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Dale Elizabeth Lawrence

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SURROGACY IN CALIFORNIA: GENETIC AND GESTATIONAL RIGHTS

Dale Elizabeth Lawrence*

INTRODUCTION

Since it began over a decade ago, surrogacy[1] has become a viable alternative means of reproduction and is utilized by an increasing number of infertile couples.[2] However, the debate over the legality and enforceability of surrogate parenting agreements continues unabated in the courts and state legislatures.[3] As of this publication, the California State Legislature has not enacted any pertinent legislation, thus leaving resolution of surrogacy disputes to the judiciary. An advisory panel[4] was ap-

* Golden Gate University School of Law, Class of 1992; B.A., University of California, Berkeley.

1. This term is used to describe a surrogate parenting agreement whereby a woman agrees to bear the child of a man not her husband, generally through artificial insemination, and to relinquish all parental rights upon the birth of the child to the man and his wife. M. FIELD, SURROGATE MOTHERHOOD 6 (1988) [hereinafter FIELD]. The surrogate mother may be genetically related to the child by providing the ovum herself (traditional surrogacy) or she may serve only as the gestational mother, the embryo having been produced through *in vitro* fertilization of the couple's egg and sperm and subsequently implanted in the gestational mother (gestational surrogacy).

2. The Center for Surrogate Parenting in Los Angeles, California, estimates there have been approximately 250 surrogate births in California since 1978 involving all professional surrogacy programs, and an additional 250 surrogate births have occurred in California privately without the aid of a professional program. Additionally, this Center estimates that approximately 2,000 surrogate births have occurred nationwide utilizing professional programs since approximately 1975 and another 2,000 have resulted nationwide privately. MINORITY REPORT OF THE ADVISORY PANEL TO THE JOINT LEGISLATIVE COMM. ON SURROGATE PARENTING, at M7-M8 (July 1990) [hereinafter MINORITY REPORT].

3. For the legislative years 1987 through 1989, legislative initiatives concerning surrogacy were introduced in 39 states and the District of Columbia. 15 STATE LEGIS. REP. OF THE NAT'L CONF. OF ST. LEGISLATURES, No. 2, at 1 (Jan. 1990) [hereinafter STATE LEGIS. REP.].

4. The advisory panel was composed of predominantly legal and medical experts, as

pointed to provide recommendations on surrogate parenting to assist the Joint Committee on Surrogate Parenting in reporting to the California State Legislature.[5] As a result of the *Final Report of the Advisory Panel to the Joint Legislative Committee on Surrogate Parenting*, surrogacy bills are being introduced during the 1991-1992 legislative year.[6]

Surrogacy presents legal, ethical and social issues that must be resolved legislatively in order to provide the judiciary and citizens with guidelines. Such issues include the legality and enforceability of surrogate parenting agreements; the scope of reproductive choice constitutionally; ethical concerns regarding the potential for exploitation; the social benefits and harms created by the practice of surrogacy; parental status and rights of the parties; and state versus federal legislation.

Part I of this article contrasts the surrogacy controversy in California with the legislative response nationwide by examining the various underlying issues that must necessarily be considered by state legislatures.[7] Although the surrogacy controversy raises issues that concern the nation and society as a whole, it should be resolved independently by each state's legislature. At the center of the debate lies the question of whether the practice of surrogacy is detrimental or beneficial to the contracting parties and to society.

Part II examines a California judicial decision[8] of first impression and compares it to other states' judicial decisions on surrogacy.[9] The California decision is indicative of the need for legislation in the state, as its results were not reached through an application of current laws.[10] Furthermore, the decision and several legislative proposals reflect the conflict on surrogacy within the state. While its holding is supported by recently in-

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well as a clinical licensed social worker and a professor of philosophy. FINAL REPORT OF THE ADVISORY PANEL TO THE JOINT LEGIS. COMM. ON SURROGATE PARENTING, at 32-37 (July 1990) [hereinafter FINAL REPORT].

5. *Id.* at 2.

6. L.A. Daily Journal, July 18, 1990, at 5, col. 2. *See infra* notes 52-57 and accompanying text (discussing recently introduced legislation in California).

7. *See infra* notes 25-82 and accompanying text.

8. *See infra* notes 135-206 and accompanying text.

9. *See infra* notes 95-128 and accompanying text.

10. *See infra* note 19.

troduced legislation,[11] it is directly at odds with the recommended legislation of the Advisory Panel's Final Report to the Joint Legislative Committee on Surrogate Parenting.[12] Legislation will serve to clarify the rights of parties to a surrogate parenting agreement.

Ultimately the surrogacy issue is one of public policy. As of this publication, Congress has not enacted any national legislation concerning surrogate parenting agreements, but has instead left resolution of the myriad of issues to individual state courts and legislatures. As a paramount public policy issue, resolution of the surrogacy controversy should be achieved through the enactment of state legislation. This Article concludes that such legislation should regulate surrogate parenting agreements rather than completely prohibit these arrangements. It is in the best interests of California and all parties involved to provide legislative regulatory guidelines as a response to the increasing practice of surrogacy. By permitting individuals to enter into surrogate parenting agreements, establishing presumptions of the legal relationships and providing for professional and court supervision, regulatory guidelines would protect individual Constitutional rights while minimizing the risk of exploitation.

BACKGROUND

A significant majority of the surrogacy cases in the courts thus far have involved what is termed "traditional surrogacy,"[13] in which a "surrogate mother" agrees to be artificially inseminated with the sperm of a man whose wife is infertile.[14] The agreement provides that she is to carry the child to term and upon giving birth will relinquish all her parental rights, thus allowing the biological father's wife to adopt the child.[15] However,

11. *See infra* notes 52-57 and accompanying text.

12. *See infra* note 30 and accompanying text.

13. *See infra* notes 95-128 and accompanying text.

14. In actuality, "surrogate mother" is a misnomer in traditional surrogacy, as the woman so termed is the genetic mother. However, this term has consistently been used to denote the woman who agrees to bear a child for a man not her husband, whether she is the genetic mother or the gestational mother. In this article, "surrogate mother" will be used when referring to a woman who serves as a surrogate in traditional surrogacy and is therefore also the genetic mother.

15. FIELD, *supra* note 1, at 6.

"gestational surrogacy"[16] has now become an alternative means of reproduction for infertile couples. In this process, the egg is fertilized *in vitro*[17] and later implanted in a surrogate who becomes the gestational mother.[18] She is therefore not genetically related to the fetus and intends to relinquish the child at birth to the couple. With gestational surrogacy, the question becomes who is the mother? Is it the gestational mother or the woman who provided the egg? These questions do not have clear legislative answers in California. Currently California state law provides that the natural mother is the one who has given birth to the child.[19] Due to the potential for a variety of roles of parties in a surrogacy arrangement,[20] legislation must be enacted to encompass each possibility. Until each state or the federal government has enacted legislation dealing with surrogacy specifically, parties to a surrogate parenting agreement cannot be sure of their respective rights should a dispute arise.

I. LEGISLATIVE ACTIVITY

Recent reports[21] conducted and legislation introduced in California[22] and in other states[23] indicate that the public policy

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16. In a "gestational surrogacy" arrangement, the surrogate is not genetically related to the child. In this article, "gestational mother" will be used when referring to a woman who is not genetically related to the fetus but has agreed to carry the infertile couple's embryo to term.

17. *In vitro* fertilization usually refers to the process whereby a doctor stimulates the development of eggs through the use of hormones, removes the eggs in a procedure called laparoscopy, and fertilizes them in a petri dish prior to implantation. T. SHANNON, SURROGATE MOTHERHOOD: THE ETHICS OF USING HUMAN BEINGS 4-5 (1988) [hereinafter SHANNON].

18. FINAL REPORT, *supra* note 4, at 4.

19. CAL. CIV. CODE § 7003(1) (West 1983). The statute provides that "the natural mother . . . may be established by proof of her having given birth to the child . . . ."

20. A child may have numerous parents: There is the potential for a genetic mother, gestational mother, rearing mother, genetic father and rearing father. SHANNON, *supra* note 17, at 79-80.

21. STATE LEGIS. REP., *supra* note 3. This report reviews surrogate parenting contract legislation enacted during the 1987, 1988 and 1989 legislative sessions; FINAL REPORT, *supra* note 4, at 19-31 sets forth the advisory panel's recommendations for legislation in California.

22. *See infra* note 24 (review of legislation introduced in California over the last ten years).

