Surrogate Motherhood at a Legal Crossroad: An Analysis of Proposed Legislation in New York

Diana Greco Attner

Patricia Fried

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CURRENT ISSUES

SURROGATE MOTHERHOOD AT A LEGAL CROSSROAD: AN ANALYSIS OF PROPOSED LEGISLATION IN NEW YORK

Balancing social concerns against the reproductive rights of individuals is the heart of the controversy that has raged in recent years over the reproductive method known as surrogate motherhood. This method is far from revolutionary but its increased frequency as an alternative reproduction technique has sparked

1 See generally C. Grobstein, From Chance to Purpose: An Appraisal of External Human Fertilization (1981) (discussing in vitro fertilization and the embryo transfer procedure). The surrogate method involves the artificial insemination of a woman with a donor's sperm. See Wadlington, Artificial Conception: The Challenge for Family Law, 69 Va. L. Rev. 465, 475-76 (1983). In most cases, the donor is the husband of a woman who is biologically unable to have children. Surrogate mothering differs from more traditional artificial insemination methods such as in vitro fertilization or embryo transfer in two significant ways. Id. First, the wife of the donor is in no way genetically related to the child and does not participate in the gestation process. Id. Second, the surrogate signs a contract which requires that she relinquish all rights to the child and finally, she is paid for her services. Id. See generally N. Keane & D. Breo, The Surrogate Mother (1981) (case studies of the legal and emotional complexities surrounding surrogate motherhood).

2 See Goldfarb, Two Mothers, One Baby, No Law, 11 Hum. Rts. 26 (Summer 1983). The notion of surrogate motherhood can be traced back to biblical times. See Genesis 16:1-6. Approximately four thousand years ago Abraham's wife, Sarah, who was unable to conceive, directed her husband to the maid Hagar, who bore Ishmael. Id. This passage provides, "Behold now, the Lord prevented me from bearing children. Go into my maid; it may that I shall obtain children by her. And Abraham harkened to the voice of Sarah." Id. The Hagar Institute, a surrogate mother service in Topeka, Kansas, derives its name from this biblical event. See generally Robertson, Surrogate Mothers: Not So Novel After All, The Hastings Center Rep., Oct. 1983 (historical survey of utilization of the surrogate method).

3 See New York State Senate Judiciary Committee, Surrogate Parenting: A Proposal for Legislative Reform at 17 (1987) [hereinafter Senate Committee Report]. Recent estimates indicate that one out of every eight American couples failed to conceive after one
heated debate. Serious questions have been raised in the legal, medical and religious communities. Opponents of surrogate motherhood cite public policy concerns and claim that it is a disguised form of baby selling. Proponents on the other hand, con-


Other explanations for the increased use of the surrogate method can be traced to changing social norms. See Bodenheimer, New Trends in Requirements in Adoption Law and Proposals for Legislative Change, 49 S. CALIF. L. REV. 10, 13 (1975). Permissive abortion laws and greater reliance on birth control methods have led to a dramatic decrease in the number of babies born and available for adoption. Id. In addition, the social stigma of being an unwed mother has waned to such an extent that more women are deciding to keep their babies. See also Aral & Cates, The Increasing Concern with Infertility, 250 J. A.M.A. 2327, 2327 (1986). Furthermore, many more women are choosing to delay childbearing for educational, financial and career-oriented reasons and consequently, may not discover that they are unable to bear children until they are in their thirties. See Note, Legal Recognition of Surrogate Gestation, 7 WOMEN'S RTS. L. REP. 107, 107-08 n.2. (1980) (Couples wishing to adopt are deterred by the lengthy and slow adoption process which does not guarantee results); Adoption and Foster Care 1975: Hearings on Baby Selling Before the Subcomm. on Children & Youth of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 6 (1975) (estimated wait to adopt is three to seven years).


5 See Postell, Establishing Guidelines for Artificial Conception, TRIAL, Nov. 1986, at 93. The Ethics Committee of the American Fertility Society recently released guidelines addressing ethical, moral and legal issues focusing upon artificial birth technologies. ETHICAL CONSIDERATIONS OF NEW REPRODUCTIVE TECHNOLOGIES, (Supp. 1) Sept. 1986, at 675. This report provides: "The Committee does not recommend widespread clinical application of surrogate motherhood at this time . . . . The Committee has serious ethical reservations about surrogacy which cannot be fully resolved until appropriate data are available for assessment of the risks and possible benefits of this alternative." Id.

6 See Note, Therapeutic Impregnation: Prognosis of a Lawyer - Diagnosis of a Legislature, 39 U. Cin. L. REV. 291, 300-02 (1970). As early as 1949, the Catholic Church condemned artificial insemination in all forms as prohibited by and contrary to morality and the law of nature. Id. In a discourse to the fourth international convention of Catholic doctors held in Rome in September, 1949, Pope Pius XII concluded that:

[artificial insemination] outside of marriage is to be condemned purely and simply as immoral. According to both the natural law and the divine positive law, the procreation of new life can be only the fruit of marriage . . . . The child conceived under these conditions would be, by that very fact illegitimate . . . .

Id. at 301. The Catholic Church recently maintained this position in a Vatican report declaring "moral opposition to virtually all forms of artificial fertilization and embryo transfer, and approving medical interference in human procreation only when it assists a married couple who have engaged in a 'normal' sexual act." Suro, Vatican Asks Governments to Curb Birth Technology and to Outlaw Surrogates, N.Y. Times, Mar. 11, 1987, at A 1, col. 6.

7 See infra notes 19-27 and accompanying text for a discussion of the black market sale of children. But see N. KEANE & D. BREO, supra note 1, at 154 (remarking that public policy underlying the antipathy to payment for adoption is largely inapplicable to surrogate situations).
Surrogate Motherhood
tend that the surrogate contract\(^8\) is a valid agreement stemming
from a constitutional right to reproduce\(^8\) thereby warranting spe-
cial protection.

It is submitted that the application of existing legislation to sur-
rogate parenting arrangements has proven to be both inappropri-
ate and ineffective to adequately protect the rights of the child,
the biological father and the surrogate mother. Moreover, in the
absence of definitive legislation, the controversy will inevitably
continue.

This Article discusses applicable contract, constitutional and
family law issues. In addition, bills put before the New York legis-
lature concerning surrogate arrangements\(^9\) will be evaluated. It is
submitted that new legislation which is both responsive to the
needs of infertile couples yet sufficiently tailored to safeguard
against abuse is not only feasible but desirable as well.

