

The Surrogate Uterus: The AGR Case and Melissa Brisman

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The question of surrogacy has always been more about us than about the participants in the relationship. Will we use the power of the people to take a child from the arms of her mother when the mother is perfectly fit, loves her child, and desires to discharge her duties to her child?

I was the attorney for the gestational surrogate mother in the first contested “gestational” surrogacy case in New Jersey. In January, 2007, I received a telephone call from Angelia G. Robinson, “AGR” as she would later be known in court papers. Ms. Robinson had acted as a “gestational” surrogate for her brother and his partner. During her pregnancy and following childbirth, she had been led to believe that she had no legal rights with respect to the twin daughters she had given birth to three months earlier. I advised her that she did. As it turned out, the surrogacy broker who drafted the surrogacy contract was Melissa Brisman, the same broker who drafted the radical Brisman-Vitale bill vetoed by Governor Christie.

Until 2005, Robinson lived her entire life in Texas, where she grew up with her parents, two older brothers, and an older sister. She graduated from Baylor University, taught in the Texas school system for ten years, and later created a small business. She never married or had children until, at the age of 44, she gave birth to twin daughters on October 4, 2006.

In 2004 and 2005, for a period of eighteen months, Robinson’s brother Donald and his partner, Sean, tried to convince her to act as a surrogate mother for them, using Sean’s sperm, with the idea that her brother would adopt the child. In the summer of 2005, Donald urged her to sell her home in Texas and move to New Jersey to act as a surrogate. He offered her a job in his New York accounting firm and a place to live free of rent.

After they had her visit Asbury Park, New Jersey, in August 2005, she sold her home, gave up her small business, and wired the proceeds of the sale of her house to her brother, who used her funds, along with a substantial sum of his own, to purchase a vacant, boarded-up house in Asbury Park which he promised to renovate into a bed-and-breakfast as a place where she could live and work during the summers.

Having moved almost two thousand miles, with no money, no friends, and no family besides her brother, she was completely dependent upon him for a place to live and a source of a modest income.

The original plan was to use her ova, but since she was 43, an anonymous egg donor was recommended and chosen instead. In January 2006, a doctor started her on hormone injections that she had to take for about

forty days. An embryo transfer was scheduled for March 1, 2006.

A day and a half before the embryo transfer, she was told that she had to sign a surrogacy contract. IVF New Jersey and its chief physician Susan Treiser, who worked in conjunction with Melissa Brisman on gestational carrier arrangements, insisted that the parties sign a formal written contract. IVFNJ was never involved in a surrogacy arrangement until Brisman approached them. Brisman advertised all across the country for women to act as surrogates, offering large sums of money, trying to get women to act as gestational surrogates for anyone who wanted a child, whether it be a couple or a single man. In the process, IVFNJ and Brisman were each paid in the tens of thousands of dollars for every arrangement.

IVFNJ would use no one other than Brisman to draft the surrogacy contracts and coordinate the arrangements. Brisman's contracts gave the false impression that the gestational surrogate was bound to certain legal obligations when, in fact, no such legal obligations existed.

On the morning after Robinson was first told there had to be a written contract, Robinson, her brother, and his partner all met in her brother's office and went to a Notary Public, where they signed the contract. Robinson was required to sign a "waiver of independent counsel," which was part of the contract. The procedure was done the following day by Dr. Treiser at IVFNJ.

As the pregnancy progressed, Robinson gained a great deal of weight and her blood pressure became extremely high. When she was in her fourth month, her brother berated her for being "lazy" and she and her brother had a bit of a falling out. As a result, her brother's partner, the genetic father of the twins, met with Robinson and told her she could have an abortion and go back to Texas.

Robinson felt that the girls were her responsibility and that she was the only person in the world who could protect them. The bond and love for the girls who had developed by then and in the ensuing months was far more powerful than anything she ever anticipated. The growing sense of moral obligation to her daughters increased as she realized that her daughters needed their mother.

Eventually, Robinson felt like an isolated freak. Everyone thought she was giving her babies away. She wanted to take the girls out of state and raise them, but her doctor and friends told her it would be illegal. The Brisman contract stated that she had legal obligations and she had to do what was necessary to let her brother adopt her daughters. Robinson was torn between her obligations to her daughters who needed their mother, and her loyalty to her brother and the legal compulsion of the contract.

At the beginning of her eighth month, Robinson developed severe pre-eclampsia, had a seizure, and fell into a coma. She was rushed to a local hospital where an emergency C-section was performed while she was unconscious. She and the two girls were minutes from death.

After the birth, Robinson signed a "Consent for Adoption," drafted by Brisman, which she thought she was legally obligated to sign, and, thanks to Brisman, which she thought was legally binding. In fact, the "consent" was legally void and Brisman knew it.

