

A Comparison of Three Surrogacy Agreement Cases Using AHP

Cynthia L. Knott, Susanne Bruno Ninassi, Alyson Eisenhardt
Marymount University, Arlington, USA

This paper builds on the previous work of Knott, Ninassi and Eisenhardt's 2009 paper, "Using the Analytic Hierarchy Process (AHP) to Look at the Tradeoffs Among Stakeholders in the Case of Surrogacy, when the Initial Intention of the Parties Involved Change After the Pregnancy Has Ensued". This paper proposes a new methodology for analyzing cases involving stakeholders in disputed surrogacy arrangement. The methodology utilized is the Analytic Hierarchy Process, which allows users to weigh different criteria based on their own opinions and background. Three case studies involved a surrogacy arrangement among three stakeholders: the biological mother, the biological father and the surrogate mother. The base for the model was that all parties had entered into an agreement, and that after the agreement had been made, a situation changed, such that a decision as to who had parental rights over the fetus became an issue. The criteria used in the decision making process in the three case studies were legal, health and ethical. The criteria differed based upon each stakeholder's point of view. In this paper, the three models were developed using the AHP methodology and judgments were gathered for each of the three cases to derive the priorities for the criteria in each model. Each author took the role of one of the three stakeholders.

Keywords: the analytic hierarchy process, surrogacy, legal issues, ethical issues, health issues, decision making model

Legal and Case Studies Background

As previously discussed in the prior paper (Knott, Ninassi, & Eisenhardt, 2009), the legal background for surrogacy cases follows.

Historically, when the custody of a child is contested, the courts will look to the standard of what is in the "best interest of the child" in reaching its decision (Hames & Ekern, 2006). However, with the reproductive technology, such as in vitro fertilization, the courts must grapple with the issue of who is the legal parent. Three California state cases are discussed to illustrate how courts are dealing with this issue.

The first case is *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), cert. dismissed, 510 U.S. 938 (1993). This is the case, the Calverts, a married couple, entered into a gestational surrogacy arrangement with Ms. Anna Johnson. Under this type of surrogacy arrangement, the wife's egg inseminated with the husband's sperm was transferred into the uterus of another woman, the surrogate, for gestation and birth. As part of the contract, Ms. Johnson agreed to relinquish all parental rights. During the pregnancy, the relationship between the Ms. Johnson and the

Cynthia L. Knott, Ph.D., assistant professor, School of Business Administration, Marymount University.
Susanne Bruno Ninassi, J.D., assistant professor, School of Business Administration, Marymount University.
Alyson Eisenhardt, DHS, assistant professor, School of Business Administration, Marymount University.

Culverts deteriorated. The Calverts sued for a declaration that they were the legal parents of the unborn child. Ms. Johnson sued to be declared the legal mother.

The California Supreme Court held that although the state statute “recognizes both genetic consanguinity and giving birth as means of establishing a mother-child relation, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother” (*Id.* at 782). The court held that the gestational mother had no parental rights, and the agreement was not inconsistent with public policy nor was the termination of the surrogate’s claims to the child unconstitutional.

The next case is *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d (Ct. App. 1994). In this case, the husband and wife, Robert and Cynthia Moschetta, entered into a traditional surrogacy arrangement in which Ms. Elvira Johnson, the surrogate, was impregnated with Mr. Moschetta sperm with the prior understanding that the resulting child would legally be the child of Mr. Moschetta. Ms. Johnson also agreed to terminate her parental rights, and Mrs. Moschetta would then adopt the child. After the baby was born, the marriage deteriorated, and Mr. Moschetta filed for divorce. The court was asked to determine the parental rights of the wife and the surrogate. The trial court held that Mr. Moschetta and Ms. Johnson were the legal parents of the child and should have joint custody. Mr. Moschetta appealed stating that contends that his wife is the legal mother.