I. Contractual Analysis

Perhaps the most distinctive feature of the surrogate procedure
as opposed to other reproductive techniques is the surrogate con-
tract.\(^11\) Essentially, it is an agreement between a married couple
who is biologically incapable of having a child\(^18\) and a fertile wo-
man\(^18\) who agrees to be artificially inseminated with the donor's

\(^8\) See infra notes 11-18 and accompanying text.
\(^9\) See infra note 23 and accompanying text.
\(^10\) See infra notes 84-124 and accompanying text for a discussion and comparison of the
two proposals.
\(^11\) See N. KEANE & D. BREO, supra note 1, at 268-305 (example of preliminary forms and
basic surrogate agreement).
\(^18\) Id. at 268. Some couples seek a surrogate not because of infertility but because of the
fear that genetic problems of the mother will be passed on to the child and/or create a life
threatening situation for the mother as a result of the pregnancy. Id. Such was the case in
Mrs. Stern, the biological father's wife, was advised against having children because of her
affliction with multiple sclerosis. Id. at 336, 525 A.2d at 1139.

\(^18\) Parker, Motivation of Surrogate Mothers: Initial Findings, 140 AM. J. PSYCHIATRY 117,
188 (1989). A recent study concluded that the motivating factors of women who wish to
become surrogate mothers are complex. Id. Approximately 85% of the women indicated
that while money was not their sole motivation, they would not participate without com-
ensation. Id. Other factors included enjoyment of being pregnant, the desire to give the
gift of a baby to an infertile couple, and an emotional need to compensate for the loss of a
child due to abortion or adoption. Id. See also Kantrowitz, Who Keeps 'Baby M'?, NEWSWEEK,
sperm, to carry the child to term, and upon the birth of the child, to surrender all parental rights.14 The contracting parties pay the surrogate mother a fee18 in addition to necessarily incurred medical costs. Very often, the couple also pays a fee to a third party intermediary who is responsible for making the arrangements.18

14 See supra note 1 and accompanying text. The contract between the parties in the Baby “M” case was typical. Paragraph 3 of the contract provided:

3. WILLIAM STERN, Natural Father, does hereby enter into this written contractual Agreement with MARY BETH WHITEHEAD Surrogate, where MARY BETH WHITEHEAD shall be artificially inseminated with the semen of WILLIAM STERN by a physician. MARY BETH WHITEHEAD, Surrogate, upon becoming pregnant, acknowledges that she will carry said embryo/fetus(s) until delivery. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree that they will cooperate with any background investigation into the Surrogate’s medical, family and personal history and warrants the information to be accurate to the best of their knowledge. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree to surrender custody of the child to WILLIAM STERN, Natural Father, immediately upon birth, acknowledging that it is the intent of this Agreement in the best interests of the child to do so; as well as institute and cooperate in proceedings to terminate their respective parental rights to said child, and sign any and all necessary affidavits, documents, and the like, in order to further the intent and purposes of this Agreement. It is understood by MARY BETH WHITEHEAD, and RICHARD WHITEHEAD, that the child to be conceived is being done so for the sole purpose of giving said child to WILLIAM STERN, its natural and biological father. MARY BETH WHITEHEAD and RICHARD WHITEHEAD agree to sign all necessary affidavits prior to and after the birth of the child and voluntarily participate in any paternity proceedings necessary to have WILLIAM STERN’S name entered on said child’s birth certificate as the natural or biological father.


18 See Goldfarb, supra note 2, at 28. The payment to the surrogate is viewed as compensation for undertaking the risks of pregnancy, pain and suffering, risk of death, loss of wages and loss of consortium. Id. See also N. Keane & D. Breo, supra note 1, at 269 (fees for the surrogate’s services are approximately $10,000). But see infra note 20; Keane, Legal Problems of Surrogate Motherhood, 1980 S. ILL. U.L.J. 147, 155 & n.48 (citing letter to Margaret Pfeiffer from Wayne County, Michigan Juvenile Court Executive Judge James Lincoln where he expressed opinion “that only the direct medical expenses of the surrogate mother—not the value of her services in carrying the child” or her foregone income—could be approved by the court).

19 See SENATE COMMITTEE REPORT, supra note 8, at 17. The use of infertility centers as a means of matching infertile couples with surrogates has become increasingly popular. Id. Major centers are currently operating in New York, Detroit, Philadelphia, Louisville, Columbus and Topeka. Id. at 19 n.20. The following fee structure is common: $6,500 to $10,000 for the infertility center, $10,000 for the surrogate mother plus all medical expenses not covered by the surrogate’s health insurance, $300 for psychiatric evaluation of the surrogate, term life insurance for the surrogate, $400 for an attorney for the surrogate, $400 for maternity clothes, $500 for paternity tests, and $500 in attorney’s fees for the adoption. Id.
Surrogate Motherhood

As a final step, the biological father establishes paternity and his wife legally adopts the child. While the arrangement initially appears equitable to all parties, opponents of the surrogate method have challenged it as being a disguised form of baby selling. Public policy arguments have

17 See supra, note 14 and accompanying text (contract between Sterns and Whiteheads specifically stated that parties agreed to participate in necessary paternity proceedings). Opponents of the surrogate arrangement have sought to preclude the biological father from obtaining an order of filiation, even where the surrogate joins in his request. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985). In Syrkowski, the natural father sought to have his name entered upon the birth certificate. Id. at 370, 362 N.W.2d at 212. The Attorney General of Michigan intervened, arguing that the trial court lacked jurisdiction to grant the relief requested because it was beyond the scope and purpose of the Paternity Act. Id. at 370, 362 N.W.2d at 212. The trial court granted the Attorney General's motion for accelerated judgment and the appellate court affirmed. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985). The Michigan Supreme Court reversed that decision however, finding that there was subject matter jurisdiction over the natural father's request even in the context of a surrogate arrangement. Syrkowski, 420 Mich. at 375, 362 N.W.2d at 214.

