

LIBERTY BAPTIST SEMINARY

SURROGATE PARENTING: AN INVESTIGATION OF
THE MORAL, LEGAL, MEDICAL AND PSYCHOLOGICAL
IMPLICATIONS

A Thesis

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By

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LIBERTY BAPTIST SEMINARY



THESIS APPROVAL SHEET

The views expressed in this thesis do not necessarily represent the views of the institution and/or of the thesis readers.

 A
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CHAPTER I

Introduction

Statement of the Problem

The phenomenon of surrogate parenting through artificial insemination has disclosed a new arena to the counseling profession through the psychological, medical, moral, and legal controversies which accompany it. Coming to prominence in the late 1970's as a viable and personal alternative to adoption for childless couples, surrogate parenting is now becoming a growing concern for those who believe in the dignity of man. Psychologists and medical doctors are researching the various medical and emotional effects which surrogate parenting has had and will continue to have upon the adults involved and the offspring.¹ Theologians and various religious spokesmen have begun to investigate the morality and religious criteria, both pro and con, of the phenomenon. Attorneys and legislators are looking into the legality of the

¹Dr. Philip Parker, a psychiatrist at Wayne State University, conducted an interview with sixty applicants for surrogate mothering. The results of his research showed that most applicants have not considered the problem of the loss of the baby at term or thought of how they would explain the loss of the baby to their own young children and to colleagues at work. Some replied that they would lie, saying the baby had died.

His research found that some prospective parents plan to tell their prospective children the steps leading to their birth as soon as they are old enough to understand the concepts involved; while others insist that they will keep the child from learning these facts. David Sobel, The New York Times: "Style", Monday, June 29, 1981.

procedure as it pertains to the surrogate, the adoptive parents, and the infant, and its effect upon public policy. Dr. Parker has taken this into consideration:

People react strongly, often totally negatively, to the mere mention of surrogate motherhood. It seems to trigger their fantasies about baby-buying, slavery and black marketeering. (Dr. Parker) said he wanted to provide a real data base so that any social action to prohibit or regulate surrogate motherhood could be founded on information instead of gut feelings or prejudice.²

Although many of these professional people sincerely have the best interests of all concerned under consideration, several do not. For these few professionals it has become big business and big money, thus compounding the legal and moral aspects.³ This new-found venture for entrepreneurs has brought surrogate parenting and artificial insemination out of the laboratories and into the Want Ad sections of newspapers, extracting the emotions of greed or compassion from the respondents. "Fees for services or expenses normal average \$5,000 to \$10,000, but they can go as high as \$20,000..."⁴

The desire to satisfy these emotions, both of the potential surrogate parent and the potential adoptive couple, often supercedes their awareness of the need for proper medical advice and assistance:

Doris and Jack Kent (after a surrogate mother had been secured) said, "We were so excited, all we wanted to

²Ibid.

³Dave Lindorff. "The Business of Surrogate Births", Venture: The Magazine for Entrepreneurs. (September, 1981): 56.

⁴Katy Brophy, Louisville, Ky., attorney who operates Surrogate Family Services, as quoted in The National Law Journal, (April 9, 1981): 4,33.

do was find a doctor willing to help us get on our way to becoming parents. We made an appointment with our family doctor, but he couldn't help us, nor could the colleague he recommended. Our need to consummate our hopes and dreams was so intense that we decided to perform the artificial insemination ourselves. And we did."

Interestingly, it was the wife, in each case, who performed the artificial insemination ...⁵

Counselors are going to be overwhelmed with multitudes of questions concerning surrogate parenting as the phenomenon becomes more and more disclosed to the public. Childless couples from all walks of life will be seeking advice and counsellors will need to be well versed with regard to the legal, medical, psychological, and moral aspects in order to answer their questions.

Statement of Purpose

The purpose of this thesis is to present an investigation of the legal, moral, medical and psychological interests which bear upon surrogate parenting. Within this framework, an analysis of the presently available studies and opinions will be presented. The paper will also present and analyze the motivational aspects of the potential surrogate mother, potential adoptive parents, and those professional persons who arrange the operation.

Surrogate motherhood is a phenomenon that many find difficult to understand... Elizabeth Kane says she became a surrogate because of her great sympathy for women who are unable to have children... Dana acted out of friendship... In fact, money was a motivating factor for a majority of surrogate applicants studied by Dr. Philip Parker.⁶

⁵Karol White. What To Do When You Think You Can't Have A Baby (Garden City, New York: Doubleday & Co., Inc., 1981), p. 129.

⁶Elaine Markoutsas. "Women Who Have Babies for Other Women," Reader's Digest (August 1981): 70-74.

Counselors will have in hand, within this finished thesis, a guide which will aid them in counseling in this matter.

Statement of Importance of the Problem

The importance of the problem of the phenomenon of surrogate parenting lies in the fact that no one at this time has a definite grasp on the totality of the implications.

There is one key point. There are no laws pertaining to surrogate mothers.. For the truth is that artificial insemination, the primary medical contribution to surrogate mothering, is relatively simple... We do not know, and will not know for some time, what the long range psychological consequences of the surrogate mother are... The question: By promoting the surrogate mother, are we doing good? Are we on the side of the angels (in promoting life) or the devils (in violating traditional moral taboos)?⁷

These implications can and do coincide with those of the in vitro fertilization process, i.e., genetic manipulation, embryonic experimentation, selective breeding, and the quest for a super-human race.

The selective breeding and the quest for a super-human race have become a reality. With the establishment of numerous "sperm banks" throughout the nation it is possible to select a particular father for the potential child. It has been reported that these certifiable intelligent women have been impregnated by semen from Nobel laureate donors.⁸

At this juncture, "everyone is doing what is right in his own eyes." There is clearly a need for a thorough investigation of the reality of surrogate parenting, bringing in those arguments for and against the process. No indepth analysis of its effects upon the family structure have been presented from a psychological or Biblical

⁷Noel P. Keane with Dennis L. Breo. The Surrogate Mother (New York: Everest House Publishers, 1981), pp. 233, 240, 246, 255.

⁸Matt Clark with Jonathan Kirsch. "Recipe for Genius: First, Get Sperm....," Newsweek Vol. XCV, No. 10 (Mar. 10, 1980): 85.

point of view. Questions which have not been answered, as yet, bear upon all four of the areas mentioned in this thesis.

1. Medical

- a. Is this procedure really bringing joy and fulfillment to the childless parents?
- b. Is science being represented at its best in serving human beings by assisting nature when nature cannot do its job?
- c. Is it expanding our knowledge about conception and fetal growth?

Clearly these technologies (surrogate mothering, artificial insemination, in vitro fertilization) bring joy and fulfillment to parents who long for children and cannot have them in the ordinary way. This is the strongest argument in favor of such procedures. They represent science at its best, serving human beings by assisting nature.

This research, too, is vastly expanding our knowledge about human conception and fetal growth. This serves the quality of human life...⁹

This thesis will illustrate that the medical profession contends that the surrogate parenting process is greatly enhancing their knowledge of human embryology. However, it will be demonstrated that those involved do have concerns about the moral and ethical value of their studies.

2. Moral

- a. Is the introduction of a third party into a marriage harmful to the union?
- b. Is the offspring a commodity offered to only those who can afford it?
- c. Are the surrogate mother and the infant without dignity?

⁹Edward Stevens. Making Moral Decisions (New York/Ramsey: Paulist Press, 1981), p. 53.

d. Is the artificial insemination moral?

e. If donor semen is used, who is the "real" father?

More than any other aspect, the moral implications of surrogate parenting have contributed to its lack of popularity. Artificial insemination is not a new solution to an old problem. Writings in the Talmud mention its use as far back as 300 B.C.¹⁰ In the fourteenth century an enemy injected some fine Arab mares with the sperm of an inferior breed. This method has been around for centuries but is now coming out of the closet.

Noel Keane, a Detroit attorney, cites the following in the Introduction to his book, The Surrogate Mother:

Once, perhaps, she might have adopted. But the pill and abortion have changed that. There are very few babies to adopt...

The ability to help people like Tom and Jane is what sustains me when the going gets rough — when the people in my parish tell me, "What you're doing is immoral," or when the editorial writers scoff, "Rent-a-womb."¹¹

The moral issues have provoked a verbal war between the religious spokesmen and scientists.

Science is not the highest value. We must consider the implicit danger to man's right to life of discoveries in the field of artificial insemination, birth and fertility control, and genetic engineering.

— Pope John Paul, II, speaking to an audience of Italian physicians, October 27, 1980.¹²

¹⁰Martin Gallin and Philip Newman. "Whose Child Is This," Human Rights. Vol. 8, No. 2 (Summer 1979): 140.

¹¹Noel P. Keane, The Surrogate Mother. p. 13.

¹²Ibid., p. 2.

Science cannot stop while ethics catch up.
 —Elvin Stackman, speaking as president of the American
 Association for the Advancement of Science, January
 9, 1950.¹³

There are those in the religious circles who contend that no moral violation has occurred.

...if the goal is to provide an infertile couple with children, surrogate motherhood is morally unobjectionable.¹⁴

Although Rabbi Seymour Siegel sees nothing objectionable in the moral issues of surrogate parenting, there are age-old Jewish beliefs which would contradict his statement.

Surrogate parenting — surrogate mothers and AID — is causing concern for morality among scientists:

Laboratory control of human reproduction is fraught with danger and uncertainty. Once scientist, Martin Curie-Cohen, Ph.D., University of Wisconsin, raises certain valid concerns:

- . Inadequate genetic screening of donors.
- . Lack of control of multiple use of donors, leading to inbreeding.
- . Inadequate record keeping.
- . Lack of uniform policies responsible for the practice of AID.¹⁵

The greatest concerns are being expressed by certain professional organizations within the medical profession itself. One such organization is the Ciba Foundation. Founded primarily for the promotion of

¹³Ibid., p. 2.

¹⁴Rabbi Seymour Siegel, Jewish Theological Seminary of America in New York City, as quoted by Elaine Markoutsas. "Women Who Have Babies for Other Women," Reader's Digest (August 1981): 70-74.

¹⁵White, p. 124.

international cooperation in medical and chemical research, it is a scientific and educational charity established by CIBA Limited, now CIBA-GEIGY Limited, of Basle and operates independently in London under English trust law.

The sum of all this is that moralism compromises truth: a judgement that the act ought not to be done, while it continues to be done, gives rise to an accumulating deceit upon society, both in records and in relationships...

It is therefore, a matter of serious concern that a new medical practice, grounded upon scientific research and so upon the high value put on truth, should in fact result in, and to some extent require, deceit and uncertainty. The secrecy involved in A.I.D. obliges the practitioner, the husband and wife, and the donor (surrogate mother) to conspire together to deceive the child and society as to the child's true parentage, his genetic identity. Truth is violated, credibility is undermined, and this is a serious ethical matter.¹⁶

As demonstrated here, the moral/ethical issues loom as legend. However, it is not the intent of this thesis to attempt a resolution of all that is involved. It is intended to enlighten the reader to those various moral/ethical issues which will need to be addressed in counseling sessions with prospective surrogate parents.

3. Legal

Another aspect of surrogate parenting which is quickly becoming of greater concern than the medical or moral issues is that of the legality of the process. The relative newness of the phenomenon has exposed the legal system as inadequate to deal with the issue at this time. Many states are hurriedly and perhaps haphazardly struggling to initiate legislation to cover A.I.D. and surrogate mothering.

¹⁶G. R. Dunstan. "Moral and Social Issues Arising from A.I.D." Law and Ethics of A.I.D. and Embryo Transfer, Ciba Foundation Symposium 17 (New York: Associated Scientific Publishers, 1973), p. 48.

Some questions which have been raised are:

- . What is the rational legislative reason why a single woman cannot be an adoptive parent?
- . How is the validity of the Agreement affected if there is a dispute whether pregnancy occurred by natural insemination rather than artificial insemination?
- . Does the Agreement only permit wealthier adoptive parents? Can single fathers enter into surrogate agreements?
- . How will the family "unit" be defined and applied?
- . Could it be a conflict of interest for the physician who artificially inseminated the surrogate mother to be able to recommend abortion?
- . Will Agreement terms which contradict provisions required by the Act to be included in an Agreement be enforceable?¹⁷

Questions have arisen in another state, Kentucky:

- . Whether such a contract (surrogate mother and adoptive parents) is legal in Kentucky.
- . Whether ordinary custody rules would apply in the event one or more of the parties to the agreement changed their minds while the pregnancy was in progress.
- . Whether surrogate transactions can be regulated by the state.
- . Whether the couple or the doctor could be held liable if the surrogate died or had her health impaired by the pregnancy.¹⁸

The state of California has been faced with cases which have required

¹⁷Ralph Mawdsley, Ph.D., Attorney at Law, upon reviewing House Bill No. 5184 introduced by Rep. Fitzpatrick to the Michigan State House, October 26, 1981.

¹⁸Steven L. Beshear, Attorney General, Commonwealth of Kentucky, response to a letter from Mr. Joe Ward, Editor, Courier Journal-Louisville Times, Louisville, Kentucky (January 26, 1981).

the intervention of the Supreme Court of that state. This particular case illustrates the ways in which the issues complicate the lives of the participants in this eternal human drama.

The State of New York has also been involved in numerous cases dealing with A.I.D. The earliest dates to 1948 in the case of Strand v. Strand. In these cases, "Adultery" seemed to be the prevelant issue.¹⁹

Although the courts will be the deciding factor as in the issues of abortion and euthenasia, a big question to be resolved is: Can legislation pertaining to surrogate parenting be considered legislating morality? As in abortion, many will ask, "Is the surrogate mother not able to do with her body and its products (egg, embryo) as she pleases?" "Is not the donor of sperm permitted to dispose of his bodily products (sperm) as he pleases?"

These are legitimate questions and the courts will have to resolve them in the formulation of public policy. Noel Keane proclaims:

The solution to this controversy is very simple. We need legislation from the states to clarify the issues and we need regulation by the states to control those involved. Court decisions can only point the way. The real answer is to be found in legislation.²⁰

This thesis will present an analysis of the existing legislation in the above mentioned states. It will also provide the reader with

¹⁹Martin Gallin and Philip Newman. "Whose Child Is This" Human Rights Vol. 8, No. 2 (Summer 1979): 17.

²⁰Keane, p. 233.

a summary of those opinions and articles which have been compiled by the legal profession dealing with surrogate parenting.

4. Psychological

The psychological aspect of surrogate parenting is probably as weak in research as the legal area is in legislation. Psychologists have attempted and are presently conducting studies to provide information concerning the donor parents, adoptive parents and the offspring. At this present time, information regarding the long range effect upon the offspring is extremely limited. There are a few cases which have surfaced and the available information on these will be investigated. Some of the questions being asked are:

- . What are the long-range psychological consequences of surrogate parenting?
- . What are the motivations of a surrogate parent?
- . What psychological consequences will there be for society?
- . What type of person will be a surrogate parent?
- . What are the psychological effects upon the family members of one who is a surrogate parent, i.e., husband, wife, son, daughter, mother, father, sister, brother?

At the time of this writing, two psychiatrists are conducting research into the motivations for surrogate parenting and are beginning a study of its effects upon the parties concerned. Philip Parker, M.D., Psychiatry, has done a preliminary study on the surrogate mother's motivation. He finds:

However, most women did not admit that any feelings of loss would occur and denied that the baby would be theirs. They said such things as:

- "I'm only an incubator."
- "I'd be nestwatching."
- "It won't be my husband's and mine."
- "I'll think of doing it for the money for my

children; like an illness, I'll think, 'In four months, I'll be better.'"
 "I'll be doing it for someone else."
 "I'd be doing it for the woman: I'd be closer to the wife."
 "I'll attach myself in a different way — hoping it's healthy."²¹

With responses like these, it is clearly evident that there is a great deal of psychological manipulation on the part of those involved. Although only in preliminary stages, the studies do provide an abundance of insight into the "person" of those who seek to be surrogate parents.

Dr. Darrell D. Franks has also investigated the psychological aspect of surrogate parenting. His results showed:

Most viewed this process somewhat like that of an unwed mother placing her child for adoption but these women felt assured that the background and characteristics of the family who would be rearing the child were good. Almost all wished to see the infant one time to assure themselves that the child was normal.²²

It is the intent of this thesis to provide the reader with the available information at this writing which is pertinent to the psychological implications of surrogate parenting.

Statement of Position on the Problem

The position taken by this thesis in relation to the surrogate parenting issue is that it is morally and psychologically wrong. Also, since the legal entanglements presently seem insurmountable, the emo-

²¹Philip Parker, M.D., Clinical Instructor, Dept. of Psychiatry, Wayne State University School of Medicine, "Surrogate Mother's Motivation — Initial Findings," paper presented at the annual meeting of American Psychiatric Association, New Orleans, May 12, 1981. p. 5.

²²Darrel D. Franks, M.D., "Psychiatric Evaluation of Women in a Surrogate Mother Program" American Journal of Psychiatry, Vol. 138 No. 10 (October 1981): 1378.

tional injustices are incalculable. Since the artificial insemination process involves masturbation, the introduction of a third party into the marital arrangement, and the possibility of incest between the offspring, it will be proven that surrogate parenting is unbiblical.

With the negligence of the parties concerned to seek proper medical advice and assistance, it will be proven from a medical point of view that it is potentially hazardous to the surrogate mothers and the offspring. In addition, it will be shown that in the A.I.D. process there is a potential danger of disease being transmitted to the surrogate mother or the A.I.D. recipient. These illnesses may range from a minor infection to venereal disease.

However, I have found that the transmission of disease ... to be more of a problem than these authors suggest. This seems to be especially true in the case of mycoplasma infection from the donor, and may possibly account for the recent increase in spontaneous abortion in my "successful" patients.²³

The ultimate question to be answered is, "Is surrogate parenting contrary to God's plan for the human family unit?" and the answer will be resoundingly, "Yes!"

Limitations

The limitations confronting this project lie in the area of research. Since this is a relatively new issue, written material dealing specifically and extensively with the subject is sparse. While numerous articles are available, it has been dealt with only as an alternative to childlessness in various books and pamphlets on the subjects of

²³Herbert W. Horne, Jr., "Artificial Insemination, Donor: An Issue of Ethical and Moral Values." New England Journal of Medicine Vol. 293, No. 17 (October 23, 1975): 873.

Infertility, Human Reproduction, Pregnancy, Genetic Engineering, Gynecology, Morals, Ethics, Adoption, Sterility, and Cloning.

The study itself is limited in that the thrust of this thesis is surrogate parenting as it relates to married couples and the family structure. Single parenthood through surrogate parenting, although a very real concern and one which stands in need of further investigation, will not be considered as an issue to be confronted within this paper. However, in presenting pertinent material for the topic it will be necessary to make reference to those areas in which there is a correlation.

Also, it is not the intent of this thesis to discuss at great length the in vitro fertilization issue. But, as with single parenthood, it will behoove the text to discuss those areas of concern which are common to both.

A side issue which is rapidly developing within the medico/science realm is embryo transfer/fetal adoption. This will be discussed because it is a direct surrogate parenting result in its truist definition.

The woman who donates the ovum to be fertilized and the woman into whom the zygote is transplanted do not need to be the same woman. Indeed, women who are unable to carry a child to term may desire to hire a "surrogate mother" who would carry the child.²⁴

Another issue springing from the surrogate parenting procedure is

²⁴This method of surrogate motherhood produces a child which is the biological issue of both parents, rather than a child of the wife alone, as in A.I.D., or husband alone, as in a surrogate mother. Paula Diane Turner, "Love's Labor Lost: Legal and Ethical Implications In Artificial Human Procreation." University of Detroit Journal of Urban Law, Vol. 58, No. 3 (Spring 1981): 471.

the ability of homosexual men and women to become parents. Many doctors report that if they are aware that a woman or man is homosexual, they will refuse to perform artificial insemination.

The greatest fear of the surrogate parenting phenomenon for those professional institutions involved is that it opens a new "Pandora's Box" of implications. This thesis will deal only with those implications which involve the husband/wife relationship.

Research Methods

This thesis will be a combination of library research, a descriptive study of existing data and analyses, and it will involve some questionnaire/interview situations with local gynecologists. An interview with potential adoptive parents is currently being pursued but is not confirmed. There will be correspondence with medical doctors, attorneys, psychiatrists, and institutions which are presently working with surrogate parenting. At the time of this writing, forty-one organizations dealing with surrogate parenting have been contacted.

The questionnaire will be brief and with yes/no answers. They will deal with motivation, justification, method, moral implications and medical views.²⁵

The basic research is library research. There will be no test

²⁵These interviews and questionnaires may not be used depending upon the quantity of such tests found within the research. Should they be used, it would be restricted to Liberty Baptist College students and personnel and perhaps the other local college students and personnel.

conducted which relates to the cultural attitudes by this writer. However, material currently being compiled by other professionals will be analyzed within the thesis.

Proposal for Chapter Division

Chapter I: INTRODUCTION

This chapter will give to the reader an overview of the content of the thesis and bring an awareness of the necessity for research in this area. It provides brief discussions of the implications projected by the surrogate parenting procedure. Chapter I also presents a detailed listing of various definitions of terminology which will provide a better understanding of the overall subject.

Chapter II: INTERESTS FURTHERED BY SURROGATE PARENTHOOD

This chapter provides the reader with the genesis of surrogate parenting and will serve as a catalyst for the development of the thesis. The intent of this chapter is to make the reader aware of the potential benefits and dangers of the act of procreation through artificial means.

Chapter III: CURRENT EFFORTS PROMOTING INTEREST IN SURROGATE PARENTING

Chapter III will present the excesses and abuses of the surrogate parenting "business". The material presented here will provide an insight into sequential results of the actions discussed in Chapter II. It will also review some of the legislation which is being proposed to regulate the surrogate parenting business.

Chapter IV: PUBLIC POLICY IMPLICATIONS OF SURROGATE PARENTHOOD

Surrogate parenting at present is governed by no moral, legal, or medical guidelines. Material presented here will discuss the various court cases which have stemmed from issues raised about surrogate parenting. The varying views of religious sects will also be reviewed as well as the moral/ethic, legal, medical, and psychological professions.

Chapter V: CONCLUSION

The content of this chapter will summarize the presented material, analyze it and state the position of the writer on each aspect.

Proposed Summary of Each Chapter

Chapter I: INTRODUCTION

This chapter will discuss those problems which present a limitation to this study, i.e., relative newness of the problem, the lack of extensive research and writing from the various fields encompassed by surrogate parenthood. It will provide an overview of the various books, articles, magazines, and opinions of professional agencies, i.e., The American College of Obstetricians and Gynecologists, The American Academy of Psychiatry and Law, American Medical Association, American Psychiatric Association, American Fertility Society, and the Attorney Generals of Illinois, Kentucky, Michigan, and California. The chapter will also present definitions of the various medical, psychological, and legal terminology which will be used throughout the

thesis. This will expose various issues which provide the structure for the thesis.

Chapter II: INTERESTS FURTHERED BY SURROGATE PARENTING

Those interests which seemingly have profited from surrogate parenting, adoptive parents, medical research, and the surrogates themselves, will be discussed. The chapter provides information from recent studies of surrogate parenthood candidates concentrating on their motivations. The medical research which has been furthered, genetic manipulation, and in vitro fertilization, is also presented.

Chapter III: CURRENT EFFORTS PROMOTING INTEREST IN SURROGATE PARENTHOOD

Presented here is an overview of those organizations which are currently publicizing the positive results of surrogate parenting and their motivations for doing so. This chapter presents an insight into the excesses and abuses of the human reproduction process.

Chapter IV: PUBLIC POLICY IMPLICATIONS OF SURROGATE PARENTHOOD

Basic to this chapter will be the pursuit of answers to various questions which have been raised:

"The practice is morally unjustifiable, because a third party is introduced into the marriage of two who have become one flesh...", Richard McCormick, Professor, Georgetown University.

"I know of no court that would be sympathetic to a contract involving the selling of babies", Professor Sanford N. Katz, Chairman, American Bar Association's Family Law Section.

"Depersonalization of the reproductive process could have adverse effects on human society", Dr. Jack W. Provonsha,

M.D., Professor, Loma Linda University."²⁶

Chapter V: CONCLUSION

This chapter will evaluate the material presented in the thesis in view of the Biblical and ethical arguments for the dignity of human reproduction.

Survey of Literature

The research will include reading, personal interviews, and a brief questionnaire. It will be conducted at the libraries of Liberty Baptist College and Seminary, Lynchburg College, Lynchburg City Public Library, and at the Medical School Library, Law School Library, and the School of Psychology Library of the University of Virginia in Charlottesville.

The interviews will be conducted with gynecologists in the city of Lynchburg and with doctors at the University of Virginia Medical School. The questionnaire will be distributed to various college students and professors of the local colleges.

The literature used for research in this project is seventy-five percent articles which have been published in newspapers, i.e., New York Times, Washington Post, and Los Angeles Times. Many major magazines and periodicals have also carried articles of interest. These include: Newsweek, Time, Venture, Reader's Digest, New England Law Journal, New England Journal of Medicine, Alabama Journal of Medicine and Science, Fertility/Sterility, The Public Interest, The National Law Journal, Psychology Today, and others.

²⁶Markoutsas, p. 72.

Books which have been written on the subject will supply twenty-five percent of the research material. There are few authors who have dealt extensively with surrogate parenting. However, those who have are professionals in their fields: attorneys, doctors, and nurses. These authors have approached the subject in a manner that presents openly the dangers and benefits and those "gray" areas which are presently hindering its furtherance.

Noel P. Keane and Dennis L. Breo in their book, The Surrogate Mother, which is the only book written on this subject specifically, write from a positive viewpoint. Mr. Keane is the first attorney in the U.S. to deal with surrogate parenting. They are not reluctant, however, to express the negative aspects because they state that answers are needed for these questions. Their motive is to instigate a reaction that will foster legislation establishing controls on the phenomenon.

What To Do When You Think You Can't Have A Baby, written by Karol White, emphasizes the problem of infertility. It is noted in the Foreword that extensive time and research have been directed toward the writing of the book. Karol White devoted more than eighteen months in researching the material, interviewing the clinicians, conversing with the patients and compiling the data. The major contributors to the book are recognized authorities in their specific fields. She says of the book:

This is a book of many voices, many tongues, and many viewpoints. From Israel to South America, from England to Australia, techniques, technology and treatment are highlighted. I spoke to women lying on operating tables in cool, green operating rooms, their arms

strapped down, an IV dripping into their veins. I questioned doctors in their offices and operating rooms. I traveled from Boston to California, from St. Louis to New York, speaking to fertility "experts" in Tennessee and Illinois, Texas and New Jersey.²⁷

This history of artificial insemination and human reproduction is the thrust of Robert T. Francoeur in his book, Utopian Motherhood. He traces the course of medical science as it relates to the fertility processes of mankind from the early Greek writers, Aristotle, Hippocrates, and others, to the 1970's.

The dilemma of infertility is discussed in They Say You Can't Have A Baby by Madeline Blais. This book discussed the psychological and physiological trauma suffered by infertile couples. She offers the many alternatives to childlessness and presents them in detailed form.

The Fertility Handbook by Judith Alsofrom Fenton and Aaron S. Lifchez, M.D., gives insight into alternative conception plans such as artificial insemination, test-tube babies, and surrogate mothers. They offer detailed descriptions of male and female sexual anatomy, information about the cost of medical treatment, case histories of infertile couples, and interviews with experts in the field.

Wilfred J. Finegold, M.D., discusses all of the aspects of impregnation through artificial methods in his book, Artificial Insemination. He presents the moral and ethical views of professional institutions, legal, medical, scientific and religious.

Another book which deals with various aspects of surrogate parenting is Law and Ethics of A.I.D. and Embryo Transfer. This book is a compilation of lectures of the Ciba Foundation.

²⁷Karol White. What To Do When You Think You Can't Have A Baby. New York: Doubleday & Company, Inc., 1981) p. 5.

Numerous articles have been published in a quantity of professional journals. These deal with the many various aspects and implications of surrogate parenting.

Results

The results and conclusions of this thesis will show that the process of surrogate parenting is legally, morally, and Biblically wrong. It is an invasion into the sacredness of the marital bonds and an exploitation of the human reproductive process and human life. In surrogate parenting, babies become a commodity rather than the blessing which God intended them to be.

It will also be proven that there are definite medical and psychological effects upon the surrogate parent, the adoptive parents, and the child. The lack of legal restraints will be used as one of the arguments to provoke public awareness of the threat to moral decency.

Definition of Terminology

There are several terms which need to be defined in order to establish a clear basis for the herein contained discussion.

Abortion - The premature expulsion of an embryo from the uterus (either spontaneous or induced).

Adhesions - The joining of the healed parts such as fibrous bands which attach to inner body organs.

Amenorrhea - The absence or cessation of menstruation.

Amniocentesis - The removal of a sample of amniotic fluid to test for certain conditions.

Andrologist - One who studies men and disease of the male sex.

- Artificial Insemination - The depositing of seminal fluid by mechanical means into a woman's cervix to achieve pregnancy.
- Artificial Insemination, Donor (A.I.D.) - The depositing of seminal fluid into the cervix of a woman by mechanical means using donated semen.
- Artificial Insemination, Husband (A.I.H.) - (Artificial Insemination-Homologous) The depositing of seminal fluid into the cervix of a woman using her husband's semen.
- Artificial Insemination, Mixed (A.I.M.) - The depositing of seminal fluid into the cervix of a woman using mixed semen from her husband and a donor.
- Aspermatogenesis - The absence of sperm in the testis.
- Aspermia - The complete absence of sperm and semen.
- Azoospermia - The absence of sperm and semen.
- Basal Body Temperature - The temperature taken first thing in the morning, while the body is at rest.
- Cervix - The neck of the uterus.
- Cesarean - A method of delivering a baby in which the uterus is cut to remove the child.
- Cilia - Tiny hairs attached to the fallopian tubes.
- Clomid - Called Clomiphene Citrate, it is a non-steroid estrogen used to stimulate ovulation in women who do not ovulate.
- Coitus - The sexual union between male and female; sexual relations.
- Condom - The sheath which covers the penis worn during intercourse to prevent pregnancy or infection.
- Contraception - The prevention of pregnancy.
- Culdoscopy - A visual examination of the female pelvic organs, using a telescope-like device (an endoscope) which has been inserted into the pelvic cavity through a slit in the vagina near the cervix.
- Dermatoglyphics - The study of patterns of ridges of skin of the fingers as a genetic indicator, specifically used to identify chromosomal abnormalities.
- Dysparneua - Painful sexual intercourse for a woman.

- Egg - The female sex cell, also known as female gamete or ovum.
- Ejaculate - The semen expelled during the process of ejaculation, the act of expelling sperm.
- Endometrium - Lining of the uterus.
- Epididymis - The elongated cordlike structure along the outside of the testis in which sperm are stored.
- Estrogen - Female hormone produced by the ovaries and, in much smaller amounts, by the adrenal glands of both men and women.
- Fallopian Tubes - The long slender tubes which extend from the ovaries to the uterus and serve to transport the ovum.
- Fertilization - The union of sperm and egg.
- Follicle - A sac filled with fluid containing the oocyte or ovum in the ovary.
- FSH - A gonadotropic hormone of the pituitary which stimulates growth and maturation of the follicles in the ovaries and stimulates spermatogenesis in the male.
- Genetics - The study of heredity.
- Gonorrhoea - A form of venereal disease spread through sexual contact.
- Habitual Abortion - The recurrent spontaneous loss of a fetus prematurely.
- Hysterosalpingogram - An x-ray of the uterus and fallopian tubes after dye is injected.
- Implantation - The attachment of the embryo to the lining of the uterus.
- Infertility - The inability to conceive after attempting to do so for one year.
- In Vitro Fertilization - Fertilization which takes place in a glass.
- Laparoscopy - The examination of the interior of the abdomen using an instrument that is equipped both for viewing and making minor corrections.
- Luteinizing Hormone (LH) - A gonadotropic hormone of the pituitary gland that causes ovulation and estrogen secretion in the female, and testosterone secretion in the male.
- Miscarriage - The loss of the embryo from the uterus, i.e., spontaneous abortion.

- Morphology - The study of the form and structure of cells, e.g. sperm cells.
- Motility - The ability (of the sperm) to move spontaneously.
- Normospermia - A semen sample which, under analysis, shows sperm numbering more than twenty million per cubic centimeter of semen and showing normal morphology and normal motility.
- Oligomenorrhea - Irregular menstrual cycles.
- Oligospermia - Low sperm count, between fifteen and twenty million per cubic centimeter.
- Ovary - The female gonad, one of two sexual glands, in which the ova are formed.
- Ovulation - The discharge of an egg from the follicle of the ovary.
- Ovum - The egg produced by the ovaries each month.
- Polycystic Ovarian Syndrome (PCO) - A condition in which many cysts on the ovaries retard fertility.
- Post Coital Test (also called Sims-Huhner test) - A test which measures the ability of sperm to penetrate cervical mucus.
- Retrograde Ejaculation - The backward release of sperm, usually into the bladder instead of out through the penis.
- Rubin's Test - A test designed to evaluate the patency of the fallopian tubes by insufflation with carbon dioxide.
- Semen - A thick, whitish secretion of the male reproductive organs composed of spermatozoa, nutrient plasma, secretions from the prostate and other glands.
- Semen Analysis - Measures the quantity, quality, motility and morphology of the semen.
- Sexual Dysfunction - The inability to perform sexually.
- Shirodkar - A stitch that closes the neck of the uterus to prevent spontaneous abortion.
- Sperm Agglutination - The collecting of sperm into clumps of cells.
- Spermicide - An agent that is destructive to spermatozoa.
- Spermatozoa - Mature male cells, the generative elements of semen which impregnate the ovum.

- Spinnbarkeit - The formation of a thread of mucus from the cervix when blown into a glass slide.
- Split Ejaculate - A process in which the semen is seperated.
- Sterility - The inability to reproduce.
- SWIM - Sperm Washing Insemination Model. A procedure to remove antibodies from semen.
- Testicle - The male gonad.
- Testosterone - The hormone produced by the testicles and responsible for male sexual characteristics.
- T-Mycoplasma - Tiny organisms found in the urogenital tract which form small colonies and may inhibit reproduction.
- Uterus - The hollow, muscular organ in the female in which the egg becomes embedded and in which the embryo develops and is nourished.
- Vagina - The female canal which receives the penis during coitus.
- Vaginismus - A painful spasm of the vagina.
- Varicocele - A varicose condition of the veins of the scrotum.
- Vas Deferens - The vessel carrying the spermatozoa.
- Vasovasostomy - The joining of the ends of a severed vas deferens to restore fertility in a man who has undergone a vasectomy.²⁸

Summary

The overview presented in this chapter lifts the lid on Pandora's box and exposes the fact of existing moral, legal, medical, and psychological problems created by the surrogate parenthood concept. Many scholars, scientists, theologians, and attorneys are being confronted with these issues. Society is demanding a resolution. The majority of articles, being by laymen, i.e, newspaper and magazine reporters, are pro. It makes for good circulation.

²⁸White, pp. 187-197.

Those professional institutions which are directly involved have published the most technical writings dealing with the relevant issues. These are questions which definitely demand an answer. This chapter has laid the cornerstone for the foundation of an examination of the questions.

CHAPTER II

Interests Furthered by Surrogate Parenthood

Science has always been labeled as the instrument through which man can make life better and easier for all or it can be the monster which can destroy the universe. As scientists continue to explore the regions of the unknown, develop and prove new hypotheses, delve into the secrets of mankind and proclaim new "truths", society will continue to reap benefits and experience increasing dangers from their experiments.

Leonardo da Vinci, premiere product of the Italian Renaissance, sculptor, artist, military engineer, and scientist, was labeled an heretic and a threat to humanity by his fellow countrymen and churchmen. He would often sit by the bedside of dying pauper men and women, talk with them and hold their hand as they slipped from this life into eternity. As their eyes closed in death, he carried their bodies to a makeshift morgue and there began dissecting the corpse. Ghoulish and horrifying as it may sound and as it was viewed in his time, medical science would not be what it is today without da Vinci's undertakings and personal sacrifice. Medical schools still use his diagrams and drawings of functions and positions of the human body both internal and external. Da Vinci's interest in the human body in the fifteenth century and its results are an invaluable asset for mankind today.²⁹

²⁹Robert Wallace. The World of Leonardo da Vinci 1452-1519 (New York: Time, Inc., 1967) pp. 57-58.

The attitudes of the general public are much the same today as they were in the fifteenth century. In the academic medical and science laboratories of contemporary time much of the experimentation with new drugs and medicines and methods of bodily repair, which is done under the cloak of "betterment of man's state", would also be condemned as unethical and immoral by society. Scientists and doctors will never be totally free of the skeptics and gnostics of modern technology. Surrogate parenthood has become "the talk of the town" in the past two years and will provide for and be provided with close scrutiny and criticism, both positive and negative, until it reaches its plateau of arrival.

Noel P. Keane, a Detroit attorney who is the first to do an extensive writing on the subject of surrogate parenting, declares, "Surrogate parenting is an idea whose time is coming..."³⁰ Mr. Keane is reputed as the first to engage in the surrogate mother aspect of parenting. His expertise is often sought by infertile couples who wish to have children.

Dr. Philip Parker, who serves as a psychiatric consultant for Mr. Keane, has a novel theory about surrogate mothering which he calls, "an informed speculation". His hypothesis is:

Strong opposition to the surrogate mother concept will, in many cases, be due to the fact that the concept triggers unconscious fantasies of adultery and incest. Although the surrogate mother is artificially inseminated and often does not even meet the biological father, to many adults her very existence will trigger anxieties and guilt about sexual intercourse. He says it all goes back

³⁰Keane, p. 15.

to Freud and the Oedipal complexes. In other words, the surrogate mother may remind many people of the repressed fantasies they may have had about having sex with their parents, or others, and their guilt may make them rise up and in knee-jerk fashion, condemn the surrogate mother. Also, Dr. Parker believes that our own unacceptable anger and hostility towards children may be stirred up and expressed by an irrational condemnation of the surrogate who will give up the child she bears. Such irrational opposition, he says, should be identified and discredited.

Certainly, there are enough genuine problems presented by the surrogate mother that we do not need any that only exist in fantasy.³¹

Mr. Keane and Dr. Parker are most likely the prominent leaders in the surrogate parenting movement. They have endured the blasts of criticism from saint and sinner alike. Their experience is first hand and they are well aware of the ramifications of their undertakings.

Keane declares, "I have become a legal expert on surrogate parenting simply by being a maverick attorney who did on-the-job training."³²

He further states:

I tend to have a very independent turn of mind and have never been afraid to take on controversial or unpopular causes — if I believe in them. I believe in surrogate motherhood because I know there are thousands of people who want it and need it, including the surrogate mothers. I intend to help them. That's how I got into this and that's why I am staying.³³

This Detroit attorney, though honorable in his declaration, is not without predecessors. Medical history records that artificial insemination is not a new issue. In order to understand the interests furthered by surrogate parenting, a brief review of the history is necessary.

³¹Ibid., pp. 254-255.

³²Ibid., p. 238.

³³Ibid., p. 23.

