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Review

Surrogacy in modern obstetric practice

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SUMMARY

Surrogacy is rising in profile and prevalence, which means that perinatal care providers face an increasing likelihood of encountering a case in their clinical practice. Rapidly expanding scientific knowledge (for example, fetal programming) and technological advances (for example, prenatal screening and diagnosis) pose challenges in the management of the surrogate mother; in particular, they could exacerbate conflict between the interests of the baby, the surrogate mother, and the intending parent(s). Navigating these often-tranquil-but-sometimes-stormy waters is facilitated if perinatal care providers are aware of the relevant ethical, legal, and service delivery issues. This paper describes the ethical and legal context of surrogacy, and outlines key clinical practice issues in management of the surrogate mother.

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1. Introduction

In 1985, a British woman made headline news when she entered into an arrangement whereby she was inseminated with the sperm of an American man and became pregnant with the intention of handing the child over to the man and his wife [1]. Although there are biblical instances of a maidservant being requested by a barren wife to bear her husband's child [2], this development was a brazen affront on traditional and stereotypical notions of motherhood. It opened a public debate about the potential of surrogacy to result in economic exploitation, moral confusion, and psychological harm to surrogate mothers; but neither public opinion nor technology has stood still, and surrogacy arrangements have become more prevalent and more complex.

The number of surrogate pregnancies in the UK is unknown, since many arrangements proceed without any formal legal or medical input (especially those between friends and family members), and the baby is handed over without any legal formalities. In 2008, however, the Human Fertilisation and Embryology Authority (HFEA) reported a 10.2% increase in surrogacy births in the UK, compared to an 8.2% increase of in-vitro fertilisation cycles [3]. The annual rate of parental orders that were granted after surrogacy arrangements more than doubled between 2007 and 2011 [4]. The use of surrogacy arrangements by celebrities such as Nicolle Kidman and Elton John has also raised the media profile of surrogacy.

In modern obstetric practice, emerging scientific knowledge and technological advances pose challenges in the management of the surrogate mother, and have the potential to influence case law. These advances include antenatal screening, prenatal diagnosis, fetal reduction in cases of multiple pregnancy, epigenetics, fetal programming, and fetal therapy. With surrogacy becoming more commonplace, it is essential for perinatal care providers to be aware of the relevant ethical, legal and service delivery issues. The use of an increasing number of case laws to resolve conflicts, especially for international surrogacy cases, has resulted in the evolution of legislation.

1.1. What is surrogacy?

With the Surrogacy Arrangements Act passed in 1985 [5], the UK became the first country in the world to have specific legislation on surrogacy. The Act defined a 'surrogate mother' as a woman who carries a child in pursuance of an arrangement made before pregnancy, to hand the child over to another person/persons, and relinquishing parental responsibility for the child [5]. Surrogacy can take two forms:

(a) Traditional (partial or straight) surrogacy involves artificial insemination using either the sperm of the intended father or donor sperm. The ovum of the surrogate is used, so she has a genetic link to the child.

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(b) Gestational (full or host surrogacy) involves in-vitro fertilisation (IVF) using gametes from the commissioning couple and/or donors, and embryo transfer to achieve the pregnancy. In this case, the surrogate has no genetic link to the child.

Either form of surrogacy can be commercial (the surrogate receives a financial benefit from the commissioning parent) or altruistic (the surrogate has no financial gain). The various ways in which a surrogate pregnancy can be conceived are outlined in Table 1.

Surrogacy agreements might be complex, attempting to cover many eventualities – such as the possibility of miscarriage, fetal abnormality, a handicapped child, stillbirth or neonatal death, death of the surrogate or intending parents during pregnancy (guardian is usually identified) or before the parental order is granted (life insurance is sometimes provided by the intending parents), and unplanned surgery (for example, hysterectomy). Surrogacy agreements are legally unenforceable in the UK.

2. Ethical issues in surrogacy

Surrogacy is a means of overcoming childlessness for couples unable to carry their own pregnancies due to infertility, medical conditions, or sexuality. The number of babies available for adoption in the western world has decreased over the years due to the availability of contraception, changes in society's attitude to single motherhood, and restrictive adoption criteria. Thus, surrogacy is often the only realistic option for many intending parents. It could be argued that surrogacy is a means by which affected couples may exercise the fundamental rights enshrined in the Human Rights Act [6]: right to a private life (article 8), right to marry and found a family (article 12), and freedom from unjust discrimination (article 14).

