

# SURROGATE PARENTING

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

## שאלה

May an infertile couple use a surrogate mother to gestate and give birth to a child? Does halakhah provide guidance regarding such cases?

## תשובה

The practice of surrogate parenting touches on powerful and sometimes conflicting ethical values, and has the potential to dramatically affect the lives of all involved in cases in which it occurs. In the United States over the past decades the practice has been the topic of vigorous ethical, legislative and popular debate.<sup>1</sup> Sharply differing and powerfully expressed views may be found among Jewish thinkers as well.<sup>2</sup> In the Jewish context, central values include

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<sup>1</sup> See, e.g. Rosemarie Tong, "Reproductive Technologies: Surrogacy," in *The Encyclopedia of Bioethics*, revised ed., ed. Warren T. Reich (New York: Macmillan, 1995), 4: pp. 2225-2229; American Fertility Society Ethics Committee, "Ethical Considerations of Assisted Reproductive Technologies," *Fertility and Sterility* 62 (1994): 67S-77S; New York State Task Force on Life and the Law, *Surrogate Parenting* (New York: New York State Task Force on Life and the Law, 1988); Larry Costin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990).

<sup>2</sup> See, for example, David M. Feldman, "The Case of Baby M," in *Jewish Values in Health and Medicine*, ed. Levi Meier (Lanham, MD: University Press of America, 1991), pp. 163-69; Fred Rosner, *Modern Medicine and Jewish Ethics*, 2d ed. (Hoboken, NJ: Ktav, 1991), pp. 113-16. Most authors do not develop an extensive halakhic argument about the practice of surrogacy; while many express misgivings, some suggest that the practice is halakhically permitted, and others that it should not occur. Immanuel Jakobovits, for example, argues: "To use another person as an 'incubator' and then take from her the child she carried and delivered for a fee is a revolting degradation of maternity and an affront to human dignity" (*Jewish Medical Ethics*, 2d ed. [New York: Bloch, 1975], p. 265). In a brief paper written for the Committee on Jewish Law and Standards in 1984, Rabbi David H. Lincoln states that "we should not deny couples this opportunity" of

those of procreation and raising children, respect for persons (כבוד הבריות), and appreciation for the human role as active but reverent partners with God in improving the world.<sup>3</sup>

In an extensive, thoughtful, and eloquent paper, “On the Use of Birth Surrogates,” Rabbi Elie Kaplan Spitz argues in favor of surrogacy.<sup>4</sup> For Rabbi Spitz, the great benefit of providing a child to an infertile couple is decisive. Concerns with avoiding exploitation of the surrogate, and harm to children born of the procedure, are real but manageable. In my judgment, a different halakhic conclusion is required. I appreciate Rabbi Spitz’s careful work and sincere intentions, and hope that my disagreements with him will be part of a *מהלוקת לשם שמים*, helping to clarify the best direction for development of halakhah.

I would agree with Rabbi Spitz that the real life experience of an infertile couple, for whom surrogacy could provide a child, bears great weight. I have argued elsewhere that such concerns, together with the Jewish tradition’s valuing of procreation, would suffice to justify the use of in vitro fertilization in a variety of cases. Objections by some that reproductive technologies are artificial, as well as additional concerns, would be outweighed by the great good of enabling the birth of the child. In that paper I emphasized as well that the members of the couple are in no way required to use reproductive technologies, and that their value as persons does not depend on their ability to have a child, but rather is intrinsic, stemming from the creation of all humans in God’s image (בצלם אלוקים).<sup>5</sup> In the case of surrogate parenting, however, precisely this value of respect for persons and human dignity is at risk. The real life experiences of all of the vulnerable persons involved, including the surrogate and especially her children, are weighty and must be considered. In light of these concerns, I argue, surrogacy cannot be recommended by halakhah and would be ill-advised in most cases.

My paper will focus on three particular concerns: a Jewish understanding of gestation and birth; the risk of harm and exploitation (עושה) and the appropriate halakhic response; and more specific questions raised by surrogacy agreements. A companion paper, “Maternal Identity and the Religious Status of Children Born to a Surrogate Mother,” addresses that issue.

### *The Significance of Gestation and Birth*

Gestation and birth are profoundly significant for halakhah, both on the basis of traditional halakhic texts, and because of broader ethical and theological concerns that I believe are important factors in the halakhic process. Appreciation of this significance is not necessarily decisive in determining the acceptability of surrogacy and related issues, but it is likely to influence both the articulation of halakhic guidelines and the application of these guidelines in particular cases.