A History of Artificial Insemination

In 1884 a wealthy businessman and his Quaker wife, ten years his junior, and childless, approached Dr. William Pancoast with their dilemma. Dr. Pancoast was undoubtedly the right man to be approached with this situation. After graduation from Haverford College and Jefferson Medical College in Philadelphia and a tour of the medical facilities of London, Paris, and Vienna, he had begun a meteoric career in medicine. He had served the Union as a Surgeon-in-Chief and second officer of the Philadelphia military hospital during the Civil War. At the end of the war he accepted a teaching position in human anatomy at his alma mater.

Motivated by the nature of the problem, Pancoast brought it to his classroom for discussion with six student doctors. They decided to concentrate their efforts on the wife giving her an examination "as complete, almost as perfect as any army examination". The conclusion was that the husband was at fault. After confrontation, the husband admitted to a youthful bout with gonorrhoea. Two months of treatment proved unsuccessful as a remedy, however. Discussion of the situation among the class led to the suggestion of a "hired man". They suggested that perhaps "the best looking member of the class" might volunteer and during a routine examination of the wife, some of his semen might be injected into her womb with a rubber syringe. All was to be done under anesthetics. Dr. Pancoast approved the ingenious solution and the experiment was conducted without consultation with either the husband or the wife.

When a healthy son was born, Dr. Pancoast began to wonder about the judiciousness of the act. He disclosed the deed to the husband and was much relieved to find him not the least disturbed. His only request was that Pancoast not divulge to his wife how she had conceived.

The case remained shrouded in secrecy until well after Pancoast's death in 1898. In 1909, Addison Davis Hard, one of the students in the class exposed the whole story in an article in Medical World under the title of "Artificial Impregnation". He personally had shaken hands with the son, who had himself become a successful businessman, on his twenty-fifth birthday.³⁴

Dr. Hard was motivated by his own interests to expose the story. He used it as a springboard to launch artificial insemination as a means of improving the human race. He advocated it as a method of eliminating venereal disease since four of every five men in New York city at that time were afflicted. His claim that men might in one stroke both protect their good women and improve the human race was to be performed by castrating the diseased and collecting semen from the respectable men. Thus the women could be inseminated with disease-free semen.

This bit of medico/scientific venturism was greeted with a somewhat double response: It has been done before and it is against the laws of nature and God. However, Hard's article brought to public eye the evidence of a major turning point and technological development in the biological revolution. This technology has already placed many

³⁴Robert T. Francoeur. Utopian Motherhood (New York: A. S. Barnes and Co., 1973) pp. 2-5.

aspects of human reproduction and sexuality in the controlling hands of man.

The reproductive process of the human has posed as a mind-boggling mystery since Creation. Ambigogenesis, the spontaneous generation of life, has been held as an honorable explanation. The Greeks and many early civilizations accepted it as truth.

Aristotle, for instance, tells of visiting a pond that had been completely dried up but was later filled with eels and fish spontaneously generated from decaying matter and slime. The Roman poet Virgil records a recipe for producing insects from mud, while other noted scholars report how thunderclouds and rain produced fish and frogs and how honey bees came from the decaying carcasses of horses. In medieval times, people believed that worms, flies, and crawling creatures were the spawn of damp putrid waters; serpents were born of women's hair that had fallen into water, and mice could be produced by wheat fermenting in a dark corner with a sweaty shirt. Such views held sway even into the time of our Pilgrim Fathers.³⁵

To prove the evidence of mystery, consider the old question, "Which came first, the chicken or the egg?" Man is continually searching for the roots of his beginning. The human egg was not discovered until 1672 by Regnier de Graaf. What he saw was actually a follicle inside the ovary. It was to be another century and a half before Karl Ernst von Baer would discover and correctly identify the mammalian egg.³⁶ It is little wonder! Those who have younger brothers and sisters and were raised in a Victorian home can remember the "suddenness" of their arrival in the family. When pondered, it is easy to

³⁵Ibid., p. 5.

³⁶Ibid., p. 6.

see how the early scientists could classify animals in two categories: those reproduced by eggs and those in which the male seed is the key. This was due to the fact that they could not relate the sexual intercourse and pregnancy. The time lapse of months and the fact that in some cases intercourse did not result in pregnancy confused them. And, when you think about it the connection between coitus, with both male and female contributing equally, is not that obvious.

An Egyptian papyrus of the Twelfth Dynasty, circa 2500 B.C., contains prescriptions for contraceptives, abortion, and inducing permanent sterility. Early Hindu writers seem to have believed that human pregnancy was caused by the union of the male seed and the menstrual blood since menstruation stops with conception... One eastern Australian tribe believes that baby girls are fashioned by the supernatural powers of the moon and boys by wood lizards. In Queensland, the thundergod supposedly forms babies out of swamp mud and inserts them in the mother's womb. Spirit children enter the womb through the mother's navel. Hunting a particular kind of frog, sitting by the fire or leaping over it, cooking a special kind of fish, all can lead to pregnancy.

The Pueblo Indians of New Mexico thought maidens could conceive from a heavy summer shower; ...the founder of the Manchu dynasty was conceived when a maiden ate red fruit dropped on her lap by a magpie; and Longfellow records how Winonah was quickened by a western wind and gave birth to Hiawatha.³⁷

Hippocrates and Aristotle also researched the reproduction mechanisms. Hippocrates formulated that since humans were not the products of eggs, like a chicken's, the preformed human could not be in any egg. He specified that semen was produced in all organs and members of the body and after traveling through the blood they gathered into one complete pattern in the testicles where they formed the male seed.

Aristotle also viewed the male semen as the most important factor in reproduction. For him, the male shaped and formed society. The

³⁷Ibid., p. 7.

woman was passive matter waiting to be molded and activated by the male principle and then as an incubator of his seed. This appears to be the first time in recorded history a scientific and philosophical argument was worked out for the natural superiority of the male. Aristotle was an incurable male chauvinist. He was quick to point out that the male is larger, stronger, and even more handsome. In reproduction it is the semen of the male which cooks and shapes the menstrual blood into a new human being.

Thomas Aquinas, the "Universal Doctor of the Church", also held that the male semen was the active principle of reproduction and the menstrual blood or egg the passive molded substance. In some of his writings he purported that the semen cooked the unformed uterine blood much as a baker does his dough or that the semen coagulates the uterine blood just as certain substances curdle milk. He even had a beautiful canard about the conception of baby girls in his first book of his Summa Theologica:

Woman is misbegotten and defective, for the active force in the male seed tends to be the production of a perfect likeness in the masculine sex; while the production of a woman comes from a defect in the active force or from some material indisposition, or even from some external influence, such as a south wind which is moist.³⁸

Leonardo da Vinci, in the fifteenth century, was the first man, of whom we have record, to truly conduct a scientific experimental approach to human reproduction. It has already been stated that he was the first to make medically accurate and detailed drawings of the dissected male and female reproductive systems, of sexual intercourse, and

³⁸Ibid., pp. 8-10.

of the human fetus in the womb. He noted beside his drawing of the fetus in the womb that "the heart of the child does not beat nor does it breathe because it is continually in water. If it breathed it would drown, nor has it need to breathe because it is vivified and nourished by the life and food of the mother..."³⁹ Da Vinci pronounced that the semen is not produced in the blood system, but in the testes. This came from his observation of castrated men and male animals.

Semen was not properly identified until Leeuwenhoek in 1677 examined the nocturnal emissions of an old sick man. This only opened the field for more debate. Many old wive's tales about reproduction were passed from generation to generation. Belief in telegony is still very common among animal breeders. It proposes that if a purebred bitch first mates with a mongrel or a prize mare is first covered by an inferior work horse, the future of prize breeding results will be ruined. The poor blood of that first mating will carry over to any future offspring regardless of the sire. Some theologians have argued that if the human is preformed in the sperm, then every sperm must have a human soul!

Abbe Lazzaro Spallanzai, in 1776, began to take the study of artificial insemination seriously. Experimenting with frogs he dressed up some male frogs in "little breeches of oilskin". As a control, other frogs were left "all natural". Placed with ripe female frogs the trousered males produced no offspring. Experimenting further, he removed eggs from the female frog and secured semen from a male frog. He proceeded to dip a pencil into the semen and spread it over the eggs

³⁹Ibid., p. 11.

which hatched. "Thus I called into life a number of animals, by imitating the means employed by nature." He continued his work with dogs and other animals. For him, the sperm was merely a stimulus to the development of the preformed germ in the egg.

Spallanzani's experiment awakened the scientific world to new horizons. The French biologist, Charles Bonnet, wrote to him and stated, "I am not so sure but that what you have just discovered may not some day have consequences for mankind of no mean significance."⁴⁰

The first human A. I. was performed at about this same time in England. Dr. John Hunter successfully impregnated the wife of a London linen merchant artificially. Dr. Everard Home reported a normal pregnancy and delivery.

In France, Professor Thouret of the Medical Faculty of Paris, was successful in his attempt at A.I. He used a tin syringe to deposit the semen in the vagina. The patient was his own wife.

In America, Dr. J. Marion Sims, reported fifty-five artificial inseminations performed on six women. He also reported the first "test-tube" pregnancy. Although at first he promoted A.I., he later recanted, proclaiming the method immoral and decided to abandon it. It was his report that gave rise to the publications on A.I. Most of this literature appeared in Germany and France.⁴¹

⁴⁰Wilfred J. Finegold, M.D. Artificial Insemination (Springfield: Charles C. Thomas, Publishers, 1976) p. 6.

⁴¹Much of the indepth study is presently being carried on in Germany, France, and Sweden. These scientists have written numerous articles covering the whole of surrogate parenting. Their experiments and articles have prompted the legal concerns of these countries to

Semen of a donor was not listed in any of the published material before 1900. However, Dr. H. Rohleder of France indicates that some patients were interested in obtaining A.I.D. He reports the following:

Professor Semola of Rome relates that a lady, on whom he had performed several inseminations to no avail, requested him to procure semen from someone else. To this he replied in no uncertain terms that a proposition of that kind came from the Devil and that an insemination such as she suggested was no whit less sinful than cohabitation with a stranger.⁴²

In 1400, Dan Ponchom performed the procedure on fish; 1550, Bartholomens Eustachius advised digital guidance of semen toward the cervical as following coitus; 1677, Louis Van Hamman discovered spermatozoa; 1838, Girault blew spermatozoa into the vagina through a hollow tube; 1876, de Lajatre successfully treated 567 women; and 1884, Pancoast was the first to rely on donor semen.

Since the 1890's, Dr. Robert L. Dickinson has been the prominent pioneer of donor insemination. His enthusiasm stirred a host of followers. In the nineteen twenties and thirties interest gained momentum and the following doctors produced American Medical writings: Dr. S. R. Meaker, Dr. I. Rubin, Dr. L. W. Mason, Dr. W. Gary and Dr. M. Huhner.

In modern days, works have been produced by: Dr. A. F. Guttmacher, Dr. A. Koerner, Dr. Sophia Kleegman, Dr. Frances Shields, Dr. A. Wiseman, Dr. W. W. Williams, Dr. J. MacLeod, Dr. Marie Warner, Dr. L.

research and write legal opinions and introduce governing legislation in the past decade. These articles were not available at the Law Library at the University of Virginia. However, they are listed in the Bibliography of this thesis as "Suggested Reading".

⁴²Francoeur, p. 6,7.

Portnoy, Dr. S. Payne, Dr. J. O. Haman, Dr. M. J. Whitlaw, Dr. R. S. Hotchkiss, Dr. S. Abel, Dr. Frances Seymour, Dr. G. S. Beardsley, Dr. S. J. Behrman, Dr. S. L. Israel, Dr. R. Bieren, Dr. R. N. Rutherford, and others.⁴³

A History of Surrogate Mothering

The surrogate mothering phenomenon is not a new discovery in the strictest sense of the word. Like artificial insemination, it has its roots in animal husbandry. Experiments have been conducted by embryologists since the early 1900's using everything from doe rabbits to prize cows. Francoeur gives an indepth review in Utopian Motherhood. He reports a conversation with a young research technician at Fairleigh Dickinson University:

As we talked he casually mentioned that he likely held the world's record for superovulation of the rabbit. In the course of one of his experiments he had injected a doe rabbit with a combination of female hormones normally associated with ovulation. The shocked rabbit responded to this physiological overdose by releasing not the usual eight or ten, but well over a hundred eggs. The doe was then artificially inseminated. When she was definitely pregnant, the technician sacrificed her for observation. With 135 tiny embryos developing in her womb, this doe rabbit certainly would qualify as a "supermother", even though she could not have possibly carried the 135 fetuses full term and delivered them normally.⁴⁴

Francoeur asks the question, "Want to be a mercenary mother?" as part of the title of this particular chapter.

The experiments of "super motherhood" continued. Dr. Gregory Pincus artificially inseminated a supermother rabbit in 1940. Sheep were added to the list in 1942 by co-workers at London's National

⁴³Ibid., p. 7. ⁴⁴Ibid., pp. 89, 90.

Institute for Medical research. Dr. John Hammond superovulated cows in 1944. Goats, in 1949, were added by Dr. A. J. Folley. Rats, mice, and hamsters were added in 1950, 1953, and 1962. The superovulation of monkeys, in 1957, spurred on the idea that this could also be achieved in women.

After successfully ovulating a six-week old calf, it was decided to experiment with human infertility. In the mid-1960's research moved rapidly on this project.⁴⁵

Astounding results came from women who had stopped using the contraceptive pill. It seems that when they ceased using the pill, some women experienced immediate ovulation of not one but several eggs. One woman, who had taken a Pergonal base pill, gave birth to stillborn octuplets. With further research the scientists perfected a fertility drug with a high success potential.

Following these genetic experiment successes, the question was asked, "Who wants a superpregnated rabbit, cow or wife?" The answer was soon announced. Transfer the embryos to a substitute mother or foster mother. Before long, (1963), ova transfers, or inovation as this technique is called, were being tried successfully by Hungarian, Polish, Italian, Spanish, Russian, Japanese, British, French, and American scientists. Scientists were like children with new found toys. They conducted experiments in which a black Freisian cow carried and delivered a white faced Hereford calf and cared for it as a substitute incubator for a pure black offspring.

⁴⁵Ibid., p. 91.

An amazing experiment in surrogate motherhood was conducted in 1962 by Dr. L. E. Rowson. His plan called for two purebred Dorper ewes in South Africa to give birth to purebred lambs of the Border Leicester strain from England. If it had been perfected, the shipping of frozen semen and eggs of the Leicester breed could have accomplished the task. The products could have been implanted in the Dorper ewes upon arrival. But, the freezing technique was not suitable. Rowson decided to fertilize the eggs and ship them to South Africa. He disclosed the operation in an article, "The Successful Long-distance Aerial Transportation of Fertilized Sheep Ova", in the Journal of Reproduction and Fertility.

The fertilized sheep embryos were implanted in the fallopian tubes of a doe rabbit. The rabbit was carefully crated for the jet ride to South Africa. Snuggled in their fur cover "incubator" the embryos continued to grow and differentiate while their substitute mother enjoyed the ride. Upon arrival, the embryos were surgically removed and implanted into two Dorper ewes who had been tricked physiologically by hormone injections into thinking they were about to become pregnant. The climax was that the two ewes delivered perfectly normal lambs.⁴⁶

Surrogate mothers, substitute mothers, mercenary mothers — however you choose to describe them — were no longer mere grist for speculations and fantasies of the science-fiction writers. They had now become part and parcel of man's technology of reproduction, one of the several methods available to us in our exploding ability to manipulate and control our own reproductive behavior.⁴⁷

⁴⁶Ibid., pp. 93-94. ⁴⁷Ibid.

Surrogate parenting is an element in the history of man whose time has come. Scientific knowledge continues to plow new ground where nothing else has dared. Not content to leave it fallow, geneticists and other medical scientists continually plant hypotheses, cultivate experiments, and harvest theories which cannot be contained in the cluttered barns of our society. However, as these theories begin to prove fruitful to humanity, space is somehow made to accept them as part of life. These scientists are pulled along in their quest to solve the mystery of human reproduction. But what motivates a man or woman to become a part of something which society may condemn?

Psychological Interests or Needs for Surrogate Parenthood

The first surrogate parent to "go public" was Elizabeth Kane (pseudonym) of Pekin, Illinois. She gave birth to an eight pound, ten ounce boy on November 9, 1980. The child was conceived through artificial insemination with the sperm of a husband whose wife was childless. Her motivation was compassion for the childless couple. One reporter likened her action to a biblical reference:

Surrogate mothering is probably a very ancient practice that has only recently become a subject of widespread public attention and controversy.

Almost 4000 years ago in Canaan, the Book of Genesis says, Abraham's wife, Sarah, who would not conceive, arranged the birth of a child by having Abraham sleep with Sarah's maid, Hagar. Hagar was called a concubine rather than a surrogate mother, but the arrangement was similar to what is happening today...

A modern-day Hagar who lives in Pekin, Illinois, and calls herself Elizabeth Kane...⁴⁸

⁴⁸Angel Castillo. "When Women Bear Children for Others" The New York Times STYLE. December 22, 1980, p. B6.

It is possible that some women would feel that they are giving God a hand when they volunteer. Others no doubt feel a great deal of compassion for the childless couple. One woman states, "There are some women who just like being pregnant. My mother had six children."⁴⁹ When she carried a child, this woman continued, she felt important in ways she otherwise never did. The idea of carrying someone else's baby makes her feel even more important because then she is not just harboring a child, she is harboring a gift. The publicity about the surrogates is just an added bonus to the women: their gallantry shines back at them from the television set.⁵⁰

Dr. Richard Levin, founder of Surrogate Parenting Associates, Inc., Louisville, Kentucky, says that he chooses surrogates very carefully, after a barrage of physical and psychological tests. He does a physical examination, reviews medical records, and does a genetic family history on the surrogates. Two psychiatrists evaluate each surrogate and her husband for their mental competence and psychological makeup and stability. The surrogate also takes a battery of psychological tests.

Dr. Levin reports that he follows the surrogate through the pregnancy by phone and regular reports from her physician. He may even have dinner with her just to find out her motives. He relates that the motives seem to be twofold: First, they feel it's an interesting idea, and they are excited to be able to help another woman; second, they see it as a financial opportunity to put aside money for the

⁴⁹Anne Taylor Fleming. "New Frontiers in Conception" New York Times Magazine (July 20, 1980): 24.

⁵⁰Ibid.

future or to pay debts.⁵¹

Dr. Philip Parker, a psychiatrist at Wayne State University, has interviewed numerous surrogate mother applicants and adoptive parent applicants for Detroit attorney, Noel P. Keane.

Dr. Parker said that one-half of his study subjects were married and many of those had children of their own. They saw surrogate motherhood as a chance to earn income for their families while rediscovering their joy in being pregnant.

"Pregnancy made them feel more competent, complete, special, adequate, feminine and attractive," Dr. Parker reported. "A few called it the best experience they'd ever had. It gave them an inner glow and made them want to be pregnant for the rest of their lives."⁵²

Surrogate mothers have surfaced all across the nation in the past five years. Articles have appeared in magazines and newspapers with varying accounts. Each episode seems to have a different quirk.

Carol Pavek, a practicing midwife in Amarillo, Texas, has a husband and young son. She is motivated to be a surrogate out of a desire to do all she can to help other people. She says she enjoyed her pregnancy and thinks "it would be wonderful to keep having babies without the responsibility of raising them." She became a surrogate mother for Bob and Dorrie Norris of Placerville, California. Mrs. Pavek is twenty-seven and her husband is twenty-eight.⁵³

⁵¹Patricia A. Mullan. "Surrogate Parenting Association Sparks New Interest at AFS Meeting" Ob. Gyn. News, Vol. 15, No. 9 (May 1, 1980): 1, 36-37.

⁵²Parker, "Surrogate Mother's Motivations," p. 3.

⁵³Jean Seligmann with Robyne Curry. "Pregnancy by Proxy" Newsweek, Vol. XCVI No. 1 (New York, July 7, 1980): 72.

What kind of woman would choose to bear the inconvenience and risks of pregnancy for a total stranger? What motivates a woman to become a surrogate mother?

Dr. Philip Parker is conducting what is believed to be the first psychological research on women who contract with a married couple to be artificially inseminated, give birth to a baby, and then give the baby to the couple for adoption. An ad was placed in the Detroit News seeking a surrogate mother and promising a fee of \$10,000 plus expenses. Of those women who responded, Dr. Parker has interviewed eighty-five. He alleges that money is the motivating factor in eighty percent of the cases. The remaining twenty percent expressed their motivation as ranging from enjoyment of being pregnant to a compassion to give needy parents a baby.

The women average twenty-five years of age with about one-half now married and one-fourth divorced. About one-half were Catholic and one-half were Protestant. Sixty percent of the women work or have a working spouse with income range of \$6,000 to \$55,000. Fifty-five percent of them completed high school and twenty-five percent attended college, business or nursing school. One had received a bachelor's degree.

About seventy-five percent of the women had experienced a full-term pregnancy. However, one-third had experienced a loss of a child through abortion, miscarriage or adoption. "For these women, being a surrogate mother may become a way of dealing with unresolved guilt by repeating the traumatic experience in a controlled manner," Dr. Parker

says.⁵⁴ His evaluation also included the following:

Over 80% of the surrogate applicants said they required a fee for their participation with most giving \$5,000 as the minimum amount. They related a need for the money, but the degree of need varied from a feeling that the money would be useful to pay bills to a more urgent need for funds. They also described their requirements for the parental applicants for whom they would carry a child. About one-half said they would participate only for a married couple unable to have a child; one-sixth for a married or unmarried couple unable to have a child; one-sixth for a single man or couple (married or unmarried) but only if unable to have a child; and one-sixth for anyone for any reason.

The data yielded some interesting results about the applicant's history. About 10% had no previous pregnancy and about 15% had no previous full term pregnancy. Those who had been previously pregnant to term had a feeling regarding their pregnancy that varied from a tolerable experience to the best time of their life such that they wanted to be pregnant for the rest of their lives... Those who were never pregnant to term described wanting to have the experience... The average number of children that the applicants delivered and raised was over 1.3.

About thirty percent lost at least one fetus, baby, or child and there were three cases who had at least two such losses and one woman had three losses... In all but one of these cases there was a voluntary loss, i.e., abortion, adoption, etc. Some women believed these previous losses would help them to control or minimize any depressive feelings in response to giving up the baby. For example, one woman who gave up a child raised by her said: "Being pregnant doesn't make you the mother. Raising the kid and giving love, that's being a mother." Another said, "I know what it's like to give up a baby." Other women felt that they were participating to atone for the guilt they felt in connection with a prior voluntary loss.

Several factors appear to have a complementary relationship in determining the applicants's decision to be a surrogate mother including: 1) the perceived desire and need for money, 2) the perceived degree of enjoyment and desire to be pregnant and deliver a baby, and 3) the perception of the advantages and dis-

⁵⁴"Surrogate Mothers — Why Do They Do It?" The Alumni Report, Wayne State University School of Medicine, (Fall/Winger, 1981): 8.

advantages of experiencing giving up the baby... Also expressed here is the often expressed strong wish to give the gift of a baby to a needy parent.⁵⁵

Compassion is the motivating factor in the majority of those cases which are made known to the public. Elizabeth Kane states that she wanted to help the childless couple. Carol Pavsek expressed a desire to have babies for others to experience the joy of raising them. One article relates that a thirty-year-old woman gave birth to a six-pound, five-ounce baby on December 4, 1980. She had been artificially inseminated with the sperm of her sister's husband. In order to keep the birth quiet, a midwife was used and the adoptive mother and the surrogate mother's ten-year-old son assisted. The adoptive mother began breast feeding shortly after the birth. Details were not available as the sisters refused to give interviews.⁵⁶

Another article relates how surrogate mother Anne Lockwood decided to have a baby for her sister and brother-in-law. Her sister had suffered several tubal pregnancies which necessitated a complete hysterectomy. Her husband was totally cooperative. "It's your body," he assured her. "It's up to you to make the decision."⁵⁷

Dr. Darrell D. Franks, M.D., a psychiatrist who has a private practice in Louisville, Kentucky, has completed a psychiatric evaluation of potential surrogate mothers. He administered the MMPI to ten

⁵⁵Dr. Philip Parker. "Surrogate Mother's Motivation - Initial Findings", a paper presented at the annual meeting of American Psychiatric Association, New Orleans, 12 May, 1981.

⁵⁶"Delivery of Surrogate Mother's Baby is Reported" New York Times 11 December 1980 Sec. D 11,25:1.

⁵⁷Mary Jane Beck "To My Sister With Love" McCall's September, 1981 p. 83.

women who applied for and were accepted into a surrogate mother program and found no psychopathology in nine of the subjects. Individual profiles of the semen showed high femininity and social extroversion scores. Dr. Franks states, "The term, 'surrogate mother' no longer applies only to those who substitute nurturing after birth: the term now also means the actual process of assuming a substitute pregnancy."⁵⁸ (For psychiatric evaluation, see Appendix 1).

The potential surrogate mothers have definite psychological motivations, but what of the adoptive parents? What motivates them to seek the help of a surrogate mother?

Noel Keane states that it is simply — Despair! One of every six American couples is infertile.⁵⁹ This turn to surrogate parenting is due to the unavailability of adoptable babies. Abortion, free birth control, and the long lists of applicants at the adoption agencies have made surrogate mothering a viable alternative to childlessness. It is more meaningful because of the genetic link between the biological father and the offspring. This makes it more appealing to the husband of the infertile wife.

Karol White paints this picture:

The application is on file at the adoption agency. Then the waiting begins, month after month, year after year. The couple appears at the agency to claim their right to a child. They can prove they are moral, up-standing pillars of the community, with extra room in their home and in their hearts. How much do we have to wait? Do you have a baby for us?

⁵⁸Dr. Darrell D. Franks. "Psychiatric Evaluation of Women in a Surrogate Mother Program" American Journal of Psychiatry 138 (October 1981): 1378.

⁵⁹Keane, p. 13.

"Children? Have we tried? Yes!" The couple's answer is defiant as they secretly wonder, "What's wrong with us?" The years go swiftly by. Their chances for parenthood are all but gone. Nighmarish dreams dominate their sleep as ethereal faces of the unborn float just beyond their grasp. They reach out. Emptiness.⁶⁰

A couple may experience this because of the following:

- . A hysterectomy
- . Fallopian tubes that are irreparably damaged
- . Advice that she may not risk pregnancy because of the damage to her health
- . She cannot become pregnant since she is a carrier of a genetically transmitted disease

In the case of Carol Pavek, Dorrie Norris had two teenage daughters but had a hysterectomy before her second marriage. Dorrie stated, "Bob wants a child of his own."⁶¹

A similar situation motivated the couple where Elizabeth Kane was involved. The couple, husband 37 years old, the wife 34 years old, had adopted a son two years previously. She was content with the size of the family. He was not. She explains:

He wants and needs his own child. He went through the adoption with me, and I feel this is something I can do for him. The husband says, "I never stopped hoping there would be an alternate means." Says the wife, "When I heard Elizabeth was pregnant, I wanted to go to work and tell everyone the news — I was going to have a baby!"⁶²

One divorced, infertile woman relates, "John was an only child. I so much wanted to give him a child, to give his parents a link with pos-

⁶⁰White, p. 125. ⁶¹Seligmann, "Pregnancy by Proxy," p. 72.

⁶²Sarah Moore Hall, "An Illinois Woman Decides to Bear a Stranger's Child as Surrogate for his Infertile Wife," People's Magazine, 21 April 1980, p. 38.

terity — to carry on the family name. I desperately wanted a child to share with him. He started a family, only without me!"

Another woman tearfully confides, "If something doesn't happen to give him encouragement, he may ask me to leave so he can find another woman who can have a baby."⁶³

With these perils facing them, childless couples turn to surrogate mothers for help. It becomes a last ditch effort at holding the marriage together.

What is the motivation when the situation is reversed? The husband is infertile and the couple resorts to A.I.D. Amazing, though not unexpected, the motivations are reactionary just as the infertile wife union. A.I.D. is the only alternative to adoption when:

- . A husband is absolutely sterile
- . A.I.H. has failed
- . For unexplained infertility when time is short
- . Genetic disease in husband's line
- . Rh incompatibility
- . Sperm agglutination, when washing or other male treatment is not effective

Emily Brennan, twenty, expresses the following upon seeking advice at a fertility clinic:

"There are two parts to our problem," she explains. "The first was being told at nineteen that my husband probably can't give me children, and the second is that our very good marriage has sometimes hit bottom over this problem. We've been told that ours is not a hopeless situation. One doctor told us, for two hundred dollars, that conception will probably occur in the next ten years. Why?"⁶⁴

⁶³White, p. 125. ⁶⁴Blais, p. 132, 133.

An infection has left her husband with only one functioning testicle and a series of blocked ducts. His sperm count is between 10.8 to 12.6 million per cubic centimeter out of an ideal count of 40-60 million.

It is estimated that between 6,000 and 10,000 children are born through A.I.D. yearly. Reports indicate that some 12,000 to 15,000 couples request this procedure annually and that for the past twenty years more than one-quarter million children have been born through this procedure.

A 1954 study of 38 couples asked: "Why did you choose A.I.D. rather than adoption?" The responses may be summarized as follows:

<u>Reasons</u>	<u>Wife</u>	<u>Husband</u>
Desire to experience pregnancy	23%	16%
Dissatisfaction with adoption procedure	21%	25%
Derive benefits from maternal heredity	20%	22%
Closer relationship to child	15%	32%
Conceal infertility	8%	6%
Faith in selection of donor	2%	3%

This study surveyed middle-class, college-educated parents. Significantly, the most frequently given reason for the husband's preference for A.I.D. was the belief that a closer relationship would exist than with an adopted child. Among the women surveyed, the largest number (but less than one out of four) indicated their primary consideration was a desire to experience pregnancy.⁶⁵

The consuming desire to be a parent evidently motivates both sexes equally. For many, infertility can be and is a life crisis. Those

⁶⁵Aphrodite Clamar. "Psychological Implications of Donor Insemination," The American Journal of Psychoanalysis 40 (1980): 173-177.

afflicted almost live a psychosocial vacuum of fear and anxiety. They feel they are "picked on" by God; have been slighted by nature; are freaks of society. These men and women are forced to face the reality of being members of an infertile couple group. Male infertility is probably more traumatizing than female infertility. Our culture has designated man as the procreator and the woman as the "birther".

In a survey of sixteen couples in which the husband was infertile, reactions ranged from hatred to infidelity for both partners. The purpose of the study was to examine the conflicts and behavior patterns of sterile husband couples. The following was reported:

I interviewed sixteen married couples after the diagnosis of azoospermia or severe oligospermia... Excluded were women who knew before marriage that the husband was infertile... The women's ages ranged from 21 to 34 years. The men's ages ranged from 21 to 38 years. At the time of the interview, 10 couples had decided for A.I.D., 2 couples decided against it, and 4 couples were undecided. The couples had known of the infertility for 8 months to 4 years.

Of the men, ten reported a period of impotence that had lasted 1 to 3 months after discovery that they were sterile. Before this, their sexual frequency was 1 to 3 times per week. The onset was within 1 week. One of them was impotent for 4 months... Three of the eleven men with impotence admitted depression, 1 developed ulcers, 1 man began an affair within one month (which he felt cured the impotence), and one man suffered a whiplash and was incapacitated for 6 months. Two of the 16 men reported no change in sexual or mood but the frequency was low (less than once per month), and only 3 reported no change...

Only in the case of the affair was the attitude toward the wife changed negatively. Some wives said the husbands were more withdrawn and moody.

...Six of the 16 couples reported that the wives were significantly angrier toward the husbands shortly after the diagnosis. In 1 couple this led to a temporary separation. In 2 couples it led to the wife's having an affair in which no contraceptives were used...

One woman developed a fear that she would give birth to a defective child. The phobia was accompanied by rage

and envy directed at others "who did have children but were terrible parents."

Ten of the women reported dreams none of them had experienced in the past. Three themes seem to be incorporated: 1) the women felt bad (perhaps guilty) about the husband's infertility, 2) she wished to be rid of her husband, and 3) she felt guilty about her wish to be rid of him...

For these couples the decision to pursue donor insemination involves two problem solving stages: 1) coming to terms with the husband's infertility, and 2) confronting the problems of donor insemination itself...⁶⁶

The motivations for seeking A.I.D. are psychological: infertile couples searching for help. But, what are the motivations of the sperm donor?

In previous days, the brothers or other male, blood relatives of the husband were encouraged to be the donor. Friends of the husband in some cases were sought as donors. These suggestions led to unsatisfactory results.

One case is reported in which the sterile husband's extremely fertile father insisted upon being the donor with the couple's approval. The doctors refused. Another case related that after being inseminated several times with the semen of the husband's friend, the wife failed to become pregnant. The husband in frustration encouraged her to cohabit with the man. She immediately became pregnant.

It is reported that in most instances the donors are screened by doctors for genetic, psychological and physical make-up. In Los Angeles one clinic maintains a pool of forty in which are graduate students, mostly in medicine and science, sometimes in law, or administrators at

⁶⁶David M. Berger, "Couple's Reactions to Male Infertility and Donor Insemination," American Journal of Psychiatry 139 (September 1980): 1047.

the nearby University of California, the kind of men who would have high IQ's.

These men are usually responding to an ad in a campus paper. Only one out of seven will be chosen. Once accepted, they are placed on weekly schedules, every other day, two to three times per week. On an average, they will donate sperm for four years. These men like the idea that they have been chosen — culled from the crowd; they have a strong but polite pride, not in their virility as much as their fertility. They like the idea that they are making babies, making them for people who can't have them as well as just making them, and they almost all say that they don't do it for the money.⁶⁷

Over thirty years ago, Dr. Abner I. Weisman listed standards for selecting proper donors. All vigilant sterologists are aware of their credos:

1. The donor must remain an unknown.
2. The donor should be in fine health mentally and physically.
3. The donor should be of fine physical stock.
4. The donor should be between thirty and thirty-five years of age.
5. The donor should be of high fertility.
6. The donor should be of excellent character.
7. The donor must be cooperative.
8. The donor's characteristics must match those of the patient's husband.
9. The donor's temperament should closely resemble that of the husband.
10. The donor's religion must be the same as that of the husband.
11. The donor should protect himself legally by ascertaining that the physician has the usual signed documents.
12. The donors should be men of science or medicine.
13. The donor's Rh must be suitable.
14. Multiple donors should be used if possible.⁶⁸

⁶⁷Fleming, p. 22.

⁶⁸Finegold, p. 38.

The motivations for surrogate parenting are numerous and varied. With each situation there is a particular need to be filled and an emotion to be quelled. But, the motivations for surrogate parenting of the couples and donors are not the only motivations satisfied by the procedure.

Medical Research Interests In Surrogate Parenthood

The medical research motivations for surrogate parenthood are extremely positive when outlined by those medical scientists who are performing the research. Their ultimate aim is to improve the human race, to eliminate birth defects, eliminate hereditary disease, eliminate the pain and suffering of the mother in childbirth, and to provide childless couples with children.

On Monday night, March 22, 1982, the ABC Network aired a made-for-TV movie entitled, "Tomorrow's Child." The plot centered around a medical experiment in which an embryo, generated in a petri dish — the egg and sperm being that of the biological parents — was fertilized and brought to birthing age in an artificial womb. A statement was made in the conclusion of the movie that what had just been viewed was based on factual experiments concurrently being conducted in a laboratory somewhere in the U.S.

Medical science has come out of its hiding. Francoeur discusses these experiments in the chapter, "Wombs of Glass and Steel", in his book, Utopian Motherhood. He cites:

Dr. Chamberlin has worked with human fetuses in both England and Washington, D.C. In his initial ex-

periments, Dr. Chamberlin used eight living human fetuses, weighing between 300 and 980 grams, which had been obtained through therapeutic abortion. Seven were removed with the amniotic sac intact while the other was placed in a saline solution. All were placed in tanks immersed in artificial amniotic fluid to prevent regular breathing from starting. Within twelve minutes of surgery, the umbilical blood vessels were connected to perfusion equipment, a combination heart-lung-kidney machine. The largest fetus, a male from a fourteen-year-old girl, survived the longest in these series of experiments. As the Ob-Gyn Observer reported: "A brisk spontaneous flow of blood was noted 22 minutes post partum; the fetus was kept on the circuit for 5 hours and 8 minutes... Only when a cannula slipped out by accident and could not be reintroduced was the experiment halted."⁶⁹

There are other reported instances as early as nineteen sixty-eight and nineteen sixty-nine. The E.M.O., extracorporeal membrane oxygenator, is one of the earlier devices used to replace the function of the natural womb. This instrument has been used to support life in lambs for up to two and a half days.

Most of these facts were, not long ago, a matter of fantasy or science fiction. Aldous Huxley, in his fictional book, Brave New World, establishes the theme for his readers by recalling a day in the year 632 A.F. (After Ford), when the director of Central Hatchery and Conditioning Center gave some new students a tour of the mass-producing human assembly line. Trained technicians controlled the entire nine months in a manner which completely bypassed sexual intercourse and personal parenthood. Eggs and sperm were collected in a sterile, scientific procedure, fertilized and placed in large bottles with a solution specific for the type of individual desired. Decantation Day would come for these "babies", only to be followed by further psychological conditioning until at length each child was properly

⁶⁹Francoeur, pp. 53-54.

prepared to enter its predestined class in society.

In the 1830's, the French writer Diderot was a fantastic dreamer when he wrote The Dream of d'Alembert. "A warm room with the floor covered with little pots, and on each of these pots a label: soldiers, magistrates, philosophers, poets, potted prostitutes, potted kings..." seemed ridiculous to Frenchmen. Americans today are just as reticent to accept genetic manipulation. A 1969 Harris poll revealed that only three percent of the American population had ever heard of artificial insemination.⁷⁰

In Vitro Fertilization

Dr. Daniele Petrucci, a forty-three-year-old father of two children, shocked and horrified the public evoking moralistic tirades and threats of criminal lawsuits in 1959. He announced to the world that after forty failures, he had finally fertilized a human egg in vitro and had kept the embryo alive in an artificial environment for twenty-nine days. The doctor terminated the experiment at that time because the embryo had become grossly deformed and enlarged — a monstrosity.

His motivation had been to find a way to culture organs which the human body would not reject when transplantation took place. Another fetus, a female, was killed after fifty-nine days as a result of a technical error.

Not to be overshadowed, the Russians moved to capitalize on Petrucci's findings. Two Soviet scientists, Dr. Anokhin and Dr. Maiscki, of the Institute of Experimental Biology in Moscow, began their exper-

⁷⁰Ibid., p. 57.

imentations. In 1966, the Russians reported that two hundred fifty embryos had been kept alive beyond Petrucci's record and stated that one fetus had survived for six months and reached a weight of one-pound, two-ounces at death. The 1966 report suggested that the Soviet Union had ambitions of producing the first human being to spend the entire prenatal life in an artificial womb. But, to date there has been no such happening.

In vitro fertilization involves the removing of an egg from the ovary and then fertilizing it in a petri dish. It is the most unique and revolutionary method for overcoming tubal blockages, in particular for those women who have learned that their fallopian tubes are hopelessly and irreparably blocked. In vitro, the Latin for "in glass" indicated here the use of an artificial environment rather than a glass test tube as many may think.

