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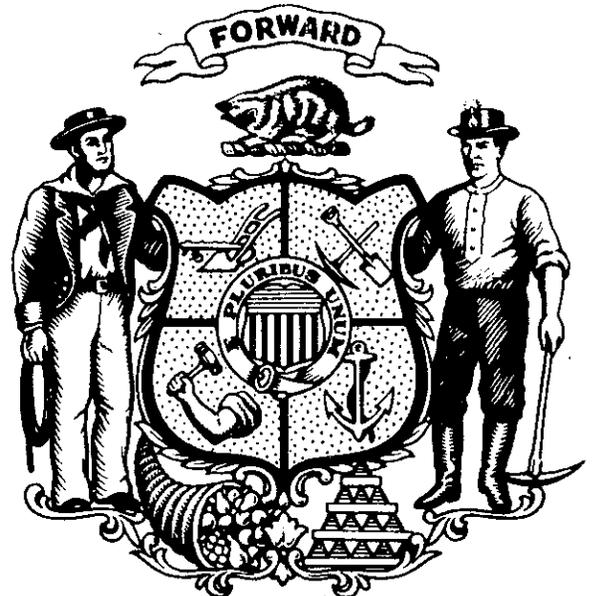
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## CHILDBEARING BY CONTRACT: ISSUES IN SURROGATE PARENTING

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## CHILDBEARING BY CONTRACT: ISSUES IN SURROGATE PARENTING

### I. INTRODUCTION

In 1985 a New Jersey woman signed a contract to conceive and bear a child for another couple for a fee. Mary Beth Whitehead agreed to be artificially inseminated by William Stern's sperm and promised to surrender the child to him. After giving birth, Mrs. Whitehead (now Whitehead-Gould) decided she could not surrender the infant. That action and events that followed led to the controversial *Baby M* case, in which a judge was asked to decide who would get custody of the child. The case triggered a national debate, not only over the circumstances of the child's birth, but on the legality and ethics of surrogate parenting.

Whether or not the facts of the *Baby M* case fit all surrogate mother arrangements, the case illustrates many of the problems and dilemmas of the practice. It has led to widespread debate in the legal and medical professions and has involved members of religious bodies, feminists, child welfare professionals, attorneys and the general public. All these groups at times have conflicting goals or values and all have a stake in how state legislatures and the legal system respond to surrogacy and its implications.

The issue has already attracted considerable legislative attention. In 1987, 27 states considered surrogate parenting bills, and 3 took final action. Louisiana banned commercial surrogate contracts (No. 583, Acts of 1987). The Arkansas Legislature approved surrogacy, but Governor Clinton vetoed the measure (HB-1989). Nebraska, in January of 1988, declared surrogate contracts invalid and unenforceable (LB-674). In addition, Nevada revised its adoption laws to allow payments to surrogate mothers (Chapter 773, Laws of 1987).

Three surrogate proposals are under consideration in the 1987 Wisconsin Legislature. One would prohibit agreements for a fee, a second would also prohibit fees for surrogates and would require a court approved contract for voluntary surrogate arrangements, and a third requests a study of legal and public policy issues by the Legislative Council.

Surrogacy raises a number of legal and ethical issues. For the most part, surrogate contracts are not recognized in either state or federal law. Although the New Jersey Supreme Court, in *In the Matter of Baby M*, declared such contracts unenforceable and against established public policy, the legal status of the child in surrogacy proceedings remains uncertain. In addition, the limited number of cases that have come to public attention have added a new dimension — some surrogate mothers are not prepared for the trauma of giving up a child they carried to term. Ethical issues being debated include whether it is morally defensible to "sell" babies or child-bearing personal services, or to contract away abortion rights, or whether the entire practice has any moral standing at all.

This bulletin will examine the concept of surrogate parenting, including arguments for and against such arrangements, legal aspects of the issue, and legislative alternatives and proposals. The primary focus is on the commercial aspects of surrogate parenting.

### II. DIMENSIONS OF SURROGATE PARENTING

#### Definitions

Women who bear children for others are called "surrogate mothers". A surrogate, according to the dictionary is "one that serves as a substitute". In current usage, a surrogate mother is a woman who is inseminated with the sperm of a man whose wife is not capable of conceiving or carrying a child to term. Synonymous terms are "natural", "genetic", "biological", or "birth" mother, when used in this context. Like the father, the woman is the child's biological parent. She is, therefore,

not a true surrogate. "Surrogate mother", however, is the most commonly used phrase adopted to describe the arrangement which is usually conducted by contract. In the typical situation, the surrogate relinquishes the child to the contracting father after birth in accord with an agreement signed before the child's conception. Although a few women have given birth and received only expense money, most surrogates receive a fee. The fee and the fact that the surrogate is also the child's biological mother is the source of much of the controversy.

A contracting father is also referred to as the "natural", "biological" or "intended" father. He is more than a sperm donor since the intent of a contract is to make him the child's legal father. Public discussion of surrogate parenting revolves around the rights of the 2 biological parents. Yet, in most cases, a third party — the wife of the natural father — may be the most important person of all. Her presumed infertility or inability to carry a child, when added to the desire of one or both parents for a child, is the major reason couples seek the services of a surrogate mother.

Although the vast majority of surrogates give birth for married couples, the procedure does not preclude similar arrangements on behalf of single parents. There are occasional press reports of such occurrences, sometimes involving disputes over custody and visitation. Adoption by single parents and artificial insemination of single women are already common, if not widespread, practices that approximate surrogate arrangements by singles.

#### **Extent: How Many Surrogate Births?**

No one knows how many children have been born to surrogate mothers. One leading practitioner estimated 500 contract births took place from 1976 to 1986. American Bar Foundation researcher Lori Andrews estimates a rate of 500 births annually in the last 2 or 3 years. Others active in the field consider this estimate too low. The attorney who represented the Sterns in the *Baby M* case suggests a total approaching 5,000 such births annually. It is not known how many surrogate births have occurred in Wisconsin, but at least one ended in a custody dispute. More may be in the offing since Michigan attorney Noel Keane, an acknowledged pioneer and leader among surrogate parenting brokers, began advertising in Wisconsin in late 1987 and early 1988.

Accurate figures are hard to find for several reasons. Surrogate births sometimes occur within families or circles of friends. The vital records system does not record surrogate births. Those done under contract seldom come to public attention, unless there is a custody dispute. Regardless of the statistics used, surrogate births are a very small proportion of total births. Nationally in 1986 there were more than 3.7 million live births; births to substitute mothers involve less than one-tenth of one percent of the total. The significance of surrogacy is not due to numbers, but stems from the issues it raises about families and public policy.

#### **History**

Surrogate motherhood may be at least as old as the Bible. In 2 instances in the book of Genesis, barren wives sent their husbands to others to conceive children. In each case, the biological mother was a servant and had sexual intercourse with the father. Biblical accounts do not mention whether the servants were paid a fee, but in both families the births caused much strife and jealousy. In modern times, the preferred technique is artificial insemination of a volunteer mother who receives expenses, or one who is under contract and paid a fee in addition to expenses.

