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Who chooses? Allocating abortion rights during surrogacy

Judith Daar is a visiting professor at UC Irvine School of Law, clinical professor at UC Irvine School of Medicine and professor at Whittier Law School.



What began as a routine surrogate parenting arrangement in Connecticut has sparked a national debate over abortion rights. Though surrogacy and abortion are rarely aligned, the pregnancy-inducing act of hiring a woman to carry a child to term has collided with the pregnancy-ending medical procedure in

Crystal Kelley, a single unemployed mother of two who agreed to accept \$22,000 to help another couple struggling with infertility. All was well until an ultrasound at five months gestation revealed a fetus with multiple medical problems. The baby had significant congenital anomalies and would likely experience a shortened lifespan filled with surgeries, pain and limited sensory and mobility capabilities.

Until that moment, as is true in the vast majority of surrogate parenting arrangements, all had gone smoothly between the intended parents - a married couple with three existing children - and the surrogate. But the medical revelations tore the parties apart as each side staked out a different position on how to proceed. The couple asked Kelley to abort the fetus immediately, urgency flaring as the pregnancy bumped up against the legal limit for lawful termination in the state of Connecticut. Kelley refused, saying she wanted to give the baby a fighting chance. This refusal, it seemed, was in violation of the signed surrogacy agreement providing she would terminate the pregnancy, upon the intended parents' request, in case of severe fetal abnormality. While all agreed that the fetus met this criterion, no agreement could be reached on how to resolve the fundamental disagreement.

Desperate, perhaps, the intended parents offered the surrogate a bribe. For \$10,000, the couple beseeched Kelley, please follow the contract and agree to terminate this pregnancy. She declined and soon thereafter a legal team was put in place, with both sides acquiring representation. According to published reports, the couple's lawyer informed the surrogate that she was "obligated to terminate this pregnancy immediately." While the contract may have so provided, the enforceability and constitutionality of such a provision are highly suspect.

After the surrogate's refusal, the intended parents relented and agreed that they would accept responsibility for the child upon birth - and promptly surrender custody to the state under the Safe Haven Act for Newborns Act. Fearful the child would end up in foster care, the surrogate launched her own legal drama, moving from Connecticut to Michigan, a state that criminalizes surrogacy (making it a felony to enter into a surrogate parenting contract) and allows a court to declare the surrogate the child's legal mother.

Once settled in Michigan, Kelley realized she did not have the resources to care for a special needs child and began to search for an adoptive family. Meanwhile, the intended parents agreed to surrender their parental rights which paved the way for

Judges and Judiciary

District court caseloads see a bump in California

Each district judge in the state handles more than the nationwide average, with the Eastern District the worst off. Bucking a nationwide downturn, filings for marijuana and other drug-related offenses jumped in California in 2012.

U.S. Court of Appeals for the 9th Circuit 9th Circuit decision could lead to more lawsuits against airlines

Lawsuits against airlines could soar thanks to a ruling Tuesday that the federal Air Carrier Access Act can work in harmony with state tort laws to let disabled passengers file claims over lack of adequate assistance at the airport.

Law Practice

Howrey clawback suits target law firms, former partners

The Howrey LLP estate launched its first wave of clawback suits against California-based lawyers and others who it says profited from unfinished legal work begun at Howrey.

Federal prosecutor jumps to LA litigation boutique

Joseph N. Akrotirianakis, a federal prosecutor responsible for some of the Central District's biggest public corruption convictions in recent years, has joined Hobart Linzer LLP.

Education

California law schools fall in rankings

Most California law schools dropped in the latest U.S. News & World Report rankings, and no school moved up as the news magazine changed its calculations to give more weight to how well graduates do landing legal jobs.

Books

Sort through the health and fitness melee

Robert Henry provides a great start to finding what works for you in his e-book, "Age Re-Defined: Take Control of Your Health, How You Feel, and How You Look Even In Your Forties & Fifties." By **Robert Bastian**

Family

Who chooses? Allocating abortion rights during surrogacy

What began as a routine surrogate parenting arrangement in Connecticut has sparked a

the baby's adoption by a married couple with special needs children of their own. Baby S, a girl weighing in at six pounds nine ounces, was born in June 2012, and while her medical problems proved far worse than doctors had anticipated, she has survived to date with the aid of surgeries and tube feeding.

While much about the legal configuration of the modern family has shifted from status to contract, the fundamental rights surrounding a woman's bodily integrity remain off limits for private negotiation.

