Symposium: Making Families

Autonomy in altruistic surrogacy, conflicting kinship grammars and intentional multilineal kinship

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Abstract Since 1982, when the first baby conceived by in-vitro fertilization (IVF) in Sweden was born, Swedish legislation on assisted reproduction has gradually become more liberal and inclusive. Today, gamete donation and IVF are permitted not only for heterosexual couples, but also for lesbian couples and single women, and embryo donation is expected to become legalized shortly which will further increase the chances for involuntarily childless people to become parents. In recent years, the possibility of allowing surrogacy has been debated increasingly, with strongly polarized arguments both for and against it. Recent reports by the Swedish National Council of Medical Ethics and a governmental investigation agreed that the possibilities for involuntarily childless people should be increased in several ways, but reached opposing conclusions concerning surrogacy. While the former argued in favour of it (in certain circumstances), the latter argued against it (in all circumstances). One difference in their argumentation centred around the issue of bodily autonomy and self-determination in surrogacy. These two opposing conclusions raise crucial questions about what the principle of reproductive intent implies for questions concerning reproductive autonomy in surrogacy. Does it matter when in the reproductive process the declaration of intent is made, and what happens if we consider the possibility of changing intentions in relation to autonomy and self-determination in surrogacy? Is the mater est rule compatible with an intersectional, queer and non-discriminatory approach to reproductive justice, and if so, under what circumstances? Are there any possibilities of thinking beyond the 'either/or' between these two principles?

Introduction

Since 1982, when the first baby conceived by in-vitro fertilization (IVF) in Sweden was born, Swedish legislation on assisted reproduction has gradually become more liberal and inclusive: insemination of sperm for heterosexual couples has been permitted since 1984, sperm donation in IVF since 1995, egg donation since 2003, sperm donation for lesbian couples since 2005, and sperm donation for single women since 2016. Embryo donation and so-called 'double donation' is expected to become legalized within the Swedish healthcare system shortly, which will further
increase the chances for involuntarily childless people to become parents (including transgender patients who were recently granted the right to fertility preservation as part of gender-confirming treatment). Today, there is no specific Swedish law explicitly forbidding surrogacy, but the legal principle *mater semper certa est* (‘the mother is always certain’; henceforth the *mater est* rule) effectively bans surrogacy-related treatments in Swedish health care.

The gradual, but relatively slow, inclusion of single people and couples that do not adhere to the heterosexual family norm speaks of general changes in cultural norms towards what David Eng has called ‘queer liberalism’. In similar ways to what has happened in many other Western states, this has entailed an incorporation (appropriation, some would say) of ‘queer’ into consumer capitalism, and the extension of liberal rights such as marriage, adoption and custody (Eng, 2010: 3), as well as access to parental leave benefits and assisted reproduction (Puuar, 2005). In the Swedish context, this has entailed, among other things, a decreased (nearly eliminated) emphasis on the idea that ‘natural’ reproduction is an ethically valid principle for policy and law (Smer, 2013: 35–36). Instead, ‘love’ and ‘choice’ have become increasingly normalized as legitimate principles for the creation of families and kinship ties. Today, although Sweden is by no means free of homophobic discrimination, the idea that ‘all love is the same’ is a dominant discourse that underpins much family legislation and policy – at least as long as this love is organized in the form of ‘respectable’ twosome relationships that do not differ too much from heterosexual nuclear families (Gondouin, 2018).

In the wake of this, the possibility of allowing surrogacy has been debated increasingly, with strongly polarized arguments both for and against it (Gondouin, 2018; Nebeling Petersen and Kroløkke, 2017). A growing number of straight and queer Swedish residents are also turning to cross-border surrogacy (which is not forbidden by law), and a ‘grey surrogacy market’ has emerged online, making it possible to arrange informal surrogacy arrangements by travelling abroad for treatment. In 2016, the first Swedish agency offering transnational surrogacy arrangements to the USA and Ukraine was set up, and Georgia is becoming an increasingly popular destination for surrogacy (Gunnarsson Payne, 2016a). One significant reason for the popularity of these three countries is that, in addition to offering commercial surrogacy (unlike Sweden), they do not practice the *mater est* rule but rather the principle of ‘parental intent’ in surrogacy – which, in practice, means that the legislation is favourable for the intended parents, and grants the surrogate mother no parental rights.³

It is in this context that two official reports were published, each produced by one of the two most authoritative advisory bodies for legislation on matters concerning assisted reproduction. The first report (2013), ‘Assisted Conception – Ethical Aspects (Assisterad befruktning – etiska aspekter)’, was published by the Swedish National Council of Medical Ethics [Statens medicinsk-etiska råd (Smer), henceforth referred to as the ‘Council’].⁶ The second report (2016) was the long-awaited governmental final report entitled ‘Different Paths to Parenthood (Olika vägar till föräldraskap)’, which was led by judge and governmental investigator Eva Wendel Rosberg.⁷

Both reports discuss a number of issues concerning assisted reproduction, including the possibility of permitting altruistic gestational surrogacy in Sweden. Although they recommend that the possibilities for involuntarily childless people to become parents should be increased in several ways (e.g. by permitting embryo donation), they reach opposing conclusions concerning surrogacy. While the Council argues in favour of it (in certain circumstances), the Governmental Investigator argues against it (in all circumstances). It should be noted that this difference in conclusions is not based on fundamental ideological differences (both are, for example, opposed to commercial surrogacy), nor on radically diverging ideas about biology, sexuality, gender or genetic kinship.⁸ Rather, one main difference in their argumentation cohered around the issue of the surrogate’s bodily autonomy and self-determination.