Modern surrogate parenting began sometime in the 1970s. A husband and his infertile wife contacted Michigan attorney Noel Keane in 1976 for help in finding a woman to be artificially inseminated with the husband's sperm in order to bear them a child. Keane cited an instance in California and another case in Michigan where apparently similar arrangements had been made. In the California case a couple found a woman to bear a child for them through newspaper advertisements. What was remarkable was the number of women who responded to the advertising. Subsequently, Keane's clients contracted for and obtained a child from a surrogate mother who received expenses but not a fee. Keane has since become a leader in the field. It was his New York

office that drew up the contract between Mary Beth Whitehead and William Stern, the principals in the *Baby M* case.

By 1980, surrogate parenting had become well known due to exposure in newspapers and national daytime television. One birth mother, who later regretted her decision and became an outspoken critic, became a popular media figure. Additional publicity was gained when a dispute over the paternity of a child born to a woman under a surrogate mother contract was resolved on the Phil Donahue show.

At the same time, instances of surrogate births occurred in other parts of the world. Cases were recorded in continental Europe, Great Britain, and Australia. In 1984, the Australian state of Victoria passed a law making it an offense to give or receive payment for acting as a surrogate mother. In Great Britain, a national commission recommended banning commercial contracts. The Warnock Commission in 1984 decided that such contracts could lead to the exploitation of poorer women as paid child bearers for others better off. It recommended criminal penalties for the operation of both for profit and non-profit surrogate agencies. In response to a highly publicized surrogate birth, in 1985 Great Britain passed an act that prevents third parties from profiting from a surrogate arrangement. The legal status of surrogate parenting in the United States, however, remains uncertain.

### *"Baby M"*

In a highly publicized case, New Jersey housewife Mary Beth Whitehead signed a 6-page contract in 1985 to bear a baby for William and Elizabeth Stern. Problems did not become apparent until after the baby was born. After she delivered the infant girl to the custody of the Sterns, Mrs. Whitehead asked to have the baby back for a few days. She subsequently decided to keep the child and forego the fee. When the Sterns discovered her intentions, they obtained a court order and sought police intervention. Whitehead and her family fled to Florida and eluded the authorities.

Eventually the Sterns found the Whiteheads in Florida and brought the child back to New Jersey. In May 1986, a court awarded temporary custody to the Sterns with supervised visitation rights for the Whiteheads. On March 31, 1987, a New Jersey trial court granted permanent custody to the Sterns, upheld their contract, permitted Elizabeth Stern to adopt the child, and denied any rights to the birth mother. On February 3, 1988, the New Jersey Supreme Court approved only the custody portion of the lower court's decision, but ruled that surrogate parenting contracts fall under the New Jersey baby-selling statutes and are therefore illegal (*In the Matter of Baby M*, Slip opinion No. A-39-87, Supreme Court of New Jersey).

## III. WHY DO PEOPLE CHOOSE SURROGATE PARENTING?

### **Female Infertility**

Demand for substitute birth mothers stems primarily from infertility. The National Center for Health Statistics estimates that from 10 to 15 percent of all married couples are infertile (defined as partners who are sexually active, not using contraception, and unable to conceive after at least one year). The center excludes the surgically sterile from its statistics. There is also evidence that suggests that the number of infertile women is on the increase due to the use of intra-uterine birth control devices, greater incidence of sexually-transmitted diseases, previous abortions, and the postponement of childbearing to establish careers. Studies have indicated that women who delay having children are more likely to be infertile, more likely to bear children with birth defects, and run greater risks of physical impairment. Until the last 10 to 15 years, adoption was considered the only alternative when a woman could not conceive.

### **Adoption as an Alternative**

Couples who want, but cannot conceive children, frequently consider adoption. Despite a marked increase in the number of live births to single women, there are fewer adoptions of unrelated individuals. Recorded births to all unmarried women increased by almost 30 percent from 1975 to 1984, while births to unmarried women 15 to 24 years of age increased by a little more than 50 percent. However, the National Committee for Adoption reports that there were only 50,720 healthy infants adopted by parents who were not blood relatives in 1982, compared to 82,800 adoptions in 1971. At the same time, demand has continuously increased. In 1984, the national committee estimated that the 2 million couples who were seeking adoption were competing for 58,000 babies, a 35 to 1 ratio. More recent estimates find as many as 40 potential parents for every available infant. Such statistics apparently do not include the number of single people who consider adoption. While birth control and abortion have served to lower the birth rate, adoption experts believe that the increasing willingness of single mothers to keep their children is also a significant factor in limiting the number of infants available for adoption.

An American Bar Foundation researcher reported that 15 percent of unwed teenage mothers gave their children up for adoption in 1972, while 4 percent allowed adoptions in 1978. In 1984, only 3 percent of all unwed mothers in California opted for adoption. One explanation offered for this trend is that the stigma once attached to births to single mothers has diminished. Peers and relatives often encourage single mothers to keep their babies. Medical personnel and social workers are less likely to encourage women to give babies up for adoption. Laws have changed in recent years to allow single mothers more time to make a decision or more time to revoke a previous decision to allow adoption. Couples often cite long waiting periods or other obstacles to adoption as a reason for seeking surrogate mothers.

### **Other Alternatives**

The most common treatments for female infertility are drugs and surgery. If these treatments fail, another alternative is *in vitro* fertilization. In this procedure, a physician unites a surgically removed egg from an infertile woman with her husband's sperm in a specially prepared laboratory dish and then implants it in her womb. The first so-called "test tube" baby was born in England in 1978. Through this procedure, pregnancy is achieved 10 to 20 percent of the time, and with multiple attempts the success rate rises to 30 percent. These statistics indicate the number of pregnancies and not the number of children born. A woman unable to produce ova or with tubal damage may have an egg from another woman implanted in her womb and fertilized by her husband's sperm. Both procedures are expensive, although one or 2 attempts cost less than a typical surrogate mother contract. Continuous treatments may cost more. These procedures are not suitable for women who cannot bear children because of other medical problems (diabetes or heart disease) or who have had hysterectomies, and are not recommended for women who have had repeated miscarriages.

There are other less commonly used alternatives which rely on experimental or newly developed technology. A woman who cannot conceive or bear a child but produces eggs may have one or more surgically removed, fertilized by her husband's sperm, and implanted in another woman. These procedures require synchronization of menstrual cycles, prescribed fertility treatments, and delicate surgical techniques. The first such birth of this type was reported in this country in 1986. Birth mothers in these cases are *true* surrogates and are not genetically related to the child. Possibilities multiply from this point on and raise in some minds the specter of Aldous Huxley's "Brave New World".

### **Genetic Link to the Father**

Not all who contract for a surrogate have failed at adoption. There are those who would rather be childless than adopt an unrelated child. For such families a genetic link to their child is of primary importance and, for one reason or another, they were unable to benefit from *in vitro* fertilization.

William Stern of the *Baby M* case lost most of his family in Hitler's holocaust and wanted a child biologically linked to him. Newspaper interviews of intended fathers confirm the importance of a biological link to some seeking surrogates. One father favored a surrogate birth because "that child will be biologically half-mine", while another stated "we believe strongly in heredity".

