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In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience

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NOTE

In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience

INTRODUCTION

For thousands of years humans have tried to prevent conception. Yet it is only in the last century that scientific efforts to aid conception have begun.[1] Artificial insemination,[2] surrogate motherhood[3] and, most recently, test-tube babies[4] have become realities; embryo transplants and artificial wombs are not far behind.[5] As a result of great strides in science and medical technology, new breakthroughs in human reproduction occur on an almost daily basis.[6] Since one of every five

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[1] Taylor, *New Frontiers in Conception*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 46 [hereinafter cited as *New Frontiers*].

[2] *See generally* W. FINEGOLD, ARTIFICIAL INSEMINATION (1976); Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331 (1979-80); Yussman, *Principles and Procedures of Artificial Insemination*, 5 CONTEMP. OB/GYN 107 (1975).

[3] *See generally* Cassidy, *Brave New Child*, BLUEGRASS WOMAN, Oct.-Nov., 1980, at 20; Markoutsas, *Women Who Have Babies for Other Women*, GOOD HOUSEKEEPING, Apr., 1981, at 96; *New Frontiers, supra* note 1, at 46; *Hiring Mothers*, TIME, June 5, 1978, at 59.

According to Dr. Marvin Yussman, head of the Department of Reproductive Endocrinology at the University of Louisville, the term "surrogate mother" is medically correct only when used to describe the result when an embryo recovered from one womb is implanted in another. Cassidy, *supra*, at 65. For purposes of this Note, however, the term "surrogate mother," as well as the term "surrogate parenting," will be used to refer to women who are carrying babies artificially conceived for other women.

[4] *See generally All About That Baby*, NEWSWEEK, Aug. 7, 1978, at 66; *The First Test Tube Baby*, TIME, July 31, 1978, at 58; N.Y. Times, July 26, 1978, § 1, at 1, col. 5. Test-tube fertilization is more accurately referred to as *in vitro* fertilization.

[5] *New Frontiers, supra* note 1, at 55, 59-60.

[6] Dr. Patrick C. Steptoe delivered the first recorded test-tube baby, Louise Brown. Subsequently he declared: "The whole field of human reproduction has been transformed." *New Frontiers, supra* note 1, at 46.

couples of childbearing age in the United States is infertile,[7] any advancement is destined to affect a substantial portion of the population.[8]

Understandably, the law has been reluctant to react to changes in an area as nebulous as conception.[9] Recent events in Kentucky, however, have thrust the courts squarely into this uncharted territory. The culmination of these events came in late January of 1981 when the Attorney General of Kentucky brought a civil suit to have surrogate parenting declared illegal in the Commonwealth.[10] Although potential legal consequences flowing from progress in the field of human reproduction are myriad, the discussion herein is limited to those problems created by surrogate parenting generally, with particular emphasis upon the legal ramifications arising from this arrangement in Kentucky.

Initially, this Note will describe surrogate parenting in general by focusing on what it is, who is doing it, and where it is being done. In so doing, the particular events leading up to the pending lawsuit in Kentucky will be detailed. Second, the

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[7] *Id.* at 52. It is estimated that six million couples of childbearing age are infertile in the United States. *Id.* Other sources have estimated this number at one in every six couples, or 15% of the population. Cassidy, *supra* note 3, at 22; Salvato, *Surrogate Mothers*, Ky. Post, Mar. 2, 1981, § K, at 1, col. 3.

[8] Physicians, scientists, fertile participants (*i.e.*, surrogates and semen donors) and the resulting children, as well as the infertile couple, will all be substantially affected by scientific and legal developments in human reproduction.

The availability of adoption does not significantly reduce the number of infertile couples interested in alternative methods of conception. Abortion and birth control have caused a severe shortage in the number of normal infants available for adoption. A couple desiring to adopt a normal infant in Kentucky must wait an average of four to six years. The Department of Human Resources maintains 1,200 couples on its waiting list, fulfilling about 300 requests each year. Cassidy, *supra* note 3, at 62.

[9] George Annas, professor of law and medicine at Boston University, recently stated: "There is no rush to legislate any of the alternative forms of conception. People have seen enough premature legislation; this time they are willing to wait and see. Something's got to go wrong first." *New Frontiers, supra* note 1, at 53.

Over 20,000 births a year are attributable to artificial insemination, *Sperm Donors: Possible Perils*, NEWSWEEK, Mar. 26, 1979, at 72, yet only 20 states have enacted statutes dealing with the legalities of this procedure. See note 201 *infra* for a comprehensive list of these statutes.

[10] Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0121 (Ky., Franklin Cir., filed Jan. 27, 1981). See text accompanying notes 51-72 *infra* for a discussion of the events precipitating this lawsuit and its ultimate dismissal.

Kentucky Attorney General's Opinion, which concludes that surrogate parenting is illegal and contractually unenforceable in Kentucky, will be examined. This Opinion provides the basis for the current lawsuit filed on behalf of the State. Third, the far-reaching effects that the Opinion and the lawsuit could have on the widely accepted practice of artificial insemination in Kentucky will be examined. Finally, constitutional objections to state controls on surrogate parenting will be explored.

I. THE CURRENT PRACTICE

A. *Surrogate Parenting in General*

From a medical perspective, surrogate parenting is a relatively simple procedure. It is accomplished through the use of artificial insemination (hereinafter AI), a tried, true and increasingly common alternative method of conception in the United States today.[11] In the "usual" AI procedure, the wife of a sterile male is injected with the semen of an unrelated donor.[12] The donor and the couple[13] never meet, and in most cases, only the doctor and the couple are aware that AI played any part in the resulting birth.[14]

The surrogate parenting situation involves the reverse of the usual AI procedure and is necessary in cases where the female is the infertile partner. In such cases, semen from the fertile husband is used to artificially inseminate another woman, who becomes the "surrogate mother." Usually she carries the child to term and then terminates her parental rights

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[11] Yussman, *supra* note 2, at 107. *See also* Shaman, *supra* note 2, at 331. See notes 162-225 *infra* for a discussion of artificial insemination.

[12] The semen is injected into the uterus, cervical canal and vagina. The entire procedure takes less than three minutes, and there is no pain. Salvato, *supra* note 7, at 8A.

[13] Surrogate parenting is not necessarily limited to "couples." Just as artificial insemination has been available to single women, the surrogate arrangement could allow single men to become fathers. This Note, however, will refer only to a "couple" wishing to engage a surrogate mother for the purposes of childbearing. The couple consists of a fertile male and an infertile female.

[14] Interview with Marvin A. Yussman, M.D., Director of the Department of Reproductive Endocrinology at the University of Louisville, in Louisville, Kentucky (Mar. 24, 1981). Due to the secrecy surrounding the procedure, the exact number of AI births is difficult to determine. Shaman, *supra* note 2, at 331.

in favor of the natural father, who was the donor of the sperm. The wife of the natural father is then able to adopt the child.[15]

The idea of surrogate parenting is by no means novel. The first recorded case was Biblical: "When Abraham wanted an heir, his barren wife, Sarah, sent him to Hagar, her young Egyptian handmaiden, who bore him Ishmael."[16] Through the years childless couples have quietly been making such arrangements, with sisters bearing children for sisters, and friends for friends.[17] It is only recently, however, that surrogate arrangements have come into the public eye,[18] and the exact number of women who have served as modern-day surrogates is unknown.[19] It has been estimated that there have been at least ten official surrogate births in recent years.[20] Although the number of surrogates now pregnant is also in dispute, it is clearly substantial.[21]

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[15] *See generally* Cassidy, *supra* note 3, at 20; Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978).

[16] *Genesis* 16:1-16.

[17] *See* Seligmann, *Pregnancy by Proxy*, NEWSWEEK, July 7, 1980, at 72; Witt, *A Detroit Lawyer Finds Proxy Mothers For Childless Couples Who Desperately Want to be Parents*, PEOPLE WEEKLY, June 12, 1978, at 71.

[18] Recent publicity is in part due to greater social acceptance of AI. Doctors and lawyers are becoming more inclined to "go public" and bring infertile couples and potential surrogates together.

[19] Noel Keane, an attorney in Dearborn, Michigan, was approached in 1976 by a couple seeking a surrogate to bear them a child. He researched the matter and discovered two similar cases. Appearing on a local radio show to solicit a surrogate mother for his clients, he received a call from a couple who announced: "We've already done it." The call was from a Detroit area couple who became parents when their best friend bore a child for them through AI. They had performed the AI themselves. (The friend subsequently bore a second child for the couple.) Witt, *supra* note 17, at 72. Surrogate births have been unrecorded for the most part; it is only recently that the persons involved are publicizing the arrangement.

[20] Ward, *In Pursuit of a Baby*, Courier-Journal, Mar. 29, 1981, § G, at 1, col. 1. This figure includes neither the child of a California surrogate due to deliver in the spring of 1981 nor a child born to a Louisville surrogate which child subsequently died. The child was one of twins. *Id.*

[21] Case histories of several pregnant surrogates are presented in Markoutsas, *supra* note 3, at 98-99. *See also* Ruffini, *Five N.Y. Couples Engage 'Proxy' Mothers*, N.Y. Post, Dec. 4, 1980, § B, at 8, col. 1.

Moreover, surrogate parenting is apparently not even limited to this country. *See, e.g.*, Cusine, *"Womb-Leasing": Some Legal Implications*, 128 NEW L.J. 824 (1978) (England); Lang, *Pregnancy by Proxy*, Cinn. Enquirer, Jan. 14, 1981, § D, at 5, col. 1. (Argentina).

Surrogate parenting is not limited to one state or even to one area of the country.[22] Kentucky and Michigan, however, are emerging as leaders in the field as a result of organizations recently formed in these states to facilitate the surrogate process. Surrogate Parenting Associates, Inc.[23] (hereinafter "SPA") in Louisville, Kentucky, and Surrogate Family Services, Inc.,[24] located in Dearborn, Michigan, are separate organizations providing basically the same service: they match infertile couples with potential surrogate mothers. The two organizations achieve like goals by quite different means and have adopted philosophies fundamentally diverse in certain respects.

SPA was formed by Dr. Richard M. Levin, a Louisville infertility specialist, in April, 1980.[25] SPA has been responsible for at least two surrogate births and one other pending pregnancy. The exact number of pregnancies in progress attributable to the organization is estimated at figures ranging from one to one hundred.[26] Despite this uncertainty, it is clear that a substantial number of childless couples and potential surrogates are in contact with the association.[27]

Dr. Levin, the driving force behind SPA, will accept any reputable couple who cannot have children of their own.[28] The

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[22] Surrogate births in the United States have been recorded in California, Kentucky, Michigan, New York, and Tennessee.

[23] *See generally* Lang, *supra* note 21, at D5; Salvato, *supra* note 7, at 1K; Seligmann, *supra* note 17, at 72.

[24] *See generally* Marcus, *The Baby Maker*, NAT. L.J., Aug. 28, 1980, at 2; Seligmann, *supra* note 17, at 72.

[25] Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0121 (Ky., Franklin Cir., filed Jan. 27, 1981) (SPA's Articles of Incorporation are appended as Exhibit A to the complaint.) Dr. Levin and Karen Zena, company secretary, are the only stockholders. Courier-Journal, Jan. 28, 1981, § A, at 1, col. 5. According to Dr. Levin, SPA first began to realize a profit in the beginning of 1981. Salvato, *supra* note 7, at 8A.

[26] *Compare* Ward, *supra* note 20, at 1 *with* Lang, *supra* note 21, at 15 *and* Courier-Journal, Jan. 28, 1981, § A, at 1, col. 5.

[27] *See, e.g.*, Cassidy, *supra* note 3, at 24; Seligmann, *supra* note 17, at 72; Ward, *supra* note 20, at 1, col. 4.

[28] Dr. Levin has stated:

> We take everybody who makes an appointment, unless of course the person were psychotic or something. If he had falling down pathology, I wouldn't accept him. But I believe people have the right of procreation. Adolph Hitler tried to select who will have children and who will not. Adoption

couple is asked to list the traits that the surrogate mother should have.[29] This list is matched with computerized lists of surrogates, and the couple receives dossiers on three potential surrogates. The couple then makes its own decision based on the surrogates' medical, psychiatric, educational and professional backgrounds.[30] To be accepted by Dr. Levin as a potential surrogate, a woman must be married with normal children of her own,[31] pass a battery of physical and psychiatric examinations[32] and be represented by her own attorney.[33] Lengthy contracts are prepared and signed by all the parties,[34] with these documents outlining the rights and responsibilities of all participants.[35] The contract contains provisions to insure that the child will be born healthy[36] and to facilitate the surrogate's relinquishment of parental rights.[37] Basically, the surrogate agrees to have the natural father's name placed on the child's birth certificate as the biological father.[38] The natural father agrees to pay the surrogate's medical expenses and a

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agencies select. I take them as they come.
Lang, *supra* note 21, at D5.

[29] These traits include blood type (mandatory), height, weight, hair and eye color, and ethnic origin. The traits specified usually match the characteristics of the couple, but this does not always occur. Elizabeth Kane, Dr. Levin's first surrogate mother, was chosen partially because she was tall and the couple wished to compensate for their being on the "short side." Cassidy, *supra* note 3, at 22.

[30] Seligmann, *supra* note 17, at 72.

[31] Marcus, *supra* note 24, at 17. Dr. Levin believes married surrogates are "more emotionally stable and less likely to want to keep the children." *Id.*

[32] Lang, *supra* note 21, at D5; Seligmann, *supra* note 17, at 72.

[33] Marcus, *supra* note 24, at 17. The couple is also represented by counsel. Ward, *supra* note 20, at 1, col. 5.

[34] The parties include the couple, the surrogate and her husband, and the physician. The surrogate's husband agrees to the arrangement and to give up all parental rights in the resulting child. *See* sample SPA contract, Complaint, exhibit C, Commonwealth v. Surrogate Parenting Assocs., Civ. No. 81-CI-0121, at ¶¶ II-III (Ky., Franklin Cir., filed Jan. 27, 1981) [hereinafter referred to as Contract].

[35] Contract, *supra* note 34. *See generally* Cassidy, *supra* note 3, at 24.

[36] The surrogate mother must agree to a specified number of pre-natal medical examinations and further agree not to smoke, drink alcoholic beverages, or use any drug without the written consent of Dr. Levin. Contract, *supra* note 34, at ¶ XXIV. She further contracts that she will not abort the child. *Id.* at ¶ XX.