23. *See* STATE LEGIS. REP., *supra* note 3, at 7-10 (A summary of state bill introductions on surrogate parenting contracts. This report indicates that for the 1987-1989 legislative sessions there were a total of 205 bills introduced to prohibit, regulate or study surrogacy).

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issues surrounding surrogacy are being examined throughout the country.

A. Surrogacy in California

Surrogacy legislation has been introduced in California periodically over the past decade.[24] These bills ranged from regulation of the practice to express prohibition of commercial surrogacy.

The California Legislature analyzed the issues surrounding the surrogacy debate through the establishment of an advisory panel.[25] This panel submitted its *Final Report to the Joint Legislative Committee on Surrogate Parenting*[26] in July 1990.[27] The State Legislature will examine surrogacy legislation based upon bills introduced by the Joint Committee's members.[28] In its re-

24. A.B. 365 and A.B. 3771 were introduced in 1981-82 by Los Angeles Democrat Assemblyman Mike Roos. These bills would have provided guidelines for surrogate parenting contracts. In particular, A.B. 3771 would have restricted the use of surrogate contracts to infertile couples only; A.B. 1707 was introduced in 1985-86 by former Assemblywoman Jean M. Duffy (D-Citrus Heights). The bill was designed to authorize and regulate surrogate arrangements. The bill attempted to deal with the rights and responsibilities of parties to surrogate contracts; A.B. 2304 and A.B. 2404 were introduced in 1987 by the late Assemblyman Richard Longshore (R-Westminster). These were two related measures. One would have prohibited a woman from relinquishing custody of her child before it was born and the other would have voided surrogacy contracts that required unnecessary tests, such as one to determine the sex of an unborn child; S. 2635 was introduced by Senator Diane Watson (D-Los Angeles) in 1988 and would have established parental relationships and regulated surrogacy; A.B. 3200 was introduced in 1988 by Assemblywoman Sunny Mojonnier (R-San Diego). This bill sought to establish that the woman who gives birth to a child is the legal mother of that child, regardless of the child's genetic background. It would also expressly prohibit contract parenting for a fee; A.B. 2100 was introduced in 1989 also by Assemblywoman Mojonnier. This bill stated that contracts to bear a child are against public policy and are void and unenforceable. L. A. Daily Journal, July 14, 1988, at 1, col. 6. The Alternative Reproduction Act of 1989 was introduced by Assemblyman Terry B. Friedman (D-Sherman Oaks). This bill would have authorized surrogacy procedures and enforcement of surrogate contracts and egg donor contracts. Final Report, *supra* note 4, at M82-M99.

25. *See supra* note 4 and accompanying text.

26. The Joint Committee on Surrogate Parenting's [hereinafter Joint Committee] members were Assemblywoman Sunny Mojonnier, Chair; Senator Robert Presley, Vice Chair; Senator Ed Davis; Senator Diane Watson; Assemblyman Mike Roos; and Assemblywoman Jackie Speier.

27. Final Report, *supra* note 4.

28. ACR-171 created the Joint Committee on Surrogate Parenting, and directed and authorized the Joint Committee to ascertain, study and critically analyze materials concerning commercial and noncommercial parenting. National Conference of State Legislatures: Bill Introductions in 1988 Legislative Sessions Relating to Surrogacy

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port to the Joint Committee, the *Majority Report of the Advisory Panel*[29] recommended legislation prohibiting commercial surrogacy in California and imposing criminal sanctions for participation in surrogacy arrangements.[30] It based these recommendations upon a comparison between adoption issues and their relationship to surrogacy,[31] finding that legalized paid surrogacy will have negative effects on the children involved, surrogates and society.[32] However, the *Minority Report of the Advisory Panel*[33] recommended that legislation be enacted to clarify the legality of surrogate parenting agreements, urging that they be considered void, and that where a dispute arises, custody of the child should be determined based upon a best interest analysis.[34] Members of the *Minority Report* argued that there is no empirical evidence to indicate that significant harm has been suffered by women who have been surrogate mothers.[35] They also asserted that there is no evidence to suggest significant harm to the siblings of children born by surrogates.[36]

The dissenting viewpoints expressed in the *Minority Report* are indicative of the controversy nationwide. Proponents of sur-

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CONTRACTS.

29. Twelve members of the Advisory Panel supported the FINAL REPORT, while the dissenting Minority Report was ascribed to by six members. FINAL REPORT, *supra* note 4, at M1.

30. The Advisory Panel Report recommends the following:

Amend CAL. PENAL CODE § 273 to prohibit payment to a surrogate mother for other than expenses allowed in all other adoption procedures; add to CAL. PENAL CODE § 273(a) to prohibit commercial surrogacy agencies; amend CAL. CIV. CODE § 224(p) to prohibit advertising for surrogacy; amend CAL. CIV. CODE § 7005 to designate as the natural father the party of a surrogate parenting agreement who donates his semen for artificial insemination; amend CAL. CIV. CODE § 7015 to provide that when ova or embryos have come from a woman other than the one who gives birth, the gestating woman is irrebuttably presumed to be the natural mother; amend CAL. CIV. CODE § 1669 to make surrogate mother agreements void and unenforceable. FINAL REPORT, *supra* note 4, at 1, 20-31.

31. *Id.* at 7-17.

32. *Id.*

33. MINORITY REPORT, *supra* note 2.

34. *Id.* at M3. The Minority Report additionally concluded that regulatory means should be used to protect the interests of the parties involved in surrogacy arrangements, rather than criminalizing all surrogate-related activities. *Id.*

35. *Id.* at M15-M17. (discussion of several studies that have been conducted indicating no significant harm has been caused to surrogate mothers).

36. *Id.* at M18-M19. Nevertheless, the Minority Report concedes that very little data exists regarding the surrogate mother's children and their reactions to the surrogate pregnancy and relinquishment of the resulting child to the biological father and his wife. *Id.* at M18.

rogacy rely on Constitutional principles[37] in support of an individual's right to pursue new reproductive technologies without interference from the government. The Constitutional right of privacy,[38] which includes the right to procreative choice,[39] is asserted as an argument in support of surrogacy.[40] The Constitutional guarantees of equal protection and due process are also raised in support of surrogacy agreements. Infertile couples contend that based upon these constitutional principles, all individuals should have equal access to available reproductive technologies to overcome infertility. The basis for the current assertion of these constitutional rights arose in earlier cases affirming certain procreative rights.[41]

The Supreme Court in *Griswold v. Connecticut*[42] affirmed the right of a married couple to use contraceptives, based on its finding that the right of privacy is a fundamental Constitutional guarantee.[43] It is argued that as a fundamental right, the right of privacy, including the right to procreative choice,[44] empowers individuals to use alternative methods of reproduction in their pursuit of this right.[45] Whether or not the right to procreative choice actually extends to the use of a surrogate remains at issue.

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37. U.S. CONST. amend. XIV, § 1. The 14th amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

38. The Constitutional right of privacy is an implied right under the U.S. Constitution. U.S. CONST. amend. XIV, § 1. However, the right of privacy under the California Constitution is an express right. CAL. CONST. of 1879, art. I, § 1 (1974): "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (emphasis added).

39. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965); American Academy of Pediatrics v. Van De Kamp, 214 Cal. App. 3d 831, 836, 263 Cal. Rptr. 46, 47 (1989); Committee to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 262, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981).

40. *See infra* notes 182-87 and accompanying text.

41. Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

42. 381 U.S. 479 (1965).

43. *Id.* at 485.

44. *See supra* note 39.

45. *See supra* note 39.

In *Eisenstadt v. Baird*,[46] the Supreme Court expanded this right of procreative choice by upholding a single person's right to use contraceptives, as guaranteed by the equal protection clause of the Fourteenth Amendment.[47] Proponents of surrogacy claim that equal protection guarantees prohibit arbitrarily drawn distinctions between persons who are similarly situated,[48] and therefore a man is being denied equal protection when he is prohibited from reproducing through a surrogacy arrangement.[49] Since couples are allowed to have the biological child of the woman through artificial insemination if the man is sterile, banning surrogacy would prohibit couples from having the biological child of the man when the woman is infertile.[50] Opponents contend, however, that due to the differences in the nature and extent of the responsibility involved, the state may distinguish between surrogacy and artificial insemination.[51]

Legislation recently introduced in California[52] seeks to provide guidance to the judiciary in resolving surrogacy disputes. This bill provides that contracts which attempt to establish parent and child relationships are void as a matter of public policy.[53] For third-party assisted childbearing,[54] parent and child relationships are to be governed by an amendment to the Civil Code.[55]

The amended statute would require that all parties be informed, orally and in writing, of the legal effect of the statute and must consent in writing.[56] This writing would indicate the

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46. 405 U.S. 438 (1972).

