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Comments: Regulatory Options for Surrogate Arrangements in Maryland

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COMMENTS

REGULATORY OPTIONS FOR SURROGATE ARRANGEMENTS IN MARYLAND

I. INTRODUCTION

The New Jersey litigation popularly known as the *Baby M* case[1] focused national attention on surrogate parenting contracts. Surrogate arrangements are not a new phenomenon—they have existed since biblical times.[2] As the *Baby M* case made clear, however, surrogate arrangements can be a source of confusion and suffering for the participants as well as for the child. Since *Baby M* was decided, a number of states have enacted legislation or considered proposals to regulate surrogate arrangements. For legislators as well as for the general public, the New Jersey decision is a significant source of insight into the moral, ethical and legal issues raised by surrogate arrangements.

This comment begins by briefly reviewing the problem of infertility and the measures available to infertile couples for obtaining a child, including surrogate arrangements. Next, it surveys the factual context and outcome of the *Baby M* case and considers the public policy issues raised by surrogate arrangements. Finally, it examines the obstacles which existing law places in the way of enforcement of surrogate arrangements in Maryland and the legislative options available to the Maryland General Assembly for addressing the problem.

II. THE INFERTILITY PROBLEM

One out of every six American couples has an infertility problem.[3] Reasons for infertility abound. For example, a man or woman of any age may have a physiological impediment to reproductivity, owing to a genetic defect, an illness, or an accident. In addition, a fertile couple may

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1. *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part, rev'd in part and remanded*, 109 N.J. 396, 537 A.2d 1227 (1988).
2. Numerous commentators have noted the possibility that the first surrogate mother was Hagar:

> 1.Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar.
>
> 2.And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing; I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.

Genesis 16:1-2.

3. "Infertility" describes a "presumably normal patient who is unable to conceive during a specific period of time, usually one year." Moghissi & Evans, *Infertility*, in OBSTETRICS & GYNECOLOGY 927 (5th ed. 1986). "Sterile," describes a "woman who can never become pregnant because of a congenital anomaly, disease, or operation." *Id.* In the *Baby M* case, the court noted that various definitions of infertility exist, including "(1) an inability to conceive, (2) unprotected coitus for a period in excess of one year without conception, (3) . . . the inability to conceive, carry or bear a child without significant risk to either the mother or the fetus." *Baby M*, 217 N.J. Super. at 379-80, 525 A.2d at 1161.

choose not to have a baby naturally for fear of passing on to the child a genetic defect, such as hemophilia,[4] or because the mother's age or condition of health puts her at unusually high risk in a pregnancy.[5] Some authorities have suggested that the term "infertility" should be defined to include not only physical impediments to fertility but also social ones, such as nutritional deficiencies which prevent conception or carrying a child to term, and that it should also be extended to include women whose children do not live through infancy.[6]

Although there are various solutions to the problem of infertility, none of them is fully satisfactory. Adoption, the traditional method by which infertile couples acquire a child, has become a long and arduous process. The waiting period to adopt an infant can range from three to eight years.[7] In some cases, a couple has specific requirements for the age, physical characteristics, health, and religious background of the child.[8] Additionally, adoption agencies may require potential parents to meet certain criteria as to age, length of marriage, or proof of infertility.[9] When these requirements combine with the shortage of desirable adoptees and the increasing number of couples seeking to adopt, the waiting period may become so protracted that adoption ceases to be a viable solution.[10]

Advanced reproductive technologies provide some infertile couples with the ability to have children who are biologically related to one or

4. L. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS INCLUDING *In Vitro* Fertilization, Artificial Insemination, and Surrogate Motherhood 7 (1984).
5. *Id.* at 7, 198; Note, *Surrogate Mothers: The Legal Issues*, 7 AM. J.L. & MED. 323, 324 & n.10 (1981) [hereinafter Note, *Surrogate Mothers*].
6. *Reproductive Technologies: Hearings Before the Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. (1987) (testimony of Lori B. Andrews, Research Fellow, American Bar Foundation) (unpublished document) [hereinafter Testimony]. The significant increase in infertility which has occurred recently is traceable to three causes: (1) women have delayed childbearing until well into their thirties, and fertility decreases with age; (2) some methods of birth control, such as IUDs, the Pill, and abortion, carry a risk of infertility, particularly when an infection occurs during use of the method; and (3) the incidence of sexually transmitted diseases, which can cause infertility, has increased. Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U.C. DAVIS L. REV. 679, 683 (1987).
7. BAKER, BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTION 1 (1978); *Desperately Seeking Baby*, U.S. NEWS AND WORLD REP., Oct. 5, 1987, at 59.
8. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 23 (1973); Note, *Surrogate Mothers*, *supra* note 5, at 324. What constitutes a desirable infant depends upon the requirements of the adopting couple. Adoptees most frequently sought are healthy white infants, and the demand for them exceeds the supply. W. MEEZAN, S. KATZ & E. M. RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 9 (1978) [hereinafter MEEZAN].
9. Posner, *The Regulation of the Market in Adoption*, 67 B.U.L. REV. 59, 61 (1987).
10. The reduction in supply of adoptees is largely attributable to three factors: (1) the widespread use of contraceptives; (2) the legalization of abortion; and (3) society's acceptance of unwed mothers. *See* MEEZAN, *supra* note 8, at 9; *see also* BAKER, *supra* note 7, at 1; *Desperately Seeking Baby*, *supra* note 7, at 59.

both parents.[11] The best known of these technologies is artificial insemination, which has existed for many years as an acceptable alternative means of reproduction.[12] Artificial insemination involves the injection of the donor's semen into the woman's reproductive tract in order to fertilize her ovum.[13] This method is often successful in overcoming both male and female infertility problems.[14]

When infertility is caused by an obstruction of the woman's fallopian tubes or by the man's low sperm count artificial insemination may not succeed and *in vitro* fertilization may be attempted.[15] In *in vitro* fertilization, an egg is surgically removed from a woman's ovary and placed in a petri dish containing both a special medium and sperm from the husband or an anonymous donor. If fertilization occurs, the embryo is implanted into the woman's uterus and the woman carries the child to term.[16]

Generally, artificial insemination and *in vitro* fertilization are desirable because the child who is conceived is genetically related to at least one of the parents. Yet a large number of women and childless couples are either sterile or are unable to carry a child to term, and thus artificial insemination and *in vitro* fertilization are unavailable as a means of re-

11. For a detailed discussion of alternative reproductive technologies, including embryo transfer, see Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 495 (1983).
12. Successful artificial insemination of humans was first documented in 1790 in England. *See* Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 331 (1980). More than 20,000 children are conceived annually by artificial insemination, and many states have artificial insemination statutes which regulate the practice. Andrews, *The Stork Market: the Law of the New Reproductive Technologies*, 70 A.B.A.J. 50, 50 (1984).
13. *See* Sagall, *Artificial Insemination*, TRIAL, Jan.-Feb. 1973, at 59; Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 914 (1981).
14. Capron, *supra* note 6, at 681. There are two basic types of artificial insemination: artificial insemination donor (AID) and artificial insemination homologous (AIH). AID is utilized when the husband is sterile, has a low sperm count, or carries genetic defects. Sperm are donated by a third party whose identity is unknown to the participating couple. In AIH, the husband's sperm is used to impregnate the wife. AIH is appropriate when the husband is impotent or has a low sperm count, or when the wife's reproductive system inhibits conception through normal intercourse. The child born by AIH is biologically related to both the husband and the wife, while the one born by AID is biologically related to the wife only. Sagall, *supra* note 13, at 59-62. For a thorough discussion of AID and AIH, see Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1643-52 (1984).
15. Popularly known as the "test tube baby" technique, the first successful *in vitro* fertilization occurred in 1978 in England. For a thorough discussion of *in vitro* fertilization, including legal considerations, see Lorio, *supra* note 14, at 1665-72. *See also* Andrews, *supra* note 12, at 50; Annas & Elias, *In Vitro Fertilization and Embryo Transfer: MedicoLegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199 (1983).
16. Singer, *Technology and Procreating: How Far Should We Go ?*, TECH. REV., Feb.-Mar. 1985, at 22.

production.[17] When adoption is also not a viable option, surrogate arrangements may be the only means available for infertile couples to obtain a child.

Typically, a surrogate arrangement involves a woman who, for a fee or the payment of certain expenses, agrees to be impregnated by artificial insemination and to surrender the child at birth to the natural father and his wife.[18] The reasons why women consent to serve as surrogates are varied and complex.[19] Some women are motivated by friendship, or by the wish to perform an altruistic deed and enable other couples to have the joy of childrearing.[20] Others may want to experience pregnancy and childbirth without the responsibility of raising the child.[21] Few women, however, act as surrogate mothers without receiving compensation.[22] It is likely that if women were prohibited from receiving meaningful compensation for their services, very few would volunteer to serve as surrogates.[23]

Ordinarily, the surrogate mother is the genetic and gestation mother of the child.[24] Some professionals who arrange surrogate births prefer the surrogate to be single, in order to obviate a presumption that a married woman's husband is the natural father of the surrogate's child.[25] Others prefer that the surrogate be married, with children of her own, on the premise that she will be more aware of the medical and emotional aspects of pregnancy than a woman without children and, consequently, less likely to attempt to keep the child after its birth.[26]

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17. N. KEANE & D. BREO, THE SURROGATE MOTHER 15 (1981).
18. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147, 147 (1980) [hereinafter *Legal Problems*]. Noel Keane was director of the surrogate agency involved in the *Baby M* case.
19. *See generally* Note, *Surrogate Parenthood—An Analysis of the Problems and a Solution: Representation for the Child*, 12 Wm. Mitchell L. Rev. 143, 147-48 (1986) [hereinafter Note, *Representation for the Child*].
20. Taub, *Amicus Brief: In the Matter of Baby M*, 10 Women's Rts. L. Rep. (Rutgers Univ.) 7, 23 (1987); *A Surrogate's Story*, TIME, Sept. 10, 1984, at 53. *See generally* N. KEANE & D. BREO, *supra* note 17, at 229-30. Additionally, some women may become surrogates in order to alleviate feelings of guilt about a past abortion.
21. N. KEANE & D. BREO, *supra* note 17, at 215-16.
22. The standard compensation for surrogate arrangements is $10,000 plus expenses. The total cost to an infertile couple usually will range from $20,000 to $30,000. *See* Lorio, *supra* note 14, at 1658. Advertisements have appeared which offer surrogate mothers significantly higher fees. *See* Annas, *Making Babies Without Sex: The Law and the Profits*, 74 AM. J. PUB. HEALTH 1415, 1416 (1984).
23. *Legal Problems*, *supra* note 18, at 153.
24. Exceptions exist which are not addressed in this article. For example, the gestation mother may bear no genetic relationship to the child. In such a case, an egg is fertilized *in vitro* and then implanted in the uterus of the surrogate mother who agrees, for a fee, to carry the fetus to term and surrender the child to the contracting parents. *See* Note, *The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood*, 12 VT. L. REV. 87, 88 n.11 (1987).
25. *See* N. KEANE & D. BREO, *supra* note 17, at 49, 287.
26. *See infra* notes 192, 206 and accompanying text; *see also* Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 293 n.7 (1982). *But see In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part,*

The parties to surrogate arrangements generally record their agreement in a signed contract. Usually, the biological father contracts with the surrogate mother and also with her husband, if she is married. In some contracts, the natural father's wife is also a party to the agreement. Because many contingencies need to be addressed, most contracts are lengthy and detailed.[27]

Once the contract is signed, conception is attempted. For a period of time prior to and following artificial insemination, the surrogate mother must abstain from sexual intercourse to ensure that any child conceived was fathered by the semen donor.[28] After conception occurs, the surrogate's remaining responsibilities are to carry the child to term, give birth, and then turn the child over to the natural father and his wife so that the wife can adopt the child.[29] Generally, this means that the surrogate mother must agree to surrender all parental rights to, and be permanently separated from, the child. It was the latter requirement which ultimately led to the breakdown of the surrogacy arrangement between the contracting parties in the *Baby M* case.