18 See Note, Surrogate Motherhood and the Baby-Selling Laws, 20 COLUM. J.L. & SOC. PROBS. 1, 8 (1986). In the situation where the natural father's wife is a party to the surrogate contract, it is often necessary to take the child out of the state for adoption since 24 states prohibit the payment of any consideration, other than medical expenses, in connection with adoptions. Id. For example, New York requires that an affidavit be filed stating that no compensation, other than medical and legal fees, have been paid in connection with the adoption. N.Y. DOM. REL. LAW § 116(3)(d) (McKinney 1977); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983); cf. Florida Step-Parent Adoption Act, FLA. STAT. ANN. § 63.04(2)(d) (West 1985) (does not include a residency requirement or disclosure of any fee paid). Recently, however, infertility centers have drafted surrogate contracts requiring only the natural father's signature. See Brophy, A Surrogate Mother Contract to Bear a Child, 20 J. FAM. L. 263, 264 (1981-82). In this way, the natural father's wife is not a party to the contract. Id. at 264. Moreover, she is not actually involved with any payments made to the surrogate, which enables her to petition to adopt in her home state without concern that she will have violated any state prohibition of compensation in connection with adoption. Id.

been promulgated on the premise that a child is not chattel and may not be bought or sold.\textsuperscript{20} An analogy is drawn to the black-market sale of babies\textsuperscript{21} which is prohibited by existing adoption statutes in each of the fifty states.\textsuperscript{22} This view has found rather limited acceptance in the courts. In \textit{Doe v. Kelley},\textsuperscript{23} the Michigan Court of Appeals held that the constitutional right to bear or beget a child\textsuperscript{24} did not bestow upon the surrogate mother the right to bear a child in exchange for compensation, while utilizing the adoption laws to effect the transfer of the child to the contracting couple.\textsuperscript{25} While the court's interpretation is clearly in furtherance of policy concerns, it is suggested that the crucial issue is not the legality of the procedure itself but rather the legality of permitting remuneration to the surrogate as consideration for services rendered. The \textit{Kelley} court found that the interest of the state in preventing the black-marketing of infants was sufficiently compelling to justify denying compensation to the mother.\textsuperscript{26} Implicit in that decision, however, is the notion that absent compensation, Michigan no longer has a viable interest in prohibiting such agreements since the characteristics of black-marketing no longer exist.\textsuperscript{27}

One feature distinguishing the surrogate contract from the

\textsuperscript{20} See Senate Committee Report, \textit{supra} note 3, at 32-36. Critics of surrogate arrangements fear that acceptance of the practice could lead to commercialization and dehumanization of reproduction. \textit{Id.} Extended to logical extremes, surrogate arrangements could lead to development of breeder farms and the mass marketing of babies. \textit{Id.}


\textsuperscript{22} See \textit{infra} note 70 and accompanying text.


\textsuperscript{25} 106 Mich. App. at 173-74, 307 N.W.2d at 441.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Cf. Op. Ohio Att'y. Gen. No. 83-868} (Oct. 18, 1983) (LEXIS, States library, Ohio AG file) (surrogate contracts considered not to be in violation of Louisiana statutes prohibiting the sale of minor children where adopting parents pay only actual prenatal care and living expenses of the surrogate mother, in addition to her necessary actual living and medical expenses for a period up to thirty days after birth).
Surrogate Motherhood

“sale” of babies is that the former is an agreement to “bear” a child not to “sell” a child. While this may seem to be a fine demarcation, the distinction is further supported by the fact that the surrogate contract is a consensual arrangement made prior to conception. In light of these factors, it is difficult to characterize the surrogate contract as black-marketing. In *Surrogate Parenting Assocs. v. Kentucky* it was precisely the absence of the coercive nature of black-marketing that the court found “central” to a decision to uphold the defendant infertility center’s charter, thereby permitting it to assist in matching infertile couples with potential surrogate mothers.

Assuming the validity of the surrogate contract, other serious public policy ramifications impinge upon the postnatal surrender of the child. Despite an unequivocal promise to relinquish all parental rights to the child, the possibility always exists that the surrogate will renege on her promise or simply change her mind. Such was the situation in the case *In re Baby “M”*, where the surrogate mother refused to comply with the essential terms of the surrogate agreement. The infertile couple took refuge in a

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*See Comment, Contracts to Bear a Child, 66 Calif. L. Rev. 611, 613 (1978).*

*See N. Keane & D. Bredo, supra note 1, at 154 (surrogate contracts differ because they are the product of the contracting couple’s desire to bring a child into existence by consensual prearrangement which is, as far as biologically possible, their “own”); Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. Rich. L. Rev. 467, 478-79 (1982) (surrogate agreements do not fit into the black market profile because they involve uncoerced, independent decisions to enter into an agreement to bear a child prior to conception).*

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

Id. at 211. The court stated:

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

*Id.* at 211-12 (emphasis added).

*See, e.g., Noyes v. Thrane, No. CF 7614, slip op. (La. 1981) (surrogate changed her mind after discovering that natural father’s wife had undergone a sex-change operation but paternity suit dropped to avoid publicity adverse to child’s welfare); In re Steve B.D. & Linda Sue D., No. 15998, slip op. (Idaho June 17, 1986) (surrogate changed her mind three weeks after termination of her parental rights but lost custody after court ruled that child’s best interests should take precedence over presumption in favor of natural mother).*


*Id.*
New Jersey court seeking enforcement of the contract in addition to the equitable relief of specific performance.\textsuperscript{88} The court awarded custody to the contracting couple, William and Elizabeth Stern, basing its decision on the best interests of the child.\textsuperscript{88} Breach by the surrogate mother\textsuperscript{87} presents a very difficult problem in the determination of an appropriate remedy.\textsuperscript{88} "Traditional contract law has been an inappropriate means of settling disputes especially where the nature of the contract is so personal.\textsuperscript{88} Courts ‘historically have refused to order an individual to perform a contract for personal services . . . [f]or practical policy and constitutional reasons;’\textsuperscript{89} yet, it is obvious that under the circumstances of

\textsuperscript{88} See Restatement of Contracts § 358 (1932). Assuming the validity of surrogate contracts, the non-breaching party would obviously seek the equitable remedy of specific performance. \textit{Id.} Such an order would require that the surrogate perform precisely as she promised. \textit{Id.} See also J. Calamari & J. Perillo, \textit{The Law of Contracts} 581 (1977).

\textsuperscript{88} 217 N.J. Super. at 523, 525 A.2d at 1132. The court stated "[t]he primary issue to be determined by this litigation is what are the best interests of a child until now called ‘Baby M’. All other concerns raised by counsel constitute commentary." \textit{Id.} Since custody was awarded to the Sterns based on the best interests of Baby M, now Melissa Stern, it is submitted that the discussions regarding the contract determined only that Mrs. Whitehead was entitled to the original contract fee of $10,000 because the court “specifically enforced” the agreement. \textit{Id.} The court failed to make any further legal findings concerning the validity of the surrogate contract in the absence of a legislative directive. \textit{Id.}

\textsuperscript{87} See generally Note, Surrogate Parenthood - An Analysis of the Problems and a Solution: Representation for the Child, 12 Wm. Mitchell L. Rev. 143, 166 (1985) (refusal to relinquish custody of child is not the only possible breach). For example, the surrogate could partially breach by failing to receive proper prenatal care, thereby jeopardizing the health of the fetus, or by failing to properly care for herself in accordance with the terms of the contract. \textit{Id.} See also Black, Legal Problems of Surrogate Motherhood, 16 New Eng. L. Rev. 373, 393-94 (1981) (contract guards against the surrogate’s practicing of contraception or engaging in activities detrimental to health of fetus); Coleman, Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions, 50 Tenn. L. Rev. 71, 86 (1982) (terms of the surrogate contract generally include prohibition of smoking, drinking and a required period of abstinence from intercourse until conception is proven).