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using a surrogate, though he does not explicitly address halakhic issues other than those of artificial insemination. At the same time, he expresses significant concerns. “Are we not degrading her [the surrogate], however noble her intentions? Can we really allow a single woman to become pregnant? If married, there is something very distasteful in carrying another man’s baby even if technically she has not committed adultery.” In light of psychological and legal concerns, “great caution must therefore be exercised” (David Lincoln, “Surrogate Motherhood,” *PCJLS* 86-90, pp. 3-6). The ensuing decade-and-a-half has provided more extensive experience with surrogacy and discussion of the issues involved, most prominently in connection with the Baby M trial. These developments now allow for a more extensive evaluation of surrogacy.

<sup>3</sup> See Aaron L. Mackler, “An Expanded Partnership with God? In Vitro Fertilization in Jewish Ethics,” *Journal of Religious Ethics* 25 (1997): 79-81.

<sup>4</sup> Elie Spitz, “On the Use of Birth Surrogates,” above, pp. 529-550.

<sup>5</sup> Mackler, “In Vitro Fertilization,” above, pp. 510-525.

As I argue elsewhere, halakhic sources indicate that maternal identity is determined primarily by gestation and birth. A woman who gives birth to a child is identified as that child's mother. Indeed, this represents the sole position authorized by the Committee on Jewish Law and Standards with regard to maternal identity.<sup>6</sup>

More generally, gestation and birth represent powerful experiences of intimacy and nurturing that have great significance. Parents' feelings of attachment at the birth of their children reflect not only awareness of genetic linkage, but also the lived experience of months of physical changes, observations, and care-giving, as well as the intense and miraculous event of birth. The mother's experience has included unique connections of biology combined with the conscious acceptance of risks and burdens, and emotional and intellectual responses of often surprising power. Perhaps for this reason, the Hebrew word for intense and other-regarding love, *רחמים*, is linked to the word for womb, *רחם*.

Accordingly, Jewish law and ethics would not agree that a "gestational surrogate" who gestates and gives birth to a child "essentially serves as an incubator," as Rabbi Spitz at one point suggests, nor would it agree to refer to her as a "tummy mummy."<sup>7</sup> It is not her tummy, but her womb, and with it her experience of biological connection and intense other-regarding care, that need to be acknowledged. According to halakhah, she simply is the mother of the child.

Such acknowledgment of the importance of gestation and birth has been reflected by non-Jewish as well as Jewish writers. Lawyer George Annas, for example, argues that in cases of dispute the relationship of gestational mother to the child should be recognized as primary, in part because of the extent of her biological and psychological investment in the child.<sup>8</sup> Rosemarie Tong notes a feminist objection to surrogacy, that "such arrangements privilege a possible relationship over an actual one, an abstract intention over concrete experience."<sup>9</sup> Concerns are also expressed with treating persons and relationships as commodities.<sup>9</sup> As Rabbi Spitz notes, not all feminists agree in rejecting surrogacy, but Tong's feminist claims focusing on relationships and responsibilities resonate importantly with general Jewish values. While some thinkers have speculated that a woman's role of gestation and birth might be replaced by an artificial womb, others have speculated that with developments in genetic engineering, the role of sperm and eggs in conveying genetic information might be replaced, strengthening the claims of gestation as primary. Both sets of claims are speculative; the important point is to avoid an unwarranted assumption that genetics are somehow essential and gestation and birth somehow accidental to parental identity.<sup>10</sup>

<sup>6</sup> Mackler, "Maternal Identity and the Religious Status of Children Born to a Surrogate Mother," above, pp. 137-145; Mackler, "In Vitro Fertilization," above, pp. 510-525. There is no reason to speculate that the identification of the birth mother as mother in earlier sources is based on an assumption of a genetic link, unless one simply assumes or has established on other grounds that genetics should be primary. In fact, the few cases that reflect a divergence of gestation/birth and genetics support gestation and birth as primary. A central precedent is the case of a pregnant woman who converts: the child is Jewish because, while the ovum was originally from the woman when she was not Jewish, the woman's status at the time of birth determines maternity.

<sup>7</sup> Spitz, above, p. 531.

<sup>8</sup> George J. Annas, "Death Without Dignity for Commercial Surrogacy: The Case of Baby M," *Hastings Center Report* 18, no. 2 (1988): 23-24.

<sup>9</sup> Rosemarie Tong, "The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements" in *The Ethics of Reproductive Technology*, ed. Kenneth D. Alpern (New York: Oxford University Press, 1992), pp. 285, 289, 291.

