Chapter 14

# Legal Considerations: Surrogate Motherhood

# CONTENTS



## *Boxes*



## *Tables*

Chapter 14

# Legal Considerations: Surrogate Motherhood

Surrogate motherhood is more a reproductive arrangement than a reproductive technology, It may require neither physician nor complicated equipment. It does require more complicated personal arrangements than are usual for bringing a baby into the world. Most often, it is used by a married couple in which the wife is either unable to conceive or unable to carry a pregnancy to term. It has also been used by at least one single man wishing to form a family.

By the beginning of 1988, almost 600 babies had been born through surrogate motherhood arrangements. For many who use the arrangement, it is an alternative to adoption, which can take years to complete and maybe unavailable to those not meeting traditional criteria for an adopting home. For others, it is the only way to have a child genetically related to the rearing father. For these people, adoption is not an acceptable alternative.

Most commonly, "surrogate mothers" are women who are impregnated by artificial insemination with the sperm of a man who intends to raise the baby, He is generally married, with an infertile wife. of course, donor sperm could be used if the man were also infertile. This, however, may change the legal consequences of the contract arrangements, as the intended rearing father would not have the legal status generally enjoyed by biological fathers.

Surrogacy can also be used with embryo transfer. In this case, a "surrogate gestational mother" is impregnated with an embryo created in vitro. Usually the embryo is formed with the sperm and egg of the intended rearing parents, but donor sperm and egg can be used instead. once again, the use of donated gametes may have legal consequences.

Commercial surrogacy arrangements generally provide that a woman will be paid for the time and effort it takes to conceive and carry the pregnancy to term, with the bulk of the payment coming at the time she relinquishes the child and her parental rights to the intended rearing father. Surrogate motherhood is viewed by some as unacceptable, as a form of baby-selling; others see it a viable alternative for couples who would otherwise wait years for an adoptable baby and for those who want a child genetically related to the rearing father.

Despite a considerable amount of earlier publicity, it was the controversy over Baby M (see box 14-A) that thrust surrogate motherhood squarely into the national consciousness. Although the case


Media coverage of *Baby M* Case.

SOURCE: *Newsweek.*

exemplified some of the difficulties associated with this particular reproductive arrangement, most surrogate matching services reported to OTA that inquiries increased after surrogate mother Mary Beth Whitehead refused to give up her parental rights in favor of those of Elizabeth Stern, wife of the baby's genetic father, even inquiries to the agency directly involved in the Baby M case (38). At the same time, more custody suits have been initiated by women wishing to retain custody of the children they bore pursuant to surrogate contracts (54,69).

**Box 14-A.—The Case of *Baby M***

William and Elizabeth Stern were a couple with no children. Mary Beth Whitehead responded to an advertisement by the Infertility Center of New York, was quickly approved, and became pregnant by artificial insemination with William Stern's semen. She was to earn $10,000 on the day she delivered a baby to the Sterns. If she miscarried, she would have earned a nominal fee.

Immediately after the birth of the baby girl, Mrs. Whitehead became distraught at the thought of giving her up. She convinced the Sterns to let her have the baby for a few days, and then fled to Florida, where she remained despite a court order directing her to deliver the baby into the custody of Mr. Stern. The baby lived with Mrs. Whitehead for 4 months, until Mr. Stern regained temporary custody of the child. Baby M then lived with the Sterns for 8 months while a trial went on in Hackensack, NJ, to determine whether the surrogacy contract signed by the Whiteheads and the Sterns was enforceable.

On March 31, 1987, the judge issued a 120-page ruling in which he awarded permanent custody to Mr. Stern (30). Further, he permanently cancelled Mrs. Whitehead's visitation privileges, terminated her parental rights, and processed Mrs. Stern's petition for adoption. The court based its ruling both on the enforceability of the underlying surrogacy contract, and upon a finding that it was in the best interests of the child to live with the Sterns.

On February 3, 1988, the New Jersey Supreme Court reversed the trial court, finding that the surrogacy contract violated New Jersey law concerning baby-selling, adoption, and termination of parental rights (3o). The court voided Mrs. Stern's adoption proceeding, and reinstated Mrs. Whitehead's status as legal mother of the child, but upheld the trial court's order based on the best interests of the child) to award custody to the Sterns, with visitation provisions to be worked out by the families and the trial courts.

SOURCE: Office of Technology Assessment, 1988.

Although there have been a number of lawsuits concerning custody or challenging adoption laws that appear to prohibit payments to surrogates, the majority of surrogacy arrangements proceed without judicial involvement, with few reported instances of parties reneging on their agreements. Preliminary psychological and demographic studies and as well as surrogate matching service reports to OTA demonstrate that women who have volunteered to be surrogates are distinctly less well educated and less well off than those who hire them, but their self-reported motivations for offering to be surrogates include noncommercial considerations (26,43)51,52)57)65). It should be noted, however, that absent financial remuneration, few say that they would offer to participate as surrogates (51,52).

This chapter reviews the legal issues raised by surrogate motherhood, and summarizes the legislative approaches proposed to date, It also reports on the findings of OTA's survey of surrogate matching services in the United States (see box 14-B). The chapter focuses largely on the situation in which a woman agrees to be artificially inseminated and to relinquish the child at birth to the genetic father. Instances have already arisen, however, in which women have been asked to carry to term fetuses to whom they are genetically unrelated, by implantation of an embryo conceived by artificial insemination followed by lavage, or by in vitro fertilization (IVF). The parental configurations arising from such arrangements can be quite complicated. For example, a 48-year-old grandmother in South Africa carried to term three embryos created in vitro with the eggs of her daughter and the sperm of her son-in-law (7). The special legal issues associated with this type of surrogacy are considered separately near the end of this chapter. Embryo donation to a gestational mother who intends to raise the child she bears is discussed in chapter 13.

**Box 14-B—The OTA 1987 Survey of Surrogate Mother Matching Services**

As part of this assessment, OTA surveyed surrogate mothering matching services around the country. Names and addresses were obtained from one 1985 publication (3), from Associated Press wire service reports, and from word-of-mouth. Of 27 services contacted, 5 were no longer in business, 5 had moved with no forwarding address, 4 failed to respond, and 13 returned completed questionnaires.

The questionnaire asked for information on agency demographics (time in operation, personnel, extent and nature of matching services); physical, medical, psychological, and social criteria for screening clients and surrogates; typical contract terms, including fees; demographics of the client and surrogate populations (age, race, religion, economic and educational attainments, marital status, and sexual orientation); and opinions held by the directors on the subject of potential State and Federal regulation of surrogate motherhood. Each service was contacted at least three times by mail and once by telephone in an effort to obtain a response.

Because it is difficult to identify all the services, physicians, and lawyers who occasionally make a match, the results of the survey are not presented as projections to the entire population of surrogates, clients, or matching services. Further, one of the nonrespondents reputedly has the largest practice in the United States, although his own publications and interviews (37,39) reflect a practice that is substantially identical to most of those responding in this survey.

SOURCE: Office of Technology' Assessment, 1988

## FINDING AND CHOOSING A SURROGATE MOTHER

### *Who Hires A Surrogate Mother?*

Surrogate mothers can be sought privately by asking friends or by placing an advertisement in a newspaper. In addition, a number of organizations have sprung up that attempt to provide surrogate matching services. These groups reported to OTA that the overwhelming majority of their clients are in their late thirties or early forties. While all services reported that at least 90 percent of their clients are married couples, there are five reports of unmarried couples and nine reports of single men who were accepted by an agency to hire a surrogate mother. The number of homosexual individuals or couples who seek to hire a surrogate mother is consistently reported as no more than 1 percent, but three agencies have sought surrogates for a homosexual male couple, and one for a homosexual female couple. Several agencies also stated that they would provide service to singles or homosexual couples should they be asked. One agency found a surrogate mother for a single man who also sought to select sperm (see ch. 15) to increase the chances of having a boy (39).

Clients are drawn from a wide range of religious affiliations, with approximately 25 percent Catholic, a similar proportion Jewish, and approximately 42 percent Protestant. More than 95 percent are reported as white couples, and on average the agencies reported that about 25 percent of the couples are already raising a child.

Agencies uniformly reported that clients must be in good health and economic circumstances to hire a surrogate; two-thirds offer or suggest psychological counseling but do not require home review. The sperm donors are required by at least half the agencies to undergo a physical examination and two-thirds require testing for sexually transmitted diseases. This latter practice may change in the future if there is continued Federal interest in the risks associated with artificial insemination (see ch. 9).