#### **Who Becomes a Surrogate Mother?**

One of the few published studies of women who applied to be surrogate mothers (*American Journal of Psychiatry*, January 1983) found that applicants expressed a variety of reasons why they were willing to undergo a pregnancy for someone else. These included a wish to give the gift of a baby to couples who wanted a child; a degree of enjoyment in being pregnant ("the best time in my life", some said); and countering negative feelings stemming from a previous loss through abortion or adoption. Elements of sexual pride were also found (men cannot have babies). However, 89 percent of the women (108 out of 122) said they would require a fee of at least \$5,000 for their participation.

The article compiled income and education data on only the first 50 applicants. Out of the first 50 women interviewed, 20 were unemployed or receiving public assistance. Most, 41 out of 50, had a high school diploma, while one had a bachelor's degree, and another was a registered nurse. Annual family income of the applicants ranged from \$6,000 to \$55,000 for 1980 or 1981. The first 125 women were an average of 25 years of age and 56 percent were married, while 20 percent were divorced. How typical these women are of other potential surrogate mothers is not known.

### **IV. COMMERCIAL SURROGATE PRACTICES**

#### **Finding a Surrogate Mother**

Women willing to be surrogate mothers are found through newspaper ads, clinics or legal practices that specialize in such cases, or informal contacts. A typical ad might read: "Wanted: childless couple with infertile wife wants female donor for artificial insemination. State fee. All replies held confidential." An Iowa woman advertised herself as a surrogate mother in newspapers for a fee of \$20,000 and received many replies. There are national organizations devoted to helping infertile couples and even a surrogate mother directory published in California. Today's leading brokers started in general law practice and have grown into clinical establishments with both legal and medical staffs. The largest services appear to be in California, Kentucky, Maryland, Michigan, and New York.

Brokers are paid to match surrogates and intended parents. Each practice apparently has its own standards for screening participants and no single pattern has emerged. One psychiatrist active in the practice says he does not know who would make a good surrogate mother and therefore, does not turn anyone down for other than physical health reasons. In Noel Keane's practice the intended parents choose the mother and, as in the case of the Sterns and Whiteheads, may have considerable contact with one another. A leading broker in Kentucky insists on anonymity by not allowing the mother and the intended parents to meet or learn each other's identity. One clinic claims it turns down 80 to 90 percent of all applicants as unsuitable. Another estimates that as many as two-thirds of all applicants are rejected. Several brokers have indicated a preference for women who have had at least one child, presuming they better understand the risks of childbearing and what it might mean to give a child away. At the heart of all surrogate agreements is a contract that requires a woman to surrender her parental rights to another party for a fee.

#### **Contract Terms**

A surrogate mother contract sets out the limits of the responsibilities of the surrogate, her husband (if she is married), and the intended father. According to Kentucky attorney Katie Marie Brophy, it may amount to no more than a "gentlemen's agreement" since many provisions could be unenforceable. The contract used here for illustration is one that was developed by Ms. Brophy for

a Kentucky surrogate practice and published in *Journal of Family Law*, January 1982. Terms of this contract are compared with clauses in the one the Whiteheads and William Stern signed.

In the Kentucky clinic's contract, the surrogate agrees to artificial insemination with the father's sperm, to carry the child to term and to surrender that child to the intended father as soon after birth as possible. She agrees to terminate her parental rights. The contract requires her to follow medical instructions. She agrees not to abort the fetus unless necessary for her health or if the inseminating physician determines the child is "physiologically abnormal". She agrees not to use tobacco, drugs, and alcohol. She (and her family) assume all risks incident to pregnancy, childbirth, and post-partum complications, including death. The contract includes a "negotiable" paragraph that would either cancel or limit the fee paid to the birth mother if the child is miscarried, dies, or is stillborn. In case of a miscarriage, she is released from any further obligation to the intended father.

Mary Beth Whitehead signed a contract that would have allowed William Stern to order an abortion if tests revealed a serious birth defect (severe retardation or serious physical handicap). If she refused, she and her family would have assumed responsibility for the child. Her contract also stated that if she miscarried before the fourth month, she would only receive expenses, and if she miscarried later she would be paid a \$1,000 fee, instead of the full \$10,000.

In the Kentucky clinic's contract, the intended father agrees to assume full responsibility for the child, pay all attorney's fees, medical expenses, and other required costs. He agrees to insure the surrogate's life with her family as beneficiaries. He agrees to pay a fee (typically \$10,000) when the child is surrendered. The intended father assumes legal responsibility for any child who might possess congenital abnormalities.

The Whitehead-Stern contract also stipulated that since some abnormalities cannot be detected, the intended father would assume responsibility for the child, regardless of birth defects.

As Ms. Brophy points out to potential clients, many clauses in the contract may be unenforceable. In fact, New Jersey's Supreme Court has ruled all such contracts invalid and unenforceable. Until the legal standing of such contracts is firmly established, their validity is, at best, uncertain.

## V. FOR AND AGAINST: THE ETHICS OF SURROGATE PARENTING

### Introduction

Moral judgments try to deal with the good and the bad aspects of life. What harm may surrogate parenting do? What good may it do? Ethical judgments of surrogate parenting express a number of concerns including the "marketing" of babies and the motives of the participants; the effect on family structure and on family members; the social status of women; and exploitation of poor women by the wealthy.

### Babies and Commerce

It is wrong, critics argue, to sell or purchase a child. "Children are not goods or property", says a family law attorney. A rabbi who teaches Jewish medical ethics is affronted by "the hiring of a uterus for 9 months". A professor of bio-medical ethics at the University of Minnesota agrees: "I do not think people should be gestating babies for money." A pioneer surrogate, Elizabeth Kane, regrets, even today, that she "sold" her infant son for \$10,000 in 1980.

Brokers such as William Handel and Noel Keane deny charges of baby-selling. They argue that they provide an essential service to couples who desperately want their own child. Surrogate agreements are arrived at openly and not surreptitiously, as in black market baby deals. Keane sees surrogacy as an acceptable alternative to adoption, particularly since adoptable babies are scarce. To him, contract parents are paying a birth mother for the services she rendered. He readily admits, however, few women would become surrogates without a fee.

The claim of payment for services strikes Elizabeth Kane as "hypocritical", because mothers may receive \$10,000 for a healthy child but only \$1,000 if the child is stillborn or deformed. As noted

earlier, Mary Beth Whitehead signed a contract that reduced or even eliminated a fee in case of an abortion or a miscarriage. The author of a Fall 1987 *Marquette Law Review* article maintains: "the argument that a surrogate contract is also for services rendered fails because final payment is not made until the mother terminates her parental rights and hands over the baby". New Jersey's Supreme Court agreed with the notion that intended parents are buying a baby.

The court also felt that the profits brokers earn, and the way in which they protect their profits, may have accounted for some of the problems between the Sterns and Whiteheads. It was later found that an attorney provided by the clinic spent little time explaining the consequences of the contract to Mrs. Whitehead (who was without her own legal counsel). The court also noted that the profit motive may have accounted for the failure to notify both parties of a psychologist's findings of Mrs. Whitehead's strong desire for another child and possible reluctance to terminate her parental rights.