Between 1878 and the 1960's, over two dozen scientists in a dozen different countries tried to fertilize the human egg artificially. Included were Onaff who worked with rabbits and guinea pigs in 1893, F. R. Lillie in the twenties and thirties at Woods Hole Marine Biological Station, Yamane and Pincus with rabbits and humans in the thirties, Krosovskaja with rats and rabbits in 1935, John Rock and Menkin with human eggs in the forties, Moricard with rabbits and humans in the fifties, and Austin, Yanagimachi, Chang, Dauzier, and Thibault with golden hamsters and other animals in the fifties.⁷¹

This technique was perfected by two British scientists. Robert Edwards, a physiologist, and Patrick Steptie, a gynecologist. Since

⁷¹Ibid., p. 60.

November, 1977, they have used this procedure on seventy-nine patients, implanted fertilized eggs in the thirty-two cases where eggs were fertilized in vitro, and achieved four pregnancies. Two pregnancies ended in spontaneous abortions and two resulted in the birth of Louise Brown in London in 1978 and Alastair Montgomery in Scotland in 1979.⁷²

East Virginia Medical School and Norfolk General Hospital is the first in vitro fertilization clinic. They announced their first successful in vitro pregnancy resulting in a birth in February, 1982. Dr. Howard Jones is the physician who screens the applicants.

In vitro fertilization involves basically the following taken from the August 1979 issue of the Hastings Center Report.

Fertilization creates a one-celled zygote which, after 24 to 36 hours, begins to divide. No special name is assigned to the two-, four-, and eight-celled human embryo. However, at about the 16-cell state (two and one half days) the embryo resembles a little mulberry and is therefore called a morula.

After four and one-half days a blastocyst (literally "germ-bag") is formed in which an inner cell mass, or embryoblast, gives rise to the embryo. On the sixth day, the blastocyst containing the embryo (barely visible) is ready for implanting in the uterine wall. Following implantation, the human embryo develops to newborn infant provided all goes well.⁷³

The embryo is implanted by means of a cannula (tube) 1.4mm. in diameter which is placed through the cervix. Dr. Steptoe relates:

It is comfy for the patient and no anethesia is

⁷²Judith Alsfrom Fenton and Aaron S. Lifchex, M.D. The Fertility Handbook (New York: Clarkson N. Potter, Inc., 1980) pp. 79-81.

⁷³Jack W. Moore. "Human In Vitro Fertilization: Can We Support It?" The Christian Century, 22 April 1981, pp. 442-446.

necessary. It is impossible to see the embryo, which must be picked up from the vessel and loaded into the cannula under a microscope. It is tricky not to accidentally draw the embryo out again when removing the cannula. A small amount of culture medium must be used so the uterus won't contract. After withdrawing the cannula, the doctor must check to see if the embryo is gone. Even at that, one cannot be sure.⁷⁴

In order to be a candidate for in vitro fertilization, certain stipulations are set forth:

1. The woman must have normal functioning ovaries that ovulate and menstruate regularly.
2. Her genitals must be infection free.
3. Her husband must be fertile, have a normal sperm count, normal motility, and normal morphology.⁷⁵
4. The couple must be under thirty-five years of age.
5. Their marriage must be stable.
6. There must be no other chance of achieving pregnancy by any other means other than surgery (as the last resort), as certified by their physician.
7. They must be in good physical and mental health.⁷⁶

The new clinic in Norfolk, Virginia, has received more than five hundred applicants since its opening. There are six in vitro clinics planned throughout the United States. This has been a source of great encouragement to many childless couples. Some of these couples have been childless for fifteen years. One young wife reports:

People who can have children at the blink of an eye don't know how lucky they are. Remember about a year ago, the woman who dropped her baby at the Social Services office and left? Oh God, how could she do that? I'd go work in the fields before I would give up a child.⁷⁷

⁷⁴White, pp. 164-165.

⁷⁵Fenton, p. 79.

⁷⁶Moore, p. 443.

⁷⁷"Childless Women Find Hope in New Clinic," The New York Times, 18 March 1979, p. 26.

Fetal Adoption

Medical science has also introduced another aspect which is furthered by the surrogate parenting phenomenon, fetal adoption (artificial embryonation). This aspect is the thrust behind a new infertility clinic which was opened in Chicago recently. Two brothers, Drs. Randolph and Richard Seed have master minded this technique after years of research and experimentation with cattle.

There are two methods to this process: a childless woman will be able to give birth to an embryo which was artificially fertilized in another woman (surrogate) by her husband's semen; a fertile woman will donate an egg which is fertilized in the Petri dish with the sperm of the husband and then implanted in the womb of the childless woman.

The procedure involves four steps. First, the doctors try to regulate the menses of the two women, hormonally, over a period of several months. When the cycles are paralled, the uterus of each woman will be ready to receive the fertilized egg at the same time. When this occurs, the doctor inseminates the donor woman (surrogate) with the sperm of the recipient's (childless woman) husband. The second step involves a process in which the doctor flushes the fertilized embryo from the donor's womb. This is done four or five days after the insemination. It takes the egg three to four days to make the journey from the ovary, through the Fallopian tube, and into the womb. During this journey fertilization occurs. After reaching the womb, the embryo will float freely for another two or three days be-

fore attaching itself to the uterine wall. Thirdly, the embryo is then transferred to the recipient. This is the same procedure which is used in the implantation process in in vitro fertilization. Fourthly, the recipient mother carries the embryo for nine months and gives birth to her "own" baby.

Francoeur discusses this same process, only in more detail in the Utopian Motherhood. He gives a history of the procedure in which animals were used. Then he poses the question: Could this technique be applied to man?

The Cambridge team of Steptoe and Clyman think it is possible. Dr. Edwards is convinced that there is no medical or biological reason why such a transplant would not work.

The transplanted fetus is indeed an allograft, a foreign tissue, but, the uterus for some unknown reason is not triggered to an immune response to the embryo. In fact, Edwards' earlier experiments with implanting unfertilized human eggs into a rabbit foster mother makes him very optimistic about this animal providing an excellent nursery for a very young human being. Before the Cambridge group attempts a zygote transplant between two women, they first plan to put human embryos into such furry, four-legged incubators.⁷⁸

Since 1973 when the Supreme Court made its historical ruling in the Roe vs. Wade case, abortion had been an overwhelming issue. Fetal adoption/embryo transfer could present an answer to this problem. Fetal Adoption Centers could be established throughout the nation and using the technology of the in vitro research, abortions could be eliminated.

⁷⁸Francoeur, p. 99.

The unwilling pregnant women would have an alternative to feticide or unwanted pregnancy. The reluctant prospective mother simply visits the local Fetal Adoption Center, undergoes surgery for removal of her viable fetus, signs legal documents, and exits a free woman. At the same time, the developing embryo is preserved. Fetuses removed during the first trimester are transplanted into the uterus of a surrogate or infertile adoptive mother and carried to term in the usual manner. Second trimester fetuses are nurtured in warm, organic artificial wombs until the third trimester, when conventional modern incubation techniques can be brought into play. Fetuses taken during the third trimester are transferred directly to an incubator, an existing medical technology often used to save the lives of infants born up to three months premature.⁷⁹

Dr. Petrucci quoted the rationale for his experiments as follows:

One of my aims is to help women have babies, for I have been upset by the large number of women giving birth to stillborn children, especially at their first pregnancy. Thus my research was directed along humanitarian lines, guided by the Christian principles I have practiced since childhood. I love mankind. If a wife should lose a baby on which the hopes of herself and her husband have been centering, this is a human tragedy. That I should be denounced for my experiment is a great personal blow, for I am a scientist dedicated to uncovering those mysteries of nature that God is prepared to reveal to us.⁸⁰

Summary

Interests furthered by surrogate parenthood, from the medical/scientific viewpoint are clear. Those psychological emotions of the childless couple, the infertile wife or husband, to be parents are assuaged by the process. For the surrogate mother, her need to express

⁷⁹Robert A. Freitas, Jr. "Fetal Adoption: A Technological Solution to the Problem of Abortion Ethics," The Humanist, May/June 1980, p. 22.

⁸⁰Francoeur, p. 81.

compassion, correct a wrong (abortion, etc.), or receive the benefit of extra income, is granted. The motivational needs of the donor of sperm for A.I.D., to feel superior to other men and to feel they are making babies for those who want and need them are satisfied. Medical researchers can feel fulfilled because of their new-found information about the genetics and reproductive processes of the human mammal. But, these are not all the interests which seek to promote the surrogate parenthood phenomenon.

CHAPTER III

Current Efforts Promoting Interest In Surrogate Parenthood

Primary to the success of any new venture is the amount of positive visibility in the public arena. This is accomplished to the greatest extent through the media. Newspapers throughout the world carried headlines when the first in vitro conceived baby was born. When Elizabeth Kane, the first surrogate mother to go public, announced to the world her undertaking, numerous newspaper articles were written, she and her husband were interviewed by magazine writers, she and the physician, Dr. Levin, appeared on a variety of TV "talk shows" and news programs. The renowned Detroit attorney, Noel Keane, who is probably the first to write contractual agreements for surrogate mothers, has appeared on a majority of talk shows, also promoting the new phenomenon.

Surrogate parenting is definitely an answer to a problem which many childless couples have had to live with until now. There are many people who have determined to take advantage of the phenomenon and promote it to the fullest.

Advertisements in newspapers have been extremely effective in "getting the word out." One person reads the ad and word-of-mouth takes over! This classified ad in a California paper brought in one-hundred sixty responses:

WANTED: Childless couple with infertile wife

wants female donor for artificial insemination. State fee. All replies held confidential.

One hundred and sixty women responded to this ad and each of them probably told a friend who told a friend, and so on. The respondent who was chosen for this particular situation received \$7,000. The couple who placed the ad picked up all the medical, hospital, and related maternity expenses. They referred to the surrogate mother as "an angel in human form taking pity on a forlorn and helpless man and woman giving them a child." Now they are thinking of trying for a boy.⁸¹

This article alone spread the news of something great to thousands, perhaps millions. When worded correctly on the front cover, the article no doubt sold many additional copies of the periodical.

The Detroit News carried this ad:

013 Personals

Couples unable to have children willing to pay a \$10,000 fee and expenses to woman to carry their child. Conception to be by artificial insemination.

All Responses Confidential
Please Contact: 82

This ad prompted many responses. Any time a new product is placed on the market, the price is the main attraction.

There have been recent efforts by the national TV networks, ABC

⁸¹Karol White. "Motherhood the Surrogate Way: Practice Has Pitfalls, Joys," Science Digest, March 1980, p. 25.

⁸²"Surrogate Mothers — Why Do They Do It?" The Alumni Report, p. 8.

and CBS to promote to the public both surrogate motherhood and in vitro fertilization with the artificial womb. The CBS movie, "The Gift of Life" centered on the surrogate mother. Brought into perspective were the overriding negative responses of family, friends, and society in general. As the young wife who sought to be the surrogate encountered the negativism, the plot brought out the positive aspects in such an overwhelming manner that this was presented as the "way to go."⁸³

The ABC movie, no doubt programmed as competition, dealt with in vitro fertilization and the mechanized artificial womb. "Tomorrow's Child" dealt with the positive aspects of becoming parents without even the act of sexual intercourse or a "fat tummy." Presented in a manner which condemned the negative proponents as old-fashioned promoters of pain and agony, the movie definitely gave the young couples of the future an extremely inviting alternative method of reproduction.⁸⁴ However, the media is not the only means by which surrogate parenthood is being furthered.

Surrogate Parenting: A Growing Business?

The American way, the free enterprize system, a capitalistic society knows no limits. Products for sale range from toothpicks to space shuttles, from insects to elephants, and they go to the highest bidder. In every transaction there is a "middle man" who skims the

⁸³CBS's "Tuesday Night Movie"
"The Gift of Life" on WDBJ.

⁸⁴ABC's "Monday Night Movie"
"Tomorrow's Child" on WSET.

cream off the top. Now there is a market for human beings. But this market need not be looked upon as evil or damaging to society. There is a need for the product. There are manufacturers. And, there are buyers!

Surrogate mothering, or as one article puts it, "Wombs for Rent," has already become something of a business venture. Organizations have been formed to deal with the varying elements of the process. Dr. Richard Levin, an obstetrician-gynecologist from Louisville, Kentucky, has organized and founded Surrogate Parenting Associates. This "business" operates for the purpose of matching an infertile couple with a woman willing to bear them a child for a fee.⁸⁵

Dr. Levin's practice is not an ordinary merchandising situation. He has worked exclusively in the field of fertility for five years following a reproductive endocrinology fellowship at Yale. There is no doubt that the thirty-six year old father of four is well qualified and capable. He has taken great care to insure against error.

"I suppose you could set up shop and start doing this fairly cheaply. Just match the couple and surrogate and let them find their own doctors. I've spent a fortune though, with sperm-freezing equipment that cost \$15,000 and an \$11,000 computer to help me make an initial selection of five suitable surrogates for each couple," he says. In all, counting legal expenses (which include a running battle with the state's attorney general that may wind up in the U.S. Supreme Court), Levin estimates his startup costs at \$100,000.

Of the handful of people in this field, Levin seems to have the biggest operation with a staff of three — two coordinators and a clerical worker. But so far, he has used only his own money. "Investors?" he says, "Oh, God no! An investor is like another wife."

⁸⁵Judy Alsofrom, "Physician Sees No Problems in Surrogate Mother Business," American Medical News, 23 (June 20, 1980): 13.

...Levin charges up to \$6,000 according to a couple's ability to pay. He now handles 150 to 200 cases per year.

"We practically live with these women for nine months, dealing with their problems early on so they won't cause trouble later," says Levin, who is putting \$100,000 into an interest-bearing escrow account for legal expenses. "That keeps me from paying taxes on it, and if I get a bill from my lawyer someday, it won't be so painful."

And, adds Levin, "There's been a lot of joy involved in this for me — joy in helping the couples become parents and joy in helping the surrogates."⁸⁶

Dr. Levin explains that they are not selling a baby but merely compensating a surrogate for her potential loss of income, the pain and suffering (that accompanies childbirth) and the loss of consortium. Their business is not to be compared to blackmarket baby-selling. There is a definite biological link between the baby and the adoptive parents through the husband.

The fees to the surrogate, according to Dr. Levin, range from \$5,000 to \$13,000, with some doing it for free. Many couples write in, he says, with the idea their insurance will cover all costs, including the surrogate's fee. The total charge is from \$13,000 to \$20,000, including medical fees (his services), the surrogate fee (around \$10,000), hospital expenses, flights to Kentucky for the participants, and legal fees.⁸⁷

Dr. Levin's Surrogate Parenting Association is not the only entrepreneurial enterprise springing forth on the surrogate parenting

⁸⁶Dave Lindorff. "The Business of Surrogate Births," Venture, The Magazine for Entrepreneurs, September 1981, pp. 56, 57.

⁸⁷Also from, p. 13.

vine. There is also an organization on the West Coast, Surrogate Parenting Foundation, founded and operated by Bill Handel.⁸⁸ The financial success of this particular venture was not available to this writer.

Katie Brophy, twenty-five-year-old Louisville attorney who is a partner with Levin, started her own organization in 1981. Surrogate Family Services was opened with only a three thousand dollar investment by Miss Brophy, for office expenses.

Surrogate Family Services has arranged several pregnancies for fees of \$3,000 to \$4,000 each... "A lot of people desperately want a child," says Brophy. "There are business aspects to this, but it's such an emotional thing that if you approach it from a typical business standpoint, you have problems."⁸⁹

Miss Brophy relates that fees for surrogate mothers normally range from \$5,000 to \$10,000, but can also go as high as \$20,000.⁹⁰ She says the business is dominated by attorneys primarily due to the vagueness of the laws in each state. For her, "it's very exciting. I'm creating a new era of law, which is a chance most attorneys never have."⁹¹

Another attorney, Noel P. Keane of Detroit, is also very much into the financial aspect of the surrogate mother business. His law office spends upwards of seventy percent of its time on surrogate

⁸⁸Lindorff, p. 56.

⁸⁹Ibid., p. 57.

⁹⁰James Giranelli, The National Law Journal 4 (April 9, 1981):33.

⁹¹Lindorff, p. 56.

matters. He charges a fee of \$3,000 plus expenses and says that that is too low, "because I spend two years working on each case." In October, 1981, his office arranged twelve inseminations. Keane maintains he will handle one hundred cases a year at earnings after expenses exceeding \$300,000.⁹²

Sperm Banks: Funds For A Deposit?

The enterprising expertise of business tycoon, Robert K. Graham, is a motivating factor behind Sperm Banking. For Graham, income is not of importance. His motivation is to promote a "better, more intelligent" human race. The sperm bank he founded is called the Hermann J. Muller Repository for Germinal Choice, located in Escondido, California. Sperm collected for this bank comes only from Nobel Prize winners. Thus far, five donations are known to have been made with only William B. Shockley of Stanford University, a Nobel Prize winner in Physics in 1956, admitting to the deposit. Three women are now known to be pregnant after being artificially inseminated with Nobel Sperm from Graham's bank.⁹³

To qualify for a Nobel sperm insemination, a woman must have an IQ which would rank her in the top two percent among all Americans. Graham requires that the women be young and healthy, with no family background of genetic defects. Their husbands must be infertile. The ladies must agree to keep him informed of the outcome of their

⁹²Ibid.

⁹³William J. Broad. "A Bank for Nobel Sperm," Science, 21 March 1980, pp. 1326-1327.

pregnancies and the child's development. Those who are accepted pay air-freight costs and a two-hundred, fifty-dollar deposit, refunded when they return the liquid nitrogen containers used for shipping the frozen semen.⁹⁴

Not all sperm banks are on a level with Graham's. The Tyler Clinic in the Los Angeles area selects men to be donors on the basis of the IQ also. These men receive twenty dollars for one ejaculate and then leave. They also store sperm for individuals at a yearly rate of forty-five dollars.⁹⁵

The largest sperm bank, commercially, is Idant in New York City. They have over thirty-thousand frozen samples which include those of many Broadway stars. Idant pays its donors twenty dollars for each specimen. The donors and storage customers (twenty-five dollars per year per ejaculate) are led to a private room equipped with a reclining chair and a stack of magazines with erotic art. They are asked to ejaculate into a jar and bring the specimen to a technician who does an analysis and then freezes it.⁹⁶

Artificial insemination is big business. It is estimated that approximately 20,000 human beings were created as a result of A.I.D. in 1978 alone. Typically, donors are paid \$20 - \$40 for each accepted ejaculate. If your physician decides to buy his sperm

⁹⁴Matt Clark with Jonathan Kirsch, "Recipe for Genius: First, Get Sperm," Newsweek 10 March 1980, p. 85.

⁹⁵Fleming, "New Frontiers In Conception," p. 20.

⁹⁶John Stossel, "One Answer to Childlessness — Artificial Insemination," Science Digest, March 1980, pp. 20-23.

from a sperm bank, he will probably pay \$35 for each straw(sample). You will probably be charged \$40 - \$50 per insemination.⁹⁷

The charge for each insemination can vary from \$75 - \$100, of which the donor receives about \$30. According to Dr. Sherwin Kaufman, a gynecologist at New York Hospital - Cornell Medical Center who has performed hundreds of A.I.D.'s, about 80 percent of the women who try the method become pregnant, though two or three artificial inseminations may be necessary.⁹⁸

That group of women who respond to the ads for surrogate mothers are also an enterprising group. They hope to gain anywhere from two hundred dollars to ten thousand dollars plus expenses. One applicant, a medical student, asked that her tuition be paid for one year. They have a commodity for which there is now a demand.

Gestation, Inc.

If England's Baby Louise Brown, who was conceived in a petri dish, is a triumph of medicine, what then is the baby born recently to a surrogate mother? Neither the product of adultery, as some claim, nor of a scientific breakthrough, as was Baby L., he is still something more than a much-wanted child who arrived at his parent's home by a rather circuitous route.

Given the fact that she was paid for her time and trouble, his mother is, in a sense, an entrepreneurial pioneer. And although babies have been bought before, he himself, being custom-tailored, is the human equivalent of a bespoke suit. Which leads us to ask: What are the economic implications of surrogate motherhood in the marketplace?

Will the doctors responsible for engineering conception get a slice of the surrogate's fee? If they have a number of prospective surrogates on their books,

⁹⁷White, p. 120.

⁹⁸Jean Seligmann, "Life Without Father," Newsweek, 22 September 1975, p. 87.

could they be said to be keeping a stable? If so, should a further job description be added to M.D.? And another consideration: must the surrogate mother pay income tax? Is the baby then subject to sales tax?

As to the fee itself, how should it be determined? Since this appears to be a seller's market, we assume it'll be pretty much in the hands of the surrogate, and closely tied to quality control. Will the college graduate with an immaculate gene pool be able to charge more for her service than the high school dropout with unsavory relatives? Can the raving beauty command more money than the plainer jane? Do blondes get a bonus?

While it's true that some of the same questions were raised in the past about sperm donation, two factors separate the issues. One is the relative impersonality of sperm donation. The second concerns the wide difference in financial incentive. At \$20 per donation, there is just no comparison with the fees a woman could command for each nine-month gestation.

It is impossible to predict all the medical or ethical implications of surrogate motherhood. These are, as the saying goes, early days. But that it represents a whole new sector of the economy is beyond dispute.⁹⁹

Legal Efforts to Further Interest in Surrogate Parenthood

According to Noel P. Keane, there are no laws pertaining to surrogate mothers. Anywhere.

At the time I first heard this request, I had never even done as much as an adoption. Today, I find myself the expert in what is a virginal legal frontier.¹⁰⁰

While specific laws governing surrogate mothers have not been enacted, some states have taken steps to regulate and control A.I.D. These include Georgia, Oklahoma, Kansas, California, Maryland, New York, Arizona, North Carolina, and Connecticut. There have also been cases which have been pursued by attorneys for the purpose of forcing legislation and rulings by the U. S. Supreme Court. Many of the rulings

⁹⁹Editorial, The New York Times, 23 November 1980, p. 20.

¹⁰⁰Keane, p. 15, 234.

in the various states mentioned above resulted from the efforts of the American Medical Association. Some of these in summary are:

In 1964, Georgia passed the first such law, declaring: "All children born within wedlock or with usual gestation period thereafter, who have been conceived by means of artificial insemination, are irrebuttably presumed legitimate if both husband and wife consent in writing to the use and administration of artificial insemination," providing that the physicians and surgeons involved are licensed to practice medicine.

In 1967, Oklahoma enacted a similar law. This statute, however, requires that the consent document be executed before a judge and filed in the manner of adoption papers. Although such a document prevents the husband from denying paternity, the required manner of the filing may be a disadvantage.

In 1968, Kansas legitimized the procedure but did not specify who is legally authorized to perform A.I.D.

In 1968, a decision of a California appellate court, held that the term "father" cannot be limited in its biological sense: The determining factor is whether the "legal relationship of the father and child" exist. The consent of the husband to A.I.D. is irreversible: "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will."

In 1973, a New York court ruled that A.I.D. accedes not only the legal duties owed by a father to a natural child, but also all the legal right in regard to that child. Thus, the first husband must give his consent before a second husband can adopt a child born as a result of A.I.D. during the first union.

In 1974, Maryland passed a law that legitimizes A.I.D. children if the husband consents to A.I.D. New York enacted a law similar to that passed in Maryland in 1975.¹⁰¹

For A.I.D. cases, the main issue addressed is the introduction of adultery as a basis for divorce. As a result of the artificial insemination

¹⁰¹Bertha Ledecy, "When A Childless Couple Asks For Help — Explaining the Artificial Options," Patient Care, 15 March 1979, pp. 71-82.

nation, husbands have contended that what took place was an adulterous act. States are now enacting statutes which will define artificial insemination, its procedure, those who are participants, i.e. the donor, recipient, adoptive father, and those who may perform artificial insemination. Many of those states choosing to deal with artificial insemination have adopted language substantially similar to that proposed in section five of the Uniform Parentage Act,¹⁰²

At this present time, twenty-four other states are known to have statutorily addressed issues related to artificial insemination. The great social and moral adversity to artificial insemination has no doubt contributed to the hesitancy of the legislatures. However, an increased public awareness of the process and its practice, has and will continue to force legislative action.

New Jersey, one of the remaining states which has not made a legislative decision, had an interesting ruling in Cumberland County

¹⁰²Uniform Parentage Act - Section 5 provides:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination and file the husband's consent with the (State Department of Health), where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived. (Lindsey E. Harris, "Artificial Insemination and Surrogate Motherhood - A Nursery Full of Unresolved Questions," Willamette Law Review, 17 (Fall, 1981): 925 Footnote).

Court. The case involved a Vineland beautician and a Vineland elementary school teacher. The school teacher, who was the donor of the semen, had sued the unmarried beautician for visitation rights to a son who was born to her as a result of artificial insemination. Both of them testified that she had wanted a child by artificial insemination and he agreed to supply the sperm. Marriage was planned and she had specified that she wanted no sexual relationship before marriage. She had conceived after injecting herself with his semen.

After learning that she was pregnant she broke off the relationship and barred him from her house. She testified that she had carefully selected the donor. During the pregnancy and subsequent birth she had paid for all the expenses. Judge Frank Testa of the Cumberland County Juvenile and Domestic Relations Court ruled:

...a case of first impression, presenting a unique factual situation with no reported precedents... in this or any other jurisdiction ... unlike anonymous donors to sperm banks, the donor in this case was known and consequently qualified for designation as the natural father. ... any natural father is entitled to visit his illegitimate children... The court takes no position as to the propriety of the use of artificial insemination between unmarried persons, but must be concerned with the best interests of the child in granting custody or visitation. In this situation a man wants to take upon himself the responsibility of being a father to a child which he is responsible for helping to conceive.¹⁰³

Some interesting observations came from this particular case which are of interest:

1. The judge referred to the donor as the natural father.
2. The natural father is entitled to visit his offspring.

¹⁰³Donald Janson, "New Jersey Judge Gives Donor of Sperm the Right of Visits to Woman's Son," New York Times, 22 July 1977, p. 3.

3. The child was designated as illegitimate.
4. The natural father does have a responsibility toward the child.

A 1948 New York case ruled on a similar situation. In the case of Strand v. Strand, the husband had consented to A.I.D. but then separated from his wife. The court granted him visitation rights and further held that "the husband was entitled to the same visitation rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent would be entitled."¹⁰⁴

Lindsey E. Harris in the Williamette Law Review (Fall, 1981) has provided an excellent overview of various cases which pertain to the different aspects of A.I.D. One of the earliest cases brought to court involving artificial insemination was Hoch v. Hoch. This issue was whether or not the wife was involved in an adulterous act. This Illinois court found the wife guilty of adultery in the normal sense, but it determined that the resulting conception by A.I.D. would not constitute adultery.¹⁰⁵

In the case of Gurskey v. Gurskey a New York State court ruled that the offspring of A.I.D. was illegitimate. However, since the husband had consented to the insemination the court imposed a support obligation on him.¹⁰⁶

¹⁰⁴Harris, p. 923.

¹⁰⁵Hoch v. Hoch, No. 44-6-8037 (Cir. Ct. Cook County, Ill. 1945).

¹⁰⁶Gurskey v. Gurskey 39 Misc. 2d 1083, 242 N.Y.S. 406(1963).

A ruling in 1968 by the California Supreme Court on the case of People v. Sorenson, the question of the legitimacy of the child was evaded. It held that the husband was the "legal father" and as such he was obligated to provide support for his "legal child."¹⁰⁷

The issue of the legitimacy of a child born to a woman whose husband had consented to A.I.D. was established by one state, New York, in 1973. In this case, Adoption of Anonymous, the court held that a child born of consensual A.I.D. is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.¹⁰⁸

Adultery is an issue in which the courts will declare a child illegitimate if it is proven on the part of a woman. A.I.D. for most jurisdictions is said to constitute adultery.¹⁰⁹ The court in the case of Orford v. Orford rejected the traditional definition of adultery and placed its emphasis instead on the fact of impregnation. Justice Orde believed that:

The essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any other person other than the husband or wife comes within the definition of adultery.¹¹⁰

¹⁰⁷People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7(1968).

¹⁰⁸Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S. 2d 430 (Sup. Ct. 1973).

¹⁰⁹Paula Diane Turner, "Love's Labor Lost: Legal and Ethical Implications in Artificial Human Procreation," University of Detroit Journal of Urban Law, 58 (Spring, 1981): 464.

¹¹⁰Orford v. Orford, 58 D.R.L. 251, 258 (1921).

The English case of L v. L held that the child of A.I.D. was illegitimate because it was "not the result of normal sexual consummation."¹¹¹ A contrast to this decision was established by the Scottish case of MacLennan v. MacLennan,¹¹² in 1958. It determined that A.I.D. did not constitute adultery and that the resulting child was not illegitimate. Accordingly, it stated that insemination is not necessary for adultery and that "the placing of the male seed in the female ovum need not necessarily result from the sexual act, and if it does not, but is placed there by some other means, there is no sexual intercourse."¹¹³

A.I.D. is not the only area of controversy to make its way into the courtroom. One such controversial case involves a surrogate mother and has been compared to the setting of Solomon's judgement. It involves Denise Lucy Thrane who contracted with a childless couple, Mr. and Mrs. James Noyes of Rochester, N.Y., to be inseminated with the semen of Mr. Noyes, give birth, and surrender the baby to them. Since the birth, Mrs. Thrane has changed her mind and wants to keep the child.

Judge Robert Olson has been asked by Noel Keane, attorney for the Noyes couple, to allow Mr. Noyes the same right to seek custody as any other father under California law. Mrs. Thrane's attorney countered

¹¹¹L v. L, (1949) 1 All E. R. 141 (Probate, Divorce and Adm. Div. 1948).

¹¹²MacLennan v. MacLennan, (1958) Sess. Cas. 105 (Scot. Outer House).

¹¹³Turner, pp. 465-466.

by stating that under California law semen donors have no rights to resulting offspring. Judge Olson admits that he doesn't have a solution. He has allowed Mrs. Thrane to name her baby after it is born.¹¹⁴

Noel P. Keane has been involved in several court cases involving surrogate mothering. He says, "I have filed a lawsuit in Wayne County (Michigan) to make payment of a fee to surrogate mothers legal and plan to pursue this landmark litigation all the way to the U. S. Supreme Court, if necessary... Binding agreements ... will require legislation and state regulation, which is the long-term goal for surrogate parenting."¹¹⁵

In his case, Doe, Doe and Roe v. Kelley and Chalan, Keane contends that the natural mother (Roe) and the couple (Doe) are free to "conceive a child, bear it, and raise it as they agree among themselves because these acts are guaranteed by the right of privacy." The oddity of this particular case is that Mary Roe has been employed by John Doe for three years. This case is still pending in the Michigan Supreme Court.¹¹⁶

Another case with which Keane is involved is Syrkowski v. Appleyard. The Attorney General of the State of Michigan is arguing in this situation that since Mr. Appleyard consented to the artificial insemination of his wife, Cormae, by the semen of Mr. Syrkowski, the

¹¹⁴"Whose Baby Is It, Anyway?" Newsweek, 6 April 1981, p. 83.

¹¹⁵Keane, The Surrogate Mother, pp. 18, 19.

¹¹⁶See Appendix 2, 3, and 4.

resultant child is the legitimate child of Mr. Appleyard. At this present time the case is still pending.¹¹⁷

The Attorney General of Kentucky, Steven L. Beshear, has challenged the legitimacy of the practice of Surrogate Parenting Associates, Inc., the organization founded by Dr. Richard M. Levin. His contention is that the contracts prepared for and signed by the participants of the surrogate mother process are illegal. The business operated by Dr. Levin is stated to be in violation of certain Kentucky statutes which pertain to the buying and selling of children. The Attorney General also states that Surrogate Parenting Associates, Inc., is guilty of an abuse and misuse of its corporate power, privilege and franchise which is detrimental to the interest and welfare of the Commonwealth of Kentucky. His objective is to seek an invalidation of the corporate powers and franchise of Dr. Levin's corporation.¹¹⁸

Mr. Beshear has a well documented case. In his opinion he writes:

In conclusion, it is the opinion of this office that because of the existence of the above-mentioned Kentucky statutes and the strong public policy against the buying and selling of children, contracts involving surrogate parenthood are illegal and unenforceable in the Commonwealth of Kentucky.¹¹⁹

No aspect of the artificial reproduction of human beings has escaped its day in court. The process of in vitro fertilization came

¹¹⁷See Appendix 5.

¹¹⁸Kentucky v. Surrogate Parenting Associates, Inc. 81-CL-0429 Franklin Circuit Court (March 12, 1981). (See Appendix 6.)

¹¹⁹Steven L. Beshear, Attorney General, Commonwealth of Kentucky, "An Opinion on Surrogate Parenting," (January 26, 1981) OAG81 18: p. 7. (See Appendix 7.)

before the bench in the summer of 1978. The case was John and Doris Delzio against the Presbyterian Hospital, Columbia University and Raymond Vande Wiele, M.D.

Mrs. Delzio had undergone two operations to correct a blockage of her Fallopian tubes. After the second operation in 1971 failed, the possibility of in vitro fertilization was discussed between her physician, Dr. William Sweeney, and Dr. Landrum Shettles of Columbia Presbyterian Hospital Medical Center. Mrs. Delzio was a patient at the New York Hospital Cornell Medical Center. Columbia Presbyterian is located at West 168th Street and Cornell is at East 70th Street. Dr. Shettles (the in vitro expert at this time) could not come to Cornell to do the work. After discussing the project with Dr. and Mrs. Delzio, she wanted to proceed immediately.

On September 12, 1973, Mrs. Delzio entered Cornell Medical Center. She was taken to an operating room, where follicular fluid was obtained from both ovaries after great difficulty. Sealed in a sterile container it was shipped immediately to Columbia Presbyterian to Dr. Shettles. Dr. Delzio provided the necessary sperm and the in vitro fertilization culture of the ovum was begun. The culture was then placed in an incubator at Columbia Presbyterian Hospital Medical Center.

The next morning the culture was removed and opened by Dr. Raymond Vande Wiek, the Chairman of the Department of Obstetrics and Gynecology at Columbia Presbyterian. He was assisted by Dr. Duane E. Todd. That afternoon they called Dr. Shettles and informed him that 1) there was an N.I.H. ban against this type of experimentation; 2) both Dr. Shettles and Dr. Sweeney were unqualified for this; 3) it was immoral and

unethical; 4) no experimentation had been conducted on sub-human primates; and 5) there had been no clearance given by Columbia Presbyterian for the procedure. Dr. Shettles then called Dr. Sweeney to inform him of the happenings. Dr. Sweeney then called Dr. Delzio and informed him. Mrs. Delzio was recuperating from the operation and was in such pain that she was not informed until the next day.

When informed the next day, Mrs. Delzio was extremely upset. Later that day she went into a profound depression and remains so to this day. Dr. and Mrs. Delzio filed suit and the case finally came to trial on July 17, 1978. The trial lasted for five weeks. After thirteen hours of deliberation, the jury found for the Delzio's first claim of mental anguish and awarded Mrs. Delzio the amount of \$50,000 to be awarded in the amount of \$12,500 from Presbyterian Hospital, \$12,500 from Columbia University, and \$25,000 from Dr. Raymond Vande Wiele. Dr. Delzio was awarded a total of three dollars.¹²⁰

Although there are negative issues involved in all of these cases, the phenomenon of surrogate parenthood is receiving positive promotion from the coverage afforded these trials by the media. This is one more means by which the proponents can keep the issue in public view thus prompting acceptance by society. Those who oppose it are exposed by the media as being anti-life and anti-happiness.

Summary

Current efforts to further interest in surrogate parenthood are to

¹²⁰William J. Sweeney, III, M.D. and Lee S. Goldsmith, M.D., LL.B., "Test Tube Babies: Medical and Legal Considerations," The Journal of Legal Medicine, 2 (April, 1980): 1-12.

some extent successful. Each of those who are involved are seeking to gain financially. Baby-making is big business! As the article in Venture Magazine pointed out: For a small investment the profits can be unlimited. This type of exposure will soon bear the news of surrogate parenting to the business world. In the past year Americans have seen the deregulation of certain commodities. The surrogate parenting business is presently operating without any regulation or control and seems to be enjoying good success. Shall it be allowed to continue? Dr. Philip Parker states, "It is time to seriously consider the direction that public policy should take in this matter."¹²¹

¹²¹Parker, "Surrogate Mother's Motivation," p. 6.

CHAPTER IV

Public Policy Implications of Surrogate Parenthood

There are no laws anywhere controlling surrogate mothering. Only twenty-four states have bothered to enact statutes concerning A.I.D. Presently, neither the United States Constitution nor any federal statute prohibits the Department of Health, Education, and Welfare (HEW) from conducting and supporting in vitro fertilization programs.

Those who favor the unregulated use of IVF claim that regulation would hamper "free scientific inquiry," and that because of the complexity of the issues involved in IVF, and because non-complying scientists could evade government regulations or perform experiments outside the United States, the only rational approach would be self-regulation by the scientific community... Legislation will ensure that until research has reached a point where little or no legal and ethical problems remain, the scientific community will strive to conform to the highest possible standard of legality and morality.¹²²

Public policy or legislation, as preferred, must originate with the people. The hindrance to the formulation of public policy is a lack of knowledge by the majority of the population concerning the present escalation of human reproduction experimentation. As mentioned in chapter three, the media is the means whereby the most people will be informed. It tends to display only the positive "look what great accomplishments for the good of mankind science has performed today," aspects. Public policy cannot be properly formulated until both the

¹²²Turner, "Love's Labor Lost," p. 477.

positive and the negative, have been given equal acknowledgement by the media and presented in an unbiased manner to the population.

Numerous issues have been posed for each of the mentioned areas of surrogate parenthood, A.I.D., in vitro fertilization, and surrogate mothering. Some are summarized as follows:

First, are the new conception technologies an intelligent effort to aid and abet nature to achieve its goals? Or are these unwarranted depersonalized incursions into a reproductive process that should be naturally linked to the interpersonal physical act of married physical love alone?

Second, is the zygote, albeit human-like, less than fully human? Or is the zygote a fully human person from the moment of conception?

Thirdly, do surrogate mothers and male sperm donors positively serve the family unity of married couples by helping them have children they so desperately long for? Or are these third party surrogates and donors to be viewed as intruders who sever the interpersonal bonds of married love?

Fourthly, as for the potential of psychological harm to surrogates, parents, and their children, there is no disagreement that every precaution should be taken to forestall such harm.¹²³

The formulation of public policy in a free land has never been given over totally to those who hold legislative positions. Every section of a population is given the opportunity to voice its opinion. Inevitably almost every piece of resulting legislation has been derived from some aspect of some moral code or guideline expressed in Scripture. To properly arrive at any law of the land, the views of the nation's religious leadership must be given an airing.