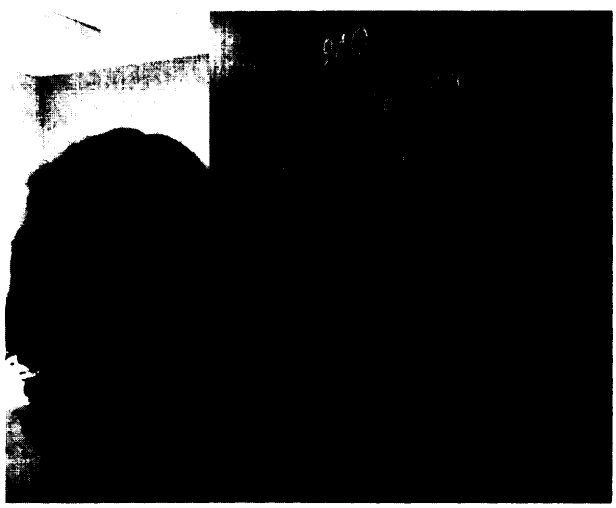
Those seeking to hire a surrogate mother are generally well off and well educated. Overall, agencies reported that approximately 64 percent of their clients have a household income over $50,000, with an additional 28 percent earning $30,000 to $50,000 per year. One-third of the services re-

ported that at least half of their clients have been to graduate school, and another third reported that at least 80 percent of their clients have been to graduate school. Overall, the services reported that at least 37 percent of their clients are college-educated, and another 54 percent have attended graduate school.

### *Commercial Surrogate Matching Services*

Some surrogate matching services are staffed by multidisciplinary teams of medical doctors, psychiatrists, lawyers, and administrators; others are primarily law firms with connections to other professionals should their clients wish a referral. Most services surveyed by OTA had been in business more than 3 years, but a number of those listed in a 1985 publication (3) were no longer active by 1987. With one exception, their volume of business was quite small, but as of late 1987 these agencies were making at least 100 matches a year, and over time their matches had been responsible for the births of almost 600 babies.

Brokers who enter the business of recruiting and matching surrogates to intended parents are in a novel industry. Nevertheless, in general, any commercial service is held to a standard of careful practice at least akin to general industrywide practice. Commercial brokers may well be held to "expert)" high standards of care, and may share responsibility with physicians and attorneys for failing to adequately inform, screen, and counsel participants. Brokers who are themselves physicians or lawyers will also be subject to ethical and regulatory standards of conduct set by their respective professions and by State law.



S g m m g

At least four centers have been involved in lawsuits arising from arrangements that went awry—e.g., for failure to provide adequate medical information, failure to have a signed contract prior to insemination, approval despite a history of heart disease, and use of fertility drugs to induce ovulation in a woman who was still nursing her son (24). Another lawsuit concerned a baby born with severe health problems and unwanted by either the sperm donor or the surrogate mother he had hired. In a Washington State case, an already pregnant woman was screened and accepted for a surrogate program, leading to charges of theft and fraud when she failed to give back the money she'd been paid (8). The outcome of such lawsuits will help clarify the standard of practice that will be demanded of surrogate matching services.

Screening of surrogates varies somewhat among the matching services. All require that the surrogate be in good health (verified by a physical examination), and all but one require that the surrogate be in a stable relationship and have had a prior conception. Half require that she be economically self-supporting, often explicitly excluding those on welfare. Agencies generally accept only women between the ages of 21 and 35 to be surrogates, but at least two accept women at age 20, and at least one at age 18. Over half require some sort of psychological screening or counseling, but the extent of that counseling is not clear from the OTA survey results.

Commercial brokers may also find that they are subject to existing State licensing laws. Several States require that persons or agencies arranging adoptions be licensed. Such a requirement could apply to the intermediaries who recruit surrogates for interested parties, who negotiate and write the contracts, and who then handle the post-birth adoption proceedings. In these States, refusal to license such brokers could have a sub-

stantial impact on the availability of surrogate services.

Two States appear to require such licensing, at least in order to charge a fee for the matching service. In an unchallenged advisory opinion, the Ohio attorney general stated:

> The Department of Welfare may reasonably conclude that a person or organization not licensed by the Department as a child placing agency . . . is prohibited . . . from engaging in any of the following activities: (I) the solicitation of women to become artificially inseminated . . . for the purpose of the women bearing children and surrendering possession of the children and all parental rights to such men and their spouses (49).

The attorney general of Louisiana stated that '([only] if the go-between is a nonprofit agency properly licensed [is] there . . . no jeopardy in accepting [the state] authorized **[adoption]** fees" (44). These fees are set by the State, and Louisiana adoption law prohibits any further payments, except for the actual medical and associated expenses of the mother during her pregnancy.

On the other hand, at least one State has explicitly recognized the right of a nonlicensed corporation to act as a surrogate matching service. The Supreme Court of Kentucky has held that preconception agreements to relinquish a child for money do not violate Kentucky law, and therefore declined the Kentucky attorney general's request to revoke the charter of Surrogate Parenting Associates, a matching service in Louisville. (64). Similarly, a New York court held that an attorney who facilitated an adoption proceeding pursuant to a surrogate motherhood arrangement was entitled to receive $3,500 for his services (29).

If commercial brokers are subject to adoption agency licensing, licensure may also determine whether an agency can advertise for clients. For example, Alabama, Georgia, Nevada, New York, North Carolina, and Oklahoma permit only licensed "child-placing agencies" to advertise. Only Kansas has addressed this question with respect to surrogacy: In 1984, its State adoption code was amended so that restrictions on advertising did not apply to surrogacy arrangements. However, no accompanying legislation addressed the legality of paid surrogacy or the enforceability of surrogacy contracts (Kansas Statutes Annotated Sec. 65-509) (50).

At this time no explicit restrictions have been placed on the techniques used by matching services to seek surrogate mothers, and OTA identified at least 10 centers that do use advertising or direct mail solicitation to find potential surrogates. one service has run advertisements in a student newspaper whose readership is largely between the ages of 16 and 23 (10). Advertisements suggesting that girls under the age of 21 might deliberately become pregnant in order to earn a fee may be a cause for concern.

### *Physicians*

Physicians are often involved in surrogacy arrangements when they are called upon to screen surrogates or intended rearing parents for their physical and mental health. They are also usually responsible for performing the artificial insemination. To the extent that they are participants in a surrogate matching service, they may incur obligations to their partners and clients beyond those normally associated with a patient-physician relationship.

Physicians have a professional responsibility to examine patients thoroughly and to explain the consequences of any medical procedure. Such a requirement falls within the guidelines of professional societies, State laws, and medical malpractice case law (see ch. 9). For surrogate mothers, this would include information on the risks of insemination, pregnancy, and childbirth. It might also include a duty to screen the genetic father for infectious diseases that might be transmitted by his semen during artificial insemination. To the extent that physicians work within a brokering agency, they may also owe a duty to the in-

Advertisements for surrogate mothers.

**SURROGATE Mothers Needed. Bring joy to a childless couple. Artificial insemination. Must be healthy, over 21, given birth to healthy child(ren). Medical expenses paid. Living expenses of $10,000 pd. 415-///-////. Hagar Institute. Asians needed. Atty.**

**SURROGATE MOTHER needed by married couple. Single, healthy and *mature preferred*. Write P.O. Box ////, Madison, WI 53705.**

**SOURCES:** *San Francisco Chronicle; University of Wisconsin Badger Herald*

tended rearing parents, depending upon the nature of the commercial arrangement.

The extent of such medical responsibilities may be greater than some physicians might imagine. For example, an intrafamilial surrogacy arrangement in 1987 ended in calamity when physicians screened the sperm donor for human immuno - deficiency virus, but not his sister-in-law, the surrogate mother. Neither the sperm donor nor his wife suspected that the wife's sister had been an intravenous drug user nearly 5 years beforehand, and the physicians' medical history failed to elicit this fact. Five months into the pregnancy, the surrogate mother underwent testing and was shown to be seropositive, as was the baby when it was born. Neither the surrogate mother nor the intended rearing parents wished to take custody of the baby (2o). Physician liability in such a situation is unclear,

With the introduction of court-ordered and contractually limited behaviors by women, such as refraining from alcohol or submitting to cesarean section (discussed later in this chapter), physicians may find themselves with a novel duty—to adequately screen surrogate mothers for their potential willingness to abide by such directions. OTA identified at least 10 matching services that do some sort of psychological screening before the surrogate mother attempts a conception.

Psychiatrists are familiar with the duty to predict patient behavior and to warn potential victims of a patient's likely misdeeds (66). This is generally restricted, however, to circumstances in which there is an identifiable person at risk of physical violence, and it is unclear if such a doctrine could extend to victims of a breach of contract.

With the widespread use of contractual arrangements for collaborative reproduction, involving large sums of money and emotionally charged arrangements, efforts may be made to hold physicians liable for inadequate psychiatric screening should contracts be breached by surrogate mothers or intended rearing parents. This is not only because the parties are likely to identify the physician as one of the persons who could have avoided the difficulties by adequate screening, but also because physicians generally have generous mal - practice insurance coverage, and therefore may be viewed as "deep pockets" from whom to obtain damages.

One example of the kind of practice that might lead to suits is a physician's choice not to screen for women who are unlikely to be able to relinquish the child at birth (24). Such practice might leave psychiatrists vulnerable to charges from the intended parents that inadequate precautions were taken to ensure the smooth operation of the contract.