Adoption experts argue that adoptions are not as difficult to arrange as they might seem. They say that people who search for surrogate mothers want perfect white babies. Many older children are available for adoption who would otherwise be in foster homes or group homes. Mildly handicapped and racially mixed children are also readily available. Black children, who constitute 14 percent of the child population, make up 37 percent of children awaiting adoptions and are readily available. On the other hand, the National Association of Black Social Workers opposes interracial adoptions. In addition, many couples are not prepared to raise handicapped or racially mixed children. As noted previously, the desire for a direct genetic linkage also causes some to rule out adopting a child of a different race.

Law professor and surrogate critic Herbert Krimmel has argued that the motives of both the surrogate and intended parents are suspect (*Hastings Center Report*, October 1983). The biological mother makes a decision to create, but not raise a child, for some benefit, usually money: "This separation of the decision to create a child from the decision to parent it is ethically suspect." When intended parents pay money they are looking for something of value. If the child is born with a genetic or congenital defect they may reject it. The surrogate may also refuse responsibility, which would result in the state becoming the child's guardian.

A Michigan case history illustrates the latter problem. A surrogate mother gave birth to a baby with microcephaly, an abnormal smallness of the head which usually indicates the child will be retarded. The contracting father, who by that time had separated from his wife, rejected the child and ordered medical treatment to be discontinued. Responsibility was also refused by the birth mother and her husband. The hospital took temporary custody to save the life of the infant. Blood and tissue test results indicated that the intended father was not the natural father. Since tests proved the surrogate's husband was the father, they ultimately accepted the child. Clearly these arrangements can get complicated. What if the intended father had been the natural father and still refused the child? Would he in fact be the legal father and be obligated for support? Krimmel believes these types of problems are inherent in surrogate parenting.

Professor of Law and Ethics John Robertson argues that selfish motives are not unique to surrogate parenting arrangements (*Hastings Center Report*, October 1983). He argues that they are no different from motives for artificial insemination, adoption, and planning for or spacing children. Uncaring reactions to a defective child are as likely among married couples or single parents under ordinary circumstances as in a surrogate arrangement. To Robertson, the fact that a couple pays a woman to bear a child is less important than how each party carries out his commitment. "Depending on the circumstances, a surrogate mother can be praised as a benefactor to a suffering couple .... or condemned as a callous user of offspring to further her selfish ends."

### **Families and Family Members**

Although it has been reported that more than 1,000 children have been born to surrogates, little is known about the effect of the surrogacy arrangement on the families involved.

To some Catholic theologians, surrogate parenting is an abomination which poses a threat to the family as an institution. It sets up, as a 1987 Vatican paper put it: "a division between the physical, psychological and moral elements which constitute these families" ("Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day"). Medical ethicist Leon Kass argues that the practice confuses the lineage of children and in so doing, can destroy the meaning of the family. Similar fears are expressed by spokespersons for the National Council of Churches and the Moral Majority, Inc.

Some surrogate mothers who subsequently regret their actions, cite their grief at losing the child. Literature on unwed mothers who gave up children uncovers long-term grief over the surrender, suggesting similar difficulties for surrogates. Other critics fear the effect of separation during the time a mother and child bond, a process which may even take place before birth. Breaking that bond is harmful to both, reasons a spokesperson for the National Committee for Adoption.

Proponents argue that while an unwed mother may surrender a child for adoption because she cannot keep it, a surrogate mother knows in advance she is to give up a child. She has signed a contract making that commitment. While both a surrogate and an unwed mother may feel a sense of loss when surrendering a child for adoption, the 2 cases differ. There may be an element of coercion, or at least force of circumstances, when a single mother surrenders a child. She may not have the means to support the child or may not want to bring up a child without a father. Surrogate mothers voluntarily sign contracts to give a child up.

Family law and treatment professionals fear the impact on the child upon discovery of his or her origins. What happens when the child finds out he or she was "bought"? Among adoptees, loss of self-esteem, feelings of rejection and rootlessness may follow the inability to find a biological mother. For a surrogate mother who has other children, the fact she gave away or sold a baby may cause problems within her family. Elizabeth Kane has testified that her children never really forgave her for giving away their "baby brother".

Neither the weakening of family structure argument nor the damage done to others convinces supporters that they are problems unique to surrogate arrangements. Divorce and remarriage, artificial insemination, and adoption are among the tolerated practices that may cause immediate or eventual grief to those involved. Should we ban these practices? What about the grief associated with not being able to have children?

### **Status of Women**

Some feminists have argued that using women as surrogate mothers for pay is a form of biological exploitation which takes advantage of a woman's reproductive capacity. Prominent feminists denounced the lower court's decision in the *Baby M* case as an "utter denial of the personhood of women", because they felt the court took away a woman's choice while upholding a dubious contract.

Not only did the Whitehead-Stern contract require Mrs. Whitehead to surrender the child, it gave Stern the right to order an abortion if the child evidenced serious defects. Failure to do so would have left the Whiteheads with the responsibility for the infant. Moreover, the contract ordered Mrs. Whitehead to follow the inseminating physician's orders on medical matters. These provisions led one nationally syndicated columnist to comment: "In short, she sold her body, put her womb in the hands of others."

Some supporters of surrogacy interpreted the New Jersey Supreme Court's decision as paternalistic and a denial of the right of women to control and profit from their bodies as they see fit.

### **Economic Exploitation**

Fear of economic exploitation of poorer women by the wealthy was the primary reason Great Britain's Warnock Commission recommended a ban on surrogate parenting. To some American observers, money not only taints individual arrangements, but would eventually create a class of women who would beget babies for fees.

At the time of the *Baby M* trial, many observers commented on the contrast between the Sterns and the Whiteheads. The Sterns both had advanced degrees, a combined annual income of around \$90,000, and a stable domestic life. The Whitehead's income was less than \$30,000, she was a high school dropout, he a sanitation worker, and they had a marital history that included a separation (they have since divorced), drinking problems, and Mrs. Whitehead was once employed as a "go-go" dancer. "Class is the fundamental underpinning of this case" said a New Jersey sociologist and critic. "It permeates everything, including the way we perceive the players and our notions of fitness."

A New York law professor and opponent doubts that blue collar couples could afford to become parents through surrogacy. The New Jersey Supreme Court observed that one would not expect women from the top income brackets to serve as surrogates for those in the lower income brackets. The author of a November 1986 *North Carolina Law Review* article interviewed potential surrogates and found that all of the women applying to be surrogates were unemployed or working at low-paying jobs.

Supporters, including an organization of surrogate mothers, argue that no one forces a woman to sign a surrogate agreement. There are other things women can do to earn money which do not entail the degree of risk and involvement required by surrogacy.

### **Medical Risks**

The American Fertility Society and the American College of Obstetricians and Gynecologists have expressed concern over the medical risk inherent in serving as a surrogate mother.

The Ethics Committee of the American Fertility Society recommended in 1986 ("Ethical Considerations of the New Reproductive Technologies", *Fertility and Sterility*, September 1986) against widespread application of surrogate motherhood because of serious reservations regarding the risk to the birth mother and to both families.