III. *IN RE* BABY M

A. The Background to the Litigation

William and Elizabeth Stern, the plaintiffs in the *Baby M* case, decided to try to obtain a child through a surrogate arrangement after learning that Mrs. Stern might have multiple sclerosis, a condition that may cause blindness or paraplegia in pregnant women.[30] Initially the Sterns considered adoption, but they anticipated difficulties in adopting because of their age and different religious backgrounds.[31]

Mary Beth Whitehead, the defendant, was motivated to enter into a surrogate arrangement both by her desire to give a couple who could have no children "the gift of life," and by the need for money.[32] Both she and the Sterns responded to advertising by a New York infertility clinic.

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rev'd in part and remanded, 109 N.J. 396, 537 A.2d 1227 (1988) (surrogate had two children of her own but nevertheless changed her mind and sought to keep the infant).

27. For examples of surrogate contracts, see N. KEANE & D. BREO, *supra* note 17, at 290-96.
28. *See infra* text accompanying notes 93-95; *see also* Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1285 (1985) [hereinafter Note, *Developing a Concept*].
29. *See* Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 2 (1986). The natural father does not need to adopt. *See infra* notes 103-116, 134-140 and accompanying text.
30. *Baby M*, 109 N.J. at 413, 537 A.2d at 1235.
31. *Id.* at 413, 537 A.2d at 1236. Mr. Stern also favored a surrogate arrangement over adoption because most of his family died in the Holocaust and he was anxious to have a child to whom he was genetically related. *Id.* at 413, 537 A.2d at 1235.
32. *Id.* at 413, 537 A.2d at 1236. In November, 1987, Mary Beth Whitehead divorced her husband Richard and remarried Dean Gould. In articles and proceedings subsequent to that date she is sometimes referred to as Mary Beth Whitehead-Gould.

In February 1985, after Mr. Stern and Mrs. Whitehead had met and negotiated the terms, they entered into a typical surrogacy contract.[33] The agreement provided that Mrs. Whitehead would be artificially inseminated with Mr. Stern's sperm, and that if conception occurred she would carry the child to term, give birth and surrender the child to the Sterns. In addition, Mrs. Whitehead was required to terminate her maternal rights so that Mrs. Stern could adopt the child.[34] Mrs. Stern was not a party to the agreement, but the contract gave her sole custody of the child in the event of Mr. Stern's death. Mr. Stern was to pay Mrs. Whitehead $10,000 when she surrendered the child to him. He also agreed to pay the unreimbursed medical expenses incurred as a result of the pregnancy unless subsequent blood tests proved that the child was not his own.[35]

Baby M was born on March 27, 1986. Although Mrs. Whitehead surrendered the baby to the Sterns on March 30, the next day she requested permission to take the child for a brief time.[36] Alarmed by Mrs. Whitehead's distraught condition and references to suicide, the Sterns permitted her to take the baby.[37] When, after repeated requests, Mrs. Whitehead refused to relinquish Baby M, Mr. Stern filed a complaint in New Jersey Superior Court seeking enforcement of the surrogacy contract.[38]

In an *ex parte* order, the court awarded temporary custody of Baby M to the Sterns.[39] After the baby was recovered and turned over to the Sterns, the temporary order was reaffirmed by the trial court. The Sterns retained temporary custody, and Mrs. Whitehead was awarded limited visitation with Baby M pending final judgment.[40] The Sterns' complaint sought possession and ultimate custody of the child on the basis of enforcement of the surrogacy contract, and requested further that Mrs.

33. *See id.* at 470-75, 537 A.2d at 1265-70; *see also supra* note 27.
34. *Baby M*, 109 N.J. at 412, 537 A.2d at 1235.
35. *Id.* If Mrs. Whitehead miscarried prior to the fifth month, she was to receive compensation for medical expenses but no fee. If she miscarried after the fourth month or if the baby was stillborn, she was to receive medical expenses plus a fee of $1,000. Mrs. Whitehead also agreed not to abort the fetus unless the inseminating physician found that it was necessary to do so to protect her health or that the child was likely to be abnormal. If an abnormality was found, Mr. Stern had the right to require that Ms. Whitehead have an abortion, whereupon she would receive a fee of $1,000 plus medical expenses. *Id.* at 471-73, 537 A.2d at 1266-68.
36. *Id.* at 414-15, 537 A.2d at 1236-37.
37. *Id.* at 415, 537 A.2d at 1236-37.
38. *Id.* at 415-16, 537 A.2d at 1237.
39. After the *ex parte* order was entered, a process server, accompanied by the Sterns and the local police, entered the Whitehead home to execute the order. During a period of confusion, the baby was handed out a window to Mr. Whitehead, who was waiting outside. Subsequently, the Whiteheads escaped to Florida and spent three months in hiding living at approximately twenty different locations. Eventually, Mrs. Whitehead was located and the child was brought back to New Jersey. *Id.* at 416, 537 A.2d at 1237.
40. Taub, *supra* note 20, at 9. Ms. Whitehead was allowed biweekly visits with the child, supervised by the guardian *ad litem*, at a state youth home. *Id.* at 9 n.10.

Whitehead's parental rights be terminated and that Mrs. Stern be allowed to adopt the child. After a lengthy trial, the Sterns were granted the relief they sought.[41] In April 1987, the New Jersey Supreme Court granted *certiorari* on Mrs. Whitehead's appeal.[42]

B. The Baby M Decision

The decision rendered by the New Jersey Supreme Court in February 1988 was the first ruling by a state appellate court which directly addressed the enforceability of a surrogate parenting contract. The court held that the contract was invalid,[43] that termination of parental rights could not be based upon such a contract,[44] and that Mrs. Whitehead retained her rights as legal mother of the baby.[45] Additionally, the court rejected the constitutional arguments advanced by both parties.[46] The court concluded, however, that it was in the best interest of Baby M to award custody to Mr. Stern.[47]

1. The Invalidity of the Surrogate Contract

According to the New Jersey Supreme Court, the Baby M surrogate contract was invalid because it conflicted with statutory provisions and violated established public policy. Specifically, the court held that the contract violated New Jersey statutes which: (1) prohibited the use of money in connection with adoptions; (2) required proof of parental unfitness or abandonment before termination of parental rights; (3) limited termination of parental rights to situations where there had been a proper surrender of the child to an appropriate agency; and (4) allowed revocation of consent to custody in private placement adoptions.[48] The court found that established New Jersey public policy was undermined because: (1) the contract determined custody rights before the child was born, thus contravening the requirement that custody be awarded in ac-

41. *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part, rev'd in part and remanded*, 109 N.J. 396, 537 A.2d 1227 (1988). The trial court concluded that the surrogate parenting agreement was a valid contract that should be specifically enforced by requiring that the surrogate relinquish control over the child to the father and terminate her parental rights. *Id.* at 398-99, 408, 525 A.2d at 1170-71, 1175. In upholding the contract, the court decided that the New Jersey adoption statutes did not apply to surrogacy, and that surrogacy did not violate the state's public policy. *Id.* at 372-75, 525 A.2d at 1157-59. The court noted, however, that "whether there will be specific performance of this surrogacy contract depends on whether doing so is in the child's best interests." *Id.* at 390, 525 A.2d at 1166.
42. *In re* Baby M, 107 N.J. 140, 526 A.2d 203 (1987).
43. *In re* Baby M, 109 N.J. 396, 421-22, 537 A.2d 1227, 1240 (1988).
44. *Id.* at 422, 537 A.2d at 1240.
45. *Id.* at 444-47, 537 A.2d at 1251-53.
46. *Id.* at 447-52, 537 A.2d at 1253-55.
47. *Id.* at 459, 537 A.2d at 1259.
48. *Id.* at 423-34, 537 A.2d at 1240-46. In deciding that the surrogate contract violated these statutes, the court also implicitly rejected the trial court's conclusion that existing adoption and termination statutes were not controlling because the state legislature did not have surrogacy in mind when it passed those statutes.

cordance with the child's best interest; (2) the contract guaranteed permanent separation of the child from one of its natural parents; (3) the contract gave the father greater rights than the mother, violating the policy that the rights of the natural parents are equal regarding the child; (4) the contract made informed consent impossible by failing to provide that the natural mother was to receive independent legal advice and counseling before surrendering her child; and (5) the contractual provision for the payment of money in connection with an adoption was conducive to the exploitation of women in need of money, advancement of the middleman's profit motive, and the sale of a child.[49]

2. Termination of Parental Rights

If Mrs. Whitehead's rights as Baby M's parent were terminated, she would no longer have a claim to rights of custody or visitation, and adoption by Mrs. Stern could proceed.[50] If the court did not terminate her parental rights, however, she would retain visitation rights as the legal mother even if she were denied custody of the child.[51]

The court determined that termination of Mrs. Whitehead's parental rights could not be based on the contract because the contract was illegal and unenforceable.[52] The court also found no statutory basis for termination based on the facts in the case. There was no intentional abandonment of the child on the part of Mrs. Whitehead, nor was she alleged to be an unfit mother.[53] Lacking any contractual or statutory standard on which to base termination of parental rights, the court held that Mrs. Whitehead was entitled to retain her legal status as mother of the child.[54]

3. Constitutional Issues

Several constitutional arguments were advanced by the parties, none of which succeeded.[55] The court dismissed Mr. Stern's claim to custody based upon the right of procreation, finding that "the custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation."[56] Consequently, the court found that Mr. Stern had no greater fundamental right to custody of his child than the rights of the child's mother. The court also rejected Mr. Stern's claim that he was denied equal protection of New Jersey law, noting that a sperm donor

49. *Id.* at 434-44, 537 A.2d at 1246-50.
50. *Id.* at 444, 537 A.2d at 1251.
51. *Id.*; *see also* Wilke v. Culp, 196 N.J. Super. 487, 496, 483 A.2d 420, 424 (App. Div. 1984), *cert. denied*, 989 N.J. 243, 491 A.2d 728 (1985).
52. *Baby M*, 109 N.J. at 429, 537 A.2d 1243-44; *see also supra* text accompanying notes 48-49.
53. *Id.* at 445, 537 A.2d at 1252.
54. *Id.* at 447, 537 A.2d at 1253.
55. *Id.* at 447-48, 537 A.2d at 1253.
56. *Id.* at 448, 537 A.2d at 1253-54.

cannot be equated with a surrogate mother.[57] Finally, in view of its decision that the contract was invalid, the court declined to rule on Mrs. Whitehead's constitutional claim that the companionship of her child was a fundamental right.[58]

4. Custody

Because the legal framework of the custody issue resembled that of a custody dispute between two natural parents when each is married to another spouse, the court relied upon New Jersey custody law to resolve the dispute.[59] The supreme court agreed with the trial court that the critical issue was the best interests of the child and that the Sterns should be awarded custody.[60] It also cautioned that only in extreme cases should the child be taken from the mother prior to resolution of the dispute.[61] Despite this comment, however, the court rejected Mrs. Whitehead's suggestion that she be granted custody in order to discourage future surrogate arrangements.[62] As the court observed, a declaration that surrogate contracts are unenforceable and illegal is sufficient to deter future arrangements. There was no need to "sacrifice the child's interests in order to make the point sharper."[63] Thus, the Sterns were ultimately awarded custody.

