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Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies

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COMMENTS

Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies

> Now Sarai, Abram's wife, had borne him no children. And she had an Egyptian maidservant whose name was Hagar. So Sarai said to Abram, 'See now, the LORD has restrained me from bearing children. Please, go in to my maid; perhaps I shall obtain children by her.' And Abram heeded the voice of Sarai. Then Sarai, Abram's wife took Hagar her maid, the Egyptian, and gave her to her husband Abram to be his wife. . . . So he went in to Hagar, and she conceived. . . . So Hagar bore Abram a son; and Abram named his son, whom Hagar bore, Ishmael.[1]

The concept of surrogate motherhood is not new. It only recently has emerged as a serious and commonly discussed option for childless couples who are unable to have children and unable or unwilling to adopt. As more people consider the possibility of surrogate motherhood, or surrogate parenting, the courts and legislatures increasingly will be asked to find answers to novel legal, ethical, and public policy questions and to decide if, and under what circumstances, it should be accepted and legalized.[2]

Our present legal system has not adequately addressed the problems inherent in surrogate motherhood. Legislation which regulates the practice is virtually nonexistent. By reason of the lack of surrogate parenting legislation, and the uncertain applicability of existing legislation, the enforceability of a surrogate parenting agreement or contract is unpredictable. As it stands presently, the children born through surrogate parenting agreements are being born into a "legal vacuum."[3]

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1. Genesis, 16: 1-4, 15 (New King James Version). *But see* Krimmel, *The Case Against Surrogate Parenting*, 3 Hastings Center Rep. 35, 36 1983 stating that Sarai actually had given Hagar to Abram as a second wife and that Hagar did not relinquish Ishmael to Sarai; rather, after Sarai gave birth to Isaac, she banished both Hagar and Ishmael.

2. Bird, *Surrogate Motherhood: Hers? Yours? Ours?*, 2 CALIF. LAWYER 21 (1982).

3. Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 664 (1986).

The purpose of this comment is to highlight the concerns which legislators must confront when proposing legislation for the regulation of surrogate mothering. By placing emphasis on the few court cases to date concerning surrogate mothering, this comment advocates the adoption of legislation designed specifically to govern the enforceability of surrogate parenting agreements. It is only through such legislation that the numerous legal and ethical questions can be finally answered. Unless legislatures familiarize themselves with the potential consequences of surrogate motherhood, and adopt precise legislation outling the rights and obligations of all the parties involved, "a chaotic patchwork of judicial decisions will result."[4]

In order to fully comprehend the necessity of legislation, it must first be understood exactly what surrogate motherhood entails. A "surrogate" is defined as a person who functions in another's life as a substitute for some third person.[5] The term "mother", when used as a verb, includes the meaning "to give birth to."[6] Hence, the term "'surrogate mother' is a woman appointed to give birth to a child in the place of another."[7] Stated simply, "surrogate mothering" is a procedure by which a woman produces a child for a couple or a single person by becoming impregnated, carrying the fetus to term, and then surrendering her parental rights to enable the adoption of the child.[8]

Surrogate mothering is classified into three distinct types.[9] The first method, which is the most prevalent, employs the process of artificial insemination.[10] Under this method, the surrogate mother is artificially inseminated with sperm from the husband of the adopting couple.[11]

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4. Comment, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEG. 140 (1981).

5. STEDMAN'S MEDICAL DICTIONARY 1370 (23rd ed. 1976). A surrogate is likewise defined as a person who reminds one of another person so that one uses the first as an emotional substitute for the second. *Id.*

6. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1474 (1981).

7. Special Project, 39 VAND. L. REV. at 632.

8. *See* Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978) (contract analysis applied to surrogate motherhood); Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385 (1982) (family law approach to surrogate mothering).

9. Special Project, 39 VAND. L. REV. at 632.

10. *Id.* Artificial insemination is the introduction of semen into the vagina or uterus by means of a syringe or other instrument. *Id.* at 632 n.172.

11. *Id.* at 632. This type of surrogate mothering is usually used when the wife of the adopting couple has some reproductive incapacity which prevents her from bearing children. *Id.* If the semen is obtained from the husband, it is homologous artificial insemination; if the semen is obtained from another male, it

Thereafter, the surrogate carries the child to term and agrees to terminate all parental rights upon birth.[12]

The second type of surrogate parenting is known as *in vitro* fertilization.[13] Under this method, the adopting couple supplies a doctor with both semen and an egg and the doctor fertilizes the egg by *in vitro* fertilization.[14] After the fertilized egg is implanted in the surrogate, the process is the same as in the first method.[15] The third and final method of surrogate motherhood is a modification of the *in vitro* fertilization method.[16] The process is almost identical to the previous method, however, instead of giving the child to the couple who donated the sperm and the egg, the surrogate mother surrenders the child to another couple.[17]

Although the three methods of surrogate mothering involve different medical processes, the legal ramifications of each are strikingly similar.[18] Therefore, the remainder of this comment will focus on the first type of surrogate mothering, that is, surrogate mothering through artificial insemination.

I. CONSTITUTUIONAL LIMITATIONS

Before enacting legislation to clarify the rights and obligations of all the parties involved in a surrogate mothering agreement, the

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is heterologous artificial insemination. *See* 1 SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE A-306 (1968). A variation of this method, known as confused or combined artificial insemination, is accomplished by taking the semen of the adopting father and combining it with semen from an unknown donor. 39 VAND. L. REV. at 633 n.173.

12. 39 VAND. L. REV. at 632-33.

13. *Id.* at 633. This type may be used either when the wife suffers from an abnormality which prevents her egg from being fertilized or when she is unable to carry the child to term due to some abnormality in her uterus. *Id.* Under this process, the ovum may be fertilized during normal sexual intercourse or by artificial insemination and then transplanted to the surrogate mother. Otherwise, the ovum must be fertilized *in vitro* and then transplanted to the surrogate mother. *See* 8 J. LEG. at 142 n.15.

14. 39 VAND. L. REV. at 633.

15. *Id.*

16. *Id.*

17. *Id.* Under these circumstances, the child would technically have five parents: the egg donor, the sperm donor, the surrogate mother, and the adopting couple. *Id.* at 633 n.176 (citing, Andrews, *The Stork Market: Legal Regulation of the New Reproductive Technologies*, 6 WHITTIER L. REV. 789, 791 (1984)). This method would most likely be employed by a couple when both the husband and wife were infertile. 39 VAND. L. REV. at 634.

18. 39 VAND. L. REV. at 634.

legislature must consider the constitutional limits on its power. A constitutionally based right of privacy was first recognized by the United States Supreme Court in *Griswold v. Connecticut*.[19] Though the Supreme Court failed to define the extent of this zone of privacy, it was held to extend at least to the intimate decisions regarding child-rearing.[20]

The boundaries of the right to privacy remain uncertain even today. The United States Supreme Court has recognized, however, that the right of a woman to decide whether or not to have children is a fundamental personal right protected by the United States Constitution.[21] "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as his decision whether to bear or beget a child."[22]

In order to determine the constitutionality of surrogate mothering, it must first be determined whether surrogate mothering involves a

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19. 381 U.S. 479 (1965). The United States Supreme Court found that a Connecticut statute, making the use of contraceptives a criminal offense, was unconstitutional as it violated the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. *Id.* at 485-86. It must be recognized that the decision in *Griswold* emphasizes the right of marital privacy. "Would we allow the police to search the sacred precincts of *marital* bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86 (emphasis added).

