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THE LEGAL SIGNIFICANCE OF GESTATION

Larry I. Palmer



The use of reproductive technologies challenges some of our most fundamental assumptions about the creation and nurturing of human life.

Editor's note: This article is from a talk given at the Pew Science Symposium on Ethics and Science at Union College, Schenectady, New York, on May 29, 1992. The views expressed here are those of the author and do not necessarily reflect the position of the New York State Bar Association's Special Committee on Biotechnology and the Law, which the author chaired.

The use of reproductive technologies has captured the public's imagination since the celebrated Baby M surrogate-parenting case in 1987. The saga of Marybeth Whitehead-Gould, William and Elizabeth Stern, and Baby M, the child that Whitehead-Gould agreed to bear for the Sterns, has been the subject of numerous newspaper articles, books, and television talk shows. It even provided sufficient drama for a made-for-television movie.

The use of reproductive technologies raises new questions about a woman's authority and control over her fetus and child; and so the dialogue about the appropriate use of those technologies must take place within the wider context of the ethical, political, and legal debate about abortion.

At the center of that debate is the series of Supreme Court opinions, beginning with *Roe v. Wade* in 1973, that have defined our abortion laws. Those "rights-based" legal decisions have created a rhetoric of discussions not only about abortion but also about many other aspects of reproduction.

When thinking about issues related to surrogate parenting, in vitro fertilization, the cryopreservation (freezing) of human embryos, and many other issues, we therefore tend to adopt the "rights" formulation of the abortion debate. We are confused about whether a woman's right to control her body includes her right to contract in advance to give away a child she will bear. We question what right a man who allows a surrogate to use his sperm for

artificial insemination has to legally compel that woman to give him (and his wife) the child to raise as their own child. We ask even more disturbing questions about what rights either a husband or a wife has to embryos created from their gametes during the process of in vitro fertilization if that couple divorces before the embryos are implanted.

Our focus on rights—the rights of women, the rights of men, the rights of embryos, the rights of fetuses, the right to privacy, and the right to life—distracts us from considering the social implications of the new technologies. And framing ethical questions in terms of rights also masks a deeper debate about the institution of the family and the obligations that adults have toward children. The use of reproductive technologies challenges some of our most fundamental assumptions about the creation and nurturing of human life.

I want to offer a different perspective for thinking about those technologies and their relation to the modern family by considering the law's relation to the dynamics of societal institutions. Our culture has both public institutions, including medicine, education, marriage, and law, and private institutions, including family and religion. Law serves two distinct functions in relation to each type of institution. In general, it functions to *regulate* public institutions while it serves to *protect* private institutions. For example, law regulates marriage, which is essentially a public act. Because our society recognizes marriage as a desirable goal, we regulate it minimally.

Private institutions such as the family and religion are *protected*, rather than regulated, by law. We believe that children are best raised and socialized inside a family. Laws are tailored to support the family unit, primarily by not restricting parental freedom to decide how to care for and nurture chil-



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dren. The law protects the family from state interference in childbearing and child-rearing decisions. Of course, there are limits to that protection. For example, we have numerous regulations about marital dissolution, because of other concerns about the family, including the general welfare of children and the economic welfare of the spouses.

To illustrate my institutionalist approach, I want to discuss the evolution of my ideas about the appropriate legal responses to the use of assisted-reproduction technologies. First, I will briefly discuss the use of artificial insemination. Second, I will look at the practice of in vitro fertilization. And finally, I will focus on the problem of “gestational surrogacy,” which judges, lawyers, and, most importantly, legislatures, are now trying to resolve. In the only such case to come before a court, a California judge determined that a surrogate mother who gestated and gave birth to a child created from another couple’s sperm and egg, pursuant to a surrogacy agreement, had no legal rights to the child. Instead, the judge recognized the ovum and sperm donors as the sole legal parents of the child.

I will argue that as a matter of ethics and good public policy that focuses on the institution of the family, the California court decided the case incorrectly. I will argue that if we look at the problem from the perspective of citizens and scholars rather than scientists, lawyers, and judges, the woman who gestates a child *must* be recognized as a parent of that child. But first let’s look at how the law has reckoned with assisted reproduction in the past.

