

## Conference article

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# Ethical and legal issues in gestational surrogacy

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**Abstract:** This study originated from events that occurred in 2014 in an Italian hospital, where the embryos of a couple, obtained by means of homologous insemination, were mistakenly implanted into the uterus of another woman who, along with her husband, underwent the same treatment.

Faced with this serious adverse circumstance, that gives rise to ethical and legal issues, the authors conducted a comparative examination of how to consider the division of maternity (between biological mother and uterine mother) and the related division of paternity (between genetic father and legal father, husband or partner of the gestational mother).

Some preliminary observations are made concerning parenthood and filiation within the context of currently applicable Italian law.

The following is a detailed analysis of the arguments in favour of the parental figures involved (gestational mother/genetic mother).

**Keywords:** Assisted reproduction; Pregnancy; Embryo; Gestational surrogacy

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## 1 Introduction

The significance of health, in its most modern and evolved sense, as a general and inviolable expectation in one’s “search for happiness” [1] suggests that any prospect of not being able to fulfil one’s desire to become a parent is unacceptable.

Assisted reproductive techniques have enormously extended the possibilities of “having a child” but at the same time they have further complicated the issues relating to the determination of filiation.

The simplest situation seems to be that of so-called homologous assisted reproduction, where both partners in a couple participate and thus where there is a coexistence of biological, legal and social parenthood. Even in this field, however, controversial issues arise. For example, who can legitimately become a parent in cases where an embryo, obtained *in vitro* with oocytes and sperm from an identified couple, is implanted by mistake into the uterus of a woman who is extraneous to the couple?

## 2 Discussion

In this regard, at least three cases have been reported in the USA where the outcomes were different. In 1999 there was the case of Richard and Donna Fasano of New York, who had twins, one of which was black, due to a mistakenly implanted embryo. The biological parents obtained custody of the child, who was thus separated from his brother.

In 2004 an “extended family” was created when a judge ruled on a matter in which a woman from California (Susan Buchweitz) had been implanted with embryos from another couple. In this case, besides ordering a one-million-dollar compensation, the magistrate ruled for “joint custody” of the child.

Five years later (2009), Carolyn Savage from Ohio, due to a mistake by the clinic, gave birth to another couple’s son. The couple took the case to the same clinic, and Carolyn decided to return the child to them. “The doctors immediately advised me to have an abortion” said Carolyn,

but “what I was carrying in my womb was a human life and we had to protect that. It didn’t matter if that child was in the wrong tummy. It wasn’t our fault or his parents’ fault. I put myself in the shoes of that child’s mother: what would I have done if my son had been in another woman’s tummy? Wouldn’t I have prayed with all my heart for that woman to let my son live?”.

And finally in 2011, in Hong Kong, two “mistaken” embryos were implanted into a woman. The matter was brought to a close with an abortion [2] and payment of compensation [3].

In Italy, however, in the last eighteen years only three cases have reached the pages of the national newspapers: two in Turin (2004) and Padua (2009), where on the morning of the implant the doctors realised the mistake and the women decided to have medical abortions. Another case occurred in 2014 at the Sandro Pertini Hospital in Rome where, because of a banal human error, two couples who had given their consent to assisted reproduction were assigned the embryos of the other.

These two parallel implants did not have the same outcome: one was not successful, in that the pregnancy did not even initiate; the other led to the successful birth of twins.

The couple, to whom the genetic heritage of the expected twins was traceable, lodged an appeal to the court of Rome.

On this subject, there is an illuminating opinion expressed by the National Bioethics Committee entitled “*Bioethical considerations on the involuntary switching of embryos*”, published on 11 July 2014, where the text reads: This is a case of “mistaken” heterologous fertilisation (the mother carries embryos that are genetically not hers nor her husband’s or partner’s) or “mistaken” surrogate mother (the genetic parents produce embryos that are implanted into the uterus of another woman who carries them for gestation) in a procedure for which no consent has been given, which appears to lead to a position of uncertainty with regard to the maternity and paternity faced with a legislative gap that needs to be filled in terms of interpretation”.