The story of Baby S' conception, gestation and birth is replete with the reallocation of the rights and responsibilities that attached to reproduction done the old-fashion way. When the couple asked the surrogate to gestate their embryo, they are implicitly allowing her to step into the legal shoes of the intended mother. Whatever rights and responsibilities a pregnant woman has with respect to her child-to-be are vested in the surrogate. While surrogacy contracts may contain language purporting to give the intended parents termination rights, these provisions are likely void as against public and constitutional policy.

From its inception in *Roe v. Wade*, the right to avoid procreation via abortion is understood as an individual right, inuring to protect "the interests of a woman in giving of her physical ... self during pregnancy." 410 U.S. 113, 170 (1973). The individualized right is re-imagined in scope in *Planned Parenthood v. Casey*, but its link to the physicality of pregnancy remains unchanged. As Justice Sandra Day O'Connor explains, "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." 505 U.S. 833, 852 (1992). Clearly, it is the burden of pregnancy and not the burden of parenthood that lies at the heart of the abortion right. So while the intended parents may argue that their right to avoid procreation is being infringed, they have no such right once the surrogate becomes pregnant.

Notably, many surrogacy contracts contain abortion clauses that specify under what circumstances the gestational carrier will agree to terminate or maintain the pregnancy. Presumably, the drafting attorneys assume - wrongly, I believe - that the pregnant woman's right to choose can be waived or transferred by commercial agreement. While much about the legal configuration of the modern family has shifted from status to contract, the fundamental rights surrounding a woman's bodily integrity remain off limits for private negotiation. At the very most, a surrogate's refusal to adhere to the abortion clause of an agreement may subject her to a claim of material breach, risking the loss of all monies paid under the contract. Specific performance for this type of personal service is legally off the table.

Should fundamental rights such as the right to abortion be inalienable, that is, not subject to voluntary waiver or transfer? In our country we do recognize that certain aspects of life are so valuable that we legally prohibit their surrender, declaring some legal protections nonwaivable (e.g., the implied warranty of habitability in residential tenancies) and some property unmarketable (e.g., solid organs such as kidneys and hearts). A few states do have laws declaring contracts regarding abortion unenforceable or at least not so by specific performance. In the surrogacy context, I think it is essential to recognize and protect the physical integrity and moral agency of the woman who agrees, albeit for a fee, to aid in another's procreative plan. Lawyers may continue to insert abortion clauses in surrogacy agreements, possibly to intimidate or signal to the surrogate her relatively inferior position in the collaborative reproductive relationship. But the day I see a judge order a surrogate to have or refrain from having an abortion is the day I will start to worry about the future of surrogate parenting arrangements. While surrogacy reallocates the norms of natural conception, it must remain faithful to upholding rights that are uniquely situated in a pregnant woman.

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national debate over abortion rights. By **Judith Daar**

Alternative Dispute Resolution Avoid the dangers of bias in dispute resolution

Those who serve as neutrals are in a unique position to affect the outcome of a case by virtue of their own biases. By **Mari J. Frank**

Administrative/Regulatory Council ignores problems with proposed green chemistry regulations

Following a cursory review of the regulation, the council "conclusively determined that the proposed regulations will not have any significant adverse impact on public health or the environment." By **Gene Livingston**

U.S. Court of Appeals for the 9th Circuit 'Iqbal Lite': coming to a court near you?

After grappling with this "perplexing" issue, Judge William Fletcher concluded that the U.S. Supreme Court itself has been inconsistent and has applied "a higher pleading standard" in certain kinds of cases. By **Matthew Schultz**

Government

Bill would nix impersonation loophole in rape law

Legislation proceeded through the Assembly Public Safety Committee on Tuesday that would rid California of a legal technicality under which impersonating a person's boyfriend or girlfriend does not constitute felony rape.

Corporate

Wilson Sonsini, Latham aid in \$1 billion Salesforce note offering

Wilson Sonsini Goodrich & Rosati represented San Francisco-based Salesforce.com Inc. in its intent to offer \$1 billion in convertible senior notes due 2018.

Intellectual Property

Appeals filed in 'dancing toddler' case over copyright takedown notices

A long-running court battle over a dancing toddler video may be headed to the 9th U.S. Circuit Court of Appeals now that both parties have filed petitions for interlocutory appeal.

Judicial Profile

Craig Phillips

Superior Court Judge Kern County (Taft)

Labor/Employment

Doubts over NLRB recess appointments leave businesses, workers hanging

While the Supreme Court decides if it will review the validity of Obama's recess appointments to the National Labor Relations Board, the fate of at