47. *See supra* note 37.

48. FIELD, *supra* note 1, at 47.

49. *Id.*

50. *Id.* This argument addresses the use of artificial insemination by donor (AID), rather than artificial insemination by husband (AIH).

51. *Id.* at 48.

52. S.B. 937 (introduced by Senator Watson, March 1991).

53. S.B. 937, § 2.

54. The term "third-party assisted childbearing" describes arrangements in which a third party is utilized to assist in childbearing. The methods encompassed in the statute include the donation of sperm, the donation of ovum, or the donation of gestational abilities. *Id.* at § 1(a).

55. S.B. 937, § 3.

56. CAL. CIV. CODE § 7005 would be amended to read in pertinent part:

> (f) The consent of all parties is required in all cases of third-party assisted childbearing pursuant to this section, and at least 30 days prior to an attempt to conceive a child, the hus-

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specific intent of the parties regarding custody of a child conceived through third-party assisted childbearing.[57]

By providing that contracts attempting to establish parent and child relationships are void as a matter of public policy, the statute deems that surrender of a child cannot be controlled exclusively by the terms of the contract. Nevertheless, the written consent reflecting the specific intent of the parties attempts to accomplish the same result of awarding custody to the intended parents. Presumably factors other than the intent evidenced in the writing would be considered by the court in determining custody.

Until legislation is enacted which establishes the rights of the parties to a surrogacy agreement, current law in California does not adequately address such arrangements. Only case law provides guidance in resolving certain surrogacy agreements.

B. State Legislative Activity Nationwide

As California seeks a solution to the surrogacy controversy, other states have addressed surrogacy legislatively and provide insight into the options available.

Numerous state legislatures have introduced or enacted surrogacy legislation in recent years.[58] During the legislative ses-

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> band and wife and the third party providing either semen, ovum, or gestational abilities, shall be informed, orally and in writing, of the legal effect of this section upon the parent and child relationships involved, and shall consent in writing, indicating, among other things, all of the following:
>
> (1) The specific intent of the parties regarding who shall have custody of the child thereby conceived.
>
> (2) The knowledge of the parties of the legal effect of this section upon the parent and child relationships created by their participation in third-party assisted childbearing.

(Presumably an attorney would inform the parties of the legal effect of the statute, although the proposed statutory amendment does not recommend the use of independent counsel for the third party donating sperm, ovum or gestational abilities).

57. *Id.*

58. The breakdown of state bill introductions on surrogate parenting contracts for 1987-1989 is as follows: 72 bills in 1987; 70 bills in 1988; and 63 bills in 1989. Only eleven states had no legislative activity during these years, which indicates the increasing attention being given to surrogacy throughout the states. State Legis. Rep., *supra* note 3, at 10.

sions of 1987 through 1989, twelve states enacted legislation dealing with surrogate parenting contracts.[59] In 1990, only one state enacted surrogacy legislation.[60]

The legislation ranges from unenforceability of surrogate parenting agreements with criminal penalties for any violations[61] to legal enforceability of the practice.[62] While a number of states permit surrogate arrangements without imposing criminal sanctions, these states provide that ultimately the contracts are void and unenforceable if a dispute arises among the parties.[63]

Only one state, Arkansas, provides that a child born of a surrogate arrangement is legally the child of the party contracting with the surrogate mother.[64] However, because the Arkansas statute does not address the commercial aspects of a surrogate parenting agreement, one must look to the state's child selling statutes and adoption laws to determine if commercial surrogate parenting agreements are legally enforceable.[65] Other than the costs of medical and legal expenses, paying a fee to the biological mother for her consent to adoption is prohibited by the child selling statutes.[66] Thus commercial surrogacy appears

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59. ARIZ. REV. STAT. ANN. § 25-218 (Supp. 1990); ARK. STAT. ANN. § 9-10-201 (1991); FLA. STAT. § 63.212 (1985 & Supp. 1991); IND. CODE ANN. §§ 31-8-1-3 to -2-3 (West Supp. 1990); KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1982 & Supp. 1990); LA. REV. STAT. ANN. § 9:2713 (West Supp. 1991); MICH. COMP. LAWS ANN. §§ 722.851 to .861 (West Supp. 1990); NEB. REV. STAT. § 25-21,200 (1989); NEV. REV. STAT. ANN. § 127.287 (Michie Supp. 1989); N.D. CENT. CODE §§ 14-18-01 to -07 (Supp. 1989); UTAH CODE ANN. § 76-7-204 (1990); WASH. REV. CODE §§ 26.26.210 to .260 (Supp. 1991).

60. N.H. REV. STAT. ANN. § 168-B (Supp. 1990).

61. KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1982 & Supp. 1990); MICH. COMP. LAWS §§ 722.851 to .861 (West Supp. 1990); UTAH CODE ANN. § 76-7-204 (1990); WASH. REV. CODE §§ 26.26.210 to .260 (Supp. 1991); N.H. REV. STAT. ANN. § 168-B (Supp. 1990).

62. ARK. STAT. ANN. § 9-10-201 (1991).

63. IND. CODE ANN. §§ 31-8-1-3 to -2-3 (West Supp. 1990); LA. REV. STAT. ANN. § 9:2713 (West Supp. 1991); NEB. REV. STAT. § 25-21,200 (1989); N.D. CENT. CODE §§ 14-18-01 to -07 (Supp. 1989).

64. ARK. STAT. ANN. § 9-10-201(b) (1991) states in pertinent part:

> [I]n the case of a surrogate mother . . . the child shall be that of: (1) the biological father and the woman intended to be the mother if the biological father is married; or (2) the biological father only if unmarried; or (3) the woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

65. STATE LEGIS. REP., *supra* note 3, at 1.

66. ARK. STAT. ANN. § 9-9-206(c) (1991) provides: "Under no circumstances may a parent or guardian of a minor receive a fee, compensation, or any other thing of value as

contrary to the child selling statutes in Arkansas.[67]

Nevada's legislation on adoption includes a subsection relating to surrogacy, but it is not clear if a surrogate parenting contract ultimately will be upheld.[68] The courts have not yet determined if the adoption law is in conflict with Nevada's child selling statutes. Thus it is unknown whether or not such contracts can be enforced.

In Florida, the statute permits individuals to enter into preplanned adoption arrangements, but only permits payment of related and reasonable legal, medical, psychiatric and living expenses of the volunteer mother.[69]

The first state to adopt the Uniform Status of Children of Assisted Conception Act[70] is North Dakota.[71] Any contract wherein a woman agrees to relinquish her rights and duties as a parent of a child conceived through assisted conception is void, in which case the surrogate is legally the mother of a resulting child.[72] Although most states that have enacted surrogacy legis-

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a consideration for the relinquishment of a minor for adoption . . . ."

67. To date there have been no legal disputes over surrogacy contracts in the Arkansas courts. It therefore is not yet known if a court will hold such a contact enforceable, especially in light of the child selling statutes.

68. NEV. REV. STAT. ANN. § 127.287(5) (Michie Supp. 1989) provides that "[t]he provisions of this section do not apply if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man who is not her husband."

69. FLA. STAT. § 63.212 (1985 & Supp. 1991). Payments to brokers as a finder's fee are also prohibited. The preplanned adoption agreement must include numerous provisions, including a right of rescission by the volunteer mother any time within seven days after the birth of the child. Finally, a violator of a statutory provision is guilty of a felony of the third degree, which carries penalties up to $5,000 and/or imprisonment up to five years. *Id.*

70. This Act was drafted by the National Conference of Commissioners on Uniform State Laws. North Dakota adopted "Alternative B" of the Uniform Act. STATE LEGIS. REP., *supra* note 3, at 4.

71. N.D. CENT. CODE §§ 14-18-01 to -07 (Supp. 1989). N.D. CENT. CODE § 14-18-05 (Supp. 1989) pertains to surrogate agreements:

> Any agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-17.

72. *Id.* The North Dakota child selling statute specifically excludes surrogate

lation appear to permit voluntary surrogacy as opposed to paid surrogacy, Arizona makes all surrogate parenting contracts illegal.[73]

Indiana,[74] Louisiana[75] and Nebraska[76] declare surrogate

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mother contracts. N.D. CENT. CODE § 12.1-31-05 (Supp. 1989). Thus while payment to the surrogate is not specifically prohibited, a surrogate parenting contract cannot be enforced if there is a dispute between the parties.