<sup>10</sup> Intuitively it might seem to some that gestation is a relatively straightforward process that science likely will develop ways to replace artificially, while the genetic material of the human genome is hopelessly complex and will elude scientists. On the other hand, the understanding of human genetics and the ability to synthe-

## Potential Harms and Exploitation

While appreciation of the significance of birth and gestation will affect judgments on surrogacy, the central issues are the assessment of risks of harm and exploitation, and the proper halakhic response. Here my greatest concern is for children affected by the procedures, although concern to avoid harm for any of the vulnerable people who might be involved is warranted. There is a danger of treating children as commodities; in some extreme cases contracting/intended parents have sought to refuse custody of a child born with birth defects or of the undesired gender. The risk of this occurring, and less extreme dangers, are present in a broader range of cases.<sup>11</sup>

Another type of concern arises when the surrogate has other children, as in the case of the “typical” surrogate who is married and has two other children.<sup>12</sup> The potential for psychological harm for these children, as they see their mother go through pregnancy and give birth to a child who is given to others, is very real.<sup>13</sup> Another ethical concern to which halakhah would be sensitive is the interference of surrogacy with the

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size genetic material have been progressing rapidly and at accelerating rates, while the capacity to nurture the developing human are only very slowly, if at all, moving later than the first week of embryonic development in vitro, and earlier than about week 23-24 of development for extremely premature infants (New York State Task Force on Life and the Law, *Fetal Extruterine Survivability* [New York: New York State Task Force on Life and The Law, 1988]). More generally, speculation on future scientific progress is uncertain at best. Writing in 1957, Isaac Asimov was able to envision a world of interstellar space travel and human-like robots, in which most of the process of gestation and human development could be managed artificially, but in vitro fertilization remained elusive and fertilization itself could only take place in the body (*The Naked Sun* [New York: Doubleday, 1957]). Within a few decades, this apparently elusive element had in fact been achieved, while other developments remained distant.

<sup>11</sup> See, for example, the discussion of the Malahoff case, “Parenting Through Contract When No One Wants the Child,” in Alpern, pp. 335-337; Angela R. Holder, “Surrogate Motherhood and the Best Interests of the Child,” in Gostin, p. 79. In a Michigan surrogacy case, Patty Nowakowski unexpectedly became pregnant with twins. The contracting couple told her that they would not accept responsibility for a boy, and when a girl and a boy were born, they only took the girl home (New York State Department of Health, *The Business of Surrogate Parenting* [Albany: New York State Department of Health, 1992], p. 8). As Holder (p. 79) observes:

In the usual situation of babies born with unexpected handicaps, parents may be shocked but they do not attempt to solve their problems by displacing custody onto anyone else. In the surrogate situation, however, the mother has doubtless attempted not to think of herself as the baby’s “mother” or to become too attached, since she plans to surrender it for adoption. Thus it is certainly not surprising that, if a problem occurs, her response is, “Here, take it. I did what I was supposed to do, so give me my money.” The father-by-contract, as well, having thought of the arrangement as placing an order for a baby, not surprisingly takes the position that there has been some sort of breach of warranty of quality and doesn’t want the baby either. Regardless of obligation to support, the situation does not bode well for love and acceptance of the handicapped child.

<sup>12</sup> Spitz, above, p. 532.

<sup>13</sup> Evidence regarding this harm remains largely anecdotal, as does evidence about the benefits and harms of surrogacy in general. One example is provided by a surrogate mother named Sally, responding to Phyllis Chesler’s question as to whether Sally’s (other) children ask about Jason, the child in the surrogacy arrangement (Phyllis Chesler, *Sacred Bond: The Legacy of Baby M* [New York: Vintage, Random House, 1988], pp. 66-67).

Yes. Quite often. My daughter Rebekah says that if she has a baby she’ll never give it away. She’s been asking me, “Did you really have to give Jason away?” It’s on her mind a lot. It’s on my son Matthew’s mind, too, but he tries not to talk about it. I’ve begun to encourage them to talk about it.

Similarly, Kathleen King agreed to serve as a surrogate but came to feel attached to the child during pregnancy. She reports that after she surrendered the child one of her other children asked, “I heard you are giving my brother away. Are you going to give me away?” (New York State Department of Health, p. 7). While careful counseling would likely lessen the harm to the surrogate’s other children, these children still would be exposed to the risk of significant harm, without their consent.

sexual relations of a (married) surrogate and her husband, and the potentially negative effect on their relationship more broadly.<sup>14</sup>

Additional concerns involve the potential of harm to and exploitation of the surrogate. One type of exploitation is that of coercion or unfair treatment by intended parents or surrogacy agencies. While relatively few surrogates have brought lawsuits, this says little either way about the existence of עוֹשֵׁק. Victims of עוֹשֵׁק are precisely those who are least likely to sue. Think, for example, of recent immigrants working in sweatshops, or oppressed agricultural workers. Victims of עוֹשֵׁק not only lack financial resources, but tend to feel intimidated and unsure of their own self worth, and are unlikely to assert themselves against those whom they correctly perceive as more powerful. On the basis of available information, it is difficult to determine how many surrogates are satisfied, and how many suffer in silence.<sup>15</sup>