\textsuperscript{89} See Comment, \textit{supra} note 38, at 470. In surrogate contracts, as with any personal services contract, the courts will generally not grant specific performance. \textit{Id.} Policy considerations such as the difficulty of court supervision of such contracts, the possibility of a violation of the thirteenth amendment prohibition against involuntary servitude and a reluctance to force individuals into unwanted personal associations, underly the court’s refusal to grant specific performance. \textit{Id.} See also Keane, \textit{supra} note 15, at 167-68 (discussing how the enforcement problem in the surrogate situation would be "monumental").

\textsuperscript{90} Keane, \textit{supra} note 15, at 167-68. Other policy concerns peculiar to the surrogate
Surrogate Motherhood

the surrogate arrangement, the infertile couple will hardly be satisfied with money damages.\textsuperscript{41}

Where the breach is occasioned by the fault of the infertile couple,\textsuperscript{42} the solutions appear to be more clear cut. If the breach occurs prior to conception, the surrogate is entitled to bring suit for the amount due her under the contract, as well as any medical expenses incurred up to the time of breach.\textsuperscript{43} Traditional contract remedies adequately accomodate this scenario as there is no child to consider. However, if the breach occurs after conception, the remedies are not so simple.\textsuperscript{44} The surrogate could presumably abort the pregnancy if she has not reached her third trimester\textsuperscript{45}

mother situation involve a reluctance to effect the transfer of a child from its natural mother to the intended parents. See Senate Committee Report, supra note 3, at 30-31. But see Keane, supra note 15, at 168 (specific performance feasible where surrogate breaches after birth because once child is born, it is within the power of the courts to order the surrogate to consent and deliver child into custody of biological parent); Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 Harv. L. Rev. 1936, 1955 (1986) (courts should permit specific performance because the risks are so severe in comparison with an inalienable abortion right and denying specific performance would risk comparable harm to the father). In the case of Baby "M", specific performance was granted to the contracting couple on the basis that doing so would be in the child's best interests. Baby "M", 217 N.J. Super. at 390, 525 A.2d at 1167. This determination was made in light of the absence of any rule of law which would squarely resolve the issue. Id.

41 See Note, supra note 40, at 1953-54. It would be difficult, if not impossible, to assess monetary damages for the mental anguish of the natural father and his wife once their hopes for having their own child are destroyed by the surrogate's breach of the agreement to surrender the child after its birth. Id.

42 See Note, supra note 37, at 165 n.143. There are numerous ways in which the employer can breach: by failing to pay the agreed compensation, by refusing to submit to the artificial insemination procedure, or by refusing to accept custody because the child is of the wrong sex or is handicapped. Id.

In one recent case, in contrast to the Baby "M" situation where four people were battling over custody, none of the contracting parties came forward to claim the baby born to surrogate Judy Stiver because it was born with birth defects indicating mental retardation. Malahoff v. Stiver, No. 83-655, slip op. (E.D. Mich. 1983). Although a paternity test revealed that Mrs. Stiver's husband was the natural father, the parties continued their suits against one another for breach of contract. Id. See infra notes 43-46 and accompanying text.


44 See infra notes 52-66 and accompanying text. Issues arising from a breach after birth involve the child's paternity and status as a legitimate or an illegitimate child. Id.

45 See Roe v. Wade, 410 U.S. 113, 162-64 (1973). The Roe Court held that a woman has a fundamental right to choose whether to have an abortion until she reaches the third trimester of pregnancy. Id. After that point, the state's interest in protecting a viable fetus
and thereafter sue for damages. If the child is already born or the surrogate is in her third trimester, the child could be placed for adoption and the surrogate could then sue for damages.\footnote{See Note, supra note 40, at 1953-54. While the court would have great difficulty in assessing the damages due to the contracting natural father, it would be equally difficult where the natural father, himself, was the breaching party. Id. The court would be required to place a monetary value on the services of and the inconvenience to the surrogate who is carrying or has already given birth to an unwanted child. Id.}

Whatever the situation, a discussion of traditional contract principles in the context of the surrogate contract, where an innocent life is the basis of the agreement, seems incongruous. It is submitted, therefore, that the implications of surrogate contracts and remedies for breach thereof should be evaluated with a focus on both contract principles and public policy concerns as a whole, rather than considering the two concepts as mutually exclusive. In this way, the desires of infertile couples and the concerns of society are most satisfactorily addressed.

II. FAMILY LAW IMPLICATIONS

While the courts have encountered much difficulty in reconciling the surrogate arrangement with traditional contract law, the application of family law principles has proved equally cumbersome. Currently, the laws of most states are not equipped to address the surrogate parenting arrangement.\footnote{See, e.g., Surrogate Parenting Assocs. v. Kentucky, 704 S.W.2d 209 (Ky. 1986) (association's charter to assist in the matching of infertile couples with potential surrogate mothers upheld as not involving black marketing); Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985) (lower court has subject matter jurisdiction over biological father's request for order of filiation under the Paternity Act where he and child's biological mother entered into surrogate parenting arrangement); Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (Mich. Ct. App. 1981) (state's interest in preventing black marketing of infants is strong enough to justify disallowance of compensation to surrogate mother). But see In re Baby "M", 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) (best

Surrogate Motherhood

The family law doctrines which are most relevant to the surrogate arrangement involve statutes pertaining to artificial insemination and adoption. It is submitted, however, that an analysis of these statutes will demonstrate that such laws were not enacted as a groundwork for the regulation of surrogate parenting arrangements.

A. Artificial Insemination

1. Case Law


See also Adoption of Baby Girl, 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. Nassau County 1986). The court found that the New York legislature did not contemplate surrogate parenting arrangements when it enacted a statute prohibiting payments in connection with an adoption. Id. See N.Y. Soc. Serv. Law § 374(6) (McKinney 1983). As current legislation does not prohibit surrogate parenting arrangements, the court indicated that it is for the legislature to determine if such payments should be disallowed so as to prevent such practices in the future. Adoption of Baby Girl, at 978, 505 N.Y.S.2d at 818. See generally Wadlington, Artificial Conception: The Challenge for Family Law, 69 Va. L. Rev. 465 (1983) (legal and medical communities must communicate in order to spark legislative action); Note, supra note 37, at 143; Comment, Artificial Insemination and Surrogate Motherhood: A Nursery Full of Unresolved Questions, 17 Williamette L. Rev. 913 (1981) (recommendation that couples considering this method proceed with caution because of the possible invalidity of the contract).