The Council argues that the autonomy and self-determination of women is a strong reason to permit altruistic surrogacy. It argues that ‘Everyone has the right to determine by themselves how they wish to live their lives’, and explains that ‘There are women who for altruistic reasons (cf. living

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¹ The *mater est* rule used to be merely implicit and taken for granted, but since 2003, when egg donation was legalized, it has been explicitly formulated: ‘If a woman gives birth to a child that has been conceived by an egg from another woman after fertilisation outside of the body that has been inserted into her body, she shall be considered the child’s mother’ (Prop. 2001/02: 89).

² It should be noted that although cross-border surrogacy is not illegal, the absence of regulation is known to cause legal and administrative problems related to custody when parents return with their surrogate-born children, as this is currently solved differently on a case-by-case basis.

³ The current European patchwork legislation on assisted reproduction makes it possible for Swedish citizens to arrange informal surrogacy arrangements within the European Union (EU); for example, by making an agreement online and travelling abroad for treatment with egg, sperm or embryo donation, and formalizing parental status at home (a non-genetic parent generally has to adopt the child).

⁴ At the time of writing, few EU countries allow surrogacy at all (UK, Netherlands, Greece) and only in non-commercial forms, so the vast majority of transnational surrogacy arrangements undertaken by Swedish (and other EU) citizens take place outside the EU.

⁵ As Marcin Smietana observed in his research on gay fathers by surrogacy, the lack of pre-birth parental orders within the EU makes these destinations less attractive for intended parents than the USA, where this is commonly practised (Smietana, 2017).

⁶ The Council (Swe. Statens medicinsk-etiska råd, Smer) was formed by the Swedish Parliament in 1985 with the specific task of advising the Swedish Parliament and the Government on issues regarding medical ethics. It consists of nine members (including medical professionals, officials and representatives of political parties) as well as a number of advisory experts on e.g. medicine, law ethics (philosophy), and public policy, etc.

⁷ A governmental final report (‘slutbetänkande’) is a report produced by a government-appointed investigator (often working with a team of experts) to advise law-makers in their political decisions.

⁸ Both reports also apply such an inclusive definition of involuntarily childlessness, including people with a medical condition that prevents them from conceiving, as well as same sex couples, some transgender couples or people, single women or men, couples that for some reason have difficulties having intercourse, and asexual people (Smer, 2013: 1: 99; SOU, 2016: 11: 97–98).
donors) want to help e.g. a sister or friend to have a child in this way’. The Council proposes a number of conditions that would ensure the surrogate’s autonomy to the greatest extent possible (Smér, 2013: 166). The Governmental Investigator, however, concludes that ‘Respect for the autonomy of the surrogate mother and her right to self-determination also requires that she must be able to change her mind once the child has been born’, and argues that, for this reason, the mater est rule needs to be kept, but concedes that such regulations ‘can, at the same time, result in serious problems’. The potential problems referred to here are conflicts between the reproductive parties, which, they argue, are likely to be detrimental to the child as well as the intended parents (if the surrogate decided to keep the child) (SOU, 2016: 1: 56).

These two opposing conclusions demonstrate, in different ways, the intrinsic tension between the mater est rule and the principle of parental intent in surrogacy that runs through the argumentation in both of the analysed reports. By paying close attention to this tension, I argue that we can raise crucial questions about what the principle of reproductive intent implies for reproductive autonomy in surrogacy. Does it, for example, matter when in the reproductive process the declaration of intent is made, and what happens if we consider the possibility of changing intentions in relation to autonomy and self-determination in surrogacy? Is the mater est rule compatible with an intersectional, non-discriminatory and ‘queerer’ approach to reproductive justice, and if so, under what circumstances? In what way may it take into account the reproductive vulnerability of all reproductive parties? Are there any possibilities of thinking beyond the ‘either/or’ between these two principles?

In this article, I seek to begin addressing these questions by reading the issue of reproductive intent and reproductive autonomy in Swedish debates about altruistic surrogacy through the lens of kinship grammars. Specifically, this will be done by close reading of the reports produced by the Council and the Governmental Investigator, paying particular attention to the ways in which these reports deal with this inherent tension.

**Kinship grammars: legal, biological and affective dimensions**

The framework of kinship grammars takes into account how parental kinship is governed by a set of historically and culturally contextual articulatory principles that serves to Howell’s a child to a specific parental figure (Gunnarsson Payne 2016a, 2016b; see also Howell, 2007). It acknowledges that kinship is never merely a ‘fact’, but rather a set of material, affective and linguistic practices that create a specific relationship between persons, and ‘cutting off’ others from a specific kinship constellation. Which kinship grammars are applied in a specific relational context has significant consequences not only for how we might feel for or treat each other as co-humans, but also for our legal rights and responsibilities to each other including the right or responsibility to be cared and provided for, and whom we may inherit from when they die (Butler, 2002; Strathern, 1996).