On the other hand, it has been argued that surrogacy could lead to moral confusion, economic exploitation, and psychological harm [7]. Three decades ago, the UK Committee of Enquiry into Human Fertilisation and Embryology (Warnock Committee) regarded surrogacy as being morally reprehensible, for the reason that 'it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child'; and on the deontological principle that people should not treat others as a means to their own ends [8]. In the 1980s the British Medical Association advised doctors not to get involved in surrogacy arrangements; however, in the 1990s it acknowledged the public's growing acceptance of surrogacy but said that surrogacy should be 'a reproductive option of last resort' [9]. A decade ago, parallels had been drawn between surrogacy and markets for organ transplantation, and surrogacy has been likened to slavery and prostitution [10].

Autonomy is vitiated when vulnerable women are exploited to bear children for clients in exchange for token financial benefits. Both the intending parents and the surrogate mother could be exploited by commercial agencies that arrange surrogacy for profit. Such agencies are outlawed in the UK but thrive in the USA, where the director of one agency claimed that she wanted 'to become the Coca-Cola of the surrogate parenting industry' [11]. On the other side of the coin, depriving a woman of the choice to be a surrogate mother infringes her self-determination, and surrogacy arrangements often empower rather than exploit the surrogate mother. The UK public's attitude to surrogacy has gradually become more positive [12], and this has weakened any anti-surrogacy arguments based on utilitarian considerations. To the argument that surrogacy degrades women, there is the counter-argument that abhorring surrogacy smacks of paternalism – women should have the freedom to use their childbearing capacity in whatever way they wish [13].

All parties concerned in a surrogacy arrangement – the surrogate mother, intending parents, the subject child, and the surrogate mother's own child(ren) – might be exposed to psychological harm, but robust evidence of the psychosocial impact of surrogacy is not available [14]. Sources of harm include conflict between the surrogate mother and the intending parents, the unequal genetic contribution of the intending parents, and disruption of family relationships. On the other hand, surrogate mothers report having psychological fulfilment from helping a couple overcome childlessness. There is concern that the nature of the child's provenance may be a source of psychological disturbance. An example is the case of a surrogate mother giving birth to her own grandchild. This should be less disconcerting as more children grow up in non-conventional settings – with lesbian or gay parents, transsexual parents, and parents who opted for donor insemination.

Table 1
Provenance of surrogate pregnancy.

Paternal genes	Maternal genes	Conception
Intending father	Surrogate mother	Artificial insemination
Intending father	Surrogate mother	Sexual intercourse
Donor	Surrogate mother	Artificial insemination
Intending father	Intending mother	IVF and embryo transfer
Donor	Intending mother	IVF and embryo transfer
Intending father	Donor	IVF and embryo transfer
Donor	Donor	IVF and embryo transfer

IVF, in-vitro fertilization.

3. Legal issues in surrogacy

3.1. What does the law allow or prohibit?

Surrogacy laws vary from country to country [15,16]. At one extreme, Germany, Sweden, Norway, Italy, China and Japan prohibit all forms of surrogacy; at the other extreme, all forms of surrogacy are legal in India, Ukraine and Russia. In France, Greece, Denmark, The Netherlands, Sweden, Spain, Switzerland, Canada and most states in Australia, commercial surrogacy is prohibited but altruistic surrogacy is allowed. In Israel, commercial surrogacy is legal, but familial and altruistic surrogacy is prohibited due to religious and moral considerations [17]. Greece also allows only gestational surrogacy [18]. In the USA, surrogacy laws differ widely from state to state, with some states criminalising all types of surrogacy and others prohibiting traditional surrogacy but legalising gestational surrogacy [19]. Some states do not have legislation on surrogacy, and case law in such jurisdictions will reflect local politics, public opinion, or judges' individual opinions. The Uniform Parentage Act 2002 [20] provides federal guidelines from which states can draft their individual laws.

The most articulate legislation on surrogacy is in the UK, and it reflects three decades of public consultations and incremental change. The Warnock Report [8] recommended that all surrogate motherhood agreements should be illegal contracts. The Surrogacy Arrangements Act 1985 [5] prohibits commercial surrogacy. Altruistic surrogacy is allowed; no money other than 'reasonable expenses' should be paid to the surrogate mother, but there is no strict definition of what constitutes 'reasonable expenses'. The Surrogacy Arrangements Act 1985 was amended by section 36 of the Human Fertilisation and Embryology Act 1990 [21], which contains two provisions in respect of surrogacy. The first (section 30) is that, subject to some conditions being met, the court is able to order that the intending parents be treated in law as the parents

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