73. ARIZ. REV. STAT. ANN. § 25-218 (Supp. 1990) states:

> A. No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.
> B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.
> C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.
> D. For the purposes of this section, 'surrogate parentage contract' means a contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child.

(This statute does not appear to distinguish between paid and voluntary surrogacy arrangements).

74. IND. CODE ANN. §§ 31-8-1-3 to -2-3 (West Supp. 1990). IND. CODE ANN. § 31-8-2-1 (West Supp. 1990) declares that:

> [I]t is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:
> (1) Provide a gamete to conceive a child.
> (2) Become pregnant.
> (3) Consent to undergo or undergo an abortion.
> (4) Undergo medical or psychological treatment or examination.
> (5) Use a substance or engage in activity only in accordance with the demands of another person.
> (6) Waive parental rights or duties to a child.
> (7) Terminate care, custody, or control of a child.
> (8) Consent to a stepparent adoption under IC 31-3-1.

Additionally, IND. CODE ANN. § 31-8-2-2 (West Supp. 1990) provides that such a surrogate agreement is void. This statute does not appear to distinguish between voluntary and paid surrogacy arrangements.

75. LA. REV. STAT. ANN. § 9:2713(A) (West Supp. 1991) states that "A contract for surrogate motherhood . . . shall be absolutely null and shall be void and unenforceable as contrary to public policy." However, there are no penalties for violations of the statute.

76. NEB. REV. STAT. § 25-21,200 (1989) provides:

> (1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

parenting contracts to be against public policy and therefore void and unenforceable. Such statutes do not penalize those participating in surrogate parenting agreements, but nevertheless alert the parties that these contracts are unenforceable should a dispute arise as to custody of the child. As a result, individuals in these states are deterred from entering into surrogacy agreements initially.

The final category of surrogate parenting statutes imposes criminal sanctions against anyone involved in a commercial surrogate parenting agreement.[77] Within this group of statutes, however, the criminal classifications range from a misdemeanor to a felony with a penalty of up to $50,000 and/or imprisonment. Utah,[78] Washington,[79] Kentucky[80] and Michigan[81] prohibit com-

> (2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

This statute defines such a contract as one in which the surrogate mother is to be compensated and does not address voluntary surrogacy.

77. KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1982 & Supp. 1990); MICH. COMP. LAWS §§ 722.851 to .861 (West Supp. 1990); UTAH CODE ANN. § 76-7-204 (1990); WASH. REV. CODE §§ 26.26.210 to .260 (Supp. 1991); N.H. REV. STAT. ANN. § 168-B (Supp. 1990).

78. UTAH CODE ANN. § 76-7-204 (1990). The statute declares that:

> (1)(a) No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.
> (b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1).
> (c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.
> (d) A violation of this subsection is a class A misdemeanor.

Although there are no penalties for entering into a voluntary agreement, it is nevertheless unenforceable. UTAH CODE ANN. § 76-7-204(2) (1990). Finally, if a custody dispute arises under either of the above sections, the court is not bound by the contract terms, but is to make its custody decision based solely on the best interests of the child. UTAH CODE ANN. § 76-7-204(3)(b) (1990).

79. WASH. REV. CODE §§ 26.26.210 to .260 (Supp. 1991). WASH. REV. CODE § 26.26.240 (Supp. 1991) declares that: "A surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy." Additionally, WASH. REV. CODE § 26.26.250 (Supp. 1991) provides: "Any person, organization, or agency who intentionally violates any provision . . . shall be guilty of a gross misdemeanor." If a custody dispute arises between the parties, the party having physical custody of the child may retain physical custody until the court orders otherwise, and

mercial surrogate parenting agreements by declaring them void and unenforceable, and provide for criminal penalties of fines and/or imprisonment. New Hampshire allows and regulates surrogacy agreements, but one is guilty of a misdemeanor if compensation other than reasonable and related medical, legal, psychological and living expenses is involved.[82]

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the court will award legal custody of the child based on factors weighing the best interests of the child pursuant to the Washington child custody statutes. WASH. REV. CODE § 26.26.260 (Supp. 1991).

80. KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1982 & Supp. 1990). This statute provides in pertinent part:

> (3) No person, agency, institution, or intermediary shall be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. No person, agency, institution or intermediary shall receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void.

In a separate statute, penalties are set for providing compensation to a surrogate mother or for acting as a broker between the parties to a surrogacy arrangement. A violation of this provision results in a fine of $500 to $2,000 or imprisonment for not more than six months, or both. KY. REV. STAT. ANN. § 199.990(2) (Michie/Bobbs-Merrill 1982 & Supp. 1990).

81. MICH. COMP. LAWS §§ 722.851 to .863 (West Supp. 1990). MICH. COMP. LAWS § 722.855 (West Supp. 1990) provides: "A surrogate parentage contract is void and unenforceable as contrary to public policy." Furthermore, any person who enters into or arranges a surrogate parentage contract for compensation is guilty of a crime. A participating party is guilty of a misdemeanor punishable by a fine up to $10,000 or imprisonment for not more than one year, or both. MICH. COMP. LAWS § 722.859(2). However, anyone other than a participating party who assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of up to $50,000 or imprisonment for not more than five years, or both. MICH. COMP. LAWS § 722.859(3). If a dispute arises concerning custody of the child, the party having physical custody may retain physical custody until the circuit court orders otherwise. This court will then award legal custody of the child based on a best interest determination. MICH. COMP. LAWS § 722.861.

82. N.H. REV. STAT. ANN. § 168-B (Supp. 1990). N.H. REV. STAT. ANN. § 168-B:16 (Supp. 1990) provides in relevant part:

> I. A surrogate arrangement is lawful only if it conforms to the requirements of this subdivision, and if, before the procedure to impregnate the surrogate:
> (a) The health care provider performing the procedure receives written certification that the parties successfully completed the medical and nonmedical evaluations and counseling . . . .
> (b) The surrogate arrangement has been judicially preauthorized . . . .
> (c) All parties to the surrogacy contract provide the health care provider performing the procedure with written indica-

While the states legislating surrogacy are few in number, they indicate the growing desire of legislatures to enact laws relating specifically to surrogacy. Application of adoption laws to surrogacy does not adequately take into consideration the differences in the two arrangements. Agreements involving new reproductive technologies and third-party assistance in childbearing take place prior to conception, while adoption is a subsequent change in the parental status of the parties after the birth of a child.

Legislatures have several options. One choice is to prohibit surrogacy entirely and provide for criminal sanctions. However, criminalization of surrogate parenting agreements may have the unfortunate result of either driving the practice underground or encouraging prospective parents to relocate to states permitting surrogate parent agreements.

Another option is to provide for regulation of the practice. The state can ensure that the parties to surrogate parenting agreements are adequately counseled and informed prior to entering into the agreements. All parties will enter the agreements with full knowledge of their rights and responsibilities. Furthermore, if the agencies which arrange surrogate agreements are required to follow specified procedures, abuses of the process may be less likely to occur.

Although a relatively small number of states have enacted surrogacy legislation during the last several years, many more have introduced such legislation or have established study commissions to examine the issue. Rather than leave the process of enacting surrogacy legislation to individual states, several legislators advocate national legislation on this controversial subject.

> tion of their informed consent to the arrangement . . . .
> IV. No person or entity shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, any party or parties to enter into a surrogacy arrangement.

Additionally, mandatory terms for a surrogacy contract are set forth, including a provision that the surrogate has 72 hours after the birth of the child to decide to keep it. N.H. REV. STAT. ANN. § 168-B:25 (Supp. 1990).

C. Proposed Federal Legislation

Whether or not surrogate parenting agreements should be legislated by Congress or by the individual state legislatures is another issue in the surrogacy debate. While state legislatures continue to examine or enact new legislation concerning surrogacy, several bills to prohibit surrogacy have been introduced in Congress.[83]

One of the more recent bills on surrogacy introduced in Congress[84] would make it a crime to enter into or act as an intermediary in a commercial surrogacy arrangement.[85] Furthermore, anyone who advertises the availability of a surrogate arrangement is also subject to criminal sanctions.[86] Although such legislation bans commercial surrogacy, it does not address private, voluntary surrogacy arrangements.[87] The enforceability of such agreements would be left to resolution by the judiciary.[88]

Another recently introduced bill[89] also concerns commercial surrogate arrangements. This bill essentially provides that such an agreement may not be enforced and prohibits brokering a commercialized childbearing agreement.[90]

Those advocating federal legislation of surrogate parenting agreements believe that if left to the individual State legislatures, it will take years before a regulated or banned form of surrogacy is enacted by all the state legislatures.[91] Different laws in different states on this volatile issue may create further problems if infertile couples should decide to change residency

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83. H.R. 275, 101st Cong., 1st Sess. (1989); H.R. 1188, 101st Cong., 1st Sess. (1989); H.R. 2433, 100th Cong., 1st Sess. (1987). To date no new federal surrogacy legislation has been introduced in Congress.