Services offering surrogate gestational mother matching may find that their physicians have an additional area of responsibility, this time with respect to the transferred embryos. The Louisiana IVF statute (see ch. 13) grants in vitro embryos certain legal rights ordinarily accorded only to live-born children, such as the right to bring suit through a legal guardian, and places specific responsibilities upon physicians to guard the embryo from harm. The combination of these two principles could enormously expand the potential liabilities of physicians subject to that or any other similar law.

### *Attorneys*

About 25 percent of the surrogate matching services surveyed by OTA have an attorney on staff; others generally have a regular attorney to whom they can refer surrogates and clients. In-house attorneys are usually used to represent the clients, rather than the surrogates. Attorneys negotiate terms of the surrogacy contract, advise clients of the likelihood that the contracts are legally and practically enforceable, handle any legal action necessary to enforce provisions of the contract, supervise the transfer of funds and of medical or expense payments to the surrogate, and manage the postbirth details concerning relinquishment of parental rights by the biological mother, transfer of custody to the biological father, and adoption by the father's wife.

Attorneys generally owe a duty of professional service and confidentiality to their clients and to no others. For this reason, every State has ethics rules that forbid an attorney from representing two parties whose interests may conflict. Thus, an attorney who represents both the surrogate

mother and any other party to a surrogate arrangement without obtaining appropriate permissions from both parties may be subject to professional discipline by the State bar, as well as to malpractice suits by the affected clients. Surrogate matching agencies uniformly reported that their attorneys do not routinely represent both clients and surrogates, but one agency does state that this can happen if all parties make such a request. Nor can an attorney who represents infertile couples arrange to refer all prospective surrogates to a particular attorney, with whom he or she splits a fee. Such fee-splitting arrangements are forbidden in most States as prejudicial to the interests of the person being referred. Nevertheless, at least one matching service routinely refers surrogates to a particular attorney (30).

In addition, most States have ethical codes forbidding attorneys from drawing up contracts that they know are illegal, unenforceable, or coercive. This poses a problem for attorneys working in a novel field, such as surrogacy, as it may be unclear at the outset whether the contracts are legal and enforceable in any particular State. To date, no attorney has been subject to disciplinary proceedings for developing surrogacy contracts.

### *Who Becomes A Surrogate Mother?*

OTA asked surrogate matching agencies to describe some of the characteristics of the women who had passed through their screening procedures and were waiting to be hired as surrogate mothers. On average, they were women of 26 to 28 years of age, almost all heterosexual, and approximately 60 percent of them married. Almost 90 percent of the women waiting to be hired through the agencies surveyed are reported to be non-Hispanic whites, approximately two-thirds Protestant, and nearly one-third Catholic (see table 14-1).

All but one of the agencies reported that all its surrogates had had a prior pregnancy, and overall the agencies reported that approximately 20 percent of the surrogates had had either a miscarriage or an abortion in the past. Generally fewer than 10 percent of the women had previously relinquished a child through adoption, and overall the agencies reported that fewer than 7 percent of the women were acting as surrogates for the second time. Agencies reported that approximately 12 percent of the women were themselves adopted.

Overall, agencies reported that fewer than 35 percent of the women had ever attended college, and only 4 percent had attended any graduate school. Agencies draw the bulk of the surrogates from the population earning $15,000 to $30,000 per year (approximately 53 percent), with 30 percent earning $30,000 to $50,000 per year, and at most 5 percent earning more than $50,000. Six agencies reported no women earning less than $15,000 per year who were currently waiting to be hired as surrogates, partly due to the fact that some agencies will not accept surrogates who are on welfare or who are not "financially independent." Overall, agencies reported that approximately 13 percent of the women had household incomes of less than $15,000 per year.

## REQUIRING CONSENT FROM THE HUSBAND OF THE SURROGATE MOTHER

Many surrogate contracts are written to include consent by the surrogate's husband, even though no State law requires it (9)11,12). Other contracts, such as the ***one*** used in the Baby M case, require both the husband's consent to the surrogacy arrangement and his explicit statement that he does not consent to the insemination, This fiction is designed to obviate the State's automatic presumption of the husband's paternity, which applies when a husband consents to his wife's insemination with donor sperm. (See ch. 13 for a description of the effect of husband consent on presumptions of paternity.)

Even if a husband were required by State law to consent to his wife's agreement to be a surrogate mother, it would be difficult to enforce. Of course, failing to get consent would probably serve as grounds for divorce, whether as a novel interpretation of adultery or as emotional cruelty.

However, as grounds for divorce are no longer needed in most States, and as property distributions are largely made with little regard for marital misconduct, this enforcement mechanism means little (21). The only effective way to enforce such a requirement would be to direct penalties at the professionals associated with arranging these contracts, namely the commercial brokers,

**Table 14-I.– Demographic Surveys of Surrogate Mothers**

| | OTA[a] | Linkins[b] | Hanifin[c] | Parker I[d] | Parker 2° | Franks[f] |
|---|---|---|---|---|---|---|
| Sample size | > 334' | 34 | 89 | 30 | 125 | 10 |
| Average age | 27 | 28 | 28 | 25 | 25 | 26 |
| Marital status: | | | | | | |
| Married | 600/0 | 73% | 80% | 870/o | 530/0 | 50% |
| Single | 40%[2] | 180/0 | 14 "/0 | 10%0 | 19% | 40% |
| Divorced | | 90/0 | 5% | 3% | 22 "/0 | 10% |
| Unknown | | | | | 60/0 | |
| Number of children | • | 1.8 | 2.0 | 1.9 | 1.4 | 1-3 |
| Race/ethnicity | | • | | | | • |
| White non-Hispanic | 88%0 | | 850/o | 100 "/0 | 100 "/0 | |
| Hispanic | 2% | | 14 "/0 | | | |
| Black non-Hispanic | <10/0 | | <10/0 | | | |
| Asian | 2%0 | | <1 "/0 | | | |
| Other | 8 % 3 | | <10/0 | | | |
| Religion | | • | | | | |
| Protestant | 670/o | | 74 "/0 | 53% | 550/0 | |
| Catholic | 280/o | | 250/o | 47 "/0 | 40 "/0 | |
| Jewish | 3% | | <10/0 | | 1% | |
| Other | 2% | | <10/0 | | 4% | |
| Household income | | | • | • | | |
| <$15,000 | 13%0 | • | | | • | • |
| $15,000-$30,000 | 530/0 | • | | | • | • |
| $30,000-$50,000 | 300/0 | • | | | | |
| >$50,000 | 4%0 | | | | | |
| **Average** | • | $18,000 | | | | |
| **Range** | • | $5K-$68K | | | $6K-$55K | $6K-$55K(moderate-modest) |
| Education | | | | | | |
| Some high school | 61 °/0[4] | 12 "/0 | | 20% | 18°/05 | |
| High school graduate | | 380/o | 520/o | 53% | 540/.5 | (average for sample) |
| Some college | 35%04 | 47% | 240/o | 270/o | 2 6 % | |
| College graduate | | 3 % | 240/.6 | | 20/,5 | |
| Some graduate school | 4%04 | | | | | |
| Previously: | | • | | | | • |
| Was surrogacy mother | 7% | | • | • | • | |
| Gave up child for adoption | 7% | | 1% | 10 "/0 | 90/0 | |
| Had abortion or miscarriage | 20 "/0 | | 37% | 230/o | 260/o | |
| Are themselves adopted | 12% | • | 1% | 1%0 | 1% | • |

*Not applicable or unavailable.
'Data supplied by matching agencies, not by surrogates themselves.
²Includes divorced.
³May include Hispanics.
⁴Includes graduates.
⁵Includes only 50 women in sample.
⁶Includes category "some graduate school."

SOURCES:
[a]Office of Technology Assessment, 1988.
[b]K. Linkins, H. Daniels, R. Richards, and D. Kinney, McLean Hospital, Belmont, MA, personal communication, Feb. 9, 1988.
[c]H. Hanifin, *The* Surrogate Mother: An *Exploratory Study* (Chicago, IL: University Microfilms International, 1984); H. Hanifin, "Surrogate parenting: Reassessing Human Bonding," presented at the Annual Meeting of the American Psychological Association Convention, New York, August 1987.
[d]P.J. Parker, "The psychology of the Surrogate Mother: A Newly Updated Report of a Longitudinal pilot Study," presented at the American Orthopsychiatric Association General Meeting, Toronto. Apr. 9. 1984.
[e]P.J Parker, '$ Motivations of Surrogate Mothers: Initial Findings," *American Journal* Of Psychiatry 140:1 17-118 (1983).
[f]D.D. Franks, "Psychiatric Evaluation of Women in a Surrogate Mother Program," *American Journal of Psychiatry*, 138:1378-1379 *(1981).*

physicians, and attorneys. To consider the contract itself unenforceable absent the consent is another possibility, although it might lead to the undesirable result that a child is left without clearly identifiable legal parents.

## RECORDKEEPING AND CONFIDENTIALITY

Births are ordinarily registered by having a birth certificate filled out in the hospital. The mother's name is entered, as is the name of her husband or the reported father of the child, Absent a court order, it is not possible to substitute an adopting mother's name on a birth certificate, Just such court orders have been used, however, for surrogate arrangements. In one case a birth mother refused to terminate her parental rights, so the genetic father dropped his custody suit in exchange for a court order to place his name on the birth certificate (31). In another case, a Michigan court entered an order that an ovum donor and her sperm donor husband should have their names entered on the birth certificate of the child borne for them by a woman hired to be the child's gestational mother (63). The same was done a year later by a California court (62).

