

Virtual Mentor

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ETHICS CASE

Physician Responsibility When a Surrogate Mother Breaks Her Contract

Commentary by Saima Rafique, MBBS, DGO, and Alan H. DeCherney, MD

Dr. Kerr greets Stacy, who is in her first trimester of pregnancy, for her second prenatal visit. Stacy's situation is still relatively rare in Dr. Kerr's obstetric practice: after extensive counseling, Stacy decided to become a surrogate mother for a gay couple. During her first visit, Stacy told Dr. Kerr about the surrogacy contract she had entered into, which detailed the compensation she would receive for her time and medical bills and stipulated that she would report for all prenatal visits, refrain from risky behavior such as smoking or alcohol consumption, and keep an open medical record, so the couple could know directly how the pregnancy was progressing.

Stacy tells Dr. Kerr that, apart from a little morning sickness, she has no complaints. Dr. Kerr goes through her examination as usual. "Everything looks great," she tells Stacy. "Do you have any questions for me?"

Stacy hesitates for a moment, but after an encouraging look from Dr. Kerr, she begins to speak. "When I signed the surrogacy contract," Stacy says, "I didn't think I'd have any trouble not drinking alcohol. But I'm finding it really hard to give it up. I did some research online and read a little alcohol won't hurt the baby, so I've started drinking a glass or two of wine a week. I know I said I wouldn't, so please don't put anything in my record, but what I'm doing is OK, right?"

Commentary

This clinical vignette describes a unique and ethically sensitive scenario that is likely to become more common in the near future as the techniques for assisted reproduction steadily advance and the incidence of surrogate pregnancy continues to rise. The matter of surrogacy is complex and challenging due to the multidimensional physical, ethical, emotional, financial, social, and legal impacts it has on all those involved. In addition to all these considerations, the added ethical dilemma here is that Stacy is asking the doctor to condone and participate in her violation of the surrogacy contract.

Surrogacy is an arrangement in which a woman (the surrogate) bears and delivers a child for another couple or person. It is further classified as traditional or gestational. In traditional surrogacy, also known as straight or partial surrogacy, the surrogate is impregnated with the sperm of the intended father or a sperm donor, usually by artificial insemination (AI). Gestational surrogacy, also known as full surrogacy, is a more sophisticated procedure in which, with the help of in vitro fertilization, gametes

from both the intended parents or from sperm or oocyte donors are used to create an embryo that is then implanted in the surrogate's uterus [1]. Surrogacy can be commercial, in which a financial compensation is provided to the surrogate and delivering the baby, or altruistic, motivated purely by an intention to help.

The first report of a baby born as a result of gestational surrogacy came from the United States in 1985 [2]. The topic of commercial (compensated) surrogacy arrangements has remained controversial since then, and individual states in the US have different laws and policies regarding these arrangements [3]. In states where commercial surrogacy is allowed, professional legal organizations assist couples in finding a surrogate. This is followed by a detailed discussion among the surrogate, the intended parents, and the clinician about different aspects of surrogacy, including medical risks, benefits, alternatives, and the treatments involved. It is highly recommended that both parties undergo in-depth counseling by an independent counselor to help them understand the process and its consequences [4]. The legal aspects are separately discussed under the guidance of a lawyer with expertise in the field.

Following the completion of the counseling and legal procedures, many fertility centers that manage surrogacy cases present a combined report to an independent ethics committee for review and approval [1]. Any physician who facilitates a surrogacy arrangement needs to be aware of the policies and the laws on surrogacy in his or her state. It is the physician's responsibility to make appropriate arrangements to protect the prospective child, the potential surrogate mother, and the intended parents from medical, psychological, and legal harms [5].

Patient First

In the current clinical scenario, although the contract Stacy signed asked her to refrain from risky behavior like alcohol and smoking, she is finding it hard to give up alcohol and has started consuming a couple of glasses of wine per week. Her concerns about alcohol consumption and willingness to discuss them with Dr. Kerr should be taken as an opportunity to appreciate her responsible behavior—this will strengthen the patient-physician relationship and facilitate further communication. According to the recommendations of the 2008 American Congress of Obstetricians and Gynecologists (ACOG) committee opinion,

While caring for a surrogate mother it is the professional obligation of the obstetrician to support the well-being of the pregnant woman and her fetus, to support the pregnant woman's goal for the pregnancy, and to provide appropriate care regardless of the patient's plan to keep or relinquish the child. The obstetrician must make recommendations that are in the best interests of the pregnant woman and her fetus, regardless of prior agreements between her and the intended parents [6].

Dr. Kerr's first ethical obligation, then, is to provide Stacy with information and recommendations that safeguard Stacy and the fetus, the contract aside.

Although there is strong evidence that high alcohol consumption during pregnancy can lead to a spectrum of damaging effects on the fetus [7], data regarding the effect of low-to-moderate alcohol consumption on fetal growth and development is not so clear [8]. Recent studies evaluating the neurodevelopmental outcomes of children exposed to low-to-moderate alcohol consumption during gestation do not demonstrate any significant effect on intelligence [9], behavior [10], executive function [11], attention [12], or balance [13]. Dr. Kerr should discuss with Stacy the potential dose-related effects of alcohol on the fetus and provide the published evidence on which the discussion is based.