Other concerns are of the type that would be more prominent in Jewish law and ethics than in U.S. law, for example. An important precedent for Rabbi Spitz is the case of Sarah, who said of Hagar, “Through her I too shall bear a child.” Appeals are also made more to general halakhic precedents of שפחה (handmaid/concubine) and יבום (levirate marriage).<sup>16</sup> All of these precedents are problematic for contemporary Jewish law and ethics. Over the centuries, Judaism has become increasingly sensitive to the demand not to use people. This stems from a number of factors, including the unfolding in Oral Torah of the significance of humans being created בצלם אלוקים, and the influence of Kantian ethics. Largely in response to these ethical concerns, halakhah has abolished (at least *de facto*) the institutions of שפחה and יבום, replacing the latter with חליצה. In light of such developments, Sarah’s intention to have her child through another woman is troubling. Similarly, as Robert Gordis observes, the elimination of יבום represents “the dual process of extending the rights of women, on the one hand, and limiting the powers of men on the other.”<sup>17</sup> Whatever the acceptability or excusability of these practices in the past, the development of halakhah reflects an understanding that it would be wrong for a person to use someone else in these ways in order to have a child. While Rabbi Spitz notes distinctions between יבום/שפחה and surrogacy, he appeals to these precedents precisely because of important common features, and these commonalities raise ethical problems.

As Rabbi Spitz rightly notes, the extent of harm and exploitation is unproven and uncertain. The difficult question then is how halakhah should respond to plausible but uncertain harms and exploitation, what might be termed עוֹשֵׁק ספק. עוֹשֵׁק ספק does not carry the same decisive power as עוֹשֵׁק נפש (possible saving of or danger to life), but cannot be ignored. One instructive model is offered by the Ethics Committee of the American Fertility Society. This committee is composed of scientists and health care professionals involved in developing and providing assisted reproductive technologies, as well as others sympathetic with such practices. For this committee, however, the potential harms of surrogacy mandate great caution, if not rejection:

<sup>14</sup> I am grateful to Rabbi Susan Grossman for this observation.

<sup>15</sup> See Chesler for interviews with surrogates and accompanying discussion.

<sup>16</sup> Spitz, above, pp. 536-540, 550.

<sup>17</sup> Robert Gordis, *The Dynamics of Jewish Law* (Bloomington: Indiana University Press, 1990), pp. 150-53. Other developments in halakhah have increasingly supported the practice of adoption, and have in at least many aspects recognized adopting parents as the child’s parents for halakhic purposes. See Rabbi Elliot N. Dorff, “Artificial Insemination, Egg Donation and Adoption,” above, pp. 501-504; Rabbi Avram Israel Reisner, “On the Conversion of Adopted and Patrilineal Children,” *PCJLS 86-90*, pp. 157-183.

The Committee continues not to recommend widespread clinical application of clinical surrogate motherhood at this time. Because of the legal risks, ethical concerns, and potential physical and psychological effects of surrogate motherhood, it would seem to be more problematic than most of the other reproductive technologies. . . .The Committee recommends that if surrogacy motherhood is pursued, a number of unresolved issues need to be addressed in the research, [including] the psychological effects of the procedure on the surrogates, the couples, and the resulting children; the effects, if any, of bonding between the surrogate and the fetus in utero; . . .the effects on the surrogate's own family due to her participation in the process. . . .The Committee has serious ethical reservations about surrogacy that cannot be fully resolved until appropriate data are available for assessment of the risks and possible benefits of this alternative. In light of these reservations, some members of the Committee judged that surrogacy could not be ethically recommended. Others concluded that it could be cautiously recommended while research on the key issues continued.<sup>18</sup>

### *Deciding About Surrogacy and Surrogacy Agreements*

Minimally, halakhah would share the “serious reservations” expressed by the American Fertility Society Ethics Committee and others. It also would be concerned with broader if less tangible dangers of the commodification of human persons and relationships. Surrogacy cannot be recommended by halakhah, and would be ill-advised in most cases.

In light of Rabbi Spitz's paper, however, I must admit that the question of whether the reservations are strong enough to support an absolute prohibition on surrogacy in all cases is less clear. If grounds to permit surrogacy are found in a particular case, at a minimum certain requirements would be clearly mandated by halakhah to protect the well-being, rights, and dignity of any children affected, and all other vulnerable persons, including the surrogate.