A Massachusetts couple has asked a Virginia court to do the same for them with respect to a baby born on December 21, 1987, to a surrogate gestational mother (17). These cases are notable because it is a new development in law to settle by either contract or court order, prior to birth, the identity of the legal parents whose names will appear on the birth certificate,

The only State law as of early 1988 that addresses this problem in the context of surrogate motherhood is Arkansas Statute Section 34-721, which states:

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

Thus, even in Arkansas, a court order is needed to issue a birth certificate with the name of the woman who intends to raise the child.

Adoptees argue they have a right to know the identity of their birth parents (55), claiming that issuing birth certificates with adoptive parents' names unconstitutionally discriminates against adoptees and violates their right to privacy. (See ch. 12 for discussion of the right to privacy.) Their arguments have been unsuccessful, so it seems unlikely that children of surrogates will have any more luck objecting to State procedures to guard the identity of their birth mothers. However, many States have passed legislation to provide adoptees with nonidentifying information concerning the heaIth, interests, and ethnic background of their biological parents (56), and such State statutes could be held to apply or could be extended to cover children of surrogacy arrangements.

Absent legislative protections, children conceived by surrogacy will have no recourse but to their rearing parents for information about the women who gave birth to them. All but one agency surveyed allow clients and surrogates to meet and to have contact during and after the pregnancy, if it is mutually desired. Four agencies will supply names and addresses, while others presumably arrange meetings at their offices, only one surveyed agency has a strict policy of mutual anonymity.

## TYPICAL CONTRACT PROVISIONS

### *Fees*

As reported to OTA, the most common fee for a surrogate mother is $10,000 plus expenses for life insurance, maternity clothes, required transportation to the matching center or physician, necessary laboratory tests, and the delivery, a figure that has not changed since 1984 (2,14), although two agencies reported a fee of $12,000 and three stated that each fee is negotiated individually. In

addition, fees are paid to the commercial broker who found the surrogate and matched her to the couple seeking a child (commonly between $3,ooo to $7,000, but ranging up to $12,000); to the physicians who examine the parties and perform the artificial insemination (from $2,000 to $3)000); to the psychiatrist or other psychological counselor (from $60 to $150 per hour); and to the attorneys who counsel the parties, draw up and negotiate the contract, and arrange for the proper adoption procedures to be followed after the child's birth (up to $5,000). The total cost of all these fees and expenses can be roughly $30,000 to $50,000, meaning that about $1 of every $4 actually goes to the surrogate mother herself.

At least 36 States make it illegal to induce parents to part with offspring or to pay money beyond medical, legal, and certain other expenses to give a child up for adoption. Some 12 statutes specifically make it a crime to offer monetary inducements beyond medical expenses. Although not clearly criminal, the statutes in the other 24 States could render voidable the surrogate mother's agreement to relinquish rearing rights and duties in exchange for such inducements.

Whether these statutes will be applied to surrogate transactions is uncertain and will depend upon judicial decisions in each State affected, as well as upon interpretations of State and Federal constitutional protections of the right to procreate. The agreement is entered into before conception or implantation, and thus lacks any coercive pressure from unwanted pregnancy or recent childbirth. It is the influence that these pressures might have on the ability to make a truly voluntary decision, coupled with concern over child placement, that underlies the many State laws against exchanging funds for a baby (36). Furthermore, one can argue that the money is paid to the surrogate for her service: "The biological father pays the surrogate for her willingness to be impregnated and carry his child to term. At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his," stated the Baby M trial court (30). Some contracts are written to pay the mother a monthly fee, rather than a lump sum upon relinquishment of the child, perhaps to enhance the impression that it is her services that are being bought, not the baby (15).

On the other hand, the agreement to relinquish custody and parental rights at birth is a central part of the surrogate's bargain. The hiring couple has no interest in obtaining her services unless she will relinquish the child at birth. If she does not relinquish her parental rights, generally no fee is paid. Furthermore, reports to OTA and other sources indicate a miscarriage often results in only a nominal fee being paid, ranging from nothing to $3)000 (24). A stillbirth can result in no fee at all in at least two centers, with two others paying only a portion of the fee (37), all further giving the impression that these contracts are in fact a direct exchange of funds for exclusive custody and parental rights to a baby.

In addition, at least two centers reduce or eliminate the fee entirely if the surrogate is found to have behaved in a way that caused a health problem in the child, furthering the parallel between the transfer of the baby and the transfer of manufactured property. The Kansas Attorney General, considering this point, concluded "we cannot escape the fact that custody of the minor child is decided as a contractual matter" involving the exchange of funds, which violated public policy that "children are not chattel and therefore may not be the subject of a contract or a gift" (35).

If the State laws prohibiting monetary inducements to adoption are deemed applicable to paid surrogacy, they would make payment of money to surrogates illegal baby-selling, For example, an Indiana court held that paid surrogacy violated both the letter and policy of Indiana's statute prohibiting the exchange of funds beyond expenses for any adoption (46), as did the New Jersey Supreme Court in the 1988 ***Baby M*** **case** (30).

Similarly, a 1983 case stated that Michigan law prohibits paid surrogacy, and furthermore that such a prohibition does not violate the fundamental right to bear children (16). The court noted that the prohibition on payment does not forestall medically assisted pregnancy, adoption, or even unpaid surrogacy. Instead, in the court's view, the prohibition legitimately protects children from becoming articles of commerce. of course,

decisions holding baby-selling prohibitions applicable to surrogacy arrangements might adversely affect the interests of some children if the result is that rearing parents forgo the necessary steps to ensure adoption by the nonbiological mother in order to avoid judicial scrutiny of the underlying surrogacy agreement.

The New York and Kentucky courts, unlike those in Indiana, Michigan, and New Jersey, have held that their State baby-selling prohibitions do not specifically address the situation created by surrogate motherhood, and that therefore payments are allowable until the State legislature decides otherwise (29)64). The fact that the transfer of custody is between biological parents influenced these decisions, as it makes the arrangement one of payment for exclusive custody and termination of parental rights, rather than the classic baby-selling envisioned in most State laws.

In 1987, amendments to Nevada's adoption law exempted "lawful" surrogacy contracts from the provisions of Nevada's statute prohibiting payment to a mother beyond her expenses (Nevada Revised Statutes, ch. 127). It should be noted, however, that the law still invalidates a mother's consent to relinquish a child for adoption if made less than 48 hours after birth. It is not clear whether a surrogacy contract that commits the mother to relinquish the child is in and of itself a violation of the law, making the contract "unlawful" and therefore outside the provisions of this amendment. Further, the statute is not clear on how the courts should balance the competing provisions of the contract terms and the statutory 48-hour cooling-off period, should there be a dispute. Although the intent of the amendment clearly seems to be to exempt surrogacy from the prohibitions on baby-selling, it is not clear whether the amendment is also intended to render surrogacy agreements fully enforceable.

Whether prohibitions on exchanging money for termination of parental rights and custody are held to make surrogacy arrangements criminal or merely unenforceable, they would effectively prevent surrogacy from becoming a freely available alternative to adoption, since few nonrelated women will be surrogates on altruistic grounds (51,52). The constitutionality of such a ban on paid surrogacy remains to be determined by most States and by the Federal courts.

### *Limitations on Behavior During Pregnancy*

Typical contract provisions reported to OTA and other sources include prohibitions on smoking, alcohol, and illegal drugs (2)9). Some may go further and consider types of permissible exercise or diet. A practical problem with provisions such as these is the difficulty of enforcement. It is hardly feasible to follow a woman around to observe or control her behavior. A more general problem is that such contract provisions, particularly if they were required by State law, could unconstitutionally interfere with individual rights to privacy, personal autonomy, and bodily integrity (see ch. 12).

An alternative enforcement mechanism is to sue for breach of contract should the mother fail to abide by these restrictions, However, it is unlikely that any minor breach of these behavioral restrictions will lead to an identifiable health problem in a child, leaving it unclear how to assess damages. Even damages agreed upon in advance for breach of a contractual provision (known as "liquidated damages") cannot be used unless the figure set for the damages bears some reasonable relationship to the harm caused by the breach. Thus, both prenatal efforts to enforce the behavioral lifestyle restrictions or postnatal attempts to collect damages for their breach are difficult propositions.

However, a pregnant woman may possibly have a noncontractual duty to prevent harm to her fetus (59), regardless of whether she intends to raise the child. This is a controversial and developing area of law, and a number of commentators have expressed concern that the identification of such a duty might unconstitutionally limit women's bodily autonomy (5,18,22)23,33,34). A few courts have held that women not only may have an obligation to refrain from harmful behaviors–such as taking drugs—but may also have an obligation to take affirmative steps to prevent harm, such as undergoing cesarean sections (58).