The American College of Obstetricians and Gynecologists, in expressing its misgivings, warned its members not to be in the pay of either party. The college found 4 ethical issues of consequence. One had to do with the physical and psychological risks to the surrogate; a second related to the responsibility for the welfare of the fetus; a third had to do with the problem of disputed custody; and the fourth involved couples who used surrogates for other than medical reasons (infertility or other disabilities).

## **VI. LEGAL ISSUES**

Surrogate parenting contracts may not be enforceable. They are now considered illegal in Louisiana, New Jersey, and Nebraska. Brokers say they warn their clients that if a birth mother changes her mind about giving up the child, there may be nothing they can do to obtain custody. At least 6 surrogates have tried to keep children. William Stern was the first father to win custody in open court. In Wisconsin, an intended father won a custody dispute with a surrogate mother in a Milwaukee County Circuit Court. Because the case was decided as a paternity matter, the records were sealed and the case only came to light when the parents told their story to the *Milwaukee Journal*.

### **Constitutional Issues**

Questions raised under constitutional law include: 1) Are surrogate arrangements protected under right to privacy decisions and implied rights to procreation? 2) Is it sex discrimination to allow a

surrogate mother to keep a child when males who donate sperm may not claim custody under artificial insemination laws?

The U.S. Supreme Court has recognized certain areas or zones of privacy relating to procreation as being constitutionally protected. In a series of cases involving the Fifth and Fourteenth Amendments, the court has ruled against involuntary sterilization, laws making the use of contraceptives by married persons a crime, and laws prohibiting abortions.

In *Skinner v. Oklahoma*, while overruling Oklahoma's involuntary sterilization law, the court stated that the right of procreation is "one of the basic civil rights of men". In *Griswold v. Connecticut*, the contraceptives case, the court condemned that state's regulation as an invasion of "the zone of privacy created by several fundamental constitutional guarantees". Unmarried individuals were drawn into the zone of privacy in *Eisenstadt v. Baird*, which reiterated the right of individuals to decide whether to bear or beget a child. The court continued this line of reasoning in *Carey v. Population Services, Inc.*: "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified invasion by the state". *Roe v. Wade* extended this right to abortions performed in the first trimester of pregnancy.

According to John Robertson, the author of a July 1986 article in the *Southern California Law Review*, the court's rulings have "recognized a married couple's right to procreate in language broad enough to encompass coital, and most noncoital, forms of reproduction". There is no reason, Robertson argues, that reproduction that uses a third party could not be recognized under procreative rights, whether the third party supplied sperm, egg, or uterus. If fertile, such couples would qualify as parents. Since they meet all but one qualification of other parents, "they should be free to procreate with the help of gamete or womb donors".

Critics writing in the November 1986 *North Carolina Law Review* and the Fall 1987 *Marquette Law Review*, found the right to procreation argument less compelling. They argued that the right of a couple to decide to have children appears to be a protected right. However, a right to contract with a surrogate mother is not protected because of the possible harm to the birth mother and the child.

A second constitutional issue involves questions of sex discrimination and relies on the equal protection clause of the Fourteenth Amendment. It also relies on an analogy between sperm donors and surrogate mothers and declares surrogacy to be the counterpart of artificial insemination.

The author of an article in the January 1987 *Iowa Law Review* argues that it is discrimination based on a sex classification not to allow payments to surrogate mothers while allowing payments to sperm donors. Furthermore, artificial insemination offers a legally recognized "cure" for male infertility, while surrogate motherhood would similarly allow a "cure" for female infertility. The author argues that sperm donors are protected from legal liability for the use of their semen, but laws neither recognize compensation for a surrogate mother, nor do they protect her from legal responsibility for the use of her womb.

Other legal observers have debunked the sperm donor/surrogate mother analogy since the risk to life and limb for a sperm donor is practically nonexistent, while pregnancy can be a considerable risk for a woman. The semen donor spends only a few moments of time, but a pregnant woman is on duty for 38 to 40 weeks.

### Issues in State Law

Court decisions and discussions of surrogate parenting indicate that 4 areas of law impinge on these arrangements. These areas are: 1) adoption and termination of parental rights; 2) legal paternity and artificial insemination; 3) child custody; and 4) contracts.

### *Adoption Laws*

Two features of many state adoption laws may restrict or prevent surrogate parenting agreements. One prohibits compensation for consent to an adoption, and the other does not allow consent for adoption before a child's birth.

At least 24 states prohibit the payment of compensation for adoptions. Often called "baby-selling" laws, these laws range from prohibiting all payments to those that allow payment of certain expenses. Illinois prohibits compensation for placing children, except by a state approved child welfare agency. Tennessee makes it a felony to sell or surrender a child for money or anything of value. Under Section 946.716 of the Wisconsin statutes, it is a Class E felony for a person to agree to place a child for adoption for an amount exceeding the actual costs of certain expenses, to receive a child for anything that exceeds certain expenses, or to arrange an adoption for anything of value (unless it is a public or licensed agency). Maximum penalties are a \$10,000 fine or 2 years in prison, or both.

In an attempt to avoid violating these laws, brokers treat surrogate agreements as service contracts which provide payments to surrogates for services rendered. Where states disallow such contracts, broker Noel Keane suggests intended parents may simply take physical custody of the child and avoid an adoption hearing. Since there is no adoption, there is no violation of baby-selling and adoption consent laws.

While critics of the practice favor the use of adoption statutes to control it, proponents maintain that modern anti-baby-selling laws predate surrogate parenting and were designed to protect unwed mothers. They do not and should not apply to surrogate contracts. Under such an agreement the intended father is also the biological father. How can a father buy his own child? Secondly, they argue a surrogate agrees to surrender the child voluntarily and does not do so under pregnancy related stress. Finally, the fees are paid to possibly replace lost work time or pain and suffering.

All 50 states have laws that prohibit a mother from granting consent to adoption before a child's birth or for some period of time after birth. Kentucky, for example, has a 5-day waiting period, while Pennsylvania has a waiting period of 20 days. Under statute Section 48.837 (4) (a), Wisconsin does not allow an adoption hearing before the birth of the child. Section 48.41 of the Wisconsin statutes spells out the procedure for voluntary termination of parental rights.

Laws to ban the sale of babies, and adoption consent laws, were both designed to prevent pressure from being applied to the unmarried mother. A surrogate's decision is unlike one caused by an unwanted pregnancy. As one observer noted (*Iowa Law Review*, January 1987): "The surrogate mother has voluntarily chosen to bear a child for the sponsoring couple with the understanding that upon birth she will relinquish all parental rights."

### *Paternity Laws*

Paternity laws may also affect surrogate arrangements. Some states retain the common-law rule that the husband of a woman who gives birth to a child is presumed to be the father. Courts in many of these states will not admit evidence to the contrary. A majority of states now allow a rebuttal to the presumption of paternity, but place a strict burden of proof on the contending party. Wisconsin law presumes a man to be the natural father of a child under Section 891.41, but sets forth determination of paternity procedures in Section 767.45.

