

BACKGROUND PAPER 88-2

SURROGATE PARENTING

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SURROGATE PARENTING

I

INTRODUCTION

In March 1987, the Nation's attention focused on a breach of contract battle underway in New Jersey. The contract in question was between Elizabeth and William Stern and Mary Beth Whitehead (now Mary Beth Whitehead-Gould). The Sterns had contracted with Ms. Whitehead in 1985 to act as a surrogate mother. Upon the birth of the baby--known as Baby M in the case--Ms. Whitehead reconsidered and refused to relinquish her parental rights. The Sterns then sued in an attempt to hold Ms. Whitehead to the terms of the contract.

On March 31, 1987, a New Jersey trial court upheld the contract, granted permanent custody to the Sterns, permitted Mrs. Stern to adopt the child, and denied any rights to Ms. Whitehead. On February 3, 1988, the New Jersey Supreme Court approved only the custody portion of the lower court's decision, ruling that surrogate parenting contracts fall under the New Jersey "baby-selling" statutes and are therefore illegal.

The publicity surrounding this case led to a flurry of activity in legislative bodies around the country as pro- and anti-surrogacy groups attempted to sway policymaking bodies to one side or the other. This paper examines some of the questions raised by the discussion of surrogate parenting and highlights how some of the states have responded. Issues raised by existing state laws are discussed, as well as alternative courses of legislative action.

II

DEFINITIONS

Although the term "surrogate parenting" has become widely used since the Baby M case, it can refer to more than one method of achieving parenthood. In addition, the parties involved in a surrogacy contract may not necessarily be limited to a married couple contracting with a single woman. The parties could involve a married surrogate mother, a single father or single-sex couples. However, for ease of

discussion in this paper, the terms "married couple," "husband" and "wife" will be used, keeping in mind that a broader definition may apply to these words.

A. Methods

Five general methods of surrogate parenting are recognized (Walton, page 1). These methods are:

1. Artificial Insemination by Husband (AIH)

The AIH method is an arrangement in which the surrogate, a woman other than the wife of the sperm donor, is artificially inseminated with the sperm of the husband of a married couple.

2. In-Vitro Fertilization (IVF)

The IVF method is a process by which a sperm and an egg are joined in a laboratory and the fertilized egg is implanted in the surrogate.

3. Artificial Insemination by Donor (AID¹)

The AID¹ method is a technique in which the surrogate is artificially inseminated with the sperm of a donor other than the contracting male. Such sperm is typically a specimen obtained from a sperm bank.

4. Artificial Insemination by Donor (AID²)

The second AID method is a technique in which the wife is artificially inseminated with the sperm of a donor other than her husband. Such sperm is typically a specimen obtained from a sperm bank.

5. Natural Insemination (NI)

The NI method involves a situation where sexual intercourse occurs between the surrogate and the husband of a married couple.

Of the five methods, AIH is the most common and NI is the least. Sometimes, the IVF and AID¹ methods are chosen in surrogate parenting situations, but not as frequently as AIH. The AID² method commonly refers to artificial insemination, not surrogate parenting. Because AIH is the most common method chosen in surrogate parenting agreements, that definition will be applied to the term "surrogate parenting" in this paper.

B. Agreements

The agreement between the surrogate mother and the intended parents takes one of two forms: (1) commercial; or (2) non-commercial. Both agreements involve similar factors. A couple contracts with a woman to bear a child for them. The woman agrees to be artificially inseminated with the husband's sperm, carry the child to term and surrender her parental rights to the biological father upon the birth of the child.

Once the husband has full parental rights to the child, the wife (technically the child's stepmother) begins adoption proceedings. Some proposed legislation is similar to the law in Arkansas which allows the wife to forego formal adoption procedures and obtain a substitute birth certificate from a court of competent jurisdiction. In return, the couple agrees to pay all of the surrogate's medical expenses and other necessary expenses (such as maternity clothing).

The difference between a commercial and a noncommercial agreement centers on whether a fee is paid to the surrogate mother. If a fee--usually around \$10,000--is paid, then the agreement is considered to be commercial. However, many surrogacy agreements are between family members or friends and do not involve the payment of a fee. These agreements are the noncommercial contracts.

A major argument in the courts and the legislatures involves the nature of this fee. Is it a fee for the surrogate mother's services or is it a fee in exchange for the surrender of her parental rights? Are both or either of these rationales acceptable? A limited study of potential and existing surrogate mothers published in The American Journal of Psychiatry in January 1983 indicates that the fee is a requirement for the majority of them to consider entering into a surrogate parenting agreement (Roe, page 5).

Another factor in surrogacy contracts is the broker. Either a private agency or a lawyer, the broker is a third party who coordinates a surrogate parenting agreement. Although a broker receives a fee (again, in the \$10,000 range), a broker could be used in both commercial and noncommercial arrangements. However, most arrangements made through a broker include a fee paid to the surrogate mother.

III

REASONS FOR CHOOSING SURROGATE PARENTING AGREEMENTS

According to a study of surrogacy recently completed in Wisconsin, the demand for surrogate mothers stems primarily from female infertility. The National Center for Health Statistics estimates that 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 1 year). The center excludes the surgically sterile from its statistics. The Wisconsin study also cites evidence that suggests the number of infertile women is on the increase due to the use of intrauterine birth control devices, greater incidence of sexually-transmitted diseases, previous abortions and the postponement of childbearing to establish careers. Studies indicate that women who delay having children have a greater risk of being infertile, bearing children with birth defects and/or being physically impaired. The most common treatments for female infertility are drugs and surgery. Until recently, when these treatments failed, adoption was the only alternative available.

Couples who want children, but cannot conceive, usually consider adoption. The Wisconsin study noted that, despite a marked increase in the number of live births to single women, fewer unrelated individuals are adopted. 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 more than 50 percent. However, the National Committee for Adoption reports that only 50,720 healthy infants were adopted by parents who were not blood relatives in 1982, compared to 82,800 adoptions in 1971. At the same time, demand has steadily increased. In 1984, the national committee estimated that the 2 million couples seeking to adopt were competing for 58,000 babies, a 35 to 1 ratio.

Adoption experts believe that the increasing willingness of single mothers to keep their children is 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. One explanation offered for this trend is that the stigma once attached 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 or revoke a decision to allow adoption. Consequently, couples often cite long waiting periods and other obstacles to adoption (such as the age limit placed on prospective parents) as reasons for seeking surrogate mothers (Roe, page 4).

Not all couples who contract with a surrogate have failed at adoption. Some couples would rather be childless than adopt an unrelated child. For such families, a genetic link to their child is of primary importance. For example, William Stern lost most of his family in Adolf 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 father stated that "we believe strongly in heredity" (Roe, page 5).

IV

MAJOR ARGUMENTS FOR AND AGAINST SURROGATE PARENTING

A review of the literature on surrogate parenting reveals several common policy positions on each side of this issue.

A. Supporting Arguments

Those who support surrogacy contracts and the regulation of them generally cite the following:

- A limitation placed on the fees charged by brokers and the licensing and regulation of brokers will ensure competency, honesty and legitimacy in this process.
- Due to the ever-decreasing number of babies available for adoption and the ever-increasing technology in the area of human reproduction, couples who desperately want children will continue to seek out surrogate mothers. Consequently, some form of protection must be provided for the couple, the surrogate mother and the resulting child.
- Proper examination of both couple and surrogate as provided in state law would ensure -
 1. That the couple is emotionally and financially ready to bear the responsibility of parenthood;

2. That the couple is truly in need of this service, such as when the wife is unable to carry a child to term; and
 3. That the woman who will bear the child is emotionally, physically and psychologically able to carry the child and to give up her rights to this child at birth.
- The majority of previous surrogate contracts were completed without issue. Only a small percentage of surrogate mothers have refused to surrender the resulting babies.
 - The United States Supreme Court has recognized that certain areas of procreation are constitutionally protected under the 5th and 14th amendments of the United States Constitution. Some laws involving human reproduction which the Court has ruled as unconstitutional are: (1) involuntary sterilization; (2) prohibition of abortion; and (3) prohibition of the use of birth control.