20. *Id.* at 485.

21. Roe v. Wade, 410 U.S. 113 (1973). Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court has recognized that a "right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* at 152. Only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. *Id.* (citing Palko v. Connecticut, 302 U.S. 319 (1937)). The United States Supreme Court noted that the right of privacy extends to activities relating to marriage, Loving v. Virginia, 388 U.S. 1 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510 (1925). Roe v. Wade, 410 U.S. at 152-53.

22. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original).

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.

Id. at 453.

fundamental right.[23] Although it appears that a surrogate mother's decision to become pregnant parallels the fundamental right of reproductive privacy, the adopting couple's claimed right of reproductive privacy does not appear to be sufficiently similar. As recognized in *Eisenstadt v. Baird*,[24] the emphasis in reproductive capacity is on the right of the individual to control his or her own reproductive faculties.[25] Giving the adopting couple a right to control the surrogate's reproductive faculties would, therefore, be contradictory.[26] Hence, since the adopting couple has no fundamental right to employ a surrogate mother, the legislature may constitutionally regulate the activities between the parties.

II. Inapplicability of Existing State Statutes

Before a state may propose legislation specifically designed to regulate surrogate motherhood, it must first be determined whether or not existing state statutes are applicable. Often states have statutes which, on their face, appear to be applicable to the surrogate motherhood arrangements.[27] However, because most of these statutes were enacted before surrogate motherhood became a viable option, the states must examine the goals and purposes underlying the statutes to determine whether they are applicable.[28]

Virtually all states have enacted statutes that bar or restrict fetal experimentation.[29] Though fetal experimentation statutes may be applicable to *in vitro* fertilization, because conception takes place outside of the womb, they would not be applicable to the traditional artificial insemination method.[30] Considering that the purpose of fetal experimentation statutes is to prevent cruelty and harm to unborn fetuses, it is clear that they should not apply to surrogate mothering

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23. Fundamental rights are those rooted in the express guarantees of the Constitution and in the implied guarantees that flow from them. Griswold v. Connecticut, 381 U.S. at 484.

24. 405 U.S. 438 (1972).

25. *Id.* at 453.

26. Comment, 8 J. Leg. at 158.

27. *See infra* notes 31-33 and accompanying text.

28. 39 Vand. L. Rev. at 639. Statutes which appear to be applicble include those regulating fetal experimentation, and statutes prohibiting a mother from receiving compensation for placing a child up for adoption. *Id.* at 639 n.187.

29. *Id.* at 643. *See also* Comment, *Surrogate Mother: The Legal Issues*, 7 Am. J. Law & Med. 323, 328 (1981). For a comprehensive review, *see* Flannery, Weisman, Lipsett & Bravermena, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 Geo. L.J. 1295, 1299-1300 (1979).

30. 39 Vand. L. Rev. at 643-44.

agreements. "The surrogate parenting process, rather than harming fetuses, promotes the health and safety of the fetus."[31]

A more troublesome analysis arises from a group of various state statutes dealing with the adoption and custody of children. Many state statutes prohibit a mother from receiving compensation for permitting another person to adopt her child.[32] In eight other states, payment to a mother to surrender a child for any purpose is prohibited.[33] Still other states prohibit any unlicensed agency or person from receiving compensation for placing a child up for adoption.[34]

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31. *Id.*

32. *Id.* at 639. *Cf., e.g.*, ARIZ. REV. STAT. ANN. § 8-114 (Supp. 1985) (stating that spouse of natural parent is exempt from prohibition, and that a mother can receive medical and legal expenses if they are approved by the court); DEL. CODE ANN. tit. 13 § 928(a) (1981); FLA. STAT. ANN. § 63.212(1)(d) (West 1985) (indicating that the mother can receive actual medical, hospital, confinement and living expenses); IDAHO CODE § 18-1511-1512 (1979) (allowing mother to receive payment of medical bills); IND. CODE ANN. § 35-46-1-9 (Burns 1985) (allowing payment and receipt of attorney's fees, medical expenses, reasonable charges by a licensed agency, and other court-approved charges); IOWA CODE ANN. § 600.9 (West 1981) (allowing receipt of actual expenses); KY. REV. STAT. ANN. § 199.590(2) (Bobbs-Merrill Supp. 1985); MD. FAM. LAW. CODE ANN. § 5-327(a) (1984) (permitting receipt of medical and legal expenses); MASS. GEN. LAWS ANN. ch. 210, § 11A (West Supp. 1985); MICH. COMP. LAWS ANN. § 710.54(1) (West Supp. 1985) (allowing receipt of court approved fees); N.Y. SOC. SERV. LAWS § 374(6) (McKinney 1977) (permitting receipt of medical expenses); N.C. GEN. STAT. § 48-37 (1984); OHIO REV. CODE ANN. § 3107.10 (Page 1980) (noting that the prohibition does not apply to adoption by a stepparent, and that the mother can receive payment for medical and legal expenses); OKLA. STAT. ANN. tit. 21 § 866 (West Supp. 1985) (allowing receipt of medical and legal expenses); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984); TENN. CODE. ANN. § 36-1-135(a) (1984) (permitting receipt of medical and legal expenses); UTAH CODE ANN. § 76-7-203 (1979) (allowing receipt of actual, reasonable medical, hospital, and confinement expenses); WIS. STAT. ANN. § 946.716(1)(a) (West 1982) (permitting hospital, medical, and legal expenses); *see also* CAL. PEN. CODE § 273 (West 1970) (prohibiting payments in excess of medical expenses to the mother or agency); GA. CODE ANN. § 74-418(b) (Harrison Supp. 1984) (prohibiting payments in excess of medical expenses); ILL. ANN. STAT. ch. 40, § 1702 (Smith-Hurd 1980) (prohibiting payments to mother or agency). 39 VAND. L. REV. at 639 n.189.

33. Note, *Human Reproductive Technologies: An Appeal for Brave New Legislation in a Brave New World*, 25 WASHBURN L.J. 458, 490-91 n.203 (1986). *See* ALA. CODE § 26-10-8 (1975); ARIZ. REV. STAT. ANN. § 8-126(c) (1974); FLA. STAT. § 63.212(1)(d) (1985); GA. CODE ANN. § 19-8-19(b) (1982) (GA. CODE ANN. § 74-418(b) (1982)); IDAHO CODE § 18-1511 (1979); LA. REV. STAT. ANN. § 14.286(a) (West Supp. 1986); TENN. CODE ANN. § 36-1-135 (1984); UTAH CODE ANN. § 76-7-203 (1978).