The California Court of Appeals held that according to the state statute, the surrogate is the legal and natural mother genetically and by giving birth. The court noted that this case differed from the *Johnson* case since the wife, Ms. Moschetta, was not the child’s genetic or biological mother. The court reasoned that since the state statute was clear there was no further need to look to the ruling in *Johnson*, and therefore held that the surrogate, Ms. Johnson, was the legal mother.

The third case is *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998), reviewed denied (June 10, 1998). In this case, the Buzzancas, a married couple, agreed to have an embryo genetically unrelated to them implanted in a woman, the surrogate, who would carry and give birth to the child for the couple. Before the birth, the Buzzancas split up, and the question before the trial court was who were the lawful parents. The trial court determined that the child had no lawful parents. The parties appealed.

The California Court of Appeals held that Mr. Buzzanca was the lawful father because “... there are times when *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child” (*Id.* at 282). The court relied on the finding in *Johnson* and found that Ms. Buzzanca was the lawful mother. The court held that:

...just as a husband is deemed to be the lawful father unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parent of a child after a surrogate bears a biologically unrelated child on their behalf. In each instant, a child is procreated because of a medical procedure was initiated and consented to by intended parents (*Id.*).

Summary of the Three California Cases

In the three California cases, the courts first looked to the California state statute to help determine the legal status of parties. The courts also looked at the intention of the parties at the time they entered into a surrogacy arrangement to help determine the legal parent(s) of the child.

In *Johnson*, although the surrogate was the birth mother, she had no genetic connection to the child. Relying on the statute and the intentions of the parties, the California Supreme court held that the husband and wife were the legal parents.

In *Moschetta*, the surrogate was the birth mother and was genetically connected to the child. The court,

relying on the statute, held that the husband and the surrogate were the legal parents. The court did not follow *Johnson*, since the surrogate in this case had the genetic connection.

In *In re Marriage of Buzzanca*, a genetic connection did not exist for any of the parties to the surrogate arrangement. The court, relying on *Johnson*, looked at the intent of the parties and held that the husband and wife were the lawful parents.

Application of Existing Law to Hypothetical Cases

Hypothetical Case 1

The Facts:

Husband and wife cannot conceive. They enter into a traditional surrogacy arrangement with a woman who has agreed to be artificially inseminated with the husband's sperm and to terminate her parental rights upon delivery. However, after delivery, the surrogate decides that she wants to keep the child.

Analysis based upon the three legal cases:

Based upon the existing case law, it would appear that the *Moschetta* case would be followed since the facts in the hypothetical and the actual case are the same. The surrogate is the birth mother and is genetically connected to the child.

Hypothetical Case 2

The Facts:

Husband and wife cannot conceive. They enter into a gestational surrogacy arrangement where the wife's egg, inseminated with the husband's sperm, was transferred into the uterus of another woman, the surrogate, who agreed to terminate her parental rights. When the surrogate is seven months pregnant, the marital relations between the husband and wife deteriorates. The wife decides she does not want the child and will terminate her parental rights. She files for divorce. The husband still wants the child; however, upon hearing about the divorce, the surrogate decides not to terminate her parental rights.

Analysis based upon the three legal cases:

Based upon the existing case law, it would appear that the *Johnson* case might be followed since facts in hypothetical and in *Johnson* are similar since the surrogate had no genetic connection to the child. Therefore, applying the case law to this hypothetical, the legal parent would be the father.

Hypothetical Case 3

The Facts:

Husband and wife cannot conceive. They enter into a traditional surrogacy arrangement with a woman who has agreed to be artificially inseminated with the husband's sperm.

The surrogate carries the baby for two months. During a routine examination, it is determined that the fetus has a medical issue. The surrogate wants to abort the fetus.

Analysis based upon the three legal cases:

The California courts have not addressed this issue. However, the California Court of Appeals discussed that enforcing a surrogate contract could lead to many legal problems and questioned:

What if a surrogate mother took drugs or alcohol during her pregnancy in violation of her contract? Or wanted an abortion? Could the contract be enforced by court order and subsequent contempt? Would there be a "surrogate mother's tank" in the local jail. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 903 & n.23 (Ct. App.1994).