B. Opposing Arguments

Those people who advocate a ban on surrogacy contracts argue that:

- Children will be psychologically damaged when they discover that they were "bought."
- Surrogate parenting arrangements are in violation of the 13th amendment of the United States Constitution which applies to slavery and can be interpreted to forbid the buying and selling of people.
- Surrogate parenting will become another form of economic exploitation of rich people over poor. As exemplified by the Baby M affair, the adoptive couples tend to have an economic and educational advantage over the surrogate. The American Journal of Psychiatry study of potential and existing surrogate mothers also indicates that most of the women are unemployed or on some form of public assistance and only have a high school diploma. Thus, surrogate parenting arrangements will serve to create a class of "womb-sellers."
- There are plenty of nonwhite babies, older children and special needs children available for adoption.

- Women will be forced--not because they choose, but because the contract requires--to abort fetuses upon demand or to become pregnant again in the case of a miscarriage.

V

LEGISLATIVE BACKGROUND

Surrogate parenting was not invented by the Sterns or Ms. Whitehead. It has been an option exercised by many prospective parents ever since advances in technology made it possible. Estimates indicate that over 500 babies were born through this arrangement between 1976 and 1986 (Roe, page 2). Recently, the American Bar Foundation estimated that the rate has risen to 500 surrogate births annually.

The Baby M case was unique because its public format opened national debate on the ethical, legal and moral aspects of a practice not defined in federal or state law. Previously, most custody cases were resolved behind closed doors.

Before March 1987, most legal decisions regarding surrogacy were determined by the courts. Two brief, nonspecific state laws existed, and only five bills had been introduced in state legislatures across the country. Four of those bills supported the practice, and one opposed it.

In the United States Congress, three bills were introduced after the Baby M affair. One would have banned the practice, one would have forbid federal enforcement of the contracts and the other would have prohibited the use of federal money for veterans who wished to create a family through surrogacy. None of these bills passed. Historically, Congress has left family issues to be regulated by the states, so the bulk of legislative activity has been located at the state level.

According to the National Conference of State Legislatures (NCSL), in legislative sessions held in 1987, 71 bills to ban, regulate or study the practice were introduced in 26 states and the District of Columbia (see Appendix A). These bills indicated that the Baby M case affected not only the number of bills but also the attitude of legislators regarding surrogacy. Of these 71 bills, 25 sought to ban or severely restrict surrogate parenting. Twenty-two of them called for study commissions, and 24 would have recognized and regulated the practice. Although the majority of these bills did not pass their respective legislatures, the issue did not die.

Surrogacy was also a major topic during the 1988 legislative sessions. According to the NCSL, as of October 5, 1988, 16 states had introduced 22 bills to regulate surrogacy; 18 states had introduced--or carried forward from 1987--31 bills to prohibit these contracts; and nine states would establish study committees (see Appendix B). Again, as in 1987, the majority of these bills did not pass.

VI

ISSUES IN STATE LAW

According to the Wisconsin study of surrogacy, court decisions and discussions of surrogacy indicate that four existing areas of law affect surrogate parenting agreements. These areas are: (1) adoption and termination of parental rights; (2) artificial insemination and legal paternity; (3) child custody; and (4) contracts. The general information in this section is derived from the Wisconsin study. Information on Nevada is interjected.

A. Adoption Laws

Two aspects of many state adoption laws may restrict or prevent surrogate parenting agreements. One forbids compensation in exchange for the consent to an adoption, and the other forbids consent to an adoption to be given prior to the birth of the child.

At least 24 states, including Nevada, prohibit the payment of compensation for adoptions. Often called "baby-selling" laws, these statutes range from those prohibiting all payments to those allowing payment of certain expenses. Nevada Revised Statutes (NRS) 127.287 forbids the payment of a fee in return for the mother's agreement to terminate her parental rights to a child.

While surrogacy opponents 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. Under a surrogacy agreement, the intended father is also the biological father; therefore, how can he buy his own child? Also, proponents argue, surrogates have voluntarily agreed to surrender the child. She is not doing so under pregnancy related stress. Finally, the fees are paid primarily to replace lost work time or pain and suffering.

All 50 states, including Nevada (NRS 127.070), have laws that prohibit a mother from granting consent to adoption before a child's birth or for some period of time after birth. Waiting periods range up to as much as 20 days (Pennsylvania). A mother's consent to surrender a newborn for adoption is not valid in Nevada until at least 72 hours after birth.

However, as with "baby-selling" laws, consent laws were designed to protect unwed mothers. The decisions facing an unwed mother are not like those facing the surrogate mother who has voluntarily chosen to bear a child for another couple.

B. 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. In Nevada, NRS 126.051 follows the common-law rule but also allows for consideration of a paternity claim by a man other than the mother's husband.

Surrogate supporters argue that paternity laws were designed to protect the child, particularly the 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 most surrogate mothers are artificially inseminated, laws on that subject might be relevant. At least 30 states, including Nevada (NRS 126.061), have laws that presume that the husband of the woman being inseminated is the child's father and that relieve the sperm donor of any legal obligation.

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

C. Custody Issues

The basis for custody decisions is a determination of the best interests of the child. The standards for judging the suitability of intended parents include marital and family status, mental and physical health, income and property, any history of child abuse or neglect and other relevant facts. In the case of Baby M, custody of the child was awarded to the Sterns because the court felt that it was in the best interest of the child. Ms. Whitehead's divorce after 13 years of marriage and subsequent marriage to the father of her unborn child 2 weeks after the divorce were key factors in the court's decision ("General Trends," page 2).

A spokesperson for the National Committee for Adoption objects to surrogate contracts because they are not required to take into account the best interest of the child. Unlike normal adoption proceedings, no one screens intended parents. Currently, surrogacy agreements require nothing more than the financial ability to hire a lawyer and pay the surrogate mother.

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. Supporters also maintain that surrogate agreements are inherently in the best interest of the child because the intended parents have given much thought to their actions and decided that they truly want a child. 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 by contract.

D. Contractual Duties

Existing federal and state contract laws do not address the issues of the surrogate's liability or acceptable remedies in case of breach of contract, nor do they address the responsibilities of the intended parents.

Contracts impose a number of duties on one or both of the intended parents. These duties 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 expenses and fees? What happens if the intended parents refuse to take the child? Can the surrogate mother sue the natural father for child support?

Some of these issues are already facing state courts. For example, in Texas, a 24-year-old surrogate mother died of heart failure in her eighth month of pregnancy; and in Washington, D.C., a baby born through a surrogate agreement was diagnosed as having acquired immune deficiency syndrome (AIDS). Now, neither surrogate mother nor contracting parents want the AIDS baby. These issues were not previously addressed in the contracts.

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 may harm the fetus. If medical clauses are included 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 clears all other legal hurdles, many questions remain about the responsibilities of each party to the contract.

VII

EXISTING LEGISLATION IN OTHER STATES

As of November 1988, nine states have laws which--in some way--govern paid surrogate contracts (Governing; Roe, page 13). Indiana, Kentucky, Louisiana and Nebraska prohibit paid surrogacy agreements. These state laws also allow surrogates to choose not to give up their babies to the other couples. Michigan is the only state that makes involvement in a paid surrogate contract a criminal activity. Arkansas, Florida, Kansas and Nevada have taken mixed approaches to the issue. The following discussion summarizes the laws in these other states.

A. Arkansas

The Arkansas statute which refers to surrogate parenting is Arkansas Code 9-10-201 (Appendix C). The law states that any child born to an unmarried woman through artificial insemination is the child of that woman, except in surrogate parenting situations. The law further allows the intended

mother in a surrogate parenting situation to obtain a substitute birth certificate from a court of competent jurisdiction.

B. Florida

The law in Florida--Florida Statutes 63-212, amended in July 1988 (Appendix D)--prohibits the payment of a fee to a woman in return for agreement to surrender her parental rights. It allows for the payment of fees in connection with a preplanned pregnancy as long as the fees are not conditioned upon transfer of her parental rights.