Inspired by thinkers such as Sarah Franklin and Catherine McKinnon (2001), Ludwig Wittgenstein (1953/2001), Charis Thompson (2001, 2005) and Aletta Norval (2007), I have termed the different sets of articulatory principles that are (flexibly) ‘applied’ to determine parental kin ‘kinship grammars’. These grammars can be traced to specific genealogical beginnings, they tend to be more or less stable, but are by no means static; rather, they tend to become rearticulated over time and when travelling across different contexts. ‘Kinship grammars’, then, is what I call the articulatory principles that govern how kinship bonds are made, undone and remade in various contexts, thereby articulating what kinship ‘is’ in a specific context (e.g. national) or domain (e.g. legal, familial). Importantly, the ontological assumption is that there is no pre-existing ‘real’ form of kinship that is then simply interpreted in different ways. Rather, it is the very interpretations that different kinship grammars make possible that constitute kinship, making it what it ‘is’ (Wittgenstein, 1953/2001: 337, 373). As such, kinship grammars tell us not only who is a relative of whom, but also what ‘kind’ of relative a person is, and what follows from that in terms of rights, responsibilities, affective attachments and cultural expectations (Schneider, 1968: 26).

The concept is aimed at extending existing pioneering work on kinship as technology (Franklin and McKinnon, 2001), on kinning and de-kinning processes (Howell, 2007), and on kinship as choreography (Thompson, 2001, 2005) by conceptualizing it in a way that, I hope, helps to shed further light on the emergence and contestation of the tensions between and the negotiations and conflicts between specific modes of understanding, practising and regulating kinship. Specifically, in this text, I will investigate the legal and affective dimensions of the kinship grammars in the analysed material.

In doing so, I shall focus on the kinship grammars that I have identified as most central in the specific documents that I have analysed, including the kinship grammar of genetics, the kinship grammar of gestation and the kinship grammar of reproductive intent. The latter I take to be paradigmatic for surrogacy, and it has crucial implications for the ways in which reproductive autonomy is understood and practised in contemporary forms of surrogacy.

**The kinship grammar of genetics**

While the genealogical beginnings of the kinship grammar of genetics owes its legacy to the Darwinian project of the mid-19th century, it is through the more recent development of molecular biology that it emerged in its current and culturally predominant version (Finkler, 2001: 235). The human genome project (1989–1993), which aimed to map the entire human genome, and the hopes and fears to explain and master not just illness but social problems such as poverty, is paradigmatic of how this kinship grammar has been used to explain biological inheritance (Finkler, 2001: 240). The predominant ‘rule’ in the kinship grammar of genetics can be summarized briefly as ‘the idea that biological kinship in itself has nothing or little to do with our actual relations with or affective ties to each other’, and that we ‘do not even have to know the existence of our kin to be related to them’ (Gunnarsson Payne, 2016a, 2016b). The underlying principle of the kinship grammar of genetics, then, privileges the existence of shared genetic substance in determining the relatedness of two individuals. Although, as we shall see, this kinship grammar is often contested or downplayed in third-party reproduction, it is crucial to the Swedish surrogacy
debates insofar as it is often its absence that is used to legitimize gestational surrogacy (as opposed to so-called ‘traditional surrogacy’, which none of the reports consider as a possible option).

In the context of gamete donation, genetic kinship may be relevant for medical reasons (such as the need to know the medical history of one’s genetic ancestors), or for affective and psychological reasons (as it has for donor-conceived people searching for donors or donor siblings via online communities such as the Donor Singling Registry or Seed Siblings) (Finkler, 2001; Freeman et al., 2009). Somewhat paradoxically, in third-party reproduction, the kinship grammar of genetics is variously backgrounded in favour of other kinship grammars (such as the kinship grammar of gestation or the kinship grammar of parental intent), and foregrounded in others (e.g. the common practice of keeping the same donor in subsequent treatments in order to ensure a genetic link between siblings, or to conceive with a surrogate using one’s own gametes) (Thompson, 2005). In the Swedish law regulating gamete donation, the kinship grammar of genetics functions as a privileged principle in determining the right of donor-conceived people to receive information about their donors after reaching ‘mature age’ (The Law on Genetic Integrity §7), but not when it comes to determining their legal and social parents.

The kinship grammar of gestation and the mater est-rule

The kinship grammar of gestation can be understood as a traditional way of understanding motherhood, and as such as paradigmatic for the mater est rule. Its historical and cultural permutations are manifold, and have variously been articulated with other kinship grammars (such as the kinship grammar of blood and the kinship grammar of epigenetics) so as to support the idea that pregnancy functions as kinning processes that establish a bond between a fetus and the person carrying it (Gunnarsson Payne, 2016b). As such, the dominant principle in the kinship grammar of gestation is that (maternal) kinship is determined by gestation (rather than, for example, shared genetic substance or expressed parental intent).

In the last three decades, the idea of maternal attachment [as famously developed by Bowlby (1969), see also Alhusen (2008)] has become increasingly extended in the psychological literature to also cover the gestational period. In an early and often-cited text, Mecca S. Cranley argued that the gestational period was significant for ‘both [the] physical development of the fetus and the transformation of a woman into a mother’ (Alhusen, 2008: 1); that ‘integral to that development is the consideration of a woman’s identity, her role identity, the identity of her developing fetus, and perhaps most important, the relationship between herself and her fetus’ (Cranley, 1981: 281). Since then, many other scholars of psychology have affirmed the link between prenatal and postnatal attachment, and others have demonstrated the importance of early attachment between infants and carers (Alhusen, 2008: 2). Cranley (1981) defined maternal–fetal attachment as ‘the extent to which women engage in behaviours that represent an affiliation and interaction with their unborn child’ (Cranley, 1981: 282). In relation to surrogacy, however, this research has not gone uncriticized. Elly Teman, for example, argued that these and similar studies do not only tend to be normative, essentialist and ill-fitted to understand surrogacy-related pregnancies, but also tend to influence legislative bodies and policy deliberations on surrogacy to be disproportionally focused ‘on the need to protect the potential surrogate from a choice she may later regret and the risk of exploiting a surrogate who is undertaking a risk for financial gain’ (Teman, 2008: 111).