See supra note 48. See also infra notes 51-83 and accompanying text.

See R. Snowden & G. Mitchell, The Artificial Family 16 (1981). Artificial insemination has been defined as the introduction of semen into the reproductive tract of a female by means of a syringe. Id.

There are three types of artificial insemination currently utilized: artificial insemination by husband (AIH), artificial insemination by donor (AID), and confused artificial insemina-
cial insemination by donor (AID), even with the consent of the surrogate’s husband was an act of adultery, and that children born as a result of this technique were illegitimate. The New York judiciary, after vacillating on the issue of illegitimacy for a number of years, finally took a definitive stance in the decision of In re Adoption of Anonymous. In this case, New York held contrary to the 1963 decision of Gursky v. Gursky, and decided that “a child born of consensual artificial insemination by a donor during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.”

tion (AIC). See Shaman, Legal Aspects of Artificial Insemination, 18 J. Fam. L. 331 (1978-79). AIC involves inseminating the woman with semen extracted from her husband. Id. at 331-32. Couples unable to conceive by normal intercourse because of physical difficulties or male infertility may use this method. Id.

The second type, AID, occurs when the woman is inseminated with semen extracted from a donor other than her husband. Id. at 332-33. This method may be used when the husband is sterile or carries genetic defects which result in hereditary diseases. See W. Fine-Gold, Artificial Insemination 20 (1964); Shaman, supra at 332.

The third method, AIC, involves combining the semen of the husband and a third party donor and then introducing this combination into the woman’s genital tract. Shaman, supra at 332. This is done for physiological or psychological reasons. Id. Using this method the husband is assured a chance that he is the biological father. Id.


See Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. N.Y. County 1948). The New York courts originally determined that a child conceived through AID was legitimate, and that the consenting father had a right to visitation after the parents divorced. Id. The court in this case viewed the husband’s consent to AID as a “potential adoption” and indicated that the children were like children born out of wedlock who are made legitimate upon the subsequent marriage of the father and mother. Id. at 787, 78 N.Y.S.2d at 391-92. See Comment, supra note 47, at 303.

In 1963, a New York trial court took a step backward and held that an AID child was illegitimate. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. Kings County 1963). The court ignored the common law presumption of legitimacy of any child born during marriage, and indicated that any child whose genetic father was not married to its mother was illegitimate regardless of the mother’s marital status. Id. at 1086, 242 N.Y.S.2d at 409. However, the court held that the husband was liable for child support based on contract law principles because he had signed a written consent to the AID procedure. Id. at 1088, 242 N.Y.S.2d at 411.


39 Misc. 2d at 1083, 242 N.Y.S.2d at 406. See supra note 53.

74 Misc. 2d at 105, 345 N.Y.S.2d at 435-36. In this case, a husband contested the adoption of his AID child by his former wife’s second husband. Id. The court held that the first husband’s consent was necessary for the adoption. Id. See also Comment, supra note 49, at 923. This case paved the way for New York Domestic Relations Law § 75 which addresses artificial insemination. See N.Y. Dom. Rel. Law § 75 (McKinney 1977). For the text of this statute, see infra note 63. See also Gallin & Newman, Whose Child is This?, 8 Hum. Rts. 14, 49 (1979).
Surrogate Motherhood

In contrast, the California court in *People v. Sorenson* avoided an express finding of legitimacy and held that the husband of a woman who conceived a child through AID was the legal father because such a child conceived by artificial insemination has no "natural father." These cases illustrate the lack of clear guidelines regarding the status of legal relationships resulting from the use of artificial insemination. Consequently, legislatures were prompted to enact statutes which attempted to remedy this problem.

2. Legislative Enactments

Currently, at least twenty-seven states have enacted legislation aimed at regulating artificial insemination. Many of these statutes, including section 73 of the New York Domestic Relations Law, are modeled after the Uniform Parentage Act, which is a

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67 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).
68 Id. at 282, 437 P.2d at 498, 66 Cal. Rptr. at 10. *Sorenson* involved a criminal prosecution for failure to support a child: Id. The husband in this case consented to AID and treated the child as his own until the couple's divorce. Id. Mr. Sorenson later claimed that he was not the father and refused to pay child support. Id. The court held that he had a duty to support the child, and indicated that the term "father" in the penal statute at issue referred to the legal father rather than the biologically related sperm donor. Id. at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.
69 See infra notes 60-68 and accompanying text.
71 N.Y. Dom. Rel. Law § 73 (McKinney 1977). For the text of this statute, see infra note 63.
72 Unif. Parentage Act § 5, 9A U.L.A. 579, 592-93 (1979). This section provides:
(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemi-
codification of the common law presumption that a child is legitimate if born within a marriage or within a reasonable time thereafter.  

If artificial insemination statutes such as section 73 of the Domestic Relations Law are applied to surrogate parenting arrangements in which the surrogate mother is married, such agreements would be effectively precluded, unless the biological father could overcome the statutory presumption that a child born to a married surrogate mother is the legitimate child of her husband.  

In eleven states, it would be even more difficult for the biological father to establish his paternity since these states have enacted statutes which specifically provide that the sperm donor is not the legal father of a child born to a woman who is not his wife.

...
Surrogate Motherhood

It is submitted, however, that the artificial insemination statutes were not enacted with surrogate parenting arrangements in mind. In fact, the Uniform Parentage Act, which served as a model for the current artificial insemination statutes, was never intended to deal with the complex and serious legal problems raised by the technique of artificial insemination. Thus, since the basis for these insemination statutes themselves is quite tenuous, their application to the surrogate arrangement is even less justifiable. Consequently, these statutes should not be used as a basis for invalidating such arrangements. To bridge this gap it is recommended that legislators consider various other legal aspects. The legislators have yet to heed this recommendation.

B. Adoption

Surrogate parenting arrangements also conflict with the general

sin and Wyoming. Id. at 53. For the corresponding code sections, see supra note 60.

See UNIF. PARENTAGE ACT § 5, 9A U.L.A. 579, 592-93 (1979). The commissioner's comment to section 5 provides:

This act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was thought [sic] useful, however, to single out and cover in this Act at least one fact situation that occurs frequently. Further consideration of other legal aspects of artificial insemination has been urged on the National Conference of Commissioners on Uniform State Laws and is recommended to state legislators.