IV. PUBLIC POLICY ISSUES REGARDING SURROGATE ARRANGEMENTS

Surrogate parenting arrangements have existed in different forms for many years, and most of them have gone uncontested.[64] Prior to the *Baby M* case, no appellate court in the United States had decided the validity of a surrogate parenting contract.[65] Thus, the New Jersey Supreme Court's decision to invalidate the *Baby M* surrogacy contract

57. *Id.* at 450, 537 A.2d at 1254-55.
58. *Id.* at 450, 537 A.2d at 1255.
59. *Id.* at 453, 537 A.2d at 1256.
60. *Id.* at 459, 537 A.2d at 1259.
61. *Id.* at 462, 537 A.2d at 1261.
62. *Id.* at 454, 537 A.2d at 1257.
63. *Id.* at 454-55, 537 A.2d at 1257.
64. Prior to the *Baby M* case, several other surrogate mothers had changed their minds and refused to relinquish custody of the child after birth. In three of the cases, the contracting couples decided not to seek enforcement of the contract. In one case, however, the surrogate mother, who had changed her mind several weeks after terminating her parental rights in an adoption proceeding, lost her custody battle. Galen, *Surrogate Law*, Nat'l L.J., Sept. 29, 1986, at 10, cols. 2-3.
65. Although other state appellate courts have heard disputes arising out of surrogate arrangements, they have not decided them on grounds of the validity of the contract. *See, e.g.*, Surrogate Parenting Assoc., Inc. v. Kentucky, 704 S.W.2d 109 (Ky. 1986) (whether surrogate parenting constitutes baby selling is for the legislature to determine); Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (Ct. App. 1981), *cert. denied*, 414 Mich. 875 (1982), *cert. denied*, 459 U.S. 1183 (1983) (adoption statute prohibits couple from paying consideration in conjunction with use of state's adoption procedures); Ohio Op. Att'y Gen. 83-001 (1983) (unless operating with

broke new legal ground. The court's decision is consistent with well-established public policy that rejects practices which make the creation of a human being the subject of a contract.[66] An examination of the public policy arguments which tend to support, or, conversely, to discourage surrogate arrangements is therefore useful in evaluating legislative proposals which address surrogacy.

A. Baby Selling

Surrogate parenting raises the broad question of whether the practice enriches us, "by providing children for those who cannot otherwise have them, or . . . degrade[s] us by turning children into a commodity."[67] The greatest impediment to the legalization of surrogate parenting arrangements is the universal condemnation of baby selling and buying.[68] Contracts which contemplate the payment of money to a child's biological parents in connection with adoption or the termination of parental rights are widely viewed to be contracts for the sale of babies, and therefore contrary to public policy.[69]

The recent scarcity of the kinds of infants most sought-after for adoption has created a "black market" for babies.[70] In an effort to combat the evils of these underground markets, most states have enacted adoption statutes that prohibit payment in exchange for a biological parent's consent to adoption.[71] Many of these statutes prohibit the payment of fees of any kind, with the exception of enumerated medical and legal

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approval of department of human services, no person shall knowingly become a party to separation of a child from its parents).

66. *See* Johnson, *The Baby "M" Decision: Specific Performance of a Contract for Specially Manufactured Goods*, 11 S. ILL. U.L.J. 1339, 1342-43 (1987).
67. *Nightline: New Jersey Surrogate Motherhood Ruling* (ABC television broadcast, Feb. 3, 1988).
68. *See, e.g.*, Parks v. Parks, 209 Ky. 127, 132, 272 S.W. 419, 422 (1928) (children cannot be made the subject of a barter); Hooks v. Bridgewater, 111 Tex. 122, 131, 229 S.W. 1114, 1118 (1921) (The bartering away of children "tends to the destruction of one of the finest relations of human life, to the subversion of the family tie, and to the reversal of an ordering of nature which is essential to human happiness and the security of society.").
69. *See* Downs v. Wortman, 228 Ga. 315, 185 S.E.2d 387 (1971); Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957); Fox v. Lasley, 212 Or. 80, 318 P.2d 933 (1957).
70. *See Legal Problems*, *supra* note 18, at 154; Katz, *supra* note 29, at 7-8. " 'Black market' refers to placements made by a middleman, a 'baby broker' engaged in the business of providing babies for eager prospective parents. 'This middleman has no altruistic reason for being in the baby business. He is in the trade for the profit and his fees are often exorbitant.' " Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 179 (1983) (citation omitted). Estimates indicate that there are approximately five thousand black market adoptions per year. Katz, *supra* note 29, at 8 n.32.
71. *See* N. KEANE & D. BREO, *supra* note 17, at 273 (1981 review of state adoption laws revealed that payment of any compensation beyond expenses in connection with adoption was illegal in 41 states). In the 1989 Legislative session, Maryland adopted a statute which prohibits the sale, barter or trade of a child. Act of May 19, 1989, ch. 300, 1989 Md. Laws — (to be codified at MD. ANN. CODE art. 27, § 35B).

expenses.[72] While these laws, often referred to as baby-broker acts, may vary from state to state, each is designed to prevent baby brokers from exploiting expectant mothers who are unwilling or financially unable to raise children.[73]

The strict application of an adoption statute which prohibits payment of any compensation in connection with adoptions is likely to block the enforcement of most surrogate parenting contracts. In Maryland, for example, the adoption statute provides:

> An agency, institution, or individual who renders any service in connection with the placement of an individual for adoption may not charge or receive from or on behalf of either the natural parent of the individual to be adopted, or from or on behalf of the individual who is adopting the individual, any compensation for the placement.[74]

The discouragement of contracts arranged by third-party intermediaries such as surrogate placement agencies would appear to be one of the explicit objectives of this statute.[75]

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72. For a recent list, see Note, *Developing a Concept*, *supra* note 28, at 1290 n.53; Katz, *supra* note 29, at 8 n.34.

73. *See* Surrogate Parenting Assoc., Inc. v. Kentucky, 704 S.W.2d 209, 211 (Ky. 1986); In re Adoption of Baby Girl L.J., 132 Misc. 2d 972, 977, 505 N.Y.S.2d 813, 817 (1986); Katz, *supra* note 29, at 8 n.34; Note, *Developing a Concept*, *supra* note 28, at 1291-92 n.71. As one report explained:

> "Since there is great demand for infants and profits to be made, some attorneys act like entrepreneurs seeking to increase the supply of infants and to keep their overheads low. Both strategies have their human consequences. To increase the supply of children, the attorney may maintain agreements with a number of women to produce children for a price. His agents may work in areas where the likelihood of illegitimate births is great. He may give fees to physicians or college counsellors who steer pregnant young women into his network. To keep his overhead low, he does not provide the services that may be needed by the biological parents who are likely to be adolescent 'at risk' youth. Further, he does not investigate the potential adoptive parents carefully. Consequently, children are often placed with couples who, for sound reasons, should not have received a child."

SUBCOMM. ON CHILDREN AND YOUTH OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 1ST SESS., FOSTER CARE AND ADOPTIONS: SOME KEY POLICY ISSUES 21 (Comm. Print 1975).

74. MD. FAM. LAW CODE ANN. § 5-327(a)(1) (1984). Violators are subject to prosecution for a misdemeanor; they may be fined up to $100 and/or imprisoned for up to three months. *Id.* § 5-327(c)-(d). Reasonable and customary charges or fees for medical or legal services are permitted by any interested person. *Id.* § 5-327(a)(2).

75. Jorgensen, *Surrogate Parenting*, CURRENT THERAPY OF INFERTILITY, 1984-1985 298 (1985). If the service provided by a commercial surrogate agency did not include adoption by the father's wife, then placing the child with the biological father would not violate adoption statutes. In a non-adoption arrangement, the surrogate or agency might be able to collect substantial payments from the biological father and/or his wife, since the surrogate's action could be characterized as consent to custody rather than to adoption. *See* Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 Women's Rts. L. Rep. (Rutgers Univ.) 107, 127-31 (1982). The obvious drawback of this arrangement is that it preserves parental rights of the surrogate

It is possible, however, that the baby-broker statutes are inapplicable to surrogate contracts. The overriding objective of these statutes is to regulate arrangements between a mother and strangers.[76] An agreement between parents for the support and custody of a child which involves adoption by the spouse of the custodial parent, however, is not as offensive to public policy as is a contract between strangers for the adoption of a child.[77] In addition, as proponents of surrogate parenting point out, a surrogate arrangement is not analogous to baby selling because there is a biological relationship between the natural father and the child. Consequently, there is no sale of an unrelated baby.[78]

Proponents of surrogacy also dismiss concerns that an unwed mother will part with her child because of societal pressure or that she will succumb to the financial inducements of the black market. It is argued that because a surrogate engages in the transaction *before* conception, she is not subject to these pressures. The termination of her parental rights and her consent to custody are, according to this view, voluntary acts done in the absence of coercion.[79]

The proponents of surrogate contracts also contend that baby-broker statutes are inapplicable to surrogate arrangements because the contract fee is paid for the surrogate's services, not for the child.[80]

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mother, including visitation privileges. Consequently, one of the primary goals of the receiving couple would be defeated: the wife would not have the legal relationship of mother to the child. If the natural father's wife would settle for the relationship of step-mother, however, the adoption statutes might not have any bearing on surrogate arrangements. The natural father does not adopt his own child, he seeks custody.

76. *See* Keane, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 426 (1987); *see also* Note, *Developing a Concept*, *supra* note 28, at 1291.

77. The courts are not in accord about the validity of custody agreements between the natural parents. For cases upholding the right to contract in custody and support disputes, see Reimche v. First Nat'l Bank, 512 F.2d 187 (9th Cir. 1975) (upholding a contract between putative father and mother in which the father assumed custody in exchange for a promise to provide for the mother in his will); Schumm v. Berg, 37 Cal. 2d 174, 231 P.2d 39 (1951) (support agreement based on mother's forebearance from instituting paternity suit was not a waiver of any of child's rights before birth); Peterson v. Eritzland, 69 Wash. 2d 588, 419 P.2d 332 (1966) (upholding custody support agreement between natural parents where such agreements were consistent with state policies favoring support for illegitimate children). For cases denying the validity of custody agreements between the natural parents, see Ford v. Ford, 371 U.S. 187 (1962) (parents cannot make agreements which bind courts as to outcome of custody case); Kimberling v. Rogers, 223 Ark. 348, 265 S.W.2d. 952 (1954) (mother cannot deprive herself of permanent custody through contract with father); Commonwealth *ex. rel* Teitelbaum v. Teitelbaum, 160 Pa. Super. 286, 50 A.2d 713 (1947) (dictum) (parents have no contractual property rights in child's custody concerning).

78. *See Legal Problems*, *supra* note 18, at 155.

79. *See* Note, *Surrogate Mothers*, *supra* note 5, at 331.

80. *See Legal Problems*, *supra* note 18, at 157. It has been argued that the surrogate mother is not paid for a baby *per se*, nor merely for her consent to adoption, but primarily for the risks she takes and the services she renders. The consideration is paid to her to conceive, carry the child for nine months, give birth, and then consent

Opponents concede that part of the fee is meant to compensate the mother for the insemination procedure and for the physical stresses and risks of pregnancy and childbirth, but emphasize that the ultimate goal of the arrangement is for the natural mother to carry the child to term and then to relinquish all her rights to her child in exchange for a fee.[81]

In the majority of cases, the surrogate mother is not an anonymous contributor to the arrangement. She usually meets the receiving couple before the child is conceived to formulate the contract terms and to agree upon their respective roles throughout the process.[82] Although not an absolute guarantee against baby-selling abuses, the biological relationship between the child and the husband of the receiving couple, along with the formality of the advance agreement, reduces the potential for unscrupulous behavior which is inherent in the baby black market.

B. Exploitation of Women

Generally, a surrogate mother is in a lower socio-economic class and has less bargaining power than the receiving couple.[83] In addition, a surrogate mother may be susceptible to the coercive tactics of third party agencies motivated by a desire for profits, and as a result she may agree to act as a surrogate without fully understanding the consequences of her decision.[84] This inherent potential for exploitation in surrogate arrange-

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to adoption. In other words, the payment involved is for the procedure as a whole and not simply for the final step, the consent to adoption. Katz, *supra* note 29, at 23-24; *see also supra* note 35 and accompanying text.