Robinson's brother and his partner made it difficult for her to visit with the girls. When her daughters were two months old, it was documented that her brother, Donald, stated that she had three options: kill herself, go back to Texas, or sue him. One month later, Robinson was fired from her job at her brother's office and was told she could no longer see her daughters. A few years later, during the trial, it was learned that her brother and his partner Sean instructed the architects to stop all design work on the bed-and-breakfast when she was only four months pregnant, because—they said—she was going back to Texas.

After we filed the complaint asserting Robinson's rights, Brisman filed an adoption complaint, in which she stated that Robinson wanted her rights terminated, and Brisman certified that she knew of no other related lawsuits. The court granted my motion to stay the adoption.

In December 2009, the Chancery Court ruled that Robinson was the girls' legal mother; Brisman's contract was declared unenforceable, and her "Consent to Adoption" form was declared void.

During the litigation of that case, Robinson's brother and his partner produced two "expert" witnesses, who, in effect, asked the court to ignore both the *Baby M* decision, and the carefully prepared 177-page report of the Bioethics Commission.

One expert opined that it was time to create a breeding class of women to provide children for men who want them. Ironically, this witness's analysis began with a complaint about the history of the nineteenth century, when a woman's role was primarily seen as a bearer of children for men, while denied any legal right to custody of the children they bore. This expert—on the record—suggested that the cure for such prejudice is to provide women for men so women can bear children for them but be denied all parental rights. She argued that this would be liberating for women.

The second expert provided a report and testimony in which she concluded that mothers provide no particular benefit for children, and children can develop just as well with no mother.

As bizarre as these two propositions are, these two experts did us a great service. They encapsulated the two fundamental assumptions upon which all surrogacy, and especially gestational surrogacy, is based:

- (1) We should create a breeding class of women for men to use to bear children for them, and then cut off the mother's rights; and
- (2) Mothers are unimportant and offer no true value to their children (once they have bred them).

These assumptions sound vulgar because they are vulgar.

In her form contracts, like the one used for Gail Robinson, Melissa Brisman refers to the pregnant mother as the "surrogate uterus." Apparently some people, like Brisman, have such a lack of empathy for the mother who carries the child that they don't even think of the mothers as human beings any longer.

Brisman, as the drafter of the gestational surrogacy bill sponsored by Senator Vitale, now wants the rest of us to join her in reducing women to surrogate uteruses.

The Bioethics Commission Statute vs. Melissa Brisman's Surrogacy Broker's Statute

After the Brisman-Vitale bill was released from committee, two senators drafted a bill which would implement the New Jersey Bioethics Commission's recommendations. New Jersey now has a clear choice. The legislature can protect women against exploitation, prohibit the commodification of women and children, and protect the sanctity of the mother-child relationship by passing the carefully drafted Bioethics Commission bill. Or, the legislature can adopt the commercial broker's bill, drafted by the commercial surrogacy broker, Melissa Brisman, to advance the interests of brokers, which was prepared without any careful consideration of the Bioethics Commission's work and report.

The proposal is that the surrogacy broker, Melissa Brisman—rather than the non-partisan, non-conflicted Bioethics Commission created by the New Jersey Legislature—should set the policy for the people of New Jersey.

The question of surrogacy always has been more about *us* than about the participants in the relationship. Will we use the power of the people to take a child from the arms of her mother when the mother is perfectly fit, loves her child, and desires to discharge her duties to her child?

While some would argue that we should honor a woman's decision to act as a surrogate, the real question is, why wouldn't we honor her decision to keep the child she bore? More importantly, by enforcing a contract we encourage the underlying conduct. We ensure that it becomes widespread. Is our culture truly willing to encourage the creation of a breeding class of women, and a class of children deliberately intended to be motherless? Are we ready to embrace the exploitation of women, the commodification of children, and accept all of the unforeseen risks of irreparably altering human civilization?

Under the Brisman-Vitale bill, a 70-year-old man, divorced, with five adult children and ten grandchildren, could call Melissa Brisman and Dr. Treiser, and ask them to get him a surrogate because he thinks it would be nice to have another child. There is no conceivable public policy or public good that could justify producing a "surrogate uterus" for this man, and then forcing the birth mother to give up her child to him when she later realizes it is not in the child's best interests to do so. There is certainly no policy that would justify encouraging either him or a young woman to engage in such irresponsible behavior and to encourage that man to rely upon the rest of us to force her to give up the child.

The contrast of policies, values, and objectives reflected in the New Jersey Bioethics Commission's bill and Melissa Brisman's surrogacy bill could not be clearer, and our duty concerning which bill to adopt is all too clear. Those who appreciate that clarity must now act and be heard.

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