The law further authorizes preplanned adoption arrangements, or surrogate parenting agreements, under certain conditions. For example, the birth mother has 7 days to change her mind about surrendering the child; the intended parents can request appropriate tests on the child, if the father is presumed to be the biological parent of the child; and the intended parents and the surrogate mother must be represented by different legal counsel.

C. Indiana

Indiana Statutes 31-8-1-1 through 31-8-2-3 (Appendix E) prohibit the state courts from enforcing surrogate mother contracts as contrary to public policy. The law declares that any surrogate agreements entered into after March 14, 1988, are void, and no custody decisions are to be based on the existence of such a contract.

The 1988 Indiana Legislature also required the legislative council to conduct a study of surrogacy in order for the legislature to more fully address the issue (Indiana Statutes 2-4-1A-9; Appendix F).

D. Kansas

Kansas Statutes 65-509 (Appendix G) prohibits a person from advertising for adoption services, either as one wanting to adopt or as one wanting to give a child up for adoption. The law also prohibits advertisements from those acting as a third party in an adoption. However, the law specifically exempts three groups from these provisions: (1) a licensed child placement agency; (2) the department of social and rehabilitation services; and (3) those wishing to contract with or as a surrogate mother.

E. Kentucky

Kentucky Revised Statutes 199.590 (Appendix H) prohibits paid surrogacy agreements. It declares all such agreements void and unenforceable. However, no penalties are assigned to any parties found guilty of engaging in such contracts.

F. Louisiana

Louisiana was the first state to pass a law in opposition to surrogate parenting. Adopted in 1987, Louisiana Revised Statutes 9:2713 (Appendix I) bans paid surrogate contracts. However, no penalties are provided.

G. Michigan

Michigan was the first state to establish criminal penalties for involvement in surrogate contracts. Effective on September 1, 1988, Public Act No. 199 (Appendix J) bans paid surrogate parenting contracts. The act is codified in Michigan Compiled Laws Annotated 722.851 through 722.863.

Parties who engage in such a contract are guilty of a misdemeanor and face a penalty of a fine up to \$10,000 and/or up to 1 year in prison. Parties involved in arranging such a contract are guilty of a felony and face a fine up to \$50,000 and/or up to 5 years in prison.

The law further states that such contracts are void and unenforceable. In the case of a custody dispute as a result of one of these contracts, custody would be decided in light of prevailing custody laws, and not the laws governing contracts.

Late in September 1988, Michigan's Wayne County Circuit Court Judge John Gillis ruled that the law is constitutional, but needs further interpretation. At the time, he promised to issue a further ruling within 2 to 3 months. The judge indicated that he would probably interpret the law to mean that it is unlawful to pay a woman to surrender her parental rights, but that it is not unlawful to pay a woman for her services. This interpretation would allow a woman to be paid for being artificially inseminated and the biological father to initiate a custody action for the resulting child. The Michigan Attorney General's Office, the American Civil Liberties Union, and the legislators involved in the passage of the bill all indicated agreement with the suggested compromise interpretation (Rizzo).

H. Nebraska

Nebraska's statute, Revised Statutes of Nebraska 25-21,200 (Appendix K), maintains that surrogate parenting agreements are void and unenforceable. No penalty is provided. However, the law states that the biological father of a child born under a surrogate agreement will have all the rights and responsibilities as allowed by law.

VIII

SURROGATE PARENTING IN NEVADA

A. Existing Law

As do many other states, Nevada has an anti-"baby-selling" law, NRS 127.287. Basically, the law prohibits the payment of fees in exchange for parental rights. It also prohibits the acceptance of expense money by the birth mother with the intent of not completing a preplanned adoption, but it does not prohibit the birth mother from reconsidering her decision to relinquish custody of the child upon that child's birth.

However, subsection 5 of NRS 127.287 (Appendix L) distinctly exempts surrogate contracts from these provisions. Specifically, this subsection provides that:

The provisions of this section do not apply if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man not her husband.

The legislation introduced in the 1987 session (which resulted in the above subsection) did not specifically address the issue of regulation of surrogacy contracts or make provisions for those contracts. But the reference to "lawful" surrogate contracts has led some analysts to interpret this statute as permitting surrogacy arrangements (Adams, 1988, page 1).

B. Legislation Proposed in 1987

No bills specifically on the subject of surrogate parenting were introduced in the Nevada legislature in 1987. However, the topic of surrogate parenting was raised before the senate committee on judiciary in hearings on Senate Bill 272. This bill provided for various changes to chapter 127 concerning the adoption of children. With the

exception of adding the amendment to S.B. 272 that exempted surrogate parenting agreements from the resulting law, surrogacy contracts were not a major topic of discussion during the hearings.

Assembly Concurrent Resolution No. 16 would have required the legislative commission to study current adoption laws in Nevada. An amendment was proposed that would have required the study to center on surrogate parenting agreements. However, the assembly committee on legislative functions chose to indefinitely postpone the resolution. The committee decided that the topic would be handled by the research division of the legislative counsel bureau as this background paper.

IX

LEGISLATIVE ALTERNATIVES

A number of options are available for states in dealing with surrogacy. The alternatives include:

1. No legislation, which would require the courts to rule under current law and/or force 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;
4. Appoint study commissions to examine the issues in greater detail before deciding what legislation, if any, is needed; or
5. Use model legislation already drafted.

Discussions of these alternatives follow. Sections A through D were derived from the Wisconsin study. Section E was outlined in the November 1988 issue of Governing.

A. No Legislation

The "no legislation" alternative argues that the courts rather than the legislatures are more flexible instruments for resolving surrogacy cases. Since few contracts end in dispute, those that do can be resolved by the courts. Although New Jersey's Superior Court originally ruled in

favor of the contract terms in the Baby M matter, the state's Supreme Court found the authority in current law to overturn that decision and rule against surrogacy contracts. Kentucky's Supreme Court found grounds for allowing contracts. The circumstances of each case were different.

A Northwestern University law professor argues that the "heavy hand of the state" should be kept out of surrogate arrangements. He contends that the law has no business being involved in what are private and often painful family decisions. Legislation would set up regulations that would need continual revision. He further believes that 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 private agencies that provide the service. If everything works out, the intended parents receive a child and the agency and mother are paid. The "no contract" approach, the professor 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.

B. Prohibiting Surrogate Agreements

Three options relate to 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. The first two options would also void any existing contracts. A third option would bar brokers from operating surrogate practices, but would not disturb relationships between individual parties.

Most state legislators seeking to outlaw surrogacy have made proposals based on the first two options. Although several bills proposed to bar surrogate brokers, none have used this method as an exclusive means to eliminate commercial contracts.

C. 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 Senate made four findings:

1. Surrogate parenting is a viable solution to female infertility;
2. Legislation should consider the implications for the contracting parties and society;
3. Surrogacy presents the legislature with the problem of adapting law to social change; and
4. Legislation is appropriate because a compelling state interest exists in ensuring the status of the child.

The committee identified three types of regulatory proposals under consideration 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 that would establish the legal status of the child, ensure informed consent of the parties and limit the potential abuses of the practice.

Assembly Bill 3038, considered in 1987 in the New Jersey Legislature, 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.

The bill 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 would be authorized to grant any legal and equitable relief, including specific performance. The bill was sent to the assembly committee on judiciary where no action has been taken since its introduction in 1987, other than assigning it a new number (A-956).

Michigan House Bill No. 4753, introduced June 4, 1987, parallels adoption procedures by allowing a surrogate to revoke consent in writing within 20 days and initiate a

custody action after the child is born. The bill would also require a statement signed by a licensed medical professional that the surrogate is capable of termination of parental rights and responsibilities. This bill was not reported out of committee. As noted previously, Michigan adopted a proposal to establish criminal penalties for involvement in surrogacy contracts.

New York Senate Bill No. 1429, introduced in February 1987, follows an informed consent model. One of the stated purposes of the bill was "to ensure informed and voluntary decisionmaking." To that end, the parties involved would have their own legal counsel and the agreement would not be binding until approved by a court. The procedure would have included advanced filing of petitions, an initial appearance and subsequent appearances until the contract was either approved or ended by the court. The bill was reported from committee, but no further action was taken.