Religious, Moral and Ethical Views

The religious views of the various aspects of surrogate parent-

¹²³Edward Stevens. Making Moral Decisions (New York: Paulist Press, 1981), pp. 55,56.

hood differ from group to group. Opinions may even vary within a particular sect. Opposition to the whole idea of artificial conception is rather vehement from certain theologians. Paul Ramsey, Professor of Religion at Princeton, voiced his stand like this:

I'd rather every child were born illegitimate than for one to be manufactured. Already women think of themselves as machines of reproduction. Look at the ease with which young women have abortions, so sure they can have another child any time they want. And now women are selling their bodies for nine months and people are talking about freezing fertilized eggs. Pretty soon, a woman will be able to go to the supermarket and pick out an embryo.¹²⁴

Dr. Ramsey has been involved in many debates on the subject of human reproduction and its moral, ethical and religious issues. His points of view have been taken into consideration in legal writings such as the University of Detroit Journal of Urban Law.

The Roman Catholic Church is the first religion to denounce the artificial experimentation. In 1959, after Dr. Daniele Petrucci announced to the world his experiments with in vitro fertilization, the Vatican's semiofficial daily C'Observatore Romano, ordered him to cease and desist. Petrucci became very distraught over the implications of the work. His conversations with Vatican officials implied that he may have committed a double sin; creating life and then destroying it.¹²⁵

The underlying methods of the artificial reproduction process are the cornerstone of the varying theological viewpoints. These include: 1) masturbation, 2) coitus interruptus, 3) coitus condomatusus, and 4)

¹²⁴Keane, p. 261.

¹²⁵Francoeur, p. 57, 58.

semen obtained after normal coitus. All of these have a vital role in the practice of artificial insemination, in vitro fertilization, and surrogate motherhood.

Catholic theologians look upon masturbation as an act against nature and extremely evil. "Wasting of the seed" is also considered a grave sin by the Orthodox Jews. For the most part, the Protestants are not so dogmatic on the method of obtaining semen.

As for coitus interruptus and coitus condomatosus, the various sects examine the motivation for obtaining the semen. Few, however, would have any objection to removing semen from the vagina for analysis. If the semen were to be used for artificial insemination, it would be of great concern to the different faiths.

The Catholic viewpoint on artificial insemination was set forth by Pope Pius XII in 1949. He listed the following:

1. The practice of artificial insemination, when concerning a human being, cannot be considered, either exclusively or even principally, from the biological and medical view, while ignoring that of morality and of right.
2. Artificial insemination, outside marriage, is to be condemned purely and simply as immoral. The Natural Law and the Divine Positive Law lay down that the procreation of new life may be the fruit of marriage only...
3. Artificial insemination in marriage, but produced by the active element of a third person, is equally immoral, and, as such, to be condemned outright. The husband and the wife have alone a reciprocal right over their bodies in order to engender new life.
4. As to the lawfulness of artificial insemination in marriage, let it suffice for the moment that we recall to your minds these principles of the Natural Law: the mere fact that the result envisaged is attained by this means, does not justify the use of the means itself, nor is the desire of the husband and wife to have a child — in itself a very legitimate desire — sufficient to prove the legitimacy of having recourse to artificial insemination, which would fulfill this desire. It would be wrong to hold that the

possibility of having recourse to this means would render valid the marriage between persons incapable of contracting it because of impedimentum impotentiae.

On the other hand, there is no need to point out that the active element can never lawfully be procured by acts contrary to nature.

Although one cannot exclude new methods "a priori" simply because they are new, nevertheless, as regards artificial insemination, not only is extreme caution called for, but the matter must be absolutely dismissed. In speaking thus, we do not imply that the use of certain artificial means solely destined either to facilitate the natural act or to cause the natural act normally accomplished to attain its end, are necessarily forbidden.

Let it not be forgotten that the procreation of new life according to the will and plan of the Creator, alone brings with it and to an astonishing decree of perfection, the realization of the ends pursued.

Donor insemination would be considered adultery if one or both parties were married and fornication if both were single. Even though no physical pleasure were obtained such actions are contrary to nature and consequently are forbidden. The Holy Father has also forbidden any attempts to unite sperm and ovum in vitro.¹²⁶

For the Catholic, who is true to his faith and reverences the leadership of the Pope, any form of A.I. is morally and ethically wrong. Pope Pius XII made this statement at a convention for Italian midwives: "To reduce the cohabitation of married persons and the conjugal act to a mere organic function for the transmission of the germ of life would be to convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory."¹²⁷

Pope Pius XII is not the only Pope to speak out against the efforts of science in behalf of human reproduction. Pope John Paul II has this to say:

¹²⁶Wilford J. Finegold. Artificial Insemination (Springfield: Charles C. Thomas, Publisher, 1976), pp. 80-82

¹²⁷Turner, p. 463.

We are well aware, ladies and gentlemen, that the future of man and mankind is threatened, radically threatened, despite very noble intentions, by men of science. And it is menaced because the tremendous results of their research and their discoveries, especially regarding natural science, have been and continue to be exploited — to the prejudice of ethical imperatives — for ends which have nothing to do with the prerequisites of science, but with the ends of destruction and death... This can be verified as well in the realm of genetic manipulations and biological experiments as well as in those of chemical, bacteriological, or nuclear armaments.¹²⁸

Ironically, the attorney who is the spearheading influence for surrogate mothering is a Catholic. His basic attitude toward the preceding statements and views of the leadership of his faith is somewhat defiant.

There are those who do not like the idea of surrogate mothers one bit.

One is Pope John Paul, II... He attacked the harmful effects of progress "that cares more for itself than for man for whom it must serve. Scientific progress cannot pretend to place itself in a sort of neutral ground."

My reaction to the Pope is... For a million years mankind has progressed by learning to master nature in one respect or another. Are we now to draw a line and say, "No farther"?¹²⁹

Keane also includes the opinion of his pastor. He states that the pastor says it is too early for the church to have an opinion. Regardless of what the Church decides, Keane says it will not bother him, he will follow his own conscience.

Bishop Thomas C. Kellogg, general secretary of the National Conference of Catholic Bishops, believes the position taken by him on

¹²⁸Nicholas Wade, "Pope Issues Warning to Scientists," Science, 27 June 1980, p. 1441.

¹²⁹Keane, p. 20-21.

test-tube babies also applies to surrogate parenting. He states, "Christian morality has insisted upon the importance of protecting the process by which human life is transmitted. The fact that science now has the ability to alter the process significantly does not mean that, morally speaking, it has the right to do so."¹³⁰

It is a well known fact that among "good" Catholics, when the Holy Father gives an encyclical announcement it is an accepted law to the members of the faith. Could it be that those (Catholics) who are deeply involved and committed to the surrogate parenting phenomenon would indeed defy all that is holy to conduct their business?

The overwhelming view of the Catholic leadership is that surrogate parenting in any form is morally and ethically wrong! Dr. Charles J. McFadden is extremely dogmatic in his view and states:

...It is repulsive to every decent tendency of human nature, and it certainly bears witness to unnatural extremes to which science based on materialistic philosophy will go... It is impossible to imagine a Christian woman submitting to such an unnatural act... According to the teachings of sound ethics, it is a principle of Natural Law that a woman has no right to receive into her vagina the semen of any man except her husband... Institution of marriage is primarily social in its objective, and for this institution to achieve the adequate and proper conservation of the race, offspring must be born only of couples united in marriage. The fact that some couples are incapable of having children does not confer upon them an authorization to infringe upon the divinely-established unity of marriage.¹³¹

Another Catholic authority is Gerald Kelley, S.J., who claims that

¹³⁰Ibid. p. 262.

¹³¹Finegold, p. 82.

there neither has been nor can be controversy among Catholic moralists concerning artificial procreation. He says, "They are definitely and certainly immoral because they violate the natural law, which limits the right to generate to married people and which demands that this right be exercised personally and not by proxy."¹³²

The Catholic Church leaves no room for a loose interpretation of its position. However, this is not true of the Jewish sect. Rabbi Seymour Sigel of the Jewish Theological Seminary of America in New York City contends, "if the goal is to provide an infertile couple with children, surrogate motherhood is morally unobjectionable."¹³³

In contrast to this opinion, another Jewish scholar, J. Jakobovits, summarizes the rabbinic attitude as:

By reducing human generation to stud-farming methods, A.I.D. severs the link between the procreation of children and marriage, indispensable to the maintenance of the family as the most basic and sacred unit of human society. It would enable women to satisfy their craving for children without the necessity to have homes and husbands.¹³⁴

Rabbi Emanuel Rachman interprets the Jewish as being extremely liberal in their view of A.I.D. He states that a woman would not be guilty of adultery nor would the child be illegitimate. He is supported in his view by Dr. Solomon B. Freehof. They both agree that the possibility of incest through marriages between offspring is very minimal and should be viewed as a practical problem rather than a moral one.¹³⁵

¹³²Ibid. ¹³³Markoutsas, p. 72.

¹³⁴Turner, pp. 461, 462.

¹³⁵Ibid.

The difference of opinion among Jewish leaders is the result of the division of the faith — Orthodox, Conservative, and Reform. Rabbis of each persuasion will interpret the Jewish law differently. Dr. Freehof writes:

As for the Orthodox point of view on the question, it is veering increasingly toward disapproval. The chief element in the negative attitude is not the status of the woman or the child, but the process of obtaining the seed. Most of the more recent discussions consider the taking of the seed to be a sinful act, and the fact that some of the seed is bound to be wasted is also sinful.

...The Orthodox scholars generally admit that the injection of the seed of a stranger is not an adulterous act, and therefore the woman's relationship to her husband is not thereby impaired...

Since the operation is not deemed to be adulterous, the child that is born of it is not illegitimate. Furthermore, even if the seed is not taken from the husband but from some donor, the child is not deemed to be the child of the donor but of the woman, and therefore belongs to her family...

...Artificial insemination is therefore favored if both the husband and wife wish it. It is preferable, of course for the seed to be taken from the husband, but even if a stranger is the donor, there is no objection.

Nor is the insemination objectionable even if the donor is not Jewish. Actually, there may be some advantage in that fact. For while legally the resulting child is not deemed to be the child of the donor but of its mother, nevertheless there would be some biological, hereditary kinship between that child and the children of the donor in his own marriage. In that case, if the donor is Gentile, the likelihood is far less that the child born of the insemination might some day marry one of his own blood kin...¹³⁶

With these divided opinions on surrogate parenting, individual rabbis will advise couples to follow the dictates of their own consciences. Orthodox rabbis base their opposition on grounds of adultery (donor and doctor as well as husband and wife are included in this

¹³⁶Finegold, pp. 84,85.

charge); in addition, they hold that the offspring is illegitimate and that the child's genealogy is in doubt. The most conservative maintain that the husband should leave the wife and that she has an obligation to forfeit the Ketuah, the money settlement that would be owed her in the event of death or divorce.¹³⁷

The Protestant sect is just as diverse in its opinion as the Jewish sect. In 1945, the Archbishop of Canterbury appointed a thirteen member commission to examine fully all the theological, moral, legal, social, and psychological issues surrounding human artificial reproduction. Every member of the commission except one confirmed that A.I.D. was immoral. They stated that the practice contravenes the personal character of procreation, the essential nature of marriage and the family, as well as the best interest of society.¹³⁸

An opposing opinion has been voiced by the American Anglican Church priest, Dr. Joseph Fletcher. He contends the A.I.D. is not a violation of the marital bonds, and lists his objections:

- 1) Marriage is not a physical monopoly.
- 2) Mutual consent by husband and wife protects against the accusation of broken faith.
- 3) The donor's relationship to the wife is completely impersonal.¹³⁹

Concerning surrogate motherhood, the executive secretary of the American Council of Christian Churches, B. Robert Briscoe states:

The parties involved have not sought God's will in the matter. To circumvent God's law simply so that cre-

¹³⁷Blais, p. 138.

¹³⁸Turner, p. 462.

¹³⁹Ibid.

ation may come about and to say it is scientific progress, that it is better to have a little than none (of the birth process) is wrong. God may have seen fit that none was the better part. We would raise our voice to protest the surrogate mother, and would pray that the Lord give understanding to couples involved in childless marriages, and that scientists and practioners within the field of genetics be aware of the grave responsibilities of turning the events from what may prove to be God's choice for barren individuals to man's choice, to which there is no comparison.¹⁴⁰

Varying opinions of clergymen were set forth by Finegold as a result of a survey he conducted regarding A.I.D. An Episcopalian priest believes there is a divergency of opinion among Protestants because the Bible does not specifically address A.I.D. He states that the marriage is not solely to achieve pregnancy. Scripture nowhere condemns a man or his wife for failure to conceive and produce. The core of the marriage is the love and devotion of one to the other, and a third party would break that bond. The use of donor semen would split the relationship and the resulting offspring would be illegitimate,

Another Protestant minister declares A.I.D. to be adultery. His belief is that although a childless marriage is a misfortune for a husband and wife, it is compatable to the Christian life. Their love and partnership should not be alienated by a donor. He believes to become a father by proxy is disrupting God's order of life. Sterile couples must accept grief as God's will, understand this and content themselves with a childless marriage.

A Protestant scholar expressed his opinion as, "God presents a donor with procreative powers, but He did not intend that morals should

¹⁴⁰Keane, p. 262.

taint this Lord-given potency to be utilized by an abnormal procedure such as artificial insemination. This action on the part of a supplier of spermatozoa, therefore, deserves severe moral condemnation."¹⁴¹

Finegold relates that the opinion of liberal Protestant Church leaders in the Pittsburg area was quite different. The thrust of their position was the intent of the couple. Science has fashioned a new method for infertile couples to "find the joy God intended them to have with children who are really their own. The Lord has encouraged women for motherhood. Science has been helped by God to find a new way to grant to wives the glory of conception (A.I.D.) and procreation. No church and no law should be permitted to take these God-given rights away from these women."¹⁴²

Joseph Fletcher, author of The Ethics of Genetic Control, is a strong advocate of the liberal viewpoint. He argues, "A person begins not at conception but at birth. Artificial insemination and surrogate mothering are tasks of tenderness. Why shouldn't we share our reproductive resources, just as we share our educational and economic ones? We ought to love our neighbors, we ought to help them. That is an important part of our humaneness. Now we are able to give help of a far more intimate and personal sort."¹⁴³

Some Protestant churches have not committed themselves on the issue. The American Lutheran Church has elected to wait until more information is available.

¹⁴¹Finegold, p. 87. ¹⁴²Ibid.

¹⁴³Keane, p. 261.

The ethical and moral questions of the surrogate parenting would involve such aspects as "celebrity seed." A man and wife would select a sperm and an egg from a favorite sports star, actor, actress, or any favorite personality. The egg and sperm would be cultured in vitro and then the embryo could be implanted in the womb of the wife. Or, if the wife did not want to be troubled with the pregnancy, a surrogate mother could be hired to carry the embryo to term, give birth and then surrender the infant to the adoptive parents. This would lead one to ask, "Who gets the Mother's Day Card?"

One doctor writes:

The moral and ethical values of both doctors and laymen are changing so fast that it is hard to know what will be accepted or condemned 10 years from now... Until 25 years have passed... the rightness or wrongness of A.I.D. will not become clear...

...I believe without reservation that the future of the potential child should be of first consideration... Unjustified A.I.D. can lead to unhappiness and feelings of inadequacy on the part of the husband and may negatively affect the marriage as well as the husband's relationship with the child.¹⁴⁴

The concern for the outcome of the child is foremost in the whole concept of surrogate parenting. What is implicated is the integrity of that individual as a unique entity. How will that person relate to his own physical being and to his history? A human individual to some extent, believes himself to belong to himself, to be responsible to himself, to be determined by things that are uniquely his own.

...But this sense of individuality is related not only to uniqueness but to randomness, to the unpredictable materialization of that particular one out of a great many

¹⁴⁴Herbert W. Horne, Jr. "Artificial Insemination, Donor: An Issue of Ethical and Moral Values," New England Journal of Medicine 293 (October 23, 1975):873,874.

possibilities which both produces and expresses the uniqueness. These concepts converge to make up the notion of an individual as a "self" who had not been totally programmed or fabricated, who is unique.¹⁴⁵

"What is becoming of the human race?" is a question which could become a real concern for future generations. With the scientific knowledge now available and the attitudes of some of those (individuals and organizations) herein mentioned it is possible that humanity could become so depersonalized that the human life would be of no value. It is conceivable that the demand for surrogate mothers, regardless of the fertility status of the couples, could be greater than the in vitro intramarital process.

Leon Kass made the following argument before the Ethics Advisory Board of the Department of Health, Education, and Welfare:

The principle truly at work here is not to provide married couples with a child of their own, but to provide anyone who wants one with a child, by whatever possible or convenient means.¹⁴⁶

Kass' main concern is that "making babies" this way will further devalue the "humanness" and change the meaning of "our embodiment, our sexual being, and our relations to our ancestors and descendants." The child would be uncertain about his "father" and his lineage. "Clarity about our origin is crucial for self-identity, itself important for self-respect. A donor egg or sperm makes for confusion for the child." Kass contends that the use of surrogate mothers severs the covenant

¹⁴⁵Charles Fried, "Ethical Issues in Existing and Emerging Techniques for Improving Human Fertility," Law and Ethics of AID and Embryo Transfer. (New York: Ciba Foundation Symposium 17, The Netherlands by Mouton & Co., 1973), pp. 42-43.

¹⁴⁶Moore, "Human In Vitro Fertilization," p. 444.

which united sexuality, procreation and love. Beyond the issue of the commercialization of the procreative function is the deeper denial of the meaning and value of one's own body, the using of it as a mere incubator for another, and the breaking of the bond among sexuality, love and procreation.¹⁴⁷

The outcome of the child is a real concern in A.I.D. one donor said:

They're not my children. But, they are in a way, I guess... I'm Catholic. I was going to be a priest... I believe in God. I believe in Jesus Christ... I don't tell my male friends. I don't trust them enough. It might come out at a party... I always wonder how many babies I've produced, but I've never asked. After this first time I was here, the girl in the lab said, "We've had a success." Wow, I didn't think in terms of myself as a father... Later, you'd be sitting down and wondering, "How many times have I been a father?" I wish one day I could see them. If you have a child, even if it's just an affair, you want to return to see. I always wonder if my son or daughter will turn out to be a great athlete.¹⁴⁸

The concern of a father for a child is present in the donor's thinking. There will always be that psychological aspect which will bear upon the question of the morality or the ethics of surrogate parenting.

Another area of the surrogate parenting ethics involves the single person. Single parenthood is becoming a reality as unwed pregnant young women decide to keep their children rather than offer them for adoption or to have an abortion. The divorce rate is adding to this total because the separating husband or wife, for some damaging reason, has been "turned off" to marriage but not to parenthood.

¹⁴⁷Ibid.

¹⁴⁸Fleming, p. 23.

One divorcee in California, a thirty-seven-year-old nurse, decided she wanted a child and has been looking for someone who would inseminate a single woman. She is now doing herself with the help of the Feminist Women's Health Center in Los Angeles. She pays thirty-eight dollars for a syringe frozen in dry ice at the Southern California Cryobank, a commercial sperm bank. She relates:

Everytime I make this trip, I'm terrified of being stopped by the highway patrol. What could I say? "Gee officer, I've got this sperm here and its melting and I've got to get home." But I like doing it at home, in my own bed.¹⁴⁹

Another single woman, Joyce Newton, who is a principal of a school in California has a son who is the product of donor insemination.

I would like women to know that this is definitely an alternative to marriage. I never rule out marriage, but I don't need to be married. I own my own house, I make over \$30,000 a year... I am going back to try again... I don't care if its the same father. I'd just feel comfortable if my son had a brother or sister brought into the world the same way. That would give them something to share.¹⁵⁰

Artificial insemination provides parenthood for almost anyone. Single women can become pregnant without the act of sexual intercourse. Single men may become fathers without sexual intercourse by hiring a surrogate mother who will submit to the A.I. But, A.I. has also opened the moral and ethical situation for homosexuals to become parents.

It is estimated that more than one-hundred, fifty lesbian women conceive through A.I.D. each year. Although many clinics will not

¹⁴⁹Ibid. ¹⁵⁰Ibid.

perform the operation if it is known that they are homosexual. A group of lesbians in Northern California formed a support organization and produced two circulars entitled, "Woman Controlled Conception" and "Artificial Insemination, an Alternative Conception for the Lesbian and Gay Community." These pamphlets were distributed to others with instructions of how it could be done with turkey basters and eyedroppers. They have had "positive" results and many are pregnant from the sperm of homosexual men. The men have agreed to be available should the child ever want to see them.

One homosexual man tells of his feelings about A.I. and his donating sperm.

The most important reason to me is that, being a homosexual man, I don't want to feel that I'm not part of procreation. It's very exciting to me to think my attributes can continue and in a very exciting way, not in the traditional nuclear-family context, but at the frontier of new kinds of families. Also, some day I hope to have children, if it becomes more acceptable for lesbians to become mothers, then perhaps the next step is for homosexual men to be fathers. Perhaps in the future some woman will donate her womb for my child.¹⁵⁰

If there were a public policy controlling these types of arrangements, would it be considered a violation of his rights to be a parent? It is evident that in his definition, the family is a community project. From what he has said, one could conclude that homosexuality is a "race" of people rather than deviant people. His idea is seemingly to procreate homosexual men with homosexual women, thus, keeping the blood line pure.

¹⁵⁰Ibid.

Some lesbians argue that they would like to experience the joy of giving birth and motherhood just the same as "straight" ladies do. Artificial insemination has made it emotionally easier for them. One Oakland couple, a black woman named Bobbi, and a white woman named Lynn secured donor sperm from Lynn's brother and inseminated the "wife" Bobbi. Lynn says, "There's just no way I would ever be able to have a baby. That's for women, I mean for Bobbi. But I knew I wanted my own blood."¹⁵²

Regarding the ethics of single parenthood through A.I., the American Medical Association has not taken a stand. However, for most doctors, the question of the child's well-being is of the utmost concern. Dr. Wayne Decker, New York Fertility Research Foundation, says, "...to me, the kind of family community the child will be born into is more important than the mother's or father's sexual preference."¹⁵³

Another physician, Dr. Simon Henderson, Chief of Women's Health and Fertility Clinic at San Francisco General Hospital, states, "I have personal reservations. We don't know enough about the rearing of children in a lesbian household."¹⁵⁴

Medical science has unleashed upon this world an alternative to procreation as lethal as the atom bomb. The sad part is that a nation can stop the production of bombs, but there may be no means by which surrogate parenthood, artificial insemination, single parenthood, or in vitro fertilization can be stopped. The demand is so great! Legis-

¹⁵²Diane K. Shah with Linda Walters, "Lesbian Mothers," Newsweek, 12 February 1979, p. 61.

¹⁵³Ibid. ¹⁵⁴Ibid.

lation may be too little, too late.

Legislative Proposals

Noel Keane, the Detroit attorney, has stated that he intends to press the issue of surrogate parenting in the courts until the Supreme Court of the United States makes a ruling. The legislators, both state and national, would be compelled to formulate and adopt laws for the regulation of the procedure. He even advocates that people want this so badly, that each "state would make it widely available by paying for it and by regulating it."¹⁵⁵

Mr. Keane may well get his wish. One lawyer says that the law will not be forced into a hasty, premature decision. He states that "as with all other scientific achievements, the law response to artificial insemination has been, and will be, 'perfect horror; skepticism; curiosity; and then acceptance'."¹⁵⁶

The Yale Law Review has stated:

...Donor insemination comes to typify a broad problem for church and court and legislating men. It is a case study in the techniques of change. The hap-hazard legal treatment it has received illustrates the need for creating some system for measuring the effectiveness of our social regulation and for better adjusting it to the phenomenon of change... Clearly the ensuing struggle will be rife with danger for doctor and for patient until artificial insemination shall have made its peace with the law.¹⁵⁷

For many legal authorities the lack of legislation in these early stages is positive. They feel that science would not be free to prove its hypotheses if it were regulated by law. Neither would it be allowed the opportunity of quiet failure and abandonment. Some contend that

¹⁵⁵Keane, p. 264.

¹⁵⁶Finegold, p. 65.

¹⁵⁷Ibid., p. 64.

the only guide necessary for this procedure is the conscience of the husband and wife and the attending physician.

A few years ago during a joint session of a joint medical-legal conference in Chicago, a lawyer stated, "We need no special laws. The less said about it the better. If people want children and are satisfied with them, whose business is it how and when they were begotten?"¹⁵⁸

At present, the illegal procedures resulting from surrogate parenting are mountainous. Falsified medical reports, falsified birth certificates, falsified hospital records, and falsified insurance claims have all been produced to cover up the surrogate parenting, baby-selling phenomenon.

Dr. Stuart Abel has suggested various steps to create adequate legislation and suggested the following:

Any child conceived and born as a result of the impregnation of his mother by artificial insemination by a duly licensed physician or under his advice and direction, and upon the written consent of herself and her husband, shall have all rights, privileges, and obligations of a child conceived and born as the result of impregnation through sexual intercourse of the husband and wife; and no evidence concerning such artificial insemination shall be received in any action at law, in equity, or other legal proceeding which in any way may impair his rights, privileges, or obligations.¹⁵⁹

Another legal expert, Dr. Alan F. Guttmacher, favors the adoption of legislation. He states:

...But since there is no sanctioning statute the threat constantly hangs over the head of patients and doctors that according to the interpretation of some

¹⁵⁸Ibid., p. 65.

¹⁵⁹Ibid., p. 66.

antique statute, even as old as the Ten Commandments, some reactionary jurist will rule that an illegal act is being performed. If so, the woman becomes an adulteress, the child illegitimate and perhaps the doctor an accomplice in an illegal action.¹⁶⁰

In any discussion of the legal questions of A.I.D. and surrogate mothering, the pre-eminent issue is that of the child. The concern centers around the legitimacy: who is the real father, or who is the real mother. In the U.S., California, Georgia, and Oklahoma have passed legislation which declares the child to be the legitimate child of the wife and her husband provided the husband has given his written consent. Legislation for this purpose has been rejected in Indiana, Minnesota, New York, Virginia, and Wisconsin. Ohio rejected a bill which declared the whole process to be a criminal act.¹⁶¹

Many European countries have begun to adopt legislation for both A.I. and surrogate mothering based on medical research. England has already made declarations which could provide guidelines for U.S. declarations. In England, a child born to a married woman by A.I.D. is declared to be the child of the wife and a man, whose identity is unknown except to the doctor, and not of the husband and wife. The birth certificate will state that the child is illegitimate and the husband and wife must apply to adopt. However, this cannot be done immediately. The mother cannot give consent for adoption until the child is six

¹⁶⁰Ibid., p. 67.

¹⁶¹This Bill was introduced in 1955 and was tabled. It read as follows: "No woman shall undergo donor artificial insemination, nor shall any person execute artificial donor insemination or assist in it with any woman in this State. Any child so born is illegitimate. Whoever violates this law shall be subject to a fine of not more than five hundred dollars and to a term of imprisonment of not less than one year and not exceeding five years. (Finegold, p. 71).

weeks old. Also, the adoptive parents must have the child in their continuous possession and care for at least ninety days after the child is six weeks old. In this situation, the child is nearly five months old before the adoption can take place. When the child is older, he must be told that he is adopted.¹⁶²

In America, the outstanding case attempting to legitimize A.I.D. children is People v. Sorenson. This was the nation's first case in which a divorced woman's former husband was charged with the criminal non-support of their A.I.D. child.¹⁶³ This case was tried in California.

Another state, Oregon, has adopted what is possibly the most comprehensive legislation of any state. Under ORS 677.360, only licensed physicians or persons under their supervision may select semen donors. The semen must be analyzed at the outset to determine the quantity, normality, and motility of the sperm cells.

ORS 677.370 provides that no person who suffers a known disease, genetic defect, or venereal disease may donate semen to be used in artificial insemination.

ORS 677.365(1) The written consent of a woman and her husband, if she is married, is required before she may be artificially inseminated.

ORS 677.365(2) Upon the birth of the child the attending physician must file this consent with the State Registrar of Vital Statistics.¹⁶⁴

The most significant Oregon artificial insemination statute is

¹⁶²Oliver M. Stone, "English Law in Relation to A.I.D." Ciba Foundation Symposium 17: p. 71.

¹⁶³Turner, p. 466.

¹⁶⁴Harris, pp. 927, 928.

ORS 109.243, which provides as follows:

The relationship, rights and obligations between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.¹⁶⁵

Another important aspect of the Oregon law is Section 109.243 which makes the child as legitimate to the consenting husband as one of his natural offspring. It provides for the child the legal protection as a natural child.

ORS 109.239 serves to sever any and all legal relationships between the donor and the offspring. It negates any rights, obligations, or interests the one may have in the other. This is done because no child is entitled to the parental support and nurturing of two sets of parents. Oddly, even though this Oregon law is quite thorough, it does not provide any guidance where the insemination of an unmarried woman is evident. However, it is implied in ORS 677.365 which reads: "Artificial insemination shall not be performed upon a woman without her prior written request and, if she is married, the prior written consent of her husband."¹⁶⁶ At the time of this writing the Oregon State Law herein stated is receiving proposed statutory amendments.

Concerning surrogate mothering, Oregon has no laws expressly addressing the issue. There is one case of note in Oregon, however, which involved the surrogate's registration in the hospital under the

¹⁶⁵Harris, p. 930.

¹⁶⁶Ibid., p. 934.

adoptive wife's name. In this case, Cutts v. Cutts, the couple had paid for all medical expenses and the child was turned over to them. They later divorced and when the origin of the child was revealed, the custody which had been granted Mr. Cutts, was revoked, and the child was made a ward of the court. Custody was later returned to him.¹⁶⁷

It should be noted that Oregon law does not address itself to the contracts which may be drawn between the surrogate and adoptive parents. Once the surrogate is obtained, however, nothing prohibits an attorney from handling documents which pertain to adoption.

As for compensation, Oregon does not presently have a statute that forbids payment to any person involved in an adoption. However, based on the rulings of the Michigan Courts and the opinion of Kentucky's Attorney General, Oregon's public policy demands that no compensation be paid to the surrogate mother. Any payment to the surrogate impairs her initial consent to adoption. Therefore, compensation for the surrogate induces baby selling and damages the adoptive couple's rights to the child.¹⁶⁸

Oregon is probably making the greatest efforts to establish legislation. However, California is also examining proposals for regulation of surrogate parenting.

Until 1981, there were no completed surrogate arrangements known in California. Early in that year there was an increase in the public interest. It was brought to full attention when a surrogate mother

¹⁶⁷Ibid., p. 942.

¹⁶⁸Ibid., p. 947.

living in Los Angeles, refused to relinquish her baby to the New York couple for whom she bore the child. Again, the court decision in Kentucky and Michigan greatly influenced the California legislature.

Under California law, the surrogate mother, as the natural mother, may place the child for adoption by the donor's wife. In Kentucky and Michigan a donor can establish himself as the father, but, in California, the laws not only fail to provide a means whereby he can declare himself the father, but effectively preclude him from doing so.¹⁶⁹

Because he is not married to the surrogate and does not intend to be, the donor can establish his paternity by only one method. Subsection 7004(a)(4) presumes him to be the natural father of the child if he receives the child into his home and openly holds out the child as his natural child. This method invokes two potential dangers... First, the surrogate may refuse to relinquish custody at birth so that the donor may not be able to receive the child into his home... Second, despite the fact that the donor does receive the child openly into his home as his own, if the surrogate is married or was married within 300 days prior to the birth, her husband is also presumed the natural father.¹⁷⁰

Another obstacle which would hinder a donor's adoption of a child through a surrogate relationship is that California's artificial insemination statute denies parental rights to the donor of semen used in the artificial insemination of a woman other than his wife. This may be circumvented if the surrogate's husband did not give written consent, or, if after the birth he denied the child was his, the donor could then establish his paternity.¹⁷¹ The existing California statutes are now being revised to accomodate surrogate mothering.

¹⁶⁹Ellen Lassner Vanltoften, "Surrogate Motherhood in California: Legislative Proposals," San Diego Law Review 18 (March 1981): 347.

¹⁷⁰Ibid., p. 357. ¹⁷¹Ibid., pp. 367, 368.

Compensation for surrogates in California amounts to selling babies. However, as long as the donor's payment to the surrogate is independent of his wife's adoption procedure, it would be permissible. This involves California Penal Code Section 273(a) and Section 181.¹⁷²

Since neither the Constitutional nor judicial precedent calls for permitting payment to surrogate mothers, Amending sections 273(a) and 181 could cast judicial and social dissatisfaction upon surrogate motherhood itself.¹⁷³ The surrogates presently volunteer for a variety of non-financial reasons. Legislation providing for their compensation may encourage a host of women to become surrogates simply for the money.

Van Hoften suggests the following in regard to the California Penal Code:

Although a number of legal obstacles presently discourage surrogate motherhood in California by hampering the semen donor's efforts to establish his paternity, minor legislative modifications would enable infertile couples to have children through the use of a surrogate. The repeal of Evidence Code Section 621 would remove a major barrier to the donor's claim to paternity, while its policy objectives would be met by the rebuttable presumptions of Civil Code Section 7004(a). The donor should be given standing to rebut those presumptions and the opportunity to introduce appropriate evidence to do so. Under a new section of the Uniform Parentage Act, he could acknowledge his paternity before or after the child's birth. Under an amendment to the artificial insemination statute his written agreement with the surrogate would manifest their intent that in this case the semen donor be treated as the legal and natural father of the child. Modifying Penal Code Sections 273(a) and 181 is neither necessary nor desirable. Because the current practice of surrogate motherhood suggests new, as yet unanswered questions, the legislature

¹⁷²Ibid., p. 372.

¹⁷³Ibid., p. 379.

should leave the details of each transaction to the parties involved. The proposed amendments are sufficient to permit surrogate motherhood as a legal childbearing option.¹⁷⁴

The Commonwealth of Kentucky, through the office of the Attorney General, Steven L. Beshear, has been involved in a long, standing battle with Surrogate Parenting Associates over the legality of "selling babies." Mr. Beshear has provided a brief survey of those Kentucky statutes which may be interpreted to pertain to surrogate mothering. He contends that the contract between the surrogate and the adoptive parents is illegal and unenforceable as a result of three Kentucky statutes.

KRS 199.500(5): "In no case shall an adoption be granted or a consent for adoption be held valid if such consent for adoption is given prior to the fifth day after the birth of the child."¹⁷⁵

This statute would negate any contract which is processed during the arrangement stage of the procedure prior to the insemination or any time prior to five days after the birth. Although a contract drawn up prior to the five day waiting period might be considered, the strong public policy would prevent it from being enforceable.

The parties concerned may choose another avenue which has been followed by Surrogate Parenting Associates, Inc. This involves a contract in which the surrogate and her husband agree to terminate their parental rights at the end of the five days. This is covered under

¹⁷⁴Van Hoften, p. 385.

¹⁷⁵Steven L. Beshear, Attorney General, Commonwealth of Kentucky, "An Opinion Concerning the Legality of Surrogate Parenthood," (See Appendix 7).

KRS 199. 601-199.617. However, there is a penalty clause which is found under KRS 199.900(5), and which states that in case of willful violation there is a fine of not less than twenty dollars nor more than two hundred dollars or imprisonment for no more than thirty days.

Mr. Beshear believes that the strongest legal prohibition against surrogate parenting in Kentucky is the strong public policy against the buying and selling of children. He cites several cases in other states: Barwin v. Reidy, 307 P.2d 175 (N.M. 1957); Matter of Adoption of a Child by I.T., 307 P 2d 341 (N.J. 1978); In re Shirk's Estate, 350 P.2d 1 (Kan. 1960); Rennche v. First National Bank of Nevada, 512 F. 2d 187 (9th Cir. 1975).¹⁷⁶

In Kentucky, much of this public policy has been embodied in statute. KRS 199.590(2) states:

"No person, agency or institution not licensed by the department may charge a fee or accept remuneration for the procurement of any child for adoption purposes."

The penalty provision for violation of KRS 199.590 is found in KRS 199.900(4) and states that any person who violates the statute shall be fined not less than \$500 nor more than \$2,000 or imprisoned for not more than six months or both.¹⁷⁷

Accordingly, Mr. Beshear points out that no business, person, or organization can advertise children for adoption. Included also is the warning that if they carry ads for such, a newspaper or publication which is published in Kentucky, they are in violation of statute KRS 190.590 (1). His conclusion is:

...It is the opinion of this office that because of the existence of the above-mentioned Kentucky sta-

¹⁷⁶Ibid., p. 4 ¹⁷⁷Ibid.

tutes and the strong public policy against the buying and selling of children, contracts involving surrogate parenting are illegal and unenforceable in the Commonwealth of Kentucky.¹⁷⁸

A proposal for the legalization of surrogate parenting contracts was submitted in the California Law Review.

...Contracts to bear a child, if properly regulated, pose no serious threat to social interests and should be permitted...

As a condition of legality and enforceability, all contracts should be required to provide for adequate life and health insurance. A copy of the contract, a doctor's report on the physical condition of the carrier, and the results of a blood test, should then be presented for review to an official of the State Department of Health. This official should witness the signing of the contract and file it with the court. Once the agreement is signed, the consent of the mother to the ultimate placement of the child according to contract terms could not be withdrawn except by court approval or by mutual consent.

After the baby's birth, the court could order a finding of the parent-child relationship between the contract couple and the child. A copy of the order which would be sent to the State Registrar, who, upon application of the contracting couple or the carrier, would issue a new birth certificate.

The proposed system would not require extensive statutory modification. If the contract was provided for in a independent enabling section, that section could also provide that the contract, conforming to the statutory requirements would be valid and enforceable, notwithstanding conflicting provisions of law. In order to facilitate proof of parentage, the conclusive presumption of section 621 of the Evidence Code should be modified to except the baby contract situation, and section 700s of the Parentage Act should be modified to exclude situations where the donor provides semen specifically to father the child.

The proposed modifications could also be implemented with minimum expenses by using the existing procedures and personnel of the State Department of Health to supervise the contracting process.¹⁷⁹

¹⁷⁸Ibid., p. 7.

¹⁷⁹Elizabeth A. Erickson, "Contracts to Bear A Child," California Law Journal (1978): 621-622.

California is not progressing in legislation pertaining to surrogate parenthood as rapidly as the phenomenon is growing.

The state of Michigan, on the other hand, is making some progress in the legislature. Noel Keane states that there is now support to draft bills on surrogate parenting in both houses of the Michigan Legislature. He has been asked by State Senator George S. Hart (Dearborn) and State Representative Richard Fitzpatrick (Battle Creek), as well as the Family Law Section of the Michigan State Bar Association to help draft proposed legislation.¹⁸⁰

On October 16, 1981, Representative Fitzpatrick introduced House Bill No. 5184 to the Michigan House of Representatives.¹⁸¹ He noted, "We know that passage of such a law will be controversial, but it is time to begin." House Bill No. 5184 is proposed to amend existing legislation as it pertains to adoption. The specific legislation to be amended is sections 44 and 54 of Chapter X of Act N. 288 of the Public Acts of 1939, Act No. 296 of the Public Acts of 1974, sections 710.44 and 710-54 of the Compiled Laws of 1970.

The Bill establishes that the ages of both the surrogate mother and the biological father must be at least eighteen and either of them can be single or married. It provides guidelines for the examination by an agent of the adoptive parents to guarantee a proper home for the child.

¹⁸⁰Keane, p. 267.