THE LEGAL RESPONSE TO ARTIFICIAL INSEMINATION

Before we assume that there is no conceptual framework in law for dealing with issues associated with the new assisted-reproduction technologies, we should remember that humans have been trying to overcome problems of infertility for a long time. Adoption is one legal solution. Of course, the difficulties of adoption make it a less-than-attractive option for many infertile couples. And it is not a solution for couples who long to have a child who is genetically related to them.

Artificial insemination was the first “technology” available to help some of these couples. Artificial insemination by donor uses sperm from a third

party (most often an anonymous donor). The process is necessary if the husband is unable to produce potent sperm and may also be used if the husband has a genetic trait that the couple does not want to pass on to their offspring. Its use also created new legal questions about genetic relatedness and parental responsibility. The method was used—significantly, in my opinion—without explicit legislation authorizing such a practice. But like most couples who have children, the couples probably assured themselves that nothing would ever happen that would make them or anyone else question the genetic origins of their children.

However, some of those marriages ended in divorce. During several of the divorce proceedings, husbands raised the issue of the lack of genetic connection of the child in attempts to defeat child support obligations. When courts were faced with those attempts by fathers to claim in effect that genetic connection was the only means of defining parental obligations, they managed to come up with a variety of legal theories to enforce the support obligations upon the fathers. After a string of such cases most states, including New York, passed legislation to settle the matter. A New York domestic relations law finally passed in 1974 provides:

§73 Legitimacy of Child Born by Artificial Insemination

- (1) Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.
- (2) The aforesaid written consent shall be executed and acknowledged by both the husband and wife, and the physician who performs the technique shall certify that he had rendered the service.

There is an ethical argument about the nature of familial obligations embedded in the statute. It is important to make the argument explicit before turning to the practice of in vitro fertilization. In any disputes that might arise as the result of the use of reproductive technology, the goal of the law is to protect the interests of the child in having at least

one, but preferably two, parents who are responsible for it. The law centers on the *obligations* of the adults rather than on their *rights*. In fact, the definition of a child, from the perspective of the law, is simply a human being, under a certain legally prescribed age, whose economic, social, and general well-being are the responsibility of some adult or adults. Thus in law the primary question is: Who are the adults who are *obligated* to act as parents to this particular child?

IN VITRO FERTILIZATION

In vitro fertilization (IVF) is so named because the fertilization actually takes place in vitro (literally, "in the glass"), usually in a laboratory test tube or petri dish. The egg, or ovum, is extracted from a woman's ovary via a surgical technique. The egg and sperm are then combined in vitro. In the event of successful fertilization, the embryo is implanted into a woman's uterus, with the hope that pregnancy will result.

The simplest IVF scenario occurs when a woman's egg is extracted, fertilized with her husband's sperm, and implanted in her own body. The process requires no donor material and may be helpful for some infertile couples. For other couples IVF with their own genetic material is impossible, and the sperm or the egg, or both, must originate from a third-party donor. Donor gametes—genetic material (sperm or eggs) before fertilization—may also be used for IVF if one or both spouses have a genetic disease that they do not want to pass on to the next generation. A third possibility is that a couple may acquire a donated embryo, which is implanted in the woman who intends to give birth to and raise the child.

My ideas about appropriate legal responses to those techniques have evolved in conjunction with my work as the chair of the New York State Bar Association's Special Committee on Biotechnology and the Law. When faced with the problem of what laws, if any, should be recommended regarding in vitro fertilization, after much debate the committee concluded that the approach taken to artificial insemination ought to be used to address in vitro fertilization. The conclusion was based on the belief that regardless of the type of assisted reproduction, the children born should be provided the same legal



protections. We created that protection by recommending that the statute on artificial insemination be modified to include in vitro fertilization. The statute would then read as follows:

§73 Legitimacy of Child Born by Artificial Insemination or *In Vitro Fertilization*

- (1) Any child born to a married woman by means of artificial insemination or *in vitro fertilization* [new language in italics] performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.
- (2) The aforesaid written consent shall be executed and acknowledged by both the husband and wife, and the physician who performs the technique shall certify that he had rendered the service.