D. 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 six other states to appoint commissions were not enacted.

As of March 1988, only one state had completed a study and published its recommendations. The Maine Subcommittee to Study Surrogate Parenting (January 1988) offered two possible approaches to the issue: (1) ban surrogate parenting; or (2) 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 to postpone proposing any legislation until the commissioners voted on their proposed legislation which is discussed in the next section.

E. Model Legislation

In August 1988, the National Conference of Commissioners on Uniform State Laws drafted and approved for use in all state legislatures the "Uniform Status of Children of Assisted Conception Act" (Appendix M). The model act provides two alternatives--one to regulate surrogate parenting agreements and the other to ban the agreements.

Alternative A would allow surrogate parenting contracts and provides a regulatory framework. A court hearing would be held at which both parties would be required to submit medical evidence to prove that the would-be mother cannot bear her own child and that the surrogate mother is mentally and physically fit to bear the child. The proposal also would allow the surrogate mother to pull out of the agreement up to 180 days into her pregnancy.

The opposing language in the act (Alternative B) simply bans all surrogate parenting agreements. It does not make any distinction between commercial and noncommercial contracts; all such contracts are void.

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CONCLUSION

The legacy of Baby M to the states is a complex, confusing issue involving numerous ethical, legal and moral questions. Although some states have taken action on the issue, most states are still grappling with these questions. This paper has reviewed some of the questions and issues relating to surrogate parenting, but many others may arise.

Technology is advancing at an ever-increasing rate, especially in the area of human reproduction. These advances may force state legislatures to consider further proposals about reproduction practices. Choices made now about laws concerning surrogate parenting likely will lay a foundation for decisions to be made concerning further advances in procreation technology.

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APPENDICES

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APPENDIX A

"Bill Introductions During 1987 State Legislative Sessions
Relating To Surrogacy Contracts"

**BILL INTRODUCTIONS DURING 1987 STATE LEGISLATIVE SESSIONS
RELATING TO SURRENDER CONTRACTS**

<u>State</u>	<u>Bill No.</u>	<u>Bill Sought To</u>			<u>Status of Bill</u>
		<u>Prohibit</u>	<u>Regulate</u>	<u>Study</u>	
Alabama	H-1113	X			Not passed
Arkansas	HB-1989		X		Vetoed 4/8/87
Connecticut	HB-5398	X			Died in comm.
Connecticut	HB-5816		X		Died in comm.
Connecticut	HB-6655			X	Died in comm.
Delaware	SJR 4			X	Signed 4/13/87
District of Columbia	7-175,7-176		X		Died in comm.
Florida	SB-1288		X		Died in comm.
Florida	SB-1297		X		Died in comm.
Illinois	HB-2101	X			Not passed
Illinois	HJR-80			X	Speaker's table
Illinois	HR-344			X	Died in comm.
Illinois	SB-499	X			Died in comm.
Illinois	SB-1111		X		Died in comm.
Illinois	SB-1510		X		Died in comm.
Indiana	HCR-61			X	Adopted 4/2/87
Iowa	SF-358	X			Died in comm.
Kentucky	SB-4	X			Signed 3/11/88
Louisiana	HB-301	X			Died in comm.
Louisiana	HB-327	X			Signed 7/9/87
Louisiana	HCR-2			X	Adopted 6/23/87
Maine	LD 658			X	Withdrawn
Maryland	HB-759		X		Died in comm.
Maryland	SB-613	X			Died in comm.
Massachusetts	H-3155		X		Not passed
Massachusetts	H-5270			X	Not passed
Massachusetts	H-5293		X		Added to H-5486
Massachusetts	H-5312			X	Added to H-5486
Massachusetts	H-5314		X		Added to H-5486
Massachusetts	H-5486			X	Not passed
Michigan	HB-4753		X		Died in comm.
Michigan	HB-4755		X		Not passed
Michigan	SB-228	X			Signed 6/27/88
Michigan	SB-483		X		Not passed
Minnesota	HF-1584	X			Not passed
Minnesota	HF-1647		X		Not passed
Minnesota	HF-1701	X			Not passed
Minnesota	SF-1167	X			Died in comm.
Missouri	HB-480	X			Died in comm.
Nebraska	LB-674	X			Signed 2/10/88
Nebraska	LR-177			X	Not passed
New Jersey	A-3038		X		No action
New Jersey	A-4138	X			No action
New Jersey	S-3302			X	No action
New York	S-2403		X		Not passed
New York	A-4748		X		Withdrawn
New York	A-5529		X		Not passed
New York	A-6277	X			Cancelled
New York	A-8005	X			Not passed
New York	S-1429		X	X	Not passed
New York	S-4640	X			Not passed
New York	S-4641	X			Not passed
North Carolina	HB-1			X	Ratified 8/14/87
North Carolina	HB-1205	X			Not passed
North Carolina	SB-305	X			Not passed
North Carolina	SB-745			X	Part of other
North Carolina	SB-871			X	major study; commission created
Oregon	HB-3307		X		Died in comm.
Oregon	SB-456	X			Died in comm.
Pennsylvania	HB-570	X			Not passed
Pennsylvania	HB-776		X		Not passed
Pennsylvania	HR-93			X	Not passed
Pennsylvania	HR-136			X	Not passed
Pennsylvania	SB-742		X		Not passed
Pennsylvania	SR-98			X	Not passed
Rhode Island	SB-386			X	Signed 6/10/87
South Carolina	S-626		X		Died in comm.
Texas	SR-643			X	Adopted 5/29/87
Wisconsin	AB-554	X			Died in comm.
Wisconsin	AJR 71			X	Adopted 3/24/87

Source: Compiled from State Legislative Report, Vol. 13, No. 2, January 1988.

APPENDIX B

"Bill Introductions During 1988 State Legislative Sessions
Relating To Surrogacy Contracts"

BILL INTRODUCTIONS DURING 1988 STATE LEGISLATIVE SESSIONS
RELATING TO SURROGACY CONTRACTS

State	Bill No.	Bill Sought To			Status of Bill
		Prohibit	Regulate	Study	
Alabama	H-172	X			Not passed
Alabama	S-664	X			Died in comm.
Arizona	S-1378		X		Not passed
California	AB-2403	X			Died
California	AB-2404	X			Died
California	AB-3200	X			Died in comm.
California	ACR-171			X	Adopted 9/15/88
California	SB-2635	X			Died in comm.
Connecticut	HB-6109		X		Died in comm.
Florida	HB-747	X			Died in comm.
Florida	HB-1633	X			No action
Florida	SB-9	X			Signed 7/1/88
Florida	SB-29		X		Died in comm.
Georgia	S-421	X			Died in comm.
Georgia	S-493		X		Not passed
Indiana	H-1140		X		Died in comm.
Indiana	S-98	X			Signed 3/5/88
Iowa	HF-2052		X		Died in comm.
Iowa	HF-2279		X		Died in comm.
Iowa	SCR-120		X		No action
Kansas	S-620	X			Died in comm.
Kentucky	SB-4	X			Signed 3/11/88
Maryland	HB-649		X		Not passed
Maryland	HB-1479	X			Not passed
Maryland	SB-436		X		Died in comm.
Maryland	SB-795	X			Died in comm.
Massachusetts	H-717		X		Not passed
Massachusetts	H-1146			X	Not passed
Massachusetts	H-2712			X	Not passed
Michigan	HB-5725		X		Not passed
Michigan	SB-228	X			Signed 6/27/88
Minnesota	HF-1701	X			Not passed
Minnesota	SF-1660	X			Died in comm.
Mississippi	S-2157	X			Died in comm.
Missouri	HB-1561		X		Died in comm.
Nebraska	LB-674	X			Signed 2/10/88
New Hampshire	H-1108		X		To study
New Hampshire	H-1139		X		Died in comm.
New Hampshire	H-751			X	To study
New Hampshire	H-1098			X	Passed 4/27/88
New Hampshire	S-281	X			To study
New Jersey	A-13	X			No action
New Jersey	A-593		X		No action
New Jersey	A-956		X		No action
New Jersey	AJR-5			X	Died in comm.
New Jersey	S-1242			X	No action
New Jersey	S-2468		X		Died in comm.
New York	A-8852	X			Died in comm.
New York	A-5529		X		Not passed
New York	A-9882	X			Died in comm.
New York	A-10851	X			Died in comm.
New York	A-11607	X			Died in comm.
New York	S-6891	X			Died in comm.
New York	S-9134	X			Died in comm.
North Carolina	SB-1583			X	Passed
Rhode Island	SB-2413			X	Passed 5/25/88
Utah	H-17			X	Signed 3/14/88
Utah	H-201	X			Not passed
Vermont	H-549		X		Died in comm.
Virginia	H-237	X			Carried to 1989
Virginia	HJR-11			X	Died in comm.
Virginia	HJR-65			X	Died in comm.
Virginia	HJR-106			X	Died in comm.
Virginia	HJR-118			X	Not passed
Virginia	SJR-3			X	Not passed
Washington	H-1529		X		Died in comm.
Washington	H-2030	X			Died in comm.
Wisconsin	AB-827		X		Died in comm.
Wisconsin	AJR 71			X	Not passed