¹⁸¹See Appendix No. 8.

Section 75(1)(C), "The Permanence As A Family Unit Of The Petitioner's Home," seems to be an area which in itself will provide controversy for the Bill. Section 76(1) establishes that a "single natural father" may enter into a surrogate parenthood agreement. Does this mean that the courts will be forced to define a "family"? Will the "family unit" be established as a single parent household? It is foreseeable that this section could create as much furor as the concept of surrogate parenting. The Bill could be interpreted as a double threat to the sanctity of the traditional family by (1) allowing for the legality of surrogate parenting, (2) allowing the court to define what constitutes a family, and (3) allowing the court to determine what would constitute a "home".

Section 77 of the Bill provides for a deed to be drawn between the surrogate and the natural father acknowledging the paternity of the child in the same manner as a deed is drawn for the exchange of real estate. This would seem to define the child as a piece of merchandise to be bartered.

Section 81 states that:

At the completion of the surrogate's sixth month of pregnancy, the judge of probate shall issue an interim order granting custody, care, and control over the child to the natural father... The interim order shall grant to the natural father and his spouse the exclusive authority to consent to all medical, surgical, psychological, educational, and related services for the child. The interim order shall be effective immediately upon the birth of the child.

This section poses three questions: (1) Does it imply that the surrogate maintains the exclusive right to make decisions concerning the fetus? (2) If, upon birth, the child required immediate medical atten-

tion of some nature — the adoptive parents not being present and unavailable for consent — is the surrogate then permitted to make the decision or is it the responsibility of the attending physician? (3) Does this imply that the adoptive parents will assume full responsibility, immediately upon birth, of the child regardless of its physical, emotional, or mental condition? These questions will be of vital concern in any surrogate parenting situation.

Section 87 establishes the medical guidelines to be followed by the surrogate. These include complete medical and psychological evaluations. The surrogate, in this section, is also required to assume all risks, medical, physical, psychological, which accompany pregnancy. It allows for abortion, only upon the recommendation of the inseminating physician, if her health is threatened.

Section 88 establishes the guidelines for the natural father and states that the surrogate's fee is to be deposited in escrows on the date the agreement is signed by all parties. The fee, plus all interest, will be paid to the surrogate upon birth of the child. However, this section does not state whether the condition, at birth, of the child will have any bearing upon the fee.

The coverage of all expenses for the surrogate is to be the responsibility of the natural father. But, this also allows that the surrogate's present medical insurance may be charged for all or part of the expenses. It becomes the primary source.

Section 91 gives the natural father the legal responsibility for any child which is born to the surrogate. This section also states:

(c) That if the natural father or the adoptive parent, if the natural father is married, dies prior to the termination of the surrogate's parental rights, the surrogate parenthood agreement shall remain in full force and effect with respect to the surviving party: That if both the natural father and the adoptive parent, if the natural father is married, die prior to termination of the surrogate's parental rights, the surrogate shall be entitled to her full compensation and expenses and may elect to keep the child or execute a consent to the adoption of the child or a release of the child for adoption.

It is implied by this section also that the child is only a commodity which may be disposed of in any manner by the surrogate or natural father. It would seem that, since the documents acknowledging the child to be born to the surrogate is indeed the child of the natural father have already been made a matter of legal record (Sec. 75 (2)) and the adoptive parent has already been approved and is a matter of legal record (Sec. 75 (3)), in the event of the death of the natural father, the child would be a legal heir to the natural father's estate. Also, in the event of the death of both the natural father and the adoptive parent, if there were no other children from the marriage, the child would seem to be the sole surviving heir.

House Bill No. 5184 is not adequate for the situation and could create more problems for the legal system. Any legislation which is proposed would be useless unless it provided for the child. Also, the proposed legislation would need to define natural father, adoptive parent, family, and home, in a manner which is acceptable to the public. This Bill does not.

Summary

At the present time, there is a concerted effort among those attor-

neys and doctors who are involved with surrogate parenting for meaningful legislation to be formulated and adopted. Many of these are not sure that what they are doing is moral and ethical. They are looking for legislation which might help to ease their conscience.

Conservative religious leaders view it much in the same way as abortion. They feel it is an intrusion into God's creative process for humanity and as such, must be abandoned.

Liberal theologians view it as an aid to childless couples to help them find happiness. Their motives lie in the social gospel philosophy. They believe that the means justifies the results.

Legislators are not sure what to do. Of those states which have enacted legislation regarding A.I.D., the laws are extremely porous when interpreted. There is no uniformity among the states regarding legislation to control and regulate surrogate parenting.

Before legislation is proposed, each existing law pertaining to adoption, A.I.D., and the proposed legislation for surrogate parenting should be thoroughly researched. The arguments from the religious viewpoint should be closely adhered to, and the potential harm to the entire human race should be the deciding factor.

CHAPTER V

Conclusion

The issues presented herein will present counsellors, both biblical and non-biblical, with numerous situations in the Christian context and secular setting, where informed direction may result in the saving of a marriage. Infertility is becoming more and more prevalent in society and an uninformed public, in its effort to alleviate the problem, will become more and more tolerant of those "alternatives" to childlessness. At present, an estimated twelve to seventeen percent of the married couples in America are involuntarily childless and the medical experts say it is increasing.

Inferility, in most cases, is the result of the freedom of choice. Today many couples are postponing parenthood until they are past the age of optimal fertility. Also at fault is venereal disease, birth control pills, complications from abortion and the use of IUDs, which are nothing more than abortive devices rather than contraceptives.

In addition, the sharp decline in the number of available infants for adoption has also left couples childless. However, it is known that fifty percent of those couples who are treated (medically) for infertility eventually have children.¹⁸¹

Medical science seems to be burning the candle at both ends. They

¹⁸¹Dan Kaercher, "What Can Be Done About Infertility?" Better Homes and Gardens, September, 1979, p. 86.

are conducting extensive research into human reproduction under the guise of seeking better ways to alleviate the problem of infertility. But, according to a recent news clipping, they are striving to find ways to control and reduce fertility.

The world's population — about 4.5 billion last year — is expected to grow over the next two decades to between 5.9 billion and 6.5 billion, according to a congressional study.

Improved birth control methods and greater support of international family planning programs could keep total population toward the lower projected figure, an Office of Technology Assessment report on the study says.

The report, released Sunday, (March 28, 1982) said that during the next decade more than 20 new or improved contraceptive methods will become available. They include safer oral contraceptives, improved intrauterine devices, new hormonal chemicals, long-acting steroid injections and implants and better barrier devices for women, including disposable, one-size-fits-all diaphragms, the study said.¹⁸²

The thought of spending tax money (and many of the research programs are underwritten by government grants) to decrease infertility while at the same time spending vast amounts to decrease fertility is ridiculous. According to the above mentioned article, family planning assistance will have to increase 10-fold by the year 2,000 — to \$10.7 billion annually — to supply needed levels of the contraceptive methods and services which are now being developed.

It appears that the above research is in contrast to surrogate parenting efforts. Could it be that surrogate parenting actually has an ulterior motive, (a forerunner of medical scientific efforts to produce a super-human race)? The major concern about surrogate parenting should be its ultimate effect upon the human race. Francoeur expresses

¹⁸²"Population Explosion May Be Slowed," The Daily Advance, 29 March 1982, p. 3.

his concern in the following manner:

...That mankind, men and women together, are standing on the brink of a major revolution far more serious than that which began a century ago with the emancipation of woman from the hearth and nursery. The eternal mystiques of masculine and feminine that have guided Western men and women for centuries are evaporating. Their death is being accelerated by a very short-fused, ready-to-explode biological bomb: mankind's newfound ability to control, manipulate, and direct his own reproductive processes. Techniques of artificial insemination, frozen germ cells, the artificial womb, embryo transplants, prenatal monitoring and manipulations, genetic engineering, and asexual cloning of human beings: these developments, many of them already a reality, will have great psychological, emotional, and religious repercussions. After thousands of years during which reproduction depended on the union of male and female, man stands ready in the next decade or two to reproduce his own image independently...

More than any other modern technology, the research into new modes of human reproduction now going on in thousands of biological and medical laboratories around the world is creating a dilemma for man. It strikes at the very heart of human society because it cuts to the quick of the human family and the relationship between husband and wife.

The Creator has somehow shared with us his omnipotence. Having created us in his own image, he now asks us to share with Him in the ongoing creation of mankind and man. But we are mere neophytes in the task of creation. We lack wisdom and experience and thus often end up as bumbling, confused gods.¹⁸³

Has God allowed man to gain the power over the procreation of humanity?

This would seem then that God had contradicted Himself. Has God failed in His process of procreation and is now going to allow man to improve himself? Romans 9:20 states:

"...Shall the thing formed say to him that formed it,
Why hast thou made me thus?"

Man's improvement of his kind rests in the finished work of Christ!

Francoeur mentions that the scientific reproductive processes will

¹⁸³Francoeur, p. vii, viii.

cause psychological problems. In Chapter II, the Psychological Motivations for Surrogate Parenthood were discussed. The primary "excuse" given for support of the surrogate mother is the Biblical account of Abraham, Sarah, and Hagar. In every instance Hagar is portrayed as the willing handmaid of Sarah who wanted to do nothing but bring happiness to her mistress. To quote this story and use it as a motivating factor for surrogate mothering is a "psychological" farce.

The Genesis 16 account is a beautiful story. Filled with sin: adultery, anger, hatred, bitterness, and malice, it is a real motivation for compassion. Hagar did not willingly surrender to Abraham. She was a slave and had no recourse but to obey Sarah's wish. Hagar was not motivated by love. Sarah was not motivated by a desire to have children. In verse four, Hagar became angry when she found that she was pregnant and hated Sarah. Sarah had her driven from the home. Those who support surrogate mothering with this verse should read the whole story.

Some of the surrogate mothers expressed that they felt they were giving the childless couple a gift. One described the surrogate pregnancy as "harboring a gift". Is not her own child a gift to her? Would she be willing to give up one of her older children to some childless couple just because they wanted a child and happened to like one of hers? The argument that they are doing it as a gift is a weaker motivation than that drawn from the Genesis story. Thus, there is more to the motivation than is being revealed. It is evident, as the various accounts are read that the main motivation is SELFISHNESS.

The Texas midwife, Carol Pavek, makes a clear statement to the fact of selfish motivations when she states, "It would be wonderful to keep having babies without the responsibility of raising them."¹⁸⁵ All of mankind is basically selfish. To a mother, the reward for all the pain and deprivation of privacy encountered in giving birth is being able to hold her very own newborn child to her breast. Since surrogate mothers forego this privilege, they must have a substitute reward. To have done a good deed for others can only be a surface excuse offered to cover up her selfish desire for money and recognition.

Another motivation for surrogate mothers is to rid themselves of guilt brought on by abortion or having given up a child for adoption as the result of a teenage pregnancy. This is viewed as a weak motivation because one wrong cannot be corrected by doing another wrong. The surrogate mother is going to compound her guilt after the baby is born and she has to give it up. Her guilt needs to be dealt with scripturally and she needs a fresh outlook on life which can only come from God.

The psychological motivations for becoming a surrogate mother are far outweighed by the psychological effects the surrogate must endure during and after the pregnancy. One surrogate relates, "I'm not kidding myself that I will give up the baby without qualms... That's what my friends are worried about."¹⁸⁶

The premier example of those aspects of surrogate mothering which traumatize the surrogate and those close to her was exemplified in the

¹⁸⁵Seligmann, p. 72.

¹⁸⁶Fleming, p. 24.

case of Elizabeth Kane. Mrs. Kane had replied to Dr. Levin's ad without the approval or consent of her husband. In fact, he knew nothing of it. Her husband, David, was totally opposed to it but she managed to convince him. His first reaction, "It will tear our family apart." Surrogate mothering is wrong because of the negative impact upon the family of the surrogate. The husband will never be able to reconcile himself to the fact that his wife had another man's baby. The husband alone has exclusive right to his wife's body because in the sight of God the two of them are one.

Ephesians 5:31 - Genesis 2:23,24: And Adam said, This is now bone of my bones, and flesh of my flesh: she shall be called woman, because she was taken out of man. Therefore shall a man leave his father and mother and shall cleave unto his wife: and they shall be one flesh.

The sin against the family and against the husband goes further. Mrs. Kane relates, "The day I was inseminated, it was a strange feeling in bed that night watching 'Johnny Carson'. There were three in the bed that night."¹⁸⁷ Even the surrogate cannot escape the psychological fact that the sacredness of the marriage has been altered and the intimacy of the husband/wife relationship has been violated.

Ephesians 5:22: Wives. Submit yourselves unto your own husbands, as unto the Lord,

Colossians 3:18: Wives. Submit yourselves unto your own husbands.

I Peter 3:1: Likewise, ye wives be in subjection to your own husbands...

Genesis 3:16: ...and thy desire shall be to thy husband, and he shall rule over thee.

¹⁸⁷Anna Quindlen, "Surrogate Mothers: A Controversial Solution to Infertility," The New York Times, 27 May 1980, p. B12.

However, the psychological trauma goes beyond the husband/wife relationship. The impact on the children of the surrogate is an unforgettable experience. In the movie, "A Gift of Life," one of the children of the surrogate mother asked her if she would sell her also. If she could have one child and give it up for a price, it would follow that her other children would question the sincerity of her devotion to them. It will be there to haunt them forever, "Did my mother really love and want me?"

Elizabeth Kane found it even more traumatic for existing children. Her four-year-old son suddenly found himself with no one to play with. Her two daughters, aged thirteen and eleven, were ridiculed in school and taunted because, "your mother is selling babies." Further, Mrs. Kane relates after the birth of the child, that her children "are sad because they never got to see their brother — and he is their brother."¹⁸⁸ This statement proves that Mrs. Kane finally awoke to the evil of what she was doing. During the first few months after the insemination she had a different attitude toward the baby. She stated, "I never think of it as mine. It's the father's child. I am simply growing it for him."¹⁸⁹

Being a surrogate mother is a psychological sin against the husband and the children, both those of the marriage and the one which is to be given up. But, the effect does not stop with just the immediate

¹⁸⁸"Surrogate Mother Explains Why She Had Baby For Couple," The Daily Advance, 4 December 1980, p. 6.

¹⁸⁹Quindlen, New York Times, p. B12.

family. Mrs. Kane says that her family, father, mother, sisters, brothers, inlaws, cut her off. When the surrogate in the movie, "Gift of Life," informed her family, she was ridiculed for her thoughtlessness. Her sister reminded her that, although she was pregnant by another man other than her husband, when she gave the baby to the other couple, she was giving away something that was a part of all of them and had a genetic link to every one in the family. This is a true statement. The child remains a descendent of the surrogate mother's family.

There is a snowballing effect with surrogate mothering. The trauma reaches beyond the family setting. Mrs. Kane relates that only one neighbor in her home town of Pekin, in Central Illinois, will speak to her. The people she worked with were horrified and some reacted with hostility when she told them what she was doing. Many of them considered what she was doing as "adultery of a heinous sort." Another one invited Mrs. Kane to her home, then announced that she was going straight to hell. Mrs. Kane says, "She accused me of selling my body. That really shocked me."¹⁹⁰

It is a form of prostitution. A man has allowed his wife to perform with her body those services which are reserved exclusively to him and has received compensation for it. This is clearly the meaning of Noel Keane's statement: "There's not a baby there when we start the process. I think the surrogate is being paid for the use of her body."¹⁹¹ The service which she is going to perform is basically a sexual

¹⁹⁰Quindlen, B12.

¹⁹¹Castillo, B6.

service and historically falls into the realm of adultery.

One couple in Detroit has used a surrogate to bear two children for them. Both times the infertile wife has done the inseminating. This has resulted in a broken relationship between the couple and their inlaws. With these growing conflicts they sought help from their priest. He told them "Your children have not sinned but you have. You have used Michael's sperm in another woman's body." The priest labeled their act as adultery.¹⁹²

The psychological effects will never cease for the surrogate mother. Her problems are not only within her family and her friends but her personal trauma begins immediately at birth. One surrogate mother says, "It's not easy. I feel the baby kick and move, yet I know the baby is not mine."¹⁹³

Although it may sound simple to have a baby and give it up, it is something that is never forgotten. Testimony after testimony has appeared in columns like "Dear Abby" and others, from women who have done so. Many still remember the child they gave up fifty or sixty years ago. But, those women were not doing so for the sake of financial gain.

Again, Elizabeth Kane relates that during the labor, while on the delivery table she asked herself why was she going through with this. She also says:

Three days after the birth tears started flowing. I decided to go to the nursery and say a final, private farewell to him. I didn't want to hold him. I thought I'd

¹⁹²Markoutsas, p. 74.

¹⁹³Ibid., p. 73.

better not... In 18 years if they all (her children and the baby) want to get together someday, that's fine. His parents that he has now said if he wants to see me in 18 years, that's fine.¹⁹⁴

One aspect which is almost totally overlooked which will have a great psychological effect on womanhood is the fact that women will be lowered to the status of "breeding stock." No one has made mention that several years ago this procedure was introduced among farmers as a method of improving the livestock breeds.

There are always plenty of second-rate cows around a herd, so that with superovulation and inoovulation with a single prize cow and frozen semen shipped from elsewhere a dairyman can end up with three dozen prize calves instead of one...¹⁹⁵

The fact that the status of women is being lowered is clearly stated when Dr. Richard Levin dehumanizes the surrogate with this statement: "I wouldn't consider this buying a baby. I'd consider this buying a receptacle, so I'm not sure you would have a problem with the compensation per se."¹⁹⁶

Looking back on all the negative remarks which Elizabeth Kane endured, she says, "I'm a rather narrow-minded person myself. And if someone else was doing this I might feel the same way."¹⁹⁷

Equally traumatizing is the introduction of A.I.D. into the marriage of a childless couple, where the husband is infertile. Many of the psychological effects of surrogate mothering carry over to this

¹⁹⁴The Daily Advance, 4 December 1980, p. 6.

¹⁹⁵Francoeur, p. 96.

¹⁹⁶Quindlen, p. B12.

¹⁹⁷Ibid.

area. One woman who was impregnated by A.I.D. says the experience was awesome for her husband.

When you have a baby sometimes you say 'My baby'. My husband would ask, 'What do you mean, your baby?' He was frequently upset...

'She contributed 80 percent' says that husband today. 'A donor contributed 20 percent, and I contributed nothing.'¹⁹⁸

Many of the women submit to A.I.D. because they want to "give" their husbands a child. They feel that the husband needs someone to carry on the family name. This psychological problem of the husband may not be relieved by the birth of an A.I.D. child. The child may serve as a constant reminder of his incapability and intensify feelings of resentment. Other possible psychological results include a developing affection by the wife for the donor, if the donor is known. This would be especially serious if the donor were a friend or relative. There would then be another image on the scene. The donor could possibly demand a role in raising the child or might resort to blackmail in order to keep his silence.

There is also the possibility of the wife transferring all of her love solely to the child. She could develop a resentment toward the husband and shower the child with her affection. Yet another problem could arise if both the wife and husband developed resentment for the child. The child could be viewed as an intruder and a trouble maker. This would be brought about by the changes which are necessary in life style when children are born into a home.¹⁹⁹

¹⁹⁸John Stossel, "One Answer to Childlessness - Artificial Insemination," Science/Digest March 1980, p. 23.

¹⁹⁹Perkins, p. 18.

A.I.D. is psychologically traumatizing to the woman also. A young wife relates:

When you're at the clinic being inseminated, you don't actually comprehend what's going on. You see the syringe and you have to remind yourself, 'Gee, there's a baby in there.' And then you have to lie there on the table for 10 minutes after they do it with this strange sperm in you, but you think about other things. It does melt out of your mind in daily living. But you're going to go through your life knowing you did this, knowing that there's somebody out there who's part of you. Somehow.²⁰⁰

This young woman is relating this as she is trying to conceive her second child through A.I.D. She says it is no different than it was at first, and there is no enjoyment. Since A.I.D. does not guarantee pregnancy with the first insemination, it is necessary for her to make several trips, twice monthly, which costs sixty-six dollars per insemination. She says that as a result of going month after month trying to conceive, she felt so hollow and that sex at home was not satisfying because her husband's touch reminded her of the doctor. The young woman adds that her children will never learn that they were A.I.D. children. The secret will go to the grave with her and her husband.²⁰¹

There is always speculation by the wife about who the donor is. One states that it could be any man in her community. This is true. In a survey of A.I.D. Clinics, Dr. Curie-Cohen found the following concerning donors:

²⁰⁰Fleming, p. 14.

²⁰¹Ibid., p. 20.

Of those who answered, most (77.1 percent) had never used a donor for more than six pregnancies, whereas 5.7 percent had used a donor for 15 or more. One respondent had used a single donor for 50 pregnancies. Although most doctors (50.7 percent) used each donor for an average of one or two pregnancies, 10.3 percent used each donor for an average of nine or more pregnancies. The multiple use of donors was usually pragmatic since most doctors (88.4 percent) had no policies concerning the maximum use of a donor. The doctors who did restrict the use of a single donor usually limited the number of pregnancies to six or less.²⁰²

The above survey involved seven hundred eleven physicians. This survey could lead to even greater psychological problems as the women begin to ponder if other women have borne children of the same donor, who would be a sibling of their child. Since the doctors seem to have little regard for use of a single donor, inbreeding will be a natural result.

Another young woman tells of her feelings about A.I.D.:

I have an ideal husband. He never swears, never raises his voice. I love him and I wouldn't leave him for anything in the world — but I do blame him. I am the one who has to bear the embarrassment and the aggravation of going in twice a month. He's the one with the blocked duct. I was a virgin for him. It's almost as if I have been raped for him. I cried on the table the first time I went in for insemination, ...I have been a nervous wreck at times because of this... You see a guy in a white jacket (young medical students or interns), and you think, is he the donor? You see another guy — is it him? They have appeared in my dreams. You worry... what if the donor belongs to some fraternity, and as a prank he replaces his sperm with a black guy's.²⁰³

A.I.D. is a life-time choice and couples need to consider that what they are doing is out of the will of God for the family. Nowhere

²⁰²Martin Curie-Cohen, Ph.D., Lesleigh Luttrell, M.S., and Sander Shapiro, M.D., "Current Practice of Artificial Insemination By Donor In the United States," The New England Journal of Medicine 300 (March 15, 1979): 587.

²⁰³Blais, p. 134.

does the Bible permit for the entrance of a third party into procreation. In Abraham and Sarah's case, God had already promised them a child. There was no need for Sarah's plot to have taken place. Childless couples should ask themselves if they are actually seeking God's will and could it be, perhaps, that His choice for them is childlessness. Should a deformed or handicapped child be born, could their marriage stand the strain?

No matter how devoted and loving a couple we may be now, the time may come when we shall no longer love one another. If we should ever wish to end our marriage, would we, in despair and frustration, lash out at each other, blame one another for this decision, or use it as a weapon to hurt and destroy? A man may well ask himself, "Will she one day confront me with my inadequacy? Will she use it to hurt me or mock me or injure our child?" A woman may wonder, "Will he one day reject us both because we are not truly his?" The decision to use A.I.D. lasts forever, and the possibilities exist that may one day be regretted.²⁰⁴

The use of A.I.D. is a potential "bomb" in the midst of a happy marriage. There is no guarantee that everyone will be content with the results. The husband and wife will still have to acknowledge the fact of his or her infertility. The child from another source does not remove that fact.

Public policy should be formulated based on the moral, ethical and religious standards. The fact that the backbone of our country, the family, is threatened should be motivation enough to outlaw surrogate parenthood. One writer states:

The law should, therefore, play neither a reactionary role nor a revolutionary role. This means that the practice should be legally permitted but cautiously regulated,

²⁰⁴Blais, p. 149.

and morally tolerated but carefully scrutinized. The psychological ramifications must be studied in the most rigorous scientific manner possible.²⁰⁵

I disagree! The material presented herein gives evidence to the fact that the practice of surrogate parenthood is highly unethical. At the present rate, twenty thousand births per year through A.I.D., incest is inevitable. Although it is not necessarily a lucrative business, it has the potential with the right men's sperm (well known celebrities and professional persons).

Surrogate motherhood raises even more subtle moral questions. It also has the potential for economic exploitation and psychological harm and moral confusion to the surrogate mother, the adoptive parents and the offspring. It should be banned!

If the processes of A.I.D. and surrogate mothering are allowed to continue, pimps and prostitutes will become more involved and may change their "business" to this more profitable route. The lucrative aspects have already been presented with some lawyers and doctors earning in excess of three hundred thousand dollars annually just for arranging surrogate mother situations. Women will be exploited as "baby-making" machines and will be dehumanized much as they were in the days of Aristotle and the Greek philosophers.

Any legislation which is considered should be to deny its practice on the basis that it is anti-man, anti-woman, anti-family, and anti-God!

²⁰⁵Winslade, p. 153.

APPENDIX 1
PSYCHIATRIC EVALUATION OF WOMEN IN A SURROGATE MOTHER PROGRAM

PSYCHIATRIC EVALUATION OF WOMEN IN A SURROGATE MOTHER PROGRAM

By: Darrell D. Franks, M.D.

Each of the 10 applicants was interviewed by me before insemination in a freely structured interview and was given the MMPI.

I found no specific profiles or patterns in these women other than routine trends. Of the 10 women, 9 had been married at least once, 4 were divorced, and 1 was a single parent. Their average age was 26 years. Each subject had from one to three living children, a requirement for acceptance into the program.

Nine of the women were of modest to moderate financial means. All were either self-supporting or maintained by husbands or boy-friends. One was the wife of a professional and also held employment of her own.

All had discussed the program in detail with close friends, boy-friends, or husbands. Most had major difficulties and conflicts when presenting the plan to parents and other older family members. All gave similar reasons for entering this program: a history of easy pregnancies and labor, love for their own children, the desire to share this love and pleasure with others who had not been able to conceive their own child, and a need for the financial remuneration to stabilize their personal lives and to provide for their own children's needs.

All had given serious thought to the difficulty of signing over custody to the biological father, and all understood that this act was essential to their participation in the program. In this way the fee becomes a custody settlement between the biological mother and the biological father, and the problems of baby selling are avoided.

Most viewed this process somewhat like that of an unwed mother placing her child for adoption, but these women felt assured that the background and characteristics of the family who would be rearing the child were good. Almost all wished to see the infant one time to assure themselves that the child was normal.

The average education of these 10 women was slightly more than high school. Their intelligence appeared normal, and little psychopathology could be detected during the initial interview.

Individual MMPI profiles revealed that they had little additional underlying psychopathology. One woman had a hypomania score elevated above the upper limit, but she showed no signs of other difficulties either on the test or during the interview. She had the only abnormal score. Individual profiles showed a high degree of honesty in answering the questions and generally showed high femininity scores and high social extroversion scores.

The composite MMPI profile was not notable; all scores were within one standard deviation of normal (see table 1). Of special interest were the low scores on the hysterical and psychopathic deviate scales. The subjects appeared to be feminine women with slightly increased energy levels and social extroversion tendencies. The hypomania scale

PSYCHIATRIC EVALUATION OF WOMEN IN A SURROGATE MOTHER PROGRAM (Page 2)

By: Darrell D. Franks, M.D.

score was probably elevated because of the one abnormal score already mentioned.

Discussion:

This initial survey suggests that women applying for the surrogate mother program have relatively normal personalities. Their reasons for wishing to enter such a program seem to be an interesting mixture of financial and altruistic factors. This study does not reflect any follow-up on the women's role as surrogate mothers, and it does not address the issue of their adjustment to the process during or after pregnancy. These areas will require additional study.

Reference

1. Ashman A.: Family law... natural father's rights. American Bar Association Journal 66:381-382, 1980.

TABLE 1
Composite MMPI Scores of 10 Women Who Applied to be Surrogate Mothers

MMPI Scale	Score			
	Mean	Median	SD	Standard
Lie	4.3	4.5	2.1	4.0
Infrequency	2.8	2.2	2.5	3.0
Correction	14.6	15.2	4.3	12.5
Hypochondriasis	10.8	10.5	2.4	13.0
Depression	20.4	19.5	4.4	19.5
Conversion hysteria	19.1	19.5	2.6	23.0
Psychopathic deviate	22.4	22.3	2.3	19.0
Masculinity-femininity	39.3	40.5	4.0	34.5
Paranoia	8.6	9.0	2.3	9.0
Psychasthenia	26.2	27.0	4.3	25.0
Schizophrenia	24.3	22.5	3.7	22.5
Hypomania	20.5	20.0	4.2	17.0
Social introversion	24.5	20.5	8.2	25.0

APPENDIX 2

DOE, DOE AND ROE V. KELLEY AND CAHALAN CIRCUIT COURT

STATE OF MICHIGAN
IN THE SUPREME COURT

JANE DOE, JOHN DOE, and MARY ROE,
JANE X., JOHN X., JANE Y., JOHN
Y., JANE Z., and JOHN Z., pseudonyms
for actual persons,

Plaintiffs-Appellants,

v

FRANK J. KELLEY, Attorney General
for the State of Michigan, and
WILLIAM L. CAHALAN, Wayne County
Prosecutor,

Defendants-Appellees

Court of Appeals
No. 503-80

Circuit Court
No. 78-815531-CZ

Supreme Court
No. _____

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BRIEF OF DEFENDANT-APPELLEE ATTORNEY
GENERAL FRANK J. KELLEY IN OPPOSITION TO
PLAINTIFFS-APPELLANTS APPLICATION FOR LEAVE TO APPEAL

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15 <u>Williston on Contracts</u> , 3rd Edition, § 1744A, p 88	12
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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.* WHETHER THE ACTIONS PROPOSED BY THE DOES AND MARY ROE OF PURCHASING/SELLING AN ADOPTION CONSENT MAY BE PROHIBITED BY THE STATE OF MICHIGAN?

Defendant-Appellee Attorney General answers "Yes."

Plaintiffs-Appellants answer "No."

The trial court answered "Yes."

The Court of Appeals answered "Yes."

II.** WHETHER THE PROHIBITION AGAINST PAYING A NATURAL MOTHER FOR CONSENTING TO THE ADOPTION OF HER CHILD IS SUFFICIENTLY NARROW IN ITS SCOPE?

Defendant-Appellee Attorney General answers "Yes."

Plaintiffs-Appellants answer "No."

The trial court answered "Yes."

The Court of Appeals did not address this issue, having concluded that the transaction proposed by the Does and Mary Roe did not involve fundamental interests protected by the right of privacy.

III. WHETHER THE PAID-FOR ADOPTION AGREEMENT PROPOSED BY THE PLAINTIFFS-APPELLANTS IS VOID AS BEING AGAINST PUBLIC POLICY?

Defendant-Appellee Attorney General answers "Yes."

Plaintiffs-Appellants do not address this question.

The trial court answered "Yes."

The Court of Appeals did not address this issue.

NOTE: Plaintiffs-Appellants' proposed issue I alleging gender discrimination was not argued in the Court of Appeals and, thus, has not been properly raised by Appellants. Proposed issue III of the Plaintiffs-Appellants appears to restate in other words their proposed issue II.

* Relates to Plaintiffs-Appellants issues II and III.

** Relates to Plaintiffs-Appellants issue IV.

STATE OF MICHIGAN
IN THE SUPREME COURT

JANE DOE, JOHN DOE, and MARY ROE,
JANE X, JOHN X, JANE Y, JOHN Y,
JANE Z, and JOHN Z, pseudonyms for
actual persons,

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Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE ATTORNEY
GENERAL FRANK J. KELLEY IN OPPOSITION TO
PLAINTIFFS-APPELLANTS APPLICATION FOR LEAVE TO APPEAL

Counter-Statement of Facts

Appellants seek to have the Adoption Code sanction the deliberate conception and relinquishment of children outside of wedlock for money by a declaration that §§ 54 and 69 of 1939 PA 288, Ch X, as added by 1974 PA 296, § 1, MCLA 710.54 and 710.69; MSA 27.3178(555.54) and 27.3178(555.69) are unconstitutional. Copies of these provisions are attached hereto as Exhibits A and B respectively. The trial court upheld the constitutionality of the foregoing statutes in its order of summary judgment of February 19, 1980. The Court of Appeals affirmed on May 5, 1981.

This Counter-Statement of Facts is based on answers to interrogatories supplied by the Appellants, John Doe, Jane Doe, and Mary Roe. Those answers fall into four categories:

1. Answers to the Attorney General's interrogatories dated April 6, 1979, which were filed on approximately May 17, 1979 ("Initial Answers");

2. Affidavits of the Appellants, John Doe, Jane Doe, and Mary Roe, referred to on page 1 of each of their Initial Answers (the "Affidavits");

3. Revised answers to the Attorney General's interrogatories dated April 6, 1979, which were filed on approximately June 6, 1979 ("Revised Answers"); and

4. Answers in response to Memorandum on Behalf of Defendant Kelley Regarding Additional Discovery dated June 15, 1979, listing various unanswered questions on pp 6-11, which were filed on approximately June 27, 1979 ("Additional Answers").

John and Jane Doe have been married for fourteen years and have two sons, ages twelve and eight. (Affidavits of the Does.) The Does would like to have a third child, but Mrs. Doe is physically incapable of having further children due to a tubal ligation (endometriosis). (Revised Answers, No. 7, page 1.)

Although the Does have made no effort to adopt a child, they do not believe children are available for adoption; and they want a child related to one of them. (Additional Answers, No. 8, page 2.)

Mary Roe has worked for John Doe for three years and draws a monthly salary of approximately \$1,400 from John Doe. (Revised Answers, No. 8, page 1; and Additional Answers, No. 3, 3rd subpart, page 2.) The Does propose to have Mary Roe conceive a child with John Doe through artificial insemination administered by a physician. (Additional Answers, No. 2, page 1.) After birth, the Does would take custody of the child once he or she leaves the hospital; and Mary Roe would consent to the adoption of the child by the Does. (Revised Answers, No. 11(q)(4), page 4.) Mary Roe would receive \$5,000, plus medical expenses, from the Does for surrendering custody of her child to the Does and for consenting to the adoption. (Additional Answers, No. 1, page 1, and No. 5, page 2.) In addition, Mary Roe will be covered by sick leave, pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and

recuperating from the delivery. (Revised Answers, No. 11(s), page 4; and Additional Answers, No. 3, 4th subpart, page 2.)

To date, the Does and Mary Roe do not have a proposed written agreement specifying the exact mutual obligations of the parties. (Revised Answers, No. 9, page 2.)

Mary Roe, a divorcee, would be having her third child. Her children are nine and twelve. (See Roe Affidavit.)

Mary Roe would retain rights to visit her child at the Does both before and after the adoption by the Does. (See Revised Answers, No. 11(q)(4) and No. 11(r), page 4.)

ARGUMENT

I

THE ACTIONS PROPOSED BY THE DOES AND MARY ROE OF PURCHASING/SELLING AN ADOPTION CONSENT MAY BE PROHIBITED BY THE STATE OF MICHIGAN.

The Appellants privacy claim is based on the argument that the proposed arrangement is their individual prerogative, free of any State interference, to bear and beget children and to have and raise a family. On various occasions, as noted by the lower courts in this case, the U.S. Supreme Court has stated that the having of children and the raising of a family are fundamental personal rights.

However, an examination of the proposed transaction discloses that the Appellants seek to engage in other activities which go far afield from the having of one's own children and the raising of one's own family. To briefly review what each of the Appellants desires:

1. John Doe

He wants to deliver his semen to a doctor, not to beget a child.¹ He wants to pay Mary Roe for an adoption consent severing all legal ties to her child.

2. Jane Doe

She wants to pay Mary Roe to give up her child by adoption.

3. Mary Roe

She wants to be paid by the Does for her agreement to consent to their adoption of her yet unborn natural child before the child is conceived.

¹The cases on whether artificial insemination outside of the married couple (where an anonymous male donor's sperm is used when the husband is sterile) are divided as to whether adultery is involved. Exhibit C is a list of references to the legal literature on artificial insemination. No Michigan cases were located on the question.

Appellants argue that in matters of marriage, sexual intimacy, and family life, a constitutional right of privacy or "personal autonomy" should permit them to be "let alone" to do as they wish without any interference by the State. In fact, however, Appellants are not complaining of interference by the State. Rather, Appellants seek the intervention of the Probate Court into their relationships - to legitimize the natural child of John Doe and Mary Roe, to declare that this child is adopted by the Does, and to sever Mary Roe's legal ties as the natural mother. The adoption process with its applicable rules (including the prohibition against consideration) in no way involves uninvited state interference in areas of sexual intimacy or family life in which there is a legitimate expectation of State non-involvement.

There is no fundamental right either to adopt or to specify the terms of adoption of one's child. Adoption laws provide an orderly mechanism for the care and protection of children and their natural parents in those cases where the natural parents are unable or unwilling to assume the parental obligations and privileges of caring for and raising one's children. These laws are a proper exercise of the State's police power for health, safety, and the general welfare. The constitutional standard for laws enacted in the exercise of the police power has been summarized as follows:

"...Insofar as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare." (Footnote omitted) The Constitution of the United States of America, Analysis and Interpretation (Library of Congress, 1973), p 1318.

This rational basis test has been applied to statutes outlawing homosexuality. Doe v Commonwealth's Attorney for City

of Richmond, 403 F Supp 1199 (1975), aff'd United States Supreme Court, 425 US 901, 96 S Ct 1498, 47 L Ed 2d 751 (1976). The district court held that the practice of homosexuality was not a fundamental constitutional right. The opinion also noted, in dicta, that adultery and fornication are not within the scope of fundamental rights protected by the constitution.

The following purposes, interests, and goals are served by the prohibition of payments to the natural mother in connection with her consent to an adoption; and these public purposes can be shown to be applicable to the transaction proposed by the Appellants as well:

1. Prohibition against a commercial market for babies - whether involving an unwed mother facing the agonizing decision of retaining or surrendering her child, a woman arranging to conceive a child anticipating a sale of that child or in performance of an agreement to conceive a child, or as a result of a contract for her participation in an extra-marital union to bear the proposed adoptive father's child.
2. The best interests of the child.
 - natural parents should decide what is best for the child, with adoption as an option of last resort, without being influenced or coerced by offers of money.
 - avoidance of any economic incentive or reward for giving up a child for adoption.
 - avoidance of possibly traumatic discovery by the child of his being separated from his mother by adoption under the terms of a monetary arrangement agreed upon before his conception.
3. Recognition of the inestimable, intrinsic worth of each person.

4. Protection of family and marriage relationships - mother and children, wife and husband - from disruption through the wife and/or mother becoming involved in conceiving and bearing a child for some adoptive father in a monetary arrangement, or in anticipation of a commercial market for adoption.
5. Avoidance of conflicting claims of parental rights and custody.
 - natural mother might renegotiate the fee by withholding consent to adoption, or resist if the probate court reduces the fee to be paid to her.
 - natural mother might resist adoption either before or after it is ordered out of guilt or out of the strong bond which quickly develops between parent and infant.
 - conflict and uncertainty of those caring for the child over the status of the child would be detrimental to the child's development.