34. 39 VAND. L. REV. at 639-40. *Cf., e.g.*, COLO. REV. STAT. § 19-4-115 (1978); DEL. CODE ANN. tit. 13, § 928(b) (1981) (attorney's fees, court costs, and a service fee can be received); ILL. ANN. STAT. ch. 40, §§ 1526, 1701 (Smith-Hurd 1980); IND. CODE ANN. § 35-46-1-9 (Burns 1985) (allowing receipt of attorney's fees, medical expenses, reasonable charges by a licensed agency, and other court-

The primary purposes and goals underlying these statutes are twofold. First, and most important, is that statutes relating to custody and adoption are designed to promote the best interests of the child.[35] Second, statutes regulating the process of legal adoption are intended to prevent child-bartering or baby selling.[36]

Under the unique circumstances of the surrogate parenting agreement, it is clear that the best interests of the child are being promoted. The adopting couple has planned extensively for the child.[37] In fact, the couple has done everything in their power to obtain the child. Additionally, the adopting father is typically also the biological father of the child. "[M]any state legislatures hold the view that the best interests of the child are promoted just as much by permitting the child to live with the natural father as by permitting the child to live with the natural mother."[38]

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appointed charges); KY. REV. STAT. ANN. § 199.590(2) (Bobbs-Merrill Supp. 1985) (allowing licensed placement agencies to charge a fee for placement); ME. REV. STAT. ANN. tit. 22, § 8204(3) (1980) (allowing receipt of reasonable costs for services); MD. FAM. LAW CODE ANN. § 5-327 (1984) (allowing receipt of medical and legal expenses); MASS. GEN. LAWS ANN. ch. 210, § 11A (West Supp. 1985); MICH. COMP. LAWS ANN. § 710.54(1) (West Supp. 1985) (allowing receipt of court-approved fees); NEV. REV. STAT. §§ 127.285, .290 (1981) (attorneys and licensed agencies can receive reasonable compensation); N.J. STAT. ANN. § 9:3-54 (West Supp. 1985) (permitting receipt of medical expenses, birth-related expenses, and fees charged by a licensed agency); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1977) (permitting receipt of medical expenses); N.C. GEN. STAT. § 48-37 (1984); OHIO REV. CODE ANN. § 3107.10 (Page 1980) (permitting medical and legal expenses and exempting step-parents from prohibition); OKLA. STAT. ANN. tit. 21, § 866 (West Supp. 1985) (allowing receipt of medical and legal expenses); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984) (permitting receipt of court-approved fees and licensed agency's fees); TENN. CODE ANN. § 36-1-135(a) (1984) (permitting receipt of medical and legal expenses); UTAH CODE ANN. § 55-8a-1 (Supp. 1985) (allowing receipt of medical and legal expenses); W.VA. CODE § 48-4-5(e) (Supp. 1985) (limiting fees to value of services rendered); WIS. STAT. ANN. § 946.716(1)(b) (West 1982) (only licensed agencies); *see also* FLA. STAT. ANN. §§ 63.097, 63.212(1)(g) (West 1985) (allowing agencies to receive compensation, but requiring court approval for more than $500 over the actual documented medical and legal expenses); IOWA CODE ANN. § 600.9 (West 1981) (allowing a receipt of a reasonable fee). 39 VAND. L. REV. at 639-40 n.190.

35. 39 VAND. L. REV. at 641.

36. *Id.* at 641 n.195. "Child-bartering (or baby selling) is the selling of children for a fee or for some other item of value." *Id.*

37. *Id.* at 642.

38. *Id.* at 642-43. For custody statute providing that the state shall not prefer one parent over the other, *see, e.g.*, ALASKA STAT. § 25.20.060 (1983); ARK. STAT. ANN. § 34-718 (Supp. 1985); DEL. CODE ANN. tit. 13, § 722(b) (1981); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd 1980); IND. CODE ANN. § 31-6-6.1-11 (Burns Supp. 1985); MD. FAM. LAW CODE ANN. § 5-203(c)(2) (1984); MINN. STAT. ANN. § 257.025 (West 1982); MO. ANN. STAT. § 453.110 (Vernon 1977); N.D. CENT. CODE § 14-09-

It is equally clear that surrogate mothering agreements do not contravene a state's interest in preventing baby selling. The black-market evils which baby selling statutes seek to prevent are not present in the surrogate parenting agreement.[39] A typical black-market adoption involves a third party who arranges for a married couple to adopt an unwed mother's baby.[40] An important characteristic present in surrogate mothering agreements which is absent in the case of black-market adoptions, is that the surrogate has agreed to relinquish her parental rights prior to the conception of the child.[41] "By its nature the surrogate mother's relinquishment of the child is completely voluntary since the contractual arrangements are made in the absence of pressure" before the surrogate becomes pregnant.[42]

Finally, the money received by the surrogate mother is not payment for the child, but rather for the services she performs.[43] The surrogate is being reimbursed for the physical acts of pregnancy and childbirth.[44] When viewed in this light, it is clear that state statutes prohibiting baby selling should not be interpreted to forbid the surrogate mother arrangement.[45]

III. Existing State Judicial Decisions

Very few cases have been reported in which a state court was called upon to interpret the enforceability and legality of surrogate

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05 (Supp. 1983); Ohio Rev. Code Ann. § 3109.03 (Supp. 1984); Or. Rev. Stat. § 109.030 (1983); Pa. Stat. Ann. tit. 23, § 1002 (Purdon Supp. 1985); S.D. Codified Laws Ann. § 25-5-10 (1984); Tex. Fam. Code Ann. § 14.07 (Vernon 1975); Wis. Stat. Ann. § 767.24(2) (West 1981). *But see* Cal. Civ. Code § 197 (West 1982); Ga. Code Ann. § 74-203 (Harrison Supp. 1984) (mother is entitled to custody of illegitimate child unless the father legitimizes him, then custody is based on best interests of child); S.C. Code Ann. § 20-7-953 (Law. Co-op. 1985); Wis. Stat. Ann. § 48.435 (West Supp. 1985).

39. 7 Am. J. Law & Med. at 330.

40. 39 Vand. L. Rev. at 642. Unlike surrogate motherhood, the intermediary in a black-market adoption rarely investigates the mental and physical health of the involved parties. *Id.*

41. *Id.* The typical black-market adoption involves a rather young, unwed mother who suffers both personal and societal pressure to relinquish the baby for adoption. *Id.* at 641.

42. 7 Am. J. Law & Med. at 331.

43. *Id.* at 331. *See also* Erickson, *Contracts to Bear a Child*, 66 Calif. L. Rev. 611 (1978). "Because the purchaser is the natural father of the child, the risk that hard 'commercial' considerations will prevail over the interests of the child or the mother is slight." *Id.* at 613.

44. 7 Am. J. Law & Med. at 331.