Source: Compiled from "Bill Introductions in 1988 Legislative Sessions
Relating to Surrogacy Contracts," October 12, 1988.

APPENDIX C

Arkansas Code 9-10-201

Arkansas Code of 1987 Annotated

9-10-201. Child born to married or unmarried woman — Presumptions — Surrogate mothers.

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman's husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman's husband.

(c)(1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of the woman intended to be the mother.

(2) For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

History. Acts 1985, No. 904, §§ 1, 2;
A.S.A. 1947, §§ 34-720, 34-721.

APPENDIX D

Florida Statutes 63-212

PARENTING—VOLUNTEER AND SURROGATE AGREEMENTS

Chapter 83-143

S.B.No. 9

AN ACT relating to preplanned adoption arrangements; amending s. 63.212, F.S.; providing that contracts for the purchase, sale, or transfer of custody or parental rights in connection with a child intended to be born of a proposed pregnancy is unlawful; providing penalties; providing that parties may enter into a preplanned adoption arrangement and that the arrangement shall be based upon a nonbinding preplanned adoption agreement which shall contain certain terms; requiring that intended parents and the volunteer mother shall be represented by separate counsel; prohibiting payment of finder's fees for matching intended parents and volunteer mothers; providing definitions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (i) is added to subsection (1) of section 63.212, Florida Statutes, to read:

63.212. Prohibited acts; penalties for violation

(1) It is unlawful for any person:

(i) To contract for the purchase, sale, or transfer of custody or parental rights in connection with any child, or in connection with any fetus yet unborn, or identified in any way but not yet conceived, in return for any valuable consideration. Any such contract is void and unenforceable as against the public policy of this state. However, fees, costs, and other incidental payments made in accordance with statutory provisions for adoption, foster care, and child welfare are permitted; and a person may agree to pay expenses in connection with a preplanned adoption agreement as specified below, but the payment of such expenses may not be conditioned upon the transfer of parental rights.

1. Individuals may enter into a preplanned adoption arrangement as specified herein, but such arrangement shall not in any way:

a. Effect final transfer of custody of a child or final adoption of a child, without review and approval of the department and the court, and without compliance with other applicable provisions of law.

b. Constitute consent of a mother to place her child for adoption until 7 days following birth, and unless the court making the custody determination or approving the adoption determines that the mother was aware of her right to rescind within the 7-day period following birth but chose not to rescind such consent.

2. A preplanned adoption arrangement shall be based upon a preplanned adoption agreement which shall include, but need not be limited to, the following terms:

a. That the volunteer mother agrees to become pregnant by the fertility technique specified in the agreement, to bear the child, and to terminate any parental rights and responsibilities to the child she might have through a written consent executed at the same time as the preplanned adoption agreement, subject to a right of rescission by the volunteer mother, any time within 7 days after the birth of the child.

b. That the volunteer mother agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.

c. That the volunteer mother acknowledges that she is aware that she will assume parental rights and responsibilities for the child born to her as otherwise provided by law for a mother, if the intended father and intended mother terminate the agreement before final transfer of custody is completed, or if a court determines that a parent clearly specified by the preplanned adoption agreement to be the biological parent is not the biological parent, or if the preplanned adoption is not approved by the court pursuant to the Florida Adoption Act.

d. That an intended father who is also the biological father acknowledges that he is aware that he will assume parental rights and responsibilities for the child as otherwise provided by law for a father, if the agreement is terminated for any reason by any party before final transfer of custody is completed, or if the planned adoption is not approved by the court, pursuant to the Florida Adoption Act.

e. That the intended father and intended mother acknowledge that they may not receive custody or the parental rights under the agreement if the volunteer mother terminates the agreement or the volunteer mother rescinds her consent to place her child for adoption within 7 days after birth.

f. That the intended father and intended mother may agree to pay all reasonable legal, medical, psychological or psychiatric expenses of the volunteer mother related to the preplanned adoption arrangement, and may agree to pay the reasonable living expenses of the volunteer mother. No other compensation, whether in cash or in kind, shall be made pursuant to a preplanned adoption arrangement.

g. That the intended father and intended mother agree to accept custody of, and to assert full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment to the child.

h. That the intended father and intended mother shall have the right to specify the blood and tissue typing tests to be performed if the agreement specifies that at least one of them is intended to be the biological parent of the child.

i. That the agreement may be terminated at any time by any of the parties.

3. A preplanned adoption agreement shall not contain any agreement:

a. To reduce any amount paid to the volunteer mother if the child is stillborn or born alive but impaired, nor shall the agreement provide for the payment of a supplement or bonus for any reason.

b. Requiring the termination of the volunteer mother's pregnancy.

4. An attorney who represents an intended father and intended mother or any other attorney with whom that attorney is associated, shall not represent simultaneously a female who is or proposes to be a volunteer mother in any matter relating to a preplanned adoption agreement or preplanned adoption arrangement.

5. Payment to agents, finders, and intermediaries, including attorneys and physicians, as a finder's fee for finding volunteer mothers or matching a volunteer mother and intended father and intended mother is prohibited. Doctors, psychologists, attorneys and other professionals may receive reasonable compensation for their professional services, such as providing medical services and procedures, legal advice in structuring and negotiating a preplanned adoption agreement, and counseling.

6. As used in this paragraph, the term:

a. "Blood and tissue typing tests" include, but are not limited to, tests of red cell antigens, red cell isoenzymes, human leukocyte antigens, and serum proteins.

b. "Child" means the child or children conceived by means of an insemination that is part of a preplanned adoption arrangement.

c. "Fertility technique" means artificial embryonation, artificial insemination, whether in vivo or in vitro, egg donation, or embryo adoption.

d. "Intended father" means a male who, as evidenced by a preplanned adoption agreement, intends to have the parental rights and responsibilities for a child conceived through a fertility technique, regardless of whether the child is biologically related to the male.

e. "Intended mother" means a female who, as evidenced by a preplanned adoption agreement, intends to have the parental rights and responsibilities for a child conceived through a fertility technique, regardless of whether the child is biologically related to the female.

f. "Parties" means the intended father and intended mother, the volunteer mother and her husband, if she has a husband, who are all parties to the preplanned adoption agreement.

g. "Preplanned adoption agreement" means a written agreement among the parties that specifies the intent of the parties as to their rights and responsibilities in the preplanned adoption arrangement, consistent with the provisions of this act.

h. "Preplanned adoption arrangement" means the arrangement through which the parties enter into an agreement for the volunteer mother to bear the child, for payment by the intended father and intended mother of the expenses allowed by this act, for the intended father and intended mother to assert full parental rights and responsibilities to the child if consent to adoption is not rescinded after birth by the volunteer mother, and for the volunteer mother to terminate, subject to a right of rescission, in favor of the intended father and intended mother all her parental rights and responsibilities to the child.

i. "Volunteer mother" means a female person at least 18 years of age, who voluntarily agrees, subject to a right of rescission, that if she should become pregnant pursuant to a preplanned adoption arrangement, she will terminate in favor of the intended father and intended mother her parental rights and responsibilities to the child.