The law centers on the obligations of the adults rather than on their rights.



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That legislation could provide some protection for children born from the use of reproductive technologies and give fair warning, assuming conscientious lawyers, of the legal risks that couples and individual gamete donors might be taking if they operate outside the legal framework.

GESTATIONAL SURROGACY AND IN VITRO FERTILIZATION

The proposed in vitro legislation takes into account the separation of genetic and gestational maternity, as in the case of egg donation. But when making its recommendation, the committee had not contemplated the full impact of gestational surrogate motherhood. Upon reflection, we realized that most of the time the law had been concerned with establishing male parentage because female parentage was so clearly established either by giving birth or adopting the child. We therefore had to go back and look clearly at the question of who are parents. Thus we realized that the artificial insemination model was inadequate for some cases of bifurcated maternity, which the practices of egg donation, embryo transfer, in vitro fertilization, and gestational surrogacy make possible.

Specifically, if a woman is unable to gestate a child, a couple may seek a physician who will create an embryo from their gametes and then enlist the aid of another woman, a "gestational surrogate," to gestate and give birth to the child. This is what occurred in the California case. Crispina Calvert was unable to bear children. She and her husband, Mark, sought out Anna Johnson, who agreed to serve as a surrogate. Johnson agreed in writing to give the child over to them for formal adoption, and the Calverts agreed in writing to pay Johnson's medical expenses plus \$10,000 after she did so.

Unfortunately, as in some agreements, things did not turn out as the parties expected. Before the birth of the child, during her seventh month of pregnancy, Anna Johnson indicated that she was not sure she wanted to give up the child. The Calverts filed suit asking the court to decide who were the rightful parents. As the case has now progressed through a trial and one appeal, the California courts have twice decided that Anna Johnson, the woman who gave birth to the child, is not the legal mother of the child.

In essence, the court has decided that the genetic connectedness is legally more significant than the biological process of gestation. However, the decision ignores the well-established family law concept that gestation and birth are the determinants of legal maternal status.

In this case, with two women contesting who should be the child's legal mother, the court determined that Crispina Calvert, the gamete donor, was the mother, and that Anna Johnson had no legal rights to custody or visitation of the child she gestated and gave birth to.

The California appellate court seemed to assume that the female and male biological contributions to the birth of a child are equivalent and thus that the same standards used to determine paternity may be used to determine maternity. A blood test showed that Crispina Calvert was genetically related to the child. And the court used that evidence to then determine that she was the mother. But neither party had disputed that Mrs. Calvert's gametes were used to form the embryo Johnson gestated. There was no dispute of the facts in the case, simply a question of the legal significance of those facts. And in failing to name Johnson as the legal mother, the appellate court in its reasoning refused to give legal significance to a biological difference between men and women—the ability of women to give birth.

I believe that a woman who gestates a child must be seen as a legal parent if the law is to give effect to the social ideal of fairness and equality between the genders. Current laws recognize that men and women are different in their contribution to reproduction. While both men and women are equal in terms of the genetic contributions, only women can get pregnant and give birth. For law to treat men and women equally, it must recognize the significance of that unique contribution. Indeed, the difference in reproductive roles is already recognized in the constitutional right of a woman to have sole decision-making authority to terminate her pregnancy, whether she is married or not.

Pregnancy also creates a unique connection between a woman and her fetus. We have recognized that connection as the basis of the intimate bond between the woman and her newborn. And before the advent of reproductive technologies, we



Current laws recognize that men and women are different in their contribution to reproduction.

always assumed that the woman who gestated a child was the legal mother. In a sense, the determination of maternity has been established in the acts of gestation and birth. For instance, for the purposes of registering a child's birth, the present law and practice is to ask the woman who gives birth who the father is. We have thus assumed and in fact structured most of our laws regarding obligations to support children on the premise that a woman who gestates is the mother.¹

Technologies such as in vitro fertilization, egg donation, and embryo transfer now allow us to contemplate separating the act of gestation from legal maternal status. The difficult question now is whether we should maintain the connection between gestation and legal motherhood and adapt our laws to accommodate the use of the new reproductive technologies. My answer is yes, but the law should be changed in small increments to leave room for scientists, lawyers, and physicians to grapple with a host of ethical questions to which the technologies give rise.