45. *Id.*

parenting agreements. This is not to be misconstrued, however, as implying that surrogate motherhood is not a frequent occurrence. In fact, it has been estimated that there have been hundreds of surrogate births in the United States.[46] Presently, there are approximately thirty centers throughout the United States which perform the services of matching prospective surrogates with childless couples.[47]

A thorough analysis of the few existing court cases will exhibit the rising need for legislation in this area. Of these cases, none have come to a conclusion consistent with the others. As more people consider the possibility of surrogate motherhood, and the practice becomes more prevalent, litigation will certainly increase, and a "chaotic patchwork of judicial decisions will result."[48]

The first reported case involving surrogate motherhood was *Doe v. Kelley*.[49] In this case, a married couple entered into a surrogate parenting agreement whereby the surrogate agreed to conceive a child by means of artificial insemination and thereafter consent to the adoption of the child.[50] In return for her services, the surrogate was to receive the sum of $5,000 plus medical expenses.[51] In an action against the State Attorney General,[52] the parties to the surrogate agreement sought to have certain statutes prohibiting the exchange of money in connection with adoption declared unconstitutional.[53]

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46. Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. LAW & MED. 243 (1984). *See* Keane & Breo, *The Surrogate Mother* 12 (1981) ("By the end of 1981, there will be about a hundred children born to surrogate mothers and adopted by others."); Smith, *The Perils and Peregrinations of Surrogate Mothers*, 1 MED. & L. 325 (1982) ("It is thought that several hundred women are currently, or have been, fulfilling roles a surrogate mothers.").

47. Cohen, 10 AM. J. LAW & MED. at 243-44.

48. 8 J. LEG. 140 (1981). *See also* Bird, *supra* 2 CALIF. LAWYER 21 (1982).

49. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

50. *Id.* at 170, 307 N.W.2d at 440.

51. *Id.* In addition, the parties agreed that the surrogate would be covered by sick leave, pregnancy disability insurance, and medical insurance for the time she was off work due to the pregnancy and delivery. *Id.*

52. *Id.* at 169, 307 N.W.2d at 438. The Wayne County Prosecutors Office was also a party to the action. *Id.*

53. *Id.* at 170, 307 N.W.2d at 439. The statutes sought to be declared unconstitutional were sections of the Michigan Adoption Code, MICH. COMP. LAWS. § 710.54; MICH. STAT. ANN. § 27.3178(555.54) and MICH. STAT. ANN. § 710.69; MICH. STAT. ANN. § 27.3178(555.69). These statutory provisions state:

> Sec. 54. (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

On appeal to the Michigan Court of Appeals from an order denying summary judgment,[54] the Michigan court held that the statutes did not prohibit the parties from having a child through the surrogate parenting agreement.[55] Rather, the statutes prohibited payment to a surrogate in connection with her consent to adoption of the child by the sperm donor and his wife.[56]

Two years later, the Michigan Court of Appeals was again confronted with the legality of surrogate parenting agreements. In *Syrkowski v. Appleyard*,[57] the biological father of a child conceived

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child available for adoption or the existence of a person interested in adopting a child.

(c) A release.

(d) A consent.

(e) A petition.

(2) Before the entry of the final order of adoption, the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or adopting the adoptee, any relative of a party or of the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

(3) To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 of the Public Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or indirectly, led to placement of the person for adoption.

Sec. 69. A person who violates any of the provisions of section 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon subsequent conviction shall be guilty of a felony.

54. 106 Mich. App. at 170, 307 N.W.2d at 439. The Circuit Court, Wayne County, Michigan, denied plaintiff's motion for summary judgment and granted summary judgment for the defendants. *Id.*

55. *Id.* at 171, 307 N.W.2d at 441.

56. *Id.* The court stated:

> The statute in question does not directly prohibit John Doe [the sperm donor] and Mary Roe [the surrogate] from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs contractual agreement discloses a desire to use the adoption code to change the legal status of the child, *i.e.*, its right to support, intestate succession, etc.

Id.

57. 122 Mich. App. 506, 333 N.W.2d 90 (1983).

through a surrogate parenting agreement[58] filed a notice of intent to claim paternity[59] and a petition seeking an order of filiation.[60] The Michigan Attorney General thereafter filed a notice of intervention, alleging that the circuit court did not have jurisdiction over the action pursuant to The Paternity Act as the action involved a surrogate motherhood arrangement.[61] Specifically, the Attorney General argued that the surrogate's husband was the legal father of the child because he consented to the artificial insemination.[62] Refusing to reach the issue of whether surrogate mother contracts were against public policy, the Michigan Court of Appeals concluded that the relief requested was beyond the scope of The Paternity Act and thus not within the court's jurisdiction.[63]

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58. 333 N.W.2d at 90. Under this surrogate agreement, Corinne Appleyard agreed to be artificially inseminiated with George Syrkowski's sperm. Upon birth of the child, the agreement specified that Syrkowski would obtain custody of the child and Appleyard would receive $10,000 plus medical expenses. *Id.* at 90-91 n.1.

59. *Id.* at 91. Syrkowski filed a notice of intent to claim paternity pursuant to § 33 of the Michigan Adoption Code, MICH. COMP. LAWS § 710.33; MICH. STAT. ANN. § 27.3178(555.33). 333 N.W. 2d at 91.

60. 333 N.W.2d at 91. Syrkowski requested an order of filiation pursuant to § 7(a) of The Paternity Act, MICH. COMP LAWS. § 722.717(a); MICH. STAT. ANN. § 25.497(a), and entry of his name as the natural father on the child's birth certificate. 333 N.W.2d at 91.

An order of filiation is defined as an order by a court or judge having jurisdiction, fixing the paternity of a bastard child upon a given man, and requiring him to provide for the support of said child. BLACK'S LAW DICTIONARY 566 (5th ed. 1979).

The proposed consent order of filiation stated that the best interests of the child would be served by the circuit court's determination that Syrkowski was the natural and legal father of the child and therefore award him full custody of the child. 333 N.W. 2d at 91.

61. 333 N.W. 2d at 92. The preamble to The Paternity Act, MICH. COMP. LAWS § 722.711 *et seq.*; MICH. STAT. ANN. § 25.491 *et seq.*, provides:

> AN ACT to confer upon circuit courts jurisdiction over proceedings to compel and provide support of children born out of wedlock; to prescribe the procedure for determination of such liability; to authorize agreements providing for furnishing of such support and to provide for the enforcement thereof; and to prescribe penalties for the violation of certain provisions of this act.