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor July 1, 1988.

Filed in Office Secretary of State July 1, 1988.

Additions in text are indicated by underlining; deletions by ~~strikethrough~~.

APPENDIX E

Indiana Statutes 31-8-1-1 to 31-8-2-3

Indiana Statutes Annotated

ARTICLE 8 HUMAN REPRODUCTION

CHAPTER.

1. DEFINITIONS, 31-8-1-1 — 31-8-1-5.
2. SURROGATE AGREEMENTS; ENFORCEABILITY, 31-8-2-1 — 31-8-2-3.

CHAPTER 1

DEFINITIONS

SECTION.

- 31-8-1-1. Applicability of definitions.
31-8-1-2. Aided conception.
31-8-1-3. Intended biological parent.

SECTION.

- 31-8-1-4. Surrogate.
31-8-1-5. Surrogate agreement.

31-8-1-1. Applicability of definitions. — The definitions in this chapter apply throughout this article. [P.L.175-1988, § 1.]

Compiler's Notes. Section 3 of P.L.175-1988 provides: "The provisions of this act are severable in the manner provided by IC 1-1-1-8(b)." **Effective Dates.** P.L.175-1988, § 4, declared an emergency and provided that the chapter take effect March 15, 1988.

31-8-1-2. Aided conception. — "Aided conception" means the fertilization of an oocyte or an ovum of a female human being by the fertilizing gamete of a male human being through any means other than sexual intercourse. [P.L.175-1988, § 1.]

31-8-1-3. Intended biological parent. — "Intended biological parent" means a party to a surrogate agreement who:

- (1) Agrees to be or is genetically related to a child borne by a surrogate; and
 - (2) Is not the surrogate's spouse.
- [P.L.175-1988, § 1.]

31-8-1-4. Surrogate. — "Surrogate" means a party to a surrogate agreement who agrees to bear or bears a child that is genetically related to:

- (1) The party who agrees to bear or bears the child and an intended biological parent;
 - (2) An intended biological parent and a gamete donor who is not:
 - (A) An intended biological parent; and
 - (B) The spouse of the party who agrees to bear or bears the child; or
 - (3) Two (2) intended biological parents of the child.
- [P.L.175-1988, § 1.]

31-8-1-5. Surrogate agreement. — "Surrogate agreement" means an agreement entered into before the birth of a child that is entered into between a surrogate and one (1) or more parties and that is intended by the parties at the time that the agreement is made to induce the surrogate to relinquish care, custody, and control over the child at birth to any of the following:

- (1) An intended biological parent of the child.
 - (2) An intended biological parent of the child and another person who is not:
 - (A) Genetically related to the child; and
 - (B) The surrogate's spouse.
 - (3) Two (2) intended biological parents of the child.
- [P.L.175-1988, § 1.]

CHAPTER 2

SURROGATE AGREEMENTS; ENFORCEABILITY

SECTION.

31-8-2-1. Agreements which may not be enforced.

31-8-2-2. Void agreements.

SECTION.

31-8-2-3. Use of agreement as evidence in civil actions involving best interests of child.

31-8-2-1. Agreements which may not be enforced. — The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:

- (1) Provide a gamete to conceive a child.
- (2) Become pregnant.
- (3) Consent to undergo or undergo an abortion.
- (4) Undergo medical or psychological treatment or examination.
- (5) Use a substance or engage in activity only in accordance with the demands of another person.
- (6) Waive parental rights or duties to a child.
- (7) Terminate care, custody, or control of a child.
- (8) Consent to a stepparent adoption under IC 31-3-1.

[P.L.175-1988, § 1.]

Compiler's Notes. As enacted by P.L.175-1988, § 1, there was a comma following "Terminate" in subdivision (7). For purposes of clarity and implementing the apparent intent of the general assembly, the compiler has deleted that comma.

Section 3 of P.L.175-1988 provides: "The provisions of this act are severable in the manner provided by IC 1-1-1-8(b)."

Effective Dates. P.L.175-1988, § 4, declared an emergency and provided that the chapter take effect March 15, 1988.

31-8-2-2. Void agreements. — A surrogate agreement described in section 1 [31-8-2-1] of this chapter that is formed after March 14, 1988, is void. [P.L.175-1988, § 1.]

31-8-2-3. Use of agreement as evidence in civil actions involving best interests of child. — After March 14, 1988, a court may not base a decision concerning the best interests of a child in any civil action solely on evidence that a surrogate and any other person entered into a surrogate agreement or acted in accordance with a surrogate agreement unless a party proves that the surrogate agreement was entered into through duress, fraud, or misrepresentation. [P.L.175-1988, § 1.]

APPENDIX F

Indiana Statutes 2-4-1A-9

Indiana Statutes Annotated (1988 Supp.)

***2-4-1A-9*. Interim study committee — Aided conception and surrogates [expires November 1, 1988].** — (a) The legislative council is urged to establish an interim study committee to do the following:

(1) Revise the laws governing adoption, paternity, custody, support, visitation, and the termination of parental rights and duties to address the issues raised by aided conception.

(2) Establish procedures and policies to protect the children borne by a surrogate and balance the interests of intended biological parents and surrogates.

(b) If the legislative council establishes the committee described in subsection (a), the committee shall operate under the direction of the legislative council and issue a final report when directed to do so by the legislative council.

(c) This SECTION expires November 1, 1988. [P.L.175-1988, § 2.]

***Compiler's Notes.** This temporary law was not enacted as part of the Indiana Code and the section number has been assigned by the compiler.

Section 3 of P.L.175-1988 provides: "The provisions of this act are severable in the manner provided by IC 1-1-1-8(b)."

Effective Dates. P.L.175-1988, § 3. March 15, 1988.

Cross References. Surrogate agreements, IC 31-8.

APPENDIX G

Kansas Statutes 65-509

Kansas Statutes Annotated

65-509. Certain advertisements and offers relating to adopting and placing children prohibited; definitions. (a) Except as otherwise provided in this section:

(1) No person shall advertise that such person will adopt, find an adoptive home for a child or otherwise place a child for adoption;

(2) No person shall offer to adopt, find a home for or otherwise place a child as an inducement to a woman to come to such person's maternity hospital or home during pregnancy or after delivery; and

(3) No person shall offer to adopt, find a home for or otherwise place a child as an inducement to any parent, guardian or custodian of a child to place such child in such person's home, institution or establishment.

(b) The provisions of paragraph (1) of subsection (a) of this section shall not apply to a licensed child placement agency operating as authorized by Kansas law or to the department of social and rehabilitation services.

(c) As used in this section:

(1) "Advertise" means to communicate by newspaper, radio, television, handbills, placards or other print, broadcast or electronic medium;

(2) "person" means an individual, firm, partnership, corporation, joint venture or other association or entity.

(d) The provisions of this section shall not apply to any person advertising to serve as a surrogate mother or to any person advertising for the services of a surrogate mother.

History: L. 1919, ch. 210, § 9; R.S. 1923, 65-509; L. 1984, ch. 224, § 1; July 1.

Law Review and Bar Journal References:

"Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals," David K. Martin, 23 W.L.J. 601, 602, 603 (1984).

APPENDIX H

Kentucky Revised Statutes 199.590

Kentucky

199.590. Adoption of children — Prohibited practices. — (1) 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.

(2) No person, agency, institution, or intermediary may sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights. Nothing in this section shall prohibit a licensed child-placing agency from charging a fee for adoption services. Nothing in this section shall be construed to prohibit in vitro fertilization. For purposes of this section "in vitro fertilization" means the process whereby an egg is removed from a woman, then fertilized in a receptacle by the sperm of the husband of the woman in whose womb the fertilized egg will thereafter be implanted.

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

(4) In any adoption for which approval of the secretary is required under KRS 199.470(4), the total amount of money paid, including attorney's fees, by adoptive parents for any purpose related to the adoption shall be made known to the court for approval or modification. (Enact. Acts 1950, ch. 125, § 22; 1984, ch. 119, § 1, effective July 13, 1984; 1988, ch. 52, § 1, effective July 15, 1988.)

