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The Ongoing Uncertainty of Surrogacy (Review of Field, Surrogate Motherhood)

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Surrogate Motherhood. By Martha A. Field.* Cambridge: Harvard University Press. 1988. Pp. xii., 215.

I. INTRODUCTION

Surrogate motherhood has not only existed for many years, but it has also been written, debated, and reported about in many medical and legal journals and newspapers. Nevertheless, most people in the United States were not familiar with the term until the highly publicized, 1987 "Baby M" case.[1] Since then, surrogate motherhood has become one of the most controversial and unsettled social issues in America. In her book, *Surrogate Motherhood*,[2] Martha Field discusses the current legal issues surrounding surrogate motherhood and presents and defends her resolution for surrogacy contracts. Professor Field ultimately determines that surrogacy contracts should be legal but unenforceable, thereby giving the surrogate mother the option to withdraw from the contract and keep the child.

The book's introduction provides a brief background of surrogate motherhood and presents the main problem of surrogacy contracts—what to do when the surrogate mother decides she wants to keep the child. The remainder of the book focuses on this problem and the author's suggested resolution. Part I, entitled "Surrogacy Contracts," addresses the various legal, moral, and constitutional issues of surrogacy. Here, Field presents her view that surrogacy contracts should be legal but unenforceable. Part II addresses custodial issues within the context of a legal but unenforceable surrogacy contract when the mother chooses to keep the child. The appendix describes the current status (as of 1988) of the United States' state and federal law as well as European law.[3] The book also contains a very good selected bibliography of various surrogacy topics.

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1. *In re* Baby "M", 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *modified* 109 N.J. 396, 537 A.2d 1227 (1988).

2. M. FIELD, SURROGATE MOTHERHOOD (1988).

3. Professor Field's view of surrogacy contracts is similar to Kentucky's law. *See* Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky.

II. PART I: SURROGACY CONTRACTS

A strong argument exists that surrogacy contracts should be illegal. The first four chapters of the book address this argument from three different perspectives—legal, moral and constitutional.

In the first chapter, Professor Field examines the legal argument for banning surrogacy contracts because of the usual fee involved. According to this argument, paid surrogacy constitutes "babyselling"—a practice which is strictly prohibited. However, the fee could also be viewed as consideration for a contract for services which is legal. The babyselling argument is not very persuasive because unpaid surrogacy arrangements do exist and some contracts only provide for payment of the surrogate mother's medical and living expenses. Field concludes that determining the legality of surrogacy contracts based on payment alone would lead to an "odd result" should the surrogate mother change her mind. A volunteer surrogate would more likely be forced to give up her child due to a legal, enforceable contract, while a paid surrogate would probably keep her baby because her contract is illegal and therefore unenforceable.[4]

The second chapter addresses policy arguments in favor of prohibiting surrogacy contracts. The first argument is that payment for surrogacy exploits women. Surrogate mothers are either unfairly tempted by the generous payment offered or else they are oppressed by being paid little or nothing for "women's work."[5] Professor Field recognizes that prohibiting surrogacy contracts overly protects women, but she asserts that prohibition does "accord best with the kind of society we want to live in."[6] Field's assumption of an ideal society, however, is too broad. Perhaps society wants surrogacy contracts; otherwise, the issue would not be nearly so controversial.

Another reason to advocate prohibition is that childbearing is too sacred and personal to commercialize. This reason assumes that to most people, the notion of exchanging offspring for money is unsettling under any circumstances. Therefore, this general interest in family privacy should be protected.[7]

1986).

4. M. FIELD, *supra* note 2, at 23.

5. *Id.* at 26.

6. *Id.* at 27.

7. *Id.* at 27-28.

In the third chapter, Professor Field addresses moral arguments against surrogacy contracts. She examines three new reproductive techniques to determine whether they are also a threat to the traditional nuclear family which society seemingly wants to protect. The three techniques she discusses are artificial insemination, in vitro fertilization, and ovum donation.

Even though they are procedurally distinct reproductive methods, all three techniques raise similar moral issues: (1) whether there is any moral obligation to implant a fertilized egg in a uterus (analogous to the right to life controversy), (2) whether the number of eggs transferred at one time should be limited because of their survival rate, (3) whether the ultimate purpose and intent of embryo research is valid, and (4) whether a fertilized egg has any rights if the "parents" die before implantation. Modern technology, however, probably will not be prohibited, nor is its progress likely to be slowed due to these unresolved moral issues. Accordingly, Professor Field argues that rules can and should be developed to regulate these techniques, including surrogacy, to "slow down the transformation they will bring."[8]

The fourth chapter addresses, albeit obscurely, the constitutionality of surrogacy contracts. The two competing, fundamental, constitutional rights are the biological father's right to procreate and the surrogate mother's right to be with her child. The right to procreate is protected by the equal protection clause of the fourteenth amendment to the Constitution. Field argues that under the equal protection clause, a husband is denied equal protection as compared to natural childbearers or sperm donors, if he cannot reproduce through a surrogate arrangement. Furthermore, the due process clause of the fourteenth amendment protects the right to be with her child. This competing right, if accepted, would mandate a complete ban of surrogacy because a contract could not deny a mother the constitutional right to raise the child she has borne. This last argument, however, depends upon the mother showing that the waiver of her constitutional right was either *not* genuine or was a mistake.