Surrogate supporters argue that paternity laws were designed to protect the child, particularly rights to inheritance, and were not drafted in anticipation of surrogate parenting arrangements. Rights and duties outlined in surrogate agreements fall on the natural father and would secure the child's rights. Critics point out that paternity determinations are made by courts and do not necessarily give custody to one party or the other.

Paternity laws could also affect surrogate arrangements based on the reliance on artificial insemination. Since surrogate mothers are artificially inseminated, laws on that subject might be

relevant. At least 30 states have laws that presume the husband of the woman being inseminated to be the child's father and which relieve the sperm donor of any legal obligation. Under Section 891.40 of the Wisconsin statutes, the husband of the mother at the time of the insemination is the natural father of the child. The donor bears neither liability for support of the child nor does he have parental rights to the child.

Although some critics approve applying artificial insemination law to surrogate agreements, others find the analogy suspect and open to court challenge.

#### *Custody Issues*

The basis for custody decisions is a determination of the best interests of the child. In a report that recommended legislative regulation of surrogate parenting agreements, the Judiciary Committee of the New York State Senate maintained that the state has an interest in determining if a child will have a stable and suitable home. The standards for judging the suitability of intended parents include marital and family status, physical and mental health, property and income, any history of child abuse or neglect, and other relevant facts.

Section 48.01 (2), Wisconsin statutes, states that: "The best interests of the child shall always be of paramount consideration", although other interests may be taken into account. Wisconsin's Supreme Court discussed the meaning of "best interests of the child" in *Adoption of Tachick*, 60 Wis.2d 540 (1973). The court saw the following factors as relevant: separation trauma; age, health and personal qualities of adoptive parents; danger of interference from natural parent or parents; and ability of adoptive parents to provide food, shelter, clothing, love and affection, and education and training.

A spokesperson for the National Committee for Adoption objects to surrogate contracts because they do not take into account the best interest of the child. Unlike normal adoption proceedings, no one screens intended parents: "Nothing is required but the financial wherewithal to hire an attorney to negotiate and set up an agreement."

Supporters of surrogate agreements argue that intended parents should receive the same treatment as ordinary parents, since the only qualification they lack is the physical ability to have children. Adoption proceedings, on the other hand, were devised to provide a permanent home for a child who otherwise would not have one. In a surrogate agreement, the child's home is provided for by contract.

#### *Contractual Duties*

Existing law does not address the issues of the surrogate's liability or acceptable remedies in case of breach, nor does it address the responsibilities of the intended parents.

Contracts impose a number of duties on one or both of the intended parents. These include the payment of expenses and fees and the assumption of responsibility for the child at birth. If the birth mother performs as agreed, does she have recourse if the other party refuses to pay all or part of the fees and expenses? What happens if the intended parents refuse to take the child? Can the surrogate mother sue the natural father for child support?

Enforcement of a surrogate mother's duties are even more difficult. She agrees to be inseminated, bear a child, and surrender all parental rights. She is also to refrain from sexual intercourse during the insemination period and has the duty to refrain from activities that might harm the fetus. If there are medical clauses in the contract, what recourse do the intended parents have if the surrogate refuses to follow them? If she refuses the insemination are any expenses refunded to the intended parents? If the surrogate chooses to have an abortion in the first trimester, which is legally her right, can the intended parents sue for expenses? Can they sue for damages if the surrogate decides to keep the child?

Even if a surrogate agreement cleared all other legal hurdles, many questions remain about the responsibilities of each party to the contract.

## VII. LEGAL STATUS

### Legislative Enactments

Surrogate parenting has received scattered recognition from state legislatures. In 1984, Kansas passed a law (Chapter 224, Laws of 1984) that allows advertising by potential surrogate mothers or those seeking one. This is an exception to the state's ban on advertising for adoptions (Section 65-509 (d), Revised Kansas Statutes). Arkansas, in No. 904, Acts of 1985, enacted a law stating that a child born to an unmarried woman through artificial insemination is the child of that woman, except in the case of a surrogate mother. In such a case, the intended mother can obtain a substituted birth certificate from a court of competent jurisdiction. Section 127.303, Revised Statutes of Nevada, exempts lawful surrogate contracts from the prohibition of payment of money or anything of value in return for consent to an adoption.

Two states, Louisiana and Nebraska, have banned surrogate contracts. The 1987 Louisiana act provides that: "A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy." The act defines the contract as one "whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child." There is no penalty prescribed. Nebraska's act, 1988 LB-674, provides that: "A surrogate parenthood contract shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child." The act defines a surrogate parenthood contract as one "by which a woman is to be compensated for bearing a child of a man who is not her husband". As in Louisiana, there are no penalties prescribed.

### Court Decisions: Baby M

The New Jersey Supreme Court ruled on February 3, 1988, *In the Matter of Baby M* (Slip opinion No. A-39-87), that commercial surrogate motherhood contracts are illegal. The court overruled the State Superior Court which decided that the contract between the Whiteheads and the Sterns was valid, but agreed with the judge's decision to give custody of the child to the natural father. The court found that the contract violated the state's adoption laws by specifying the payment of a fee in return for the right to adopt a child. The court stated that the contract also violated state public policy by making a permanent separation of the infant from one of her natural parents: "The whole purpose and effect of the surrogate contract was to give the father exclusive rights to the child by destroying the rights of the mother."

In the court's opinion, the lower court's award of custody to Mr. Stern was in the best interests of the child. His home promised a security that Mary Beth Whitehead's family life lacked. However, the court argued, the contract disregarded these interests with its complete lack of inquiry into the relative fitness of the intended parents and the natural mother and the effect on the child of not living with her natural mother.

The decision did not accept the idea that a surrogate parenting agreement would be protected under the right to procreate: "The right to procreate very simply is the right to have natural children whether through sexual intercourse or artificial insemination." It does not imply freedom to make a contract with a third party. Thus, the court concluded that Stern's right to procreate did not imply the right to custody of Baby M over and above that of Mrs. Whitehead.

### Other Court Decisions

How definitive the New Jersey ruling will be remains to be seen. A Michigan trial court ruled just prior to the New Jersey ruling that a surrogate contract is unenforceable under Michigan laws on grounds similar to those mentioned in the New Jersey ruling. The Michigan court also ruled that

insofar as the surrogate agreement was one for personal services, the Thirteenth Amendment bars specific performance. A ruling on the custody issue is pending.

Michigan's Supreme Court, in *Syrkowski v. Appleyard*, 420 Mich. 367 (1985), allowed a biological father to use the state's paternity statute to effectuate a surrogate parenting agreement. In this case, the defendant — the natural mother — joined in the request. The Court did not overrule a lower court case, *Doe v. Kelly*, 307 N.W. 2d 438 (1981), in which the lower court concluded that statutory language prohibiting payment of consideration for adoptions did not infringe on the rights of privacy claimed in connection with a surrogate motherhood contract.

Kentucky's Supreme Court, on the other hand, in *Surrogate Parenting Assocs. v. Commonwealth ex. rel. Armstrong*, 704 S.W. 2d 209 (1986), held that "fundamental differences" between surrogate arrangements and baby-selling placed surrogate parenting beyond the reach of the state's baby-selling statute. Unlike a normal adoption, the court said, the agreement was made before conception and was not the result of an unwanted pregnancy. In addition, the court stated that this was not an adoption case: "Because of the existence of a legal relationship between the father and the child, any dealing between the father and the surrogate mother in regard to the child cannot properly be characterized as an adoption." Although allowing the contract, including the fee, the court also held that a surrogate mother could change her mind about giving up the child within the 5-day statutory limit, regardless of the contract.

