unenforceable. This latter provision is what was under challenge by the couple, as they were being denied legal parenthood status and had to "adopt" the twins (born almost 3 years ago) if they were to have custody.

At issue here is the tricky question of "who is the mother" in cases of gestational surrogacy, in which (by definition) the surrogate is not genetically related to the child she is carrying. The Utah couple - who donated their own egg and sperm - assumed that it is the genetic connection that establishes parenthood due to the fact that such a tie constitutes an important biological relationship to the child. However, that is not the only biological connection that counts. What occurs in the womb has a formative influence on who the child becomes; therefore, the gestational surrogate is more than a "human incubator." One can argue that at the time of birth, she has the greater "sweat equity" in the child she is carrying. A gestational surrogate's intent to keep the infant she has carried - a desire that may arise as a result of her having bonded with the child - should not be given any less weight than the corresponding intent of the genetically contributing parents. Usually this aspect of the law is invoked when there is a dispute between the contracting couple and the surrogate concerning rights to and custody of the child. What makes this case unusual is that there was no dispute over who has rights to the child. The surrogate willingly turned over custody of the child to the contracting couple and relinquished any claim of maternal rights to the child. So the case should be closed, right? Not so fast, said the
The state did not recognize surrogacy contracts as valid and saw the child's mother as the woman who gave birth and (if married) her husband as the father, consistent with the long-standing presumption of parenthood. The intent of the law that makes these contracts unenforceable is to protect the surrogate in cases in which there is a dispute over rights to the child. But such a dispute did not exist here! The state's actions are consistent with the letter of the law, but since the surrogate willingly gave up rights to the child without a contest it seems silly to require that the contracting couple formally adopt the child. If a dispute had arisen, then the law making the contract void would be invoked, and in my view correctly so.

The Utah law was designed to discourage surrogacy arrangements, and in my view justifiably so, by making payment to surrogates illegal and protecting surrogates' rights in cases of dispute. It was not designed to stop transactions such as this one, where there was no fee illegally paid to the surrogate and no dispute over parental rights. Though from a Christian world-view I would suggest that surrogacy violates the biblical pattern for procreation, it is not clear to me that the law should intervene in cases such as this one.

In the end, a federal judge struck down the portion of the law which recognized only the surrogate as the parent. Lawmakers have been working on a new surrogacy law.

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