UNIF. PARENTAGE ACT, supra note 62, § 5.

See infra notes 84-124 and accompanying text.

N.Y. DOM. REL. LAW § 110 (McKinney 1977). Adoption has been defined as “the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person.” Id. In New York, adoptions are permitted via authorized agencies as well as through private placements. See id. at §§ 112-116 (McKinney 1977).

It is suggested that adoption laws may be employed to resolve problems stemming from surrogate arrangements in certain situations. For example, in an uncontested proceeding in which the surrogate mother voluntarily surrenders the child, the spouse of the biological father might seek to adopt the child. The natural father is not required to adopt his biologically related offspring since he can establish his rights as the natural parent under other statutes. See, e.g., N.Y. Family Court Act § 511-757 (McKinney 1983). See also Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972). Alternatively, adoption laws might come into play in situations where the surrogate reneges on the contract and the validity of the contract is undecided. In these situations, the proceeding would become a custody dispute with the judge awarding custody based on the best interests of the child. See N.Y. DOM. REL. LAW §§ 114 and 116(2) (McKinney 1977). These statutes authorize the judge or surrogate to make an order approving an adoption if he is satisfied that the best interests of the adoptive child...
prohibition against providing compensation in connection with the placing of a child for adoption. While many state statutes contain such restrictions, payment of medical and legal fees is generally deemed proper. However, it is uncertain whether the payment of a fee to the surrogate mother is in violation thereof, and an examination of a number of cases which address this issue is illustrative.

As previously discussed, the court in Doe v. Kelley held that the Michigan adoption statute did not directly prohibit a couple from having a child as planned. Instead, it merely interfered with the arrangement whereby the couple promised to pay a third party a sum of money to bear a child which was fathered by the husband via artificial insemination. Implicit in the court's decision, however, was the underlying suggestion that the contractual arrangement itself was valid, even though the payment of consideration in connection with the adoption was not.

are promoted thereby. In an adoption, where the natural mother revokes her consent, the court must be satisfied that the adoptive parents can provide a better home than the surrogate mother. Such a standard would leave couples who enter into surrogate arrangements uncertain as to whether they would ever have custody of the child, even though they have complied with the terms of the agreement.

Recently, however, in the celebrated Baby "M" case, Judge Sorkow found that the adoption laws of New Jersey did not apply to surrogacy agreements. The court indicated that its power to award custody of the child derived from the exercise of its parens patriae jurisdiction. Id. Parens patriae has been defined as the power of the sovereign to watch over the interests of those who are incapable of protecting themselves. Black's Law Dictionary 1005 (5th ed. 1979). It was this jurisdiction, and not the laws of adoption, custody, and parental termination, which allowed the court to determine that the best interests of the child favored enforcement of the surrogate agreement, and enabled the court to place the child in her father's sole custody. 217 N.J. Super. at 390, 525 A.2d at 1157-58.

See, e.g., N.Y. Soc. Serv. Law § 374(6) (McKinney 1983), which provides in part:

[no person may or shall request, accept or receive any compensation or thing of value, directly or indirectly, in connection with the placing out or adoption of a child ... and no person may or shall pay or give to any person ... any compensation or thing of value in connection with the placement or adoption of a child . . . .]

Id. See also N.Y. Soc. Serv. Law § 389(2) (McKinney 1983), which provides that a violation of section 374(6) is deemed to be a misdemeanor. Id. A second violation is considered a felony. Id.


Id.
In a recent New York case, In re Adoption of Baby Girl L.J., Anonymous, the court held that a contractual arrangement whereby a surrogate mother was to receive a payment of $10,000 for bearing a child, was a voidable contract, but not void. The court opined that the best interests of the child required approval of the adoption petition of the child’s biological father and the father’s spouse. The court further explained that while it is a misdemeanor in New York to violate the adoption statutes which prohibit accepting compensation in connection with placing a child for adoption, it is within the discretion of the legislature to determine if such payments should be disallowed in the context of surrogate parenting arrangements.

In the 1978 English decision, A. v. C., the Court of Appeal refused to grant the biological father visitation rights in a surrogate parenting arrangement, reasoning that the natural mother should be free from “interference from an obsessive father.” [1985] F.L.R. 445 (Fam. & C.A. 1978). In this unusual case, the natural father and his live-in girlfriend, a divorced mother who could no longer bear any children, solicited a prostitute to bear the man’s child. Id. at 451-53. She declined, however, and a young girl of nineteen was found to bear the child. Id. When she refused to hand over the child the father brought suit for a determination of visitation rights. Id. The trial court held the contract unenforceable as against public policy. Id. Nevertheless, it granted visitation rights to the father reasoning that it was to the child’s advantage to have contact with both parents. Id. In reversing the trial court’s reluctant grant of visitation rights, the court of appeals indicated that the arrangement was a “totally inhuman proceeding” and “a sordid commercial bargain.” Id. at 455-57.

Two of the three justices indicated that they originally had decided not to publish the decision because they considered it of little precedential value. Letter from Professor Cyril C. Means to his colleagues (January 27, 1987) (discussing his letter on surrogacy in England to the New York Times). When they changed their minds in 1985, the case was published not in the official reports, but in the unofficial Family Law Reports, which is not readily available in many American law libraries. Id. See also N.Y. Times, Jan. 25, 1987, at A 22, col. 5 (letter from Cyril Means to the editor).

In the United States, a California court decided a case involving a young woman who
It is submitted that statutes prohibiting compensation in connection with the placing of a child for adoption should not be applied to surrogate arrangements. The purpose of such legislation is to prevent unscrupulous persons from preying on financially insecure pregnant women, and coercing them into giving up their unwanted children in exchange for money. This is not the profile of the typical surrogate arrangement where the payment involved is for the services of the surrogate in carrying the child, and not for the "purchase" of the child. As these arrangements do not involve any of the evils contemplated by legislatures in their enactment of provisions prohibiting such compensation, they should not then, be used as tools to invalidate surrogate agreements.