In a 1986 case, a lower court in New York, in *Baby Girl L.J.*, 505 N.Y.S. 2d 813, upheld a fee paid to a surrogate. Despite serious moral and legal reservations, the court ruled that current legislation does not specifically forbid payments to natural mothers under surrogate parenting agreements. The court recommended that the legislature determine if such payments are legal.

While surrogacy opponents believe the New Jersey ruling will be influential, the practice of commercial surrogate parenting has continued. Whether other state courts will follow New Jersey's lead remains to be seen. It may be that the future of surrogacy lies in the hands of state legislatures.

### VIII. LEGISLATIVE ALTERNATIVES

A flood of legislation followed the March 31, 1987, *Baby M* ruling. According to the National Conference of State Legislatures, 27 states and the District of Columbia considered 73 bills in 1987, and took final action on 3 of the bills. Of the 73 bills, 26 would have regulated surrogacy, 25 would have outlawed it, and 22 called for study commissions. Many of the bills died in committee.

There are several approaches which states may follow in dealing with surrogacy. Among the alternatives they could choose are: 1) leave things as they are and either allow the courts to rule under current laws or allow the private sector to regulate the practice; 2) outlaw all forms of arrangements or ban commercial contracts and third party profits; 3) regulate either all arrangements or purely commercial ones; or 4) appoint study commissions to examine the issues in greater detail before deciding what legislation, if any, is needed.

#### No Legislation

Since few contracts end in disputes, those that do can be resolved by the courts. New Jersey's Supreme Court found ample means in current law to rule against contracts in the *Baby M* matter. Kentucky's Supreme Court found grounds for allowing contracts. The circumstances of each case were different. This approach argues that the courts rather than legislatures are more flexible instruments for resolving surrogacy cases.

A Northwestern University law professor argues that we should keep the "heavy hand of the state" out of surrogate arrangements. The law has no business being involved in what are private and often very painful family decisions. Legislation sets up regulations that will need continual revision. Courts should simply refuse to enforce surrogate contracts, treating them as illegal in the same manner as they treat gambling contracts. Couples wanting surrogate mothers would go to

agencies that provide that service. If everything works out, the intended parents receive a child and the mother and agency are paid. If the surrogate mother decides to keep the child neither she nor the agency would be paid. The "no contract" approach, the author argues, would protect the weakest party, the natural mother. Agencies would have incentives to screen for reliable mothers or they would go out of business. Contracting parents would only lose time and could try again.

### **Prohibiting Surrogate Arrangements**

There are 3 levels of surrogate prohibition. The first would prohibit all arrangements whether or not they involved a fee. The second type would ban commercial contracts, which would allow women who conceive and bear someone else's child to be reimbursed for expenses. A third would bar brokers from operating surrogate practices, but would not disturb relationships between individual parties.

Bills introduced in 1987 in Alabama, Illinois, Iowa, and Maryland would outlaw all surrogate arrangements. In Maryland, for example, 1987 Senate Bill 613 declared that a "person may not be a party to an agreement in which a woman agrees to conceive a child through artificial insemination and to voluntarily relinquish her parental rights". The bill provided for penalties.

Proposals offered in Florida, Kentucky, Michigan, New Jersey, New York, Oregon, and Pennsylvania would ban only commercial contracts. The New York bill (A-5529) would also regulate not-for-fee contracts similar to the manner in which contracts involving fees would be regulated by other states. Michigan's bill, 1987 Senate Bill 228, was introduced to "establish surrogate parenting contracts as contrary to public policy and void" and to "prohibit surrogate parentage contracts for compensation". The bill also provided that a surrogate mother and her spouse (if any) would be entitled to custody of the child. The Michigan bill is the basis for a Wisconsin proposal to outlaw contracts and its author, Senator Connie Binsfeld, testified at a public hearing in favor of Assembly Substitute Amendment 1 to 1987 Assembly Bill 554.

Although several bills proposed to bar surrogate brokers, none have used this as an exclusive means to all but eliminate commercial contracts. This is the approach taken by the British Parliament. Great Britain's Surrogacy Arrangements Act, which became law on July 16, 1985, prohibits third parties from: 1) initiating or taking part in negotiations with a view to the making of a surrogacy arrangement; 2) offering or agreeing to negotiate the making of surrogacy arrangements; and 3) compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements. While the act did not make payment of a fee to the surrogate illegal, Great Britain's 1958 adoption act may make such payments an offense.

### **Permit But Regulate**

Regulating surrogate parenting would mean that the state recognizes the practice and has a compelling interest that makes certain restrictions necessary.

In its January 1987 report, "Surrogate Parenting in New York: A Proposal for Legislative Reform", the Judiciary Committee of the New York State Senate made 4 findings: 1) surrogate parenting is a viable solution to female infertility; 2) legislation should consider its implications for the contracting parties and society; 3) surrogacy presents the Legislature with the problem of adapting law to social change; and 4) there is a compelling state interest in ensuring the status of the child and therefore regulation is appropriate.

The committee identified 3 types of regulatory proposals being introduced in a number of states: 1) proposals based on a contract law model, that would legalize contracts and guarantee the adoption of the child by the natural father and his wife; 2) proposals that would regulate surrogate parenting in a highly structured manner, in close resemblance to adoption laws; and 3) proposals based on an informed consent model, designed to establish the legal status of the child, ensure informed consent of the parties and limit the potential abuses of the practice.

1986 New Jersey Assembly Bill 3038 (considered in 1987) exemplifies a contract law approach. The bill declares that "it is the intent of the Legislature to facilitate the ability of infertile married couples to become parents through the employment of the services of a surrogate mother". It would require the surrogate to relinquish the child for adoption, and the married couple to adopt the child, regardless of condition. In a custody dispute, the terms of the contract would prevail and in the event of a breach of the contract, a court can grant any legal and equitable relief, including specific performance.

Michigan House Bill No. 4753, introduced June 4, 1987, parallels adoption procedures in that it would allow a surrogate to revoke consent in writing within 20 days and initiate a custody action after the child is born. It would also require a statement signed by a licensed medical professional that the surrogate is capable of terminating parental rights and responsibilities.

1987 New York Senate Bill 1429, introduced in February of 1987, follows an informed consent model. One of the stated purposes of the bill is "to ensure informed and voluntary decision-making". To that end each party would have their own legal counsel and the agreement would not be binding until approved by a court. The procedure includes advanced filing of petitions, an initial appearance, and subsequent appearances until the contract is either approved or ended by the court.

Another way to look at legislative regulation is to outline what issues are raised by the various bills and how they might affect the parties in a contract — the birth mother, the intended parent or parents, and the child. An article by American Bar Foundation researcher Lori B. Andrews, "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood", in *Hastings Center Report*, October/November 1987, describes these issues as follows:

What provisions would affect the surrogate mother?