Of course, the legislation that I would recommend does not answer all the ethical questions created by new reproductive technologies. In fact, I propose only to confirm the legal significance of gestation, even if doing so would yield a rather messy result in the Johnson-Calvert case. I believe that the child in that gestational surrogacy arrangement now has three legal parents: the Calverts, who donated the gametes, and Anna Johnson, who bore the child. A court should consider which parent or parents should get custody based on what is best for the child.

Following that reasoning, the bar association committee reached the conclusion that further amendments to §73 are necessary.

§73 Parents of Child Born by Artificial Insemination or In Vitro Fertilization

- (1) *Any child born to a woman by means of artificial insemination or in vitro fertilization shall be deemed the child of that woman.*
- (2) *Any child born to a married woman by means of artificial insemination or in vitro fertilization performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her*

husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.

- (3) *The aforesaid written consent shall be executed and acknowledged by both the husband and wife, and the physician who performs the technique shall certify that he had rendered the service.*²

The original statute implicitly takes into account the possible separation of genetic and social paternity. It recognizes the social union of marriage and the man's relation to the woman who gives birth as the legal determinant of paternity. The proposed amendment, which includes a child born as a result of in vitro fertilization, also allows for the separation of genetic and gestational maternity. The proposed amendment further recognizes that, regardless of the source of the genetic material, a woman who gives birth to a child via artificial insemination or in vitro fertilization is the mother of that child. Thus in a case of gestational surrogacy, in order for the gamete donors, usually husband and wife, to achieve their objective of raising their genetic progeny as their own child, the gestational woman's status as a legal parent would have to be extinguished through some legal process such as adoption.





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In sum, the recommended statute does not outlaw or prohibit surrogacy but does clarify who has maternal status in the same way that the existing statute clarifies paternal status in the case of artificial insemination. The proposed statute is designed as the starting point for resolving conflicts about maternity. The modifications would make clear that regardless of the source of the gametes, a child born to a particular woman is, in the eyes of the law, the child of that woman. The modification would cover the majority of cases, in which genetic and gestational maternity are not separated, as well as the less common situations of bifurcated maternity (gestational surrogacy or situations in which the woman who is the intended parent gestates a donated egg or embryo).

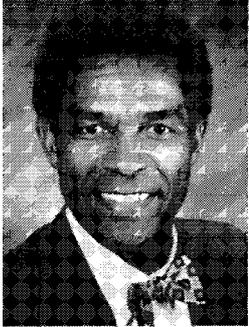
The proposed statute could lead to a disturbing result in a dispute between a woman who has gestated a child and a man and woman who provided the gametes for the embryo with the intention of raising the child as their own. Without any further legislation a judge could find that the child has three parents, each of whom would be entitled to be heard as to questions of custody and visitation. The gestating woman would be the mother of the child by operation of the statute. Upon giving birth, she would immediately have custody of the child. The sperm donor would be the father, because law recognizes genetic contribution for determining male parental status. And, for equity concerns, the female gamete donor would be given equal status in law to the male gamete donor. So the gamete donors are also parents and would be entitled to be heard as to the child's custody. Although under existing law the gestating woman is presumed to be entitled to custody, both gamete donors would thus be entitled to contest that custody or seek visitation rights.

To avoid such contests, the legislature could pass a law to facilitate surrogacy agreements. Such a law might include explicit provisions for judicial supervision of the parties. New Hampshire recently enacted legislation that creates just such a system of judicial oversight.³ The New Hampshire law permits arrangements in which the surrogate is artificially inseminated with the sperm of the intended father and also gestational surrogacy arrangements.