81. Pierce, Contract Law and the Surrogacy Issue (unpublished article) (copyright 1987 by the Nat'l Comm. for Adoption, Inc.).

82. *See generally* Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71 (1982); Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 478-79 (1982) (surrogate parenthood arrangements are planned and deliberate; theoretically there is no duress, hurried decision making, or bidding involved).

83. In one study, approximately 40% of the applicants were unemployed or receiving some type of financial assistance. Their total annual family incomes ranged from $6,000 to $55,000. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983); *see also Summary Findings of Dept. of Human Resources Report on Surrogate Mothering Programs in Maryland*, at 1-2 (Aug. 1983) [hereinafter *Summary Findings*].

84. As noted in REPORT OF THE COMMITTEE TO STUDY SURROGATE MOTHER PROGRAMS IN MARYLAND, at 8 (Feb. 1983) [hereinafter COMMITTEE REPORT],

> [O]ur society as a whole feels very strongly that no form of baby-selling should be permitted. In this connection, it should be noted that some surrogate mother programs do charge the biological father and his wife a very high fee for the program's services. For example, we understand that the National Center for Surrogate Parenting, Inc. charges the biological father and his wife from $20,000 to $45,000. Of this sum, about $10,000 to $13,000 goes to the surrogate mother upon delivery of the child to the biological father.

The Department of Human Resources observed in its report: "[T]he profit motive associated with surrogate mother programs . . . [needs] to be dealt with immediately in the law as an initial step toward protection of the children, the surrogates, and the couples." *Summary Findings*, *supra* note 83, at 1. Some couples who are impa-

ments poses a dilemma for feminists, because prohibiting the arrangements would limit a woman's right of choice with respect to her body.[85] Some commentators argue that childbearing for a fee constitutes a type of voluntary servitude.[86] These issues will eventually need to be addressed by states that elect to permit some form of surrogate arrangements.[87]

C. *Preservation of Marriage and the Family*

Courts or legislatures which determine that surrogate parenting agreements are unenforceable as against public policy may base their decision on a conviction that surrogacy threatens the stability of the family unit, the sanctity of marriage, and the traditional ideas of the family.[88] It may be argued, however, that although surrogate arrangements are not traditional, they nevertheless promote the traditional family by providing a couple with a child who is at least biologically related to the father. Surrogate parenting may also strengthen the family by providing a solution to couples whose marriages are under stress because their desire for children is thwarted by the wife's infertility.[89]

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tient with the lengthy evaluations required by certain agencies arrange private deals with fees for the mother "upwards of $50,000." N.Y. Times, June 26, 1988, at A1, col. 6.

85. Sidney Callahan, an associate professor of psychology at Mercy College in New York, was reported as saying: "It has taken a long time for women to stop being only baby machines, with only certain parts of their bodies being used, and now here we are being used for uterus rentals. . . . This is going to end up as the final exploitation of women. It is always going to be poor women who have the babies and the rich women who get them." N.Y. Times, Feb. 24, 1987, at B1, col. 6; *see also In the Best Interests of a Child*, TIME, April 13, 1987, at 71 (questioning "whether surrogacy permits the more prosperous and sophisticated to exploit those who are less so").

86. William L. Pierce, a past president of the National Committee for Adoption, Inc., has stated that "these contracts should be declared null and void because even if it can somehow be proven that surrogacy does not involve baby selling, it certainly does involve a type of voluntary enslavement." Pierce, *supra* note 81, at 2. Pierce quoted Lawrence Tribe of Harvard Law School as saying in an April 2, 1987 interview with *The Washington Times* that to conclude "that women have a right to sell themselves in what amounts to a kind of incubatory servitude seems to me to completely misundertand the rationale for *Roe v. Wade*." *Id.* Pierce also finds support in an editorial page article which appeared in *The Wall Street Journal* by Hadley Arkes, Professor of Jurisprudence at Amherst College, who observed that "the courts have refused to uphold contracts in which people voluntarily contracted themselves into peonage or slavery." *Id.*

87. *See* Note, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140, 146-47 (1985) [hereinafter Note, *Surrogate Mothering*].

88. *Id.* at 147.

89. *See Legal Problems*, *supra* note 18, at 155-56. William Pierce asserts that the concern for the continuity of the male bloodline which lies behind many surrogate arrangements is "anti-wife." Pierce, The Government Should Ban Surrogate Parenting (unpublished article) (copyright 1987 by the National Committee for Adoption, Inc.)

D. The Potential for Abuse of Surrogate Parenting Arrangements

Even if it is agreed that the positive aspects of surrogate arrangements outweigh the negative aspects, there are legitimate public policy concerns that the surrogate motherhood process might be abused or misused. For example, controversial issues are raised when a healthy woman chooses to employ a surrogate for convenience rather than for medical reasons.[90] It might be fair to ask whether a woman who does not have time to bear a child would have the time or desire to raise a child. Similarly, when gay couples turn to surrogacy to obtain children, questions arise as to whether it is in the child's best interest to be raised in a homosexual environment.[91] Opponents of surrogacy arrangements are also concerned that parties may agree to abort a fetus for non-medical reasons, such as when the fetus is not of the desired sex or if the natural father and his wife change their minds.[92]

An even greater cause for concern is the possibility that a situation might arise where, in contrast to the *Baby M* case, neither the surrogate nor the natural father wants the child because it is born with serious physical defects. The Stiver-Malahoff surrogate case is a dramatic example of such a problem.[93] In 1983, Judy Stiver, a surrogate mother, gave birth to a baby boy with microcephaly.[94] Malahoff questioned whether he was the biological father and declared that he did not want the defective child. The surrogate mother and her husband also rejected the baby, arguing that according to the agreement Malahoff was wholly responsible for the child's care and custody. The controversy ended when blood tests revealed that the child's father was the surrogate's husband.[95] This unfortunate example lends strong support to the argument that the state should do nothing to encourage the practice of creating children by contract.

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90. Some suggest that the procedure be limited to infertile couples and those with medical reasons for not having their own children. *Cf.* Capron, *supra* note 6, at 697.
91. *See* N.Y. Times, Feb. 25, 1987, at B2, col. 1. In one case, a surrogate mother "sued to keep her baby when she discovered that the woman who hired her to carry the child to term was a transexual." *Statement to the House Judiciary Committee on House Bill 759, Re: "Surrogate Mother" Agreements*, at 4 (Feb. 24, 1987) (statement by Maryland Catholic Conference to Maryland legislature.)
92. *Statement to the House Judiciary Committee on House Bill 759, supra* note 91, at 4.
93. *See* Friedrich, *A Legal, Moral, Social Nightmare*, TIME, Sept. 10, 1984, at 54.
94. *Id.* at 55. Microcephaly is a condition of abnormal smallness of the head and is usually associated with mental retardation. WEBSTER'S THIRD NEW WORLD DICTIONARY 1427 (1971).
95. Friedrich, *supra* note 93, at 55. The test results were first announced on the Phil Donahue television show. *Id.*

V. THE LEGAL STATUS OF SURROGATE ARRANGEMENTS IN MARYLAND

A. Current Legal Obstacles to the Enforcement of Surrogate Contracts in Maryland

Legislatures in Maryland and in other states did not envision the issues surrounding surrogate contracts when they enacted their respective laws.[96] In Maryland, concepts relevant to surrogate arrangements are found primarily in the Family Law, Health-General, and Estates and Trusts articles of the Maryland Annotated Code. These statutes provide an incomplete and sometimes inconsistent framework for the regulation of surrogate arrangements.[97]

Five areas of Maryland law are relevant to the question of the legality and enforceability of surrogate arrangements: (1) adoption consent laws;[98] (2) artificial insemination laws;[99] (3) legitimacy and paternity laws;[100] (4) custody laws;[101] and (5) laws regarding birth certificates.[102]

1. Adoption Consent Laws

All fifty states have statutes permitting natural parents to revoke consent to adoption before the child's birth or for some time after birth.[103] In Maryland, the law prohibits the entry of a final decree of adoption until at least fifteen days after the birth of the child,[104] and grants the natural parents the right to revoke consent at any time before the final decree or within ninety days of filing their consent, whichever

96. *See Legal Problems, supra* note 18, at 158; *see also* Note, *The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood*, 12 VT. L. REV. 87, 103 (1987).

97. Two Maryland surrogate mother agencies are currently operating in this legal vacuum: Infertility Associates, International, in Chevy Chase, and Surrogate Motherhood, Inc., in Germantown. These centers are for-profit organizations which contract with infertile couples who wish to have a child by a woman who wants to be a surrogate. Using screening and testing procedures of their own devising, the agencies select individuals to participate in surrogate parenting programs, match surrogates with receiving couples, and arrange a contract which offers certain safeguards to the parties by clarifying their rights and duties. *Summary Findings, supra* note 83, at 3. To date, no disputes arising out of surrogate contracts arranged by these centers have been brought before a Maryland appellate court.

98. MD. FAM. LAW CODE ANN. §§ 5-301 to -330 (1984 & Supp. 1988).

99. MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974).

100. *Id.* § 1-208; MD. FAM. LAW CODE ANN. § 5-1028 (Supp. 1988).

101. MD. FAM. LAW CODE ANN. § 5-203 (1984 & Supp. 1988).

102. MD. HEALTH-GEN. CODE ANN. §§ 4-201 to -227 (1982 & Supp. 1988).

103. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-107B (1974) (prohibiting consent within 72 hours after birth); FLA. STAT. ANN. § 63.082 (West 1985) (consent shall be executed after birth); ILL. ANN. STAT. ch. 40, para. 1511 (Smith-Hurd 1980) (father's consent permitted during pregnancy, but mother or father may revoke within 72 hours after birth); KY. REV. STAT. ANN. § 199.500(5) (Baldwin 1987) (invalidating mother's consent to adoption given prior to fifth day after birth); LA. REV. STAT. ANN. § 9.422.6(A)(9) (West Supp. 1988) (prohibiting surrender for adoption prior to fifth day after child's birth).

104. MD. FAM. LAW CODE ANN. § 5-324 (1984).

comes first.[105] The Maryland legislature stated that its purposes in enacting the adoption statute were to protect children from unnecessary separation from their natural parents,[106] to prevent adoption by individuals who are unfit for the responsibility,[107] and to protect natural parents from a hurried or ill-considered decision to give up a child.[108] The statute's provisions reflect a state policy that children should remain with their natural families, secure from state intervention, unless the interests of the child would best be served by adoption.[109] Because surrogate arrangements require the child to be separated from its natural mother without considering the best interests of the child, they conflict with this policy. Thus, the adoption statute represents an obstacle to the enforcement of surrogate contracts.

Surrogate arrangements ordinarily provide for the termination of the surrogate mother's parental rights in contemplation of adoption of the child by the wife of the biological father.[110] Termination of parental rights, however, is an extraordinary judicial power which is cautiously exercised.[111] A Maryland court will grant a decree of adoption without the consent of the child's parents only under circumstances which demonstrate that the parents either have abandoned the child or represent a danger to him or her.[112] In addition, the court must find by clear

105. MD. FAM. LAW CODE ANN. § 5-311(c)(1) (Supp. 1988). The consent of a natural parent to adoption is not valid unless the consent form contains express notice of the right to revoke. *Id.* § 5-314(a) (1984). The Court of Special Appeals of Maryland has held that Maryland Rule 2-535(a), when construed together with the Family Law article of the Maryland Annotated Code, safeguards the interests of the natural parent by allowing the court to revoke the entry of the final order of adoption if "[t]he natural parent . . . create[s] in the trial judge's mind 'a reasonable doubt that justice has been served.' " *In re* Adoption No. 85365027/AD, 71 Md. App. 362, 367, 525 A.2d 1081, 1083 (1987).