The Three Hypothetical Case Study Models With Weights and Outcomes

The three cases were developed into the Analytical Hierarchy Process (AHP) Models, which is a methodology developed by Thomas Saaty (Saaty, 1994). The process allows users to enter judgments via a pair-wise comparison mode to derive the relative priorities of the criteria and the alternatives. The criteria that were considered in the hypothetical cases included: ethical, health and legal. The alternatives considered were: parental rights, custody rights, carrying to term and abortion. After the judgments were entered, the model was synthesized to determine the overall best alternative for each individual case. Depending on the background of the case, the priorities changed due to different scenarios. The findings are listed in Table 1, Table 2 and Table 3.

Table 1

Hypothetical Case 1 Model

Criteria	Overall criteria priority	Surrogate legal parent	Father legal parent	Both legal parents
Health issues	0.069	0.111	0.111	0.778
Legal issues	0.348	0.111	0.111	0.778
Ethical issues	0.582	0.107	0.107	0.776
Overall alternative priority		0.109	0.115	0.777

Since there were no real health issues, except for those associated with a normal pregnancy, this criterion weighted low in the overall model. However, the fact that the health and the overall well-being of the child is best served by having both parents, this criterion was factored in the overall decision. In terms of the alternatives, both the husband (the father) and the surrogate are the biological parents. Therefore, both have parental rights over the child based upon the current case law. When weighing in the ethical factor, sharing parental rights was the overall best decision. Note, in this hypothetical, abortion was not an option since the biological parents wanted to keep the child.

Table 2

Hypothetical Case 2 Model

Criteria	Overall criteria priority	Surrogate legal parent	Father legal parent	Both legal parents
Health issues	0.062	0.319	0.221	0.460
Legal issues	0.653	0.076	0.766	0.158
Ethical issues	0.285	0.349	0.168	0.484
Overall alternative priority		0.199	0.496	0.306

As in case 2, there are no health issues, and therefore that criterion weighted low. However, the legal criterion is more important than the ethical. In this case, the husband and the wife are the biological parents. Yet, the wife terminated her rights and now the surrogate, who has no genetic connection to the child, seeks parental rights. Although allowing parental rights for the surrogate was weighted high in terms of ethics, because of the high weight of the legal issues, the overall decision would be for only the father to have parental rights. Note, in this case, abortion was not an option because both the father and the surrogate wanted to keep the child.

In case 3, the ethical issues weighted the highest, with legal the next highest, because the husband and wife still want the child even though the child will have a medical issue. Although the health criterion should, at first glance, be a priority, it weighted low. This resulted because of the ethical decision by the couple to keep the child even though the child will have a medical condition. However, in the overall decision, abortion came out to be the best alternative. Even with respect to the ethical and legal issues, it still weighted high. In fact, abortion was the

best alternative with respect to each criterion.

Table 3

Hypothetical Case 3 Model

Criteria	Overall criteria priority	Abort	Carry to term
Health issues	0.088	0.875	0.125
Legal issues	0.243	0.857	0.143
Ethical issues	0.669	0.667	0.333
Overall alternative priority		0.721	0.279

Conclusions and Future Research

The Analytic Hierarchy Process, as developed by Saaty (1994), is a methodology used to assist in high-level decision-making. AHP allows decision-makers to weigh criteria based on their own opinions and thoughts. This paper employed the usage of AHP methodology to analyze three related hypothetical cases involving parental rights and surrogacy. Judgments for each stakeholder were made based on the following components: legal, ethical, and health. The judgments were then assessed and evaluated to determine which criterion weighed highest for each stakeholder.

The researchers would like to explore the assistance of AHP models using these and other case studies in the classroom to discuss the tradeoffs with students when making decisions. We would also like to find a current case in litigation to see if our model comes to the same conclusions as the court. However, this presents challenges. As indicated in the current case law, the court looks at the biological connection of the parties to the child and then will examine the intent of the parties in determining parental rights.

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