The New Hampshire surrogate agreement must be judicially preauthorized in a county probate court. Under it, the surrogate mother can choose to exercise her right to keep the child at any time before seventy-two hours after birth, in which case, parental rights vest solely in her (and her husband). Otherwise the parental rights of the surrogate (and her husband) terminate seventy-two hours after birth. So even inside a regulatory scheme to facilitate surrogate arrangements, gestation still creates an exclusive claim on legal maternity for the surrogate if she chooses to keep the child.

Another option is to suggest that the legislature pass a law to prohibit surrogacy altogether. Under such a law, surrogate contracts would not be enforceable in court.⁴ I favor the option, because I believe that the evidence is now clear that doctors and lawyers involved in surrogacy arrangements will continue to encourage couples who desperately want genetically related children to push the ethical frontiers in ways that could undermine our sense of obligation to children.

Supporting a statute that would prevent the enforcement of surrogacy agreements does not require supporting criminal sanctions against those who engage in surrogacy practices. Some people will seek to use such agreements, just as they used artificial insemination before legal safeguards were in place, because it was available and because they had a strong desire for genetically related offspring. The wish to be responsible for the next generation is not something that society should discourage, yet we must create some constraints by advising the parties of the risks, including the legal ones, if they choose to employ a surrogate. Under my recommendation, by operation of the statute, married couples would have no legal risks to custody of their children through their use of in vitro fertilization or artificial insemination. However, when a couple seeks to use another woman's reproductive capacity (as a surrogate), my legislative solution requires that the parties bear the consequence of judicial uncertainty as to the child's custody without explicit legislative standards. Scientists, physicians, and lawyers should consider that uncertainty as they develop or advocate the use of reproductive technologies.



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CONCLUSION

My general conclusion about the new reproductive technologies is that we should get away from the rights-based approach that I believe has its origins in the abortion debate in this country. As I have tried to demonstrate, an institutionalist approach focuses on the social implications of the technologies and recognizes that the aim is to keep the family secure as an important social institution, while allowing infertile couples access to those technologies.

If we adopt the institutionalist framework, we must recognize that family is a private, not a public, institution, and thus the role of law is limited and indeterminate. When thinking about the family as an institution, the primary function of the law is to delineate the adults' obligations toward children, not their rights to them. I would remind you that the legal and ethical problems with in vitro fertilization and the practice of surrogacy are not new. The legislative response to the use of artificial insemination is based on a concept of family and obligations to children. And I believe that that is the proper foundation for a legislative response to the newer technologies.

As suggested, law should base legal maternal status on the act of childbearing. To do otherwise would be to ignore the unique role that a woman plays in nurturing a new life. And to eliminate the presumption that a child born to a woman is that woman's child would demand that the law inquire into issues that I believe should remain private. Again, that is not to say that a woman could not choose to follow through on a private agreement to relinquish her maternal status after the child's birth and allow another woman to become the legal mother

of the child. All I suggest is that it is improper for law to force her to do so by making enforceable a surrogacy agreement.

Finally, because law is protecting a private institution, it cannot and should not resolve all the ethical issues that the new reproductive technologies create. Many of the concerns can only be resolved by individuals with reference to their own religious or personal values about human life. Rather, law should make accommodations to the new reproductive technologies in small increments. The ethical debate must continue, for we are sure to have newer and bolder technologies within reach soon. I believe that we need to address the advances not just with reference to the rights of individuals. More importantly, we must contemplate the impact of the technologies on the creation of families and on how adults accept responsibility for the creation and care of the next generation.

1. Of course, the status of motherhood can be transferred after birth. Adoption is the clear example of that transfer: the woman who gives birth is the mother, but she can relinquish her legal maternal status to allow another woman to adopt the child and so become its legal mother.

2. The bar association's Special Committee on Biotechnology and the Law is still deliberating on this modification of the statute.

3. N.H. Rev. Stat. Ann. §168-B:1 to B:32 (1990).

4. New York recently passed a law, effective July 17, 1993, to prohibit surrogacy. New York Domestic Relations Law §§ 121-24 makes surrogate-parenting contracts void and unenforceable. But the statute does not make clear what standing the female gamete donor might have in a failed (unenforceable) surrogate agreement by virtue of her genetic relation to the child.