Surrogate motherhood arrangements could affect the development of this evolving area of law

because the pregnant woman is often unrelated to the intended rearing parents of the child. The couple generally invest a great deal of time and money in trying to ensure that they will raise the child she bears. They might conceivably be less reluctant to use legal methods to try and control her behavior.

### Limitations on Control Over Medical Decisions

Typically, the surrogate agrees in the contract to abide by her physician's orders. Such orders can extend to whether or not to undergo amniocentesis, electronic fetal monitoring, or a cesarean delivery. Further, two-thirds of the agencies surveyed report that their contracts allow the client to exercise some control over whether the surrogate mother will undergo chorionic villi sampling, amniocentesis, or abortion, as well as the type of prenatal care she will receive. Placing such provisions in the contract gives the client the possibility of more extensive control over the surrogate mother's pregnancy, as it gives the client another basis upon which to go into court to seek an injunction to force her to comply or to seek damages should she refuse to comply. Principles of personal autonomy probably prevent the enforcement of any requirement to undergo amniocentesis or abortion, and many proposed State laws would prohibit enforcement of such clauses. But a surrogate's refusal to comply with these requests might serve as a justifiable cause for breaking the contract and requiring the return of any monies received.

In the ***Baby M*** case, the trial court stated in dictum that such clauses are not specifically enforceable, but did not state whether any form of monetary damages would be owed (3o). "Specific enforcement" or "performance" is a judicial remedy for breach of contract. It means that the court orders that the terms of the agreement be carried out, rather than that monetary damages be paid. Here, specific performance refers to ordering the woman to submit to amniocentesis or abortion, something that raises constitutional questions concerning her right to bodily integrity and autonomy. With respect to other aspects of surrogate contracts, it could refer to relinquishing custody and parental rights. It could also be used to try to enforce an agreement not to smoke or drink or work in the presence of toxic materials. Specific performance is rarely ordered for these last types of promises, as it is virtually impossible to ensure compliance (19).

The contractual arrangement with the surrogate mother and the evidence of intent to rear the child might be used by the client, however, to argue that he and his partner have standing to seek an injunction ordering the mother to undergo a medical procedure such as a cesarean section. "Standing" generally means the right to be a plaintiff in a suit before a court. only persons who have a legally recognizable interest in the case are granted standing. This is particularly important in light of the controversy surrounding the use of court orders to force women to undergo cesarean sections because their physicians or husbands disagree with their decision to forgo the procedure (41,58). HOW the courts might react in the contractual surrogacy situation, however, is difficult to predict, as is the extent to which judicial decisions would be taken to apply equally to women who intend to raise the children they bear.

### Choice-of-Law Provisions

Some contracts used by the surveyed agencies provide that disputes will be resolved by courts located in a particular jurisdiction or by application of the laws of a particular State. Such provisions are important, as the arrangements often involve participants and brokers from different States. State court decisions vary concerning the acceptability of paid surrogacy and the enforceability of the contracts, as do individual State law provisions concerning the mechanics of adopting a child or identifying legal paternity of a child conceived by artificial insemination. Thus, the outcome of a dispute concerning a surrogacy arrangement could depend largely upon which State's laws are applied.

In any litigation involving parties from different States, often the first task facing a court is to decide which court should hear the case and which State's laws should be applied. Contract provisions can often, but not always, be used to settle these questions before a dispute has arisen (42).

This is particularly important with respect to disputes concerning custody of a child, as delays could affect the amount of time the child spends with one of the parents, in turn affecting the court's willingness to change the child's custodial parent. For example, the New Jersey Supreme Court explicitly noted in its ***Baby M*** decision that court orders should no longer be issued in New Jersey to force a woman to relinquish a baby, even temporarily, pursuant to a surrogacy contract (30).

With the passage of conflicting legislation in Arkansas and Louisiana–with one State facilitating and the other inhibiting commercial surrogacy—choice-of-law questions have gained importance. This is particularly relevant since every service surveyed by OTA said it had matched surrogates and clients from different States, at least nine services had made matches with surrogates or clients outside the United States, and two services had tried to open branches in Europe (37,38,67).

### *The Surrogate Mother's Rights to the Child*

Surrogate contracts typically require the mother to immediately relinquish custody of the newborn baby. (Only three agencies do not use this provision, each reporting that it would appear to be unenforceable under State law.) She then is required to sign papers terminating her parental rights. Custody and parental rights are different: A parent may have the right to visit his or her children without having the right to live with them. Terminating parental rights means terminating visitation, intervention in the education and training of the child, and indeed all rights to the child. Legally, the parent becomes a stranger to the child. The same is true in the case of more ordinary forms of adoption, although there has been considerable legislative activity in the States to provide children and their biological parents the opportunity to learn each other's identity if mutually desired, and in some cases to give adopted children access to nonidentifying medical information concerning their biological parents (55,56).

Almost all surrogacy contracts provide that the genetic father will take custody regardless of the sex or health of the child, and that his wife will assume custody if he should die. (At least one service, however, writes contracts that do not require the genetic father to take custody if the child is born with a health problem that seems to be the result of some action by the surrogate mother; it is not clear that such an exemption is valid under State law.) If both intended parents die before the birth of the child, the surrogate mother could keep the baby or put the child up for adoption.

As indicated earlier, a central issue in surrogacy is whether a contract can determine custody and parental rights when the surrogate mother refuses to relinquish either. Courts and attorney general opinions have consistently stated in dictum that a surrogate mother has all the same rights to her child as does a mother who conceived with the intention of keeping her baby. In other words, in the event of a custody dispute between the genetic father and surrogate mother, both would stand on equal footing and the best interests of the child would dictate the court's decision (29, 35,44,46,49,64). The courts reasoned that a surrogate motherhood contract, while not void from inception, is nevertheless voidable. This means that if all parties agree to abide by the contract terms, and the intended rearing parents are not found to be manifestly unfit, then a court will enter the necessary paternity orders and approve the various attorney's fees agreed upon (29). If, on the other hand, the surrogate mother changes her mind about giving up her parental rights within the statutory time period provided by the applicable State law, then "[s]he has forfeited her rights to whatever fees the contract provided, but both the mother, child and biological father now have the statutory rights and obligations as exist in the absence of contract" (64).

Until the ***Baby M*** (30) and Yates v. *Huber* **(69)** cases, no custody dispute ever made it to trial in the United States (see app. E for a description of events in other countries). In both of these 1988 decisions, however, surrogate motherhood contracts were voided, and held irrelevant to determining custody of a child wanted by both the surrogate mother and the genetic father. The New Jersey decision, particularly important because it comes from the highest court in the State, went further than many of the prior advisory opinions,

and held that commercial surrogacy contracts are void (and possibly criminal), not merely voidable.

Finding the contract void has several important consequences. First, as noted earlier in this chapter, it removes an important basis on which a court could order a surrogate mother to relinquish a child to the genetic father pending resolution of a custody dispute. Second, it eliminates the contractual authority of a genetic father to control the behavior of a surrogate mother during pregnancy, or to specify the conditions of her prenatal care and delivery. Finally, it makes a surrogacy contract unenforceable, so that courts would not be allowed to order even monetary damages for its breach. This complete lack of enforceability could be a tremendous deterrent to the further popularization of surrogate motherhood, although it should be noted that similar unenforceability with regard to prenatal independent adoptions has not eliminated that practice. The Baby M decision only applies to cases decided under New Jersey law, of course, but its reasoning may be influential in many other States.

The ***Baby M*** reasoning was based on three factors. First, the New Jersey Supreme Court found that the contract conflicted with laws that prohibit exchange of funds in connection with adoption, dismissing arguments that the payments were for a surrogate's services. Second, the contract violated State statutes under which parental rights may only be terminated for parental unfitness or abandonment, as well as case law holding that parents may not agree between themselves by contract to terminate rights or determine custody of a child, noting that such laws are designed to ensure that a child's best interests, rather than the wishes of parents, are paramount at all times. Finally, the court held that the contract violated State law making a parent consent to adoption revocable for a certain time period following birth.

The same reasoning with regard to consent for adoption has been used by other State courts. Permission to adopt a child is not valid if given before birth (see table 14-2), leading a number of courts to state that this would bar specific performance of the custody and termination of parental rights provisions of surrogacy contracts (29, 46,64). Acknowledging that the surrogate's consent to adoption is made before conception, and therefore not under the duress of an unintended pregnancy (36), the New Jersey Supreme Court nevertheless stated:

> The natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commit - ment) the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary (30).

Informed consent to engage in a surrogacy arrangement is made even more problematic in translational surrogacy arrangements, where language barriers, absence of legal counsel, and immigration considerations may affect the transaction. For example, one surrogacy contract between an American couple and a Mexican woman who is second cousin to the infertile wife has resulted in a custody dispute complicated by allegations of misunderstanding and violations of immigration law. The surrogate mother has said that she understood that she was to be impregnated by artificial insemination and that the embryo was then to be transferred to the uterus of the infertile woman. The couple asserts that the handwritten contract and oral understandings always contemplated a full-term pregnancy, with the child relinquished to the genetic father and his wife at birth. In exchange, the couple was to provide clothing, medical care, food, and assistance at obtaining a visa for permanent residency in the United States (27,67).