III. PROPOSED LEGISLATION IN NEW YORK

A. Senate Bill

A bill introduced by Senators Dunne and Goodhue places surrogacy agreements within the realm of traditional contract law. Essentially, it provides that subject to court approval, the surrogate contract is enforceable and shall not be deemed a violation of

agreed to be a surrogate mother for her second cousin and her husband. See Peterson, Surrogates, Finding No Laws, Often Improvise Birth Pacts, N.Y. Times, Feb. 25, 1987, at A1, col. 5. She then inseminated herself with the husband's sperm using a syringe. Id. The surrogate later sued for joint custody of the child. Id. In a very unusual decision, the court allowed her to see the child several days a week, awarding her child support as well. Id. In this case, the young woman and the couple had written their own brief surrogate contract in which the woman agreed to give up all rights to the child in exchange for $1500. Id. See Comment, supra note 29, at 478. Underlying such legislation is the recognition that because profit is the main motive for baby selling, there is little or no concern for the child and thus its welfare is in danger. Id. See generally Note, Black-Market Adoptions, 22 Cath. Law. 48, 50-51 (1976).

See Comment, supra note 29, at 478-79; Note, supra note 37, at 156. Surrogate parenting attorney Noel Keane notes that pregnancy and childbirth are hazardous, painful conditions which few women can be expected to experience for another unless they are duly compensated. See Keane, supra note 15, at 153.

See supra note 81, and accompanying text. (discussion of purposes of such legislation).


Id. at § 2:120(1). A petition for judicial review shall be brought in the county where the surrogate mother resides. Id. at § 2:120(3). It shall be verified by the intended parents. Id. at § 2:123(1). A hearing shall be held within thirty days of the filing at which the surrogate mother and intended parents shall be examined to determine whether they are making voluntary and informed decisions. Id. at §§ 2:124(1)(a-b).
Surrogate Motherhood

public policy. Furthermore, section 73 of the Domestic Relations Law is amended in this context to provide that any child born to a surrogate mother shall be deemed the legitimate, natural child of the intended parents.

The Senate version also contains a number of provisions worthy of note. First, it permits the payment of fees to the surrogate in exchange for services rendered. The only limitation is that these fees be stated in an affidavit filed with the court in order that a determination can be made as to whether they are "just, reasonable and consistent." Second, before the parties may proceed with the actual surrogate procedure, the agreement must be reviewed and approved by a court of competent jurisdiction. The filing of this petition is to be followed by a hearing at which both the surrogate mother and the intended parents are to be examined. Only after requisite court approval shall the agreement

* Id. at §§ 1, 2:126.

* See supra note 61 and accompanying text.

* N.Y.S. 1429 § 5:73(5), 209th Sess. (1986). The intended parents are considered to be the sperm donor father and his wife. Id. at § 2:119(2).

* Id. at § 2:123(1). This section provides that a statement must be filed attesting to "any and all fees paid or to be paid by or on behalf of the intended parents in connection with the surrogate parenting agreement." Id. See also id. at § 2:124(1)(e)(1)-(5).

* Id. at § 2:124(2)(b).

* Id. at § 2:120(1).

* Id. at § 2:124(1). The court's examination of the parties under oath is to determine the following:
  (a) That the party being examined has freely and knowingly entered into the agreement;
  (b) That the party being examined is fully informed as to all aspects of the agreement and the proceeding, and of that party's rights and obligations under the agreement and in the proceeding;
  (c) That the intended parents understand that as of the date of the child's birth they will have full parental responsibilities, including the duty of support of such child;
  (d) That the surrogate mother understands that upon the birth of the child, she will have no parental rights in and to such child; and
  (e) The compensation paid to the surrogate mother shall be based on the surrogate mother's:
     (1) calculation of anticipated lost wages;
     (2) actual or anticipated expenses incurred;
     (3) value of time expended:
     (4) the value of health risks incurred or likely to be incurred to or on account of the surrogate parenting agreement; and
     (f) Any other information the court in its discretion deems necessary to ascertain the validity of the surrogate parenting agreement.

Id.
have full force and effect.\textsuperscript{93}

Third, the Senate bill provides that upon judicial approval, the surrogate's consent to relinquish her parental rights is irrevocable.\textsuperscript{94} However, should any compelling, changed circumstances arise, the surrogate would be able to petition for custody of the child.\textsuperscript{96} Finally, the proposal makes an exception to traditional contract law regarding personal service contracts by affording the intended parents the remedy of specific performance in the case of a breach by the surrogate.\textsuperscript{98}

B. Assembly Bill

Assembly bill \#3774 was introduced in 1983 by Assemblymen Halpin, Hevesi and Catapano.\textsuperscript{97} Unlike its Senate counterpart, this bill operates within the realm of adoption law.\textsuperscript{98} However, it too recognizes the validity of surrogate arrangements and deems any child born to the surrogate to be the legitimate child of the biological father and his spouse.\textsuperscript{99}

Perhaps because it is rooted in adoption law principles, the Assembly bill contains a number of provisions in sharp contrast to the Senate bill.\textsuperscript{100} First, no fees or monetary compensation are permitted, with the exception of necessary medical and maternity costs, attorney's fees, and the loss of real income.\textsuperscript{101} Second, while the Senate bill provides for the irrevocable consent of the surrogate,\textsuperscript{102} the Assembly bill provides for an unconditional twenty-day "cooling off" period during which the surrogate is entitled, if she so chooses, to initiate a custody proceeding.\textsuperscript{103} Finally, the

\textsuperscript{93} Id. at § 2:126.
\textsuperscript{94} Id. at § 2:124(1)(d).
\textsuperscript{95} See also id. at § 2:127 (change in circumstances application for review).
\textsuperscript{96} Id. at § 2:122(1)(b). Note that the remedy of specific performance is only available after the surrogate mother has been inseminated. Id. In the instance where the insemination has not yet taken place, the legislature has not deemed either party's interests compelling enough, at this point, to warrant the remedy of specific performance. Id.
\textsuperscript{97} N.Y.A. 3774, 206th Sess. (1983).
\textsuperscript{98} Id. at § 1.
\textsuperscript{99} Id. at § 1:65-c.
\textsuperscript{100} Id. See infra notes 101-03 and accompanying text.
\textsuperscript{101} N.Y.A. 3774, 206th Sess. § 165-a(3) (1983). See also supra notes 15 and 27 and accompanying text for a discussion of compensation to the surrogate mother.
\textsuperscript{102} See supra note 95 and accompanying text.
\textsuperscript{103} N.Y.A. 3774, 206th Sess. § 1:65-e(3) (1983).
Surrogate Motherhood

terms of the Assembly bill make it a requirement that the surrogate be represented by independent legal counsel.\textsuperscript{104} In addition, such counsel is to be of the surrogate's own choosing and any legal fees incurred are considered part of the necessary and legitimate expenses which are reimbursable to her by the contracting parties.\textsuperscript{108}