[37] Specifically, the surrogate mother and her husband agree to institute proceedings on the fifth day after delivery, or as soon thereafter as possible, to terminate their respective parental rights. Contract, *supra* note 34, at ¶ III.

[38] *Id.*

pre-arranged fee.[39] The parties never meet or learn each other's names.[40]

In Dearborn, Michigan, a similar service is provided by Surrogate Family Services, Inc.[41] (hereinafter "SFS"). SFS was recently established by Noel Keane,[42] a Dearborn attorney responsible for a number of surrogate arrangements, and Katie Brophy,[43] a Louisville attorney who formerly worked with Dr. Levin. SFS operates on a slightly different concept than does Kentucky's SPA.[44] Services are offered to childless couples outside Kentucky, and doctors in the surrogate's home state provide the medical services.[45] In contrast to Dr. Levin's approach, no formal contracts are executed. The couple and the surrogate sign a twelve line "Statement of Understanding" that outlines the arrangements and provides that "actual and legal custody of the child" will go to the childless couple.[46] No fee other than medical expenses is paid to the surrogate mother; she provides her services strictly on a

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[39] The exact amount of the fee paid to a surrogate mother has never been disclosed. It is estimated at $10,000. Cassidy, *supra* note 3, at 22. *But see* Salvato, *supra* note 7, at 8A ($13,000).

[40] The contract specifically provides that the couple and surrogate may not "seek" each other out. Contract, *supra* note 34, at ¶¶ XIV, XV. There is some dispute, however, concerning SPA's policy regarding this prohibition. *Compare* Seligmann, *supra* note 17, at 72 with Salvato, *supra* note 7, at 8A.

[41] *See generally* Marcus, *supra* note 24, at 2; Salvato, *supra* note 7, at 8A; Seligmann, *supra* note 17, at 72.

[42] Noel Keane has been involved in surrogate parenting for at least four years, well before all the publicity surrounding the surrogate births in Louisville. He claims responsibility for handling at least eight such births. A partner in a two-man firm, Keane had not even handled an adoption case prior to becoming involved with the surrogate procedure. Presently, he has contracted to co-author a book on the subject, has appeared numerous times on national television in defense of surrogate parenting and continues to lecture at medical conferences. *See generally* Cassidy, *supra* note 3, at 24; Marcus, *supra* note 24, at 2; Ward, *supra* note 20, at 1, col. 6.

[43] Katie Brophy is an attorney in the Louisville firm of Greene & Triplette. She worked closely with Dr. Levin in the early stages of his work with surrogate parenting, mainly researching the law and drafting contracts. Brophy subsequently split with Dr. Levin and began her own surrogate service with Noel Keane. *See generally* Cassidy, *supra* note 3, at 22, 24; Ward, *supra* note 20, at 1, col. 1.

[44] SFS is also incorporated; Keane and Brophy are both shareholders in the company. Salvato, *supra* note 7, at 8A, col. 3.

[45] Courier-Journal, Jan. 28, 1981, § A, at 18, col. 4. SFS claims that its clients can save substantially on travel expenses. *Id.* at 18, col. 5.

[46] Marcus, *supra* note 24, at 17.

voluntary basis.[47] It is also possible for the surrogate and the couple to meet and get to know each other.[48] Like SPA, SFS requires extensive medical and psychological testing of its "host mothers."[49] SFS is presently responsible for "between three and five" surrogate pregnancies.[50]

B. *Surrogate Parenting in Kentucky*

> Wife, unable to conceive, looking for woman who would agree to be artificially inseminated with semen of husband and then give child to couple. All responses confidential, all expenses paid. Please state fee expected . . . .[51]

This classified advertisment appeared in a Louisville newspaper on November 24, 1979. It resulted in the first recorded "surrogate birth" in Kentucky[52] and created immediate controversy.[53] The advertisement was placed in the paper on behalf of a couple who desperately wanted a child of their own[54] but who were unable to conceive due to the wife's infertility. The couple, known only as "Ralph" and "Emily Ransdale,"[55] approached Dr. Levin[56] one Sunday morning in July,

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[47] An informal opinion by Judge James Lincoln construed MICH. COMP. LAWS ANN. § 710.54 (Supp. 1981), a Michigan statute forbidding payment in connection with an adoption, to prohibit paying money to a surrogate. *Hiring Mothers, supra* note 3, at 59. Keane challenged this interpretation in court, but his arguments were rejected. Judge Roman S. Gibbs held that contracts to pay surrogates are in violation of public policy and are unenforceable. Doe v. Kelley, Civ. No. 78-815-531 CZ (Mich., Wayne Cir., filed May 15, 1978).

[48] Seligmann, *supra* note 17, at 72; *Surrogate Motherhood Isn't Child's Play, But She's Game,* Dallas Morning News, July 10, 1980, § A, at 4, col. 1. *But see* Salvato, *supra* note 7, at 8A, col. 3.

[49] Keane prefers to call his surrogates "host mothers." Salvato, *supra* note 7, at 8A, col. 4.

[50] Ward, *supra* note 20, at 1, col. 4.

[51] Courier-Journal, November 24, 1979, Home Marketplace Supp., at 9, col. 13.

[52] For a discussion of the Elizabeth Kane birth, see text accompanying notes 59-64 *infra.*

[53] *See* Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0121 (Ky., Franklin Cir., filed Jan. 27, 1981); Ky. Op. Att'y Gen. 81-18 (1981); Courier-Journal, Feb. 1, 1981, § D, at 2, col. 1.

[54] *See generally* Cassidy, *supra* note 3, at 22; Ward, *Surrogate Mother Will Help a Couple Realize Their Dream,* Courier-Journal, Feb. 11, 1980, § D, at 3, col. 1.

[55] "Ralph" and "Emily Ransdale" are fictitious names used by the couple to protect their privacy. The two have been married for ten years and have been struggling vainly for nine of those years to have children. While they have one adopted child,

1979, and requested his help in their struggle to have a child.[57] After all the options were discussed, Dr. Levin, working with Attorney Brophy, placed the ad in the newspaper. There were many responses,[58] and on March 2, 1980, "Elizabeth Kane,"[59] a 37 year old housewife from Illinois, was artificially inseminated with the semen of Ralph Ransdale.[60] Prior to the insemination, the surrogate mother, her husband, the Ransdales and Dr. Levin signed a contract prepared by Brophy.[61]

On November 9, 1980, Elizabeth Kane gave birth to a boy at Louisville's Audubon Hospital.[62] Five days later in Jefferson Circuit Court, she and her husband terminated all parental rights regarding the child[63] and returned home to Illinois.[64]

Mr. Ransdale desperately wanted a biologically related child; Mrs. Ransdale wanted one for him. Ward, *supra* note 54, at 3.

[56] Dr. Richard Levin graduated from the University of Louisville medical school and also studied at the Harvard and Yale medical schools. He maintains his fertility practice along with SPA. Married with four daughters of his own, Levin has deep sympathy for couples who cannot have children:

> I think God meant for us to build, create and improve the quality of human nature. Sure we're tampering with nature. . . . But every doctor is trained to tamper with nature. You tamper when a baby gets stuck in the birth canal.
>
> It's just when you're dealing with sex and reproduction that some people say it's inappropriate.

Salvato, *supra* note 7, at 8A, col. 4. *See generally id.* at 1K.

[57] *Id.* at 1K.

[58] Ward, *"I Feel Fulfilled,"* Courier-Journal, Nov. 15, 1980, § B, at 1, col. 1. One news article reports the number of responses at 30. Salvato, *supra* note 7, at 1K, col. 4.

[59] "Elizabeth Kane" is the pseudonym that the surrogate mother uses to protect her privacy. She is married with three children and volunteered to be a surrogate for the Ransdales because:

> It seems so often a person reads about things in the paper — death, illness, famine — things that you think, oh I wish I could help, and you're totally helpless. When I read about this, I thought 'Gee, I can help these people.' This is one thing that I can do as a Christian and a healthy woman.

Ward, *supra* note 58, at 8. After the birth Mrs. Kane reported that she felt "fulfilled." She regretted that she was not ten years younger so that she could do it again. *Id.*

[60] Cassidy, *supra* note 3, at 24.

[61] *Id. See also* Contract, *supra* note 34.

[62] Salvato, *supra* note 7, at 8A, col. 1.

[63] Ward, *supra* note 58, at B6.

[64] Although Mrs. Kane was greeted warmly by her immediate family upon arriving home, she received a "generally icy" reception from the townspeople. She and her

The long-awaited child was taken home by his natural father and Mrs. Ransdale, who was soon to become his adoptive mother.[65]

Dr. Levin originally planned only to be involved in the delivery of the one child. Due to the publicity surrounding the birth, however, he was deluged with requests for his services from childless couples all over the world. After much consideration he decided to offer the service to other couples,[66] and SPA was soon formed.

Closely following the first surrogate birth in Kentucky, the State Attorney General, Steven Beshear, issued an opinion advising that surrogate parenting is illegal in Kentucky.[67] The Opinion was issued on January 26, 1981, in response to a request by the Courier-Journal, the Louisville newspaper that had run the original advertisement.[68] On January 27, 1981, the Attorney General filed a civil suit[69] in Franklin Circuit Court to have surrogate parenting declared illegal in Kentucky.[70] A second complaint was filed on March 12, 1981, seeking the in-

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children were snubbed and taunted; it was rumored her husband lost his job because of her actions; and her own parents accused her of giving away their grandson. Markoutsas, *supra* note 3, at 96; Ward, *supra* note 58, at B1.

[65] *Id.*

[66] Salvato, *supra* note 7, at 8A, col. 1. At least two more children have been born to surrogates in Louisville since Elizabeth Kane gave birth, although there is disagreement over the exact number. Ward, *supra* note 20, at 1.

[67] Ky. Op. Att'y Gen. 81-18 (1981). The Opinion was issued on Jan. 26, 1981.

[68] Courier-Journal, Jan. 27, 1981, § A, at 1, col. 1. Despite receiving legal assurance from its own attorneys when it published the surrogate advertisement, the editors were concerned about its legality.

[69] The Attorney General filed a civil suit rather than a criminal one because it was not his intention to "have any detrimental effect" on those who have already had a child by a surrogate or those who have contracted with a surrogate who is now pregnant. "I don't want to cause those people any harm. It would be pretty hard for them to back out now." Courier-Journal, Jan. 28, 1981, § A, at 18, col. 5.

[70] Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0121 (Ky., Franklin Cir., filed Jan. 27, 1981).

Lawsuits concerning surrogate parenting are also pending in other states. In California, a paternity-custody suit has been brought after a divorced surrogate mother changed her mind and decided she would like to keep the baby. The natural father is suing for custody. *Whose Baby Is It, Anyway?*, NEWSWEEK, Apr. 6, 1981, at 83; Lexington Herald-Leader, Mar. 22, 1981, § A, at 2, col. 2. In Michigan, Noel Keane was unsuccessful in his appeal from the unfavorable decision he received in *Doe v. Kelley*. Doe v. Attorney General, No. 50380 (Mich., decided May 5, 1981).

voluntary dissolution of SPA.[71] As of the date of this writing, the first suit has been dismissed on jurisdictional grounds.[72] In the meantime, SPA continues to match childless couples with surrogate mothers, and the legal status of surrogate parenting in Kentucky remains in limbo. An examination of the relevant Kentucky statutes and the common law of this and sister states, however, illustrates that the Attorney General's Opinion is improperly reasoned and compels the conclusion that surrogate parenting is legal in Kentucky.

II. A CRITICAL ANALYSIS OF OAG 81-18

Kentucky's Attorney General came down emphatically against the surrogate parenting arrangement utilized in the Elizabeth Kane pregnancy.[73] That analysis will undoubtedly be relied upon in the pending suit against SPA[74] as well as in future attacks upon surrogate parenting everywhere. The following discussion will detail the reasoning of the Attorney General, critique his approach and suggest an alternative analysis that would better reconcile the competing interests involved.

The conclusion of Opinion of the Attorney General 81-18 (hereinafter "OAG" or the "Opinion") is that contracts between married couples and a surrogate mother for the artificial insemination of the surrogate by the husband, with the understanding that the surrogate will terminate her parental rights shortly after the birth of a resulting child, are *"illegal and unenforceable in Kentucky."*[75] The Attorney General supports this determination through his reading of the express provisions of several Kentucky statutes and by reference

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[71] Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0429 (Ky., Franklin Cir., filed Mar. 12, 1981).

[72] Order Dismissing, Commonwealth v. Surrogate Parenting Assocs., Inc., Civ. No. 81-CI-0121 (Ky., Franklin Cir., filed Jan. 27, 1981). *See also* Ward, *supra* note 20, at 3, col. 4. In addition, a motion to intervene was filed by an infertile couple desiring to hire a surrogate mother. Courier-Journal, *supra* note 71, at 1, col. 4. The action cited in note 71 *supra* was still in discovery in March 1982.

[73] *See* Ky. Op. Att'y Gen. 81-18 (1981).

[74] See the text accompanying notes 67-72 *supra* for a discussion of the suits filed against SPA by Kentucky's Attorney General.

[75] Ky. Op. Att'y Gen. 81-18, at 2 (1981) (emphasis added).

to a strong public policy against "baby-buying" in the state.[76] This Note will demonstrate: (1) that the typical surrogate parenting contract violates none of Kentucky's statutes; (2) that the Attorney General has construed Kentucky's public policy against baby-buying too broadly and has ignored other legitimate policies which favor freedom of contract, parental custody, and step-parent adoption; (3) that the Opinion disregards case law that declares custody contracts to be legal; and (4) that the Attorney General's analysis completely ignores the fundamental difference between void and merely voidable contracts[77] and thus erroneously equates illegality with unenforceability.

A. *Overview of OAG 81-18*

The Attorney General first relies on Kentucky statutory authority to construct his case against surrogate parenting contracts. Kentucky has two statutory procedures, similar in nature, whereby a parent may voluntarily terminate his or her rights and obligations as such.[78] A parent may either consent to the adoption of a child[79] or file a petition to terminate his or her parental rights.[80] The OAG initially notes that neither consent to adoption[81] nor a petition for voluntary termination of parental rights may be filed prior to five days after the birth of a child.[82] From this premise it is argued that a surrogate parenting contract utilizing either statutory scheme would be illegal since it would necessarily require some kind of consent on the part of the surrogate prior to conception

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[76] *Id.*

[77] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 13.1 (1973); 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1770 (3d ed. 1972).