Thus, in its order of 8 August 2014, the court of Rome, after establishing that currently applicable Italian law neither addresses nor explicitly regulates the circumstance in question, stated that it would be unreasonable in relationships of filiation to assign superordinate status to the principle of genetic truth over other conflicting interests, because “recognising the prevalence of the genetic mother, juridical legitimacy would be attributed to a coercive substitutive maternity, with the renunciation having been imposed on a child that the biological mother

brought into the world”. This solution would be “totally unreconcilable with the right of the mother carrying the foetus to the intangibility of her body and, therefore, to being able to make every decision relating to her pregnancy, as well as being seriously damaging to the human dignity of the expectant mother”.

With an appropriate reference to scientific literature, the order also points out that it is in the uterus that the symbiotic relationship is created between the unborn child and the expectant mother and that it is only the latter who can breastfeed the child.

After all, – reads the order – the figures of genetic mother, uterine mother and social mother (i.e. a woman who, wishing to have a child but unable to procreate one, “commissions” a child from the genetic mother) do not always coincide. However, art. 269, subsection 3, of the Civil Code, unchanged from its original wording even following the reform on filiation, as per Legislative Decree 154/2013, enshrines the principle by which *it is birth that determines motherhood*.

For this reason, the judge dismissed the couple’s appeal and left the twins to the mother who had given birth to them and to her partner, sustaining that any interim injunction would have prejudiced the stability of the minors’ status and their right to life with what should be considered their family.

### 3 Conclusions

The uncommon split in natural contribution between genetic and uterine mothers imposes the need to make a “tragic choice between two partial truths” [4] that are both of equal importance. Whilst the passing on of genetic makeup to the unborn child depends on the former, it is the latter who prepares him/her for life, through the unbreakable bond that is created, during pregnancy, between her own vital functions and those of the foetus she is carrying in her womb.

Albeit, in the light of the abovementioned legally codified principle (art. 269, subsection 3, Civil Code), a strong orientation has been established, also in the last hypothesis, towards attribution of maternity to the birth mother [5-8], such a solution has not failed to give rise to differences between scholars.

Those who highlight the essential and conditioning value – aimed at possibly identifying the true mother based on the dual biological and social factor – of a precise legislative ruling oriented in this direction [9], are opposed by those who, by taking a different path, con-

sider, on the basis of existing law (*de jure condito*), the “gynaecological” fact of birth to be insufficient [10-12].

From the latter perspective, it has been observed that the law’s attribution of maternity to the birth mother is only apparent. The principle that underpins the rule contained in art. 269, subsection 3 of the Civil Code should, in fact, be read in the sense that the mother is the woman who gives birth to the product of the fertilisation of her (own) oocyte. If Italian lawmakers did not expressly require the subsistence of such a coincidence between birth mother and genetic mother, this would have depended – it has been said – exclusively on the fact that it was impossible for them to imagine the emergence of a different situation.

Therefore, in cases where, as a consequence of the practice of leasing out the uterus, such a coincidence does not effectively subsist, the choice between the two women should be made taking account of the interest of the child that is to be born, who, according to the orientation considered, is identified in the attribution of parenthood to the genetic mother (provided that she is the commissioning mother) [13]. Indeed, only the latter would have an emotional, as well as biological, bond with the child, considering not only her genetic but also social contribution – having consciously and responsibly given rise to the causal chain of actions that conclude with the birth – made with the creation of the embryo [14].

All in all, however, attribution of legal maternity to the birth mother remains the most accredited thesis. Among the arguments in support of this option, it appears that particular importance should be given to the fact that the child acquires legal capacity at the moment of separation from the maternal womb, without minimally pointing to the circumstance that the birth follows the implanting of another woman’s ovum into the gestational mother’s body [15]. It can be observed, furthermore, that it is in the behaviour of the gestational mother that there is a need to identify the element of personal responsibility in order to define the juridical concept of maternity [8]. It is thanks to the contribution of the gestational mother that the life of the person springs forth and develops in a symbiotic bond with the mother up to the moment of birth [5,6,16]. The birth mother is not a machine for producing children, nor is she an animal whose womb can be used to provide a purely material service [5]. But, above all, it is the gestational mother who must remain the “arbiter” of the destiny of the pregnancy [17].

**Conflicts of interest:** The authors have no conflicts of interest to declare.

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