The arrangement was complicated by the fact that it included providing housing in the United States for the Mexican mother, in violation of immigration regulations. The case has had preliminary hearings in U.S. courts, and temporary custody was awarded to the couple, with visitation rights granted to the surrogate mother. Translational contracts such as these, made difficult by language problems (the surrogate mother in this case spoke no English and was not represented by an attorney) and the vulnerability of women hoping to enter the United States from poorer

**Table 14-2.—State Adoption Laws**

| State/jurisdiction | Prohibit payment beyond expenses | Permission to adopt invalid before birth[a] | Adoption agencies must be licensed |
|---|---|---|---|
| Alabama | x | x | x |
| Alaska | | x | |
| Arizona | x | x | x |
| Arkansas | x | x | |
| California | x | x | x |
| Colorado | x | x | |
| Connecticut | | x | x |
| Delaware | x | x | x |
| District of Columbia | | x | |
| Florida | x | x | |
| Georgia | x | x | x |
| Hawaii | | x | |
| Idaho | x | x | |
| Illinois | x | x | x |
| Indiana | x | x | |
| Iowa | x | x | |
| Kansas | x | x | |
| Kentucky | x | x | x |
| Louisiana | x | x | |
| Maine | x | x | |
| Maryland | x | x | x |
| Massachusetts | x | x | x |
| Michigan | x | x | |
| Minnesota | | x | x |
| Mississippi | x | x | |
| Missouri | x | x | |
| Montana | x | x | |
| Nebraska | | x | x |
| Nevada | x[b] | x | x |
| New Hampshire | | x | |
| New Jersey | x | x | x |
| New Mexico | | x | |
| New York | x | x | x |
| North Carolina | x | x | x |
| North Dakota | x | x | |
| Ohio | x | x | x |
| Oklahoma | x | x | x |
| Oregon | | x | |
| Pennsylvania | x | x | |
| Rhode Island | | x | |
| South Carolina | x | x | |
| South Dakota | x | x | |
| Tennessee | x | x | x |
| Texas | x | x | |
| Utah | x | x | |
| Vermont | | x | |
| Virginia | | x | |
| Washington | | x | x |
| West Virginia | | x | |
| Wisconsin | x | x | x |
| Wyoming | | x | |

[a]Includes statutory and judge-made law.
[b]Surrogate motherings exempt from prohibition by 1987 act of legislature.

SOURCES: National Committee for Adoption, *Adoption Factbook: United States Data, Issues, Regulations, and* Resources( Washington, DC: 1985); J. A Robertson, "StateStatuteson IVF, Artificial insemination, and Surrogate Motherhood," prepared for the Office of Technology Assessment, US Congress, Washington, DC, November 1988.

countries, are particularly subject to attack. Infact, in this particular case, the contract claims were dropped by the couple) and the custody dispute was heard in family court.

## *Adoption*

Surrogacy contracts usually require an adoption by the genetic father's spouse. Insome States,

the genetic father may already be identified as the legal father (e.g., by a judicial finding of his uncontested paternity) and thus able to initiate expedited stepparent adoption proceedings for his wife. A number of States have special procedures for stepparent adoptions that expedite adoption waiting periods and avoid the use of adoption agencies. In other cases, the genetic father and his wife will both have to adopt the child, requiring a series of home inspections, references, and court approvals (47).

As some States do not allow anyone but a husband to bring a suit to counter the presumption of his paternity (12,25,61), a genetic father and his wife may be faced with a tremendous difficulty in the event that the surrogate is married, and she and her husband refuse to relinquish the child. By not allowing a challenge to be brought to his presumed paternity, the surrogate mother's husband could thwart the genetic father's attempts to establish his own paternity in order to contest custody of the baby.

Courts might avoid this result by not reading such laws literally when a husband consents to his wife being inseminated as part of a surrogate transaction but does not consent to assuming rearing rights and duties for offspring. Such a result is most likely in New Jersey, New Mexico, and Washington, which specifically allow the parties to agree separately about donor rights and duties. However, other jurisdictions might also reasonably find that the artificial insemination laws were not intended to regulate surrogate inseminations. For example, the "sperm donor" in a surrogate situation is in fact not donating sperm for pay or altruism, but with the intention of taking custody of any resulting child. Courts might find that such persons are not "sperm donors" for the purpose of artificial insemination statutes.

one State law attempts to avoid some of these difficulties. Arkansas Statute Section 34-721(B) states:

> 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.

This provision avoids the complications of adoption by declaring the intended rearing mother to be the child's legal parent. Thus, if all parties agree to fulfill the contract terms, the surrogate mother's rights should be cut off in favor of the intended rearing mother, without the need to get a court order or approval.

The statute is unclear, however, on certain points. First, by its terms it applies only to unmarried women, leaving open the question of the child's legal parentage if the surrogate is married. (In 1987 a bill to extend the provision to married women was passed by the Arkansas legislature but vetoed by the Governor.) Section 34-721(A) of the statute states without reservation that a child born by artificial insemination to a married woman is presumed to be her husband's child. Second, the statute concerns "presumptions" of legal parenthood. Unless clearly stated otherwise, presumptions are generally rebuttable. The statute does not address the problem of a surrogate mother changing her mind and deciding to retain parental rights, and it is unclear whether this statute would automatically cut off her rights should she choose to rebut the presumption. Artificial insemination statutes concerning paternity are similarly written in terms of "presumption of paternity," and those presumptions are rebuttable under certain circumstances–for example, if the husband can show that he did not consent to the insemination. The reasons for which a surrogate mother can rebut the presumption of maternity are not stated in the Arkansas law.

## THE SURROGATE GESTATIONAL MOTHER

For many years, a woman who bore a child was clearly the mother of that child, a doctrine recently expressed in classical fashion as ***mater est quam gestatio demonstrate*** ("the mother is demonstrated by gestation") (45). This certainty is no longer unequivocal. The separation of biological motherhood into genetic and gestational components opens the door to fresh legal consideration of the

crucial aspect of motherhood that entitles a particular woman to ***a priori*** rights to a child. The developing law of surrogate motherhood may not help, as it pits the rights of a genetic and gestational mother against the rights of a genetic father, with an underlying preconception agreement between the two as a key factor. Surrogate gesta - tional motherhood concerns somewhat different relationships. The two factors of similarity, however, are the existence of an underlying agreement that reflects the intentions of the parties, and the surrogate mother's experience of pregnancy.

Women who are unable to carry a pregnancy to term, whether due to disease (such as certain forms of diabetes), physical handicap, or repeated idiopathic miscarriage, may wish to have an alternative to adoption. To have a child to whom they are genetically related, one developing although still rather rare option is the employment of a surrogate gestational mother, in whom is implanted an embryo conceived with the sperm and egg of the intended rearing parents. Women who carry to term babies to whom they are not genetically related, and who intend to relinquish the child at birth to the genetic mother, may have fewer rights with respect to the child than do the surrogate mothers who are genetic as well as gestational parents. Their lack of a genetic connection, combined with their original intent to bear the child for someone else, may work to deny them equal footing with the baby's genetic parents should a custody dispute arise.

A further consideration in this area is that this technique could be used to allow Caucasians to hire non-Caucasians from this country or abroad to bear babies. Concern has been expressed that, particularly with surrogates drawn from developing countries or the American underclass, the technique could be used to lower costs for the intended rearing parents, as payments of far less than $10)000 would nevertheless constitute a considerable sum to the surrogate gestational mother (28). Of course, as the technique requires sophisticated medical procedures to transfer the embryo from the ovum donor or petrie dish to the gesta - tional mother, it is likely to have limited application. Nevertheless, it could be used, and some fear abused (13). The problems arising from the Mexican-American surrogacy contract previously discussed illustrate some of the possible areas for abuse.

**Pre-Birth Judicial Order**

illiam W. Handel
383 Wilshire Blvd. 6750
everly Hills, CA 90211
(213)655-1974

ttorney for Plaintiffs

FILED
JUN 0 1987

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OHN SMITH and MARY SMITH, Plaintiffs,
vs.
ANE JONES and MIKE JONES, Defendants.

CASE NO:

FINAL ORDER DETERMINING MATERNITY AND PATERNITY

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Plaintiff John Smith is the father and Plaintiff Mary Smith is the mother of the child to be born to defendant Jane Jones on or about July, 1987.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Mike Jones is not the father of the child to be born to his wife, defendant Jane Jones, on or about July, 1987, by reason of non-access.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Jane Jones is not the mother of the child to be born on or about July, 1987, by reason of "ovum Implantation" wherein an ovum was removed from plaintiff, Mary Smith and fertilized with the semen of plaintiff John Smith and them implanted into defendant Jane Jones.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

aka John Smith herein, shall be listed as the father and aka Mary Smith, shall be listed as the mother on the birth certificate of the child to be born of the ovum implantation herein.