106. MD. FAM. LAW CODE ANN. § 5-303(b)(1) (1984).

107. *Id.*

108. *Id.* § 5-303(b)(2); *see also In re* Adoption No. 85365027/AD, 71 Md. App. at 366, 525 A.2d at 1083 ("In cases of adoption, . . . notions of equity, statutory and case law all attempt to safeguard the parental rights of the natural mother and father.").

109. *See* Walker v. Gardner, 221 Md. 280, 157 A.2d 273 (1960). In *Gardner*, the court noted that the legislature and the court of appeals have made sure, "as far as possible, that adoption shall not be granted over parental objection unless that course clearly is justified. The welfare and the best interests of the child must be weighed with great care against every just claim of an objecting parent." *Id.* at 284, 157 A.2d at 276; *see also* Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 184-85 (1983).

110. *See, e.g., In re* Baby M, 109 N.J. 396, 470-71, 537 A.2d 1227, 1265-66 (1988) (paragraph 1-3 of the surrogate contract). In Maryland, the biological father's wife would file a petition for adoption pursuant to sections 5-315(a) and 5-322 of the Family Law Article. *See* MD. FAM. LAW CODE ANN. §§ 5-315(a), 5-322 (1984 & Supp. 1987).

111. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence for irrevocable termination of natural parents' rights); *see also* Cohen, *Surrogate Mothers: Whose Baby Is It ?*, 10 AM. J.L. & MED. 243, 279 (1985).

112. The common bases for adoption without parental consent include clear and convincing evidence that the natural parent:

(1) has not maintained meaningful contact with the child during the time

and convincing evidence that it is in the child's best interests to terminate the natural parent's rights.[113] Consequently, the Maryland courts could readily conclude, as did the New Jersey Supreme Court,[114] that surrogate contracts are unenforceable because they conflict with laws requiring proof of parental unfitness or abandonment before termination of parental rights may be ordered, or because they conflict with laws that require that surrender of custody and consent to adoption be revocable in private placement adoptions.

Many commentators argue that legislative action is necessary to provide separate rules for surrogate contract adoptions because they are distinguishable from other adoptions.[115] A surrogate mother's decision to terminate her parental rights is not founded in an attempt to avoid the consequences of an unwanted pregnancy or the financial problems inherent in raising a child, considerations usually present in other adoptions.[116] The surrogate agreement is entered into before conception, whereas most adoptions are arranged after conception. Furthermore, in a typical adoption the child is not related to either adopting parent, while in surrogacy, the child is genetically related to the natural father. Because the surrogate arrangement can result in a hybrid of custody and adoption, rather than in pure adoption, different statutory treatment may be warranted.

2. Custody Statutes

If a court, upon the surrogate's refusal to relinquish custody, specifically enforced the contract, custody statutes would be irrelevant to resolution of the dispute and parental rights would be controlled by the agreement between the parties. But if, as in the *Baby M* case, the court

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the petitioner has had custody despite the opportunity to do so; (2) has repeatedly failed to contribute to the physical care and support of the child although financially able to do so; or (3) has been convicted of child abuse of the child.

MD. FAM. LAW CODE ANN. § 5-312(b)(4) (Supp. 1988).

113. Courtney v. Richmond, 55 Md. App. 382, 462 A.2d 1223 (1983); MD. FAM. LAW CODE ANN. §§ 5-312(b)(1), 5-313(a) (Supp. 1988); *see also Santosky*, 455 U.S. at 753 (interference with fundamental right to care for and raise children must be based upon a compelling state interest). The Maryland adoption without consent statute also requires that the child remain out of the custody of the natural parent for at least one year and that the adopting parent excercise control or custody over the child for at least six months. MD. FAM. LAW CODE ANN. § 5-312(b), (b)(2) (Supp. 1988). Visitation agreements are permitted and are specifically enforceable unless they are contrary to the best interests of the child. *See* Weinschel v. Strople, 56 Md. App. 252, 466 A.2d 1301 (1983); MD. FAM. LAW CODE ANN. § 5-312(e) (Supp. 1988).

114. *See Baby M*, 109 N.J. at 444-47, 537 A.2d at 1251-53.

115. Note, *Surrogate Motherhood Agreements: The Law in Pennsylvania*, 91 DICK L. REV. 1085, 1097 (1987); Note, *Developing a Concept, supra* note 28, at 1292; Note, *Womb for Rent: A Call for Pennsylvannia Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 251-59 (1985).

116. *See* Surrogate Parenting Assoc., Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986); Note, *Surrogate Mothers, supra* note 5, at 331.

voided the contract and denied the father specific performance, custody statutes would be likely to govern the resolution of the dispute. Because custody awards do not irrevocably alter parent-child relationships, courts may be more likely to award custody to the natural father than to terminate the parental rights of the surrogate mother.

Under the equitable doctrine of *parens patriae*,[117] the state is the ultimate arbiter in custody battles.[118] The Maryland courts have the authority to award custody of a minor child to either parent.[119] The scope of inquiry in any custody proceeding must concern the needs of the particular child and each of the parties' relationship with the child.[120] The welfare of the child is paramount to the claims of either parent, and care and custody must be awarded with regard to the child's best interests.[121]

Many of the factors typically relied upon in custody determinations[122] are applicable to the adoption/custody hybrid characteristic of surrogate arrangements.[123] "Abandonment" by the surrogate mother could be a critical issue. A Maryland court might interpret the natural mother's willingness to enter into the contract as evidence of her intent to

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117. *Parens patriae* is defined as "literally, 'parent of the country,' [and] refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). This power, which the English court first articulated in the seventeenth century, rests upon the theory that "while the law of nature gives to parents the right to the custody of their children, a child from the time of its birth owes an allegiance to the state, and the state in return is obligated to regulate the custody of the child whenever necessary for its welfare." Ross v. Pick, 199 Md. 341, 351, 86 A.2d 463, 468 (1952).

118. Ross v. Hoffman, 280 Md. 172, 176, 372 A.2d 582, 586 (1977).

119. MD. FAM. LAW CODE ANN. § 5-203 (c)(1) (Supp. 1988). Since 1974, the maternal preference doctrine has been abolished in child custody cases. *See* McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978); MD. FAM. LAW CODE ANN. § 5-203(c)(2) (Supp. 1988).

120. *McAndrew*, 39 Md. App. at 9, 382 A.2d at 1086.

121. Taylor v. Taylor, 306 Md. 290, 303, 508 A.2d 964, 970 (1986); *Hoffman*, 280 Md. at 174-75, 372 A.2d at 585; Miller v. Miller, 191 Md. 396, 407, 62 A.2d 293, 298 (1948); *see also* Ester, *Maryland Child Custody Law - Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225 (1982); Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641 (1978).

122. In determining what is in the best interests of the child for purposes of custody determinations, courts consider a variety of factors:

> [T]he fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Hild v. Hild, 221 Md. 349, 357, 157 A.2d 442, 446 (1960).

123. For example, in its review of the surrogate arrangement employed in *Baby M*, the Supreme Court of New Jersey strongly condemned the contract's total disregard for the best interests of the child. Justice Wilentz observed:

> There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.

Baby M, 109 N.J. at 437, 537 A.2d at 1248.

terminate her parental rights through abandonment.[124] Similarly, a court might also determine that the natural mother's decision to enter into a surrogate contract constituted abandonment at the outset, and consequently find the natural father, who intended to have custody at the outset, to be the more "fit" parent for the child.[125] If the natural father and his wife were deemed to be a party to the surrogate's abandonment, however, a court resolving custody in the best interests of the child would be required to choose the lesser of the two perceived evils.

3. Artificial Insemination Laws

In Maryland, a child conceived by artificial insemination of a married woman with the consent of her husband is presumed to be the legitimate child of the woman and her husband.[126] Most states have a similar statutory scheme for establishing paternity.[127] The purpose of these statutes is to prevent the sperm donor from raising the issue of paternity and to protect the donor from legal responsibility for any children conceived by the use of his semen.[128]

The legislature probably did not contemplate surrogate arrangements when it enacted the artificial insemination legitimacy presumption, since the statute works against the intent of a natural father in the surrogacy context.[129] The presumption that the natural mother's husband is the father of the child is rebuttable,[130] however, and the court can order

124. According to section 5-203(a)(2) of the Family Law article of the Maryland Annotated Code, "[a] parent is the sole natural guardian of the minor child if the other parent . . . abandons the family . . . ." MD. FAM. LAW CODE ANN. § 5-203(a)(2) (1984). Abandonment for one year coupled with failure to maintain contact or provide financial support would appear to satisfy the elements necessary to terminate the natural parents' rights as to the child without their consent. *See id.* § 5-312(b)(2) (Supp. 1988).

125. Cohen, *supra* note 111, at 275. A New Mexico court held that the parents' act of consenting to adoption in exchange for $400 constituted abandonment as a matter of law. *See* Barwin v. Reidy, 62 N.M. 183, 196, 307 P.2d 175, 184 (1957).

126. MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MD. FAM. LAW CODE ANN. § 5-1028(c) (Supp. 1988). The husband's consent to the artificial insemination is presumed. MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974).

127. *See* ALASKA STAT. § 25.20.045 (Supp. 1983); ARK. STAT. ANN. § 9-10-201 (1987); CAL. CIV. CODE § 7005 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. § 45-69f to 69n (1981); GA. CODE ANN. § 19-7-21 (1982); ILL. ANN. STAT. ch.40 para. 1451-53 (Smith-Hurd Supp. 1988); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE. ANN. art. 188 (West Supp. 1983); MICH. COMP. LAWS ANN. §§ 333.2824, 700.111 (West 1980); MINN. STAT. ANN. § 257.56 (West 1988); MONT. CODE ANN. § 40-6-106 (1987); NEV. REV. STAT. § 126-061 (1985); N.Y. DOM. REL. LAW § 73 (McKinney 1988); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1987); OR. REV. STAT. §§ 109.239, 109.243 (1987); TENN. CODE ANN. § 68-3-306 (1987); TEX. FAM. CODE ANN. § 12.03 (Vernon 1986); VA. CODE ANN. § 64.1-7.1 (1987); WASH. REV. CODE ANN. § 26.26.050 (1986); WIS. STAT. ANN. § 767.47(9) (West 1981), § 891.40 (West Supp. 1987); WYO. STAT. § 14-2-103 (1986).

128. Comment, *Contracts to Bear a Child*, 66 CAL L. REV. 611, 614 (1978).

129. *See* MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974).

130. *Id.* § 1-105(b).

the surrogate's husband and the adopting father to submit to blood tests to determine which one is the child's biological father.[131] If parentage cannot be confirmed through blood tests, the natural father could argue that the presumption of paternity was intended to apply only to artificial insemination arrangements, not to surrogate contracts. The natural father could also argue that because his intent in entering into the surrogate arrangement was to attain full parental responsibility, he should not be treated by law in the same manner as the man who anonymously donates his sperm.[132]

4. Legitimacy and Paternity Laws

Maryland's legitimacy and paternity laws raise the same presumption of paternity as do the artificial insemination statutes.[133] Although the presumption is rebuttable,[134] the party who is not married to the mother carries the burden of establishing that he is the father of the child.[135] In Maryland, the only proof necessary to rebut the presumption is a showing that the husband and wife lived separately and apart at the time of conception.[136] Nevertheless, because paternity determinations are made on a case-by-case basis after a child's birth, even a rebuttable presumption with a light burden of proof does not guarantee that the

131. MD. FAM. LAW CODE ANN. § 5-1029(a) (1984). "The legislative intent in adopting [a blood testing] statute was to protect illegitimate children through court ordered support based upon a sophisticated and reliable genetic test." Haines v. Shanholtz, 57 Md. App. 92, 96, 468 A.2d 1365, 1367 (1984).

132. Cohen, *supra* note 111, at 266.

133. *Compare* MD. EST. & TRUSTS CODE ANN. §§ 1-206(b), 1-105(b) (1974) *with* MD. FAM. LAW CODE ANN. § 5-1028 (Supp. 1988).

