

ON THE USE OF BIRTH SURROGATES

Rabbi Aaron L. Mackler and Elie Kaplan Spitz

This paper was approved by the CJLS on September 17, 1997, by a vote of fifteen in favor and two abstentions (15-0-2). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Elliot N. Dorff, Baruch Frydman-Kohl, Shoshana Gelfand, Nechama D. Goldberg, Judah Kogen, Aaron L. Mackler, Paul Plotkin, Avram Israel Reisner, Joel E. Rembaum, James S. Rosen, Joel Roth, Elie Kaplan Spitz and Gerald Zelizer. Abstaining: Rabbi Lionel E. Moses and Gordon Tucker.

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.

The practice of surrogacy involves powerful and sometimes conflicting Jewish concerns, including the value of procreation, respect for persons (כבוד הבריות), and concern for the well being of all of the vulnerable people involved. The Rabbinical Assembly Committee on Jewish Law and Standards has approved two different papers on this sensitive subject, by Rabbi Aaron L. Mackler and Elie Kaplan Spitz. Both agree that, on the one hand, traditional Jewish law does not mandate an absolute prohibition of surrogacy in all cases. On the other hand, surrogacy entails serious potential problems which would make it inappropriate in at least some cases. The two papers differ, however, both in their general evaluation of surrogacy and on some more particular points.

General Evaluation

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. These must be addressed by couples considering surrogacy, and ideally would be dealt with at the policy level by civil legislation. At the same time, the data of the last fifteen years indicate that problems as a result of these risks occur only in a small number of cases, and that the vast majority of surrogacies have resulted in offering the couple the joy of parenthood without harming or exploiting the surrogate or others. "From a Jewish perspective, it would be wrong to outlaw a procedure that has the potential to help so many couples overcome infertility and which works smoothly in the overwhelming majority of cases."

Rabbi Mackler expresses greater concern with potential harms and exploitation. There is a danger of treating people as commodities, and in some extreme cases, contracting/intended parents have sought to refuse custody of a child born with birth defects

or of the undesired gender. When the surrogate has other children, those children face the potential psychological harm of seeing their mother go through pregnancy and give birth to a child who is given to others. The risk of exploitation (ערושק) of surrogates is real as well. While such harms have been documented in some cases, their extent is debated and difficult to ascertain precisely. Still, these have been enough to lead secular groups such as the Ethics Committee of the American Fertility Society, which generally supports reproductive technologies, to express “serious ethical reservations,” and “not to recommend widespread clinical application of clinical surrogate motherhood at this time.” From a Jewish perspective, “surrogacy cannot be halakhically recommended, and in at least most cases would be forbidden by Jewish law and ethics.”

Particular Guidelines

Whether surrogacy agreements might be appropriate in most cases or only in exceptional cases, both rabbis agree on some important guidelines:

1. Couples contemplating the use of a surrogate 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 fully respected.

2. The surrogate should be protected from pressure to continue pregnancy when she judges abortion to be required to avoid serious threat to her health, and conversely she should be protected from pressure to abort.

3. 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.

4. Both Rabbi Spitz and Rabbi Mackler agree that a surrogate may receive reimbursement for her expenses and that any money the surrogate receives cannot be contingent on her giving up custody of the child. For Rabbi Spitz, it is appropriate that a surrogate be paid a reasonable sum for her services, which is separate and distinct from payment for a child. This payment is compensation for time engaged in the medical, psychological, and legal procedures; physical restrictions due to pregnancy; medical risk; and the use of her womb. The permissibility of payment is rooted in the reality that not everyone has a volunteer family member or friend to assist in the much wanted blessing of a child. For Rabbi Mackler, any payment to a surrogate mother beyond reimbursement of expenses would be discouraged as dangerously close to babyselling, or minimally the selling and purchase of parental relationships, which are inconsistent with halakhah.

5. Both Rabbi Spitz and Rabbi Mackler address the possibility of a dispute arising over the custody of the child, and each discusses the response he views as most consonant with Jewish law and ethics. For Rabbi Spitz, during the pregnancy a surrogate has the right to withdraw from the agreement, an extension of her freedom of choice. Upon birth to a gestational surrogate the surrogate should have no right to challenge custody. In contrast, an ovum surrogate may assert her maternal rights, but the burden of proof is on her to show cause why the original intent should not be honored. For Rabbi Mackler, the surrogate mother, as gestational and birth mother, is halakhically recognized as mother, and 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 by both “ovum surrogates” and gestational surrogates. 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. The views of Rabbi Spitz and Rabbi Mackler on this matter are not necessarily offered as decisive halakhic rulings, however, and both rabbis recognize that in practice custody likely would be determined by general civil law.

6. The sole position approved by the Committee on Jewish Law and Standards is that the religious status of a child follows that of the gestational/birth mother, in cases involving surrogacy as in all other cases. Children born to a non-Jewish surrogate (whether a gestational or ovum surrogate) would require conversion to be halakhically recognized as Jewish. Rabbis should display personal and pastoral sensitivity in such cases.

Any individuals considering surrogacy, as well as other interested readers, are strongly advised to read the full papers.

EDITORS' NOTE: *The full responsa by Rabbis Spitz and Mackler can be found below, pp. 529-550 and 551-557, respectively.*