Cited: O.S. v. C.F., 655 S.W.2d 32 (Ky. Ct. App. 1983).

NOTES TO DECISIONS

1. Surrogate Parenting.

There are fundamental differences between surrogate parenting procedure and the buying and selling of children which place surrogate parenting procedure beyond the purview of subsection (2) of this section. Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986).

When the legislature included "in vitro" fertilization procedure in this section while

leaving out the surrogate parenting procedure, the legislature was not legislating against surrogate parenting; all that can be derived from this language is that the legislature has expressed itself about one procedure for medically assisted conception while remaining silent on others. Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986).

APPENDIX I

Louisiana Revised Statutes 9:2713

Louisiana Revised Statutes

§ 2713. Contract for surrogate motherhood; nullity

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. "Contract for surrogate motherhood" means any agreement 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.

Added by Acts 1987, No. 583, § 1.

APPENDIX J

1988 Public Act No. 199 (Michigan)

Michigan Session Law

SURROGATE PARENTING ACT

PUBLIC ACT NO. 199

S.B.No. 228

AN ACT to establish surrogate parentage contracts as contrary to public policy and void; to prohibit surrogate parentage contracts for compensation; to provide for children conceived, gestated, and born pursuant to a surrogate parentage contract; and to provide for penalties and remedies.

The People of the State of Michigan enact:

M.C.L.A. § 722.851

Sec. 1. This act shall be known and may be cited as the "surrogate parenting act".

M.C.L.A. § 722.853

Sec. 3. As used in this act:

(a) "Compensation" means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother or surrogate carrier.

(b) "Developmental disability" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974, being sections 330.1001 to 330.2106 of the Michigan Compiled Laws.

(c) "Mental illness" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(d) "Mentally retarded" means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(e) "Participating party" means a biological mother, biological father, surrogate carrier, or the spouse of a biological mother, biological father, or surrogate carrier, if any.

(f) "Surrogate carrier" means the female in whom an embryo is implanted in a surrogate gestation procedure.

(g) "Surrogate gestation" means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.

(h) "Surrogate mother" means a female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination pursuant to a surrogate parentage contract.

(i) "Surrogate parentage contract" means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental rights to the child.

M.C.L.A. § 722.855

Sec. 5. A surrogate parentage contract is void and unenforceable as contrary to public policy.

M.C.L.A. § 722.857

Sec. 7. (1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier.

(2) A person other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who enters into, induces, arranges, procures, or otherwise assists in the formation of a contract described in subsection (1) is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

M.C.L.A. § 722.859

Sec. 9. (1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation.

(2) A participating party other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both.

(3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

M.C.L.A. § 722.861

Sec. 11. If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in section 3 of the child custody act of 1970, Act No. 91 of the Public Acts of 1970, being section 722.23 of the Michigan Compiled Laws.

M.C.L.A. § 722.863

Sec. 13. This act shall take effect September 1, 1988.

This act is ordered to take immediate effect.

Approved June 27, 1988.

Filed June 27, 1988.

Substantive changes in text indicated by underline; asterisks * * * indicate deletion

APPENDIX K

Revised Statutes of Nebraska 25-21,200

Revised Statutes of Nebraska 1943
(1988 Cumulative Supplement)

(u) SURROGATE PARENTHOOD CONTRACTS

25-21,200. Contract; void and unenforceable; definition. (1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

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

Source: Laws 1988, LB 674, § 1.
Effective date July 9, 1988.

APPENDIX L

Nevada Revised Statutes 127.287

Nevada Revised Statutes

127.287 Payment to or acceptance by natural parent of compensation in return for placement for or consent to adoption of child.

1. Except as otherwise provided in subsection 3, it is unlawful for any person to pay or offer to pay money or anything of value to the natural parent of a child in return for the natural parent's placement of the child for adoption or consent to or cooperation in the adoption of the child.

2. It is unlawful for any person to receive payment for medical and other necessary expenses related to the birth of a child from a prospective adoptive parent with the intent of not consenting to or completing the adoption of the child.

3. A person may pay the medical and other necessary living expenses related to the birth of a child of another as an act of charity so long as the payment is not contingent upon the natural parent's placement of the child for adoption or consent to or cooperation in the adoption of the child.

4. This section does not prohibit a natural parent from refusing to place a child for adoption after its birth.

5. The provisions of this section do not apply if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man who is not her husband.

(Added to NRS by 1987, 2049)

APPENDIX M

"Uniform Status Of Children Of Assisted Conception Act"

UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-SEVENTH YEAR
IN WASHINGTON, D.C.
JULY 29 - AUGUST 5, 1988

WITHOUT PREFATORY NOTE AND COMMENTS

* The following text is subject to revision by the Style Committee of the National Conference of Commissioners on Uniform State Laws. Final copies of the Act with style changes and complete Prefatory Note and Comments can be obtained for a nominal charge from the Headquarters Office of the National Conference of Commissioners on Uniform State Laws after November 1, 1988: 676 North St. Clair Street, Suite 1700, Chicago, IL 60611, 312/915-0195.

1 UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

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4 SECTION 1. DEFINITIONS. As used in this [Act]:

5 (1) "Assisted conception" means a pregnancy
6 resulting from insemination of an egg of a woman with
7 sperm of a man (i) by means other than sexual
8 intercourse or (ii) by removal and implantation of an
9 embryo after sexual intercourse, but does not include
10 the pregnancy of a wife resulting from the insemination
11 of her egg using her husband's sperm.

12 (2) "Donor" means an individual [other than a
13 surrogate] whose body produces sperm or egg used for the
14 purpose of assisted conception, whether or not a payment
15 is made for the sperm or egg used, but does not include
16 a woman who gives birth to a resulting child.

17 [(3) "Intended parents," means a man and woman,
18 married to each other, who enter into an agreement
19 providing that they will be the parents of a child born
20 to a surrogate through assisted conception, under this
21 [Act], using an egg or sperm of at least one intended
22 parent.]

23 (4) "Surrogate" means an adult woman who enters
24 into an agreement to bear a child conceived through
25 assisted conception for intended parents.

26 (5) "Child" includes children.

1 SECTION 2. MATERNITY. [Except as provided in
2 Sections 5 through 9 of this [Act],] a woman who gives
3 birth to a child is the child's mother.

4
5 SECTION 3. ASSISTED CONCEPTION BY MARRIED WOMAN.
6 [Except as provided in Sections 5 through 9 of this
7 [Act],] the husband of a woman who bears a child through
8 assisted conception is the father of the child,
9 notwithstanding any declaration of invalidity or
10 annulment of the marriage obtained after the assisted
11 conception, unless within two years after learning of
12 the child's birth he commences an action in which the
13 mother and child are parties and in which it is
14 determined that he did not consent to the assisted
15 conception.

16
17 SECTION 4. PARENTAL STATUS OF DONORS AND DECEASED
18 PERSONS. [Except as otherwise provided in Sections 5
19 through 9 of this [Act]:]

20 (a) A donor is not the parent of a child
21 conceived through assisted conception.

22 (b) A person who dies before a conception using
23 his sperm or her egg is not a parent of any resulting
24 child born of the conception.

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ALTERNATIVE A

Comment: A state which chooses Alternative A shall also consider Section 1(3) and the bracketed language in Sections 1(2), 2, 3, and 4.

[SECTION 5. SURROGACY AGREEMENT.

(a) Notwithstanding any other provisions of this [Act], a surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If a surrogacy agreement is not approved by the court under Section 6, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

SECTION 6. PETITION AND HEARING FOR APPROVAL OF SURROGACY.

(a) The intended parents and the surrogate, at least one of whom is a resident of this State, and the

1 surrogate's husband if she is married, must join in a
2 petition in the [appropriate court] before conception.
3 A copy of the written surrogacy agreement must be
4 attached to the petition. The court shall name a
5 [guardian ad litem] to represent the interests of any
6 child who might be born as a result of assisted
7 conception and shall [may] appoint counsel to represent
8 the surrogate.