[78] *See* Ky. Rev. Stat. § 199.520(2) (1977) [hereinafter cited as KRS] ("Upon entry of the judgment of adoption, . . . the child shall be deemed the child of petitioners . . . ."); KRS § 199.613(2) (Cum. Supp. 1980) ("Where parental rights have been terminated . . . all legal relationships between the parents and child shall cease to exist, . . . except that the child shall retain the right to inherit from its parents . . . until the child is adopted.").

[79] KRS § 199.500 (Cum. Supp. 1980) (repealed effective July, 1982).

[80] KRS § 199.601 (Cum. Supp. 1980) (repealed effective July, 1982).

[81] KRS § 199.500(5) (Cum. Supp. 1980) (repealed effective July, 1982).

[82] KRS § 199.601(2) (Cum. Supp. 1980) (repealed effective July, 1982).

itself.[83]

The Attorney General's ultimate conclusion is then reinforced by reference to the strong public policy against the buying and selling of children.[84] First, four cases from other jurisdictions are cited for the proposition that natural parents should not profit monetarily from adoption.[85] Second, an additional Kentucky statute is quoted to further demonstrate the public policy against surrogate parenting. This statute is Kentucky Revised Statutes (hereinafter cited as KRS) section 199.590(2),[86] which states: "No person, agency, or institution not licensed by the department may charge a fee or accept remuneration for the procurement of any child for adoption purposes."[87] Additional reliance is placed on the first subsection of that statute, which prohibits any newspaper advertisement that "solicits children for adoption or solicits the custody of children."[88] The policy argument of the Opinion closes by emphatically stating: "The public policy behind these statutes is clear: The Commonwealth of Kentucky does not condone the purchase and sale of children."[89]

B. *Critique of OAG 81-18*

1. *Reliance on Express Provisions of Kentucky Statutes*

The Attorney General was correct in recognizing that a surrogate parenting contract might rely on either a surrogate's termination of parental rights or her consent to an adoption.[90] The contractual arrangements sponsored by SPA, however, call *exclusively* for the termination of parental rights.[91] Any

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[83] Ky. Op. Att'y Gen. 81-18, at 3 (1981).

[84] *Id.* at 4.

[85] Reimche v. First Nat'l Bank of Nev., 512 F.2d 187 (9th Cir. 1975); *In re* Shirk's Estate, 350 P.2d 1 (Kan. 1960), *appeal dismissed,* 363 P.2d 461 (Kan. 1961); *In re* Adoption of a Child by I.T., 397 A.2d 341 (N.J. 1978); Barwin v. Reidy, 307 P.2d 175 (N.M. 1957).

[86] KRS § 199.590(2) (1977).

[87] *Id.*

[88] KRS § 199.590(1) (1977).

[89] Ky. Op. Att'y Gen. 81-18, at 5 (1981).

[90] See the text accompanying notes 79-82 *supra* for a discussion of the Attorney General's treatment of these procedures.

[91] See Contract, *supra* note 34, at ¶ III for a description of the surrogate's con-

reference to Kentucky's adoption statutes, therefore, merely muddies the waters unnecessarily. There is a fundamental difference between the five-day requirement in the adoption statute and the similar requirement in the statute providing for voluntary termination of parental rights. The former is quite explicit: "In no case shall an adoption be granted or consent for adoption be held valid if such consent for adoption is given prior to the fifth day after the birth of the child."[92] The latter merely requires that no termination petition *be filed* before the five-day period elapses.[93] Elizabeth Kane filed a petition in district court to terminate her parental rights five days after the birth of her child, just as the contract and the statute contemplate.[94] Furthermore, even if it is assumed that the child will eventually be adopted by the natural father's wife,[95] it is clear that the surrogate's sworn consent to such adoption would not be required *at any time* should she terminate her rights pursuant to KRS section 199.601.[96]

Thus, the argument that the two five-day delay statutes are expressly violated by surrogate contracts is not persuasive. If a contract required the surrogate's consent to adoption prior to conception, or if consent to adoption was the only recognized method for voluntarily relinquishing parental rights, that contract might indeed violate Kentucky law. Neither situation is present in SPA arrangements, as evidenced by the Elizabeth Kane contract. Such contracts contemplate only that the surrogate file the necessary termination petition at

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tractual commitment.

[92] KRS § 199.500(5) (Cum. Supp. 1980) (repealed effective July, 1982).

[93] KRS § 199.601(2) (Cum. Supp. 1980) (repealed effective July, 1982).

[94] *See* Ward, *supra* note 58.

[95] The contract with the surrogate mother contains a recital which states that "the Surrogate and her husband shall do all acts necessary to permit the adoption of said child by any party, upon request by the Natural Father." Contract, *supra* note 34, at ¶ III.

[96] KRS § 199.500(1) (Cum. Supp. 1980) (repealed effective July, 1982) provides in part:

> No adoption shall be granted without the sworn consent . . . of the mother of the child born out of wedlock, . . . except that such consent of the living parent or parents shall not be required if:
>
> . . . .
>
> (b) The parental rights of such parents have been terminated under KRS 199.601 to 199.617.

the proper time.

2. *Reliance on Public Policy*

The Attorney General correctly notes that public policy offers a stronger argument against surrogate parenting than do the express provisions of the Kentucky statutes.[97] Nonetheless, OAG 81-18 goes too far when it declares surrogate parenting contracts to be illegal on the basis of Kentucky's policy against "baby-buying." Any policy argument is cheapened greatly by superficial reliance on inflammatory labels. Public policy is not a one-way street; there are legitimate policies that are served by a less restrictive approach to surrogate parenting contracts. It should also be noted that there is a heavy burden placed upon anyone attempting to void a contract on public policy grounds:

> [C]ontracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality.[98]

Thus, there is a legal presumption that people will be permitted to order their affairs by agreement.

a. *Extra-jurisdictional cases evidencing public policy*

The Attorney General primarily relies on four extrajurisdictional cases to support his public policy argument.[99] All of

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[97] Ky. Op. Att'y Gen. 81-18, at 3 (1981).

[98] Zeitz v. Foley, 264 S.W.2d 267, 268 (Ky. 1954). "Public policy is an unruly horse which courts are loath to ride unless it is necessary." Hennis v. B.F. Goodrich Co., 349 S.W.2d 680, 681 (Ky. 1961). The *Hennis* Court continued:

> The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes. Public policy has its place in the law of contracts, — yet that will-o'-the-wisp of the law varies and changes with the interests, habits, need, sentiments and fashions of the day, and courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain.

Id. at 681-82 (quoting Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. 1954)).

[99] See note 85 *supra* for a listing of these cases.

these cases arise in an adoption context, and thus none of them entails the termination of parental rights that would occur in Kentucky. Additionally, the holdings are colored by the different statutory makeup of each state. Nonetheless, the cases are very instructive and in fact go a long way toward discrediting the very proposition for which they are cited.

The first two cases, *Barwin v. Reidy*[100] and *Matter of Adoption of a Child by I.T.*,[101] are factually distinguishable from the Kentucky case since both deal with adoptive parents, neither of whom are related to the children in question. Furthermore, while it is technically correct that these two states condemned the "purchase" of children by third party parents, the condemnation was not so pervasive as to frustrate the initial purpose of either bargain. Although the court voiced disapproval of the method by which the children were procured in each case,[102] the courts allowed both adoptions to proceed.[103]

The third case, *In Re Shirks's Estate*,[104] more closely reflects the Kentucky arrangement since it deals with an adoption by a relative of the child. *Shirk* involved a contract between a daughter and her mother wherein the daughter gave her consent to the adoption of her child by the mother. In addition, the daughter promised to go elsewhere to live in return for a promise that she and her child would each receive one-third of the mother's estate.[105] Although there was dicta condemning the barter or sale of children on public policy grounds, the contract was held to be *valid* and *enforceable* against the mother's estate. In so concluding, the *Shirk* court astutely recognized that the general prohibition against baby-buying does not always include contracts between family

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[100] 307 P.2d 175 (N.M. 1957).

[101] 397 A.2d 341 (N.J. 1978).

[102] *Id.* at 344; Barwin v. Reidy, 307 P.2d at 183-84.

[103] *In re* Adoption of a Child by I.T., 397 A.2d at 348; Barwin v. Reidy, 307 P.2d at 181. In each case, the court's decision to let the adoption proceed was specifically based upon the best interests of the child. 397 A.2d at 346-47; 307 P.2d at 185. Any pronouncements of public policy contained in these cases were clearly secondary to concern for the welfare of the children.

[104] 350 P.2d at 1.

[105] *Id.* at 7-9.

members and those others which would promote the welfare of the child:[106]

> [A] contract of a parent by which he bargains away for his pecuniary gain the custody of his child *to a stranger* and attempts to relieve himself from all parental obligations, placing the burden on another who assumes it, *without natural affection or moral obligation, but only because of the bargain,* is void as against public policy. Such a contract would be a mere sale of the child for money. *But the instant case involves a family compact.* The proposal for adoption upon which the contract was based came from the grandmother. It was not prompted by self-seeking on the part of the mother. Implicit in it is the favorable inference that the controlling consideration was the welfare of the two-year-old child.[107]

Thus, the evil of baby-buying is mitigated considerably when the adopting parent is not a stranger to the child and when the best interests of the child will be served by the adoption.

The final extra-jurisdictional case cited in OAG 81-18 is *Reimche v. First National Bank of Nevada.*[108] This case comes closest to the unique Kentucky situation since it concerns a mother's attempt to obtain specific performance of a contract providing that the father execute a will for the benefit of their illegitimate child.[109] The mother had agreed to move away, to remain silent about the parentage of the child and to consent to the adoption of the child by the father. In return, the father promised to support her and to provide for her medical care during pregnancy. Additionally, the father agreed to raise, support, educate and maintain the child and to leave, upon his death, his estate to both the *mother* and the *child.*[110] As in *Shirk,* this contract was held to be enforceable and not to be violative of public policy. Once again, the un-

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[106] *Id.* at 11. *Accord,* Clark v. Clark, 89 A. 405 (Md. 1913); Enders v. Enders, 30 A. 129 (Pa. 1894). *See* 59 AM. JUR. 2D *Parent and Child* § 37 (1971).

[107] 350 P.2d at 12 (emphasis added).

[108] 512 F.2d at 187.

[109] *Id.* For other cases dealing with aspects related to this fact pattern, see Annot., 65 A.L.R.3d 632 (1975) (contracts to will property); Annot., 20 A.L.R.3d 500 (1968) (contracts to support illegitimates).

[110] 512 F.2d at 189-90.

derlying test was whether the contract was in the best interests of the child. The court held that the contract furthered the child's best interests, citing the father's initiation of the agreement as proof that the motivating factor on the part of the mother was not pecuniary gain.[111] Finally, the court explained why the arrangement fell outside the policy against baby-buying: "The fears that approval of such a policy would lead to the bartering or sale of children are not borne out when we deal only with *agreements between parents* or close family members."[112]

b. *Kentucky cases evidencing public policy*

The extra-jurisdictional cases mentioned above considerably undercut any attack on surrogate parenting based on public policy. Of even more importance, however, are several Kentucky opinions that were ignored in OAG 81-18. The *Reimche* decision itself specifically relied on two Kentucky cases, *Smith v. Wagers' Administrators*[113] and *Doty's Administrator v. Doty's Guardian,*[114] both conspicuously absent from the Opinion.

There is another line of cases that provides even better support for the *Reimche* and *Shirk* holdings, *i.e.,* that adoption contracts between parents or between parents and close family members that do not violate the best interests of the

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[111] *Id.* at 189. The consideration on the part of the mother that was sufficient to support the agreement was her significant detriment in "foregoing her right to child support through filiation proceedings, relinquishing the companionship and affection of their child as well as any financial compensation she might have obtained from her daughter's earnings during minority and her support obligations thereafter." *Id.* Clearly the same elements of consideration are present in a surrogate parenting arrangement.

[112] *Id.* at 190.

[113] 38 S.W.2d 685 (Ky. 1931). The holding in *Smith* is as follows: "[A] promise by a father to provide for his illegitimate child out of his estate in consideration of the [unmarried] mother's agreement not to institute bastardy proceedings against him is valid and enforceable." *Id.* at 686 (citations omitted).

[114] 80 S.W. 803 (Ky. 1904). The holding in *Doty's Adm'r* is that a promise by a father to support his illegitimate child is legal and enforceable if supported by the mother's agreement to let the child remain at the father's home and under his control. *Id.* at 807.

child are valid and enforceable.[115] In one case, which roughly approximates the typical surrogate arrangement, Couple *A* approached Couple *B* and wanted to adopt one of Couple *B*'s children, whom they knew.[116] The wife in Couple *A* was "delicate" and could have no children. Couple *B* agreed to let the child go, and Couple *A* agreed to leave the child their estate. The Kentucky court enforced this contract without any mention of public policy whatsoever.[117] This holding is even more liberal than any of those previously mentioned because it allows biological strangers to contract for custody of a child.

It is true that most of the cases discussed above are distinguishable from disputes that could arise under a surrogate parenting contract. All but *Reimche*[118] deal with contracts formed after the birth of the child in question. All but *Barwin* and *I.T.*[119] were brought by the children or on their behalf to receive property promised to them under a contract. Nonetheless, they are all illustrative of the limits placed on the public policy against baby-buying. One Kentucky case, however, deals squarely with whether parents may contract for the custody and maintenance of their children, namely the case of *Edleson v. Edleson.*[120]

In *Edleson,* a husband and wife, having separated, entered into a contract agreeing upon the distribution of their property and the custody of their child. In a subsequent divorce suit, the court considered the custody provisions of the contract:[121]

> [I]t is evident that a husband and wife, with each other, cannot make a contract regarding the maintenance or custody of their child, *which the court is compelled to enforce.* . . .

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[115] *See* Broughton v. Broughton, 262 S.W. 1089 (Ky. 1924); Benge v. Hiatt's Adm'r, 82 Ky. 666 (1885).

[116] Small's Adm'r v. Peters, 26 S.W.2d 491 (Ky. 1930).

[117] *Id.* at 492.

[118] For a full discussion of *Reimche,* see the text accompanying notes 108-12 *supra.*

[119] For a full discussion of these two cases, see the text accompanying notes 100-03 *supra.*

[120] 200 S.W. 625 (Ky. 1918).

[121] It is interesting to note that the court initially declared one provision of the contract, which called for the wife to pay all costs in any divorce action, void as violative of public policy. *Id.* at 629.