The kinship grammar of reproductive intent – paradigmatic for surrogacy

Although it is often argued – especially by its proponents – that different forms of surrogacy have existed since biblical times (using the example of Sarah, Abraham and Hagar), the beginnings of the kinship grammar of reproductive intent as it is formulated in the late modern context of surrogacy only emerged a few decades ago. Significantly, the kinship grammar of parental intent initially emerged as a solution to solve the conflict between two competing kinship grammars of biological motherhood, namely the conflict between the kinship grammar of gestation and the kinship grammar of genetics (gestation or DNA). Instead, its underlying principle is based on initial and unretractable agreements made by the reproductive parties.

A crucial genealogical starting point of the legal concept of parental intent in surrogacy can be traced to the US case of Johnson v. Calvert in the Supreme Court of California. In this case, the notion of parental intent was used to solve a conflict between a heterosexual couple and a surrogate mother who was contracted to carry a fetus, conceived using genetic material from both parties of the couple. The court concluded that: ‘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 under California law’ (Dorfman, 2016: 409, emphasis added). This principle was further confirmed in a later case, one that was brought to court a year later. In re Marriage of Moschetta, the commissioning mother was not granted parental status; the difference being that, in this case, while the commissioning father’s sperm had been used, this was a so-called traditional surrogacy arrangement, meaning that the surrogate mother had both a genetic and a gestational tie to the child and was thus considered to be the natural and legal mother. This led the court to determine that parental intent was only to be an over-riding principle when the genetic and the gestational tie did not coincide (Dorfman, 2016: 409).

In a third case, the Buzzanca case, the child was genetically related to neither party in the commissioning couple, nor to the woman who gestated it. The trial court first concluded that the child had no parents at all, but later, the California Court of Appeals determined that the principle of parental intent should be applied. In the absence of genetic ties to either of the involved reproductive parties, the court relied not only on the Johnson case, but also on ‘Section 7613 in the Family code of the UPA, which states that an infertile husband who consented to artificial insemination of his wife by another man’s sperm is the father of the baby who is born as a result’.

The Appeal Court thereby refined the meaning of parental intent by stating that the commissioning mother ‘is situated like a husband in an artificial insemination case whose consent
triggers a medical procedure which results in pregnancy and eventual birth of a child’, and concluding that her ‘motherhood may therefore be established “under his part” by virtue of the consent’. What the court concludes here is that in the case of surrogacy, whereby an embryo conceived by anonymous donors was implanted into a woman who agreed to carry the baby to term on the commissioning mother’s behalf, husbands and wives ‘are equally situated from the point of view of consenting to an act which brings a child into being’ (Dorfman, 2016: 410). The over-riding principle in the Buzzanca case, then, is the couple’s ‘initiating role’ in the child’s conception and birth. Thereby, gestation in surrogacy was articulated as equivalent to gamete donation. This principle was subsequently integrated in the legal systems in California and a number of other jurisdictions (Dorfman, 2016: 410–411).

Importantly, the application of the kinship grammar of parental intent to surrogacy cannot be reduced to its legal consequences. On the contrary, its affective dimension has been demonstrated in qualitative studies, including the pioneering research of Helena Ragoné, which showed how surrogates and intended mothers in her study continuously performed what can best be referred to as ‘emotional kinning work’ so as to confirm the parental status of the intended parents (Ragoné 1994: 352–353; see also Krolakke and Hidtfeldt Madsen, 2014; Teman, 2008). Although this research does indeed destabilize determinist understandings of gestation as an affective kinning process, it also introduces a certain ambivalence to the kinship grammar of parental intent by showing how the legal and affective dimensions of parental intent do not necessarily operate along the same temporal axis. Indeed, as opposed to the declaration of intent in a pre-birth order, the kinning work performed by the reproductive parties may take place over a longer period of time, and may serve important affective purposes, but will most likely not have any consequences for the legal rights and responsibilities for any of the reproductive parties. Another difference between these two dimensions of the kinship grammar of parental intent is that while the legal application of it serves to resolve a (potential) conflict, the mutual emotional work described by Ragoné is a form of cooperation that reinstates and coordinates the initial mutual agreement between the reproductive parties. The extended period of time over which such kinning work may take place in surrogacy (as opposed to, for example, the extraction of gametes in egg donation), as well as the increased – real or imagined – risk that the gestational carrier might form an attachment to the growing fetus are precisely the issues that set surrogacy apart from other forms of third-party reproduction. As we shall see, these differences do play a central part in the argumentation in the Swedish reports.