333 N.W.2d at 93.

62. 333 N.W.2d at 92. *See* MICH. COMP. LAWS § 333.2824(6); MICH. STAT. ANN. § 14.15(2824)(6) which provides: "A child born to a married woman as the result of artificial insemination, with consent of her husband, is considered to be the legitimate child of the husband and wife." *Id.* Contrary to the Attorney General's contention, the surrogate's husband did not consent to the artificial insemination. *Id.* In fact, in a statement of nonconsent, the surrogate's husband declared: "I expressly revoke and withhold my consent for any artificial insemination of my wife in connection with the surrogate arrangement and recognize that by doing so I cannot be declared or considered to be the legal father of said child." *Id.*

63. 333 N.W.2d at 93-94. The court noted:

The Supreme Court of Michigan reversed the decision of the Michigan Court of Appeals, finding that the circuit court would have jurisdiction over a biological father's Paternity Act request for an order of filiation when the biological mother and father have entered into a surrogate parenting agreement.[64] The Michigan Supreme Court recognized that the purpose of The Paternity Act is to provide for children born out of wedlock.[65] Such children include not only those born to an unmarried woman, but also children which the court determines to be born during marriage but not the issue of that marriage.[66]

Additionally, the Michigan Supreme Court recognized that if a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child.[67] Moreover, a child born to a married woman as a result of artificial insemination, with the consent of her husband, is considered to be the legitimate child of both the wife and the husband.[68] "Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence."[69] Both of the statutes relied upon by the Attorney General make the husband's consent to the artificial insemination a prerequisite to application of this presumption. "In other words, it is a rebuttable presumption."[70] Under the circumstances, it is clear that the surrogate's husband unequivocally rebutted the presumption of paternity,[71] thereby placing the child within the meaning of "a child

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> We view the surrogate mother arrangements with caution as we approach an unexplored area in the law which, without a doubt, can have a profound effect on the lives of our people. The courts should not be called upon to enlarge the scope of The Paternity Act to encompass circumstances never contemplated thereby. Studied legislation is needed before surrogate arrangements are recognized as proposed under the facts submitted herein.

Id. at 94.

64. 420 Mich. 367, 362 N.W.2d 211 (1985).

65. 362 N.W.2d at 214.

66. *Id.* Previously, the Act's definition of a "child born out of wedlock" was limited to children born to an unmarried woman. *Id.* The present definition provides, however, that a "child born out of wedlock" means "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child which the court has determined to be a child born during the marriage but not the issue of that marriage." *Id. See* MICH. COMP. LAWS § 722.711(a); MICH. STAT. ANN. § 25.491(a).

67. 362 N.W.2d at 213 (citing Michigan Revised Probate Code, 1978 P.A. 642; MICH. COMP. LAWS § 700.1 *et seq.*; MICH. STAT. ANN. § 27.5001 *et seq.*

68. 362 N.W.2d at 212. *See* note 62 and accompanying text.

69. 362 N.W.2d at 213.

70. *Id.*

71. *See* note 62 and accompanying text.

born out of wedlock", and thus, under the jurisdiction of The Paternity Act.[72]

Michigan is not the only state to have decided issues surrounding surrogate motherhood. In Kentucky, parties to surrogate arrangements have met with several levels of opposition. The Kentucky Attorney General issued an opinion in 1981 concluding that surrogate contracts violated Kentucky statutes which prohibit payment in connection with adoption.[73] Three years later, a Kentucky trial court held that fee arrangements for the relinquishment of parental rights were not prohibited under the statute.[74] Later that same year, however, another Kentucky trial court denied a motion by a surrogate and her husband to terminate their parental rights, holding that evidence of the surrogate's marriage created a conclusive presumption that he was the child's legal father.[75]

The issue of the legality of surrogate agreements eventually reached the Kentucky Supreme Court in *Surrogate Parenting Associates v. Kentucky*.[76] The Kentucky Attorney General instituted proceedings against Surrogate Parenting Associates, Inc. [hereinafter SPA] seeking to revoke the corporation's charter on the grounds of abuse and misuse of corporate powers detrimental to the welfare of the state.[77] SPA operates a medical clinic whereby it assists infertile couples in obtaining children through the artificial insemination of a surrogate mother.[78]

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72. 362 N.W.2d at 214.

73. *See* Surrogate Motherhood Contracts Declared Illegal by Kentucky A.G., 7 FAM. L. REP. (BNA) 2246 (1981).

74. *See* Kentucky v. Surrogate Parenting Assocs., 10 FAM. L. REP. (BNA) 1105 (1983).

75. *See In re* Baby Girl, 9 FAM. L. REP. (BNA) 2348 (1983). The trial court determined that since the mother was married and had been in contact with her husband during the possible time of conception, the presumption was deemed conclusive and could not be overcome merely by an affidavit admitting to artificial insemination. *Id.*

76. 704 S.W.2d 209 (Ky. 1986).

77. *Id.* at 210. The Kentucky Attorney General alleged that SPA's surrogate parenting procedure is in violation of several Kentucky statutes. The relevant statutes are as follows: KY. REV. STAT. ANN. § 199.590(2) prohibits the sale, purchase or procurement for sale or purchase of any child for the purpose of adoption; KY. REV. STAT. ANN. § 199.601(2) prohibits the filing of a petition for the voluntary termination of parental rights prior to five days after the birth of the child; and KY. REV. STAT. ANN. § 199.500(5) which specifies that a consent for an adoption shall not be held to be valid if such consent is given prior to the fifth day after the birth of the child. 704 S.W.2d at 210.

78. 704 S.W.2d at 211. SPA and its president are paid a fee by the biological father for the selection and artificial insemination of the surrogate. SPA also receives an additional fee for obstetrical care and testing of the surrogate mother during pregnancy as well as for the actual delivery of the child. *Id.*

The Kentucky Supreme Court focused on interpreting the statutory language to determine if SPA's involvement in surrogate parenting procedures should be construed as participating in the buying and selling of babies.[79] In a five to two decision, the Kentucky Supreme Court held that, "there are fundamental differences between the surrogate parenting procedure in which SPA participates and the buying and selling of children," and therefore, the procedures employed are beyond the purview of present legislation.[80]

By its decision, the Kentucky Supreme Court has taken the position that custody contracts, such as surrogate parenting agreements, are voidable, not illegal and void.[81] Therefore, the surrogate mother who decides to retain custody of the child rather than follow through with her contractual obligations stands in the same legal position as a woman who conceives without the benefit of a contract.[82] By breaching the contract, the surrogate has forfeited her rights to any payment.[83] Moreover, upon breach, the mother, child, and biological father retain all statutory rights and obligations which exist in the absence of a contract.[84]

Circumstances similar to those in *Surrogate Parenting Associates, Inc. v. Kentucky* arose in New York with the case of *In re Adoption of Baby Girl, L.J.*[85] In determining that statutes which prohibit the payment or acceptance of compensation in connection with the

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79. *Id.*

80. *Id.* The court noted that:

> [T]he central fact in the surrogate parenting procedure is that the agreement is entered into *before* conception. The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are *not* avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically- related offspring. (emphasis in original).

Id. at 211-12.

81. *Id.* at 213.

> Indeed, we have no reason to believe that the surrogate parenting procedure in which SPA participates will not, in most instances, proceed routinely to the conclusion desired by all of the parties at the outset—a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child.

Id. at 213-14.

82. *Id.* at 213.

83. *Id.*

84. *Id.* The term "biological father" refers to the sperm donor, not the surrogate's husband.

85. 505 N.Y.S.2d 813 (Sur. 1986).

placing of a child for adoption are inapplicable to surrogate agreements, the New York Surrogate's Court noted that biomedical science has advanced man into a new era of genetics which was not contemplated by the legislature when enacting statutes prohibiting payments in connection with an adoption.[86] "Accordingly, the court finds that this is a matter for the legislature to address rather than for the judiciary to attempt to determine by the impermissible means of 'judicial' legislation."[87] The most recent, and probably most controversial, case concerning surrogate parenting agreements is *In re Baby M.*[88] Though the facts in *Baby M.* are particularly interesting, they are much too lengthy to be reproduced here. Therefore, discussion will be limited to the New Jersey Superior Court's analysis which is based primarily on contract law.