DATED

JUDGE OF THE SUPERIOR COURT
KENNETH A. BLAC

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.
ATTEST 11 1987 19
DEPUTY

This order declares a genetic mother and tat her to be the legal parents of a child still being carried by a **gestational** surrogate mother.

**SOURCE: Superior Court of the State of California for the County of Los Angeles.**

The fact that surrogate mother matching services have been opened in European countries, so

that Europeans forbidden under their own laws from the practice (see app. E) might seek a surrogate mother in the United States, indicates that the practice may well soon take on a significant international character.

Whether it is because they are not genetically linked to the fetuses they carry or because they are impoverished or non-American, the rights of surrogate gestational mothers may be diminished as compared with those of other mothers. However, the evidence of their pregnancy and the fact that they gave birth make these women appear to be the babies' "natural" mothers. Thus, their dilemma most clearly poses the question of whether a genetic or gestational relationship, in and of itself, ought to generically determine maternal parentage and legal rights.

One approach is to mimic the law of paternity, by providing that genetic parentage is definitive parentage. This would mean that a genetic mother could apply to a court for a ruling that she is the legal mother of a child being carried to term by another. Such a ruling has been issued at least twice (62)63)) although in those cases the orders were made with the consent of all the parties involved and in furtherance of their stated intentions. A similar request was made in 1987 by a Massachusetts couple who had a Virginia woman carry their genetic child to term and relinquish the infant at birth, with a court decision expected in 1988 (17). The very need to resort to a court order, however, indicates that a ***de facto*** presumption exists that the birth mother is the child's legal mother. In many ways this is analogous to determining paternity, in which a presumption exists that the husband of a pregnant woman is the father of her child, with the presumption rebuttable by evidence that another man is the genetic father.

Another approach is to consider the woman who bears the child as the legal mother, with any further changes in parental rights to be made as per agreement, or in the event of a dispute, as per court order (6). Such an approach implicitly asserts the primacy of the g-month pregnancy experience as the key factor in designating a "mother. " The approach has simplicity as one advantage. For example, hospital officials would always know at the time of birth the identity of the legal mother. This is also the approach taken in the Arkansas statute discussed previously, which addressed the use of birth certificates in the context of surrogate mother agreements.

Of course, such an approach would undercut efforts to regularize surrogate motherhood, as the intended parents would live with uncertainty over whether the birth mother would in fact abide by earlier stated intentions. As the legal mother of the child, the woman giving birth would not be automatically barred from asserting her parental rights. This development might prevent surrogate gestational motherhood from ever becoming widely used, as the uncertainty of the success of the arrangement could dissuade individuals from making the necessary emotional and financial investment. Nevertheless, similar uncertainty surrounds prebirth adoption agreements, which remain an extremely popular way for couples to form a family.

A third approach is to enforce these underlying agreements, regardless of the various genetic, gestational, and intended social arrangements. This would grant the parental rights of motherhood to a genetic mother who intends to rear a child brought to term by another. Such an approach was taken for the first time when the Wayne County Circuit Court in Michigan issued an interim order declaring a gamete donor couple to be the biological parents of a fetus being carried to term by a woman hired to be the gesta - tional mother. The judge also held that the interim order would be made final after tests confirmed both maternity and paternity (40), Upon birth, the court entered an order that the names of the ovum and sperm donors be listed on the birth certificate, rather than that of the woman who gave birth, who was termed by the court a "human incubator" (63).

## MODELS OF STATE POLICY

Legislation related to surrogate motherhood has been introduced in over half the State legislatures since 1980 (1,4,32,36,48,53), much of which is still pending. Only Arkansas, Kansas, Louisiana, and Nevada have passed legislation; their approaches have differed, with Arkansas endorsing surrogacy, Louisiana making the arrangement unenforceable, Kansas simply exempting surrogacy from prohibitions on adoption agency advertising, and Nevada exempting it from its prohibition on baby-selling. As indicated in chapter 13, the approaches taken by State legislatures maybe broadly grouped into categories: static, private ordering, inducement, regulatory, and punitive (14,68). Should Congress choose to follow one of these models, its legislative action would most likely be based on the interstate commerce clause, although conditions on receipt of Federal grants or approval of interstate compacts are other possible routes to Federal involvement (see ch. 1).

### *The Static Approach*

To date, the static approach has had mixed results. While several courts have so far declined to find that surrogates lose their rights of motherhood by virtue of their preconception agreement to relinquish parental rights, most courts have at the same time agreed to enforce the paternity and fee payment provisions of these contracts, at least when all parties to the agreement still desire its enforcement. In other words, although these courts have found surrogate agreements to be voidable, thev generally have not found them to be void. A notable exception is the New Jersey Supreme Court, which held that these agreements are void (3o).

This socially and psychologically conservative approach seeks to minimize the impact of non-coital reproductive techniques upon the structure and relationships of the traditional family, mainly by refusing to recognize legally new parental configurations. “The family unit has been under severe attack from almost every element of our modern commercial society, yet it continues as the bedrock of the world as we know it. Any practice which threatens the stability of the family unit is a direct threat to society’s stability, ” stated the dissenting justice in ***Surrogate Parenting Association, Inc.,*** the 1986 case finding that paid surrogate matching services are permissible under Kentucky law. This attitude is typical of the static approach, which aims to support traditional family configurations.

one legislative method for furthering this viewpoint would be the adoption of a definition of “mother” as a woman who gives birth to a child or who obtains a child through a legal adoption proceeding. Such a definition could guarantee surrogate mothers at least those rights held by all mothers with respect to their children and control of their pregnancies.

Although the static approach will undoubtedly slow the growth of surrogate motherhood as an industry, it will not eliminate it entirely. The expansion of these services since 1980, in the absence of judicial or legislative guidelines, demonstrates that this arrangement can be used when all parties abide by their original intentions. There can be some problems with the use of State laws and courts to manage birth certificate recordations and paternity orders, but it is primarily when the parties change their minds that State action becomes important and the absence of governmental guidelines becomes an active barrier to the successful conclusion of the arrangement.

### *The Private Ordering Approach*

The private ordering approach views a government’s role primarily as that of facilitating individual arrangements, and thus would compel recognition and enforcement of any conception and parenting agreement freely formed among consenting adults. Such an approach could accommodate commercializing the services of surrogate mothers (14). Private ordering is of course subject to some constraints, for example by allowing special protection of vulnerable parties to the transaction. Children are traditionally viewed as such vulnerable parties, and thus judicial inter-

vention to ensure that custody is awarded to a fit parent would be consistent even with this approach of limited governmental intervention.

Examples of such private ordering philosophy can be found in several of the bills introduced in State legislatures, such as the Nevada amendment that exempts surrogacy from prohibitions on baby-selling. proposed legislation in Oregon would also follow this model, while another Oregon proposal goes further and specifically legalizes paid and unpaid surrogacy, while providing for specific enforcement and damages as remedies for breach of contract. An early Rhode Island bill also aimed to make surrogacy contracts enforceable, stating that surrogate motherhood "is to be viewed as a business venture, " and that the "rights of motherhood" do not apply to the surrogate mother (H.B. No. 83 H-6132, 1983).

Without addressing the question of enforceability of surrogacy contracts, an amendment to an Arkansas artificial insemination statute explicitly contemplates surrogate arrangements, and at least with respect to unmarried women allows an exception to the presumption that the childbearing mother is the legal mother of a child. It states that in the case of surrogate motherhood, the child "shall be that of the woman intended to be the mother. " The statute does not address questions of evidence, such as the kind of agreement necessary to demonstrate who was intended to be the mother, or the enforceability of these arrangements. Nevertheless, it is the first statute in the United States of its kind. A Wisconsin bill calling for a presumption that the intended social parents are in fact more fit to raise the child also exemplifies the private ordering approach, but with some protection for the vulnerable child. Further, the bill attempts to ensure that if all the adult parties refuse custody, an adoptive home for the child would be found.

Consistent with the private ordering approach are State law provisions to ensure informed and voluntary consent by all parties. A number of bills require that the surrogate and the intended rearing parents be represented by attorneys, many further specifying that the parties be represented by separate counsel. Bills in at least five States require that the intended rearing parents review the results of medical, psychological, and genetic examinations of the surrogate mother before agreeing **to** hire her. Bills in Michigan and the District of Columbia propose that at least 30 days pass between the time that the contract is signed and the first insemination, **to** allow a cooling-ff period (4). It is unclear if such provisions could meet all the objections of the New Jersey Supreme Court (see ch. 12), but the Baby M decision did say that State legislatures could legalize and regulate surrogacy, within constitutional limits (30).

The private ordering approach can be inadequate if parties fail to agree to a contract that spells out all contingencies and their outcomes. For example, a contract might fail to specify a remedy if one or both of the intended social parents were to die, leaving it unclear whether the surrogate mother or the State is responsible for the child. Contracts may also fail to specify the medical tests to be performed during pregnancy, remedies for failure to abide by lifestyle restrictions, or the lines of authority for emergency medical decisions concerning the health of the newborn. In the absence of State guidelines that create presumptive responses to these situations, private contracts may lead to disagreement and confusion. Courts attempting to enforce the contracts and carry out the parties' intentions could find it necessary to decide on matters not explicitly contemplated under the contract, making even these arrangements unclear as to their outcome and highly variable from State to State.