C. Analysis

Both of the proposals illustrate an awareness of the need for legislation in the area of surrogate motherhood; yet, it is suggested that neither bill of its own accord adequately addresses the problem.\textsuperscript{108} Nonetheless, there are certain meritorious aspects of each proposal that, working in concert, can provide a satisfactory resolution of the controversy surrounding the surrogate procedure.\textsuperscript{107}

By allowing for the payment of compensation to the surrogate, the Senate bill leaves both the statute itself and surrogate agreements, which it regulates, open to abuse. It is a major concern of many that the payment of fees could lead to the undesirable concept of "wombs for rent" with the added tendency that the procedure be rendered a viable alternative only for the rich.\textsuperscript{108} Moreover, existing case law suggests that such a practice would be unacceptable.\textsuperscript{109} As previously discussed, the court in \textit{Kelley}\textsuperscript{110} found that absent compensation, the surrogate contract would be enforceable.\textsuperscript{111} Similarly, the English court in \textit{A. v. C.}\textsuperscript{112} strongly

\textsuperscript{104} Id. at § 1:65-k(2). This section provides that the same attorney cannot represent both the natural father and the surrogate. \textit{Id.} Not only is the surrogate entitled to independent counsel, but such counsel may be provided at a cost to the natural father. \textit{Id.} \textit{See also supra note 99 and accompanying text.}

\textsuperscript{108} N.Y.A. S774, 206th Sess. § 1:65-k(2) (1983).

\textsuperscript{109} \textit{See infra} notes 107-127 and accompanying text.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{See} Letter from Assemblyman Patrick G. Halpin to Mel Miller, at 3 (Feb. 9, 1987) (discussing the dangers of allowing monetary compensation to surrogate mothers). \textit{But see} \textit{SENATE COMMITTEE REPORT supra note 3, at 54 (allowing payment of compensation to surrogate mothers will prevent exploitation).}

\textsuperscript{109} \textit{See supra} notes 23-26 and accompanying text for a discussion of the \textit{Kelley} case. \textit{See also supra note 80 for a discussion of \textit{A. v. C.}}


\textsuperscript{111} \textit{Id.} at 169, 307 N.W.2d at 438. \textit{See supra} notes 23-26 and accompanying text.

disapproved of the payment of fees, describing it as a "sordid commercial bargain"\(^\text{118}\) and a "lamentable commercial transaction."\(^\text{114}\)

In comparison, the Assembly bill strictly prohibits the payment of fees.\(^\text{116}\) It is suggested that this is the only way to assure a non-pecuniary motive of surrogate candidates.\(^\text{116}\) It is further suggested that this will not decrease the pool of willing surrogates because the statute does provide that the surrogate be compensated for her lost income during the period of her pregnancy.\(^\text{117}\)

Another favorable aspect of the Assembly bill is its provision for a twenty-day "cooling off" period in which the surrogate may decide to petition for custody of the child.\(^\text{118}\) However, this provision interjects an element of risk for the intended parents, as it affords the surrogate mother the unconditional right to revoke her consent and petition for custody.\(^\text{119}\) Hence, this seems to establish a noticeable inequity. In contrast, the Senate bill requires that the surrogate mother demonstrate a compelling change in circumstances in order to petition for custody of the child.\(^\text{120}\) Therefore, should additional information concerning the intended parents come to light or certain circumstances arise that would indicate their unfitness as parents, the surrogate would have recourse by which she could protect the child if she felt it necessary to do so. Thus, this approach is more favorable.

The Senate bill also contains a specific performance provision which would force the surrogate to deliver over the baby to the intended parents.\(^\text{121}\) While this provision may appear sound in

\(^{113}\) Id. at 457.

\(^{114}\) Id. at 460.

\(^{115}\) See supra note 99 and accompanying text.

\(^{116}\) See Parker, Motivation of Surrogate Mothers: Initial Findings, 140 AM. J. PSYCHIATRY 117 (1983). In a recent survey on the motivations of women applying to become surrogate mothers, 85% of the women surveyed indicated that they would not participate without compensation. Id. at 118. But see Markoutsas, Parenting by Proxy - A Story of Love and Friendship, Chicago Tribune, Jan. 14, 1980, § 2, at 1 (surrogate mother who was friend of wife bore two babies for her gratuitously).


\(^{118}\) Id. at § 1:65-c(3).

\(^{119}\) Id. Even though they comply with all of the terms of the contract, the couple runs the risk of never obtaining custody of the child. Id.

\(^{120}\) N.Y.S. 1429, 209th Sess. § 2:127 (1986).

\(^{121}\) Id.
light of the prolific litigation in recent years over custody, it is likely that such a provision would be viewed as a violation of the thirteenth amendment which prohibits all types of forced servitude. It is precisely for this reason that courts will not grant specific performance as a remedy for breach of personal service contracts. It is suggested that the surrogate agreement must not be deemed an exception.

Finally, the Senate bill contains numerous provisions for judicial intervention and approval of surrogacy contracts. Opponents of this measure cite practical problems such as the inability of an already congested court system to handle this burden, as well the increased costs this procedure will place on the contracting couple. It is submitted that while the reasoning behind requiring judicial approval is sound, its practicality is suspect. It is suggested, therefore, that a somewhat less stringent review be conducted by an appointed official under the direction of the state's family court system. In this way, surrogate contracts can still be adequately monitored without overloading the court system.

CONCLUSION

It is apparent that advocates on both sides of the surrogate issue pose legitimate concerns which must be addressed. The courts have demonstrated their unwillingness to determine the law in this area without legislative authority and guidance. The most recent proposed legislation in New York and elsewhere is encouraging; yet much remains to be determined concerning the boundaries that apply to the surrogate procedure. It is submitted that while the current proposals come very close to providing a solution to concerns involving the surrogate technique, legislators must act quickly to prevent the legal uncertainty that currently

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122 See supra notes 4-9 and accompanying text.
124 U.S. Const. amend. XIII.
125 See supra note 39.
126 See supra note 85.
127 See Letter from Assemblyman Patrick G. Halpin to Mel Miller (Feb. 9, 1987) (discussing proposed surrogate parenting legislation).
plagues both the children and families involved with this procedure.

**EPILOGUE**

As this book was going to press, the New Jersey Supreme Court case of *In re Baby “M”* was decided. That court held contrary to the arguments set forth in this article with respect to the impact of the adoption and *in vitro* fertilization laws on the validity of surrogate motherhood.

The authors continue to believe that these laws are not applicable to surrogate motherhood and that the issue should be decided by the legislature and not the courts.

On another note, press reports indicate that the New York legislature is considering redrafts and resubmission of the proposed legislation. It is hoped that the new proposals will more adequately address surrogate motherhood.

*Diana Greco Attner & Patricia Fried*