Field does not resolve this conflict, but embarks on a discussion of balancing the harm and benefits of surrogacy. Such balancing primarily consists of the child's and society's interests. While she raises some interesting issues here, her organization

8. *Id.* at 45.

and intent are difficult to ascertain. Initially, Professor Field maintains that if one uses a constitutional framework to analyze surrogate contracts, balancing would be necessary. Furthermore, the harm-benefits balance would have to "be much clearer to sustain [a judge's] ruling if it is to be based on the Constitution than if it is to be decided simply as a matter of policy."[9]

Later, however, Field argues that even if balancing the child's and society's interests resulted in a constitutional right to surrogacy, universal access to this right would become the only viable, constitutional result. Accordingly, to avoid such a widespread availability of surrogacy, it would be "better to proceed on the basis of policy . . . rather than on the basis of constitutional law."[10]

What is most perplexing, however, is Professor Field's addition of the effects of prohibition to the harm-benefits balance. To this point she has discussed the balancing procedure in a constitutional framework, but suddenly she introduces it as a legislative tool to regulate surrogacy. Despite this confusion, the author's suggestions for regulation are insightful and informative. For example, legislatures could define certain groups who are qualified to enter into surrogacy contracts, the surrogate's compensation could be limited, or screening of all parties involved could be required. However, one limitation that is often included in surrogacy contracts, which is clearly unconstitutional, is the restriction of the surrogate's right to have an abortion.[11] Field seems to believe that the surrogate mother should be the only one to decide to have an abortion; if "her husband will control the abortion decision, it would seem most peculiar for a woman to be able to bind herself by an agreement with a stranger."[12]

Ultimately, Professor Field favors a policy approach as opposed to a constitutional one. Unfortunately, the reader may be confused with her reasoning because of her somewhat convoluted presentation of the constitutional issues.

The next three chapters of the book present and support her view that surrogacy contracts should be legal but unenforceable if the surrogate mother decides to keep the baby before surrendering it to the contracting couple. Professor Field's ap-

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9. *Id.* at 53.
10. *Id.* at 60.
11. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
12. M. FIELD, *supra* note 2, at 65.

proach represents a middle ground. At the opposite extremes are prohibition (which the United Kingdom adopted)[13] and complete enforcement of surrogacy contracts regardless of whether the surrogate mother changes her mind (which is the preferred view among lay people).[14]

Professor Field supports her view in several ways. First, her proposed option applies to both paid and volunteer surrogates, thus alleviating any inconsistent or "odd" result. In addition, giving the surrogate mother the option to withdraw diminishes the exploitation of women due to economic and financial constraints and recognizes the fundamental right of childbearing.

Another of Field's arguments is that, according to contract law, most personal service contracts are not enforced by specific performance.[15] Even though prostitution, marriage, and abortion are all viable options at a woman's discretion, they are not specifically enforceable. Finally, legal but unenforceable surrogacy contracts could also be characterized as either unilateral, voidable, unenforceable as against public policy, or option contracts, and still be valid.

Professor Field devotes an entire chapter to advocating the integration of surrogacy laws with existing adoption laws. In particular, she recognizes many similarities between the contracting couple in a surrogacy arrangement and a couple who use private placement or independent adoption. The important distinguishing factor, however, is that the adopting couples all recognize that the birth mother can change her mind, thereby terminating the arrangement. Accordingly, Professor Field suggests that legislators should place surrogate couples in the same position; that is, they should have the foreknowledge that they might not get the baby.

While this approach may seem fair in some respects, it com-

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13. Surrogacy Arrangements Act, 1985, ch. 49. (Source unavailable)

14. *Surrogate Motherhood: A Newsweek Poll*, NEWSWEEK, Jan. 19, 1987, at 44, 48.