The system of having court approval of payments to the natural mother permits the payment of reasonable hospital and medical expenses connected with the birth of the child, as noted by Judge Lincoln in his memorandum of March 2, 1977 concerning these matters. (See Exhibit D.) At the same time, § 54 of 1939 PA 288, supra, authorizes the probate judge to disapprove any payment to the mother which would improperly influence her or make the child an object of commerce. Such statutory regulation is neither oppressive nor arbitrary, and it has been correctly declared to be constitutional by the lower courts in this case.

Appellants also argue that while the adoption code prohibitions "are gender-neutral on their face" (page 4 of Appellant's brief), the prohibitions have a disproportionate

impact on Appellant Roe and other women who want to surrender their children to adoption for a stipulated fee. Appellants attempt to base this argument, not presented in the Court of Appeals, on cursory speculation as to the prevalence and legality of the sale of sperm to sperm banks which then disseminate it for physicians for artificial insemination. However, Appellant Roe, as the proposed natural mother in the transaction described by Appellants, is not seeking to sell ovum to some sort of "ovum bank," but rather she is seeking to conceive and bear a child and then turn over that child of hers for adoption by others for a fee. Accordingly, this argument of Appellants as to gender discrimination should be rejected as being without merit.

II

THE PROHIBITION AGAINST PAYING A NATURAL MOTHER FOR CONSENTING TO THE ADOPTION OF HER CHILD IS SUFFICIENTLY NARROW IN ITS SCOPE.

Even if Appellants were correct (which is not conceded²) in asserting that the proposed transaction involved fundamental rights, the applicable constitutional test as set forth in Zablocki v Redhail, 434 US 374, 388; 98 S Ct 673, 54 L Ed 2d 618 (1978) involving the right to marry would be satisfied:

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The Adoption Code does not interfere with the right of the Does to have a child or to raise a family. In fact the Does already have two children. The Adoption Code does not prevent the Does or any couple from having their own children, through their own intimate union with each other. The Does' inability to have further children arises from Mrs. Doe's physical condition, not from anything in the Adoption Code.

² The trial court indicated on pp 10-11 of its opinion dated January 28, 1980, that Appellants' allegations did not involve any fundamental rights. The Court of Appeals reached the same conclusion at p 3 of its opinion of May 5, 1981, affirming the trial court's opinion.

Likewise, Mary Roe is not prohibited from having further children, even out of wedlock, by the Adoption Code.

Thus, whatever fundamental rights may be found here, they are not substantially interfered with by the Adoption Code. Mary Roe states that she will not consent to the adoption of her proposed natural child unless she is paid to do so, but this adoption consent is subject to important State interests. The interests of the State in prohibiting the payment of money to Mary Roe to induce her to give up her child have been demonstrated above - the prevention of a commercial market for babies, the best interests of the child, a recognition of the child's intrinsic worth, the protection of family and marriage relationships, and the avoidance of conflicting claims of parental rights to custody.

Further interests of the State are in the protection of the mother from duress and overreaching - such as would be potentially involved in the employer/employee relationship as in the proposed transaction or in any case where one party has influence over the other. Another consideration is that the child would already be brought into the world before any of the terms of this type of transaction would be reviewed by the probate court, so that the probate court would be presented with an accomplished event.

The challenged prohibitions in the Adoption Code are sufficiently tailored in that they are applicable only to those persons involved in adoption proceedings and relate only to payments and expenses connected with adoption.

In light of the various State interests advanced by the prohibition against fees for adoption consents, and the absence of any State interference with fundamental rights, Appellants argument that §§ 54 and 69 of 1939 PA 288, supra, are unconstitutional should be rejected as being without basis.

III

THE PAID-FOR ADOPTION AGREEMENT PROPOSED BY
THE PLAINTIFFS-APPELLANTS IS VOID AS BEING
AGAINST PUBLIC POLICY.

A discussion of public policy serves to demonstrate the strong State interests which are involved in this area, and the absence of any fundamental rights of the Does and Mary Roe implicated by their proposed transaction. As noted in Appellants' brief at page 12, the right to privacy is seen by the courts as including only personal rights "implicit in the concept of ordered liberty." Paris Adult Theatre, Inc v Slaten, 413 US 49, 65; 93 S Ct 2628; 37 L Ed 2d 446 (1973). The following discussion of public policy demonstrates that the transaction proposed by Appellants is contrary to the "concept of ordered liberty" in Michigan and other states as well.³

The general doctrine that contracts against public policy are void is well summarized in Mahoney v Lincoln Brick Co, 304 Mich 694, 705; 8 NW2d 883 (1943), which quotes from 12 Am Jur, § 167, p 664, as follows:

"The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present."

In applying this general rule, the Michigan Supreme Court has held, for example, that marriage broker contracts are void as being against public policy. Attorney General v Marital Endowment Corp, 257 Mich 691; 242 NW 297 (1932). In that case the court refused to recognize the handling of marriage promotion

³It should be noted that the Kentucky Attorney General has ruled that a transaction of the type proposed by Appellants is contrary to the law and public policy of that state. See 7 Family Law Reporter 2246 (February 17, 1981).

contracts as a valid corporate purpose. The court recognized the corrosive effect of involving monetary considerations in matrimony at 257 Mich 694-5 as follows:

"...The plan is calculated to promote and to induce on financial grounds marriage of the members. This commerce in marriage is, on the part of the defendant, in practical effect, the promotion of marriage between third persons, its members and others, and tends to marriage through mercenary considerations. This is against public policy. Antcliff v June, 81 Mich. 477 (10 L.R.A. 621, 21 Am St. Rep. 533).

* * *

"Anything which induces parties to enter into the marriage relation through mercenary considerations strikes at the very foundation of human society, and is necessarily injurious to the community...."

Another application of the public policy doctrine in the area of marriage is found in the case of Graham v Graham, 33 F Supp 936, (ED Mich, 1940), wherein an agreement by the wife to support the husband in exchange for his agreement to quit his employment so as to be able to travel with his wife was held to be unenforceable as contrary to public policy. The court relied on the Restatement of the Law of Contracts, § 587, which states:

"A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal."

Certainly the obligations of the parties to mutual fidelity and exclusivity in sexual relations are as essential to matrimony as is the obligation of the husband to support the wife. Accordingly, an agreement by the Does whereby Jane Doe would permit John Doe to go outside of matrimony to conceive a child would likewise be contrary to public policy.⁴

⁴The Revised Probate Code, § 111(1), 1978 PA 642, MCLA 700.111(1); MSA 27.5111(1) states in part:

"...A child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their legitimate child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence."

This provision clarifies the legitimacy of such children born in wedlock, but it does not constitute a basis for a married couple altering the fundamental terms of their marriage as a matter of enforceable contract right.

Another public policy consideration is the fundamental principle that children cannot be bought and sold. This elementary rule is stated in 67A CJS Parent and Child, § 16, p 201-202, as follows:

"Parents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." (Footnotes omitted)

15 Williston on Contracts, 3rd Edition, § 1744A, p 88, states:

"The sovereign has an interest in a minor child held superior even to that of the parent; hence, there is a public policy against the custody of such a child becoming a subject of barter." (Footnote omitted)

In discussing the related problem of in vitro fertilization and implantation of the embryo in a second woman, the Executive Director of the Program in Law, Science and Medicine at Yale Law School, speculates that contracts for "surrogate gestation" are likely to be held non-enforceable and among her reasons cites the following:

"In any case, the sale of children is illegal in all states; therefore, any contract by which a host-mother is paid a fee in excess of expenses to gestate the unborn child is likely to be held unenforceable as against public policy. That being the case, the 'foster' or gestating mother would presumably be considered by most courts the natural mother of the child since she and not the donor-mother was willing to go through the inconvenience, discomfort, and dangers of pregnancy and childbirth.

"It is highly unlikely that a judge, faced with a conflict between two women, one of whom has delivered the child and the other of whom 'should' have done so by normal means but who was too busy or disinterested, would resolve the issue of which is the true mother in any way other than by awarding parental status to the host-mother, contracts to the contrary notwithstanding.

"Second, by statute in many states any adoption release executed by the natural mother before the birth of a child is invalid. Even in those states that do not declare prenatal surrenders to be absolutely void, courts

appear to take a dim view of the validity of an adoption release signed prior to the birth of the child." Holder, Legal Issues in Pediatrics and Adolescent Medicine (John Wiley & Sons, 1977) pp 7, 8.

Appellants often refer to Mary Roe's role as being that of a "surrogate Mother." This jargon serves to gloss over the fact that Mary Roe is the real mother, and Jane Doe would be a substitute (or surrogate) mother if she were permitted to adopt the child.

Appellants attempt to distinguish their case from baby selling situations by pointing out that John Doe would be the natural father of the child, who is the subject of the monetary transaction. The fallacy in the Appellants' argument is that at the time of the formation of the contract, John Doe will not be related to the child, since the child does not yet exist. Appellants' calculated, clinical proposal defies comparison with situations where the custody and care of a child must be worked out by the parents, married or unmarried, who had the child in the course of their human non-commercial relationship.

A third reason from a public policy standpoint why this agreement would be unenforceable is its potential for duress and overreaching through the exploitation of various relationships, such as the employment relationship in the case presented by the Does, and any other situation where one party has some control or authority over the other. See In Re Allon, 356 Mich 586; 97 NW2d 744 (1959), wherein the court upheld the consent of a mother to the adoption of her child where there was no showing of the mother being subject to duress or overreaching.

The proposed contract is likewise unenforceable because the subject matter is beyond the Court's competence to adjudicate. For example, if Mary Roe refused to perform, no court would grant specific performance by ordering her to accept artificial insemination and to conceive and bear a child as a result. Nor would a court order John Doe to deliver his semen to a physician and to

arrange for artificial insemination of Mary Roe. Matters of custody and adoption after the birth would be determined by the Probate Court without respect to the proposed agreement. Thus, specific performance of the agreement would not be available to the parties.

Actions for damages would lead the court into a welter of confusing relationships and claims. For example, if Mary Roe after several unsuccessful artificial insemination sessions, refused to continue, would she be liable to the Does for the incalculable loss of a child not yet conceived? What liability for damages would Mary Roe have if she deliberately terminated her pregnancy, or refused to give up the child to the custody and adoption of the Does after the birth? What damages/orders if one of the Does insists on custody and adoption while the other refuses to perform - due to divorce, separation, abandonment, etc? What if either the Does or Mary Roe remove the child from the State and resist participating in any Michigan litigation concerning the child?

Without specific legislative authorization of this type of transaction setting forth the legal rights and obligations of the various parties, the proposed transaction violates Michigan public policy.

RELIEF REQUESTED

For the reasons set forth herein, it is submitted that the proposed transaction is not based on constitutional rights of the Appellants and that it would violate the public policy of the State of Michigan. It is further submitted that Appellants have failed to establish any of the criteria for review by this Court, e.g. major significance to the jurisprudence of this state, material injustice, or clear error on the part of the lower courts which upheld the constitutionality of the applicable statutes. Appellee Kelley therefore requests that the Court deny Appellants' Application for Leave to Appeal to this Court.

Respectfully submitted,

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Attorney General

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Dated: June 15, 1981

Adoption \Rightarrow 13, 14, 26.

Library References

C.J.S. Adoption of Persons §§ 49, 60, 88 to 97, 98 to 102, 124 to 128, 124 to 135
M.L.P. Adoption §§ 5, 6, 1In general $\frac{1}{2}$
Jurisdiction 1

Notes of Decisions

 $\frac{1}{2}$. In general

The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption. *Bikea v. Nobliski* (1979) 278 N.W.2d 541, 88 Mich.App. 161.

1. Jurisdiction

Although probate court could properly consider in hearing on petition for entry of order terminating parental rights with respect to an illegitimate child who has been released to licensed placement agency the parental suitability of one who opposed adoption and who was in loco parentis, probate court lacked power to direct agency to deliver custody of child to one form-

erly in loco parentis or, without consent of agency, or possibly of Michigan children's institute, to enter termination order or to approve petition for adoption by one formerly in loco parentis. *In re T.* (1967) 164 N.W.2d 27, 8 Mich.App. 122.

Under former statutory scheme, §§ 710.1 et seq., 710.3, and 710.5 (repealed; see now, §§ 710.2) et seq., 710.25, 710.36, and 710.51) relating to entry of termination orders in adoption proceedings, probate court was limited either to signing or refusing to sign a termination order to which consent has been given by those whose consent was statutorily required. *Id.*

Concealment of power concerning welfare of legitimate and illegitimate children did not disappear upon release of child for adoption or upon the consent of placement agency to petition for adoption, or even upon entry by probate court of a termination order. *Id.*

710.52 Supervision of child prior to adoption; reports; investigations

Sec. 52. During the period before entry of the order of adoption, the child shall be supervised at the direction of the court by an employee or agent of the court, a child placing agency, or the department, who shall make such reports regarding the adjustment of the child in the home as the court shall order. The investigations shall be made under reasonable circumstances and at reasonable intervals. P.A.1939, No. 285, c. X, § 52, added by P.A.1974, No. 296, § 1, Eff. Jan. 1, 1975.

The subject matter of this section was covered by former section 710.4.

For effective date provision of P.A.1974, No. 296, see note following section 710.21.

710.54 Charges and fees; witnesses

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 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 722.123 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.

P.A.1939, No. 288, c. X, § 54, added by P.A.1974, No. 296, § 1, Eff. Jan. 1, 1975.

The subject matter of this section was covered by former section 710.12.

For effective date provision of P.A.1974, No. 296, see note following section 710.21.

Library References

Adoption \Rightarrow 1.C.J.S. Adoption of Persons §§ 25 to 46.
M.L.P. Adoption § 2.

Notes of Decisions

1. In general

Acting as middleman in adoption proceedings and failure to tell truth to probate court attorney acting in his official capacity

by warrants suspension for two years. *In re Marawitz* (1974) 222 N.W.2d 504, 333 Mich. 6.

710.67 COMPILED LAWS ANNOTATED

Cross References
Adoption, new birth certificate, see § 333.2825

Adoption \Rightarrow 14
Library References
C.J.S. Adoption of Persons §§ 98 to 102
124 to 125

710.69 Violations, offenses

Sec. 69. A person who violates any of the provisions of sections 43 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony.
P.A.1939, No. 258, c. X, § 69, added by P.A.1974, No. 296, § 1, Eff. Jan. 1, 1975.

Sections 710.41, 710.54.
The subject matter of this section was covered by former section 710.14.
For effective date provision of P.A.1974, No. 296, see note following section 710.2.

EXHIBIT B

LEGAL ASPECTS OF ARTIFICIAL INSEMINATION

Books, Articles

Annotation, Legal Consequences of Human Artificial Insemination, 25 ALR3d 1103-1112 (1969)

Clark, Domestic Relations (West, 1968)

Comment, Artificial Insemination - A Model Statute, 24 Cleveland State L Rev, 341-355 (1975)

Comment, Contracts to Bear a Child, 65 Cal L Rev, pp 611-622 (1978)

Holder, Legal Issues in Pediatrics and Adolescent Medicine, (John Wiley & Sons, 1977)

Kinney, Legal Issues of the New Reproductive Technologies, 52 Cal State Bar Journal, Nov/Dec 1977, pp 514-519

Schlemer, Artificial Insemination and the Law, 32 Michigan State Bar Journal, pp 44-51 (March 1953)

Smith, A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary, 17 Journal of Family Law, 41-47 (1978-79)

Wayne County Juvenile Court

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Y. GLADYS BARSAMIAN
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JUDGES OF PROBATE

PRENTIS EDWARDS
REGISTER



March 2, 1977

To: Miss Margaret Pfeiffer

From: Judge James H. Lincoln

Re: Artificial insemination case.
Mr. Noel Keane, attorney.

Here is the situation.

We were requested by Mr. Keane to respond to the following questions:

First: A married couple suitable for adoptive parents wish to adopt a child. The wife cannot have a child. The husband would be used to artificially inseminate a non-related woman.

Would the child born as a result of this arrangement be considered as related to the adopting parents so that the adopting parents could file with the Court for adoption without going to an adoption agency?

Answer: My answer is yes! After considerable study and consultation I would hold that it makes no difference what means is used to impregnate a woman. The father is the person who produced the sperm that impregnated the woman. He could even be held liable for support.

Second: Could the adopting parents pay the woman for having the child or consent to its adoption?

Answer: No! The law clearly forbids this.

Third: Could the adopting parents pay the expenses of the pregnancy delivery - medical - hospital - doctor - transportation to hospital - attorney fees, etc.?

Answer: Yes! The law permits this and it has been the custom of all Michigan Probate Court to allow the payment of such expenditures.

I personally would not be concerned with permitting payment of reasonable costs of transportation to hospital, etc., etc. I do not care about the manner of transportation as long as the expense was actually incurred.

Page 0 2

Of course I would not approve giving a car, etc. That could be regarded as paying the woman. Nor would I permit payment of lost wages.

Mr. Keane wants me to approve expenditures as they arise.

Comment:

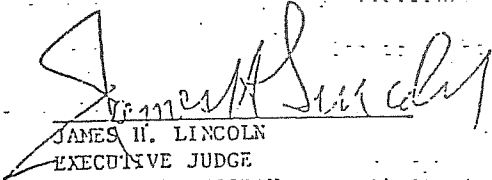
I will probably not be the Judge who handles this adoption. The petition may not be filed until after the child is born - this will be early in 1978.

The Judge who handles the case will make all the rulings and will determine what expenses to approve or disapprove.

All that I can do is to give my opinion on all of these matters.

My opinion is not binding on the Judge who will hear the petition.

I appreciate the fact that Mr. Keane wishes to clear all matters for his clients prior to proceeding and I wish I were in a position to give him something other than what I would do if I were handling the petition.


JAMES H. LINCOLN
EXECUTIVE JUDGE
JUVENILE DIVISION

JHL:gm

EXHIBIT D

(Page 2 of 2)

APPENDIX 3

DOE, DOE AND ROE V. KELLEY AND CAHALAN (CIVIL ACTION)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JANE DOE, JOHN DOE, and MARY ROE,
JANE X., JOHN X., JANE Y., JOHN Y.,
JANE Z., and JOHN Z., pseudonyms
for actual persons,

Plaintiffs,

-vs-

FRANK J. KELLEY, Attorney General
for the State of Michigan, and
WILLIAM L. CAHALAN, Wayne County
Prosecutor,

Defendants.

HONORABLE ROMAN S.
GRIBBS P-14369

CIVIL ACTION
NO. 78 815 531 CZ

OPINION DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JANE DOE, JOHN DOE, and MARY ROE,
JANE X., JOHN X., JANE Y., JOHN Y.,
JANE Z., and JOHN Z., pseudonyms
for actual persons,

Plaintiffs,

-vs-

HONORABLE ROMAN S.
GRIBBS P-14369

CIVIL ACTION
NO. 78 815 531 CZ

FRANK J. KELLEY, Attorney General
for the State of Michigan, and
WILLIAM L. CAHALAN, Wayne County
Prosecutor,

Defendants.

OPINION DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

On May 15, 1978, plaintiffs filed a Complaint for
Declaratory Judgment in the Wayne County Circuit Court. Motions
for summary judgment are brought by plaintiffs and defendants
pursuant to GCR 1963, 117.2(3).

Facts

The facts in this case are not in dispute.
Plaintiffs, Jane and John Doe, are husband and wife. Jane Doe
is biologically incapable of bearing children. The Does are
joined in their complaint by Mary Roe.

The Does propose to have Mary Roe conceive a child with John Doe through artificial insemination administered by a physician. After birth, the Does would take custody of the child once he or she leaves the hospital; and, Mary Roe would consent to the adoption of the child by the Does. Mary Roe would receive \$5,000, plus medical expenses, from the Does for surrendering custody of her child to the Does and for consenting to the adoption. In addition, Mary Roe will be covered by sick leave pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery.

The statutes whose constitutionality is involved in this matter are MCLA 710.54 and MCLA 710.69. The former provides, as follows:

"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 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."

MCLA 610.69 provides:

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

Plaintiffs' suit seeks to have these statutes declared unconstitutional by this Court and to enjoin defendants from prosecuting plaintiffs for proceeding with the plan outlined above.

Discussion

Plaintiffs' constitutional challenge is basically two-pronged. Plaintiffs first urge that MCLA 710.54 is void for vagueness. Second, that the arrangement proposed by plaintiffs is within the constitutional "right of privacy." Contained within that second contention are the propositions that the government does not have a compelling interest to invade that area of privacy and that the statute as drawn is not sufficiently narrow.

I.

This Court does not agree with plaintiffs' first contention that MCLA 710.54 is void for vagueness. Plaintiffs are correct in asserting that a statute is violative of due process if it proscribes conduct in terms so vague that a person of common intelligence must guess at the statute's meaning. Connally v. General Construction Co., 269 US 385, 70 L Ed 322, 46 S Ct 126 (1926).

The dangers involved in the existence and enforcement of a vague statute are set forth by Mr. Justice Marshall in Grayned v City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972) as follows:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic first amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

In Grayned, Justice Marshall also enunciated a problem involved in all statutes, even those not void for vagueness. "Condemned to the use of words, we can never expect mathematical certainty from our language."

In a footnote to Grayned, the Court cited American Communications Assoc. v Doreeds, 339 US 382, 94 L Ed 925, 70 S Ct 674 (1950), in which the Court stated:

"There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

The statute in the instant case is as specific as is necessary to give fair notice to those to whom the statute is directed.

Plaintiffs question the explicitness of the phrase "or other consideration or thing of value" used in the statute. Even standing alone, this phrase is sufficiently specific to give fair notice to persons of reasonable intelligence what things may not be given in connection with the acts or items listed in (a)-(e) of MCLA 710.54(1). The meaning of that phrase is even more specifically defined when it follows the only specific item listed, money. The well-established principle of eiusdem generis is pertinent to plaintiffs' contention of statutory vagueness. As the Court stated in diLeo v. Greenfield, 541 F 2d 949 (1976):

"Where general terms in a statute follow an enumeration of terms with specific meaning, the general terms can be expected to apply to matters similar to those specified."
(Citations omitted)

It is not necessary that the statute list all conceivable items of value to be constitutionally specific.

II.

Plaintiffs' second basis for urging the constitutional infirmity of the statutes is that they invade plaintiffs' constitutional right of privacy and further that the statutes do not comply with the requirements of compelling state interest and the narrow drafting required of statutes regulating an act within the right of privacy. Before addressing the latter two points, it must first be determined that plaintiffs' proposed agreement is within the constitutional right of privacy.

That there exists a fundamental right of privacy is well established. The origins of this right were set forth in Roe v. Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973), as follows:

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."
(Citations omitted)

In stating that only "fundamental" rights are included within the right of privacy, Roe acknowledged that activities relating to marriage, procreation, contraception, family relationships and child rearing and education are included in the guarantee of personal privacy.

The right which plaintiffs assert is specific, narrow and is not of the same personal nature that the constitutional right of privacy protects. Plaintiffs only attack the sections of the Michigan Adoptive Code that prohibits the exchange of money or other valuable consideration. Although plaintiffs seek to exclude governmental interference with reference to a portion of the adoption statutes, they do not want to exclude the government altogether. They wish to avail themselves of other portions of the Michigan Adoption Code in order to effect a legal adoption. Plaintiffs intend to utilize other protective provisions of the adoption law; i.e., total control of the child's welfare as legal parents, preserving the rights of inheritance of the child, etc. The right to adopt a child based upon the payment of \$5,000 is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the Court) are not constitutionally infirm.

It is this Court's opinion that a contract to use the statutory authority of the Probate Court to effect the adoption of a child wherein such contract provides for valuable compensation, is not deserving of, nor is it within the constitutional

protection of the right of privacy as defined by the many cases of the United States Supreme Court.

III.

Although the foregoing makes further discussion unnecessary, this Court will assume, arguendo, that the constitutional right of privacy does apply to the plaintiffs and proceed to the ancillary issues.

First, even if the constitutional right of privacy is applicable, such right is not absolute. It must be considered against important state interests in regulation. Roe v. Wade, supra. In determining the constitutionality of regulations, the Roe Court set forth the following test:

"Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (Citations omitted)

The State's interest expressed in the statutes at issue here is to prevent commercialism from affecting a mother's decision to execute a consent to the adoption of her child. Although the case is distinguishable on the facts from the present case, the statement of the general rule by the Supreme Court of Kansas in In re Shirk's Estate, 350 P 2d 1 (1960), is applicable here.

"Consequently, this controversy resolves itself down to the question whether the contract with respect to the mother's rights violated public policy. It is fundamental that parents may not barter or sell their children nor may they demand pecuniary gain as the price of consent to adoptions. This is so inherent in the fabric of American law that citation of authority is unnecessary."

"Baby bartering" is against the public policy of this State and the State's interest in preventing such conduct is sufficiently compelling and meets the test set forth in Roe.

Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community.

It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all states. The brief of the Attorney General cites this elementary rule in 67A CJS Parent and Child, §16, p 201-202, as follows:

"Parents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sold or otherwise disposed of."
(Footnotes omitted)

The leading and recognized authority on Contracts, Professor Samuel Williston, writes that bartering for a child is and has been against public policy. He states in 15 Williston on Contracts, 3rd Edition, Section 1744A, p 88:

"The sovereign has an interest in a minor child held superior even to that of the parent; hence, there is a public policy against the custody of such a child becoming a subject of barter." (Footnote omitted)

The Attorney General cogently argues that contracts for "surrogate gestation" are against public policy. He quotes the Executive Director of the Program in Law, Science and Medicine in Yale Law School, who stated:

"In any case, the sale of children is illegal in all states; therefore, any contract by which a host-mother is paid a fee in excess of expenses to gestate the unborn child is likely to be held unenforceable as against public policy. That being the case, the 'foster' or gestating mother would presumably be considered by most courts the natural mother of the child since she and not the donor-mother was willing to go through the inconvenience, discomfort, and dangers of pregnancy and childbirth.

"It is highly unlikely that a judge, faced with a conflict between two women, one of whom has delivered the child and the other of whom 'should' have done so by normal means but who was too busy or disinterested, would resolve the issue of which is the true mother in any way other than by awarding parental status to the host-mother, contracts to the contrary notwithstanding.

"Second, by statute in many states any adoption release executed by the natural mother before the birth of a child is invalid. Even in those states that do not declare prenatal surrenders to be absolutely void, courts appear to take a dim view of the validity of an adoption release signed prior to the birth of the child." Holder, Legal Issues in Pediatrics and Adolescent Medicine (John Wiley & Sons, 1977) pp 7, 8.

The evils attendant to the mix of lucre and the adoption process are self-evident and the temptations of dealing in "money market babies" exist whether the parties be strangers or friends. The statute seeks to prevent a money market for the adoption of babies. The defendant prosecuting attorney concedes that the plaintiff natural mother (Roe) and the plaintiff couple (Doe) are free to "conceive a child, bear it, and raise it as they agree among themselves because these acts are guaranteed by the right to privacy." The defendant prosecuting attorney argues perceptively when he asks: How much money will it take for a particular mother's will to be overborne, and when does her decision turn from "voluntary" to "involuntary."

In their brief and in oral argument plaintiffs vigorously argue that they are in this Court motivated by good will and with the best of intentions seek the Court's approval of their proposed course of action. The prosecuting attorney pointedly responds as follows:

"Plaintiffs seek to convince this court that the 'surrogate' mother would [act] out of altruistic rather than pecuniary motives. If that were so, no monetary payment would be necessary because under MCLA 710.54 she can still be reimbursed for fees and expenses. What plaintiffs seek is to provide her with a sum of money (\$5,000) over and above the reasonable expenses she has incurred. Even if some of this money goes for legitimate expenses unrecognized by MCLA 710.54, the fact remains that the primary purpose of this money is to encourage women to volunteer to be

'surrogate' mothers. Plaintiffs have initiated this lawsuit because few women would be willing to volunteer the use of their bodies for nine months if the only thing they gained was the joy of making someone else happy by letting that couple adopt and raise her child. Thus, contrary to plaintiffs' exhortations, in all but the rarest of situations, the money plaintiffs seek to pay the 'surrogate' mother is intended as an inducement for her to conceive a child she would not normally want to conceive, carry for nine months a child she would not normally want to carry, give birth to a child she would not normally want to give birth to and then, because of this monetary reward, relinquish her parental rights to a child that she bore."

The personal desires and intentions of plaintiffs are not in question, and their good faith is conceded. Nonetheless, public policy is established to guide all of the people of this State, of whatever intent.

A desire to change the established stated public policy that meets constitutional muster is properly addressed to the legislature and not to the courts.

IV.

As to the second part of the Roe test, it is the opinion of this Court that the statutes here in question are drawn sufficiently narrow so as to comply with the test. The statute must be drawn so as to express only the legitimate interest of the State and no other. If other interests, as well as the State's compelling interest, are regulated by the statute, then the statute must fall. Here the statute is aimed at preventing compensation as consideration involving an adoption proceeding.

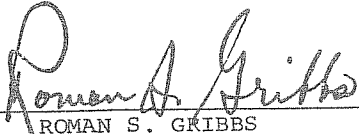
Plaintiffs urge that their arrangement is not the type of action which the statute contemplated or intended to proscribe. The fact that this is not a contract among strangers, or that one of the adoptive parents would also be a natural parent, does not alter the fact that the action prohibited interjects compensation in an adoption proceeding; that money, beyond court-approved charges and fees, must be paid to the biological mother before the parties will strike an agreement.

The statute is clear in expressing the public policy of this State that all persons involved in offering, giving or receiving anything of value in connection with an adoption are controlled by the statutes proscriptions. Neither the relationship of persons involved nor the arrangements between the parties are an exception but clearly all such actions are proscribed.

Conclusion

For the above-stated reasons, it is the conclusion of this Court that MCLA 710.54 and 710.69 do not violate the provisions of the Constitution. In addition, it is clear that there exists no genuine issue as to any material fact. Accordingly, pursuant to GCR 1963, 117.2(3), plaintiffs' Motion for Summary Judgment must be DENIED and defendants' Motion for Summary Judgment must be GRANTED as a matter of law.

Pursuant to the provisions of GCR 1963, 522, counsel are to present a proposed judgment consistent with this opinion within ten days of this date.


ROMAN S. GRIBBS
Circuit Judge

A TRUE COPY
JAMES F. KILLEEN

DATED: January 28, 1980
Detroit, Michigan


BY _____
DEPUTY CLERK

APPENDIX 4

DOE, DOE AND ROE V. KELLEY AND CAHALAN (COURT OF APPEALS)

MAY 08 1981

STATE OF MICHIGAN
COURT OF APPEALS

JANE DOE, JOHN DOE, and MARY ROE,
JANE X., JOHN X., JANE Y., JOHN Y.,
JANE Z., and JOHN Z., Pseudonyms for
actual persons,

MAY 05 1981

Plaintiffs-Appellants,

v

No. 50380

FRANK J. KELLEY, Attorney General for the
State of Michigan, and WILLIAM L. CAHALAN,
Wayne County Prosecutor,

Defendants-Appellees.

Before: V.J. Brennan, P.J., and M.J. Kelly and D.C. Riley, JJ.

M. J. Kelly, J.

In this case, we are asked to declare unconstitutional those sections of the Michigan Adoption Code, MCL 710.54; MSA 27.3178 (555.54) and MCL 710.69; MSA 27.3178 (555.69), which prohibit the exchange of money or other consideration in connection with adoption and related proceedings.¹ The plaintiffs appeal of right from a January 29, 1980 opinion of the lower court, denying their motion for summary judgment under GCR 1963, 117.2(3) and granting the defendants' own motion under the same rule. The parties are in agreement as to the pertinent facts in this decision.

Jane Doe and John Doe are pseudonyms for a married couple residing in Wayne County. In response to interrogatories posed by the Attorney General concerning the Doe's marriage and whether any children were born of the marriage, the Does filed virtually identical affidavits stating the following information:

"2. That he [she] was married in the City of Farmington, Michigan, on August 20, 1965.

"3. That he [she] is the father [mother] of two sons, ages eleven and seven years."

From the nonresponsive answer to question #3, we are unable to say whether the two children were born of the Does' marriage or are adopted.

It is alleged that Jane Doe has undergone a tubal ligation, rendering her biologically incapable of bearing children and that the Does "wish to have a child biologically related to JOHN DOE". Mary Roe is employed as a secretary by John Doe and also resides in Wayne County. The complaint alleges that these parties contemplate and intend to enter into the following agreement:

"(a) That JANE DOE and JOHN DOE will pay MARY ROE a sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.

"(b) That a licensed physician will conduct the artificial insemination process.

"(c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.

"(d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.

"(e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.

"(f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE".

The agreement also provided that plaintiffs would pay to Mary Roe the sum of \$5,000 plus medical expenses. In addition, Mary Roe will be covered by sick leave, pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery.

The plaintiffs allege that the disputed statutory provisions impermissibly infringe upon their constitutional right to privacy. This right, first recognized in Griswold v Connecticut, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965), was more recently described in Carey v Population Services International, 431 US 678; 97 S Ct 2010; 52 L Ed 2d 675 (1977). In Carey, the Court specifically held that the decision "whether or not to bear or beget a child" was among those protected by the constitutional right of privacy.² See also Harris v McRae, US ; S Ct ; 65 L Ed 2d 784 (1980) ("The constitutional underpinning of Wade was a recognition

that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life".)

While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, see Maher v Roe, 432 US 464; 97 S Ct 2376; 53 L Ed 2d 484 (1977), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe 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. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

The plaintiffs also allege that the state has no compelling interest sufficient to justify the prohibitions embodied in the disputed statutes and, in addition, that the provisions are drawn too wide to reflect any legitimate state interests in this area. Our disposition of the foregoing issue, however, renders consideration of this issue unnecessary.

Affirmed.

FOOTNOTES

1 The statutory provisions sought to be declared invalid provide:

"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 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, 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 sections 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony."

2 The Carey Court summarized those previous decisions in which the right of privacy prohibited unwarranted governmental interference or regulation and which compelled the Court's conclusion as to the right to bear children:

"Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' Roe v Wade, 410 US 113, 152, 35 L Ed 2d 147, 93 S Ct 705 (1973). This Right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.' Whalen v Roe, 429 US 589, 599-600, 51 L Ed 2d 64, 97 S Ct 869 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference

are personal decisions 'relating to marriage, Loving v Virginia, 338 US 1, 12, [18 L Ed 2d 1010, 87 S Ct 1817] (1967); procreation, Skinner v Oklahoma, 316 US 535, 541-542, [86 L Ed 1655, 62 S Ct 1110] (1942); contraception, Eisenstadt v Baird, 405 US, at 453-454, [31 L Ed 2d 349, 92 S Ct 1029]; id., at 460, 463-465, [31 L Ed 2d 349, 92 S Ct 1029] (White, J., concurring in result); family relationships, Prince v Massachusetts, 321 US 158, 166, [88 L Ed 645, 64 S Ct 438] (1944); and child rearing and education, Pierce v Society of Sisters, 268 US 510, 535, [69 L Ed 1070, 45 S Ct 571, 39 ALR 468] (1925); Meyer v Nebraska, [262 US 390, 399 (1923)], [67 L Ed 1042, 43 S Ct 625, 29 ALR 1446].' Roe v Wade, *supra*, at 152-153, 35 L Ed 2d 147, 93 S Ct 705. See also Cleveland Board of Education v LaFleur, 414 US 632, 639-640, 39 L Ed 2d 52, 94 S Ct 791, 67 Ohio Ops 2d 126 (1974)."

APPENDIX 5

SYROWSKI V. APPELYARD

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GEORGE SYRKOWSKI,

Plaintiff,

HONORABLE ROMAN S.
GRIBBS P-14369

-vs-

CORINNE APPELYARD,

Defendant,

CIVIL ACTION
NO. 81 122 683 DP

and

ATTORNEY GENERAL FOR THE STATE
OF MICHIGAN,

Intervenor.

and

ROGER APPELYARD,

Intervenor.

OPINION

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GEORGE SYRKOWSKI,

Plaintiff,

HONORABLE ROMAN S.
GRIBBS P-14369

-vs-

CORINNE APPELYARD,

CIVIL ACTION
NO. 81 122 683 DP

Defendant,

and

ATTORNEY GENERAL FOR THE STATE
OF MICHIGAN,

Intervenor,

and

ROGER APPELYARD,

Intervenor.

OPINION

The Attorney General, as intervening party, has filed, pursuant to GCR 1963, 116.1(1) and (2), the motion sub judice for a summary dismissal of these proceedings on the basis that the Court lacks jurisdiction over the parties and the subject matter of the plaintiff's complaint. Intervention by the Attorney General was permitted because the issues raised by the principal party's pleadings involve significant matters of State interest and public policy. See GCR 1963, 209.1, 1919 PA 232, Sec 1; MCLA 14.101; MSA 3.211, R.S. 1847, ch 12, Sec 28; MCLA 14.28; MSA 3.181.

Summary disposition of plaintiff's complaint is warranted under the circumstances presented to the Court. This Court, today, decides that the Paternity Act was not intended, and cannot be used, as a mechanism to establish the paternal rights of a semen donor in a "surrogate parent arrangement". Neither the laws nor the public policy of the State of Michigan permit the direct or indirect judicial recognition and enforcement of "surrogate mother" contracts. The social wisdom and legal recognition of such agreements are matters of legislative concern and not for judicial pre-emption.

In June, 1981, plaintiff Syrkowski filed a complaint under the Paternity Act, MCLA 722.711 et seq, alleging that defendant Corinne Appleyard was pregnant with a child conceived by him on March 23, 24 or 25, 1981.

In July, 1981, defendant Corinne Appleyard (the surrogate mother) admitted the allegations of the complaint, and asked the Court for an appropriate order of filiation adjudging the plaintiff to be the natural and legal father of her child.

Thereafter, the parties proposed a consent order of filiation which requests the Court to declare that: (1) plaintiff Syrkowski is the natural, legal father; (2) plaintiff Syrkowski is awarded custody and is responsible for care, support and education of the expected child; (3) the expected child's birth

certificate shall show plaintiff Syrkowski as the father; and
(4) plaintiff Syrkowski may specify the child's surname.

In support of the proposed consent order was an affidavit of a physician verifying the artificial insemination of defendant Corinne Appelyard and an affidavit of Mr. and Mrs. Appelyard relative to the artificial insemination and their abstention from sexual intercourse during this period.

In support of the motion for accelerated judgment, the Attorney General argues that this Court lacks jurisdiction over these parties under the Paternity Act because the pleadings indicate that a child is being born to a married couple through artificial insemination of the wife with the husband's consent. Pursuant to the Michigan Public Health Code, MCLA 333.3821(6) and Michigan Probate Code, MCLA 700.111(2), the Attorney General argues that the child born to Corinne Appleyard as a result of artificial insemination is presumed to be the legitimate child of her marriage because Roger Appleyard consented to the insemination. The Attorney General contends that the consent is manifested in the affidavits filed in this matter which assert voluntary and willing abstention from sexual intercourse by defendant and her husband for six weeks before and four weeks after insemination.

Though the Attorney General's claim for summary relief has merit, this argument advanced in support thereof is untenable. Basically, his position is that the child conceived by and

born¹ of the defendant during marriage is conclusively presumed to be the legitimate child of the defendant and her husband. Neither the law nor the facts in this particular case support this proposition. The statutes cited raise presumptions that are clearly subject to rebuttal.