At the outset, the court concluded that adoption statutes would not be used to either accomodate or deny surrogacy contracts.[89] "[T]here is no law governing surrogacy contracts in New Jersey and the laws of adoption do not apply."[90] Furthermore, surrogate contracts are not contrary to public policy as New Jersey has no stated public policy against surrogacy.[91]

The New Jersey Superior Court focused its analysis on whether the surrogate agreement constituted a valid, enforceable contract.[92] The parties to the surrogate agreement had expressed their respective offers and acceptances to each other and had reduced their under-

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86. *Id.* at 817. "Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under parenting agreements." *Id.* at 818.

87. *Id.* at 818. In the absence of legislation, the court will not prohibit surrogate parenting contracts. *Id.*

88. 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987).

89. *Id.* at 375, 525 A.2d at 1159.

90. *Id.* "Use of laws not intended for their intended purpose creates forced and confusing results." *Id.* at 374-75, 525 A.2d at 1159. The court further noted that the adopting wife is not a party to the surrogate contract and thus, the contract does not violate the state statute prohibiting the giving of consideration to obtain an adoptable child. *Id.*; *see* N.J. STAT. ANN. § 9:3-54(a) which provides:

> No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith,
> (1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or
> (2) Take, receive, accept or agree to accept any money or valuable consideration.

91. 217 N.J. Super. at 389, 525 A.2d at 1166.

92. *Id.*

standing to writing.[93] Even if their mutual promises were insufficient to constitute valid consideration, consideration certainly existed once there was conception.[94] "The male gave his sperm; the female gave her egg in the pre-planned effort to create a child, thus a contract."[95]

Once the court determined that the surrogacy arrangement was indeed a contract, it was necessary to discuss the applicability of defenses which could potentially render the contract unenforceable. The defenses specifically addressed by the court included contracts of adhesion and illusory contracts. By definition, "a contract of adhesion is one in which one party has no alternative but to accept or reject the other party's terms and there are no options by which the party may obtain the product or the service."[96] Under the circumstances of a surrogate contract, neither party has a superior bargaining position. Each has what the other wants.[97] Furthermore, because neither party has disproportionate bargaining power, there is no problem of unconscionability.[98] Clearly, the contract at issue was not a contract of adhesion.

Similarly, the contract was not illusory.[99] An illusory contract is one in which only one of the parties has an obligation which benefits the other.[100] Mutuality of obligation, however, does not mean equality of obligation. The mere fact that the adopting couple may refuse to accept the child does not alleviate their obligation to support that child.[101]

As none of the foregoing defenses were applicable to the surrogacy contract under the circumstances, the court then turned its discussion to the remedies available for the breach of the agreement. Although a contract is valid from the time it is signed, the surrogate mother may nevertheless renounce and terminate the contract up until the time of conception.[102] If a breach occurs at this time, the surrogate

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93. *Id.* at 374, 525 A.2d at 1158.

94. *Id.*

95. *Id.* "The child was conceived with a mutual understanding by the parties of her (the child's) future life." *Id.*

96. *Id.* at 376, 525 A.2d at 1159.

97. *Id.* In fact, the surrogate may be in a better position than the adopting couple as she is the one who is able to have the child that the adopting couple desperately wants but cannot have without the surrogate's cooperation.

98. *Id.* at 377, 525 A.2d at 1160.

99. *Id.* at 384, 525 A.2d at 1163.

100. *Id.* An illusory contract does not contain mutuality of obligation. *Id.*

101. *Id.* The biological father may be responsible for the support of the child even if custody is refused due to some physical defect. *Id.*

102. *Id.* at 375, 525 A.2d at 1159.

would relinquish all payments made to her under the contract and may be liable for monetary damages.[103] Once conception has occurred, however, the rights of the parties are fixed, the terms of the contract set, and performance anticipated.[104] Under these circumstances, monetary damages are probably insufficient.

The remedies which exist for an ordinary breach of contract include either an award of monetary damages or specific performance of the terms of the contract.[105] Monetary damages cannot possibly compensate the adopting couple for the loss of a child.[106] Under the unique circumstances of the surrogate contract, specific performance, or the surrogate's forced relinquishment of the child, may be ordered by the court, but only if doing so would be in the best interest of the child.[107] In the case of *Baby M.* the New Jersey Superior Court found that the best interests of the child would be served by compelling the delivery of the child to the adopting couple.[108] Specifically enforcing the contract will automatically sever and terminate all parental rights of the surrogate.[109]

The New Jersey Supreme Court granted direct certification[110] and subsequently reversed the decision of the trial court.[111] In a unanimous decision,[112] the court invalidated the surrogacy contract because they found that it conflicted with the law and public policy of the State of New Jersey.[113] The New Jersey Supreme Court noted, however,

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103. *Id.* "Specific performance to compel a promised conception, gestation, and birth shall not be available to the male promisor." *Id.*

104. *Id.*

105. *Id.* at 389, 525 A.2d at 1166.

106. *Id.*

107. *Id.* at 390, 525 A.2d at 1166. "[T]he child's best interest is the only aspect of man's law that must be applied in fashioning a remedy for this contract . . . for *any* contract that deals with the children of our society. . . ." *Id.* Additionally, the court noted that since they are dealing with a human life, "the most precious and unique thing on this earth, a small vulnerable and lovable child," any order for specific performance must be determined to be in the best interest of the child. *Id.*

108. *Id.* at 398, 525 A.2d at 1170-81.

109. *Id.* at 399, 525 A.2d at 1171. As the court noted, "termination of parental rights is an extraordinary judicial remedy which is to be granted only after intensive consideration of parental conduct and the needs of the child. Judicial caution in granting termination arises from the permanent and irreversible nature of the order." *Id.*

110. 107 N.J. 140, 526 A.2d 203 (1987).

111. Feb. 3, 1988, on LEXIS, States library, N.J. file at 1 (1988).

112. The opinion of the court was rendered by Chief Justice Wilentz, joined by Justices Clifford, Handler, Pollock, O'Hern, Garibaldi, and Stern.

113. Feb. 3, 1988, on LEXIS, States library, N.J. file at 5. "While we recognize

that their decision did "not preclude the legislature from altering the statutory scheme within constitutional limits, so as to permit surrogacy contracts."[114] In its opinion, the New Jersey Supreme Court agreed substantially with the superior court's analysis and conclusions concerning the custody of the infant,[115] however, it found that the surrogacy contract was invalid since it not only conflicted directly with existing statutes, including those concerning adoption, termination of parental rights, and payment of money in connection with adoption, but it also conflicted with the public policies of New Jersey.[116]

Initially, the New Jersey Supreme Court found the surrogacy contract violative of laws prohibiting the payment of money in connection with adoptions.[117] Despite the contention that the money was paid solely for the services of pregnancy and childbirth, and not to facilitate an adoption, the court noted that no money would be exchanged should the child die prior to the fourth month of pregnancy, and only $1,000 would be paid if the child were stillborn, "even though the 'services' had been fully rendered."[118] "This is the sale of a child, or, at the very least, the sale of a mother's right to her child . . ., [a]lmost every evil that prompted the prohibition of the payment of money in connection with adoptions exists here."[119]

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the depth of the yearning of infertile couples to have their own children, we find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women." *Id.*

114. *Id.* at 6.