15. *But cf.* In re Baby "M", 217 N.J. Super. 313, 344, 525 A.2d 1128, 1159 (Ch. Div. 1987) ("Specific performance to compel the promised conception, gestation, and birth shall not be available to the male promisor. However, once conception has occurred the parties rights are fixed, the terms of the contract are firm and performance will be anticipated with the joy that only a newborn can bring."), *modified* 109 N.J. 396, 537 A.2d 1227 (1988); *see also* C. SHALEV, BIRTH POWER 139 (1989) (The author analogizes a surrogate mother's duty of performance to that of a commissioned sculptor. "It is, technically impossible to force the sculptor to create a piece of art, but once it is completed the sculptor cannot refuse to deliver it to the commissioning party merely because she or he wants to keep it.").

pletely ignores that "[a]doption differs from surrogacy arrangements in two *obvious* respects: (1) the [biological] mother has already become pregnant (usually unintentionally) by the time any issue of adoption presents itself, and (2) the baby as a rule does not have any biological connection to the father of the adopting couple."[16] In addition, there is a binding contract in a surrogate arrangement which does not exist in adoption. Despite these very important, controversial differences, Professor Field "do[es] not believe that the differences are sufficient to sustain radically different rules concerning whether a contract is enforceable against the [surrogate] mother."[17] Perhaps Field's earlier suggested response to the Catholic church's position of opposing surrogacy but supporting adoption is more appropriate: "[A]doption is laudatory but is not analogous to surrogacy or other methods of creating children because it addresses the needs of children already in existence. Adoption therefore raises very different issues from the questions of what arrangements society should sanction for the creation of children."[18]

Furthermore, the unavoidable dilemma that the father is biologically related to a child whom he is prevented from raising may be more difficult to solve than by merely giving the father a chance at gaining custody or, more likely, visitation rights. The difficulty of these issues, then, seems to argue in favor of one of the two "extreme" positions—prohibition or enforcement—rather than Professor Field's middle ground approach.

Included in the chapter on adoption laws is a section addressing the issue of when the surrogate mother should lose the right to change her mind. Most states differ on the ultimate surrender date and whether the mother can revoke her decision after she has given up the child. The law would be most consistently and easily applied, Professor Field argues, if the surrogate mother lost the right once she gave the baby to the couple. Field concedes, however, that states could impose a waiting period of one week or less after the surrogate mother has given her child away, to reflect on the decision.

Professor Field then attempts to refute the various arguments opposing the surrogate mother's right to change her mind. She writes that "[t]here is every reason to believe that when

16. M. FIELD, *supra* note 2, at 84 (emphasis added).
17. *Id.* at 88-89.
18. *Id.* at 37.

women enter into such arrangements they do and will intend to perform" because "current experience" supports this.[19] However, most jurisdictions have never given the surrogate mother the discretionary legal option to keep her child. Therefore, an equally persuasive counterargument is that no one can predict how many women would really change their minds if they knew they could legally withdraw from the arrangement.

Other potential problems exist with the surrogate mother's right to change her mind. One difficulty is that the surrogate mother might fraudulently enter into the contract. Professor Field, however, does not think that a significant number would use surrogacy just for the money or opportunity to be inseminated to have a child of their own. The author argues that an interview with the surrogate mother will supposedly protect the couple from such an occurrence.

Another problem is that of extortion. Obviously the law cannot prevent all possibilities of extortion, but the problem is exacerbated in a surrogacy arrangement when the mother has a significant time period in which to change her mind. Professor Field's only suggested response to this challenge is to threaten harsh prosecution in the contract itself if extortion were to occur.

A third potential problem arises when the child is born and the contracting couple no longer wants the child. This will usually occur only if the baby is not normal. Since the child's needs then become an issue, Professor Field's solution is to prevent a couple from withdrawing from the arrangement.[20] Interestingly, she is able to draw a distinction here between privately adopting couples and surrogate couples but did not do so in the chapter on adoption. If an adopting couple no longer wants the baby, they will not be forced to accept him or her because "(1) they did not participate in the creation of the child; and (2) they are unlikely to have an actual contract."[21] The question remains why the same arguments cannot be made for enforcing (or prohibiting) surrogacy contracts in general.

The last problem Professor Field addresses is whether a sur-

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19. *Id.* at 98.

20. Field acknowledges the inherent unfairness of only permitting the surrogate mother to withdraw from the contract. She is not opposed to making surrogacy contracts mutually void, but only if the baby is normal so that it will be "well cared for even without the surrogacy arrangement." *Id.* at 103-04.

21. *Id.* at 106.

rogacy contract is characterized as void or voidable. If the contract is voidable, damages are possible. However, Professor Field argues that damages should only be appropriate for "valid contractual duties."[22] According to her, failing to deliver the child or having an abortion would not justify damages, but if the mother's conduct during pregnancy were to permanently harm the child, then damages might be available.