134. Section 5-1028(c) of the Family Law article of the Maryland Annotated Code provides: "There is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception." MD. FAM. LAW CODE ANN. § 5-1028(c) (Supp. 1988). Generally, this presumption places the paternity of a child born during marriage on the mother's husband. J. Long, A Treatise on the Law of Domestic Relations § 252 (1923). In Maryland, however, the husband is not required to support a child who, though born to his wife during wedlock, was not sired by him. *See* Knill v. Knill, 306 Md. 527, 510 A.2d 546 (1986).

135. MD. FAM LAW CODE ANN. § 5-1028(a) (Supp. 1988).

136. *See* Corley v. Moore, 236 Md. 241, 203 A.2d 697 (1964); Downes v. Kidwell, 14 Md. App. 92, 286 A.2d 199 (1972); MD. FAM. LAW CODE ANN. § 5-1028(c)(2)-(4) (Supp. 1988). As in the artificial insemination context, the natural father also has the option of filing a motion to require the putative father to submit to a blood test pursuant to MD. FAM. LAW CODE ANN. § 5-1029(a) (1984). Some jurisdictions, however, have established a standard which makes overturning the presumption extremely difficult. *See, e.g.*, Hanley v. Flanigan, 104 Misc. 2d 698, 700, 428 N.Y.S.2d 865, 867 (1980) (presumption of legitimacy will not fail unless common sense and reason are outraged); Ewell v. Ewell, 163 N.C. 233, 79 S.E. 509 (1913) (presumption that husband is the father unless he could not have been because of impotence or non-access). The increasing use of artificial insemination and the increasing sophistication of paternity tests are contributing to the decline of the near-absolute rule that once characterized the paternity presumption. *See, e.g., Cherchez la Gene*, THE ECONOMIST, Jan. 4, 1986, at 66-67 (reliable new genetic test for paternity and maternity introduced).

biological father will be recognized as the child's actual father.[137]

Generally, the state's interest in the presumption of paternity is in "promoting the marital relationship [and] preserving intact an existing family unit. . . ."[138] The state legislatures are also motivated by a desire to protect the rights of illegitimate children[139] and by a desire to provide adequate support for children born out of wedlock.[140] But the paternity presumptions do not allocate rights and obligations in the ways the parties to surrogate arrangements intend; paternal rights and responsibilities are placed upon the husband of the surrogate mother even though at the time of contracting he had no direct interest in the arrangement or in the resulting child. The natural father, on the other hand, is hindered in asserting his parental rights because the paternity presumption lies in favor of the surrogate's husband.

5. Birth Certificate Laws

Maryland laws regarding birth certificates[141] reflect the strong state interest in preserving the accuracy of vital records and in protecting their confidentiality.[142] Every birth certificate must include the name of the biological mother and father, if known.[143] Agencies which arrange surrogate contracts sometimes promise the parties that no one, not even the child, will be allowed to ascertain the identity of the surrogate mother. In order to achieve this anonymity, the surrogate contract might provide that the surrogate mother's name is not to appear on the birth certificate.[144] Such a provision, however, would violate the Health-General

137. In jurisdictions where the burden of proof for rebuttal is heavier than in Maryland, legitimacy laws raise a barrier to paternity which is difficult to overcome. For example, in *In re Baby Girl*, the Kentucky circuit court required clear and convincing evidence that a child "born to a husband and wife" was the illegitimate child of a third person. Consequently, an affidavit of artificial insemination, without proof of blood grouping and nonaccess by the husband, was insufficient. *In re* Baby Girl, 9 Fam. L. Rep. (BNA) 2348, 2348 (Ky. Cir. Ct. Mar. 8, 1983).

138. Petitioner F. v. Respondent R., 430 A.2d 1075, 1079 (Del. 1981).

139. As one California appellate court has stated, this presumption exists to protect the child from the social stigma of illegitimacy. Vincent B. v. Joan R., 126 Cal. App. 3d 619, 624, 179 Cal. Rptr. 9, 11 (1981).

140. Syrkowski v. Appleyard, 420 Mich. 367, 374, 362 N.W.2d 211, 214 (1985).

141. MD. HEALTH-GEN. CODE ANN. §§ 4-201 to -227 (1982 & Supp. 1988).

142. The Secretary of Health and Mental Hygiene is charged with administering the recordation of birth certificates and other vital records. MD. HEALTH-GEN. CODE ANN. § 4-203(a) (1982). The Secretary's duties are to collect, preserve and protect birth certificates and to record accurate information. 63 Op. Att'y Gen. 670, 673 (1978). A copy of a birth certificate may be issued only on order of a court of competent jurisdiction, on request of the individual to whom the record relates, or on request of a parent, guardian, or other authorized representative of the individual. MD. HEALTH-GEN. CODE ANN. § 4-217(b) (Supp. 1988).

143. Telephone interview with clerk of Maryland State Department of Vital Records (February 26, 1988). The Secretary of Health and Mental Hygiene establishes the appropriate procedures and the necessary forms for the accurate registration of vital records pursuant to MD. HEALTH-GEN. CODE ANN. § 4-203(b) (1982).

144. The inability to obtain information on family medical history injures the interests of

article of the Maryland Annotated Code, which provides that "[a] person may not willfully provide false information for entry or willfully enter false information on a certificate of birth . . . ."[145] It might also violate the code section which prohibits the willful alteration of birth certificates.[146]

If the surrogate mother voluntarily terminates her parental rights and the court allows the child to be adopted by the natural father's wife, the surrogate arrangement can be made to comply with the birth certificate statutes. The Maryland Annotated Code provides for issuance of a new certificate of birth after an adoption decree is entered.[147] The adoptive parents are recorded as the parents of the child,[148] and the new birth certificate replaces the original.[149] In the surrogate context, the father's name would already be on the certificate, and his wife's name would replace the surrogate mother's name. The original certificate of birth and all records that relate to the new certificate would be placed under seal.[150]

B. Constitutional Issues

The *Baby M* court dismissed or declined to rule on the constitutional challenges raised by Mr. Stern and Mrs. Whitehead.[151] To find the constitutional challenges controlling in the *Baby M* case, the court would have had to broadly construe the decisions recognizing a constitutional right of privacy. If a state regulates surrogate arrangements by statute, however, it may find it necessary to reconcile its statutory scheme with the growing body of law recognizing privacy in reproductive decisionmaking as a substantive constitutional right.

In 1923, the United States Supreme Court found that the constitutional guarantee of liberty included the right to "marry, establish a home and bring up children."[152] Two decades later, in *Skinner v. Oklahoma*,[153] the Court held that the power to procreate is a "basic liberty" and a "basic civil right," and that "marriage and procreation are

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children born of surrogates. Note, *Representation for the Child*, *supra* note 19, at 180-81.

145. MD. HEALTH-GEN. CODE ANN. § 4-226(b) (1982). Violators who provide false information are subject to a fine not to exceed $100. *Id.* § 4-227(1).

146. *Id.* § 4-226(c). Violators who willfully alter the birth certificates are subject to a fine not to exceed $500 or imprisonment not to exceed six months, or both. *Id.* § 4-227(4).

147. *Id.* § 4-211(a)(2)(ii), (b)(3) (Supp. 1988).

148. *Id.* § 4-211(d)(3) (Supp. 1988).

149. *Id.* § 4-211(e)(1)(i) (1982).

150. *Id.* § 4-211(e)(1)(ii) (1982). The seal may be broken only on order of court or on written order of a designee of the Secretary of Health and Mental Hygiene as long as the confidentiality of the record is not violated. *Id.* § 4-211(e)(2)(ii) (1982).

151. *See supra* text accompanying notes 55-58.

152. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

153. 316 U.S. 535 (1942).

fundamental to the very existence and survival of the race."[154] These rights were extended by one of the Court's most far-reaching decisions, *Griswold v. Connecticut*,[155] which established a fundamental right to privacy for married persons. Subsequently, in *Eisenstadt v. Baird*[156] the Court noted that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[157]

Because surrogate arrangements involve personal decisions relating to procreative choice, the right of individuals to engage in these arrangements might be constitutionally protected by *Griswold* and *Eisenstadt*.[158] If surrogate arrangements are protected, it could be difficult for state-imposed restrictions on surrogates arrangements to pass constitutional muster. But even if the right to engage in a surrogacy contract is constitutionally protected, the right of privacy is not absolute; it may be limited by the states' legitimate and compelling interests in the subject matter.[159] Consequently, the regulation of surrogate parenting could be justified by compelling state interests in the health and well-being of children if no less restrictive means of protecting those interests is available.[160]

Additional privacy issues arise from the fact that surrogacy contracts may limit a surrogate's choice regarding abortion. For example, most contracts prohibit the surrogate from aborting for non-medical reasons.[161] Furthermore, some contracts *require* abortion when amniocentesis reveals a genetic or congenital defect.[162] In *Roe v. Wade*,[163] however, the right of personal privacy was extended to encompass a wo-

154. *Id.* at 541.
155. 381 U.S. 479 (1965).
156. 405 U.S. 438 (1972).
157. *Id.* at 453 (emphasis in original).
158. *See Legal Problems, supra* note 18, at 161-64; Coleman, *supra* note 82, at 75-82; Cohen, *supra* note 111, at 256-57. It may be argued, however, that surrogate arrangements are not protected by the right of privacy because they are qualitatively different from the child bearing decisions protected by *Griswold* and *Eisenstadt*. For example, surrogate arrangements involve contractual agreements to obtain a child rather than a personal decision to bear or beget a child. *See* Rushevsky, *supra* note 75, at 112; Cohen, *supra* note 111, at 257. Similarly, because surrogate arrangements necessarily involve third parties, the arrangement may not be sufficiently "private" to involve constitutional protection. *See* Rushevsky, *supra* note 75, at 112-13.
159. *See* Roe v. Wade, 410 U.S. 113 (1973); Rushevsky, *supra* note 75, at 110-11.
160. *See* Carey v. Population Services, Int'l, 431 U.S. 678, 686 (1977); *see also* Roe v. Wade, 410 U.S. 113 (1973). In *Roe v. Wade*, the Court recognized that the state's interest in the fetus began at the end of the first trimester and increased as viability increased; after viability, the state had an absolute right to regulate and intervene. *Id.* at 163. The Supreme Court of New Jersey, reiterating *Roe v. Wade*, stated that when the fetus becomes viable, state interest prevails. *Baby M*, 109 N.J. at 449 n.13, 537 A.2d at 1254 n.13.
161. *See, e.g., Baby M*, 109 N.J. at 473, 537 A.2d at 1268.
162. *See id.*
163. 410 U.S. 113 (1973).

man's decision as to whether to terminate her pregnancy.[164] Accordingly, in light of *Roe v. Wade* and subsequent cases,[165] a regulatory scheme which permitted enforcement of either type of provision would be open to constitutional challenge.

Finally, questions of sex discrimination could be raised by regulations that invalidate surrogate parenting arrangements if the surrogate receives consideration beyond her medical expenses. By acknowledging that the practice of artificial insemination exists, Maryland law tacitly permits a man to sell his sperm.[166] Artificial insemination by donor[167] is in many respects the biological counterpart to surrogacy.[168] Because the surrogate mother's role parallels that of the man who sells his sperm, it can be maintained that a woman should have the right to sell her ovum, and that any statutory distinctions in the treatment of surrogate mothers and sperm donors would constitute unconstitutional gender classification.[169] In states such as Maryland that have passed an equal rights amendment to their state's constitution,[170] such potentially discriminatory legislation might be subject to the highest level of equal protection scrutiny.