Ideals articulated in the two reports

In the following reading of the two reports, I shall investigate how the kinship grammar of reproductive intent is articulated with ethical and democratic ideals of justice, equality, non-discrimination and autonomy as guiding principles for legislation on assisted reproductive technologies in general and surrogacy in particular. Particular attention shall be paid to how ideas of intent in surrogacy cannot be understood as entirely separate from reproductive autonomy. It is worth noticing that although the kinship grammar of parental intent has only emerged recently in public debates on surrogacy in Sweden (often in relation to the issue of problems faced by parents who bring surrogacy-conceived children to the country from abroad), its basic principles have long guided regulation on gamete donation where the reproductive intent, rather than DNA, determines legal parenthood. The issue at stake, then, is whether surrogacy shall indeed be understood as equivalent to gamete donation (as in the Californian cases referred to above), or whether the process of gestation raises particular issues with regard to reproductive autonomy.

Justice and the limits of autonomy and self-determination

Under the subheading ‘Justice: equal care on equal terms’, the Council writes that ‘There are several different demands on justice and principles of non-discrimination. The foundational idea in the demand for justice is that like shall be treated alike and based on this it is immoral to give specific groups special treatment unless there are ethically relevant differences between them’ (Smer, 2013: 1: 113). They concede that what counts as ‘ethically relevant differences’ is, however, not self-evident, and that cultural norms concerning this may change over time – and they argue that the principle of justice needs to be considered in all discussions about priorities in health care (Smer, 2013: 99–100).

In their subsequent definition and discussion on self-determination and autonomy specifically, the Council states that:

One of the foundational concepts in medical ethics is that of autonomy or self-determination. According to this principle, each and every one shall have the right to live their own life in accordance with their own idea of what constitutes a good life and live in accordance with their own values and foundational wishes. (Smer, 2013: 1: 114).

Therefore, they argue that each individual ‘has a fundamental right to decide by him or herself whether if, and if so when she or he wants children’ (Smer, 2013: 1: 114). When read through the framework of kinship grammars, the Council’s decision to support a regulation of altruistic surrogacy in Swedish health care can be seen as one in which the kinship grammar of intent would affirm the mutual reproductive intent of all reproductive parties in a surrogacy arrangement, while at the same time increasing justice, equality and non-discrimination in assisted reproduction. In the Council’s argumentation, the kinship grammar of parental intent would then serve to increase the reproductive autonomy of everyone involved.

Along very similar lines, the Governmental Investigator initially argues that they ‘agree [with the Council] that the premises of justice and equal care on equal conditions are central in issues of assisted reproduction’. They clarify that these premises mean that ‘among other things, […] equal cases shall be treated equally, that all humans shall be met equally and that it is immoral to treat a certain group differently if there are no ethically relevant differences between this group and other groups’. They emphasize especially ‘the importance of promoting gender equality and counteracting discrimination...
based on e.g. gender or sexual orientation’ (SOU, 2016: 11: 283). On the issue of autonomy and self-determination, the Governmental Investigator argues that they are also central to issues concerning assisted reproduction and surrogacy. But, in contrast to the Council, they do emphasize, to a greater extent, that one person’s autonomy might stand in conflict with that of another person. They write that the principle of ‘integrity and self-determination (autonomy)’ means that ‘all humans have the right to have their values, opinions and wishes “respected”’ (emphasis added), but add that this right is limited and can only be practised to the extent that it may not “impinge on someone else’s equivalent right”. Furthermore, they point out that, in practice, nearly all situations involve ‘another actor with a right to have their self-determination respected’, and clarify that the ‘right to self-determination thereby often entails the right to “participate in and make decisions that concern the person themselves”’. They also add that the principle ‘entails the right to not be influenced to undergo or be forced to medical treatment’ (SOU, 2016:11: 283, emphasis added). Precisely this tendency to focus more on potential conflicts of interests (rather than mutual reproductive intent) will influence their decision on autonomy and self-determination in altruistic surrogacy.

**Mutual versus conflicting parental intent — two takes on ensuring reproductive autonomy**

The Council acknowledges that the reasons why women decide to become surrogates vary, and that they are often complex: ‘In commercial⁹ forms, the most important reason is often the incomes that the surrogacy arrangement brings in. Altruistic reasons can be that one wishes to help someone that is close to become a parent. It can also be about having positive experiences of being pregnant and wants to help others that for various reasons cannot [conceive] by themselves’. They also state that the ‘issue of surrogacy raises fundamental ethical principles concerning reproductive autonomy, self-determination and integrity, respect for human value and the principle of the child’s best interest’ (Smer, 2013: 1: 165). In the Council’s argumentation, altruism is articulated with autonomy and self-determination to the extent that the former is seen as a precondition for the latter. If we understand the kinship grammar of parental intent to be inextricably bound with autonomy and self-determination – that is, that parental intent is meant to reflect the reproductive desires and wishes of all reproductive parties – then commercial arrangements are here understood as potentially interfering with the autonomous reproductive intent of surrogates.