84. H.R. 275, 101st Cong., 1st Sess. (1989).

85. *Id.* at 2.

86. *Id.* at 2-3.

87. *Id.*

88. One commentator exposes the anomaly of a law which declares as void and unenforceable a paid surrogacy agreement while at the same time a voluntary surrogacy agreement is enforceable. Field, *supra* note 1, at 23.

89. H.R. 1188, 101st Cong., 1st Sess. (1989).

90. *Id.* at 2-3.

91. *Surrogacy Arrangements Act of 1987: Hearings on H.R. 2433 Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987).

solely to hire a surrogate in a state which permits commercialized childbearing. Interstate conflicts over this issue could erupt periodically as a result of geographically diverse laws.[92]

Legislation is needed to provide the judiciary with guidance in deciding surrogacy cases. Advocates of federal legislation wish to avoid uncertainties through the enactment of federal surrogacy laws. However, such legislation definitely lies within the realm of state legislatures.[93] Each state legislature can explore the issues surrounding surrogacy independently and implement laws reflecting its decided public policy. What is agreed upon is that legislation needs to be enacted.

II. SURROGACY CASES

A surprisingly small number of surrogacy cases have gone to trial.[94] However, these illuminate the issues central to the surrogacy controversy.

A. Traditional Surrogacy Cases

By prohibiting the exchange of money in an adoption and similar proceedings, the Michigan Court of Appeals in *Doe v. Kelley*[95] denied a couple's claim that certain statutory provisions were unconstitutional. While the court recognized that the decision to bear or beget a child is a fundamental interest protected

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92. *See* Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 Wis. L. Rev. 399 (analyzing four hypothetical fact situations involving two different jurisdictions; and discussing the means by which a restrictive state can deter the out-of-state conduct of those attempting to avoid local law).

93. *Surrogacy Arrangements Act of 1987: Hearings on H.R. 2433 Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987). Family law matters such as adoption have traditionally been matters of State concern and the states can adopt laws suited to their own needs (statement of Bob Whittacker, member, Subcomm. on Transp., Tourism, and Hazardous Materials).

94. There have been less than five cases in California during the past ten years involving surrogate parenting arrangements, while the number of reported cases discovered in the United States is approximately ten. Using these estimates, approximately .01% of California surrogacy arrangements and .0025% of all cases nationwide resulted in a legal dispute. Minority Report, *supra* note 2, at M10.

95. 106 Mich. App. 169, 307 N.W.2d 438 (1981), *leave to appeal denied*, 414 Mich. 875 (1982), *cert. denied*, 459 U.S. 1183 (1983).

by the right of privacy,[96] that right is not a valid prohibition to state interference in such an agreement.[97] The statute[98] at issue prohibits payment in conjunction with use of adoption procedures,[99] although it does not directly prohibit the couple from having the child as planned.[100]

In *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong*,[101] the Supreme Court of Kentucky determined that a surrogate parenting procedure was not prohibited by then current law. Although an amended statute[102] prohibited the purchase of a child for adoption or any other purpose, including termination of parental rights,[103] the court held it did not apply to the surrogate parenting procedure because the agreement was entered into prior to conception.[104] However, a surrogate parenting agreement in Kentucky at that time was determined to be voidable by the surrogate, pursuant to the termination of parental rights statute[105] and the consent to adoption

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96. *Id.* at 173, 307 N.W.2d at 441.

97. *Id.*

98. MICH. COMP. LAWS § 710.54 (1967) (MICH. STAT. ANN. § 27.3178 (555.54) (Callaghan 1987)) provides:

> (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
> (a) The placing of a child for adoption.
> (b) The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
> (c) A release.
> (d) A consent.
> (e) A petition.

99. *Doe*, 106 Mich. App. at 170-74, 307 N.W.2d at 439, 441.

100. *Id.* at 173-74, 307 N.W.2d at 441.

101. 704 S.W.2d 209 (Ky. 1986).

102. KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill 1982 & Supp. 1990): "No person, agency, institution, or intermediary may sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights . . . ."

103. *Surrogate*, 704 S.W.2d at 211.

104. *Id.* (The court determined that KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1982 & Supp. 1990) was intended to prevent baby brokers from coercing an expectant mother or parents of a child into relinquishing a child through financial inducement).

105. *Id.* at 210. (KY. REV. STAT. ANN. § 199.601(2) (Michie/Bobbs-Merrill 1982 & Supp. 1990) prohibits filing a petition for voluntary termination of parental rights "prior to five (5) days after the birth of a child.")

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statute.[106] Thus, while surrogacy contracts were voidable, they were not deemed illegal.[107] Ultimately the court correctly concluded that this volatile issue of public policy should be resolved by legislation, not by the judiciary.[108] The two dissenting opinions in this case viewed the surrogate parenting procedure at issue as one involving the termination of parental rights in exchange for a monetary consideration, thus being no less than the sale of a child.[109]

The New York Surrogate's Court of Nassau County determined in *Adoption of Baby Girl L.J.*[110] that then current legislation did not expressly prohibit the use or compensation of surrogate mothers under surrogate parenting agreements.[111] Such arrangements were deemed to be voidable, although not void.[112] The court requested that the legislature review the practice of surrogate parenting and the payments involved to determine whether they should be permitted or prohibited through statutory provisions.[113]

In the landmark case of *In re Baby M*,[114] the Supreme Court of New Jersey invalidated surrogacy contracts as being contrary to the law and public policy of the State.[115] Furthermore, it voided both the termination of the surrogate mother's parental rights[116] and the adoption of the child by the biological father's wife.[117]

On the issue of parental rights, the court stated that the purpose and effect of the surrogacy contract was to give the fa-

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106. *Id.* (KY. REV. STAT. ANN. § 199.500(5) (Michie/Bobbs-Merrill 1982 & Supp. 1990) specifies that a "consent to adoption" shall not "be held valid if such consent for adoption is given prior to the fifth day after the birth of the child").

107. *Surrogate*, 704 S.W.2d at 213. *See supra* note 80 and accompanying text (Kentucky law now expressly prohibits commercial surrogate parenting agreements by declaring them void and unenforceable and imposing criminal sanctions for violation of the statutes).

108. *Id.* at 214.

109. *Id.* at 214-15 (Vance, J., dissenting; Wintersheimer, J., dissenting).

110. 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. 1986).

111. *Id.* at 978, 505 N.Y.S.2d at 818.

112. *Id.* at 977, 505 N.Y.S.2d at 817.

113. *Id.* at 978, 505 N.Y.S.2d at 818.

114. 109 N.J. 396, 537 A.2d 1227 (1988).

115. *Id.* at 411, 537 A.2d at 1234.

116. *Id.*

117. *Id.*

ther exclusive right to the child. Therefore the surrogacy agreement violated State policy because natural parents have equal rights concerning the child.[118]

The court also discussed the commercial issues of surrogacy. It expressed the belief that money was being paid to obtain an adoption, and not for the personal services of the surrogate mother.[119]

In *Adoption of Paul*,[120] the New York Family Court in Kings County found that the language of New York's adoption statutes must be controlling to determine the legality of the surrogate parenting agreement at issue.[121] Although numerous surrogacy bills were introduced in the New York Legislature,[122] ranging from complete prohibition to complex regulation, none passed prior to the decision in this case. Consequently, the court looked to current state law governing adoption.[123] Compensation given to the surrogate mother directly for her "services" in conceiving, carrying and giving birth to the child was not permitted.[124]

The court concluded that the surrogate contract provided for the sale of a child, or at least the sale of a mother's right to her child, in direct contravention of the state's laws prohibiting payment for a child.[125] Consequently, such contracts were deemed to be void in the State of New York.[126] The court's agreement to accept the mother's surrender of her child and subsequent termination of parental rights was conditioned upon all parties providing sworn affidavits that no compensation was

118. *Id.* at 435, 537 A.2d at 1247.

