Kansas State Senate Bill Seeks to Declare Surrogacy Contracts Against Public Policy

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INTRODUCTION

The Bioethics world has been abuzz lately over both the McMath (13 year-old girl in California who suffered hemorrhaging after a tonsillectomy) and Munoz (pregnant Texas woman who developed aneurism) death by neurological criteria cases—and rightly so. The specter of judicial destabilization concerning the legal determination of death is likely to be one of the hot topics of 2014. But the judicial branch of the government is not alone in attempting to reopen issues once considered fairly well settled within the bioethics literature.

ANALYSIS

Consider a newly introduced bill proposed in the Kansas State Senate. Proposed by republican Senator Mary Pilcher-Cook, from Johnson County, Senate Bill 302 (SB 302) in entitled "An Act Concerning Surrogate Parenting Contracts." SB 302 declares that "surrogate parenting contracts are hereby declared to be against public policy and such contracts shall be void and unenforceable." Not only will the contract be unenforceable, also the parties will be subject to criminal penalties.

On Monday, January 27, 2014, the Senate Public Health and Welfare Committee heard testimony on the bill. The political and ideological lines were sharp. The Bill's sponsor argued that surrogacy potentially exploits poor women and encourages commodification of children. A pediatric nurse and president of The Center for Bioethics and Culture, an advocacy group based in California, testified that surrogacy undermines the dignity of women, children and human reproduction.

Opponents of the bill, including parents of children born via surrogacy, argued that current Kansas state laws adequately protect women against exploitation. A physician who specializes in infertility, Dr. David Grainger, argued that the law would have criminalized the birth of Jesus Christ, had it existed 2,000 years ago.

Reasonable people may disagree about the content, intent and potential impact of SB 302. This is not the first time the legitimacy of surrogate contracts has been challenged. The issue was first considered in the *In re Baby M* case. That case involved enforceability a surrogacy contract. An infertile couple from New Jersey, the Sterns, entered into a surrogacy contract with Mary Beth Whiteman, whom they located through an ad in a newspaper. Whiteman's own egg was used with Stern's sperm. This means that Baby M was Whiteman's biological child, a traditional surrogacy. When the baby was born, Whiteman decided to not give up the baby and the Sterns filed suit to enforce the contract. The New Jersey Supreme Court invalidated the contract as

violating public policy, but remanded the case to Family Court for determination of custody. Eventually, the Sterns were awarded custody and Whitehead was allowed visitation. A similar case in California, Calvert v. Johnson, came to a different conclusion. The Calverts were a married couple who were unable to have their own children. However, Mrs. Calvert and Mr. Calvert were capable of donating gametes, which were used to create a zygote. The zygote was implanted into Ms. Johnson for surrogacy. As was the case in the *Baby M* case, after the baby was born, the woman who born the child refused to relinquish the baby. In that case, the court upheld the parental rights of the biological parents, not the gestational surrogate mother.

CONCLUSION

More than the debate regarding public policy, careful bioethicists should be concerned about the use of vague or ambiguous language regarding surrogacy. As in the recent death by neurological criteria cases, the imprecise use of terms such as coma, life-support, and brain injury exacerbate conflict and confuse the facts—particularly in cases relying involving dynamic, evolving medical facts. In Kansas, the failure to preserve precise definitions will muddy this debate as well. Attempting to define surrogacy (the act which she finds worthy of laws to prohibit), Pilcher-Cook said it was "creating a child that you know is purposely not going to have either a biological mother, biological father or both." The confusion here is palpable, were it not such an important issue for many infertile couples, it would be laughable.

The advent of assisted reproductive technology has increased the permutations of parentage and surrogacy. Distinctions are now made between traditional and gestational surrogacy, as well as between which parents or donors provide the gametes. The Kansas Senate bill, which is currently facing significant opposition, would criminalize all forms of surrogacy. If the Kansas State Legislature chooses to move forward with this law, it ought to provide some clarity and precision in the language, and then offer some reasonable justification.

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