Therefore, the majority of the Council argues that altruistic surrogacy should be permitted in Swedish health care if the decision is based on a genuine wish to help someone else to conceive: ‘There are women who for altruistic reasons want to help a next of kin or close friend that cannot themselves go through a pregnancy’. They compare the situation with that of an organ donor who donates within the family, but adds that there are differences with respect to the ‘more extensive social and psychological commitment’ and ‘partly unknown consequences for the surrogate mother’ (Smer, 2013: 168). If it can be ensured that altruism (rather than financial pressures) is the motive for surrogacy, they argue that: ‘A majority of the Council considers altruistic surrogacy – under certain conditions – may be an ethically acceptable method of assisted conception’ (Smer, 2013: 21). The specific conditions that, according to the majority of the Council, would make surrogacy ethically acceptable are: (i) surrogates and intending parents need to have a close relationship; (ii) surrogates need to have gone through pregnancy and have their own children; and (iii) surrogates may not be genetically related to the children they carry. Moreover, both presumptive surrogates and intended parents need to go through an assessment of their suitability, and have access to support and advice throughout the process, and any surrogacy-conceived children need to be told early in life about the way in which they were conceived, and have the right to access information about the surrogate mother at the age of majority (in the same way as donor-conceived children can today) (Smer, 2013: 168).

Hence, while the Council acknowledges that the surrogate’s autonomy might be compromised by pressure from family and close friends, they argue that ‘this potential risk can be tackled by a conscientious investigation of suitability in each individual case’. The purpose of such an investigation would be to ensure that the presumptive surrogate has not been subjected to pressure that would interfere with her genuine and autonomous reproductive intent, as well as making sure that she harbours ‘a strong wish to carry a child for someone else, as well as that she is capable to go through the process physically and psychologically’ (Smer, 2013: 1: 172). Leaning on previous experiences from other national contexts in which altruistic surrogacy has been permitted, the report also argues that ‘it may be less complicated to carry and hand over a child to parents that one knows can provide good conditions for the child’. This, in turn, would make the whole process more secure for all involved parties (Smer, 2013: 1: 172–172). All of the ‘right conditions’ that relate to the reproductive parties, then, are formulated so as to prevent a situation where mutual reproductive intent is being compromised at any time, before, during or after birth.

The opposing minority in the Council argues that it is difficult to assess self-determination and informed consent in altruistic surrogacy, that the method is not compatible with the principle that a human being shall never be used as a means for other people’s ends (to fulfil another person’s reproductive intent), and there is a risk of commercialization, pressure and ‘acceptance gliding’ that might lead to women being exploited and children becoming commodities (Smer, 2013: 1: 166–167).

In similar terms to the opposing minority of the Council, the Governmental Investigator argues that the risk of ‘tacit pressure to help a close relative’ may be problematic when the involved parties know each other, and argue that while this type of pressure may be counteracted by not allowing surrogacy between close friends and relatives, the latter
model may instead risk leading to commercialization. They concede that if the circumstances are such that ‘one can ensure that the woman have consented of free will that to be a surrogate, the psychological risks do not seem as severe so that the procedure of that reason should not be allowed’ (SOU, 2016: 11: 422), but adds that the difficulty is to assess whether this is truly the case, and if so, how this can be known. Unlike the Council, they argue that the risks of pressure are especially stark if the surrogate is in a close relationship with the intended parents:

It can be difficult to say no to a next of kin, whose wish to be a parent one has witnessed close by. Family members and friends can have strong emotional influence over each other and the family is not always a safe place. There are women who have little influence over their life and their body, including women who live in families with strong patriarchal traditions. (SOU, 2016: 11: 422).

The alternative of not allowing it among friends or within families, however, risks leading to commercialization, which the Governmental Investigator argues strongly against (SOU, 2016: 11: 422-423).

The report also refers to the temporal dimension of surrogacy in expressing a worry that it might be difficult for the surrogate to ‘form a view in advance of what it is like to carry a child and then give the child away to the prospective parents’ (SOU, 2016: 11: 58). The conclusion that the Governmental Investigator draws is that although permitting altruistic surrogacy within the Swedish healthcare system would indeed have some advantages in increasing the possibilities for involuntarily childless people to have children, the potential conflicts and traumatic situations that may emerge as a result outweigh these advantages. Crucially, as mentioned in the introduction to this paper, they argue that any ‘regulation in this area must be consistent with the mater est rule’. The report also points out that ‘there are further disadvantages; for example, a surrogate mother may also have other difficulties in exercising her right to self-determination, for instance regarding her right to abortion’ (SOU, 2016: 11: 59, English in original) – an issue barely touched upon by the Council. Furthermore, the Governmental Investigator also states that it is not ‘a human right to, at any cost, either give birth to one’s own child or become the parent of a child in some other way’ (SOU, 2016: 11: 48), again reinforcing that reproductive autonomy has certain limits. In the argumentation by the Governmental Investigator, we can thus see that the kinship grammar of gestation is applied as a means to ensure the reproductive intent of the pregnant person – also in cases when this reproductive intent might change over time.

Autonomy, parental intent and the risk of regret

In the Council’s report, the surrogate’s reproductive autonomy is foregrounded in two ways: first, as an ethical argument for increasing women’s self-determination and bodily autonomy (their right to be a surrogate); and second, in the proposed form of surrogacy that, to the greatest extent possible, ensures that the surrogate enters into the agreement autonomously and reduces the risk that she will change her mind during the process. Somewhat paradoxically, however, the very proposed form of surrogacy, at the same time, does, in fact, tend to pose limits to the very autonomy it declares to promote and protect.