1. Couples contemplating the use of a surrogate mother should consider the halakhic and personal concerns involved, receive thorough counseling, and seriously investigate alternatives, including adoption. Either member of the couple would be fully justified in a decision not to proceed with surrogacy, and such refusal must be respected.

2. The surrogate mother, as gestational and birth mother, is halakhically recognized as the child's mother. She should have the right to contest the assumption of custody by the intended parents (one of whom would be halakhically recognized as the child's father). This right would be held whether the ovum originally came from the surrogate, the intended/social mother, or another woman. The exact parameters of this right are beyond the scope of this paper, and in practice would be determined by general civil law. Custody of the child, in these as in other cases, should be determined on the basis of the child's best interest, as required by Jewish ethical values as well as halakhic precedent.<sup>19</sup>

<sup>18</sup> American Fertility Society Ethics Committee, 76S-77S.

<sup>19</sup> See S.A. Even HaEzer 82:7, where Karo states that in case of divorce a child should stay with the mother until age six, and Isserles adds that this should only be the case when it serves the best interests of the child, which should be decisive. George Annas (23) supports the ruling of the New Jersey Supreme Court in the Baby M case that custody of children in surrogacy disputes should be decided according to the best interests

3. The gestational/birth mother should be protected from pressure to continue pregnancy when she judges abortion to be required to avoid serious threat to her health, and from pressure to abort when she judges continuation of the pregnancy to be consistent with her physical and psychological health.

4. Halakhah would discourage, if not prohibit, payments to a surrogate mother beyond reimbursement of expenses. Any money the surrogate receives cannot be contingent on her giving up custody of the child. For the surrogate to receive money if she gives over custody of the child would represent baby-selling, or minimally the selling and purchase of parental relationships, which are inconsistent with halakhah.

5. In the formulation of surrogacy agreements, and all actions taken with regard to surrogacy, greatest concern must be given to the well-being and rights of the child to be born of the procedure, as well as any other children who might be affected. Concern must be given to avoid exploitation of other vulnerable parties, including the surrogate, as well.

While these provisions represent the minimal requirement of Jewish law and ethics, they would be difficult to implement in commercial surrogacy. If these provisions are followed, surrogacy would likely be limited to cases in which all parties are well-intentioned and trust one another. Such a limitation would itself be appropriate.

A final note concerns the acceptability of a woman serving as surrogate mother, gestating and giving birth to a child to be raised by another couple. Minimally, all of the above requirements would apply. In addition, if a Jewish woman gives birth to a child, the child would be Jewish. As argued in this paper and my accompanying paper, and authorized by the Committee on Jewish Law and Standards, the birth mother's status would define the child's in all cases. Accordingly, allowing Jewish women to serve as surrogates entails either the birth of Jewish children who will be raised as non-Jews, or the surrogate's willingness to serve only for Jewish couples. Either option would be highly problematic. Unless this problem is explicitly and satisfactorily addressed, I do not see how halakhah can authorize Jewish women to serve as surrogates.<sup>20</sup> If this is the case, this provides an additional consideration against halakhically supporting surrogacy. To authorize Jews to use others as surrogates but not serve as surrogates would itself be problematic, as reflected in the Jewish tradition's commitment to *דרכי שלום*, the paths of peace.

## Conclusion

Surrogacy cannot be halakhically recommended, and in at least most cases would be forbidden by Jewish law and ethics. Any exceptional cases in which surrogacy is accepted would need to meet specific requirements safeguarding the well-being, rights, and dignity of any children affected, and all other vulnerable persons, including the surrogate.<sup>21</sup>

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of the child, and that the child should remain with the mother until permanent custody can be determined. In at least some situations, the surrogate mother's seeking of custody would be a morally appropriate course of action. David M. Feldman (163) comments that in the Baby M case, the judge should have thanked Mary Beth Whitehead "for reminding us of the special bond of attachment that a mother forms with her child; and he should have gratefully acknowledged her message that surrogacy as an option ought to be discouraged."<sup>20</sup>

<sup>20</sup> While Rabbi Spitz, in earlier drafts of his paper, approved Jews serving as surrogates, his final draft as approved by the CJS does not offer this permission.

<sup>21</sup> For their suggestions and thoughtful insights which have contributed greatly to this paper, I would like to thank Lorraine Newman Mackler, and members of the Committee on Jewish Law and Standards, including my fellow members of the Subcommittee on Bioethics: Rabbis Kassel Abelson, Elliot N. Dorff, Shoshana Gelfand, Avram Israel Reisner, Joel Roth, and Elie Kaplan Spitz.