> *It is, however, not illegal* for the parents, who have separated, to enter into a contract with each other for the custody and maintenance of their child, but the court will not recognize such contract unless it is one which insures the proper care and maintenance of the child. . . . *So long, however, as the court recognizes the contract which has been entered into between the parents, its provisions should be enforced.*[122]

Thus, *Edleson* sets out clearly Kentucky's public policy regarding custody contracts. Unlike OAG, it acknowledges the distinction between void and voidable contracts. Moreover, the rationale of the case is quite simple: *No,* the courts cannot be compelled to enforce custody contracts since their primary duty is to insure the welfare of the child; *yes,* parents may enter into such contracts, they are not illegal, and they will be enforced whenever it is not detrimental to the child to do so.

c. *Kentucky statutes evidencing public policy*

The Attorney General relies on statutory as well as case authority for the proposition that public policy voids surrogate parenting contracts. KRS section 199.590(2)[123] is said to embody much of Kentucky's public policy against baby-buying.[124] This statute states that "[n]o person, agency, or institution not licensed by the department may charge a fee or accept remuneration for the procurement of any child for adoption purposes."[125] The Attorney General felt that this

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[122] *Id.* at 631 (emphasis added). *See* RESTATEMENT OF CONTRACTS § 583 comment a (1933); 15 S. WILLISTON, *supra* note 77, at § 1744A. *But cf.* Wells v. Wells, 412 S.W.2d 568 (Ky. 1967). The *Wells* Court refused to enforce a custody agreement entered into: 1) under conditions of temporary distress; 2) without advice of counsel; and 3) as merely a temporary solution. *See generally* 59 AM. JUR. 2D *Parent and Child* § 33 (1971).

[123] KRS § 199.590(2) (1977).

[124] Ky. Op. Att'y Gen. 81-18, at 4 (1981).

[125] KRS § 199.590(2) (1977). The Attorney General also relies on the first subsection of KRS § 199.590 which restricts advertising concerning the solicitation of children for adoption or custody. Such organizations as SPA might indeed be penalized for violating this statute should they advertise in the future, but this provision alone can hardly be taken as evidence of a public policy against surrogate parenting contracts. Public and private adoption agencies could also run afoul of this statute by advertising. Although the provisions of KRS § 199.590(1) could violate the first

statute prevented not only the surrogate from receiving money but also precluded the receipt of money by "all who are involved in the surrogate transaction since each of them is involved 'in the procurement of a child for adoption purposes.' "[126] It should be remembered, however, that the SPA contract is designed primarily to bring about the termination of the surrogate mother's parental rights so that the natural father might take custody of the child.[127] In this regard, the first subsection of KRS section 199.590 forbids advertising "which solicits children for adoption *or* solicits the custody of children," while the second subsection proscribes only "remuneration for the procurement of any child *for adoption purposes.*"[128] The surrogate parenting contract is not truly a "procurement of a child for adoption purposes" but is simply a contract for custody.[129] Regardless of the literal application of KRS section 199.590, however, the argument remains that it is evidence of Kentucky's public policy, and this contention must be analyzed in light of the overall purpose of Kentucky's statutory scheme.

It has already been shown that a state's interest in contracts involving adoption and custody is satisfied when parents or close family members are involved and when the best interests of the child are promoted.[130] It can be shown that Kentucky has a statutorily identifiable public policy favoring

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amendment rights of organizations such as SPA, this Note will not attempt to address this issue.

The penalty provision for KRS § 199.590(2) is KRS § 199.990(4) (1977) (repealed effective July, 1982), which states that violators "shall be fined not less than $500 nor more than $2000 or imprisoned for not more than six months, or both."

[126] Ky. Op. Att'y Gen. 81-18, at 4 (1981). The Attorney General does not list the persons that this may include, but presumably the doctor performing the artificial insemination and counsel representing the parties could be charged with violations of the statute.

[127] See note 37 *supra* and accompanying text for a discussion of the surrogate mother's commitment.

[128] *Compare* KRS § 199.590(1) (1977) *with* KRS § 199.590(2) (1977) (emphasis added).

[129] It is fair to say, however, that all parties reasonably expect the father's wife to adopt the child. See note 95 *supra* for the contractual recital that indicates the expectations of the parties.

[130] See text accompanying notes 104-22 *supra* for a discussion of cases illustrating this principle.

step-parent adoption.[131] Assuming that the state's interest in the child's welfare is satisfied when the natural father obtains custody of a child under a surrogate parenting contract and the child's step-parent subsequently adopts him, the Attorney General's policy argument based on KRS section 199.590 must necessarily involve policy considerations yet unmentioned. Two such policies are potentially applicable: protection of those couples who seek to adopt and protection of the natural mother.

Unlike many states,[132] Kentucky allows private[133] as well as public adoptions and does not prohibit couples from paying for the privilege of adoption.[134] Thus, the policy evidenced by KRS section 199.590 cannot be the protection of couples who might want to adopt. Apparently, once the state's interest in the welfare of the child is satisfied, the only other interest sought to be protected by KRS section 199.590 is that of the mother who gives up her baby for adoption. KRS section 199.590 is intended to keep unconcerned, black-market baby

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[131] *See, e.g.*, KRS § 199.473(3) (Cum. Supp. 1980) (repealed effective July, 1982), which states in part:

> No person, association or organization, other than the department or a licensed child-placing institution or agency shall place a child or act as intermediary in the placement of a child for adoption or otherwise, *except in the home of a stepparent*, grandparent, sister, brother, aunt or uncle . . . .

Id. (emphasis added). *See also* Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979) (step-parent was granted visitation rights to a child despite being a non-parent); KRS § 199.470(4) (1970).

[132] *See New Frontiers, supra* note 1, at 52.

[133] KRS § 199.473 (Cum. Supp. 1980).

[134] *See* KRS § 199.590(2) (1977) *quoted in* text accompanying note 87 *supra*. Notice that this statute does not prohibit *anyone* from receiving payment for procuring a child for adoption — just those not licensed by the Kentucky Department for Human Resources.

The cost of an adoption of a biologically unrelated child through a licensed private adoption agency is quite substantial. For example, it costs five percent of a couple's yearly gross income to adopt through the Kentucky Baptist Board of Child Care. The adopting couple must be Southern Baptist, and there is a five to six year waiting list. Catholic Social Services accepts "donations" ranging from $300 to $1000 for its services. This waiting list is three and one-half years. In either case, the couple must also pay court costs of around $125 and attorney's fees of as much as $2000. Cassidy, *supra* note 3, at 62-63.

A "free," public adoption through the Kentucky Department for Human Resources may take as long as six years, and the couple must still pay court costs and attorney's fees. *Id.* at 62.

brokers from financially overwhelming a mother who is often young, unwed or poor, and already burdened with too many mouths to feed.[135]

The unique setting in which surrogate parenting contracts arise goes far toward satisfying the public policy expressed by KRS section 199.590(2). The process requires a doctor as middleman, and all parties are represented by counsel. The surrogates are physically and psychologically screened.[136] Finally and most importantly, "the agreement to carry the child is entered into prior to conception, free from the financial and emotional pressure of an unwanted pregnancy. Thus, the decision to contract for a child is likely to be better considered than a corresponding private adoption decision."[137] For all of these reasons, neither the explicit terms nor the underlying policy of KRS section 199.590 is violated by surrogate parenting contracts.[138]

A final aspect of the Attorney General's public policy argument must be discussed. While it has been shown that the literal terms of the two five-day delay statutes are not violated by surrogate parenting contracts,[139] the Opinion relies on the policy behind the two statutes for support. The OAG states: "[T]he legislature as a matter of public policy intended that the mother not be rushed into making a decision to give consent for adoption [or to file a petition for termination of pa-

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[135] *See* Cassidy, *supra* note 3, at 62; Marcus, *supra* note 24, at 17.

[136] For a discussion of SPA's surrogate selection process, see text accompanying notes 31-38 *supra*.

[137] Comment, *supra* note 15, at 619. *See also* Marcus, *supra* note 24, at 17.

[138] A final authority cited by the Attorney General in support of his policy argument under KRS § 199.590(2) is Professor Ralph S. Petrilli, professor of law at the University of Louisville and acknowledged family law scholar. "It is . . . clear legislative policy that no one shall profit economically from the adoptive process." Ky. Op. Att'y Gen. 81-18, at 4 (1981) (quoting R. PETRILLI, KENTUCKY FAMILY LAW § 29.6 (1969)).

It would seem, however, that Professor Petrilli either did not intend for the quoted language to apply to surrogate parenting contracts or he has lately reconsidered his original position. The Professor has more recently been quoted as stating: "I think it quite possible to interpret [Kentucky's] statutes as not barring surrogate mothering . . . . They're aimed at an evil, but I'm not sure the evil they're aimed at is a surrogate mothering kind of thing." Courier-Journal, *supra* note 25, at 12, col. 6.

[139] See text accompanying notes 92-96 *supra* for a discussion of the literal application of KRS § 199.500(5) and KRS § 199.601(2).

rental rights]; rather she should have at least five days to think it over."[140] This policy, however, can only be violated if it is assumed that surrogate parenting contracts will be specifically enforced against the mother should she change her mind and refuse to terminate her parental rights. As has already been shown, custody contracts are not enforceable unless they are in the best interests of the child.[141] The surrogate's consent prior to five days after the baby is born is no more legally binding than the decision of an unwed mother during her pregnancy that she will put her baby up for adoption. The policy of the statute is not violated by well-considered decisions; it merely seeks to give the mother one final chance to reconsider. Should the mother change her mind before a final judgment is entered terminating her parental rights, she is free to void the contract and take her chances in a custody proceeding. Thus, while custody contracts may be unenforceable in *some* cases, that does not mean they are void or illegal in *every* instance.

C. *Suggested Analysis of Surrogate Parenting Contracts*

The preceding critique of the Attorney General's treatment of surrogate parenting contracts suggests an alternative analysis that better resolves the interests of the state, the surrogate, and the infertile couple. The position of this Note is

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[140] Ky. Op. Att'y Gen. 81-18, at 2 (1981). Both five-day delay features were added to their respective statutory schemes in 1978. 1978 Ky. Acts Ch. 137, §§ 7-8. An examination of the histories of the consent to adoption statute and the voluntary termination of parental rights statute illustrates that the five-day delay features added little in terms of protection.

The judicial rule with regard to withdrawing a sworn consent to adoption is that such consent may be withdrawn at any time before a final judgment of adoption upon a showing of good cause. Hill v. Poole, 493 S.W.2d 482 (Ky. 1973); Warner v. Ward, 401 S.W.2d 62 (Ky. 1966). Essentially the same rule has developed concerning petitions to terminate parental rights. After final judgment has been entered, no one can revoke a termination of rights. Hill v. Garner, 561 S.W.2d 106 (Ky. Ct. App. 1978); Commonwealth, Dept. of Child Welfare v. Helton, 411 S.W.2d 932 (Ky. 1967). As a result, regardless of whether the five-day requirement of either statute is met, natural parents may rescind their actions for good cause prior to an entry of final judgment granting the adoption or terminating their parental rights.

[141] Edleson v. Edleson, 200 S.W. at 625. See text accompanying notes 120-22 *supra* for a discussion of this case.

that surrogate parenting contracts should be considered legal but voidable custody contracts that are ratified upon entry of a final judgment terminating the parental rights of the surrogate mother. Viewing surrogate parenting contracts in this way prevents a surrogate from overreaching an infertile couple who might utilize this method of conception, regardless of its legality, out of sheer desperation. Furthermore, it is consistent with Kentucky's traditional treatment of both custody contracts and other contracts in which the state has a special interest. Finally, this approach meshes surrogate parenting contracts with existing custody laws so that reference to those laws will solve any problems that might arise when surrogate parenting contracts are avoided.

The principal shortcoming of OAG 81-18 is that it fails to differentiate between void and voidable contracts, suggesting that a contract that is unenforceable is therefore illegal. Such is not the case. An illegal contract is but one type of unenforceable contract; many other unenforceable contracts are merely voidable.[142] "The term 'voidable' means simply that the contract or transaction can be avoided by some action on the part of one or more parties, but that until such action is taken, the transaction is a valid one."[143]

Once surrogate parenting contracts are characterized as voidable, the purpose of the statutes cited by the Attorney General must be seen as the protection of the parties to custody and adoption contracts. Such protective statutes, as described by Dean Williston, "make transactions in violation of them unenforceable, [but] do not make them illegal, properly speaking."[144] To the extent the statutes cited by the Attorney General do express a public interest,[145] such interest is always satisfied by surrogate parenting contracts. Custody will always

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[142] With regard to unenforceable contracts, see D. DOBBS, *supra* note 77, at §§ 13.1-.5.

[143] *Id.* at § 13.1.

[144] 15 S. WILLISTON, *supra* note 77, at § 1770. A well-known example of a statute of this type is the Statute of Frauds.

[145] The previous analysis of this issue demonstrated that the state's interest is satisfied when the agreement involves the parents or a parent and a close relative of the child and the best interests of the child are not violated. See text accompanying notes 104-22 *supra* for the factors supporting this conclusion.

lie with a biological parent of the child, and the child's best interests will be protected either by the surrogate's ratification of the contract[146] or through an independent custody proceeding if she chooses to void the contract.

Analyzing surrogate parenting contracts as voidable rather than illegal agreements will also avoid the potential for unexpected and inequitable consequences to the infertile couple. Surrogate parenting is usually an alternative of last resort for a scientifically irreducible number of couples who cannot conceive; therefore, its legality may be of limited importance with regard to an infertile couple's ultimate decision. In this regard, it must be remembered that one consequence of a void contract is that the parties are left in the position in which the court finds them.[147] Should the surrogate breach a contract classified as illegal, not only would enforcement be disallowed, but restitution would be denied the couple for any payments advanced to the surrogate or for medical expenses paid.[148] While it may be salutary for a court to refuse specific performance of a surrogate parenting contract against a natural mother's will in some cases, it is quite a different thing to allow her a windfall.

It has already been shown that traditional custody contracts in Kentucky are analyzed under the reasoning urged herein.[149] While these contracts plainly offer the closest analogy to surrogate parenting contracts, an infant's contract presents another well-known example of a voidable contract recognized in Kentucky and elsewhere.[150] Minors have the privilege of voiding their contracts made during minority unless such contracts are ratified when the minor becomes of age. These contracts are not void, however, and other parties to the contract are bound thereby.[151] One particularly inter-

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[146] Implicit in this statement is the judgment that a child is certainly better off with his natural father and stepmother who desperately want him than with his natural mother who bore him as a service to the infertile couple and who wishes simply to live up to her contract.