115. *Id.* at 18.

116. *Id.* at 23-24.

> Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the 'surrogate' as the mother of the child.

Id. at 5-6.

117. *Id.* at 25. *See* N.J. STAT. ANN. § 9:3-54(a) which prohibits the paying or accepting of money in connection with any placement of a child for adoption.

> The prohibition of subsection (a) shall not apply to the fees or services of any approved agency in connection with a placement for adoption, nor shall such prohibition apply to the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child, or to the acceptance of such reimbursement by a parent of the child.

Feb. 3, 1988, on LEXIS, States library, N.J. file at 26 n.4 (citing N.J. STAT. ANN. § 9:3-54(b)).

118. Feb. 3, 1988, on LEXIS, States library, N.J. file at 28.

119. *Id.* at 52. "The negative consequences of baby buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother." *Id.* at 30.

Additionally, the New Jersey Supreme Court found that the surrogacy contract violated laws which required proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted.[120] New Jersey laws provide for the termination of parental rights only where there has been a voluntary surrender of a child to an approved agency,[121] or to the Division of Youth and Family Services (DYFS),[122] or in a private placement adoption, where there has been a showing of parental abandonment or unfitness.[123] Therefore, in order to terminate parental rights in the instant case, a private placement adoption, there must be a showing of "intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future."[124] It therefore becomes apparent that "a contratual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced by our courts."[125]

Moreover, the New Jersey Supreme Court found that the surrogacy contract violated the law that makes the surrender of custody and consent to adoption revocable in private placement adoptions.[126] As noted previously, a natural mother's consent to surrender her child and to its subsequent adoption is not required in private placement adoptions; rather, all that need be shown is parental abandonment or unfitness.[127] "[I]n an unsupervised private placement, since there

120. *Id.*

121. *Id.* at 31. N.J. STAT. ANN. § 9:2-18 *et seq.* governs an action by an approved agency to terminate parental rights. Feb. 3, 1988, on LEXIS, States library, N.J. file at 31.

122. Feb. 3, 1988, on LEXIS, States library, N.J. file at 32. N.J. STAT. ANN. § 30:4C-23 governs where DYFS is the agency seeking termination. Feb. 3, 1988, on LEXIS, States library, N.J. file at 32.

123. Feb. 3, 1988, on LEXIS, States library, N.J. file at 33. N.J. STAT. ANN. § 9:3-48(c)(1) governs the termination of parental rights in private placement adoptions. Feb. 3, 1988, on LEXIS, States library, N.J. file at 33.

124. Feb. 3, 1988, on LEXIS, States library, N.J. file at 33 (citing N.J. STAT. ANN. § 9:3-48(c)(1)). *See also* Sees v. Baber, 74 N.J. 201, 377 A.2d 628 (1977), wherein the New Jersey Supreme Court observed that in an unregulated private placement, "neither consent nor voluntary surrender is singled out as a statutory factor in terminating parental rights." *Id.* at 213, 377 A.2d at 634.

125. Feb. 3, 1988, on LEXIS, States library, N.J. file at 37. "The legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract." *Id.*

126. *Id.* at 37-38.

127. *See supra* notes 123-24 and accompanying text.

is no statutory obligation to consent, there can be no legal barrier to its retraction."[128] Thus, there can be no doubt that a contractual provision purporting to constitute an irrevocable agreement to surrender custody of a child for adoption is invalid.[129]

The New Jersey Supreme Court also found the surrogacy contract to violate numerous aspects of the state's public policy.[130] Such a contract guarantees permanent separation of a child from one of its natural parents in contravention of New Jersey's policy, that whenever possible, a child should remain with both parents.[131] Moreover, "[t]he surrogacy contract violates the policy of the state that the rights of natural parents are equal concerning their child, the father's right no greater than the mother's."[132]

In concluding, the court recognized that the long-term effects of surrogacy are not known, but feared.[133] "[T]he harmful consequences of this surrogacy arrangement appear to us all too palpable. In New Jersey the surrogate mother's agreement to sell her child is void. Its irrevocability infects the entire contract, as does the money that purports to buy it."[134]

IV. The Need for Legislative Reform

The unique circumstances of surrogate parenting, the inapplicability of existing statutes, and the inconsistencies in judicial decisions, all point to the conclusion that legislation is desperately needed in the area of surrogate motherhood. State legislatures have generally failed to address the unresolved legal problems which arise in surrogate parenting agreements.[135] Some of the many issues which need to be

128. Feb. 3, 1988, on LEXIS, States library, N.J. file at 45.

129. *Id.* at 43-44.

130. *Id.* at 46.

131. *Id.* at 47.

132. *Id.* at 48. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *Id.* at 48-49 (citing N.J. Stat. Ann. § 9:17-40).

133. Feb. 3, 1988, on LEXIS, States library, N.J. file at 57.

134. *Id.* at 59.

135. As of 1984, surveys of the National Committee for Adoption found legislative activity related to surrogate parenting in twenty-one (21) states and the District of Columbia. Discussions on Alabama, District of Columbia, Kentucky, and Oklahoma were centered on prohibiting surrogate parenting. Missouri and Ohio had considered similar prohibitions, but took a neutral stance. In fifteen (15) states, however, activity focused on allowing surrogate agreements. These states included: Alaska, California, Connecticut, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, South Carolina, and Virginia. The Committee for Adoption concluded that Michigan is the only state with strong advocates, legislatively and otherwise, on both sides of the issue. *See* Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 Fam. L. Rep. (BNA) 3001, 3003 (1985).

resolved through legislation include, but are not limited to: (1) the rights of all the parties involved, including the spouses of the biological mother and biological father; (2) the legitimacy of the child; (3) the allowance of compensation; (4) the duties of the parents regarding the imperfect child, specifically amniocentesis and abortion; and, (5) the remedies available for a breach of contract.

As of 1986, Arkansas is the only state that has a statute designed specifically to regulate surrogate parenting.[136] Stated simply, the Arkansas statute provides that a child born to an unmarried surrogate mother is the child of the intended parents.[137] Even this statute, however, does not adequately deal with all of the problems inherent in surrogate parenting since it only applies to arrangements involving an unmarried surrogate mother.[138]

On March 2, 1987 and March 10, 1987, two bills were introduced in the General Assembly of Pennsylvania to specifically govern the practice of surrogate parenting.[139] The first bill[140] would amend an already existing statute which prohibits dealing in humanity by trading, bartering, buying, selling, or dealing in infant children.[141] Specifically, this bill proposes to make the participation in a verbal or

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136. *See* ARK. STAT. ANN. § 34-720-21 (Supp. 1985).