For instance, the required absence of a genetic link between a surrogate and the child can be read as rather ambiguous in relation to the strong emphasis on the surrogate’s reproductive autonomy: its purpose might be read as a way of, to borrow Charis Thompson’s (2005) terminology, ‘disambiguating’ the kinship relationship between surrogate and child, thereby ensuring that the surrogate would be less likely to change her mind during or after the pregnancy. Yet, this limitation would also be a limitation of precisely the presumptive surrogate’s reproductive autonomy (‘the right to live their own life in accordance with their own idea of what constitutes a good life and live in accordance with their own values and foundational wishes’). In a similar way, the requirement for surrogacy-related pregnancies to only take place between friends or within a family (where a genetic link between the reproductive parties is indeed permitted) serves the purpose of making it easier for the surrogate to hand over the child. Likewise, the assessment is meant to make sure that the surrogate would be psychologically suitable to go through the process, as well as her altruistic motives (the latter of which can also be read as limiting to her autonomy to make sure she does it for ‘the right reasons’). The requirement to have had children ‘of her own’ aims to make sure she knows what a pregnancy entails, and can better visualize what it might mean to hand over the child after it has been born than if she was not already a mother. In their report, then, the surrogate’s autonomy and self-determination is actually rather strongly regulated in order to prevent her from changing (rather than permitting her to change) her reproductive intent throughout the process. This would, on the one hand, if we follow Teman’s (2008) criticism, make the Council guilty of disproportionally taking this unusual scenario into account. On the other hand, they neither pay much attention to the surrogate’s reproductive autonomy in terms of her right to abortion, tests or medical interventions during pregnancy, nor to what would happen in the exceptional cases whereby a surrogate may actually change her mind during the pregnancy or after birth.

The Governmental Investigator’s conclusion is rather less ambiguous on the matter of the surrogate’s autonomy after initial parental intent has been declared. Although they argue that autonomy and self-determination are indeed important principles, they state clearly that these values are not absolute, and that there are few, if any, situations whereby an individual’s autonomy and self-determination do not affect other people’s lives. They acknowledge to a greater extent the issue of the surrogate’s reproductive autonomy both before and after conception, both with

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10 In this context, it should be noted that the same report also proposes that a female-to-male transgendered individual who gives birth to a child shall be registered as the child’s father, and shall have the same parental rights, benefits and responsibilities as s/he (or zie) would have had before undergoing gender-confirming treatment (SOU, 2016: 11: 42). As such, strictly speaking, the mater est rule would be applied in a gender-neutral (or gender-flexible) way.
regard to altruistic surrogacy, conflicting kinship grammars, and intentional multilineal kinship

One may argue that allowing surrogacy in one way [would] strengthen women's autonomy, namely through allowing them to be given the choice to be surrogates in a way that is sanctioned by society. At the same time, the surrogacy arrangement may take place in a way that is in conflict with her bodily integrity. (SOU, 2016: 11: 426).

The Governmental Investigator exemplifies such conflicts, not only with a situation whereby the surrogate has not entered into the arrangement out of free will, but also mention how restrictive rules about how she shall live her life during the pregnancy, including what she shall eat or drink, would indeed interfere with her autonomy and self-determination. Abortion is stressed as a crucial right for all pregnant persons: “A possible regulation on surrogacy should therefore never be allowed to entail a restriction on the women's freedom of action during pregnancy, or of the right to abortion”. Such restrictions, they argue, would neither be compatible with Swedish law, nor with women's rights more generally (SOU, 2016: 11: 526). However, this argument would, they say, not be sufficient reason in itself not to permit surrogacy.

Instead, the main issue for the Governmental Investigator is the issue of whether it is acceptable that consent that is given in advance can lead to a situation whereby the surrogate has to hand the child over against her will, or whether it would be required that the mater est rule would have to be kept, thereby providing the surrogate the chance to change her mind. They disclose that this issue has been subject to intense discussions during the investigation, and state that there are arguments both for and against this possibility. Referring to research, they concede, like Teman (2008) and others, that it is very rare that surrogates do change their minds or regret their decision to be surrogates, and argue that keeping the mater est rule would necessarily not be advantageous for either surrogate or intended parents (as it would make the arrangement less secure for everyone involved), but yet draw the conclusion that: “The strongest reason for the surrogate to be regarded as the child’s mother at birth is, however, the importance of respecting the women’s autonomy and self-determination” (SOU, 2016: 11: 1: 430). Thus, it can be said that the kinship grammar of gestation is applied as a means to disambiguate her position in relation to the fetus until after birth, thereby ensuring the surrogate’s reproductive autonomy.

Even though the Governmental Investigator have previously referred to research demonstrating that women tend to be less attached to a child they carry in the capacity of a surrogate than a child planned to be their own, they argue that the problem with pre-birth orders (or similar forms of consent given in advance) is that they consent to ‘hand over a child that does not yet exist’ and that it presumes that the surrogate can predict 9 months in advance how she will feel in the future after having gone through pregnancy and childbirth (SOU, 2016: 11: 430). The Governmental Investigator therefore brings up the possibility that the surrogate might bond with the child during pregnancy:

Such a regulation does not take into account that the women may during that time have developed an emotional attachment to the child and that it can be utterly traumatic for her to be separated from it. That such situations rarely happen in practice does not mean that they may not happen. One should also take into consideration that there is a difference between consenting to be pregnant, and consenting to handing over a child. (SOU, 2016: 11: 430).