[147] Miller v. Miller, 296 S.W.2d 684 (Ky. 1956).

[148] D. DOBBS, *supra* note 77, at § 13.5.

[149] *See* Wells v. Wells, 412 S.W.2d at 568; Edleson v. Edleson, 200 S.W. at 625.

[150] *See generally* R. PETRILLI, *supra* note 138, at §§ 30.2-30.8.

[151] *Id.* at § 20.2.

esting Kentucky case held that a minor could void the consent she gave to her child's adoption prior to a final judgment granting the adoption.[152] This case not only bridges the conceptual gap between contracts of minors and surrogate parenting contracts, it also sets the limit beyond which a surrogate parenting contract should not be voidable: entry of judgment terminating parental rights of the surrogate.

The voidable contract approach is a workable solution that best reconciles the interests of the state, the surrogate and the infertile couple. In the most likely scenario, the surrogate would consider her legal and emotional position carefully before entering into the contract and would happily fulfill its terms, thus providing a biologically related child for an otherwise infertile couple.[153] In such a case, there would be no reason not to allow the surrogate to terminate her parental rights[154] nor could there be any question that a final judgment in the termination proceedings would prevent the surrogate from later challenging the procedure.[155] It is not inconceiv-

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[152] Warner v. Ward, 401 S.W.2d 62, 63 (Ky. 1966) (alternative holding).

[153] The comments of Elizabeth Kane after she gave birth are enlightening in this regard: "I had a glimpse of the adoptive parents in the delivery room. I'll never forget the delight on their faces — what the sight of the baby meant to that woman. Maybe it does hurt me a little. So what? It was worth every minute of it." Markoutsas, *supra* note 3, at 104.

[154] Again, reference to the recent Louisville experience is instructive: "Jefferson Circuit Judge Earl O'Bannon treated it as a 'routine termination' . . . . He made sure the Kanes had thought about it, satisfied himself that it was in the best interests of the child and signed the order." Ward, *supra* note 58, at B6, col. 2.

[155] Hill v. Garner, 561 S.W.2d at 106. Note the following language taken from *Department of Welfare v. Helton*:

> The order of the Pike Circuit Court terminated the parental rights of Mrs. Helton. Nothing has occurred which could be held to have legally restored those rights. So long as that order remains in force, Mrs. Helton stands at bar as a stranger to the child from a legal point of view . . . . Although we are fully mindful of the claims which may be made in behalf of a mother's rights to her child, we are equally aware of the salutary purpose underlying the laws of adoption . . . . The entire adoption program would be utterly frustrated if judgments terminating parental rights were to be lightly regarded. The prospective adoptive parents, the Department, and indeed the parents whose rights have been terminated would have no assurance of when or if an adoption could be effected if the termination were regarded as revocable. That this condition would militate against the best interests of the child and the public at large hardly needs elaboration.

561 S.W.2d at 108 (quoting 411 S.W.2d at 934).

able, of course, that a surrogate might change her mind about surrendering the child prior to termination of her parental rights. Indeed, this has occurred recently in California.[156] Reference to basic custody principles supplies a solution to such problems once the surrogate parenting contract is acknowledged to be a voidable contract.

Initially, KRS section 403.270 provides for a resolution of this dilemma by stating: "The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent."[157] This would put the surrogate and the natural father on equal terms as to custody,[158] and it would simply be up to the judge to determine what would be in the best interests of the child.[159] Similarly, the couple could receive in restitution any payments or expenses that were made for the benefit of the surrogate before the contract was avoided.[160] Secondly, it should be noted that the contract would not be voidable on the part of the couple. In the unlikely event that they should breach the contract and a surrogate choose to keep the baby, she could institute a paternity action against the father for "the expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child."[161]

In conclusion, the preceding exposition and critique of

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[156] The resulting lawsuit is discussed at note 70 *supra*.

[157] KRS § 403.270(1) (Cum. Supp. 1980). The passage of this statute undoubtedly destroys the so-called "tender years presumption" that favored maternal custody when both parents were equally fit for custody. *See* Jones v. Jones, 577 S.W.2d 43, 45 n.1 (Ky. Ct. App. 1979). For a discussion of the history and development of the tender years presumption, see Comment, *Paternal Custody of the Young Child Under the Kentucky No-Fault Divorce Act*, 66 KY. L.J. 165 (1977-78).

[158] It would not hurt the father's chances if the child was born "out of wedlock." Stanley v. Illinois, 405 U.S. 645 (1972). "[A] biological father of a child born out of wedlock has the right to petition and obtain custody of his child if he is suited to the test, and if such is in the best interest of the child." Sweat v. Turner, 547 S.W.2d 435, 437 (Ky. 1976). Nor should the father's custody rights be affected solely because the child was conceived by artificial insemination. In this regard, see the discussion of C.M. v. C.C., 377 A.2d 821 (N.J. 1977), at text accompanying notes 197-200 *infra*.

[159] This course is apparently the one which will be taken in the California case discussed at note 70 *supra*. "After the baby is born, [Judge] Olson will probably order an investigation of both families and then try to decide what course is in the best interest of the new baby." *Whose Baby Is It, Anyway?*, *supra* note 70, at 83.

[160] *See* D. DOBBS, *supra* note 77, at § 13.5.

[161] KRS § 406.011 (Cum. Supp. 1980).

the Kentucky Attorney General's Opinion on surrogate parenting contracts uncovers serious problems with its chosen analysis. There simply is no outright statutory ban on such contracts under present Kentucky law. Likewise, the Opinion considerably overstates its policy argument and overlooks crucial Kentucky precedent reflecting on that policy. A Kentucky court should be aware of these deficiencies and should approach surrogate parenting agreements as voidable rather than illegal contracts.

III. A COMPARISON OF ARTIFICIAL INSEMINATION AND SURROGATE PARENTING

At its most basic level, surrogate parenting is a technique whereby couples can have a child biologically related to the husband although the wife is infertile. The reverse procedure, enabling couples to have a child biologically related to the wife despite the husband's infertility,[162] is a daily occurrence throughout the United States. This technique, artificial insemination (AI),[163] accounts for almost one percent of all births in any given year.[164]

Twenty states have already enacted statutes specifically legalizing AI,[165] and the rest largely accept its legality without question. AI is readily analogous to surrogate parenting; thus, a successful legal attack on surrogate parenting contracts in Kentucky could adversely affect the future of AI everywhere.

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[162] It is noteworthy that a couple's infertility is due to the female roughly 60% of the time. Yussman, *supra* note 2, at 107.

[163] *See generally* W. FINEGOLD, *supra* note 2. Technically, there are three different varieties of AI: 1) AIH (homologous insemination), in which the wife is artifically inseminated with her husband's sperm because sexual intercourse is for some reason impossible; 2) AID (insemination by donor), in which an anonymous donor's sperm is used; and 3) AIC (confused or combined insemination), in which a combination of the husband's sperm and donor sperm is used. Shaman, *supra* note 2, at 331-32. Surrogate parenting is most analogous to AID.

[164] Interview with Marvin A. Yussman, M.D., Director of the Department of Reproductive Endocrinology at the University of Louisville, in Louisville, Ky. (Mar. 24, 1981) [hereinafter cited as Yussman Interview]. The oft-quoted figure of births per year attributed to AI is 20,000. Shaman, *supra* note 2, at 331. "There are now 17 frozen sperm banks in this country with at least 100,000 total sperm samples for sale." *New Frontiers*, *supra* note 1, at 46.

[165] See note 201 *infra* for a listing of these statutes.

There are fundamental differences in the two concepts to be sure; the disparity in the commitments of the anonymous sperm donor and the surrogate mother is the primary distinction between the two methods.[166]

The discussion which follows will briefly describe the procedure involved in AI as it is generally practiced. The legal precedents for AI will be examined, as will the statutes that have been passed in response to its popularity. At each point, the treatment of AI will be analyzed in light of its similarities to and differences from surrogate parenting. Finally, the potential effect of OAG 81-18 on the continued practice of AI in Kentucky will be discussed.

A. *Artificial Insemination Practice and Procedure*

In Kentucky, inseminations are being performed routinely at the University of Kentucky's Division of Reproductive Endocrinology and at the University of Louisville's Department of Reproductive Endocrinology.[167] Upon a determination that the male is irreversibly sterile, the AI alternative is discussed with the couple.[168] Should they choose to proceed, they both sign consent forms absolving the donor of paternity and the doctor from legal responsibility.[169] The wo-

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[166] Dr. Marvin Yussman, Director of the University of Louisville Department of Reproductive Endocrinology and President of the Louisville Obstetricians and Gynecologists Society, has described the medical differences between AI and surrogate parenting. Primarily, the AI donor provides sperm, or mere genetic material, while the surrogate mother donates more than an egg to the pregnancy. Cassidy, *supra* note 3, at 63.

Kentucky's Attorney General, Steven L. Beshear, described the legal differences between AI and surrogate parenting during a television interview. In response to a question phoned in by one of the authors of this Note, he stated: "Frankly, in my mind I can't equate a male coming in and taking five dollars to donate his sperm, with a woman having a baby for pay. It's just not the same thing." Television Appearance by Attorney General Beshear, Kentucky Educational Television's "Kentucky Journal" (Mar. 23, 1981).

[167] Yussman Interview, *supra* note 164. Inseminations began in Louisville in 1970 with the doctors then performing about five inseminations a month. That figure reached 40 a month by 1975 and has since doubled as of 1981. *Id.* At the Tyler Clinic in New York, doctors perform 15 donor inseminations a day, resulting in 200 pregnancies a year. *New Frontiers, supra* note 1, at 52.

[168] Yussman, *supra* note 2, at 110-11.

[169] *Id.* Included in this form is a waiver of the couple's right to discover the iden-

man is then inseminated two or three times each month during her period of ovulation until conception occurs.[170] The overall success rate in Louisville is about seventy-six percent.[171]

Typically, AI donors tend to be medical students or other graduate students.[172] Prospective donors are given a physical, and a complete medical history is taken.[173] Some clinics also administer chromosome tests.[174] In Kentucky, once a donor is chosen, he and his wife must sign forms waiving their rights in any children, including any right to find out who those children are.[175] Donors are paid from twenty to thirty dollars for each sperm sample,[176] and most donate two or three times a week for two or three years.[177] Clinics match donors with couples in various ways. Certain clinics allow the couples to

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tity of the donor. *Id. See* 15 AM. JUR. LEGAL FORMS 2D *Physicians and Surgeons* §§ 202:81-:88 (1973) (American Medical Association sample forms).

[170] Yussman, *supra* note 2, at 108-09. A University of Wisconsin survey of 400 doctors revealed that 57% of inseminated women involved in the survey became pregnant after three to four months of AI. *Sperm Donors: Possible Perils, supra* note 9. At the Tyler Clinic in New York, each insemination costs $66. *New Frontiers, supra* note 1, at 52.

[171] Yussman, *supra* note 2, at 108-09. Success with fresh semen is around 80%, but when frozen sperm is used, the success rate drops to about 60%. Yussman Interview, *supra* note 164.

[172] *New Frontiers, supra* note 1, at 52. There is one sperm bank in Escondido, California, which accepts only Nobel Prize winners as donors. *Id.*

[173] *Id.* at 53. In Louisville, Dr. Yussman will accept as donors only married medical students who have fathered more than one healthy child. This has resulted in a lower abnormality rate among AI children than among conventionally conceived infants since one-half of the AI child's gene pool is of "proven" normality. Yussman Interview, *supra* note 164.

[174] *New Frontiers, supra* note 1, at 52.

[175] Yussman, *supra* note 2, at 111.

[176] As with any other commodity, the price of semen seems to vary. *New Frontiers, supra* note 1, at 52 ($20.00); Yussman Interview, *supra* note 164 ($25.00); *Sperm Donors: Possible Perils, supra* note 9 ($30.00). Surrogate parenting proponent, Dr. Richard Levin, estimated that a donor could receive up to $10,950 a year if he donated sperm every day. Salvato, *supra* note 7, at 8A, col. 1.

[177] This is the case in Louisville, although any member of the approximately 20-man donor pool is dismissed after he is responsible for seven pregnancies. This is to minimize the remote possibility that AI children by the same donor might grow up and unwittingly enter an incestuous relationship. Yussman Interview, *supra* note 164. *See* Shaman, *supra* note 2, at 339. At the Tyler Clinic in New York, the average donor participates for about four years, although some have been donating regularly for seven years. *New Frontiers, supra* note 1, at 53.

fill out a "wish list" that includes a desired height, weight and hair color, while at others the doctor in charge simply makes the decision based on similarities of physical characteristics.[178]

The typical insemination is marked by rigid anonymity. Donors are generally disinterested in the children they have sired.[179] Similarly, the couple tends to act as if the whole affair never occurred. Most doctors do keep records,[180] but the children rarely discover that they are not the natural offspring of both parents. Usually, the husband's name appears on the child's birth certificate as the father, and he does not bother to adopt the child.[181]

B. *Cases Involving Artificial Insemination*

There are no reported cases in Kentucky involving AI, nor has the Attorney General issued an opinion as to its legality. The lack of an express legal basis, however, has not impaired AI's growth and development within the Commonwealth.[182] Only a handful of AI decisions[183] have been rendered anywhere, and only one by a court of last resort in any state.[184] These cases are briefly examined in the paragraphs that follow in order to clarify the present legal status of AI in the United States.[185]

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[178] *Compare New Frontiers, supra* note 1, at 52 *with* Yussman, *supra* note 2, at 110.

[179] In fact, donors may not even know whether they have been responsible for a pregnancy. It is doubtful that donors could be as easily procured if their anonymity could not be protected. *New Frontiers, supra* note 1, at 53.

[180] *Id. See also* Yussman, *supra* note 2, at 111.

[181] Yussman Interview, *supra* note 164.

[182] For a description of the rapid growth rate in Louisville alone, see note 167 *supra.*

[183] *See generally* Annot., 25 A.L.R.3d 1103 (1969).

[184] *See* People v. Sorenson, 437 P.2d 495 (Cal. 1968).