VI. LEGISLATIVE OPTIONS AVAILABLE TO THE MARYLAND GENERAL ASSEMBLY

In Maryland, as in other states, the 1988 legislative session was notable for the consideration given to bills drafted in response to the *Baby M* decision.[171] The fact that so few states have succeeded in passing legislation dealing explicitly with surrogate arrangements indicates the difficulty of the task that legislators face.[172]

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164. *Id.* at 153.
165. *See, e.g.,* Carey v. Population Serv., Int'l, 431 U.S. 678 (1977).
166. MD. HEALTH-GEN. CODE ANN. § 20-214 (1987); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974).
167. *See supra* note 14 and accompanying text.
168. *See* Coleman, *supra* note 82, at 81-82; *Legal Problems*, *supra* note 18, at 153 (artificial insemination by donor constitutes male counterpart to surrogate motherhood); Lorio, *supra* note 14, at 1653 (surrogate's role is analogous to that of artificial insemination by donor).
169. *See* Coleman, *supra* note 82, at 81; Lorio, *supra* note 14, at 1653.
170. In Maryland, the Equal Rights Amendment provides: "Equality of rights under the law shall not be abridged or denied because of sex." MD. DECL. OF RTS art. 46.
171. The lower court decision in the 1987 *Baby M* litigation also caused consternation among the state legislatures. In Maryland, Delegate Tyras S. Athey introduced a proposal to regulate surrogate mother agreements which noted on the cover sheet that it was "imperative that we act to save other children from being in the same 'legal limbo' as 'Baby M'." H.B. No. 759, 1987 Md. Leg. Sess. This bill eventually died in the House Judiciary Committee.
172. As of October 1988, Florida, Indiana, Kentucky and Michigan had enacted laws which ban surrogate parenting arrangements involving compensation and impose criminal sanctions on violators. Nebraska and Lousiana have enacted laws that make contracts involving compensation void and unenforceable, but they do not further penalize violators. National Conference of State Legislators, Bill Introductions in 1988 Legislative Sessions Relating to Surrogacy Contracts, at 1-3 (October

The legality of surrogate arrangements must be clarified. Not only would the legitimacy and paternity of surrogate children remain unsettled by a failure to legislatively address surrogate arrangements, but the children's well being would be threatened, the courts would continue to be burdened with questions about the enforceability of the contracts, and surrogate parenthood agencies would remain unregulated. A clear legislative statement of the consequences of entering into a surrogate arrangement would both prevent a certain number of contracts from being entered into and would aid in the resolution of any dispute. Consequently, the remaining question is whether the interests of all concerned are best protected by regulating surrogate arrangements or by banning them altogether.

A. Absolute Prohibition

One commentator suggests that "this human and societal experimentation" should be put to an end until there has been a full investigation of all of the implications that such arrangements have for the children created, their siblings, the surrogate, those who expect to obtain the child, the various social institutions that will be affected (including adoption and "the family," as that institution is perceived by society), and family law.[173] This sentiment appears to be reflected by the legislatures of the various states, which so far have either prohibited or have been reluctant to endorse the practice of surrogacy.[174]

A ban on surrogate arrangements may take several forms. The significant variables are the scope of the ban (*i.e.*, whether it extends to all such arrangements or only to those for compensation) and the sanctions for violation of the ban. The six states which to date have enacted laws banning surrogate arrangements have all focused on contracts involving compensation, either to the surrogate or to a third-party agency; no state has explicitly banned agreements where no money is exchanged.[175] Preplanned adoptions are also covered by some of the new statutes.[176]

12, 1988) (unpublished report) [hereinafter Bill Introductions Report]. In 1988, 16 states introduced 22 bills to regulate surrogacy, and 18 states introduced or carried forward from 1987 31 bills to prohibit such contracts. *Id.*

173. Pierce, *An Analysis of Legislative Trends in Current State Surrogacy Proposals*, ABA Section of Family Law, Aug. 1986, at 9 (unpublished report).

174. *See supra* note 172. Professor James B. Boskey, a family law expert at Seton Hall Law School, is quoted as saying: "What we're seeing now is an emotional outburst of hasty legislation in response to perceived political pressures. . . . 'Ban it now!' That's quick and easy. Then, in a year or two, comes the next stage, a more sophisticated, complex approach to regulate human behavior, where appropriate, because laws can't forbid it, as we've seen with drugs, Prohibition, and abortions." N.Y. Times, June 26, 1988, at A1, col. 6.

175. Bill Introductions Report, *supra* note 172, at 1-3.

176. Under Florida law, surrogate arrangements are defined as "pre-planned adoption arrangements," and the rights of the parties are decided according to the Florida adoption code. In Indiana, valid adoption agreements may only be made after the birth of the child. *Id.* at 2.

Four of the six states have imposed criminal sanctions for violations of the statutes, which range from prison terms of six months to five years, and fines up to $10,000.[177]

On February 5, 1988, two days after the New Jersey Supreme Court issued the *Baby M* decision, a bill was introduced in the Maryland Senate which would have banned surrogate parenthood arrangements absolutely and imposed criminal sanctions upon violators.[178] The bill was adopted by the Senate with floor amendments, but was subsequently defeated in the House Judiciary Committee. Later that month a similar bill was proposed to the House of Delegates.[179] This bill provided that surrogate mother agreements were void if they required the exchange of consideration, and once again held violators subject to criminal sanctions.[180] The bill exempted sisters and sisters-in-law from the prohibition so long as they received only reasonable compensation for medical, prenatal and birth expenses.[181] This bill received unfavorable reports and was defeated by a vote of 16-5 in the House Judiciary Committee.[182]

The defeat of bills similar to those introduced in the Maryland General Assembly may be an implicit recognition by legislators of several problems inherent in prohibiting surrogate arrangements. First, a ban on surrogate arrangements may result in surrogate mothering moving un-

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177. *Id.* Michigan law provides for a fine of up to $50,000 for persons acting as surrogate brokers. *Id.*

178. S.B. No. 795, 1987 Md. Leg. Sess. This bill read as follows:

> For the purpose of prohibiting a person from being a party to an agreement in which a woman agrees to conceive a child under certain conditions and agrees to voluntarily relinquish her parental rights; providing a penalty; and generally relating to surrogate mothering agreements.
>
> Section 1. Be it enacted by the General Assembly of Maryland, that the Laws of Maryland read as follows:
>
> Article - Family Law
>
> 5-207
>
> (A) A person may not be a party to an agreement in which a woman agrees to conceive a child [through artificial insemination] and agrees to voluntarily relinquish her parental rights.
>
> (B) A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $10,000, or imprisonment not exceeding 1 year, or both.
>
> Brackets [ ] indicate matter deleted when original bill was amended after passage by the Senate.

179. H.B. No. 1479, 1987 Md. Leg. Sess. (introduced by Delegate Kreamer).

180. *Id.*

181. *Id.*

182. House Judiciary Committee vote tally sheet for H.B. No. 1479, March 18, 1988. A proposal similar to the previous bills was defeated in 1989 in the Maryland House of Delegates. H.B. No. 1340, 1989 Md. Leg. Sess. (introduced by Delegate Kreamer). This proposal called for a ban on most surrogate arrangements and imposed criminal sanctions on violators. *Id.* Two other bills involving surrogate arrangements were also introduced in the 1989 Maryland Legislative Session, but neither bill passed. S.B. No. 477, 1989 Md. Leg. Sess. (introduced by Senator Stone); S.B. No. 526, 1989 Md. Leg. Sess. (introduced by Senators Hoffman and Hollinger).

derground.[183] Second, the validity of a ban on surrogate arrangements may be challenged on constitutional grounds.[184] Finally, surrogacy prohibition forecloses a solution to the problem of infertility which appears to have worked out to the satisfaction of the parties in a number of surrogate arrangements.[185]

B. Regulation Short of Prohibition

Numerous states have considered bills proposing to subject surrogate arrangements to regulation, but few regulatory schemes have been enacted.[186] In Maryland, the 1988 session of the General Assembly considered House Bill 649,[187] which addressed the issue by proposing amendments to the Family Law, Estates and Trusts and Health-General articles of the Maryland Annotated Code. The bill would have established minimum protections for the parties involved in surrogate agreements and required that certain terms be included in an enforceable contract.[188] Like the proposals to prohibit surrogacy altogether, however, House Bill 649 was defeated in the House Judiciary Committee.[189]

House Bill 649 provided important protections for the interests of the child, the natural father and his wife, and the surrogate mother.[190] Nevertheless, it did not adequately address questions concerning baby-

183. Harriet Blankfield, Director of Infertility Associates, International of Chevy Chase, Maryland, who has arranged over 50 surrogate births, has observed: "We screen out 95 of every 100 applicants. But if you believe there are abuses now, wait till it goes underground. How many couples desperate for a biologically related baby will be so careful medically and psychologically? None. They'll take the first woman who seems committed to them." N.Y. Times, June 26, 1988, at A1, col. 6.

184. *See supra* text accompanying notes 151-170.

185. *See A Surrogate's Story*, TIME, Sept. 10, 1984, at 53; N.Y. Times, June 26, 1988, at A1, col. 6.

186. *See supra* note 172.

187. H.B. No. 649, 1988 Md. Leg. Sess. The bill was introduced by Delegate Tyras S. Athey and referred to the House Judiciary Committee on January 29, 1988.

188. *See infra* note 190.

189. By a vote of 19-2 the House Judiciary Committee voted against recommending the bill to the full House. House Judiciary Committee Tally Sheet for H.B. 649 (Mar. 18, 1988).

190. Foremost among the protections for the child were provisions requiring the surrogate and natural father to share parental rights and duties from the moment of conception and shifting these rights and duties to the natural father and his wife from the time of birth, regardless of the child's condition. H.B. No. 649, 1988 Md. Leg. Sess. (amending MD. FAM. LAW CODE ANN. §§ 5-311 (Supp. 1988). The bill also established the child's legitimacy and right to inherit. *Id.* (amending MD. FAM. LAW CODE ANN. §§ 5-311, 5-313 and 5-1028 (Supp. 1988) and MD. EST. & TRUSTS CODE ANN.. § 1-206 (1974)).

Protections for the natural father and his wife included provisions guaranteeing them the right to review the results of medical, genetic, and psychological screening of the surrogate before entering into a binding agreement with her. *Id.* (amending MD. FAM. LAW CODE ANN. § 5-316 (1984)).

The most important protection for the surrogate was a provision that her consent to adoption would not be effective until the birth of the child. *Id.* (amending MD. FAM. LAW CODE ANN. § 5-312 (Supp. 1988)). Furthermore, in the event the surrogate's consent was declared void, the surrogate would assume all parental

selling and the exploitation of needy women.[191] Despite its attempt to provide added protections for the child, the bill probably went too far in putting the state's stamp of approval on a controversial practice, the consequences of which are relatively unknown.

C. *The Uniform Status of Children of Assisted Conception Act*

In August 1988, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states the Uniform Status of Children of Assisted Conception Act (The "Act").[192] The drafters of the Act observe in their impassioned prefatory notes:

> This Conference is faced with the birth of many beautiful, innocent children brought into the world through certain extraordinary procedures which will ultimately require regulation, but meanwhile the status of these children demands our attention. These children are without traditional heritage, or parentage and other fundamentals, they are buffeted by forces beyond their comprehension and control. Although without guile or fault, but because of accident of birth, these children of the new biology have been deprived of certain basic rights.[193]

The drafting committee proceeded on the premise that its work was not to regulate surrogacy, but to clarify the status, rights, security, and well being of children born to surrogate mothers.[194] Recognizing that numerous surrogate arrangements already have been entered into and that the practice will continue, the committee strove to provide legislators with a clear statement of essential principles "without inordinate elaboration or detailed regulatory procedures."[195] The committee anticipated that the Act's sensitivity to the needs of the parties to surrogate arrangements, particularly to the needs of children, would make it ac-

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rights and duties relating to the child. *Id.* (amending MD. FAM. LAW CODE ANN. § 5-314(C) (Supp. 1988).

191. For example, it failed to guarantee the surrogate independent legal representation or an opportunity for counseling.

192. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) (drafted by the National Conference of Commissioner on Uniform State Laws) [hereinafter UNIF. ASSISTED CONCEPTION ACT]. "Assisted conception" is defined as "a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband." *Id.* § 1(1).

193. *Id.* Prefatory Note.

194. *Id.* Prefatory Note.

195. *Id.* Prefatory Note; *see also id.* § 1 comment (The Act was "*not* intended to establish a regulatory scheme establishing the appropriate methods for the performance of such assisted conception. A jurisdiction may, *e.g.*, choose to enact separate regulations requiring genetic screening when assisted conception is undertaken, requiring that assisted conception be conducted only under certain conditions, etc.") (emphasis in original).

ceptable to legislators and the public where other measures had failed.[196]

The committee noted that "there was great urgency . . . to provide a child with two parents."[197] This is accomplished by the two fundamental provisions of the Act, which state that "a woman who gives birth to a child is the child's mother,"[198] and that "the husband of a woman who bears a child through assisted conception is the father of the child . . . unless . . . it is determined that he did not consent to the assisted conception."[199] The Act then creates two alternatives for legislatures to follow. Alternative A provides that if the parties have entered into an agreement which has been approved by the court *prior* to conception, the basic presumption of parentage is overridden, and upon the child's birth, the natural father and his wife are the child's parents.[200] If the parties enter a surrogate agreement which has not been approved by the court prior to conception, however, the child's parents are the surrogate and the surrogate's husband, if he has consented to the assisted conception.[201]

The approval process requires the court to appoint a guardian *ad litem* to represent the interests of the child who is to be conceived; the court may also appoint counsel to represent the surrogate.[202] A hearing is then held on the petition of the parties to approve the contract. Approval may be granted only upon the satisfaction of ten criteria aimed at protecting the interests of the parties and the child.[203]

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196. *Id.* Prefatory Note.
197. *Id.*
198. *Id.* § 2.
199. *Id.* § 3. The husband has two years in which to commence an action to show that he did not consent to the assisted conception. *Id.* Sperm donors, however, are presumed not to be the parent of a child conceived through assisted conception unless there is a prior agreement. *Id.* Prefatory Note.
200. *Id.* Alternative A, §§ 6, 8(a)(1).
201. *Id.* Alternative A, § 5(b). Where the surrogate is unmarried at the time of conception or where her husband is not a party to the agreement, the parentage of the child is determined according to applicable state law. *See id.*; *id.* Alternative A, § 5 comment; *see also infra* note 218.
202. UNIF. ASSISTED CONCEPTION ACT Alternative A, § 6(a).
203. *Id.* Alternative A, § 6(b). This section requires a finding that:

> (1) the court has jurisdiction and all parties have submitted to its jurisdiction under subsection (e) and have agreed that the law of this State governs all matters arising under this [Act] and the agreement;
>
> (2) the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;
>
> (3) the [relevant child-welfare agency] has made a home study of the intended parents and the surrogate and a copy of the report of the home study has been filed with the court;
>
> (4) the intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State;
>
> (5) all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding;
>
> (6) the surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn

Any party may terminate the agreement at will prior to conception, and the court may do so for cause.[204] Once conception has occurred, the surrogate may terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement.[205] If the court finds that the surrogate is acting voluntarily and understands the consequences of the termination, it will vacate the order declaring the intended parents to be the parents of the child.[206] The surrogate has no liability to the intended parents for the termination.[207]

States reluctant to accept this carefully controlled approval of surrogate agreements may adopt Alternative B. This option provides that an agreement in which a woman agrees to become a surrogate through assisted conception is void. The effect of voiding the agreement is to establish the Act's basic presumption of parentage, that the surrogate is the mother and her husband, if she is married, is the father.[208] No sanctions are imposed upon any of the parties for entering into surrogate arrangements.

If the Maryland General Assembly wishes to prohibit the practice of surrogacy altogether, Alternative B will effectively deter many surrogate contracts, since it would give parties advance notice that the state's courts are unavailable for enforcing the agreement. It would also clarify the legitimacy and paternity of the child by giving effect to the paternity presumption of the artificial insemination statutes.[209] Finally, by declaring surrogacy contracts void, it would eliminate the financial incentives for surrogate motherhood agencies to facilitate the arrangements.

If the legislature is reluctant to foreclose entirely the option of surrogacy for responsible parties, Alternative A of the Act provides a means of making the procedure available without unduly offending public policy. The appointment of a guardian *ad litem* does much to ensure that the

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child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence;

(7) all parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court;

(8) a report of the results of any medical or psychological examination or genetic screening agreed to by the parties or required by law has been filed with the court and made available to the parties;

(9) adequate provision has been made for all reasonable health-care costs associated with the surrogacy until the child's birth including responsibility for those costs if the agreement is terminated pursuant to Section 7; and

(10) the agreement will not be substantially detrimental to the interests of any of the affected individuals.

Id. Alternative A, § 6(b)(1)-(10) (bracketed material in original).

204. *Id.* Alternative A, § 7(a).

205. *Id.* Alternative A, § 7(b).

206. *Id.*

207. *Id.* Alternative A, § 7(c).

208. *Id.* Alternative B.

209. *See supra* notes 126-128 and accompanying text.

baby's interests will be attended to before it is conceived.[210] In addition, the fitness of not only the intended parents but also of the surrogate and her husband, who may in the end be recognized as the child's parents, would be evaluated by the same criteria as are applied by the state's adoption procedures.[211] While Alternative A does not prohibit the payment of compensation to the surrogate or a placement agency, court approval of the surrogacy contract prior to conception should prevent the worst abuses of baby selling.

Many of the procedures designed to protect the child will also protect the surrogate mother from exploitation. Section 6 of Alternative A requires the court to find that the surrogate entered into the agreement voluntarily and understands its terms and consequences, and also mandates that she receive counselling.[212] Additionally, the court has broad authority to ensure that any agreement entered into is not "substantially detrimental to the interests of any of the affected individuals."[213] This authority would empower the court to determine both whether the compensation proposed was adequate and whether the financial inducements constituted overreaching. Most important, the proposal provides an extended period during which the surrogate can change her mind and withdraw from the agreement without penalty.[214]

The sanctity of marriage and the traditional family is not unduly threatened by this proposal. The intended parents must be a married couple, and the intended child must be conceived through the use of the egg or sperm of one or both of them.[215] Additionally, in the event the contract is terminated, the Act provides that the child has two parents; the surrogate and her husband if he has consented to the conception.[216] Alternative A preserves a reproductive option for couples whose childless marriages might otherwise be threatened, and it minimizes the possibility of perceived abuses such as use of the surrogacy process by women who are able to bear a child themselves.[217]

Alternative A also provides a framework for reconciling surrogate agreements with existing laws. The most important is the provision governing parentage under approved surrogacy agreements, which reestablishes the paternity presumption of the artificial insemination statutes in

210. For a more detailed discussion of the advantages of appointing a guardian *ad litem*, see Note, *Representation for the Child*, *supra* note 19, at 173-80.
211. UNIF. ASSISTED CONCEPTION ACT Alternative A, § 6(b)(4).
212. *Id.* Alternative A, §§ 6(b)(5), 6(b)(7).
213. *Id.* Alternative A, § 6(b)(10).
214. *Id.* Alternative A, § 7.
215. *Id.* § 1(3).
216. *Id.* §§ 2-4; *id.* Alternative A, § 8. If the surrogate mother is unmarried at the time of conception or if her husband has not consented, upon termination of the surrogate contract the parentage of the child is determined according to applicable state law. *Id.* Alternative A, § 8(a)(2).
217. *See id.* Alternative A, § 6(b)(2). Section 6(b)(2) requires medical evidence that the intended mother is unable to bear a child without unreasonable risk to herself or the child. *Id.*

the event that the surrogate terminates the agreement.[218] The Act also resolves the privacy issues related to surrogacy by granting the surrogate a 180-day recantation period which coincides with the period during which she has a constitutionally protected right to terminate her pregnancy.[219]

The most controversial aspect of Alternative A undoubtedly will be the provision for the 180-day recantation period for the surrogate. The drafters of the legislation weighed the relative merits of a purely contractual treatment of surrogate agreements, which would have entitled the intended parents to the remedy of specific performance, against the application of adoption consent principles, whereby the surrogate's consent would not be final until some time after the child's birth. The comment to section 7 states:

> [T]his recantation period can be explained by pointing out that the surrogacy arrangement is simply different from both the ordinary contract situation and the ordinary adoption decision and, therefore, ought to be treated differently. Surrogacy is not an ordinary contract because it contemplates the creation of a human being whose interests must be taken into account. It can be argued that the child's interests in a parent-child relationship with his or her biological mother are protected by giving her an extra 180 days to decide if she really wants to give up the child to the intended mother.
>
> On the other hand, surrogacy is different from an adoption and the post-birth consent requirement of adoption is not appropriate to the surrogacy situation. . . .
>
> [T]he original decision to give up the child is made *before* the pregnancy by an adult woman who has already experienced a previous pregnancy. It is an arrangement which has been examined and approved by a court under Section 6, with all the

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218. *Id.* Alternative A, § 8. This section provides:

> (a) The following rules of parentage apply to surrogacy agreements approved under Section 6:
>
> (1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).
>
> (2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b) the surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

Id. The comment to this section observes that under section 8(a)(2), the legally recognized father (the intended father) and the legally recognized mother (the surrogate) could be part of two different households, but states: "This situation, while regrettable, is not unique in family law and may precipitate litigation over custody." *Id.* Alternative A, § 8 comment.

219. *Id.* Alternative A, § 7(b); *see also* Roe v. Wade, 410 U.S. 113 (1973).

protections of the surrogate provided under that section.[220]

Under those circumstances, according to the drafters, some measure of recognition should be given to "the interests of the intended parents in the finality of the decision-making process before birth."[221]

The drafters of the Act stress that Alternative A does not authorize surrogate contracts, it merely makes possible the authorization of such contracts by the courts.[222] Some may object to burdening the courts with these determinations. It could be argued, however, that because the procedures for approving surrogate arrangements are similar to those for approving adoptions, the burden on the courts will be manageable. A case-by-case determination of the merits of a particular surrogate arrangement is more likely to serve the interests of all involved than is a blanket authorization of surrogacy by the legislature.

VII. CONCLUSION

The development of alternative birth technologies has broadened reproductive options while sorely testing the limits of human law. The *Baby M* case exemplifies these limits by demonstrating how the best interests of a child could be jeopardized by a surrogacy arrangement. Public policy has for many years been concerned with preventing baby-selling, protecting financially needy women from exploitation, preserving the sanctity of the family and protecting the right of privacy in decisions regarding childbearing. In Maryland, as in other states, these concerns are expressed by statutes governing adoption, custody, artificial insemination, legitimacy and paternity, and public records. These laws often conflict with the provisions of surrogate arrangements and call into question their validity and enforceability.

Agencies which provide assistance in arranging surrogate agreements are already operating in Maryland. Legislation is needed to clarify the rights and duties of the parties to these arrangements. To date, the Maryland legislature has considered both a total ban on surrogate arrangements with criminal sanctions for violators, and a fairly permissive regulatory statute. Neither alternative was acceptable, undoubtedly because neither adequately reflected public policy. The current legal vacuum, however, cannot be allowed to continue. The recently-drafted Uniform Status of Children of Assisted Conception Act addresses the most important of these public policy concerns by means of two proposed statutory schemes, one prohibiting surrogate arrangements, the other providing a specific procedure for court approval of each contract. The Maryland General Assembly should avail itself of the care and effort

220. *Id.* Alternative A, § 7 comment (emphasis in original).
221. *Id.* Alternative A, § 7(b) comment.
222. *Id.* Alternative A, § 6 comment.

of the drafters of the model Act and consider enacting one of the proposed alternatives.

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