Furthermore, they argue that any regulation that means that a woman may be legally forced to hand over a child that she has carried and given birth to ‘is incompatible with her right to self-determination and does not respect the bond that can develop between a pregnant woman and the child she carries’ (SOU, 2016: 11: 431). Due to this, they conclude that the mater est rule has to be kept but, as stated earlier, that this could give rise to another set of conflicts and potentially traumatic situations for the intended parents.

In the argumentation of the Governmental Investigator, the kinship grammar of gestation is not applied so as to claim that all, or even most, surrogates do or should form an attachment to the child they carry. Yet, they argue that the rights and responsibilities that follow with a presumed parental kinship bond are crucial in order to secure the surrogate’s autonomy and self-determination in the same way it is in adoption, where pre-birth orders are not permitted. The mater est rule, then, becomes a vehicle to grant the surrogate the right to change her mind, to permit her to do it (rather than merely preventing the situation from occurring, as is the case with the Council’s proposed requirements that are formulated so as to ensure that the surrogate’s original reproductive intent is not disrupted during the process).

Beyond individual autonomy: the queer potential of the kinship grammar of multilineal reproductive intent

The different conclusions in the reports are supported by two competing – and in their currently practised interpretations, incompatible – kinship grammars, namely that of the kinship grammar of parental intent (the Council) and the kinship grammar of gestation (the Governmental Investigator), each granting parental rights and responsibilities on different grounds (initial intent versus gestation) and at different points in time (before or during and after gestation). These different grounds and timings, in turn, influence the ways in which each report focuses on the surrogate’s autonomy and self-determination. While the Council mainly emphasizes a number of preventive measures to ensure that the initial parental intent of the reproductive parties shall remain the same throughout the process, the Governmental Investigator, to a greater extent, stresses the need for a legal framework that is open for the possibilities of a change of reproductive intent as necessary for the surrogate’s reproductive autonomy. In this sense, the latter’s way of arguing for the mater est rule (and thereby the kinship grammar of gestation as a privileged kinning principle) is not so much an expression of an essentialist and normative view of motherhood, but rather a vehicle to ensure that a surrogate would have the same rights and autonomy as any other pregnant person within the same jurisdiction. Although the end result of their decision does little to strengthen women’s reproductive autonomy (as it effectively
prevents them from carrying a child for someone else – thereby actually reducing their reproductive autonomy), it does, however, raise crucial questions concerning reproductive autonomy and reproductive justice in surrogacy: Is the possibility of changing intent a necessary component of reproductive autonomy? How just is reproductive justice when changing one’s mind regarding something that takes place within one’s own body is not an option once an initial declaration of intent has been expressed? Shall the cases, however rare, whereby a surrogate might develop a sense of affective kinship with the child during pregnancy merely be dismissed as exceptional cases that shall not be acknowledged by law, or do we need to take this possibility into account when we debate not only the ‘for’ or ‘against’, but also the ‘how’ of surrogacy? In my view, any perspective on surrogacy that takes the question of the surrogate’s autonomy and self-determination seriously must indeed take these issues into account – but the solution is neither to be found in a strict adherence to the kinship grammar of parental intent, nor in a non-negotiable application of the mater est rule that underpins the kinship grammar of gestation.

Whether we agree with the Governmental Investigator’s conclusion or not, I do believe that it points to a crucial and far-too-seldom debated issue when we debate the ‘for’ or ‘against’ of surrogacy, namely the (in absence of a better word) ‘fact’ that the strongest feminist argument both for and against surrogacy is precisely that of the presumptive surrogate’s reproductive autonomy. For this very reason, I do believe that any feminist version of surrogacy needs to put the autonomy and self-determination of the surrogate centre stage, as well as accepting that autonomy and self-determination cannot be reduced to a simple ‘choice’ made at one determined point in time, but something that may be changed and renegotiated by the person whose body it concerns, and that, in doing so, we will necessarily reduce the security and, indeed, power of the intended parents.

Despite this, I am not convinced by the conclusion made by the Governmental Investigator that the only possible solution to the problem of autonomy and self-determination is not to permit surrogacy-related treatments in Swedish health care. Rather, I believe – and I am fully aware that this possibility is not without its own problems – that one possible route – one that would better take into account both the reproductive autonomy of the surrogate and the reproductive vulnerability of involuntarily childless people (including gay male couples and trans or cis-women that cannot themselves gestate a child) – would be to look into solutions that move beyond the strict norm that a child can have (maximum) two parents, a norm that is intrinsically linked to bilineal understandings of kinship. Only by doing so can we begin to seriously consider and legally acknowledge queerer and more inclusive ways of reproducing and creating families; ways that consider kinship as a set of relations between reproductive parties that can take multilineal forms. If taken, this route could not only include both already existing forms of queer co-parenting (e.g. legally recognising three or four parents), but could also open up novel ways of acknowledging the importance of affective bonds that might emerge from the reproductive labour involved in a mutually agreed reproductive endeavour (e.g. visitation rights or shared custody for surrogates). Although it is beyond the scope of this article to propose any detailed legislative formulations, I do believe that it is only by extending the legal system to acknowledge multilineal parental kinship constellations in more flexible ways that we can begin to constructively address the inherent tension between the kinship grammars of intent and gestation. Indeed, it is only by doing so that the queer feminist (emphasizing both ‘queer’ and ‘feminist’) potential of surrogacy can be realized in a way that increases both reproductive autonomy and justice, not just for some, but for all.

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