[185] The potential legal ramifications of AI are myriad:

> [A]rtificial insemination could be asserted as a ground for divorce (as constituting adultery or cruelty), . . . it could be the basis for a criminal prosecution for adultery or a civil action for criminal conversation (possibly to be brought against the physician or the donor of the semen by a husband who did not consent to the artificial insemination of his wife), . . . it could involve any or numerous parties in an action to determine the legitimacy of the child, . . . it could create complications with respect to child support, custody, and visitation in a divorce action, and . . . , it has been suggested,

The first consequential AI decision was rendered in the New York case of *Strnad v. Strnad,*[186] which involved a custody determination. The husband was seeking visitation rights to a child conceived by his wife through AI. He had consented to the insemination. The court held that the child had been "potentially adopted or semi-adopted" by the husband, and he "was entitled to the same rights as those acquired by a foster parent who had formally adopted a child, if not the same rights to which a natural parent under the circumstances would be entitled."[187] The court also reasoned that the child was legitimate despite being conceived through AI.[188] *Strnad* was rejected in a subsequent New York case involving AI, *Gursky v. Gursky.*[189] The controversy arose when the husband, who had consented to the wife's AI, later challenged the legitimacy of the resulting child. The court found that the child was illegitimate and refused to accept a theory of "potential adoption" or "semi-adoption."[190] The court held, however, that the husband's consent to the procedure constituted an implied promise on his part to support the child. He was estopped from denying paternity due to his wife's reliance on that promise.[191]

Whatever the reason for the retreat in *Gursky,*[192] the New

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it could even bring about a unique charge of rape, as in the case of a physician who, by force or fraud, performs the procedure on an unwilling patient. Annot., 25 A.L.R.3d 1103, 1107 (1969).

[186] 78 N.Y.S.2d 390 (1948).

[187] *Id.* at 391-92.

[188] *Id.* at 392.

[189] 242 N.Y.S.2d 406 (1963).

[190] *Id.* at 410-11. The court also relied on an often-cited but unreported case, Doornbos v. Doornbos, No. 54 S. 14981 (Super. Ct., Cook County, Ill., Dec. 13, 1954), *appeal dismissed,* 139 N.E.2d 844 (Ill. 1956) (abstract only). That case held that AID with or without the consent of the husband was contrary to public policy, that any child born thereby was illegitimate, and that the wife was guilty of adultery. *See also* Comment, *Legal Problems of Artificial Insemination,* 39 MARQ. L. REV. 146 (1955).

[191] 242 N.Y.S.2d at 411-12.

[192] One might suspect that public opinion was responsible for this shift in judicial attitude. Public opinion is generally quite strong on any issue affecting procreation and reproduction, as witnessed by the Kentucky experience with surrogate parenting. A most striking example of the fierceness of public opinion in this area is presented by the reaction to AI legislation introduced in 1949 by a Minnesota state senator. The senator introduced three bills: one made all AI illegal; one legalized AIH only; and one permitted both AIH and AID in certain cases. The senator described

York judiciary felt comfortable enough with the concept of AI by 1973 to readopt the *Strnad* approach to the legitimacy question and did so in *In re Adoption of Anonymous.*[193] There, the parents of an AI child had divorced, and the wife's second husband sought to adopt the child. The first husband would not give his consent. The court, citing New York's strong policy favoring legitimacy and the husband's consent to the original AI procedure, held that the child was legitimate and that the first husband could lawfully withhold his consent to the adoption.[194] The court further relied on the case of *People v. Sorenson,*[195] an opinion rendered in 1968 by the Supreme Court of California. *Sorenson* was another case in which a husband who had consented to AI was trying to avoid a support duty after his divorce from the mother of the child. Support was required primarily because the husband was found to be the "legal father" of the child. This was deemed sufficient in the absence of a "natural father." The court noted:

> A child conceived through [AID] does not have a 'natural father' as that term is commonly used. The anonymous do-

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the public response as follows:

> Exhaustive hearings were had on all three bills. Lobbying against the bills was terrific. Most of the lobbyists made no distinction between the provisions of the three bills. Certain religious groups became quite fanatical on the subject. The personal abuse that I and members of my family took was unbelievable. Vicious, anonymous calls were received by the hundreds. No member of my family was spared. For a considerable period it was impossible for my children to run errands to the various shopping centers or otherwise venture on the streets. In all the twelve years that I have served in the Legislature, I have never seen anything that would compare with the hearings, etc. in connection with these bills.

Letter from Senator Charles A. Root to Thurston A. Shell (July 28, 1955), *quoted in* Note, *Artificial Insemination — Legal and Related Problems,* 8 FLA. L. REV. 304, 315 (1955). The conclusions of one commentator of this time period are also instructive:

> The above reasons form the basic objections to AID. On the other side of the scale is found the joy of a barren couple in raising a family. Let us hope for the public good that when the [legislative] decision is made, reason will outweigh this twinge of humanism and the sterile couple will be left to the normal procedures of adoption.

Comment, *supra* note 190, at 153.

[193] 345 N.Y.S.2d 430 (1973).

[194] *Id.* at 435.

[195] 437 P.2d at 495.

> nor of the sperm cannot be considered the 'natural father,' as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney.[196]

The obvious implication from the more recent AI cases is that a husband who consents to his wife's artificial insemination will be considered to be the father of the resultant child when the donor is anonymous. This reasoning could completely frustrate the surrogate parenting scheme if extended to include the *surrogate's husband,* who would then become the "legal father" of the child. The natural father in the surrogate arrangement, however, is certainly not anonymous in the same sense as is a typical AID donor, even though he may in fact be unknown to the surrogate. A final case of the AI variety, *C.M. v. C.C.*,[197] considerably clarifies the rights of a non-anonymous sperm donor. The facts of *C.M. v. C.C.* are quite bizarre. C.C. desired a child, but she was unmarried and did not wish to engage in sexual intercourse before marriage. She and her boyfriend, C.M., were contemplating marriage, and he offered his sperm for purposes of an artificial insemination. A sperm bank refused to inseminate C.C. under these circumstances, but she learned enough from her visit to attempt the procedure herself. After several months she successfully inseminated herself with C.M.'s sperm. About three months into the pregnancy, C.C. and C.M. ended their relationship, and C.C. subsequently refused to allow C.M. to visit "their" baby after its birth.[198] In delineating the rights involved, the court considered all of the AI cases discussed above, focusing on *Sorenson* and its explicit denial of donor rights. Not surprisingly, the court distinguished *Sorenson* and the others,[199] allowing visitation on the ground that C.M. was

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[196] *Id.* at 498 (footnotes omitted). The universal interest in alternative methods of conception is amply illustrated by a comment found in *Playboy* magazine. The comment refers specifically to the quoted language from *Sorenson.* "The California court's statement as to natural fathers showed a tremendous insensitivity; it was a kick in the groin to all the artificial inseminators, who work so hard with few of the rewards of non-artificial inseminators." Weisman, *An Unprecedented Pregnancy,* PLAYBOY, Mar., 1981, at 21.

[197] 377 A.2d 821 (N.J. 1977).

[198] *Id.* at 821-22.

[199] *Id.* at 822-24.

not an anonymous donor. C.M. was non-anonymous in two respects: 1) he had known C.C. for some time and they had been dating, and 2) unlike a typical sperm donor, he intended to take on the responsibilities of a father.[200]

The AI decisions provide several useful insights in dealing with the surrogate parenting situation. For instance, although the surrogate's husband will consent to the procedure, his consent is certainly not of the type that would indicate a willingness to accept responsibility for the resulting child. Therefore, no implied contract or estoppel theory could render him liable for support or give him parental rights in the child. The position of the surrogate appears similar to that of the anonymous sperm donor. Although her commitment is more substantial, she does not intend to take on parental responsibilities. Finally, the natural father, as a nonanonymous donor, should retain parental rights in the child conceived with the surrogate. While he probably will not have had a personal relationship with the surrogate such as was present in *C.M. v. C.C.*, he will have intended to take on the responsibilities of fatherhood.

C. *Artificial Insemination Statutes*

There are, of course, no statutes yet passed which specifically deal with surrogate parenting. Twenty states,[201] however, have enacted AI statutes in response to the cases discussed above and the critical commentary they have engendered.[202]

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[200] *Id.* at 824.

[201] ALASKA STAT. § 20.20.010 (1975); ARK. STAT. ANN. § 61-141(c) (1971); CAL. CIV. CODE § 7005 (West Supp. 1980); COLO. REV. STAT. ANN. § 19-6-106 (1978); CONN. GEN. STAT. § 45-69(t)-(n) (Supp. 1980); FLA. STAT. ANN. § 742.11 (West Supp. 1981); GA. CODE § 74-101.1 (1973); KAN. STAT. ANN. §§ 23-128 to -130 (1974 & Supp. 1980); LA. CIV. CODE ANN. art. 188 (West Supp. 1980); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MINN. STAT. ANN. § 257.56 (West Supp. 1981); MONT. REV. CODES ANN. § 40-6-106 (1981); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. tit. 10, §§ 551-553 (Supp. 1980); OR. REV. STAT. §§ 109.239, .243, .247 (1979); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE ANN. § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050(1)-(3) (1979); WYO. STAT. ANN. § 14-2-103 (1978).

[202] *See generally* Shaman, *supra* note 2; Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U.L. REV. 48 (1975); Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L. REV. 497 (1968); Comment,

Exemplary in this regard is the following provision of the Uniform Parentage Act (UPA):

> If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . .
>
> The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[203]

This statute does not purport to cover every AI situation.[204] In fact, it appears to be nothing more than a legislative embodiment of the *Sorenson* decision.[205] One readily apparent problem with the statute is that it fails to distinguish between anonymous and non-anonymous donors. In the surrogate context and in cases such as *C.M. v. C.C.*,[206] this distinction is crucial. As a result, states that hurriedly enact the UPA in order to aid a number of infertile couples may unwittingly outlaw the only childbearing method a majority of infertile couples can use, *i.e.*, surrogate parenting.[207] Despite this problem, five states have enacted the quoted section of the UPA, either intact or with minor variations.[208]

Artificial Insemination — A Model Statute, 24 CLEV. ST. L. REV. 341 (1975).

[203] UNIFORM PARENTAGE ACT § 5(a)-(b). The act also requires: 1) that the husband's consent be in writing and signed by him and his wife; 2) that the doctor certify the signatures and date and file the consent with a state department of health (although his failure to do so does not void the consent); 3) that the consent be kept confidential; and 4) that *all* records pertaining to the insemination, wherever kept, are subject to inspection only by court order and for good cause. *Id.* at § 5(a).

[204] "This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was thought useful, however, to single out and cover in this Act at least one fact situation that occurs frequently." *Id.* (Commissioner's Comment).

[205] See text accompanying notes 195-96 *supra* for a discussion of *Sorenson*.

[206] For a discussion of this case, see text accompanying notes 197-200 *supra*. It is encouraging to note that at least one state has modified § 5(b) of the UPA to eliminate certain problems raised by *C.M. v. C.C.* See note 213 *infra* for a discussion of the Washington AI statute.

[207] It has been statistically documented that the wife is infertile more often than the husband. See note 162 *supra* for this documentation.

[208] CA. CIV. CODE § 7005 (West Supp. 1980); COLO. REV. STAT. ANN. § 19-6-106

The statutes in fourteen other states, which have drafted their own AI laws, do not vary substantively from the UPA draft. Most require written consent of at least the husband;[209] many require a licensed physician to perform the procedure;[210] many conclusively establish the legitimacy of the child;[211] and some provide for confidential record-keeping.[212] Only the Washington statute permits donors who are not married to the mother to retain parental rights in the child by agreement.[213]

While it is indeed admirable that these twenty states have attempted to provide legal protection for infertile couples and AI children,[214] other states considering passage of an AI law should be aware of the ramifications that such a statute may have on surrogate parenting and other alternative conception techniques.[215] It is simply a matter of time before test-tube conception occurs in the United States; embryo transplants and artificial wombs will soon be medically feasible.[216] As the surrogate parenting experience clearly shows, each new technique will be accompanied by its own legal and ethical problems. Proponents of alternative methods of con-

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(1978); MINN. STAT. ANN. § 257.56 (West Supp. 1981); MONT. REV. CODES ANN. § 40-6-106 (1981); WYO. STAT. § 14-2-103 (1978). Washington has enacted § 5 with the major change pointed out in note 213 *infra*.

[209] *See, e.g.*, ALASKA STAT. § 20.20.010 (1975). *But see* the following statutes in which the husband's consent is *presumed:* ARK. STAT. ANN. § 61-141(c) (1971); FLA. STAT. ANN. § 742.11 (Supp. 1981).

[210] *See, e.g.*, GA. CODE § 74-101.1 (1971); N.Y. DOM. REL. LAW § 73 (McKinney 1977).

[211] *See, e.g.*, N.C. GEN. STAT. § 49A-1 (1976); VA. CODE § 64.1-7.1 (1980).

[212] *See, e.g.*, KAN. STAT. ANN. § 23-130 (Supp. 1980); OKLA. STAT. tit. 10, § 553 (Supp. 1980).

[213] WASH. REV. CODE ANN. § 26.26.050(2) (1979). "The donor . . . is treated in law as if he were not the natural father of a child thereby conceived *unless the donor and the woman agree in writing that said donor shall be the father.*" *Id.* (emphasis added).

[214] For the most comprehensive AI statute to date, see CONN. GEN. STAT. § 45-69(f)-(n) (Supp. 1980), *reprinted in* [Reference File] FAM. L. REP. (BNA) § 307.0001 (1975).

[215] *See* ETHICS ADVISORY BOARD OF THE DEPARTMENT OF HEALTH EDUCATION AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER, 44 Fed. Reg. 35,033, 35,053 (1979).

[216] See note 3 *supra* for a listing of authorities on newly developing alternative methods of conception.

ception should not also have to contend with the earlier, ill-conceived draftsmanship of laws covering their predecessors' methods.

D. *Artificial Insemination in Kentucky Following OAG 81-18*

The ten-year practice of AI in Kentucky would be greatly jeopardized if the judiciary were to adopt the reasoning of OAG 81-18.[217] Statutes and public policy are seldom elastic; once stretched too far they tend to lose their original scope and are interpreted even more broadly in future cases. Undoubtedly, AI cases and statutes in other states will shape the development of surrogate parenting in those states. On the other hand, Kentucky may enjoy the dubious distinction of stifling the widely accepted practice of AI in its zeal to outlaw surrogate parenting contracts.