III. Part II: Custody, Visitation, and Child Support

Part II of the book assumes that the author's approach of legal but unenforceable contracts will prevail. If that is the case, then custody, support, and visitation rights remain unsettled issues. Naturally, if an absolute rule were adopted for surrogacy contracts, none of these issues would exist. Avoiding these issues may therefore be another strong argument in favor of absolute prohibition or enforcement. Nevertheless, Field provides background rules which help to determine the better parent in custody contests. Making that determination is the focus of her last chapter.

According to the author, parental rights in surrogacy contracts are affected by three factors: artificial insemination, the surrogate mother's marital status, and the rights of unwed fathers. As expected, none of these factors provide a clear answer as to who would be the better parent. Professor Field, however, prefers a clear presumption of giving custody to the child's caretaker—the mother—over a protracted custody battle to determine who is the "best" parent.[23]

Custody battles involve more uncertainties than are necessary. In surrogacy cases, the financial status of the parties involved is usually quite disparate. The outcome may therefore depend upon the surrogate mother's love versus the father's wealth and education. Determining the "better" parent is also very difficult, especially when newborns are involved or the parties have no children of their own. In addition, the trial judge's personal prejudices and experiences will inevitably affect the outcome.

To avoid these uncertainties, Professor Field argues that "[t]he best solution for the future is to have a clear rule gov-

22. *Id.* at 108.
23. *Id.* at 126.

erning who will be the custodial parent."[24] In Field's opinion, the surrogate mother should have custody of a newborn, based on the definition of a "primary caretaker"—the one who takes care of the child's daily needs. With a newborn, the mother usually assumes this role. Not only is the mother the one who has borne the child, but because she has carried the child for nine months, she is also "far more familiar to the child than the father is."[25] This view is patently unfair to the father, because there is nothing he could have done, biologically or otherwise, to change this situation. Professor Field's only response to this objection is that "the rule should prevail unless the father has a more satisfactory presumption to suggest."[26] Why the father must bear this burden, however, is not clear.

Field then addresses visitation and child support issues. She makes the following important distinction between surrogacy contracts and custody contests:

> [E]ven if the prospect of sharing responsibility when the mother changes her mind does not sharply deter surrogacy arrangements, it would produce a result that may seem more humane: the loser of the custody contest would not have to lose contact with her or his child, but instead would be in much the same position as other parents who lose custody but retain visitation rights.[27]

If the contracting father receives custody and he and the surrogate mother are cooperative, then Professor Field believes that both of them should maintain contact with the child. This alternative would avoid "having the child grow up with the knowledge that her mother fought for her and was prevented, by the parents she knows and by the law, from having any contact with her."[28] Field's position fails to recognize, however, the love and stability that come from one set of parents. Nor does Field make the same argument if the natural father and surrogate mother cannot cooperate. In that situation, "a child may be better off having one set of parents rather than two."[29] Determining visitation rights based on the parents' ability to cooperate is not going to make much sense to the child. Instead, a general rule should

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24. *Id.* at 139.
25. *Id.* at 129.
26. *Id.* at 130.
27. *Id.* at 145.
28. *Id.* at 146.
29. *Id.* at 147.

be applicable for all legal but unenforceable surrogacy contracts; either the non-custodial parent receives visitation rights or no rights at all.

Under existing law, the natural father in a surrogacy arrangement may be liable for child support if the surrogate mother receives custody.[30] But

> [i]f the mother is to have power to avoid the contract and is favored in the custody dispute, it is necessary to relieve the father from liability for child support, both because that approach best comports with the equities and because it states the most workable rule [for allowing the mother the option of keeping the child].[31]

Accordingly, the author rightfully urges that special laws should be enacted to remove the burden of child support from surrogacy cases.

Although Professor Field acknowledges the illegality argument in each of the first four chapters of the book, she ultimately decides that surrogacy contracts should remain legal but unenforceable. Despite this final outcome, throughout the book she maintains her uncertainty whether these contracts should even be a viable childbearing option. In the introduction, Professor Field admits "[i]t is a close question whether surrogacy—at least paid surrogacy—should be made illegal."[32] Later in the book she argues "there is no need to hasten [acceptance of contracts which bind parties to an advance custody determination] by enforcing surrogacy contracts today."[33] Nor, she contends, would the Constitution forbid a legislature from prohibiting surrogacy based on the public's interest in reducing them.[34] Perhaps the concluding sentence of the book best portrays her extreme reluctance toward legalized surrogacy when she states that "[s]urrogacy for hire is probably with us for the long term, but society can afford to move slowly in evolving toward the new era of options in childbearing."[35] With this ending, the reader is left

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30. *Id.* at 148.

31. *Id.* at 150.

32. *Id.* at 10.

33. *Id.* at 45.

34. *Id.* at 68.

35. *Id.* at 152.

wondering not whether her "legal but unenforceable" argument is persuasive, but whether she should have argued instead for a complete prohibition of surrogacy contracts.

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