CHILD BORN AS RESULT OF ARTIFICIAL INSEMINATION SHALL BE DEEMED LEGITIMATE NATURAL CHILD OF HUSBAND. Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman's husband if the husband consents in writing to the artificial insemination.

CHILD BORN TO MARRIED OR UNMARRIED WOMAN - PRESUMPTIONS - SURROGATE MOTHERS. (A) A child born by means of artificial insemination to a woman who is married at the time of the birth of such child, shall be presumed to be the child of the woman's husband.

(B) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child, shall be for all legal purposes the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of the woman intended to be the mother. For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth can be issued upon orders of a court of competent jurisdiction.

137. *See* ARK. STAT. ANN. § 34-721(B) (Supp. 1985).

138. *Id.*

139. *See* H.R. 570, 171st Sess. (1987); H.R. 776, 171st Sess. (1987).

140. H.R. 570, 171st Sess. (1987). This bill proposes an amendment to Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, prohibiting surrogate mothering.

141. 18 PA. CONS. STAT. ANN. § 4305 (1983) provides: "A person is guilty of a misdemeanor of the first degree if he deals in humanity, by trading, bartering, buying, selling, or dealing in infant children."

written agreement relating to the practice of surrogate mothering, a misdemeanor of the first degree.[142]

The second bill,[143] rather than prohibiting surrogate mothering,[144] purports to regulate the practice by adopting a statute specifically written for that purpose.[145] The bill recognizes the increase in the practice of surrogate parenting brought about by the increased incidence of female infertility.[146] Moreover, the proponents of this bill acknowledge that the legal status of children born under surrogate parenting arrangements is currently uncertain, and therefore propose that the General Assembly act to protect the best interests of the children who will result from the practice of surrogate parenting.[147]

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142. H.R. 570, 171st Sess. (1987). As amended, 18 PA. CONS. STAT. ANN. § 4305(b) would provide:

> As used in this section the term "surrogate mothering" means doing any of the following for the purpose of receiving financial compensation for providing a couple or single person with a child:
> (1) Becoming pregnant.
> (2) Completing the gestation cycle of that pregnancy.
> (3) Delivering the child of that pregnancy.
> (4) Conspiring with or enticing another to become preganant, complete gestation, and deliver the child of that pregnancy.

143. H.R. 776, 171st Sess. (1987).

144. *Id.* The proponents of this bill recognize that an individual's decision regarding whether or not to bear or beget a child falls within the constitutionally protected right of privacy. "[T]herefore, the Commonwealth may not prohibit the practice of surrogate parenting or enact regulations that would have the effect of prohibiting the practice." *Id.*

145. H.R. 776, 171st Sess. (1987) seeks to amend Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, to provide for surrogate parenting.

146. *Id.* The General Assembly of the Commonwealth of Pennsylvania recognized that "due to the increased incidence of female infertility, many couples are turning to surrogate mothers to help them create families." *Id.* Approximately fifteen to twenty percent of American couples of childbearing age are infertile. Cohen, 10 AM. J. LAW & MED. at 243-44. "Due to the availability of birth control and abortion, the lessened fertility apparently caused by environmental pollutants, venereal disease, and certain forms of contraception such as intrauterine devices, as well as to the lessening social stigma that faces today's unwed mothers, there simply are not enough healthy, adoptable babies to meet the demand. . . ." Bird, 2 CALIF. LAWYER 21, 22 (Feb. 1982). Therefore, because of this decrease in the number of available adoptable babies, many couples are turning to the alternative of surrogate motherhood. Cohen, *supra* at 244.

147. H.R. 776, 171st Sess. (1987). As amended, 23 PA. CONS. STAT. ANN. § 3001 would be entirely a definitional section. Under this section, the term "surrogate parent agreement" is defined as:

> A written contract entered into by the intended parents and a surrogate mother, which conforms to the requirements of section 3004 (relating to surrogate parenting agreements), whereby the surrogate mother agrees to be inseminated by the sperm of the husband of an infertile woman and to carry

The necessary provisions of the surrogate parenting agreement are set forth at length in the proposed bill. More important, however, are the provisions which give the surrogate mother control over the medical decisions relating to her pregnancy[148] and limit the remedies available for breach of contract to money damages.[149] Moreover, the proposed bill would enable the surrogate mother to revoke her consent to relinquish custody of the child if done within twenty days of the birth of the child.[150]

V. CONCLUSION

The surrogate parenting procedure may provide a childless couple with its only means of obtaining a child biologically related to at least one of the parents. Because of the lack of surrogate parenting statutes, however, and the uncertain applicability of existing statutes, the enforceability of such surrogate agreements remains unpredicta-

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the child to term, or consents to carry to term the embryo/zygote produced by the intended parents through the process of *in vitro* fertilization, and consents to the surrender of the child to the intended parents upon the birth of the child as soon thereafter is as medically feasible.

In order to be enforceable, the surrogate agreement must be judicially approved. *See* H.R. 776, 171st Sess. (1987) (proposed 23 PA. CONS. STAT. ANN. § 3003). "A person who enters into a surrogate parenting agreement and pays fees under that agreement without court approval . . . commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of $2,000 or to imprisonment for not more than one year, or both." *See* H.R. 776, 171st Sess. (1987) (proposed 23 PA. CONS. STAT. ANN. § 3009).

148. H.R. 776, 171st Sess. (1987). As amended, 23 PA. CONS. STAT. ANN. § 3004(a)(4) would provide "that the surrogate mother will have control of medical decisions relating to her preganancy." This section would enable the surrogate to decide for herself whether to abort, or refrain from aborting, should it be discovered that the child will be born with a physical or mental defect.

149. H.R. 776, 171st Sess. (1987). As amended, 23 PA. CONS. STAT. ANN. § 3004(a)(11) would provide that "a cause of action arising from a surrogate parenting agreement be limited to an action for breach of contract and an action for enforcement of the terms of the agreement and that remedies for breach of contract be limited to money damages in the amount described in the agreement." This section would therefore eliminate the remedy of specific performance.

150. H.R. 776, 171st Sess. (1987). As amended, 23 PA. CONS. STAT. ANN. § 3008 would provide:

A surrogate mother may revoke her consent to relinquish custody of the child of the intended parents. Revocation under this section must:
(1) be made in writing;
(2) be filed with the court that approved the surrogate parenting agreement;
(3) be given to the intended parents;
(4) be made within 20 days of the birth of the child; and
(5) comply with the surrogate parenting agreement.

ble. In order to obtain stability in the law, therefore, legislation should be adopted. Such legislation would enable the parties to become fully informed of their rights prior to entering into a surrogate agreement. Furthermore, legislation would ensure that the best interests of the child are being met at all times.

Surrogate motherhood is not a fad. The problems inherent in the procedure will not go away. In fact, as more couples proceed to enter into these agreements, litigation will only increase. Therefore, the time for appropriate legislation has arrived.

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