119. *Id.* at 424, 537 A.2d at 1241.

120. 146 Misc. 2d 379, 550 N.Y.S.2d 815 (Fam. Ct. 1990).

121. *Id.* at 382, 550 N.Y.S.2d at 817.

122. *Id.*

123. New York's adoption laws prohibit the request, acceptance, receipt, payment, or gift of "any compensation or thing of value, directly or indirectly, in connection with the placing out or adoption of a child or for assisting a parent, relative or guardian of a child in arranging for the placement of the child for the purpose of adoption" by any person other than an authorized agency. N.Y. Soc. Serv. Law § 374(6) (McKinney 1983 & Supp. 1991). *Id.* at 383, 550 N.Y.S.2d at 817.

124. *Id.*

125. *Id.* at 384-85, 550 N.Y.S.2d at 818.

126. *Id.*

to be paid or accepted.[127] The surrender of parental rights had to be truly voluntary and motivated solely by the child's best interests. Only then would the biological father and his wife be permitted to adopt the child.[128]

Interwoven in the arguments presented in the cases are the most central issues of all. These concern the effect of surrogacy on society as a whole, and the effect specifically on our view of women and children within society. Proponents of surrogacy contend that it is a service, not a child, which is being provided and compensated. Most surrogacy contracts state that consideration is for the services performed by the surrogate. This wording is designed to prevent application of state adoption laws, which prohibit payment for a child.

Proponents of surrogacy contend that a surrogate voluntarily enters into such a contract and should therefore be subject to its enforcement.[129] However, opponents argue that it is questionable whether or not the decision to become a surrogate mother is actually "voluntary."[130] Generally the fee paid to a surrogate mother is $10,000.[131] To a woman who is economically disadvantaged, this standard fee may be a sufficient inducement to enter into such an agreement. Some have expressed concern that eventually women from third world countries will be hired as cheap labor to bear children for couples in the United States.[132] Regulation providing for a complete evaluation of potential surrogates, including their motives and financial stability, should be required to ensure that the risk of exploitation is minimal. However, only those with substantial financial resources will be able to pursue this method of alternative reproduction, while the poor in society will remain at a disadvantage in their attempts to overcome infertility. As evidenced by the surrogacy cases and the underlying controversial issues, legislation is necessary to determine the legality of surrogate parenting

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127. *Id.* at 385, 550 N.Y.S.2d at 819.

128. *Id.*

129. *See* Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1954 (1986) [hereinafter *Inalienable Rights*].

130. SHANNON, *supra* note 17, at 49-65 (discussing coercive aspects of the new reproductive technologies and the possibility that the financial gain may be "inducement, perhaps undue, but not essentially coercive"). *Id.* at 65.

131. STATE LEGIS. REP., *supra* note 3, at 1.

132. G. COREA, THE MOTHER MACHINE 274 (1985).

agreements.

B. Gestational Surrogacy Case

The cases discussed thus far all involve traditional surrogacy.[133] In California, a gestational surrogate mother[134] and the genetic father and mother each brought suit to establish legal parenthood in *Johnson v. Calvert*.[135] This case is one of first impression for both California and the nation.

1. *Factual Background*

During the fall and winter of 1989-1990, Anna Johnson and a married couple, Mark and Crispina Calvert, met and discussed entering into an agreement whereby Johnson would serve as a gestational surrogate and carry the Calvert's fertilized embryo[136] to term.[137] The agreement provided for a payment of $10,000 to Johnson and stated that she would claim no interest in the child.[138] On January 15, 1990, Anna Johnson signed an agreement with Crispina and Mark Calvert, which provided that upon the child's birth Johnson would relinquish the child to the Calverts and would make no claim for parental rights.[139]

On January 19, 1990, a fertilized embryo of the Calverts was implanted in Johnson.[140] She delivered a baby boy on Septem-

133. *See supra* note 1 (discussing traditional and gestational surrogacy).

134. *Id.*

135. Nos. X-633190, AD-57638 (Orange County Super. Ct., Decided Oct. 22, 1990), *appeal filed*, No. G010225 (Cal. Ct. App. March 15, 1991). (Johnson filed a complaint, dated August 13, 1990, for declaratory relief in superior court for a determination that she was the biological mother of the child, should be given custody of the child and be awarded damages for breach of contract and misrepresentation. The Calverts brought suit seeking a declaration that they were the legal parents. The cases were consolidated). *See* L.A. Daily Journal, Sept. 27, 1990, at 1, col. 4; TIME MAGAZINE, Aug. 27, 1990, at 53.

136. The procedure in this case involved an *in vitro* fertilization embryo transfer, in which the Calverts' egg and sperm were fertilized *in vitro* and subsequently implanted in Johnson for gestation. The National Law Journal, Nov. 5, 1990, at 3, col. 3. Crispina Calvert had had a hysterectomy and thus was unable to carry a child.

137. Johnson v. Calvert, No. X633190 (Orange County Super. Ct. Oct. 22, 1990), Reporter's Transcript, Statement of Decision, at 1481.

138. *Id.* at 1481-82.

139. *Id.* at 1482.

140. *Id.*

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ber 19, 1990.[141] Chemical tests performed on all the parties and the child demonstrated that Johnson had no genetic relationship to the child, and that there was a 99.999 percent probability that the Calverts were the genetic parents of the child.[142]

After the birth of the child, an initial award of temporary custody was given to the Calverts and Johnson had visitation rights pending resolution of the controversy.[143]

2. *The Trial Court Decision*

Judge Richard N. Parslow, Jr. found beyond a reasonable doubt that Crispina and Mark Calvert were the genetic, biological and natural parents of the child.[144]

The most significant finding of Judge Parslow was that although Johnson made a substantial contribution to the child, a surrogate carrying the genetic child[145] of a couple does not acquire parental rights.[146] He based his finding of no parental rights for Johnson on two approaches: That there are no parental rights in an *in vitro* fertilization case in which the surrogate is not genetically related to the child; and that even if there were parental rights, in this case they were relinquished in the contract by the gestational carrier.[147] He viewed Johnson's relationship to the child as analogous to that of a foster parent who cares for a child during the period of time when the child's natural mother is unable to do so.[148] Therefore, upon the birth of the child, Crispina Calvert was able to assume the care of the child.[149]

Secondly, Judge Parslow viewed gestational surrogacy contracts in the *in vitro* fertilization cases as neither void nor against public policy.[150] The contract was entered into by the

141. *Id.*
142. *Id.*
143. L.A. Daily Journal, Nov. 1, 1990, at 5, col. 1.
144. *Johnson*, at 1482-83.
145. *See supra* note 136.
146. *Johnson*, at 1485.
147. *Id.* at 1487-88.
148. *Id.* at 1483.
149. *Id.* at 1484-85.
150. *Id.* at 1489.

parties before implantation of the embryo and had a provision concerning relinquishment.[151] The trial court judge believed this provision was enforceable by either specific performance or arguably even by habeas corpus.[152] He alluded to earlier case law on procreative rights, but stated that the procreative rights involved in gestational surrogacy concern the right of the genetic mother, not the procreative right of the gestational mother.[153]

Judge Parslow relied heavily on the testimony of one of the defendants' expert witnesses.[154] The expert testified that there is no clear evidence of emotional bonding between the child and the mother in the uterine environment.[155] Furthermore, this expert testified that psychologically there is less likelihood for the person carrying the child to bond with the child, since the original plan is that the child is the genetic child of another couple and will be raised by them exclusively.[156]

Finally, the trial court judge determined that a finding of three natural parents would not be in the best interests of the child.[157] The judge found that this would be true in any *in vitro* fertilization case.[158] He discussed public policy problems if the child had three natural parents, such as bitter, protracted custody disputes.[159] He also commented on the confusion which a three-parent arrangement would create for a child.[160]

The judge made a number of recommendations to the state legislature.[161] First, he suggested that intensive psychological evaluation of the parties should be conducted, arguably by an

151. *Id.*

152. *Id.*

153. *Id.* at 1493-94.

154. *Id.* at 1487. Dr. Call testified regarding bonding between the child and the mother during gestation.

155. *Id.* The judge conceded that "[T]here may be and usually is and often is a bonding between a person carrying the child and the child. That's not universal, but it does happen." *Id.*

156. *Id.* at 1490. *But see* M. KLAUS, MATERNAL-INFANT BONDING, at 45 (1976) (arguing there is evidence that women begin to feel attached to the child during pregnancy). He states that "[s]ignificant affectional bonding had been established by the time of or soon after the birth of the child." *Id.* at 46.