Upon the initial filings, counsel for plaintiff and defendant advised this Court in chambers that substantial sums of money were to be paid by plaintiff to defendant for bearing the child and, upon birth, relinquishing custody to plaintiff. To the extent that money or other consideration is being furnished by plaintiff Syrkowski to defendant Appleyard in this "surrogate parent arrangement", the Attorney General argues that Michigan public policy is being violated. In support of this contention, it cites this Court's opinion in Doe et al v Attorney General et al, Wayne Circuit Court No. 78 815 531 CC, dated January 28, 1980, Affirmed, 106 Mich App 169 (1981).

Based on the foregoing arguments, the Attorney General submits that the petition for order of filiation filed by plaintiff in this matter is beyond the scope of the Paternity Act.

1. The Court has been apprised that the defendant gave birth to a female child on November 22, 1981.

To the contrary, counsel for plaintiff argues first that the Paternity Act permits the Court to determine paternity under these circumstances. Secondly, it is the plaintiff's position that MCLA 333.3821(6) and MCLA 700.111(2) were designed for an infertile husband who submits to his wife's insemination so that the child shall not be designated as an illegitimate child. Plaintiff argues that he did not consent to his wife's insemination and in support of this contention offers his affidavit and "Statement of Non-Consent".

At the outset, it should be noted that this appears to be a matter of first impression in the State of Michigan. The unveiled issue raised in this non-adversarial lawsuit between plaintiff and defendant is whether the Paternity Act may be utilized as a procedural device to validate a contract for a "surrogate parent arrangement". Stated another way, was the Act intended to establish a procedure to determine and legalize the paternity of a child born to a "surrogate mother" who was voluntarily impregnated with male semen solely for the purpose of relinquishing the child to the semen donor and his wife under a pre-existing agreement. The Paternity Act is silent on its face with regard to such a situation. Thus, this Court is obligated to ascertain and give effect to the intention of the Legislature in determining whether the Paternity Act was intended to encompass such circumstances.

Under the general rules of statutory construction, it has been said:

"There is always a tendency * * * to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience. The true rule is that statutes are to be construed as they were intended to be understood when they were passed. Statutes are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment. The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted." Wayne County Commissioners v Wayne County Clerk, 293 Mich 229 (1940); Powers v City of Troy, 380 Mich 160 (1968). (Underscoring supplied)

Accordingly, the Court must determine the purpose of the enactment in light of the circumstances existent in 1956 when the Paternity Act was enacted.

The Paternity Act and its predecessor the "Bastardy Act" were enacted to impose financial responsibility of illegitimate children upon those who fathered them and to protect the children from becoming a public charge. People v Stoeckl, 347 Mich 1 (1956); Sutfin v People, 43 Mich 37 (1880); Waite v Washington, 44 Mich 388 (1880). This intention is manifested in the preamble to the Act, which 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."

Pursuant to the Act, this Court has jurisdiction over paternity proceedings for the limited purpose of determining financial responsibility for a child "born out of wedlock". Plaintiff's petition requests this Court to go beyond this limited purpose--it asks this Court to recognize and endorse the terms of a "surrogate parent arrangement" by declaring that plaintiff is the legal and natural father of a child conceived through artificial insemination of a surrogate. A careful reading of this Act reveals that there is no indicia of legislative history or intent that when the Paternity Act was enacted (1956), or any time prior thereto, the Legislature intended it to apply to the situation presented herein. Further, no amendment to the Act has altered the general purpose and intent of the Act to such a degree that it encompasses the circumstances in this case.

The legal and public policy considerations associated with the relief requested by plaintiff, and from surrogate arrangements in general, clearly go beyond the scope of the Paternity Act and the jurisdiction of this Court. Existing authority demonstrates that "surrogate parent arrangements" are contrary to public policy. See, discussion in Doe et al v Attorney General et al, supra, wherein the Court held that any contract by which a mother is paid a fee to bear a child is violative of public policy. If changes in the law and changes in the established public policy are warranted, such changes are

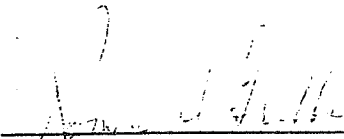
primarily within the province of the legislative and executive branches of the State of Michigan.

If the State of Michigan is ultimately going to recognize "surrogate parent arrangements", comprehensive legislation is needed to resolve profound societal concerns relating to the rights, obligations and interests of all parties affected by the arrangements. In passing, it may be observed that steps have been taken to introduce legislation dealing with the subject of surrogate parenthood². This Court cannot circumvent by judicial fiat the legislative process by enlarging the intended scope of the Paternity Act to encompass circumstances never contemplated thereby.

Based on the foregoing, it is the opinion of this Court that the relief requested in plaintiff's petition is beyond the scope and purpose of the Paternity Act in light of the factual setting upon which the complaint is based. Accordingly, this Court lacks subject-matter jurisdiction in this matter and intervenor's, the Attorney General, motion for accelerated judgment is granted.

2. House Bill 5184 was introduced on October 26, 1981, and seeks to amend the Probate Code to "govern surrogate parenthood".

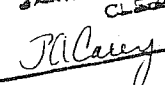
Pursuant to GCR 1963, 522, counsel for intervenor,
Attorney General, is to present an order for entry by this
Court consistent with the above opinion.



CIRCUIT JUDGE

ROMAN S. GIBBS

DATED: November 25, 1981
Detroit, Michigan

A TRUE COPY
JAMES R. ALLEN
CLERK
BY  J.R. ALLEN

APPENDIX 6

BESHEAR V. SURROGATE PARENTING ASSOC., INC.

FRANKLIN CIRCUIT COURT
DIVISION NO. A
CIVIL ACTION NO. _____

31-0129

COMMONWEALTH OF KENTUCKY, EX REL.
STEVEN L. BESHEAR, ATTORNEY GENERAL
and STEVEN L. BESHEAR, ATTORNEY
GENERAL

PLAINTIFFS

vs.

COMPLAINT

SURROGATE PARENTING
ASSOCIATES, INCORPORATED

Serve: Karen M. Zena
Suite 222
Doctors Office Building
250 East Liberty Street
Louisville, Kentucky 40202

FILED

DEFENDANT

MAR 12 1981

EUNICE MOORE
Clerk Franklin Circuit Court

* * * *

Comes now the Plaintiff, Commonwealth of Kentucky, ex rel. Steven L. Beshear, Attorney General, and Steven L. Beshear, Attorney General, by counsel, and pursuant to KRS 271A.470 and 415.010 brings his complaint for the involuntary dissolution of the Defendant, Surrogate Parenting Associates, Inc. and states as follows:

(1) Plaintiff, Steven L. Beshear, is the duly elected, qualified and acting Attorney General of the Commonwealth of Kentucky, and brings this action in his official capacity as chief law officer of the Commonwealth and for and on behalf of the Commonwealth, its citizens, residents and taxpayers.

(2) The Defendant, Surrogate Parenting Associates, Inc. is a domestic corporation doing business in Kentucky and organized pursuant to KRS Chapter 271A. (A true and correct copy of the Articles of Incorporation are attached hereto, made a part hereof and marked Exhibit A).

(3) The Defendant, Surrogate Parenting Associates, Inc., in furtherance of its stated business purpose of operating a medical clinic designed to assist infertile couples in obtaining a child through the process of artificial insemination of a surrogate mother has in the past and continues to enter into contracts for monetary consideration to the president of the Defendant, Richard M. Levin, M.D., with couples who are seeking a surrogate mother for the selection of a suitable surrogate mother to be artificially inseminated with the semen of the infertile wife's husband. (A true and correct copy of a sample contract is attached hereto and made a part hereof and marked Exhibit B).

(4) The Defendant, Surrogate Parenting Associates, Inc., has in the past and continues to prepare and furnish contracts to be entered into by and between the surrogate and the surrogate's husband and the natural father by which the parties agree that the surrogate will be artificially inseminated with the semen of the natural father by the president of the Defendant, Richard M. Levin, M.D., and further that the surrogate and her husband agree that on the fifth day after delivery, or as soon thereafter as is medically possible, the surrogate and her husband will institute proceedings to terminate their parental rights to the child. The agreement further states that monetary consideration will be paid to the surrogate by the natural father upon entry of judgment terminating the parental rights of the surrogate and

the surrogate's husband, such consideration to be in an escrow account at the time of the signing of the agreement until the duties and obligations of the surrogate and her husband are fulfilled. (A true and correct copy of a sample contract is attached hereto and made a part hereof and marked Exhibit C).

(5) The Plaintiff, Steven L. Beshear, Attorney General, for the Commonwealth of Kentucky hereby states affirmatively that said contracts heretofore designated as Exhibits B and C are in contravention of the laws and public policy of this Commonwealth as enunciated by and through the duly elected legislative body of this Commonwealth.

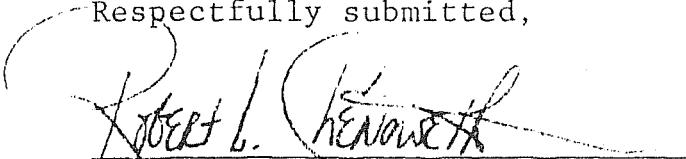
(6) The Plaintiff, Steven L. Beshear, Attorney General, for the Commonwealth of Kentucky, hereby further states affirmatively that regardless of the approach taken, or type of contract or agreement drawn for use and executed, that one or more of the following statutory provisions will be violated: KRS 199.500(5), KRS 199.601(2), KRS 199.590(2), KRS 199.990(4),(5); that these violations are in addition to the proscription engendered by a strong public policy against the buying and selling of children; and that no such contract or agreement relating to surrogate parenthood in Kentucky is legal and enforceable.

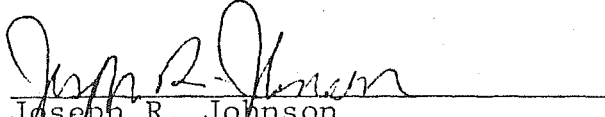
(7) The Plaintiff, Steven L. Beshear, Attorney General, has rendered an official advisory opinion regarding the legality of the surrogate parenthood process in Kentucky, OAG 81-18. (A copy of this advisory opinion is attached hereto and made a part hereof and marked Exhibit D). The defendant through such process will thereby abuse and misuse its corporate power to the detriment of the interest and welfare of this Commonwealth and its citizens.

(8) The Plaintiff states that the Defendant, Surrogate Parenting Associates, Inc., is guilty of an abuse and misuse of its corporate power, privilege and franchise which is detrimental to the interest and welfare of the Commonwealth of Kentucky and its citizens pursuant to Article II, Section 1 of its Articles of Incorporation, to-wit: "To form and operate a medical clinic designed to assist infertile couples in obtaining a biologically related child through the process of artificial insemination of a surrogate mother."

WHEREFORE, the Plaintiff, Commonwealth of Kentucky ex rel. Steven L. Beshear, Attorney General, and Steven L. Beshear, Attorney General hereby prays this court to revoke the corporate powers and charter of the Defendant, Surrogate Parenting Associates, Inc. or in the alternative that this court grant a permanent injunction against the plaintiff to prohibit it from engaging in any business in connection with the surrogate parenthood process.

Respectfully submitted,

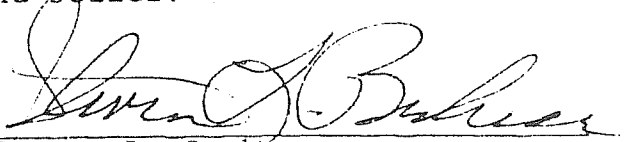

 Robert L. Chenoweth
 Deputy Attorney General


 Joseph R. Johnson
 Assistant Attorney General
 Capitol Building
 Frankfort, Kentucky 40601

Attorney for Plaintiff

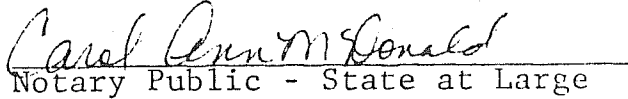
VERIFICATION

Steven L. Beshear, Attorney General, Commonwealth of Kentucky, states that he is the Plaintiff in the foregoing action and that he has read the foregoing Complaint for declaration of rights and the statements contained therein are true and correct to the best of his knowledge and belief.



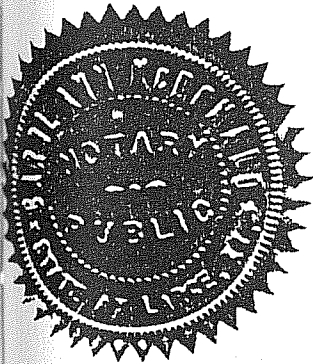
Steven L. Beshear
Attorney General

Subscribed and sworn to before me by Steven L. Beshear, Attorney General, Commonwealth of Kentucky, this 12th day of March, 1981.



Notary Public - State at Large

My Commission expires: August 5, 1981



SECRETARY
RECEIVED

APR 11 1980

APR 11 1980

Francis J. Williams
SECRETARY OF STATE

Commonwealth of Kentucky

ARTICLES OF INCORPORATION
OF

SURROGATE PARENTING ASSOCIATES, INCORPORATED 167705

KNOWN BY ALL MEN BY THESE PRESENTS:

The undersigned, being a natural person of the age of eighteen (18) years or more, desiring to form a corporation, for profit, does hereby certify:

ARTICLE I

The name of the Corporation shall be Surrogate Parenting Associates, Incorporated.

ARTICLE II

The purpose for which the corporation is formed is as follows:

(1) To form and operate a medical clinic designed to assist infertile couples in obtaining a biologically related child through the process of artificial insemination of a surrogate mother.

(2) To manufacture, purchase or acquire in any lawful manner and to hold, own, mortgage, pledge, sell, transfer, or in any manner dispose of, and to deal and trade in goods, wares, merchandise, and property of any and every class and description, and in any part of the world.

(3) To acquire the good will, rights and property, and to undertake the whole or any part of the assets or liabilities of any person, firm, association or corporation; to pay for the same in cash, the stock of this company, bonds or otherwise; to hold or in any manner to dispose of the whole or any part of the property so purchased; to conduct in any lawful manner the whole or any part of any business so acquired, and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

(4) To apply for, purchase or in any manner to acquire, and to hold, own, use and operate, and to sell or in any manner dispose of, and to grant license or other rights in respect of, and in any manner deal with, any and all rights, inventions, improvements and processes used in connection with or secured under letters patent or copyrights of the United States or other countries, or otherwise, and to work, operate or develop the same and to carry on any business, manufacturing or otherwise, which may directly or indirectly effectuate these objects or any of them.

(5) To guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this Commonwealth or any other Commonwealth or State, country, nation or government, and while owner of said stock may exercise all the rights, powers and privileges of ownership, including the

right to vote thereon, to the same extent as natural persons might or could do.

(6) To enter into, make and perform contracts of every kind with any person, firm, association or corporation, municipality, body politic, country, territory, State, Government or colony or dependency thereof, and without limit as to amount to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the laws of the Commonwealth of Kentucky.

(7) To have offices, conduct its business and promote its objects within and without Kentucky, in other States, the District of Columbia, the territories and colonies of the United States, and in foreign countries, without restriction as to place or amount.

(8) To do any or all of the things set forth above to the same extent as natural persons might or could do and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

(9) In general to carry on any other business in connection therewith whether manufacturing or otherwise, not forbidden by the laws of Kentucky, and with all the powers

conferred upon corporations by the laws of Kentucky.

ARTICLE III

The duration of the Corporation shall be perpetual.

ARTICLE IV

The registered office of the Corporation in the Commonwealth shall be Suite 222, Doctors Office Building, 250 East Liberty Street, Louisville, Kentucky, 40202, and the process agent is Karen M. Zena, Suite 222, Doctors Office Building, 250 East Liberty Street, Louisville, Kentucky, 40202.

ARTICLE V

The authorized capital of the Corporation shall be ONE THOUSAND (1000) shares of common stock having a no par value, with each outstanding share entitled to one (1) vote and each fractional share thereof to its equivalent fractional vote.

ARTICLE VI

The name and address of the Incorporator and the number of shares of stock subscribed for her is:

KAREN M. ZENA	500 Shares
Suite 222, Doctors Office Building,	
250 East Liberty Street	
Louisville, Kentucky, 40202	

ARTICLE VII

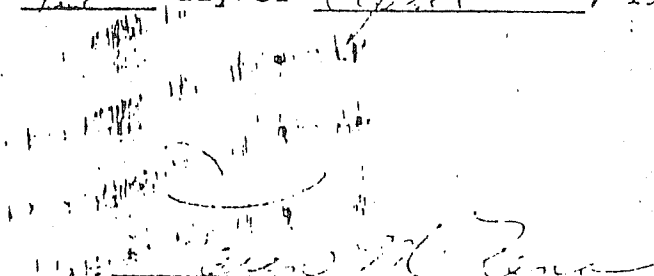
The number of Directors to be elected at the first meeting of the Shareholders shall be two. Thereafter, the number of Directors to be elected shall be at the discretion of a majority vote of the Shareholders. The initial Board of Directors

shall consist of two (2) members, namely, President, Rich Levin, M.D., Suite 222, Doctors Office Building, 250 East Liberty Street, Louisville, Kentucky, 40202, and Secretary, Karen M. Zena, Suite 222, Doctors Office Building, 250 East Liberty Street, Louisville, Kentucky, 40202.

ARTICLE VIII

The Shareholders of the Corporation shall not be liable for the debts of the Corporation.

IN TESTIMONY WHEREOF, witness the signature of the Incorporator, the 1st day of April, 1980.



Karen M. Zena

STATE OF KENTUCKY)
 :
COUNTY OF JEFFERSON)

SS

I, the undersigned Notary Public, in and for the State and County aforesaid, certify that KAREN M. ZENA did personally appear before me in said State and County, and she is known to me to be the person who executed the foregoing instrument, and acknowledged the same to be her free act and deed.

Witness my signature and seal of office this 1st day of April, 1980.
My commission expires: 8/30/83.

Juan Ross
NOTARY PUBLIC
Kentucky, State at Large

This Instrument Prepared By:

Karen M. Zena
KAREN M. ZENA
Suite 222, Doctors Office Building
250 East Liberty Street
Louisville, Kentucky 40202

RECITALS

Mr. and Mrs. _____ of
Louisville, Jefferson County, Kentucky hereby retain Richard
M. Levin, M.D. to assist them in selecting a suitable "Surrogate
Mother" who will enter into a contract with Mr. and Mrs.

_____ whereby a
Surrogate Mother will be artificially inseminated with the
semen of Mr. _____.

Upon delivery it is expected that the Surrogate Mother and
her husband will permit the adoption of said child by Mr. and
Mrs. _____.

(1) Mr. and Mrs. _____
hereby pay to Richard M. Levin, M.D., as compensation for his
services hereunder the sum of \$ _____

(2) It is expressly understood that Richard M. Levin, M.D.
does not guarantee or warrant that the Surrogate Mother will
in fact conceive a child fathered by Mr. _____.
_____ . Nor does Richard M. Levin, M.D. guarantee
that if said child is conceived it will be a healthy child free of

all defects or that the Surrogate Mother and her husband will comply with the terms and provisions of the contract entered into between Mr. and Mrs. _____

and the Surrogate Mother and her husband.

(3) It is further understood that no portion of the fee paid to Richard M. Levin, M.D. is refundable regardless of whether Mr. and Mrs. _____

ever receive a child pursuant to the contract entered into between Mr. and Mrs. _____

and the Surrogate Mother and her husband.

(4) Mr. and Mrs. _____

further agree that they will hold Richard M. Levin, M.D. harmless from any and all liabilities associated with the Surrogate Mother procedure and the expected adoption.

(5) Mr. and Mrs. _____

have been advised of and accept the risk inherent in pregnancy and childbirth and of the risk that the child born to the Surrogate Mother will possess congenital abnormalities either dominant or recessive. (See Attached Exhibit "C").

(6) In the event of litigation by or between Mr. and Mrs. _____

and the Surrogate Mother and her husband and/or their family and/or the Commonwealth of Kentucky and/or any other state, nation, or other governing body, Richard M. Levin, M.D. will be compensated at

an hourly rate of \$ _____

for any and all additional work including testimony and/or investigations done pursuant to this transaction or any related transaction.

(7) This agreement cannot be modified or amended except by writing signed by all parties.

Mr. _____ Date _____

Mrs. _____ Date _____

Katie Marie Brophy _____ Date _____

State of Kentucky)

County of Jefferson)

The foregoing instrument was acknowledged before me this _____ day of _____, 1980, by _____

and _____

Notary Public, State-at-Large, Kentucky

My commission expires the _____ day of

_____, 19____

SURROGATE PARENTING ASSOCIATES, INC. III

AGREEMENT

THIS AGREEMENT is made this _____ day of _____, 1980, by and between _____ (hereinafter referred to as "Surrogate") and her husband, _____ (hereinafter referred to as "Husband") and _____ (hereinafter referred to as "Natural Father").

RECITALS

THIS AGREEMENT is made with reference to the following facts:

(1) The Natural Father is a married individual over the age of eighteen (18) years who is desirous of entering into the following agreement.

(2) The Natural Father desires to have a child who is biologically related to him.

(3) The Surrogate and her husband are a married couple each over the age of eighteen (18) years who are desirous of entering into the following agreements in consideration of the financial remuneration incident hereto.

Now therefore, in consideration of the mutual promises contained herein and with the intentions of being legally bound, hereby the parties agree as follows:

I. The Surrogate represents that she is capable of conceiving children, but agrees that she will not form or attempt to form a parent-child relationship with any child she may conceive pursuant to the provisions of this contract and shall freely and readily within a reasonable time, terminate all parental rights to said child pursuant to this Agreement.

II. The Surrogate and her husband have been married since _____ and the Husband is in agreement with the purposes, intents, and provisions of this agreement and agrees that his wife, the Surrogate, shall be artificially inseminated pursuant to the provisions of this agreement. The Husband will not form a parent-child relationship with any child and the Surrogate may conceive by artificial insemination as described herein and agrees to freely and readily terminate all parental rights to said child and acknowledges he will do all acts necessary to rebut the presumption of paternity as provided under KRS 403 including blood testing.

III. The Natural Father is hereby entering into a written contractual agreement with the Surrogate and her husband, whereby the Surrogate shall be artificially inseminated, with the semen of the Natural Father, by RICHARD M. LEVIN, M.D. The Surrogate, upon becoming pregnant, shall carry said embryo/fetus(s) hereinafter referred to as "Child") until delivery. The Surrogate and her husband agree that they will, on the fifth day after delivery, or as soon thereafter as is medically possible, institute proceedings in Louisville, Kentucky to terminate their respective parental rights

to said child, and sign any and all necessary affidavits, documents, etc. in order to further the intent and purposes of this agreement. The Surrogate and her husband agree to sign *all necessary affidavits* prior to the birth of the child in order to have the Natural Father's name placed on said child's birth certificate as the biological father pursuant to KRS 213.050 (1) and 901 KAR 5.070, Sec. 1. Thereafter, the Surrogate and her husband shall do all acts necessary to permit the adoption of said child by any party, upon request by the Natural Father.

IV. The Natural Father and the Surrogate and her husband recognize and acknowledge that the attorney (s) for the Natural Father, Katie Brophy, shall act as agent for the Natural Father in all matters pertaining to this agreement in order to maintain complete confidentiality.

V. The consideration for this agreement, in addition to other provisions contained herein, shall be as follows:

a. \$ _____

_____ shall be paid to the Surrogate and her husband upon entry of the judgment fully terminating the parental rights as defined by the law in Kentucky of the Surrogate and her husband, pursuant to the child to be born, to the provisions between the Surrogate and her husband and the Natural Father.

b. The consideration to be paid said Surrogate and her husband, shall be deposited with the attorney for the Natural Father at the time of the signing of this agreement and held in

escrow until completion of the duties and obligations of the Surrogate and her husband as herein described.

c. The Natural Father shall pay the expenses incurred by the Surrogate and her husband pursuant to her pregnancy, more specifically defined as follows:

1. All medical, hospitalization, and pharmaceutical, laboratory and therapy expenses incurred in the Surrogate's pregnancy, not covered or allowed by her present health and major medical insurance, including all extraordinary medical expenses, but excluding any expenses for emotional/mental conditions/problems related to said pregnancy, lost wages, or other incidentals.

2. The Natural Father shall not be responsible for any latent medical expenses occurring six (6) weeks subsequent to the birth of the child unless the medical problem/ abnormality incident thereto was known prior to the expiration of said six (6) week period.

3. The total costs of all paternity testing.

4. The Surrogate's travel expenses incurred pursuant to this Agreement.

5. The Natural Father shall not be responsible for any lost wages of the Surrogate or her husband, child care expenses of the Surrogate's children or any other expense not specifically enumerated herein.

VI. Immediately subsequent to the birth of the child, the Surrogate, the Natural Father, and the child shall undergo the following tests under the direction of a pathologist designated by RICHARD M. LEVIN, M.D.:

- (1) Blood Group
- (2) Serum Proteins

- (3) Red Cell Enzymes
- (4) White Cell/H.L.A.

In the event that the Natural Father is excluded by one (1) or more of the aforementioned tests, this contract shall immediately terminate, and all monies and/or all other consideration paid to the Surrogate and her husband, or in their behalf; or expended to screen and/or investigate the surrogate and/or her husband in contemplation of this contract by the Natural Father shall be immediately returned by the Surrogate and her husband to the Natural Father. In addition, the Surrogate and her husband shall pay interest on said monies at the U. S. prime rate existing at the time said sum(s) were expended.

VII. The Natural Father shall pay the cost of a term life insurance policy on the Surrogate's life payable to a named beneficiary of the Surrogate with a policy amount of \$ _____ and said policy shall remain in effect for six (6) weeks subsequent to the birth of the child. In addition, the natural father shall make appropriate arrangements in his will for the support of the infant child should he die prior to the birth of said child and shall pay the cost of a term life insurance policy on his life payable in trust to said unborn child.

VIII. The Surrogate and her husband understand and agree to assume all risks including the risk of death which are incident to conception, pregnancy, childbirth and postpartum complications. A copy of said possible risks and/or complications is attached hereto and made a part hereof. (See attached Exhibit "A").

XI. The Surrogate and her husband hereby agree to undergo psychological/psychiatric evaluation by _____
 _____ psychiatrist(s) and _____
 _____ psychologist(s) designated by the
 Natural Father or an agent thereof. The Natural Father shall pay for the cost of said psychiatric and psychological reviews. The evaluations of said psychiatrist and psychologist shall be submitted to the Natural Father, absent any information which would tend to identify or allow identification of the Surrogate and her husband. The Surrogate and her husband shall sign prior to their evaluations, a medical release authorizing the Attorney for the Natural Father to secure the release of said psychiatric evaluations after said evaluations.

X. "Child" as referred to in this agreement shall include all children born simultaneously pursuant to the inseminations as defined in the terms and provisions of this agreement provided the tests enumerated in paragraph six (VI) are completed and satisfactory as to each child.

XI. In the event that the child is miscarried prior to the fifth (5th) month of pregnancy, no compensation as enumerated in Paragraph V(a) shall be paid to the Surrogate. However, the expenses enumerated in paragraph V(c) shall be paid or reimbursed to the Surrogate and her husband. In the event the child is miscarried, dies or is stillborn subsequent to the fourth (4th) month of pregnancy and said child does not survive, the Surrogate shall receive \$ _____
 in lieu of the compensation enumerated in paragraph V (a) only if

the paternity testing enumerated in Paragraph V (1) is completed and satisfactory as to said child. In the event of a miscarriage or stillbirth as described above, this agreement shall terminate and neither the Surrogate nor the Natural Father will be under any further obligation under this agreement.

XII. The Surrogate and the Natural Father, shall undergo a complete physical and genetic evaluation, under the direction and supervision of RICHARD M. LEVIN, M.D., to determine whether the physical health and well being of each is satisfactory.

Said physical examination shall include testing for venereal diseases, specifically including syphilis and gonorrhea. Said venereal disease testing shall be done prior to each insemination.

XIII. In the event that custody of the child is awarded to the Surrogate and/or her husband or their family, or any individual or organization, not related to the Natural Father by any Court decision or otherwise, the Natural Father shall be entitled to subrogation by the Surrogate and/or her husband, both jointly and severally, for any and all monies they are required to pay for child support or pregnancy related expenses pursuant to said Court order and shall be entitled to immediate reimbursement from the Surrogate and her husband for all monies and/or other consideration paid to the Surrogate pursuant to this agreement or expended on behalf of the Surrogate and/or her husband.

XIV. The Natural Father agrees, that he will not seek to learn the identity of the Surrogate and/or her husband or their family, not advise the child of said identity if known.

XV. The Surrogate and her husband agree that they will not seek to learn the identity of the Natural Father of the child and will not attempt to contact same if their identity is learned.

XVI. In the event that pregnancy has not occurred within a reasonable time, in the opinion of the inseminating physician, RICHARD M. LEVIN, M.D., this agreement shall terminate by written notice from the attorney for the Natural Father to the Surrogate and/or her husband.

XVII. All parties hereto agree that they will not provide nor allow their agents to provide any information to the public, news media or any other individual or group which could lead to the disclosure of the identity of the parties hereto or the child.

XVIII. In the event the Surrogate and/or her husband violate any of the provisions contained herein, this agreement may be immediately terminated at the option of the Natural Father without any further liability hereunder. In the event the Natural Father does terminate this agreement, the Natural Father shall be under no obligation to pay any monies to the Surrogate or reimburse any of her expenses or her husband's expenses. In addition, the Surrogate and her husband must reimburse the Natural Father and/or DR. RICHARD M. LEVIN, M.D., for all monies expended on her behalf pursuant to this agreement.

XIX. The Surrogate and her husband agree that they will provide no interviews of any kind whatsoever, either of a public or private nature, without the prior written consent of the attorney for the Adoptive Parents.

XX. The Surrogate agrees that she will not abort the child once conceived except, if in the opinion of the inseminating physician, such action is necessary for the physical health of the Surrogate or the child has been determined by said physician

to be physiologically abnormal. In the event of either of those two (2) contingencies, the Surrogate desires and agrees to have said abortion.

XXI. The Natural Father assumes the legal responsibility for any child who may possess congenital abnormalities and they have been previously advised of the risk of such abnormalities. (See attached Exhibit "C".)

XXII. In the event that the Natural Father predeceases the birth of the child, said child shall be placed in the custody of RICHARD M. LEVIN, M.D., for placement through a private adoption to a designated person upon consent of the appropriate social agency.

XXIII. The Surrogate and her husband both agree that they will not seek to view the infant child born pursuant to this contract at anytime, nor will the Surrogate and her husband seek to view or meet with the Natural Father.

XXIV. The Surrogate further agrees to adhere to all medical instructions given to her by RICHARD M. LEVIN, M.D. as well as her independent obstetrician. The Surrogate also agrees not to smoke cigarettes, drink any alcoholic beverages, use any illegal drugs, non-prescription medications or prescribed medications without written consent from RICHARD M. LEVIN, M.D. The Surrogate agrees to follow a pre-natal medical examination schedule to consist of no fewer visits than: One visit per month during the first seven months of pregnancy, two visits (each to occur at two week intervals) during the eighth month of pregnancy and four visits (each to occur at weekly intervals) during the ninth month of pregnancy.

XXV. Each party acknowledges that he or she fully understands the Agreement and its legal affect and that he or she is signing the same freely and voluntarily and that neither party has any reason to believe that the other(s) did not freely and voluntarily execute said Agreement.

XXVI. In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

XXVII. This Agreement may be executed in two (2) or more counterparts, each of which shall be an original but, all of which shall constitute one and the same instrument.

XXVIII. This Agreement sets forth the entire agreement between the partners with regard to the subject matter hereof. All agreements, covenants, representations, and warranties, express and implied, oral and written, of the parties are contained herein. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made by any party to the other(s) with respect to the subject matter of this Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants and warranties with respect to the subject matter hereof are waived, merged herein and superseded hereby. This is an

integrated agreement.

XXIX. This Agreement can be amended only by a written Agreement signed by all parties hereto.

XXX. This Agreement has been drafted and executed in Louisville, Kentucky and shall be governed by, continued and enforced in accordance with the laws of the Commonwealth of Kentucky.

XXXI. No provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provisions.

Prepared By:

KATIE MARIE BROPHY
Attorney at Law
Suite 450, 730 W. Main Street
Louisville, Kentucky 40202
502-507-8722

583 1711

We, _____ and

_____, recognize that there is a signature line on the attached page for signatures by the Natural Father and that in order to maintain confidentiality, we will never see any signature of said Natural Father, although it is our collective intention to enter into a binding legal obligation.

Surrogate Date

Surrogate's Husband Date

Attorney for Surrogate and her husband Date

Attorney for Natural Father Date

State of Kentucky)

County of Jefferson)

The foregoing instrument was acknowledged before me this _____ day of _____, 1980, by _____

and _____

NOTARY PUBLIC, Ky. State At Large

My Commission expires: _____

APPENDIX 7
BESHEAR LETTER OF OPINION



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

January 26, 1981

CAPITOL BUILDING
FRANKFORT 40601

Mr. Joe Ward
Courier Journal - Louisville Times
Louisville, Kentucky 40202

QAG 81 18

Dear Mr. Ward:

This opinion is in response to your letter in which you inquire about the legality of "surrogate parenthood" in Kentucky. Specifically you have asked the following four questions:

1. Whether such a contract is legal in Kentucky.
2. Whether ordinary custody rules would apply in the event one or more of the parties to the agreement changed their minds while the pregnancy was in progress.
3. Whether surrogate transactions can be regulated by the state.
4. Whether the couple or the doctor could be held liable if the surrogate died or had her health impaired by the pregnancy.

The surrogate parenthood situation would typically arise when a couple wants children but the wife is not physically able to bear children. Another woman, the "surrogate mother", is artificially inseminated with the sperm of the husband, who becomes the natural father. When the child is born and the paternity of the natural father has been established, the surrogate mother terminates her parental rights; the natural father receives the child, and his wife then adopts it.

In response to your first question, while several different approaches may be taken, in general some type of contract between the couple desiring the child and the surrogate mother would be necessary. However, regardless of the approach taken, because of the existence of at least three Kentucky statutes and a strong public policy against "baby-buying", it is the opinion of this office that any such contract is illegal and unenforceable in Kentucky.

First, KRS 199.500(5) states:

"In no case shall an adoption be granted or a consent for adoption be held valid if such consent for adoption is given prior to the fifth day after the birth of the child."

The question arises whether, prior to the establishment of the surrogate arrangement, the couple can legally contract with the surrogate mother that for a stated consideration from the couple to the surrogate, the latter consents or will consent to the wife's adoption of the child. Inherent in the surrogate's promise is that she agrees to be artificially inseminated with the natural father's sperm and to carry the fetus to delivery.

Obviously, prior to the birth of the child the surrogate mother cannot give legally binding consent for adoption of the future child; such consent would violate KRS 199.500(5). The purpose of this statute is to give the mother time after the birth of her child to consider whether or not to give it up for adoption. The addition of (5) to KRS 199.500 by the 1978 General Assembly indicates that the legislature as a matter of public policy intended that the mother not be rushed into making a decision to give consent for adoption; rather she should have at least five days to think it over.

Even if the contract might be written to provide that the surrogate mother would give consent in the future, five days after the child is born, in our opinion the contract would still be illegal. Even though such a contract might not fail for lack of consideration, it would not be enforced for reasons of public policy, for it is obvious that such a contract is merely a subterfuge to get around the language of KRS 199.500(5), by which the surrogate has in effect given consent before the pregnancy even has begun.

In order to avoid the difficulties of contracting for consent for adoption, an alternative method has been devised. This involves the formation of a contract for the termination of parental rights by the surrogate mother and her husband. Under such a contract, the termination agreement is made between the natural father and the surrogate mother (and her husband if she is married); the natural father's wife is not involved in this agreement. The surrogate agrees to be artificially inseminated with the semen of the natural father and to carry the fetus to delivery. The surrogate and her husband also agree that on the fifth day after the birth or as soon as possible afterward, they will institute proceedings to terminate their parental rights to the child. The natural father agrees to pay a stated monetary consideration and to pay medical and other expenses. It is our understanding that this is the method used by Surrogate Parenting Associates, Inc. of Louisville, Kentucky.

Termination of parental rights is differentiated from consent for adoption and is covered by different statutes; these are found at KRS 199.601-199.617. The penalty provision is found at KRS 199.990(5). The penalty for willful violation of the statutes or rules promulgated under them is a fine of not less than \$20 nor more than \$200 or imprisonment for not more than 30 days or both.

A parent may file a petition for the voluntary termination of his or her parental rights. KRS 199.601(1). However, according to KRS 199.601(2), "No petition may be filed under this chapter prior to five (5) days after the birth of a child".

Once again, the public policy behind such a provision is apparent. The legislature intends that the mother have time to consider her decision to terminate parental rights. Therefore, the same legal roadblock appears here as in the situation concerning consent for adoption. Even though such a contract might not fail for lack of consideration, in our opinion the courts of Kentucky would not enforce such contract or find such contract legal because of its obvious intent to circumvent KRS 199.601(2) and the public policy behind the five day waiting period.

While either of the above discussed statutes is sufficient in and of itself to declare the surrogate parenting process illegal in Kentucky, in our opinion the strongest legal prohibition against surrogate parenting in Kentucky is found in

Mr. Joe Ward

Page 4

the strong public policy against the buying and selling of children. Courts in many states have held that as a matter of public policy children are not to be bought and sold; that is, monetary consideration other than for medical expenses is not to be made to the natural parents who have placed their children up for adoption. Barwin v. Reidy, 307 P.2d 175 (N.M. 1957); Matter of Adoption of a Child by I.T., 397 A.2d 341 (N.J. super. 1978). Self-seeking on the part of the natural mother is condemned. See In re Shirk's Estate, 350 P.2d 1 (Kan. 1960); Reimche v. First National Bank of Nevada, 512 F.2d 187 (9th Cir. 1975).

In Kentucky, much of this public policy has been embodied in statute. KRS 199.590(2) states:

"No person, agency or institution not licensed by the department may charge a fee or accept remuneration for the procurement of any child for adoption purposes."

The penalty provision for violation of KRS 199.590 is found in KRS 199.990(4) and states that any person who violates the statute shall be fined not less than \$500 nor more than \$2,000 or imprisoned for not more than six months or both.

It is the opinion of this office that this statute precludes not only the surrogate mother from receiving payments for giving up her child for adoption but also includes all who are involved in the surrogate transaction, since each of them is involved "in the procurement of a child for adoption purposes". As pointed out in Petrilli, Sec. 29.6, "It is . . . clear legislative policy that no one shall profit economically from the adoption process".

Even though there is not a statutory equivalent to KRS 199.590(2) for termination of parental rights, there is the same public policy issue. In addition, even in the termination of rights approach, it is expected that the wife of the natural father will adopt the child. It is our opinion that the courts of this Commonwealth will not allow persons to receive monetary consideration for the procurement of a child, regardless of whether it is referred to as an adoption proceeding or as a termination of parental rights.

In addition, KRS 199.590(1) provides:

"No person, corporation or association shall advertise in any manner that it will receive children for the purpose of adoption nor shall any newspaper published in the commonwealth of Kentucky nor any other publication which is prepared, sold, or distributed in the commonwealth of Kentucky contain an advertisement which solicits children for adoption or solicits the custody of children."