The first basis for the Kentucky Attorney General's Opinion that surrogate parenting contracts are illegal is that they violate the letter and the spirit of two five-day delay statutes.[218] These statutes require a parent to wait five days after the birth of his or her child before consenting to an adoption or filing a petition to terminate his or her parental rights. If an agreement prior to conception that such a petition will eventually be filed is illegal, however, an anonymous sperm donor's waiver of parental rights must also be void. Furthermore, the typical surrogate *would* terminate her parental rights at the proper time. The sperm donor never legally terminates his rights or consents to adoption.

The second ground for the Attorney General's attack on surrogate parenting contracts is that they violate Kentucky's public policy against baby-buying.[219] KRS section 199.590, which forbids payment for procuring children for adoption

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[217] An overview and critique of OAG 81-18 appears in the text accompanying notes 73-141 *supra*.

[218] KRS § 199.500(5) (Cum. Supp. 1980) (repealed effective July, 1981); KRS § 199.601(2) (Cum. Supp. 1980) (repealed effective July, 1982). These statutes are discussed in the text accompanying notes 79-83 *supra*.

[219] See text accompanying notes 84-89 *supra* for a discussion of the policy arguments against surrogate parenting.

purposes, is offered in support of this conclusion. It has been shown, however, that sperm donors could make nearly as much money donating sperm[220] as Elizabeth Kane reportedly received for her services as a surrogate.[221] Furthermore, money is exchanged for each insemination performed by the doctor in an AI procedure.[222] Thus, any policy that prohibits surrogate parenting would naturally proscribe AI as well. In this regard, two things must be remembered. First, most husbands of artifically inseminated women do not bother to adopt the resulting child,[223] a fact that defeats the literal application of KRS section 199.590 in the AI context. Second, the literal wording of that section does not apply to the surrogate parenting situation either.[224] If a father's contracting for the custody of his child is "procuring a child for adoption purposes," it is not difficult to imagine that a mother's payment for inseminations could be similarly classified.

Simply put, the statutes and the public policy delineated by the Attorney General were not intended to apply to artificial inseminations.[225] A misapplication is possible, however, as evidenced by the OAG's approach to surrogate parenting contracts. The factual differences between these two alternative methods of conception blur considerably on the conceptual level at which the law must be formulated and expressed.

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[220] See note 176 *supra* for a discussion of the financial benefits of donating sperm.

[221] For estimates of Elizabeth Kane's compensation for her services as a surrogate, see note 39 *supra*.

[222] See note 170 *supra* for the price *per insemination* at one New York clinic.

[223] Yussman Interview, *supra* note 164. This could create many problems for the child, the non-adopting father, and the sperm donor. For example, KRS § 199.613(2) (Cum. Supp. 1980) states:

> Where parental rights have been terminated . . . all legal relationships between the parents and child shall cease, the same as if the relationship had never existed, except that the child shall retain the right to inherit from its parents under the laws of descent and distribution until the child is adopted.

Id. As a result of this provision, a child could claim againt the sperm donor's estate or more importantly, his status as an heir of his non-adopting father's estate could be challenged.

[224] The Attorney General appears to concede this point. *See* Ky. Op. Att'y Gen. 81-18, at 4 (1981).

[225] See note 166 *supra* for the Attorney General's expression of the difference between AI and surrogate parenting.

Thus, adherence to the Attorney General's reasoning regarding surrogate parenting contracts would set a dangerous precedent for all Kentucky couples making use of AI, as well as for the children conceived through that procedure.

IV. CONSTITUTIONAL IMPLICATIONS OF SURROGATE PARENTING

There is a constitutional dimension to surrogate parenting. Both the infertile couple and the surrogate mother have fundamental rights protected by the Constitution of the United States. These rights, conferred by the due process[226] and equal protection[227] clauses, outweigh any corresponding state interests furthered by prohibitive restrictions on surrogate parenting. This section will explore the fundamental human rights involved in surrogate parenting and will balance those rights against the relevant state interests. This balance clearly favors the individual's right to procreate in the way which, for many, is the only one biologically possible.

A. *Substantive Due Process*

A determination as to the constitutionality of state restrictive action necessarily involves a balancing process. This balance will depend upon the nature of the right involved. To comply with due process, a state regulation must at least be "rationally related to a constitutionally permissible purpose."[228] When that regulation infringes on a *fundamental* right protected by the Constitution, however, the state must justify its action by a far more stringent showing. Only a state interest of extraordinary weight will justify an imposition upon a fundamental right.[229] As stated by the Supreme Court in *Roe v. Wade*,[230] a case involving the right to an abortion:

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[226] U.S. CONST. amends. V, XIV (§ 1).

[227] U.S. CONST. amend. XIV, § 1.

[228] Maher v. Roe, 432 U.S. 464, 478 (1977).

[229] Carey v. Population Servs., Int'l, 431 U.S. 678, 686 (1977); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

For a brief history of the origins of substantive due process, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7-3, 8-7 (1978).

[230] 410 U.S. 113 (1973).

"Where certain 'fundamental rights' are involved, the Court has held that regulations limiting those rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."[231] In effect, the state's interest in promulgating the regulation is balanced against the personal interest infringed upon and "the outcome of this balance will determine constitutionality."[232]

1. *Surrogate Parenting as a Fundamental Right*

The first step in an analysis of the constitutionality of surrogate parenting restrictions is to determine whether a fundamental right is involved. The conclusion that infertile couples and surrogate mothers have a fundamental right to agree to a surrogate arrangement is compelled by a long line of Supreme Court decisions affording constitutional protection to certain privacy interests.[233] While there is no explicit right of privacy in the Constitution,[234] "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[235] Implicit in this guarantee is the *fundamental* right to independently make important decisions, without government

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[231] *Id.* at 155.

[232] *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1195 (1980).

[233] See cases cited in Roe v. Wade, 410 U.S. at 152. The earliest case recognizing this principle was Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[234] The Court as a whole and individual justices have found the source of this right to be in various amendments of the constitution at various times. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969) (privacy right found in the first amendment); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (right located in the fourth and fifth amendments); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (root of the privacy right found in the penumbras of the Bill of Rights); *id.* at 486 (Goldberg, J., concurring) (right found in the ninth amendment); Meyer v. Nebraska, 362 U.S. 390, 399 (1923) (privacy right rooted in the fourteenth amendment's concept of personal liberty). The Court today appears to have accepted the reasoning in *Meyer* that a right of privacy is founded in substantive due process. 410 U.S. at 153.

Controversy over the basis of the right to privacy existed among scholars. *Compare* Greg, *Do We Have An Unwritten Constitution*, 27 STAN. L. REV. 703 (1975) *with* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

[235] 410 U.S. at 152.

interference, regarding marriage,[236] procreation,[237] conception,[238] abortion,[239] family relationships,[240] child-rearing[241] and "whether to bear or beget a child."[242]

The fundamental right to enter surrogate parenting arrangements can be found in any one of three zones of privacy that have heretofore been given constitutional protection: 1) the right to be free from state interference with procreation; 2) the right of marital privacy; or 3) the right to decide whether to bear or beget a child. Although surrogate parenting has not yet been held to fall specifically within one of these areas of privacy, it is closely analogous to rights protected in several Supreme Court privacy cases.[243]

a. *The right of procreation*

The right of procreation has been deemed to be fundamental since *Skinner v. Oklahoma*,[244] which struck down a state statute providing for the sterilization of persons convicted of three or more felonies involving moral turpitude. The Court found that "one of the basic civil rights of man" was the right to be free of unwarranted state interference with procreative capacity.[245] The statute was subjected to strict scrutiny[246] since the right involved was characterized as

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[236] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[237] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

[238] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. at 479.

[239] *See, e.g.*, Roe v. Wade, 410 U.S. at 113.

[240] *See, e.g.*, Moore v. City of E. Clev., 431 U.S. 494 (1977) (plurality opinion); Prince v. Massachusetts, 321 U.S. 158 (1944).

[241] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. at 390.

[242] Carey v. Population Servs. Int'l, 431 U.S. at 687 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[243] The report of the HEW Ethics Advisory Board states that these rights are "reasonably analogous" to the *in vitro* situation and such an "argument might well be persuasive." ETHICS ADVISORY BOARD OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *supra* note 215, at 35,048.

[244] 316 U.S. 535 (1942).

[245] *Id.* at 541.

[246] *Id.* The case was actually decided on equal protection grounds rather than upon due process. The right was deemed to be fundamental under that approach as

fundamental.[247]

As in *Skinner,* any regulation infringing on the right to enter surrogate parenting arrangements would directly interfere with the couple's ability to procreate. In situations where the wife is infertile, surrogate parenting is the only available means by which the couple can have a biologically related child of their own.[248] Furthermore, state restrictions on the surrogate arrangement prevent fulfillment of the procreative capabilities of the husband alone. Quite simply, such restrictions confront him with an impermissible choice. He may preserve his marriage and remain childless; he may enter into an adulterous relationship solely to have a child; or he may divorce his wife and remarry in the hope of continuing his bloodline.[249] Such a choice is a substantial burden upon the fundamental right recognized by *Skinner:* the right to procreate. Hence, any state action must be justified by a compelling interest.

b. *The right of marital privacy*

The Supreme Court has decided in a number of cases that the "liberty" inherent in the due process clause encompasses a right to marital privacy.[250] Basically, this right protects freedom of personal choice in matters intimate to marriage or family.[251] In *Griswold v. Connecticut,*[252] a

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well.

[247] "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

[248] Certainly there are a number of infertile women who are treated and eventually are able to bear a child. There is an irreducible number, however, who will never be able to conceive or to carry a child of their own. An example is those women who have had a hysterectomy. Yussman Interview, *supra* note 164.

[249] To some a genetic link is unimportant. Carolyn Bratt, a professor at the University of Kentucky College of Law, stated: "I don't know what makes people want the biological link. Being a mother myself, it's the raising (that matters)." Cassidy, *supra* note 3, at 63.

[250] *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. at 479; Pierce v. Society of Sisters, 268 U.S. at 510; Meyer v. Nebraska, 262 U.S. at 390. *See also* Roe v. Wade, 410 U.S. at 168 (Stewart, J., concurring).

[251] 410 U.S. at 169 (Stewart, J., concurring). *See also Developments in the Law, supra* note 232, at 1163.

[252] 381 U.S. 479 (1965).

Connecticut statute forbidding the use of contraceptives was struck down on the notion that the choice should be left to the couple. As one member of the Court stated:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.
>
> . . . The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization — surely does not show that the Government was meant to have the power to do so.[253]

Under the auspices of a right to marital privacy, *Griswold* forbade state intrusion into a married couple's decision whether to have a child.[254] This right should logically be extended to protect the couple's decision as to *how* that child is conceived. Any decision regarding conception strikes at the heart of matters protected by the right to marital privacy.[255] Thus, absent a compelling interest, any state action prohibiting surrogate parenting would unlawfully impinge upon the fundamental right to make intimate marital decisions.

c. *The right to bear or beget a child*

The strongest case for a constitutional guarantee of the right to engage in surrogate parenting is based on the Supreme Court's pronouncements that an individual has a right, free from unwarranted governmental interference, to deter-

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[253] *Id.* at 495-96 (Goldberg, J., concurring).

[254] For an interesting view that *Griswold* carried the right to privacy too far, see Note, *The Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980).

[255] Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how . . . one's body is to terminate its organic life.

L. TRIBE, *supra* note 229, at 921.

mine whether to bear or beget a child.[256] This right was first enunciated in *Eisenstadt v. Baird*,[257] which struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. The Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrustion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[258]

Five years later in *Carey v. Population Services International*,[259] the Court struck down a New York law that restricted the distribution of contraceptives to adults and criminalized their distribution to minors. The Court again recognized the right of all people to make unimpeded decisions concerning contraception, stating:

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, . . . and most prominently vindicated in recent years in the context of contraception . . . and abortion. . . .
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> . . . .
>
> [T]he Constitution protects individual decision in matters of childbearing from unjustified intrusion by the State.[260]

A couple's decision whether to bear or beget a child, a constitutionally protected choice, is the very essence of the surrogate arrangement. Essentially, the decisions of the surrogate mother and the natural father to enter into a surrogate contract involve individual choices: to bear on the one hand, and on the other to beget a child. If the surrogate mother chooses to bear a child through artificial insemination, a fre-

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[256] *See* Carey v. Population Servs. Int'l, 431 U.S. at 678; Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. at 113; Eisenstadt v. Baird, 405 U.S. at 438; Griswold v. Connecticut, 381 U.S. at 479.

[257] 405 U.S. 438 (1971).

[258] *Id.* at 453 (emphasis in original).

[259] 431 U.S. at 678.

[260] *Id.* at 685, 687.

quently employed[261] and widely accepted[262] method of conception, she has a *fundamental* right to so decide, free of government intervention.[263] The right is no less fundamental because she later terminates her parental rights in favor of the natural father.[264] Similarly, the natural father's decision to beget a child is a protected choice.[265] "A man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom."[266] There is no rational justification for diluting this paternal prerogative solely because the children will be fathered through the use of artificial insemination.[267]

In conclusion, it would appear that both the couple and the surrogate mother have a fundamental right to enter a surrogate arrangement free of unwarranted state intervention. This fundamental privacy right could be based on either the right to procreate, the right to marital privacy, or the right to bear or beget a child. Any state action infringing on this constitutionally protected practice must be the least burdensome alternative and must be justified by a *compelling* state interest.[268]

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[261] See note 164 *supra* for statistics on the substantial number of yearly AI births.

[262] See notes 182-216 *supra* and accompanying text for a discussion of the acceptance and legality of artificial insemination.

[263] See cases cited in note 256 *supra* for support of this position.

[264] The *Griswold* Court was shocked at the possible consequences that could flow from a state statute prohibiting the distribution of contraceptives. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy . . . ." Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). Is it any less shocking that a state could inquire into a woman's motives for having a child and restrict that right if her motives were not consistent with those the state deemed "proper"?

[265] See cases cited in note 256 *supra* for support of this position.

[266] Planned Parenthood v. Danforth, 428 U.S. at 90 (Stewart, J., concurring). *See also* Stanley v. Illinois, 405 U.S. 645 (1972); Skinner v. Oklahoma, 316 U.S. at 535.

[267] *But see In re* Adoption of Anonymous, 345 N.Y.S.2d 430, 434 (1973). In that case the court stated: "An AID child is not 'begotten' by a father who is not the husband; the donor is anonymous; the wife does not have sexual intercourse or commit adultery with him; if there is any 'begetting' it is by the doctor who in this specialty is often a woman." For a discussion of this case, see notes 193-94 *supra* and accompanying text.

[268] *See* Roe v. Wade, 410 U.S. at 155.