157. *Johnson*, at 1492.

158. *Id.*

159. *Id.* at 1488.

160. *Id.* at 1492.

161. *Id.* at 1494-97.

independent agency.[162] Second, he would require that the genetic mother be unable medically to carry a child to term.[163] Third, that it should be completely clear prior to implantation for *in vitro* fertilization cases that all the parties understand that the child will go to the genetic parents immediately after birth, and that the surrogate will have no parental rights.[164] Fourth, the surrogate should have previously carried at least one child to term, to assist the surrogate in the decision-making process.[165]

Judge Parslow saw no problem with a surrogate receiving a fee, payment being for the pain and suffering involved with carrying a child to term.[166] He stated that a baby is not being sold, only the pain and suffering that goes with carrying a child to term is being compensated.[167]

3. *Analysis of Johnson v. Calvert*

As the first legal custody case involving gestational surrogacy, *Johnson v. Calvert* raises additional issues not previously addressed in traditional surrogacy cases. It also illustrates the need for legislation in California encompassing all potential third-party assisted childbearing methods.[168] Since Judge Parslow's decision specifically addressed gestational surrogacy,[169] it may prove to have insubstantial persuasive value for future traditional surrogacy cases.[170]

The superior court decision awarding sole legal and physical custody of the child to the Calverts was based upon three cen-

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162. *Id.* at 1494.

163. *Id.* at 1495. This would be to ensure that women able to carry a child, but not wishing to interrupt career plans or to endure pregnancy, would not be able to enter into a surrogacy arrangement.

164. *Id.*

165. *Id.* at 1497. (This recommendation for legislation is without validity, since an equal protection argument can be raised and it does not acknowledge a childless woman's ability to make a decision regarding surrogacy).

166. *Id.* at 1499.

167. *Id.*

168. *See supra* notes 52-57 and accompanying text (discussing S.B. 937 introduced by Senator Watson, which attempts to include all potential third-party assisted childbearing methods).

169. *Johnson,* at 1492.

170. *See supra* notes 95-128 and accompanying text.

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tral findings[171] that require analysis.

a. *Parental Rights of the Parties*

Judge Parslow determined that a surrogate carrying the genetic child of a couple does not acquire parental rights.[172] He essentially established that genetic contribution should be given priority over gestational contribution.[173] Until recent history, genetic connection was the sole means of determining natural biological parenthood.[174] That the gestational relationship in *Johnson* was not given legal recognition[175] is therefore not surprising.

However, one can argue that the gestational carrier is also a natural parent.[176] During pregnancy, there is a unique physiological relationship between the fetus and the gestational mother.[177]

171. First, that a surrogate carrying the genetic child of a couple does not acquire parental rights; second, gestational surrogacy contracts are not void nor against public policy and Anna Johnson relinquished her parental rights when she executed such a contract; and third, it is in the best interests of the child not to have three natural parents. *Johnson*, at 1485-92.

172. *Id.* at 1485. *See* Brief of Amicus Curiae, American Civil Liberties Union of Southern California, at 8-10, Johnson v. Calvert (Orange County Super. Ct., Decided Oct. 22, 1990) (No. X633190) [hereinafter ACLU Brief] (citing Lehr v. Robertson, 463 U.S. 248, 258-62 (1983) for the proposition that in determining parental rights, biological connection is not the exclusive factor). ACLU Brief, at 8.

173. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (the Court recognized that the private interest of a man in the children he has sired and raised warrants protection). *Id.* at 651. (Quoting Meyers v. Nebraska, 262 U.S. 390, 399 (1923), the court in *Stanley* stated that the "rights to conceive and to raise one's children have been deemed essential"). *Id.*

174. In some instances genetics is deemed not to establish parental rights. CAL. CIV. CODE § 7005(b) (West 1988) provides: "[T]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." *See* ACLU Brief, *supra* note 172, at 8 & n.3.

175. *Johnson*, at 1485.

176. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 332 [hereinafter *Intent-Based Parenthood*](arguing that "[t]here is no persuasive basis for a categorical preference for either a gestational contributor or a genetic contributor to receive exclusive recognition as 'mother' "). *See also Inalienable Rights, supra* note 129, at 1951-52 (a gestational carrier would have a strong claim as a biological mother); Annas, *Redefining Parenthood and Protecting Embryos: Why We Need New Laws*, THE HASTINGS CENTER REPORT, Oct. 1984, at 50 (arguing that the legal presumption that the gestational mother is the legal mother should remain, thus recognizing "the biological fact that the gestational mother has contributed more of herself to the child than the genetic mother"). *Id.* at 51.

177. M. YOUNG, IMMUNOLOGY OF PREGNANCY AND ITS DISORDERS (1989). ("The environment of the fetus is a reflection of maternal health and nutrition.") *Id.* at 23. *See* M. ADINOLFI, IMMUNOLOGY OF PREGNANCY AND ITS DISORDERS (1989). *See also* ACLU Brief,

Nevertheless, Judge Parslow ruled that only a genetic connection warrants legal recognition in gestational surrogacy.[178]

b. *Enforceability of Gestational Surrogacy Contracts*

Superior Court Judge Richard Parslow further found that even if there were parental rights, they were previously relinquished by the gestational carrier pursuant to the surrogacy contract.[179] He determined that gestational contracts in the *in vitro* fertilization cases are neither void nor against public policy.[180] He alluded to constitutional rights that would be infringed upon if all surrogacy contracts were declared illegal.[181]

Proponents of surrogacy assert that fundamental rights protected by both the federal Constitution and the California Constitution support the right to enter into surrogacy arrangements. Most notably, the right of privacy is expressly guaranteed by the California Constitution,[182] and includes a right of procreative choice.[183]

Since the California Constitution expressly recognizes a right to privacy, it is considered broader than the federal right to privacy[184] and has been interpreted as a document of independent force.[185] The United States Supreme Court and the Cal-

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supra note 172, at 9.

178. Judge Parslow conceded that Anna Johnson had made a "substantial contribution" to the child, but her role as the gestational carrier was insufficient to warrant recognition as a natural parent. *Johnson*, at 1485.

179. *Id.* at 1487-88.

180. *Id.* at 1489.

181. *Id.* at 1493.

182. *See supra* note 38. The right to privacy is only implied by the 14th Amendment to the United States Constitution. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

183. Committee to Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981). ("The fundamental right at issue is the right to private procreative choice free from governmental interference.") *Id.* at 288, 625 P.2d at 801, 172 Cal. Rptr. at 888; People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (first recognizing the Constitutional right of procreative choice in California); American Academy of Pediatrics v. Van De Kamp, 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (1989).

184. American Academy of Pediatrics v. Van De Kamp, 214 Cal. App. 3d at 839, 263 Cal. Rptr. at 49.

185. *Id.* The court in *American Academy of Pediatrics* stated that "[t]he California Supreme Court recognized its authority 'to construe the California Constitution to provide protection beyond that afforded by parallel provisions of the federal document.'" *Id.* at 841, 263 Cal. Rptr. at 50 (quoting People v. Teresinski, 30 Cal. 3d 822, 827, 640

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ifornia Supreme Court have repeatedly acknowledged a right of privacy or liberty in matters related to marriage and family.[186] Additionally, the fundamental right of parenting has been recognized by the California courts, and is only disturbed in extreme cases of neglect or abandonment.[187]

The constitutionally protected freedom of association[188] also supports the right of persons to enter into surrogacy arrangements. The relationships entitled to this constitutional protection are those concerning the creation and sustenance of a family.[189] Thus the fundamental right of intimate association has been recognized by the Court as encompassing the right to make procreative choices.[190]

These constitutionally recognized rights support the proposition that individuals should be free to enter into surrogacy arrangements. Yet whether a surrogacy contract should be enforced or considered void as against public policy requires further analysis.

In upholding the surrogacy contract in *Johnson*,[191] Judge Parslow emphasized that it contained a provision regarding relinquishment, and that the agreement was entered into before the embryo was implanted.[192] He also pointed out that Anna Johnson knew she had to give the child to the Calverts upon its

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P.2d 753, 755, 180 Cal. Rptr. 617, 619 (1982)).

186. Griswold v. Connecticut, 381 U.S. 479, 485, 486, 500 (1965); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942); People v. Belous, 71 Cal. 2d 954, 963, 458 P. 2d 194, 199, 80 Cal. Rptr. 354, 359 (1969).