The public policy behind these statutes is clear: The Commonwealth of Kentucky does not condone the purchase and sale of children.

In your second question you ask about the consequences of a breach of contract by any of the parties. As we have just stated above, we do not believe there can be a legal and enforceable surrogate parenting contract in Kentucky under our present laws. This being the case, there is no reason to discuss the possible consequences of a breach of a contract we believe cannot legally exist!

We do note, however, there may be non-contractual remedies if parties to a surrogate arrangement back out. If the surrogate mother decides to keep the child, the natural father could institute a custody proceeding. The father would need to prove that he is the natural father of the child and that it would be in the best interest of the child to be in his custody. Even though the natural father is not married to the mother of the child, he still has the right to seek custody of his child. The court in Sweat v. Turner, 547 S.W.2d 435 (Ky. 1976), concluded that "a biological father of a child born out of wedlock has the right to petition and obtain custody of his child if he is suited to the trust, and if such is in the best interest of the child." Id. at 437. An unwed father has the same right to a custody hearing as do other parents. Stanley v. Illinois, 405 U.S. 645 (1972).

KRS 403.270(1) states in part: "The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent".

(Although found in the chapter on divorce, the custody statutes have been applied to non-divorce situations, e.g., Sweat v. Turner, supra.) "So long as a father can produce reliable evidence that he is the father and is not a stranger to the child, and that the best interest of the child would result, the putative father may petition the circuit court for custody". Sweat v. Turner, supra, at 437.

If the natural father and his wife decide they do not want to have custody of or adopt the child, thus leaving the child with the surrogate mother, the surrogate has a remedy. She could institute a paternity action. KRS 406.021(1) states in part: "Paternity may be determined upon the complaint of the mother, child, person or agency substantially contributing to the support of the child." There is a presumption that the child born during lawful wedlock or within ten (10) months afterwards is a child of the husband and wife. KRS 406.011. But this presumption can be overcome. After the surrogate mother proves that the child was born out of wedlock, she could seek to impose liability on the natural father for the payment of certain expenses.

"The father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support, and funeral expenses of the child." KRS 406.011.

In response to your third question, the state would have the authority to enact laws regulating surrogate transactions so long as such laws do not violate any of the parties' constitutional rights.

The final question you have presented concerns potential liability of the natural father or the physician if the surrogate dies or has her health impaired by the pregnancy.

We are aware that Surrogate Parenting Associates has dealt with this problem through several provisions in the "contract" between the natural father and the surrogate mother. The surrogate and her husband agree to assume all risks incident to the pregnancy, including the risk of death. The natural father buys a term insurance policy on the surrogate's life and agrees to pay for her medical expenses.

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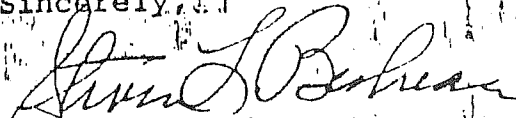
Barring any such provisions as noted above, the natural father would not appear to have any liabilities for injuries done to the surrogate mother because of her pregnancy, except if his paternity is shown, he could be liable for the "reasonable expense of the mother's pregnancy and confinement" pursuant to KRS 406.011. A negligence action would not be appropriate; it is unclear what the father's duty to the surrogate would be, and in any event, the surrogate would have entered into this arrangement knowing what risks she would be exposed to.

If any of the harm done to the surrogate mother was a result of some action by the physician, the surrogate could bring a medical malpractice action. Such a suit could be brought as a tort action in negligence or as a breach of a contract, express or implied. Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1977). If the surrogate dies, her family or her estate could bring a wrongful death action against the physician. The standard of care which the physician would be under is set out in Blair v. Eblen, 461 S.W.2d 370 (Ky. 1970). The physician would be "under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances." Id. at 373. See also Seaton v. Rosenberg, 573 S.W.2d 333 (Ky. 1978).

CONCLUSION

In conclusion, it is the opinion of this office that because of the existence of the above-mentioned Kentucky statutes and the strong public policy against the buying and selling of children, contracts involving surrogate parenthood are illegal and unenforceable in the Commonwealth of Kentucky.

Sincerely,



Steven L. Beshear

SLB:cm

On the Opinion:
Ms. Dale D. Brodkey
Assistant Attorney General

APPENDIX 8
HOUSE BILL NO. 5184

HOUSE BILL No. 5184

October 26, 1981, Introduced by Rep. Fitzpatrick and referred to the
Committee on Judiciary.

A bill to amend the title and sections 44 and 54 of chapter
X of Act No. 288 of the Public Acts of 1939, entitled as amended

"An act to revise and consolidate the statutes relating to the organization and jurisdiction of the probate courts of this state; the powers and duties of such courts, and the judges and other officers thereof; the statutes of descent and distribution of property, and the statutes governing the probating of estates of decedents, disappeared persons and wards, change of name of adults, the adoption of children and the jurisdiction of the juvenile division of the probate courts; to prescribe the manner and time within which claims against estates and other actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in actions and proceedings in said courts; appeals from said courts; and to provide remedies and penalties for the violation of this act,"

as added by Act No. 296 of the Public Acts of 1974, being sections 710.44 and 710.54 of the Compiled Laws of 1970; and to add sections 71, 73, 75, 76, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 7. The title and sections 44 and 54 of chapter X of
2 Act No. 288 of the Public Acts of 1939, as added by Act No. 296
3 of the Public Acts of 1974, being sections 710.44 and 710.54 of
4 the Compiled Laws of 1970, are amended and sections 71, 73, 75,
5 76, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99 are added
6 to read as follows:

7 TITLE

8 An act to revise and consolidate the statutes relating to
9 the organization and jurisdiction of the probate ~~courts~~ COURT
10 of this state, ~~the~~ the powers and duties of such ~~courts~~ COURT,
11 and the judges and other officers ~~thereof~~, OF THE PROBATE
12 COURT, the statutes of descent and distribution of property, and
13 the statutes governing the ~~probating of estates of decedents,~~
14 ~~disappeared persons and wards,~~ change of name of adults, AND
15 CHILDREN, the adoption of ADULTS AND children, and the jurisdic-
16 tion of the juvenile division of the probate ~~courts~~ COURT; TO
17 GOVERN SURROGATE PARENTHOOD; to prescribe the manner and time
18 within which ~~claims against estates and other~~ actions and pro-
19 ceedings may be brought in ~~said courts~~ THE PROBATE COURT; TO
20 PRESCRIBE pleading, evidence, practice, and procedure in actions
21 and proceedings in ~~said courts~~ THE PROBATE COURT; TO PROVIDE
22 FOR appeals from ~~said courts~~ THE PROBATE COURT; TO PRESCRIBE
23 THE POWERS AND DUTIES OF CERTAIN STATE AGENCIES AND OFFICERS; TO
24 PROVIDE FOR THE EXECUTION, TERMS, CONDITIONS, AND ENFORCEMENT OF
25 CERTAIN AGREEMENTS ENTERED INTO IN RELATION TO ADOPTION; and to
26 provide remedies and penalties for the violation of this act.

CHAPTER X.

1
2 Sec. 44. (1) Except as otherwise provided in this section,
3 the consent required by section 43 OR SECTION 79 shall be by a
4 separate instrument executed before the judge of probate having
5 jurisdiction or, at the court's direction, before another judge
6 of probate in this state. In counties having a population of
7 150,000 inhabitants or more, a consent may be executed before a
8 referee of the probate court. If the consent of a parent or
9 guardian is executed before a judge or referee as provided in
0 this subsection, a verbatim record of testimony related to execu-
1 tion of the consent shall be made.

2 (2) If the person whose consent is required is in any of the
3 armed services or is in prison, the consent may be executed and
4 acknowledged before any person authorized by law to administer
5 oaths.

6 (3) If the child to be adopted is legally a ward of the
7 department or of a child placing agency, the consent required to
8 be made under section 43 by the duly authorized representative of
9 the department or agency may be executed and acknowledged before
0 a person authorized by law to administer oaths.

1 (4) If the consent is executed in another state or country,
2 the court having jurisdiction over the adoption proceeding in
3 this state shall determine whether the consent was executed in
4 accordance with the laws of that state or country and shall not
5 proceed unless it finds that the consent was so executed.

6 (5) If a parent's consent to adoption is required under
7 section 43 OR SECTION 79 or if a guardian's consent is required

1 pursuant to section 43(1)(e), the consent shall not be executed
2 until after such investigation as the court deems proper and
3 until after the judge, referee, or other person authorized in
4 subsection (2) has fully explained to the parent or guardian the
5 legal rights of the parent or guardian and the fact that the
6 parent or guardian by virtue of the consent voluntarily relin-
7 quishes permanently his or her rights to the child.

8 (6) If the adoptee's consent to adoption is required under
9 section 43, the consent shall not be executed until after such
10 investigation as the court deems proper and until after the judge
11 or referee has fully explained to the adoptee the fact that he or
12 she is consenting to acquire permanently the adopting parent or
13 parents as his or her legal parent or parents as though the
14 adoptee had been born to the adopting parent or parents.

15 Sec. 54. (1) Except AS PROVIDED IN SUBSECTION (4) AND
16 EXCEPT for charges and fees approved by the court, a person shall
17 not offer, give, or receive any money or other consideration or
18 thing of value in connection with any of the following: —

19 (a) The placing of a child for adoption.

20 (b) The registration, recording, or communication of the
21 existence of a child available for adoption or the existence of a
22 person interested in adopting a child.

23 (c) A release.

24 (d) A consent.

25 (e) A petition.

26 (2) Before the entry of the final order of adoption, the
27 petitioner shall file with the court a sworn statement describing

1 money or other consideration or thing of value paid to or
2 exchanged by any party in the adoption proceeding, including
3 anyone consenting to the adoption or adopting the adoptee, any
4 relative of a party or of the adoptee, any physician, attorney,
5 social worker or member of the clergy, and any other person, cor-
6 poration, association, or other organization. The court shall
7 approve or disapprove fees and expenses. Acceptance or retention
8 of amounts in excess of those approved by the court ~~constitutes~~
9 CONSTITUTES a violation of this section.

0 (3) To assure compliance with limitations imposed by this
1 section ~~—~~ AND by section 14 of Act No. 116 of the Public Acts
2 of 1973, being section 722.124 of the Michigan Compiled Laws,
3 ~~and by section 4 of Act No. 263 of the Public Acts of 1973, as~~
4 ~~amended, being section 331.404 of the Michigan Compiled Laws,~~
5 the court may require sworn testimony from persons who were
6 involved in any way in informing, notifying, exchanging informa-
7 tion, identifying, locating, assisting, or in any other way par-
8 ticipating in the contracts or arrangements which, directly or
9 indirectly, led to placement of the person for adoption.

0 (4) THIS SECTION DOES NOT APPLY TO A PETITION FOR SURROGATE
1 ADOPTION FILED PURSUANT TO SECTION 73.

2 SEC. 71. (1) AS USED IN THIS SECTION AND SECTIONS 73 TO
3 99:

4 (A) "ADOPTIVE PARENT" MEANS A NATURAL FATHER'S SPOUSE WHO
5 PROPOSES TO ADOPT A CHILD TO BE CONCEIVED PURSUANT TO A SURROGATE
6 PARENTHOOD AGREEMENT.

1 (B) "NATURAL FATHER" MEANS A MALE OF AT LEAST 18 YEARS OF
2 AGE WHOSE SEMEN WILL BE USED TO ARTIFICIALLY INSEMINATE A
3 SURROGATE.

4 (C) "SURROGATE" MEANS A MARRIED OR SINGLE FEMALE OF AT LEAST
5 18 YEARS OF AGE WHO AGREES PURSUANT TO A SURROGATE PARENTHOOD
6 AGREEMENT TO BE ARTIFICIALLY INSEMINATED WITH THE SEMEN OF A NAT-
7 URAL FATHER, AND, IF SHE CONCEIVES AND BEARS A CHILD, TO VOLUN-
8 TARILY RELINQUISH HER PARENTAL RIGHTS TO THE CHILD.

9 (D) "SURROGATE PARENTHOOD AGREEMENT" MEANS AN AGREEMENT EXE-
10 CUTED AS PROVIDED IN SECTIONS 85 TO 93.

11 (2) IN ADDITION TO THE WORDS AND PHRASES DEFINED IN SUBSEC-
12 TION (1), SECTION 22 DEFINES WORDS AND PHRASES APPLICABLE TO SEC-
13 TIONS 73 TO 99.

14 SEC. 73. (1) IF A SPOUSE OF A NATURAL FATHER DESIRES TO
15 ADOPT A CHILD TO BE CONCEIVED PURSUANT TO A SURROGATE PARENTHOOD
16 AGREEMENT, THAT PERSON TOGETHER WITH THE NATURAL FATHER SHALL
17 FILE A PETITION FOR SURROGATE ADOPTION WITH THE PROBATE COURT OF
18 THE COUNTY IN WHICH THE PETITIONER RESIDES OR IN WHICH THE SURRO-
19 GATE RESIDES.

20 (2) THE PETITION FOR SURROGATE ADOPTION SHALL BE VERIFIED BY
21 THE PETITIONER AND THE NATURAL FATHER AND SHALL CONTAIN THE FOL-
22 LOWING INFORMATION:

23 (A) THE NAME, DATE AND PLACE OF BIRTH, AND PLACE OF RESI-
24 DENCE OF THE PETITIONER, INCLUDING THE MAIDEN NAME OF THE PETI-
25 TIONER AND OF THE NATURAL FATHER.

26 (B) THE NAME, DATE AND PLACE OF BIRTH, AND PLACE OF
27 RESIDENCE OF THE SURROGATE.

1 (C) A COPY OF THE SURROGATE PARENTHOOD AGREEMENT ENTERED
2 INTO PURSUANT TO SECTIONS 85 TO 93 BY THE PETITIONER, THE NATURAL
3 FATHER, THE SURROGATE, AND THE SURROGATE'S HUSBAND, IF THE SURRO-
4 GATE IS MARRIED.

5 (3) A PETITION FOR SURROGATE ADOPTION FILED PURSUANT TO THIS
6 SECTION AND ANY REPORT OR DOCUMENT FILED PURSUANT TO SECTIONS 75
7 TO 99 SHALL BE SUBJECT TO SECTIONS 67 AND 68.

8 SEC. 75. (1) IN A SURROGATE ADOPTION PROCEEDING INITIATED
9 PURSUANT TO SECTION 73, THE COURT SHALL DIRECT A FULL INVESTIGA-
10 TION BY AN EMPLOYEE OR AGENT OF THE COURT, A CHILD PLACING
11 AGENCY, OR THE DEPARTMENT. THE FOLLOWING SHALL BE CONSIDERED IN
12 THE INVESTIGATION:

13 (A) THE CAPACITY AND DISPOSITION OF THE PETITIONER TO GIVE
14 THE CHILD TO BE CONCEIVED PURSUANT TO THE SURROGATE PARENTHOOD
15 AGREEMENT LOVE, AFFECTION, AND GUIDANCE, AND TO EDUCATE THE
16 CHILD.

17 (B) THE CAPACITY AND DISPOSITION OF THE PETITIONER TO PRO-
18 VIDE THE CHILD TO BE CONCEIVED PURSUANT TO THE SURROGATE PARENT-
19 HOOD AGREEMENT WITH FOOD, CLOTHING, EDUCATION, PERMANENCE, MEDI-
20 CAL CARE OR OTHER REMEDIAL CARE RECOGNIZED AND PERMITTED UNDER
21 THE LAWS OF THIS STATE IN PLACE OF MEDICAL CARE, AND OTHER MATE-
22 RIAL NEEDS.

23 (C) THE PERMANENCE AS A FAMILY UNIT OF THE PETITIONER'S
24 HOME.

25 (D) THE MORAL FITNESS OF THE PETITIONER.

26 (E) THE MENTAL AND PHYSICAL HEALTH OF THE PETITIONER.

1 (F) ANY OTHER FACTOR CONSIDERED BY THE COURT TO BE RELEVANT
2 TO A PARTICULAR SURROGATE ADOPTION PROCEEDING.

3 (2) A WRITTEN REPORT OF THE INVESTIGATION SHALL BE FILED
4 WITHIN 60 DAYS OF THE FILING OF A PETITION PURSUANT TO
5 SECTION 73.

6 (3) THE JUDGE OF PROBATE SHALL REVIEW THE REPORT PREPARED
7 AND FILED PURSUANT TO THIS SECTION. IF THE REPORT RECOMMENDS
8 THAT SURROGATE ADOPTION BE PERMITTED, THE JUDGE, WITHIN 10 DAYS
9 AFTER RECEIPT OF THE REPORT, SHALL ENTER AN ORDER CERTIFYING THE
10 SUITABILITY OF THE PETITIONER FOR SURROGATE ADOPTION. IF THE
11 REPORT RECOMMENDS THAT SURROGATE ADOPTION NOT BE PERMITTED, THE
12 JUDGE, WITHIN 10 DAYS AFTER RECEIPT OF THE REPORT, SHALL CONDUCT
13 A HEARING TO REVIEW THE REPORT AND TO TAKE OTHER EVIDENCE REGARD-
14 ING THE SUITABILITY OF THE PETITIONER. IF THE JUDGE IS SATISFIED
15 AS TO THE SUITABILITY OF THE PETITIONER BASED ON THE EVIDENCE
16 PRODUCED AT THE HEARING, THE COURT SHALL ENTER AN ORDER CERTIFY-
17 ING THE SUITABILITY OF THE PETITIONER FOR SURROGATE ADOPTION.

18 SEC. 76. (1) IF A SINGLE NATURAL FATHER HAS ENTERED INTO A
19 SURROGATE PARENTHOOD AGREEMENT WITH A SURROGATE, THAT NATURAL
20 FATHER, TOGETHER WITH THE SURROGATE, SHALL FILE A PETITION TO
21 TERMINATE THE PARENTAL RIGHTS OF THE SURROGATE AND TO ESTABLISH
22 THE PATERNITY OF THE NATURAL FATHER.

23 (2) A PETITION FILED PURSUANT TO SUBSECTION (1) SHALL BE
24 VERIFIED BY THE NATURAL FATHER AND THE SURROGATE AND SHALL CON-
25 TAIN THE FOLLOWING INFORMATION:

26 (A) THE NAME, DATE AND PLACE OF BIRTH, AND PLACE OF
27 RESIDENCE OF THE PETITIONER.

1 (B) THE NAME, DATE AND PLACE OF BIRTH, AND PLACE OF
2 RESIDENCE OF THE SURROGATE.

3 (C) A COPY OF THE SURROGATE PARENTHOOD AGREEMENT ENTERED
4 INTO PURSUANT TO SECTIONS 85 TO 93 BY THE PETITIONER, THE SURRO-
5 GATE, AND THE SURROGATE'S HUSBAND, IF THE SURROGATE IS MARRIED.

6 (3) A PETITION FILED PURSUANT TO THIS SECTION SHALL BE
7 SUBJECT TO SECTIONS 67 AND 68.

8 SEC. 77. (1) UPON VERIFICATION OF THE SURROGATE'S PREGNANCY
9 AS THE RESULT OF AN ARTIFICIAL INSEMINATION, NOTICE OF THE PREG-
10 NANCY SHALL BE FILED WITH THE COURT.

11 (2) UPON VERIFICATION OF THE SURROGATE'S PREGNANCY, THE NAT-
12 URAL FATHER SHALL JOIN WITH THE SURROGATE AND ACKNOWLEDGE THAT
13 THE CHILD TO BE BORN TO THE SURROGATE IS THE NATURAL FATHER'S
14 CHILD IN A WRITING EXECUTED AND ACKNOWLEDGED BY THEM IN THE SAME
15 MANNER PROVIDED BY LAW FOR THE EXECUTION AND ACKNOWLEDGMENT OF
16 DEEDS OF REAL ESTATE. THE ACKNOWLEDGMENT SHALL BE FILED WITH THE
17 COURT.

18 (3) UPON RECEIPT OF AN ACKNOWLEDGMENT MADE PURSUANT TO SUB-
19 SECTION (2), THE JUDGE OF PROBATE SHALL ENTER AN ORDER OF FILIA-
20 TION ESTABLISHING THE NATURAL FATHER'S PATERNITY OF THE CHILD TO
21 BE BORN TO THE SURROGATE. ON THE NEXT BUSINESS DAY AFTER ENTRY
22 OF THE ORDER OF FILIATION THE COURT SHALL SEND A COPY OF THE
23 ORDER TO THE VITAL RECORDS DIVISION OF THE STATE DEPARTMENT OF
24 PUBLIC HEALTH.

25 SEC. 79. (1) SUBJECT TO SECTION 44, CONSENT TO THE
26 RELINQUISHMENT OF PARENTAL RIGHTS OVER A CHILD CONCEIVED PURSUANT

1 TO A SURROGATE PARENTHOOD AGREEMENT SHALL BE EXECUTED BY THE
2 SURROGATE AND HER HUSBAND, IF THE SURROGATE IS MARRIED.

3 (2) THE CONSENT REQUIRED BY SUBSECTION (1) SHALL BE EXECUTED
4 BEFORE THE BIRTH OF THE CHILD TO BE EFFECTIVE UPON THE BIRTH OF
5 THE CHILD.

6 SEC. 81. AFTER THE RECEIPT OF NOTICE OF THE SURROGATE'S
7 PREGNANCY AND THE COMPLETION OF THE SURROGATE'S SIXTH MONTH OF
8 PREGNANCY, THE JUDGE OF PROBATE SHALL ISSUE AN INTERIM ORDER
9 GRANTING CUSTODY, CARE, AND CONTROL OVER THE CHILD TO THE NATURAL
10 FATHER AND, IN THE CASE OF A SURROGATE ADOPTION PROCEEDING, THE
11 PETITIONER. THE INTERIM ORDER SHALL GRANT TO THE NATURAL FATHER
12 AND, IN THE CASE OF A SURROGATE ADOPTION PROCEEDING, THE PETI-
13 TIONER THE EXCLUSIVE AUTHORITY TO CONSENT TO ALL MEDICAL, SURGI-
14 CAL, PSYCHOLOGICAL, EDUCATIONAL, AND RELATED SERVICES FOR THE
15 CHILD. THE INTERIM ORDER SHALL BE EFFECTIVE IMMEDIATELY UPON THE
16 BIRTH OF THE CHILD.

17 SEC. 83. (1) A SURROGATE ADOPTION IS GOVERNED BY THIS SEC-
18 TION AND NOT BY SECTION 46, 51, OR 52.

19 (2) FOURTEEN DAYS AFTER THE COURT RECEIVES NOTICE OF THE
20 BIRTH OF A CHILD CONCEIVED PURSUANT TO A SURROGATE PARENTHOOD
21 AGREEMENT, THE JUDGE OF PROBATE SHALL ENTER AN ORDER TERMINATING
22 THE PARENTAL RIGHTS OF THE SURROGATE AND ANY CLAIM TO PATERNITY
23 BY THE SURROGATE'S HUSBAND, IF THE SURROGATE IS MARRIED.

24 (3) NOT MORE THAN 4 DAYS AFTER THE COURT IS NOTIFIED OF THE
25 BIRTH OF A CHILD CONCEIVED PURSUANT TO A SURROGATE PARENTHOOD
26 AGREEMENT, THE SURROGATE AND THE SURROGATE'S HUSBAND, IF THE
27 SURROGATE IS MARRIED, SHALL BE NOTIFIED OF THE DATE ON WHICH THE

1 JUDGE OF PROBATE WILL ENTER AN ORDER TERMINATING THE PARENTAL
2 RIGHTS OF THE SURROGATE AND ANY CLAIM TO PARENTAL RIGHTS BY THE
3 SURROGATE'S HUSBAND, IF THE SURROGATE IS MARRIED, AND SHALL BE
4 ADVISED TO RAISE ANY OBJECTIONS TO THE ENTRY OF THE ORDER BEFORE
5 THAT DATE.

6 (4) IF THE HUSBAND OF A SURROGATE ASSERTS A CLAIM OF PATER-
7 NITY, THE JUDGE OF PROBATE SHALL STAY THE ENTRY OF THE ORDER AND
8 SHALL HAVE A HEARING TO DETERMINE THE PATERNITY OF THE CHILD. IF
9 THE JUDGE FINDS THAT THE SURROGATE'S HUSBAND IS THE FATHER OF THE
0 CHILD, THE PETITION FOR SURROGATE ADOPTION SHALL BE DISMISSED.

1 IF THE JUDGE FINDS THAT THE HUSBAND OF THE PETITIONER IS THE NAT-
2 URAL FATHER OF THE CHILD, THE JUDGE SHALL ENTER AN ORDER OF FILI-
3 ATION ON BEHALF OF THE NATURAL FATHER AND TERMINATING THE CLAIM
4 OF PATERNITY BY THE SURROGATE'S HUSBAND.

5 (5) IF THE SURROGATE OBJECTS TO THE ENTRY OF THE ORDER TER-
6 MINATING THE SURROGATE'S PARENTAL RIGHTS, AND IF THE SURROGATE'S
7 HUSBAND IS NOT DETERMINED TO BE THE CHILD'S FATHER UNDER SUBSEC-
8 TION (4), THE JUDGE OF PROBATE SHALL STAY THE ENTRY OF THE ORDER
9 AND SHALL HAVE A HEARING TO DETERMINE WHETHER TO TERMINATE THE
0 PARENTAL RIGHTS OF THE SURROGATE. THE JUDGE SHALL ENFORCE THE
1 SURROGATE PARENTHOOD AGREEMENT AND ORDER THE TERMINATION OF THE
2 SURROGATE'S PARENTAL RIGHTS UNLESS THE SURROGATE DEMONSTRATES BY
3 CLEAR AND CONVINCING EVIDENCE THAT THE BEST INTERESTS OF THE
4 CHILD ARE NOT SERVED BY THE TERMINATION OF THE SURROGATE'S PAREN-
5 TAL RIGHTS.

6 (6) IF AN ORDER TERMINATING THE PARENTAL RIGHTS OF A
7 SURROGATE HAS BEEN ENTERED IN A SURROGATE ADOPTION PROCEEDING

1 INITIATED PURSUANT TO SECTION 73, THE JUDGE OF PROBATE MAY ENTER
2 AN ORDER OF ADOPTION AS PROVIDED IN SECTION 56. IF AN ORDER TER-
3 MINATING THE PARENTAL RIGHTS HAS BEEN ENTERED IN A PROCEEDING
4 INITIATED PURSUANT TO SECTION 76, THE JUDGE OF PROBATE MAY ENTER
5 AN ORDER OF FILIATION ON BEHALF OF THE NATURAL FATHER.

6 SEC. 85. (1) A PERSON SHALL NOT BE A PARTY TO AN AGREEMENT
7 IN WHICH A FEMALE AGREES TO CONCEIVE A CHILD THROUGH ARTIFICIAL
8 INSEMINATION AND TO VOLUNTARILY RELINQUISH HER PARENTAL RIGHTS TO
9 THE CHILD UNLESS THAT PERSON, TOGETHER WITH HER OR HIS SPOUSE, IF
10 MARRIED, EXECUTES A SURROGATE PARENTHOOD AGREEMENT AS PROVIDED IN
11 SECTIONS 87, 89, AND 91.

12 (2) THE ATTORNEY WHO REPRESENTS THE PROSPECTIVE NATURAL
13 FATHER AND HIS SPOUSE, IF MARRIED, SHALL NOT REPRESENT THE SURRO-
14 GATE IN THE EXECUTION OF A SURROGATE PARENTHOOD AGREEMENT. AN
15 ATTORNEY REPRESENTING A PERSON EXECUTING A SURROGATE PARENTHOOD
16 AGREEMENT SHALL ALSO SIGN THE AGREEMENT, BUT NOT AS A PARTY.

17 SEC. 87. A SURROGATE PARENTHOOD AGREEMENT SHALL CONTAIN THE
18 FOLLOWING TERMS:

19 (A) THAT THE SURROGATE AGREES TO BE ARTIFICIALLY INSEMINATED
20 WITH THE SEMEN OF THE NATURAL FATHER BY A LICENSED PHYSICIAN.

21 (B) THAT THE SURROGATE AGREES NOT TO FORM OR ATTEMPT TO FORM
22 A PARENT-CHILD RELATIONSHIP DURING THE PENDENCY OF THE INTERIM
23 ORDER AS PROVIDED FOR IN SECTION 87, OR SUBSEQUENT TO TERMINATION
24 OF THE SURROGATE'S PARENTAL RIGHTS TO THE CHILD.

25 (C) THAT THE SURROGATE EXPRESSLY ACKNOWLEDGES THE INTENT AND
26 PURPOSES OF THE SURROGATE PARENTHOOD AGREEMENT AND AGREES TO
27 VOLUNTARILY RELINQUISH ALL PARENTAL RIGHTS TO THE CHILD AND UPON

1 REQUEST OF THE NATURAL FATHER TO EXECUTE A CONSENT TO THE
2 ADOPTION OF THE CHILD BY THE ADOPTIVE PARENT.

3 (D) THAT THE SURROGATE UNDERSTANDS AND AGREES TO ASSUME ALL
4 RISKS, INCLUDING THE RISK OF DEATH, WHICH ARE INCIDENT TO CONCEPTION,
5 PREGNANCY, CHILDBIRTH, AND POSTPARTUM COMPLICATIONS.

6 (E) THAT THE SURROGATE AGREES TO UNDERGO PSYCHIATRIC EVALUATION
7 AND TO SUBMIT THE EVALUATIONS TO THE NATURAL FATHER AND THE ADOPTIVE
8 PARENT, IF THE NATURAL FATHER IS MARRIED, AND THE INSEMINATING
9 PHYSICIAN, ABSENT ANY INFORMATION WHICH WOULD TEND TO IDENTIFY
10 THE SURROGATE, AND THAT THE SURROGATE AGREES TO SIGN MEDICAL
11 RELEASES PRIOR TO THE EVALUATIONS.

12 (F) THAT THE SURROGATE AGREES TO SUBMIT TO THE INSEMINATING
13 PHYSICIAN ANY MEDICAL EVALUATIONS RELATING TO THE SURROGATE PARTNERSHIP
14 AGREEMENT WHICH ARE NOT MADE BY THE INSEMINATING PHYSICIAN.

16 (G) THAT THE SURROGATE AGREES TO ADHERE TO ALL MEDICAL
17 INSTRUCTIONS GIVEN TO HER BY THE INSEMINATING PHYSICIAN AS WELL
18 AS HER PHYSICIAN.

19 (H) THAT THE SURROGATE AGREES TO FOLLOW A PRE-NATAL MEDICAL
20 EXAMINATION SCHEDULE TO CONSIST OF AT LEAST 1 VISIT PER MONTH
21 DURING THE FIRST 7 MONTHS OF PREGNANCY AND AT LEAST 2 VISITS PER
22 MONTH DURING THE EIGHTH AND NINTH MONTHS OF PREGNANCY.

23 (I) THAT THE SURROGATE AGREES THAT SHE WILL NOT ABORT THE
24 CHILD ONCE CONCEIVED UNLESS SHE DESIRES TO DO SO UPON BEING
25 ADVISED BY THE INSEMINATING PHYSICIAN THAT SUCH ACTION IS
26 NECESSARY FOR HER PHYSICAL HEALTH.

1 (J) THAT THE SURROGATE AGREES TO UNDERGO A COMPREHENSIVE
2 MEDICAL EVALUATION, UNDER THE DIRECTION AND SUPERVISION OF A
3 LICENSED PHYSICIAN, TO DETERMINE WHETHER HER PHYSICAL HEALTH IS
4 SATISFACTORY. THE COMPREHENSIVE MEDICAL EVALUATION SHALL INCLUDE
5 TESTING FOR VENEREAL DISEASES, SPECIFICALLY INCLUDING SYPHILIS
6 AND GONORRHEA. THE SURROGATE AGREES TO UNDERGO VENEREAL DISEASE
7 TESTING BEFORE EACH INSEMINATION.

8 SEC. 89. IN ADDITION TO THE TERMS REQUIRED BY SECTION 85, A
9 SURROGATE PARENTHOOD AGREEMENT SHALL CONTAIN THE FOLLOWING
10 TERMS:

11 (A) THAT THE NATURAL FATHER AND THE ADOPTIVE PARENT, IF THE
12 NATURAL FATHER IS MARRIED, AGREE TO DEPOSIT THE SURROGATE'S COM-
13 PENSATION IN AN INTEREST BEARING ESCROW ACCOUNT UPON EXECUTION OF
14 THE SURROGATE PARENTHOOD AGREEMENT, TO BE PAID TO THE SURROGATE
15 IN FULL WITH ACCRUED INTEREST UPON BIRTH OF THE CHILD AND TERMI-
16 NATION OF THE SURROGATE'S PARENTAL RIGHTS.

17 (B) THAT THE NATURAL FATHER AND THE ADOPTIVE PARENT, IF THE
18 NATURAL FATHER IS MARRIED, AGREE TO PAY THE EXPENSES INCURRED BY
19 THE SURROGATE AS A RESULT OF HER PREGNANCY, WHICH EXPENSES SHALL
20 INCLUDE ALL MEDICAL, PSYCHIATRIC, HOSPITALIZATION, PHARMACEUTI-
21 CAL, LABORATORY, AND THERAPY EXPENSES INCURRED IN THE SURROGATE'S
22 PREGNANCY, NOT COVERED OR ALLOWED BY HER PRESENT HEALTH AND MAJOR
23 MEDICAL INSURANCE, INCLUDING ANY MEDICAL EXPENSES INCURRED UPON
24 ORDER OF A LICENSED PHYSICIAN, BUT WHICH EXPENSES SHALL NOT
25 INCLUDE ANY EXPENSES FOR LOST WAGES OF THE SURROGATE OR OTHER
26 NONRELATED INCIDENTALS, UNLESS SPECIFICALLY ENUMERATED WITHIN THE
27 AGREEMENT.

1 (C) THAT THE NATURAL FATHER AGREES TO UNDERGO A
2 COMPREHENSIVE MEDICAL EVALUATION, UNDER THE DIRECTION AND SUPER-
3 VISION OF A LICENSED PHYSICIAN, TO DETERMINE WHETHER HIS PHYSICAL
4 HEALTH IS SATISFACTORY. THE COMPREHENSIVE MEDICAL EVALUATION
5 SHALL INCLUDE TESTING FOR VENEREAL DISEASES, SPECIFICALLY INCLUD-
6 ING SYPHILIS AND GONORRHEA. THE NATURAL FATHER AGREES TO SUBMIT
7 TO VENEREAL DISEASE TESTING BEFORE EACH DONATION OF SEMEN.

8 (D) THAT THE NATURAL FATHER AGREES TO SUBMIT TO THE INSEMI-
9 NATING PHYSICIAN ANY MEDICAL EVALUATIONS WHICH RELATE TO THE SUR-
0 ROGATE PARENTHOOD AGREEMENT WHICH ARE NOT MADE BY THE INSEMINAT-
1 ING PHYSICIAN.

2 SEC. 91. IN ADDITION TO THE TERMS REQUIRED BY SECTIONS 85
3 AND 87, A SURROGATE PARENTHOOD AGREEMENT SHALL CONTAIN THE FOL-
4 LOWING TERMS:

5 (A) THAT THE SURROGATE PARENTHOOD AGREEMENT WILL TERMINATE
6 UPON WRITTEN NOTICE TO THE SURROGATE FROM THE NATURAL FATHER AND
7 THE ADOPTIVE PARENT, IF THE NATURAL FATHER IS MARRIED, IF THE
8 NATURAL FATHER AND THE ADOPTIVE PARENT, IF THE NATURAL FATHER IS
9 MARRIED, DETERMINE THAT PREGNANCY HAS NOT OCCURRED WITHIN A REA-
0 SONABLE TIME.

1 (B) THAT THE NATURAL FATHER AGREES TO ASSUME THE LEGAL
2 RESPONSIBILITY FOR ANY CHILD CONCEIVED PURSUANT TO THE SURROGATE
3 PARENTHOOD AGREEMENT.

4 (C) THAT IF THE NATURAL FATHER OR THE ADOPTIVE PARENT, IF
5 THE NATURAL FATHER IS MARRIED, DIES PRIOR TO TERMINATION OF THE
6 SURROGATE'S PARENTAL RIGHTS, THE SURROGATE PARENTHOOD AGREEMENT
7 SHALL REMAIN IN FULL FORCE AND EFFECT WITH RESPECT TO THE

1 SURVIVING PARTY; THAT IF BOTH THE NATURAL FATHER AND THE ADOPTIVE
2 PARENT, IF THE NATURAL FATHER IS MARRIED, DIE PRIOR TO TERMINA-
3 TION OF THE SURROGATE'S PARENTAL RIGHTS, THE SURROGATE SHALL BE
4 ENTITLED TO HER FULL COMPENSATION AND EXPENSES AND MAY ELECT TO
5 KEEP THE CHILD OR EXECUTE A CONSENT TO THE ADOPTION OF THE CHILD
6 OR A RELEASE OF THE CHILD FOR ADOPTION.

7 SEC. 93. A SURROGATE PARENTHOOD AGREEMENT MAY CONTAIN TERMS
8 AGREED TO BY THE PARTIES IN ADDITION TO THE TERMS REQUIRED BY
9 SECTIONS 87 TO 91.

10 SEC. 95. THE DEPARTMENT SHALL ESTABLISH BY A RULE PROMUL-
11 GATED PURSUANT TO ACT NO. 306 OF THE PUBLIC ACTS OF 1969, AS
12 AMENDED, BEING SECTIONS 24.201 TO 24.315 OF THE MICHIGAN COMPILED
13 LAWS, A MAXIMUM FEE FOR COMPENSATION OF A SURROGATE. THE MAXIMUM
14 FEE SHALL BE REVIEWED EVERY 2 YEARS. THE MAXIMUM FEE ESTABLISHED
15 BY THE DEPARTMENT SHALL NOT BE LESS THAN \$10,000.00.

16 SEC. 97. A PHYSICIAN SHALL NOT ARTIFICIALLY INSEMINATE A
17 PERSON WHO THE PHYSICIAN KNOWS TO BE A SURROGATE UNLESS THE PHY-
18 SICIAN IS PROFESSIONALLY SATISFIED WITH THE MENTAL AND PHYSICAL
19 SUITABILITY OF THE SURROGATE AND THE NATURAL FATHER, AND, IF A
20 PROCEEDING UNDER SECTION 73 IS COMMENCED, UNLESS AN ORDER CERTI-
21 FYING THE SUITABILITY OF THE ADOPTIVE PARENT GRANTED UNDER
22 SECTION 75 IS PRESENTED.

23 SEC. 99. NOT MORE THAN 3 DAYS AFTER THE BIRTH OF A CHILD
24 CONCEIVED PURSUANT TO A SURROGATE PARENTHOOD AGREEMENT, A HUMAN
25 LEUKOCYTE ANTIGEN TEST SHALL BE PERFORMED ON THE NATURAL FATHER,
26 THE SURROGATE, AND THE CHILD. THE TEST RESULTS SHALL BE
27 SUBMITTED TO THE COURT.

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