2. *The State Interest in Surrogate Parenting*

As previously discussed, the Attorney General seeks to have surrogate parenting declared illegal in Kentucky because the practice allegedly violates several adoption statutes and a "public policy" against baby-buying.[269] The state's interest in promulgating these statutes and enforcing this policy is two-fold. First, the state has an interest in protecting the natural mother from coercive pressure to surrender her child for adoption. Second, the state may properly seek to promote the "best interests" of the child.[270] Aside from these two principle interests that might be offered to justify a ban on surrogate parenting, the state might conclude that surrogate parenting is an immoral method of reproduction[271] or that it gives rise to such difficult legal questions that restrictions are warranted.[272] Whatever the state interest urged in support of restrictions on surrogate parenting, that interest must outweigh the fundamental right sought to be infringed in order to be constitutional.

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[269] See notes 73-141 *supra* and accompanying text for an analysis of the OAG.

[270] See notes 97-141 *supra* and accompanying text for an examination of the state interests underlying these statutes.

[271] At least one religious group has condemned the surrogate parenting concept as "immoral." The Roman Catholic Church has consistently taught that artificial insemination "outside of marriage, is to be condemned purely and simply as immoral . . . . Artificial insemination in marriage, but produced by the active element of a third party, is equally immoral, and, as such, to be condemned outright." Ryan, *Symposium on Artificial Insemination: Religious Viewpoints — Catholic,* 7 SYRACUSE L. REV. 99, 100-01 (1955) (quoting Pope Pius XII in a discourse to the Fourth International Congress of Catholic Doctors, in Rome (Sept. 29, 1949)). *See also* Note, *Therapeutic Impregnation: Prognosis of a Legislature,* 39 U. CIN. L. REV. 291 (1970).

[272] Commentators have advanced a veritable parade of horrors. For example: 1) the surrogate mother decides to have an abortion, Seligmann, *supra* note 17, at 72; 2) the surrogate wants to keep the baby and sues the father for custody and child support, *Hiring Mothers, supra* note 3, at 59; 3) surrogates begin to advertise, form a union and demand minimum wages, Cassidy, *supra* note 3, at 23; 4) the surrogate suffers medical complications and wants to sue the couple for damages, Witt, *supra* note 17, at 73; 5) the surrogate is married and her husband claims paternity of the child, Marcus, *supra* note 24, at 17; 6) the child is born abnormal, *id.;* or 7) during pregnancy the couple divorces or one of them dies. *Id.*

3. *Balancing the State Interest and the Fundamental Right*

Initially, it is doubtful that an outright ban on surrogate parenting is even rationally related to any state interest advanced to support it. It is clear, however, that those interests are not so compelling as to justify total infringement of a fundamental right.

a. *Rational Relationship*

The state does have a legitimate interest in protecting its natural mothers from coercive pressure to give up their babies for adoption. This interest, however, does not rationally justify a prohibition of surrogate parenting. As has been shown, the surrogate agrees to the arrangement before the child is conceived, she is counseled extensively by professionals beforehand, and she is at all times represented by an attorney.[273] Thus, the potential for black market overreaching is either minimal or nonexistent.

Under its *parens patriae* power, the state has authority to promote the "best interests" of its children.[274] A complete ban on surrogate parenting, however, cannot be a promotion of the best interests of the child because no child has yet been conceived. Moreover, once the child is born, the judge will terminate the surrogate mother's parental rights *only* if to do so would be in the best interests of the child.[275] Should a surrogate breach the contract and seek custody, the same standard would apply.[276] In light of these existing protections, state action making surrogate parenting illegal is not rationally related to promoting the child's welfare.[277]

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[273] See text accompanying notes 31-35 *supra* for a discussion of these safeguards.

[274] *See generally* Mnookin, *Child-Custody Adjudications: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROB. 3, 226 (1975).

[275] KRS § 199.601(7) (Cum. Supp. 1980) (repealed effective July, 1982).

[276] KRS § 403.270(1) (Cum. Supp. 1980).

[277] It seems clear that in most cases couples who want children enough to attempt alternative methods of conception because of their infertility would be good risks as parents. As Dr. Yussman remarked, "It's such a difficult moral question especially because of desperate couples who will make *marvelous* parents." Cassidy, *supra* note 3, at 63. A 1978 study reports that couples who seek AI have only one eighth as many divorces as do other couples. *Id.*

b. *Compelling Interest*

Even if regulations restricting surrogate parenting were deemed rationally related to one or more identifiable state interests, it would not follow that such regulations would be constitutional. The fundamental rights involved in a surrogate parenting arrangement require the existence of a *compelling* state interest to justify infringement. Were a court to deem the state's interests sufficiently compelling, it must nonetheless balance those interests against the parties' fundamental constitutional rights. This approach requires that the restrictions be narrowly tailored so as to result in the least possible infringement. At most, this could result in the permissibility of limited regulations but would not allow a complete ban on surrogate parenting. In this regard, reference to *Roe v. Wade*[278] is appropriate.

In *Roe v. Wade,* the Supreme Court held that a woman has a fundamental right to an abortion and that only a compelling state interest could justify infringing on that right in any way.[279] During the first trimester of pregnancy the state interest in the mother's health is not compelling and the state may require only that the abortion be performed by a licensed physician.[280] After the first trimester the state may adopt reasonable regulations to promote safe abortions due to its increased interest in the mother's health.[281] Once the fetus becomes viable, however, the state interest in preserving life is compelling, and the state may regulate and may even proscribe abortion, except when necessary to preserve the mother's life or health.[282]

A similar balancing would be appropriate in the surrogate context should it be decided that the state's interest is compelling. Prior to conception the state's interest in protecting the natural mother from coercion and in promoting the best interests of the potential child would support only reasonable regulations prohibiting coercive contracts and insuring that

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[278] 410 U.S. 113 (1973).
[279] *Id.* at 155-56.
[280] *Id.* at 163, 165.
[281] *Id.* at 163.
[282] *Id.* at 163-64.

the couple is financially and emotionally capable of raising a child. For example, the state could require that all parties to the arrangement be represented by an attorney and that they receive extensive counseling.[283] During her pregnancy the surrogate mother's interest would outweigh either that of the state or of the contracting couple subject, of course, to state restrictions consistent with *Roe v. Wade*. Thus, in certain cases, she could exercise her constitutional right to abort the fetus and thereby avoid the contract.[284] Upon birth of the child, state interests in protecting the natural mother and the child would remain, and it could adopt narrowly tailored regulations to satisfy those interests. Requiring a five day wait prior to a final termination of parental rights[285] or mandating that the best interests of the child be considered at such a proceeding[286] would be permissible; such regulations strike a proper balance between the state's interest and the fundamental rights of the parties involved. Any regulations, however, which overburden either the surrogate's choice to terminate her parental rights or the father's right to custody are tantamount to a ban on surrogate parenting and therefore unconstitutional.

A consideration of the other state interests advanced, *i.e.*, prevention of immorality and avoidance of complex legal issues, would not change the preceding analysis. Since the acceptance of AI as a viable method of conception, the once prevalent notions that AI constitutes adultery and that children so conceived are illegitimate have all but disappeared.[287] Surrogate parenting begins with AI and is no less "moral" than that procedure. In any event, a state interest in furthering a particular moral viewpoint is not likely to be compel-

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[283] A limited investigation of the couple, similar to those conducted prior to an adoption, might also be permissible if not overburdensome. *See, e.g.*, KRS § 199.473 (Cum. Supp. 1980) (repealed effective July, 1982).

[284] See notes 142-61 *supra* and accompanying text for a discussion of the voidability of the contract.

[285] *See* KRS § 199.601(2) (Cum. Supp. 1980) (repealed effective July, 1982).

[286] *See* KRS § 199.601(7) (Cum. Supp. 1980) (repealed effective July, 1982).

[287] See notes 193-216 *supra* and accompanying text for a discussion of the abandonment of these prior notions.

ling.[288] Implicit in a number of court decisions is the notion that moral considerations alone cannot justify infringement of a fundamental right.[289]

It is equally untenable that a state could declare surrogate parenting contracts illegal simply because they create "difficult" legal issues. The most difficult contingencies could be anticipated and provided for in the contract.[290] Naturally, legal battles could ensue when one party "breaches" the contract. Similar problems, however, are inherent in every contract. Furthermore, when the contract is viewed as "voidable," a "breach" by the surrogate does not present insurmountable enforcement difficulties.[291]

In the final analysis, the fundamental rights of the surrogate mother and the couple must be balanced against the protective interests of the state. The outcome of this balance would permit reasonable state regulations to protect both the natural mother and the resulting child but would not allow the state to categorically prohibit surrogate parenting arrangements.

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[288] *See generally* Lauerman, *Nonmarital Sexual Conduct & Child Custody*, 46 U. CIN. L. REV. 647, 699-704 (1977); *Developments in the Law, supra* note 232, at 1202-13. This result is due in part to substantial disagreement over what constitutes "immoral" behavior. *See* Morrison v. State Bd. of Educ., 461 P.2d 375, 383-84 (Cal. 1969) ("No such contention can be presumed about 'morality.' 'Today's morals may be tomorrow's ancient and absurd customs.' And conversely, conduct socially acceptable today may be anathema tomorrow."); H. HART, LAW, LIBERTY, AND MORALITY 81 (1963) ("[N]o one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires . . . its imposition on a minority. . . .").

[289] Roe v. Wade, 410 U.S. at 117. *See* Carey v. Population Servs. Int'l, 431 U.S. at 678; *In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971); State v. Saunders, 381 A.2d 333 (N.J. 1977); State v. Elliott, 539 P.2d 207 (N.M. Ct. App. 1975).

[290] For example, the contract in the Kane/Ransdale surrogate arrangement provided that: "[I]n the event that the Natural Father predeceases the birth of the child, said child shall be placed in the custody of [the physician] for placement through a private adoption to a designated person upon consent of the appropriate social agency." Contract, *supra* note 34, at ¶ XXII.

[291] See notes 142-61 *supra* and accompanying text for a discussion of the concept of voidability.

B. *Equal Protection Analysis*

Surrogate parenting restrictions would also implicate the equal protection clause of the fourteenth amendment.[292] This principle basically requires that the state afford equal treatment to those who are "similarly situated."[293]

A prohibition of surrogate parenting would make the use of AI unavailable when the female of a given couple is infertile. When the male is infertile, however, this same procedure is accepted and widely available.[294] A couple with an infertile female is substantially similar to a couple with an infertile male; the only available method of having a child biologically related to either of them is through AI. A couple with an infertile female receives unequal treatment when the state restricts only the couple's use of AI through a ban on surrogate parenting. This unjustifiable discrimination violates the couple's right to equal protection under the law.

Every classification drawn in the law does not violate the equal protection clause.[295] Those drawn for a sufficiently good reason and with a sufficient degree of accuracy will be upheld.[296] In the usual case the classification need only have a rational connection to the objectives of the legislation.[297] It is only when state action discriminates against a "suspect" class[298] or infringes upon a fundamental right[299] that it is examined with "strict scrutiny."[300] Strict scrutiny requires that

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[292] U.S. CONST. amend XIV, § 1.

[293] *See* Tussman & Tenbroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949). *See also Developments in the Law, supra* note 232, at 1188.

[294] See note 164 *supra* for statistics on the widespread number of births attributable to AI.

[295] Tigner v. Texas, 310 U.S. 141 (1940).

[296] *See generally* Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classification*, 68 KY. L.J. 845 (1979-80); Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143; *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[297] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Nat'l. Carbonic Gas Co., 220 U.S. 61 (1911).

[298] McLaughlin v. Florida, 379 U.S. 184 (1964).

[299] Skinner v. Oklahoma, 316 U.S. at 535.

[300] *Id.*

the classification be necessary to satisfy a *compelling* state interest.[301]

An equal protection analysis of a surrogate parenting prohibition would require strict scrutiny. Heightened judicial review is warranted when the state action sufficiently intrudes upon a fundamental right.[302] State action banning surrogate parenting is clearly an intrusion upon a fundamental right, namely, the right to make independent decisions concerning procreation.[303]

Strict scrutiny involves essentially the same "compelling state interest" test applied earlier in the due process analysis.[304] The same conclusion must also be reached: state action barring surrogate parenting is not constitutionally permissible. The state's prohibition of the use of AI only when the female is infertile is not necessary to achieve a compelling state interest, as is obvious from state approval of AI in cases where it is the male who is infertile.[305] Furthermore, equal protection requires that the least burdensome means of achieving the state interest be adopted.[306] The rational restrictions deemed permissible under the due process analysis are substantially less burdensome than an outright ban on surrogate contracts, yet these requirements satisfy the state's interest in protecting the natural mother and the child.[307] The Constitution demands that these less burdensome alternatives be employed.

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[301] Shapiro v. Thompson, 394 U.S. 618 (1969).

[302] Arguably, a ban on surrogate parenting involves a gender based classification. In that case an intermediate level of scrutiny would be appropriate. "[C]lassification by gender must serve important governmental objections and must be substantially related to achievement of those objectives . . . ." Craig v. Boren, 429 U.S. 190, 197 (1976).

[303] See text accompanying notes 273-91 *supra* for a discussion of the balance of potential state interests with the fundamental rights inherent in surrogate parenting.

[304] See text accompanying notes 228-32 *supra* for a general outline of this test.

[305] While there is no Kentucky statute explicitly providing for the legality of AI, it has been openly employed by physicians throughout the state for over ten years. See note 167 *supra* for specifics regarding the use of AI in Kentucky.

[306] Dunn v. Blumstein, 405 U.S. 330 (1972).

[307] For a discussion of the state regulations permissible under due process, see text accompanying notes 283-86 *supra*.

CONCLUSION

The purpose of the preceding discussion has been to set out a legal defense for surrogate parenting. There is room for these arrangements in a state that allows custody contracts and permits certain infertile couples to utilize artificial insemination. If surrogate parenting agreements are analyzed as voidable contracts, they pose enforcement problems no more difficult than those of many other contracts. Furthermore, overregulation by the state in the field of procreation is forbidden by the Constitution.

The furor generated by the first widely-publicized surrogate birth in Louisville in November of 1980 represents but the tip of the iceberg. Science will continue to supply the courts with novel legal dilemmas as rapid advances occur in the area of human reproduction. It is inexcusable to suggest that infertile couples should not benefit from these advances simply because they lead to unexplored legal territory. The sole question is whether the law will keep pace with science or force these couples and their children to find their way as best they can.

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