Despite the findings mentioned above, since there are no clear guidelines on the acceptable levels of alcohol in pregnancy and Stacy is in the sensitive situation of surrogacy, the conservative approach of avoiding alcohol in pregnancy would be safest. Further, that Stacy is finding it hard to give up alcohol means she may benefit from additional resources like counseling and behavioral interventions. Following the ethical principle of respect for patient autonomy and patient's right to know, all the pros and cons should be clearly discussed so that Stacy is able to make a responsible decision. Knowledge of the state laws on the rights of surrogate mothers would help Dr. Kerr to further assist Stacy in understanding her options.

The Child's Welfare

Along with her obligation to Stacy, Dr. Kerr has a responsibility to the unborn child. Since the conception of the first surrogate baby, child welfare in this context has been a topic of ongoing and intense debate. The regulatory framework on children born through surrogacy and assisted reproduction is still in the process of solidification [14]. Advocates of child welfare argue that, because of the desire of the intended parents to procreate and the motivation of the fertility specialist to deliver a baby to the intended parents as quickly as possible, the welfare of the child involved does not receive appropriate attention [14]. These advocates argue for a heightened focus on the best interests of the child. Vulnerability and dependency are the two important characteristics of children around which most of the sociocultural and legal safeguards are framed, and they should be applied here [15].

It is imperative to recognize that children's rights cannot be adequately protected without the participation of the adults who have been vested with the responsibility to make decisions that affect them [16]. While most adults can safeguard their own rights and interests, the health of children, especially unborn children, is significantly dependent on the choices and actions of their parents. Parental decisions may influence the child's future capacities, health status, and quality of life. A physician's responsibility is to give those parents information about avoiding risks to their children's lives, guide them to appropriate resources, and assist them in making decisions that are in the best interest of their children.

Although novel techniques for assisted reproduction have been successful in filling voids in the lives of infertile couples and have led to the birth of many healthy children, the risks associated with these techniques cannot be completely overlooked. For the mother, these risks range from those that are inherent to pregnancy and delivery to those that occur as side effects of medications and procedures used in assisted reproduction. The higher incidence of multiple fetuses in assisted reproduction adds to the obstetric risk.

Studies analyzing the development and performance of children conceived by IVF suggest that, in the long term, they are generally healthy and do not differ in cognitive development and performance from children conceived without assistance [17, 18]. However, there are reports of significantly higher rates of low- and very-low-birth-weight babies in both multiple and singleton pregnancies achieved through assisted reproduction [19], as well as a higher rate of major birth defects [20], childhood cancers [21], genomic imprinting disorders [22], cerebral palsy, and developmental delay, the last two often caused by prematurity [23]. Having a child with any of these disorders not only creates an environment of psychosocial, emotional, and financial distress for the parents but also limits the child's future potential. Hence all the parties involved in such an arrangement have a responsibility to avoid any predictable risk that would compromise the health and welfare of the child. Advocates of child welfare have repeatedly said that “children born through assisted reproduction have a right to expect that their parents received appropriate information about risks and the actions that might be taken to prevent or reduce them, and that a fair balance was struck between their parents' liberty rights and their rights to protection” [24].

In this particular situation Dr. Kerr should initiate a discussion with Stacy to get an idea of Stacy's knowledge about the potential risks associated with assisted reproduction, filling in any missing gaps in information and addressing any queries. She should explain to Stacy that, even after appropriate planning and precautions, unforeseeable consequences do arise, but all foreseeable risks associated with surrogate pregnancy, assisted reproduction, and alcohol consumption—for example a disability that could lead to the rejection of the infant by the intended parents or the diminishment of his or her capacities—should be avoided as far as possible through appropriate planning. Dr. Kerr should also highlight that Stacy's difficulty giving up alcohol might augur a tendency to drink more or be unable to control her drinking. If needed, arrangements should be made to counsel Stacy to adopt responsible behavior for her own health as well as to make informed decisions that safeguard the health of the fetus.

Hiding Information

The third important issue that Dr. Kerr must address is Stacy's request that she not put anything in the medical record regarding Stacy's recent alcohol consumption. Having an open medical record allows the other party to the surrogacy contract access to the surrogate's medical information. It would not be appropriate for Dr. Kerr to withhold information from the medical record, even if she were doing it to

remain faithful to Stacy. Lying to Stacy by saying that she will not put anything on record and later updating it would not be suitable either. Dr. Kerr has to approach this issue in a tactful way that honors her various professional obligations. An appropriate way to address the concern would be to repeat that the health and well-being of Stacy and her child are Dr. Kerr's first priority and that she will do everything in her capacity to protect them. Dr. Kerr could then explain that she is bound by medical practice rules that mandate accurate and complete record keeping, but that she will be by Stacy's side as her physician and health advocate in any situation. Dr. Kerr should strongly encourage Stacy to communicate with the prospective parents and could also offer to mediate such a discussion during which she could provide the parents with evidence about low alcohol consumption and fetal health. She could highlight that Stacy's not hiding her alcohol consumption is responsible behavior and that Stacy is willing to participate in counseling and other resources on behavioral modification if needed.

Conclusion

Dr. Kerr is facing a clinical and ethical dilemma unique to surrogate pregnancy. She has to take an approach that puts Stacy's health and that of her child first regardless of the contract. Dr. Kerr should safeguard their health by providing appropriate information on the dose-related effects of alcohol and encouraging Stacy to make informed and responsible decisions for herself and the future child by avoiding any foreseeable risk. She should honestly convey to Stacy that her ethical responsibilities do not allow her to hide medical information but assure Stacy that she will be by her side at all times and would be happy to mediate an evidence-based discussion with the intended parents to give them a complete picture of the situation, make arrangements for appropriate follow-up, and provide additional resources.

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