1. Will she be allowed to revoke the agreement and keep or sue for custody of the child?
2. If revocation is not allowed can she be sued to surrender the child and for breach of contract?
3. Will she be paid a fee, and, if so, how much? Is there a floor or ceiling on the fee?
4. If she is to be paid a fee, will it be reduced because she miscarried or had to terminate the pregnancy?
5. What requirements are there for medical, genetic and psychological screening?
6. Is she entitled to her own legal counsel or, at least, an informed consent hearing before a court?
7. What control does she have over health care decisions?
8. What restrictions are there on medically related practices such as use of tobacco, alcohol, and drugs?
9. Are there restrictions as to age, marital status, and previous childbirths?

What provisions would affect intended parents?

1. Are other than married couples allowed to make contracts?
2. Must the intended female parent prove her own infertility or other inability to conceive or carry a child to term?
3. Are there medical conditions that interfere with the ability to carry out parental duties?
4. Is medical, genetic and psychological screening required?
5. Is there an explicit duty to assume parental responsibilities and, if so, must the parents accept the child regardless of condition?
6. Are the intended parents required to provide health and life insurance for the birth mother?
7. Are there provisions for paternity testing?

What provisions would affect the child?

1. What happens to the child if one or both intended parents die or if the contracting couple separate or divorce?

2. Are there provisions that would allow the child to obtain information on his or her natural mother at some future time, and, if so, what type of information?

3. What names are entered on the final birth certificate?

Other issues include a cooling-off period before the contract is carried through, court approval of provisions at one or more stages of the contract, and special record-keeping for surrogate births. A few bills regulate or prohibit third-party solicitation of or arranging for surrogate parenting contracts.

### **Study Committees**

Because surrogate parenting raises novel issues of law, a number of states have appointed study commissions as an intervening step prior to the consideration of specific legislation. Legislatures in Delaware, Indiana, Louisiana, North Carolina, Rhode Island, and Texas established study commissions. Proposals in 6 other states to appoint commissions were defeated.

One state has completed a study and published its recommendations. The Maine Subcommittee to Study Surrogate Parenting (January 1988) offered 2 possible approaches to the issue: ban surrogate parenting, or ban commercial surrogate parenting and regulate noncommercial agreements. At the request of the chairman of the drafting committee of the National Conference of Commissioners on Uniform State Laws, the subcommittee decided not to propose any legislation at this time. The Commission's drafting committee intends to complete work in August 1988 on a Uniform Parentage Act, including sections on surrogate motherhood.

### **Wisconsin Legislation**

Three proposals are under consideration by the 1987-88 Wisconsin Legislature. One would ban surrogate agreements that provide for a fee, a second would ban such agreements and require those not paying a fee to sign a court approved contract, and a third requests a study of legal and public policy issues by the Legislative Council.

1987 Assembly Bill 554, was introduced on September 3, 1987, by Representative Merkt and others, and referred to the Committee on Children and Human Services. The original version of the bill would have repealed all statutory references to surrogate motherhood and would declare surrogate agreements to be against public policy and unenforceable. Parties entering into such an agreement could be fined not more than \$10,000, or imprisoned not more than 9 months, or both.

Assembly Substitute Amendment 1, offered January 20, 1988 by Representative Merkt, declares surrogate motherhood agreements to be against public policy and unenforceable. It is based on 1987 Michigan Senate Bill 228. The substitute would not allow a person to make or arrange an agreement with a developmentally disabled or mentally ill woman, or an agreement for compensation. Penalties are provided. As of March 20, 1988, the bill remains in committee.

1987 Assembly Bill 827 was introduced by Representative Magnuson and others on January 14, 1988, and referred to the Committee on Children and Human Services. The bill creates a statutory section on surrogate agreements and provides for a penalty for any person who executes an agreement not conforming to specified requirements.

The bill bans payment of fees to the surrogate mother. It prohibits third party solicitation or arrangement of surrogate agreements to discourage the use of brokers and requires court review and approval prior to execution of the contract. Situations where the intended mother provides the egg to be fertilized, or where egg or sperm donors or both are third parties are also included. The bill requires the state registrar of vital statistics to keep a record of surrogate births.

Other provisions require a surrogate to be at least 25 years of age and to have previously borne at least one child. If she is married, her spouse must be a party to the agreement. The birth mother must be represented by an attorney throughout the procedure and is required to provide a comprehensive medical history and undergo pregnancy, fertility and genetic tests.

Under terms of the contract, the surrogate must agree to undergo fertilization, relinquish the child to the intended parents, and terminate parental rights within 15 days of the child's birth. The surrogate (and spouse) is entitled to psychological counseling for up to 2 months after the birth.

The intended parents agree to take custody of the child upon birth regardless of any condition the child may have. Intended parents pay all costs incurred by the birth mother during the life of the agreement, whether or not the fertility technique used results in conception or a live birth. Intended parents are not liable for lost wages, child care, or transportation costs unless the agreement provides for them. If the intended parents are a married couple and one of them dies, there is no change in the agreement. If both die, or a single intended parent dies, the surrogate's consent to give up the child is voidable within 20 days of birth.

The intended father must undergo tests for genetic and sexually transmitted diseases. Each party must provide the other with a psychological or psychiatric evaluation administered within 60 days of execution of agreement.

The child has inheritance rights of the intended parents, but no inheritance rights of the surrogate mother, unless she specifically provides for it by a will executed after the date on which the surrogate agreement was signed.

As of March 20, 1988, the bill remains in committee.

1987 Assembly Joint Resolution 71 was introduced by Representative Tesmer and co-sponsored by Senator Andrea, and referred to the calendar. It asked to have the Legislative Council study the legal and policy issues related to surrogate mother agreements. It requested that the council to report its findings, conclusions and recommendations to the Legislature by January 1, 1989.

The Assembly adopted AJR-71 by a voice vote on October 21, 1987. On March 23, the Senate adopted Senate Amendment 1 and concurred in AJR-71 as amended. The Assembly concurred in SA-1 on March 24.

### **Surrogate Contracts and Model Legislation**

Both the American Bar Association and the National Conference of Commissioners on Uniform State Laws are considering model legislation. In January of 1988, the Family Law Section of the American Bar Association endorsed a model surrogacy act which will be considered by the association's House of Delegates in July. The act follows a contract law model in that it requires specific performance by each party, including the right of the intended parents to have a court enforce delivery of the child to them. It sets minimum and maximum limits on fees paid to surrogates and provides for periodic review of the limits. The act requires the surrogate to have previously given birth to one child and provides for payment of fees and expenses in case of involuntary termination of the pregnancy. It further requires that all parties receive legal, medical, and psychological counseling before signing the agreement. Under its terms, a court is directed to hold a hearing for certification of parenthood within a year of the child's birth.

The Commissioners on Uniform State Laws expect to have a Uniform Parentage Act in August of 1988, which will include a section on surrogacy.

There is also a bill in Congress to bar surrogate contracts. H.R. 2443, introduced by Representative Thomas A. Luken (Dem. — Ohio) has been referred to a subcommittee of the House Commerce Committee and has not been reported out as of March 10, 1988.

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