9 (b) The court shall hold a hearing on the
10 petition and shall enter an order approving the
11 agreement, authorizing the assisted conception for the
12 period of 12 months after the date of the order,
13 declaring the intended parents to be the parents of a
14 child born pursuant to the agreement and discharging the
15 guardian ad litem and attorney for the surrogate, upon
16 finding that:

17 (1) the court has jurisdiction and all parties
18 have submitted to its jurisdiction under subsection (e)
19 of this Section and have agreed that the law of this
20 State shall govern all matters arising under this [Act]
21 and the agreement;

22 (2) the intended mother is unable to bear a
23 child or is unable to do so without unreasonable risk to
24 the unborn child or to the physical or mental health of
25 the intended mother or child. This finding must be
26 supported by medical evidence;

1 (3) the [relevant child welfare agency] has
2 made a home study of the intended parents and the
3 surrogate and a copy of the report of the home study has
4 been filed with the court;

5 (4) the intended parents, the surrogate, and
6 the surrogate's husband, if any, meet the standards of
7 fitness applicable to adoptive parents in this State;

8 (5) all parties have voluntarily entered into
9 the surrogacy agreement and understand its terms and the
10 nature, meaning, and effect of the proceeding;

11 (6) the surrogate has had at least one
12 pregnancy and delivery and bearing another child will
13 not pose an unreasonable risk to the unborn child or to
14 the physical or mental health of the surrogate or the
15 child. This finding must be supported by medical
16 evidence;

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

23 (8) the results of any medical, psychological,
24 or genetic screening agreed to by the parties or
25 required by law have been filed with the court and made
26 available to the parties;

1 (9) adequate provision has been made for all
2 reasonable health care costs associated with the
3 surrogacy until the child's birth including
4 responsibility for such costs in the event of
5 termination under Section 7; and

6 (10) the agreement would not be substantially
7 detrimental to the interest of any of the affected
8 persons.

9 (c) Unless otherwise provided in the surrogacy
10 agreement, all court costs, counsel fees, and other
11 costs and expenses associated with the hearing shall be
12 assessed against the intended parents.

13 (d) Notwithstanding any other law concerning
14 judicial proceedings or vital statistics records, all
15 hearings and proceedings conducted under this section
16 must be held in camera, and all court records must be
17 kept confidential and subject to inspection under the
18 same standards applicable to adoptions in this State.
19 At the request of any party, the court shall take all
20 steps necessary to insure that the identities of the
21 parties are not disclosed to each other.

22 (e) The court conducting the hearing has
23 exclusive and continuing jurisdiction of all matters
24 arising under the surrogacy agreement until any child
25 born after entry of an order under this section is six
26 months old.

1 SECTION 7. TERMINATION OF SURROGACY AGREEMENT.

2 (a) Subsequent to any order entered under
3 Section 6, but before the commencement of surrogate
4 pregnancy by assisted conception, the court for cause,
5 or the surrogate, her husband, or the intended parents
6 may terminate the agreement by giving written notice of
7 termination to all other parties and filing notice of
8 the termination with the court. Thereupon, the court
9 shall vacate the order entered under Section 6.

10 (b) A surrogate who has provided the egg for the
11 assisted conception pursuant to an approved agreement
12 may terminate the agreement by filing written notice
13 with the court within 180 days after the last
14 insemination pursuant to the agreement. Upon finding,
15 after notice to the parties to the agreement and
16 hearing, that the surrogate has voluntarily terminated
17 the surrogacy agreement and understands the nature,
18 meaning, and effect of the termination the court shall
19 vacate the order entered under Section 6. The
20 surrogate incurs no liability to the intended parents
21 for exercising her right of termination.

22

23 SECTION 8. PARENTAGE UNDER APPROVED SURROGACY. For
24 surrogacy agreements approved under Section 6 the
25 following rules of parentage apply:

26 (a) Upon birth of a child to the surrogate, the

1 intended parents are the parents of the child and the
2 surrogate and her husband, if any, are not parents of
3 the child unless the court vacates the order pursuant to
4 Section 7(b). The intended parents shall file a written
5 notice with the court that a child has been born to the
6 surrogate within 300 days after assisted conception and
7 the court shall thereafter enter an order requiring the
8 [Department of Vital Statistics] to issue a new birth
9 certificate naming the intended parents as parents, with
10 the original birth certificate to be sealed in the
11 records of the [department].

12 (b) If after notice of termination by the
13 surrogate the court vacates the order under Section
14 7(b) the surrogate is the mother of the resulting child,
15 and her husband, if a party to the agreement, is the
16 father. If the surrogate's husband is not a party to
17 the agreement or the surrogate is unmarried, paternity
18 of the child is governed by [the Uniform Parentage Act].
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20 SECTION 9. SURROGACY: MISCELLANEOUS PROVISIONS.

21 (a) Notwithstanding any law to the contrary, the
22 surrogacy agreement that is the basis of an order under
23 Section 6 may provide for the payment of a fee.

24 (b) A surrogacy agreement may not limit the right
25 of the surrogate to make decisions regarding her health
26 care or that of the fetus.

1 (c) After the entry of an order under Section 6,
2 the marriage of the surrogate does not affect the
3 validity of the order and her husband's consent to the
4 surrogacy agreement is not required nor is he the
5 father of any resulting child.

6 (d) A child born to a surrogate within 300 days
7 after assisted conception pursuant to an order under
8 Section 6 is presumed to result from the assisted
9 conception. The presumption is conclusive as to all
10 persons who have notice of the birth and who fail to
11 file within six months after notice an action to assert
12 the contrary in which the child and the parties to the
13 agreement are named as parties. The action must be
14 filed in the court that issued the order under Section
15 6.

16 (e) Health care providers shall not be liable for
17 recognizing the surrogate as the mother before receipt
18 of a copy of the order entered under Section 6 or for
19 recognizing the intended parents as parents after
20 receipt of an order entered under Section 6.]

21 End of Alternative A

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ALTERNATIVE B

Comment: A state which chooses Alternative B shall consider Sections 10, 11, 12, 13, 14, 15, and 16, renumbered 6, 7, 8, 9, 10, 11, and 12, respectively.

[SECTION 5. SURROGATE AGREEMENTS. Any agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].]

End of Alternative B

SECTION 10. RELATION OF PARENT AND CHILD. A child whose status as a child is declared or negated by this [Act] is the child only of his or her parent or parents as determined under this [Act] for all purposes including but not limited to succession and gift rights in Section 11 of this [Act].

SECTION 11. SUCCESSION AND GIFT RIGHTS. Unless superseded by later events forming or terminating a

1 parent and child relationship, the status of parent and
2 child declared or negated by this [Act] as to a given
3 individual and a child born alive controls:

4 (1) for purposes of intestate succession;

5 (2) for purposes of probate law exemptions,
6 allowances, or other protections for children in a
7 parent's estate; and

8 (3) for purposes of determining eligibility of the
9 child or its descendants to share in a donative
10 transfer from any person as a member of a class
11 determined by reference to the relationship.

12

13 SECTION 12. UNIFORMITY OF APPLICATION AND
14 CONSTRUCTION. This [Act] shall be applied and construed
15 to effectuate its general purpose to make uniform the
16 law with respect to the subject of this [Act] among
17 states enacting it.

18

19 SECTION 13. SEVERABILITY. If any provision of this
20 [Act] or its application to any person or circumstance
21 is held invalid, the invalidity does not affect other
22 provisions or applications of this [Act] which can be
23 given effect without the invalid provision or
24 application, and to this end the provisions of this
25 [Act] are severable.

1 SECTION 14. SHORT TITLE. This [Act] may be cited as
2 the Uniform Status of Children of Assisted Conception
3 Act.

4 SECTION 15. EFFECTIVE DATE. This [Act] shall take
5 effect on _____. Its provisions are
6 to be applied prospectively.

7
8 SECTION 16. REPEALS. Acts or parts of acts
9 inconsistent with this [Act] are repealed to the extent
10 of the inconsistency.