187. In re Carmaleta B., 21 Cal. 3d 482, 489, 579 P. 2d 514, 518, 146 Cal. Rptr. 623, 627 (1978).

188. Roberts v. United States Jaycees, 468 U.S. 609, 617-20 (1983). The Court stated:

> [T]he Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Id. at 617-18.

189. *Id.* at 619.

190. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (childbirth). *See* ACLU Brief, *supra* note 172, at 5-6.

191. *Johnson*, at 1489.

192. *Id.*

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birth,[193] and that this was in accord with the expectations of the parties to the agreement.[194]

At the time of signing the surrogacy agreement, all the parties to the contract intended that the Calverts would have exclusive custody of the child upon its birth.[195] A custody determination based upon the intent of the parties[196] is one method of both resolving disputes involving third-party assisted childbearing and of legislating surrogacy.[197]

Opponents of surrogacy contend that the state has a compelling interest against enforcement of commercial surrogacy agreements.[198] Claims of commodification and exploitation arise. Underlying the commodification argument is the fear that children and surrogate mothers will be viewed as a means to another's end.[199] Yet permitting the exchange of money in new reproductive arrangements does not automatically result in commodifying both children and women.[200] Already donors in other reproductive techniques, such as artificial insemination and ovum donation, are compensated. To compensate a surrogate is an extension of the recognition for a donor's contribution.

Exploitation of women is another expressed fear of opponents of surrogacy. Yet one commmentator argues that exploitation of women is actually perpetuated when women are unable to gain monetary recognition for things uniquely achieved by

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193. *Id.* at 1485.

194. *Id.* 1490.

195. *Id.* at 1489-90.

196. *Intent-Based Parenthood, supra* note 176, at 323. ("Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.")

197. *See supra* notes 52-57 and accompanying text (discussing recently introduced legislation in California).

198. A number of commentators have addressed the negative ramifications of surrogacy. *See* SHANNON, *supra* note 17; Recht, *"M" is for Money: Baby M and the Surrogate Motherhood Controversy*, 37 AM. U.L. REV. 1013, 1020-28 (1988).

199. Krimmel, *The Case Against Surrogate Parenting*, THE HASTINGS CENTER REPORT, Oct. 1983, at 35 (arguing that it is unethical to separate the decision to create children from the desire to have them. By creating a child without desiring it may cause children to be viewed as commodities or items of manufacture). *Id.* at 36-37.

200. *See Intent-Based Parenthood, supra* note 176, at 334-37. ("The critical issue is not whether something involves monetary exchange as one of its aspects, but whether it is treated as reducible solely to its monetary features.") *Id.* at 336.

women.[201] Furthermore, monetary concerns only seem to surface when women and children are involved.[202]

Nevertheless, there are important concerns raised in compensating surrogates. One concern is that the decision to become a surrogate may not in fact be voluntary. This potential arises when a surrogate's choice becomes involuntary due to personal circumstances of hardship, such that no choice actually exists. However, these fears can be allayed if sufficient precautions are undertaken.

Prior to entering into a surrogate agreement, a surrogate should be determined to be financially stable and independently represented by an attorney to ensure that her decision to be a surrogate is voluntary. Professional counseling should be undergone by all the parties to a surrogacy agreement. A surrogate also should be informed, orally and in writing, of her rights and responsibilities as a surrogate, and should consent in writing evidencing her intent. By completing these procedures a substantial amount of time before undergoing any insemination or *in vitro* procedures, the surrogate will have time to consider all of the negative ramifications of entering into a surrogacy agreement. If all of the above precautions are taken, it is more likely that a surrogate will be sufficiently informed to decide whether or not to enter into a surrogacy arrangement. Basing custody decisions upon the intent of the parties alone, however, may prove to be detrimental to the best interests of the child.

c. *Best Interests of the Child*

Judge Parslow's decision awarding sole legal and physical custody of the child to the Calverts was in part based upon a determination of the best interests of the child. He believed there were public policy problems with a child having three parents.[203]

In determining custody, the courts should consider more than the intent of the parties. The best interests of the child

201. *Id.* at 336.
202. *Id.* at 337.
203. *Johnson*, at 1492.

should also be addressed.[204] For an infant, it is manifestly important to ensure continuity in the child's life.[205] Continuity should be used as a guideline by the courts.[206]

By taking into account the best interests of the child, the adult's interests are consequently subordinated in favor of the child's interests. However, since surrogacy arrangements do not consider a child's best interests, it is imperative that in a custody dispute, courts address the best interests of the child. As in the *Johnson* case, a *guardian ad litem* protects a child's best interests contrasted to the interests asserted by the adults in a surrogacy custody dispute.

In *Johnson,* the final decision by the trial court judge to place the child with the Calverts, and to deny visitation rights to Johnson, reflects a best interest determination for the child. The decision to permit only one adult to act as the "psychological mother" was an attempt to eliminate confusion and uncertainty in the child's life. Despite the harsh consequences of such a decision on the surrogate in this case, the decision to award sole legal and physical custody to one set of parents was in the best interests of the child.

CONCLUSION

As new reproductive technologies become available, laws must be enacted to address them. Without legislation on the

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204. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979)[hereinafter BEYOND THE BEST INTERESTS]. (Claiming that "[w]hile they make the interests of a child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often intentionally, his psychological well-being to . . . an adult's right to assert a biological tie"). *Id.* at 4. CAL. CIV. CODE § 4608 (West 1988) provides in relevant part: "In making a determination of the best interest of the child . . . the court shall, among other factors it finds relevant, consider all of the following: (a) The health, safety, and welfare of the child."

205. BEYOND THE BEST INTERESTS, *supra* note 204, at 18, 32. ("When there are changes of parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship becomes evident.") *Id.* at 18. Change of the caretaking person for infants also affects the course of their emotional development. *Id.* at 32.

206. *Id.* at 34. "The implications for this guideline for the laws on . . . custody are that each child placement be final and unconditional and that pending final placement a child must not be shifted to accord with each tentative decision." *Id.* at 35. However, if this continuity guideline is followed by the courts, the longer a child remains in an adult's custody pending appeal, the less likely the court will allow the other party to obtain custody. *Id.* at 46.

subject, the judiciary is left to the task of interpreting current statutory law. Most of these laws were not drafted with any consideration of surrogacy.

Additionally, the interests of surrogate mothers, infertile couples and intermediaries must be weighed against societal concerns. To address these potentially competing values, legislation regulating commercial surrogacy in California should be enacted. Regulations requiring intensive counseling and evaluations of prospective surrogates and parents will minimize exploitation of those involved. Potential surrogates should be independently represented by counsel to ensure voluntary choice and to eliminate the potential for conflict of interest. Licensing of surrogate intermediaries will ensure adherence to uniform standards throughout the whole process. Rather than criminalizing those involved in surrogate parenting agreements, regulation of the practice will recognize individual procreative choice while at the same time minimize any risks of exploitation or of driving the practice underground.

While the intent of the parties in a surrogacy agreement should be considered by the judiciary in establishing custody, also employing a best interest determination will preserve society's fundamental value of putting the child's interests first, rather than those of the adult parties.

POSTSCRIPT

On appeal the California Court of Appeal affirmed the ruling of the trial court in *Anna J. v. Mark C.*[207] The court held that under the Uniform Parentage Act[208] and the Evidence Code,[209] the wife and husband were the natural mother and father of the child.

The court held that the question of maternity as determined under section 895 of the Evidence Code confirms who is the "natural" mother of the child.[210] As the blood tests excluded Anna from being the natural mother and because Anna had stipulated that Crispina is genetically related to the child, the court found that the trial court's determination that Crispina is the natural mother should be upheld.[211]

The court of appeal found that the designation of natural parent status to the genetic parents did not violate the gestational surrogate's due process and equal protection

207. 234 Cal. App. 3d 1557, 286 Cal. Rptr. 369 (1991). The case is now pending before the California Supreme Court.

208. CAL. CIV. CODE § 7000 et seq. (West 1983 & Supp. 1991).

209. CAL. EVID. CODE §§ 621, 895 (West 1983 & Supp. 1991).

210. Anna J. v. Mark C., 234 Cal. App. at 1567, 286 Cal. Rptr. at 376.

211. Id.

rights.[212] The court also stated that it was not necessary to decide whether the contract is enforceable in this case.[213]

212. Id. at 1572-76, 286 Cal. Rptr. at 378-81.
213. Id. at 1576-77, 286 Cal. Rptr. at 381.