### *The Inducement Approach*

The inducement approach offers individuals an exchange. By agreeing to follow prescribed practices—such as judicial review of the contract, adherence to a model set of terms and conditions, or use of a licensed surrogate matching service—the State facilitates legal recognition of a child born by the arrangement (14). For example, a Missouri bill introduced in 1987 would require that judges approve surrogate contracts before insemination takes place. In exchange, the bill would automatically terminate the rights of the surrogate mother, thereby offering the intended rearing parents the certainty that they will be able to gain custody of the child. The penalty for failure to follow these

practices might be that the contract is unenforceable under State law or that adoption proceedings are ineligible for expedited treatment. of course, penalties that harm a baby's psychological, physical, or even legal well-being would probably be unacceptable. A preliminary draft by the National Conference of Commissioners on Uniform State Laws takes a similar approach (60).

Another form of this approach is to induce use of a particular approved procedure or agency by offering some Government assurance of its quality. Thus, for example, Government could license particular adoption agencies to operate as surrogate matching services. As a condition of licensing, the agency could agree to certain conditions, such as use of a standard contract or psychological screening of participants. The State would also ensure that the personnel of the agency meet certain minimum criteria, such as years in practice or professional training. Although there would be no penalty for failure to use the service, many participants would likely be interested in assuring themselves that the surrogates they hire have been screened for drug or alcohol abuse, that the persons for whom they bear children have been interviewed to identify the kind of home they plan to provide for the child, or that the contract they sign has been reviewed for fairness, completeness, and enforceability.

Any inducement approach that relies at least partly upon licensing surrogate matching agencies permits the Government to prevent abuses without necessarily limiting the freedom of individuals who wish to pursue these agreements. For example, licensing could specify permissible and impermissible ways of recruiting surrogates and infertile couples, standardize the medical testing and screening of the participants and their gametes, require monitoring of the health of the baby, or set standard fees and expenses. To broaden access to the poor, licensing could provide sliding fee scales and agency-financing.

Inducement or regulatory approaches may also, however, enable the Government to specify who will be permitted to take advantage of the agencies. Thus, for example, agencies might be limited to serving married couples, thereby leaving unmarried couples, homosexual couples, and single persons without access to the advantageous, State-approved method of surrogate adoption. Any such limitations would be subject to constitutional review, particularly to the extent that they are viewed as State interference in the right to privacy with regard to procreative decisions (see ch. 12).

### *The Regulatory Approach*

State regulation can also be used to create an exclusive mechanism by which an activity may be carried out. A number of proposals have been made to regulate surrogacy. Bills in Florida, Illinois, New Jersey, and South Carolina, for exampIe, would permit only married couples to hire a surrogate, and bills in at least eight States would further specify that surrogates might be used only for medical reasons, such as inability to conceive or to carry a pregnancy to term (4). A South Carolina bill would require extensive investigation of intended rearing parents' homes, as is generally done prior to adoption. Bills also propose standards for potential surrogate mothers, for example excluding women who have never had children before.

Besides regulating who may participate in surrogacy arrangements, a number of bills specify that the surrogate and at times the intended rearing parents undergo psychological screening or counseling, and some bills would require the biological mother and father to undergo testing for sexually transmitted diseases. This latter point takes on particular importance after the report that one surrogate was not stringently screened before she became pregnant, resulting in a child born seropositive for the human immunodeficiency virus, and rejected by the biological father and his wife (2o). Regulations have also been proposed in South Carolina to require the surrogate mother to follow physician orders during pregnancy, to adhere to a particular prenatal care schedule, and to forgo abortion unless medically indicated.

Regulations have also been proposed to limit compensation to the surrogate mother, or to set forth pro rata schedules of fees in the event of abortion, miscarriage, or stillbirth. Some proposals have also been made to maintain State records of surrogacy arrangements, and in a few cases, to provide the child, at age 18, with information

about his or her conception, State proposals have split on whether to allow the surrogate a period after birth in which to change her mind about relinquishing custody, and whether the remedy should she do so would be monetary damages or specific enforcement of the contract custody provisions (4,36).

### *The Punitive Approach*

The punitive approach imposes sanctions upon certain specified practices, prohibits commercialization of the surrogacy arrangement, or denies enforceability to surrogate contracts. Thus, for example, a bill could prohibit payment of fees to surrogates, by stating that commercial surrogacy contracts are void and therefore unenforceable. This was the approach taken in the 1987 Louisiana law. Proposals in Alabama, Minnesota, Nebraska, and New York take this same approach, while proposals in Connecticut, Illinois, North Carolina, and Rhode Island would void even noncommercial contracts. Voiding these contracts means that should the surrogate change her mind about relinquishing the child, she will stand on at least equal footing with the genetic father when she seeks permanent custody. In some States, if she is married, her husband will be presumed by law to be the child's father (see ch. 13), leaving the genetic father with a difficult task should he seek custody of the baby.

Punitive measures may be directed at a variety of parties. Civil and criminal sanctions could attach to the professional matching services, to the physicians and attorneys who are involved in the arrangements, or to the surrogates or couples themselves (14). Nevada's legislature, for example, is to consider a bill making surrogate matching a felony punishable by up to 6 years in prison. A Michigan bill also makes surrogate matching a felony, with stiff penalties for any person who matches a couple to a surrogate who is not of legal age. The bill would make the participation by the surrogate and the genetic father a felony as well. However, the fact that surrogacy does not always require the services of a physician or an attorney, and therefore is not easy to detect, means that punitive approaches are unlikely to completely eliminate surrogate arrangements, although they may drive them underground.

## SUMMARY AND CONCLUSIONS

The legal status of surrogate arrangements is still unclear. Despite activity in over half the State legislatures, only Arkansas, Kansas, Louisiana, and Nevada have enacted legislation either facilitating or inhibiting the arrangement. Louisiana has voided commercial surrogacy contracts, while Arkansas has begun to regularize the legal parentage of the child. Nevada has exempted surrogacy contracts from its baby-selling prohibition, and Kansas, from its prohibition on adoption agency advertising.

State court decisions are similarly sparse, but consistently find surrogacy contracts unenforceable in the event of a custody dispute, although the decisions do split on whether the contracts necessarily violate State adoption law. The 1988 Baby M case held that commercial surrogacy contracts are completely void and possibly criminal. This decision, coming from the highest court in New Jersey, may well be influential in other State courts. Nevertheless, absent Federal legislation or a Federal judicial decision identifying constitutional limitations on State regulation in this field, State courts and legislators are likely to continue to come to different conclusions about whether these arrangements can or should be enforced, regulated, or banned.

## CHAPTER 14 References

**1.** American College of Obstetricians and Gynecologists, Governmental Affairs Division, personal communication, Nov. 23, 1987.

**2.** Andrews, L. B., "The Stork Market: The Law of the New Reproduction Technologies," ***American Bar Association Journal*** 70:50-56, ***1984.***

3. Andrews, L. B., *New Conceptions (New* York, NY: Ballantine Books, 1985).
4. Andrews, L. B., "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood," *Hastings Center Report* 17(5):31-40, *1987.*
5. Annas, G., "Pregnant Women as Fetal Containers," *Hastings Center Report* 16(6):13-14, *1986.*
6. Annas, G., and Elias, S., "In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique To Create A Family," *Family Law Quarterly 17:199-233, 1983.*
7. Associated Press, Apr. 7, 1987.
8. Associated Press, Jan. 13, 1987.
9. Brophy, K. M., "A Surrogate Mother Contract to Bear a Child," *University of Louisville Journal of Family Law* 20:263-291, *1982.*
10. *Columbia Spectator,* p. *7,* Mar. 27, 1984.
11. Comment, "Surrogate Motherhood in California: Legislative Proposals," *San Diego Law Review* 18: 341-385, 1981.
12. Comment, "Wrongful Birth and Wrongful Life: Questions of Public Policy)" *Loyola Law Review* 28:77-99, *1982.*
13. Corea, G., *The Mother Machine (New* York, NY: Harper and Row, 1985).
14 Dickens, B., '(Surrogate Motherhood: Legal and Legislative Issues," *Genetics and the Law III,* A. Milunsky and G.J. Annas(eds.) (New York, NY: Plenum Press, 1985).
15 Dickens, B., University of Toronto, Faculty of Law, personal communication, Oct. 12, 1987.
16. Doe v. *Kelly,* 122 Mich. App. 506, 333 N.W. 2d 90 (1983).
17. *Doe v. Roe,* Fairfax County (VA) Circuit Court (Chancery No. 103-147), as reported by Associated Press, Aug. 16, 1987, and Jan. 12, 1988.
18 Dworkin, R.B, "The New Genetics," *BioLaw,* J. Childress, P. King, K. Rothenberg, et al. (eds.) (Frederick, MD: University Publishers of America, 1986).
19 Farnsworth, E. A., *The Law of Contracts* (Mineola, *NY:* Foundation Press, 1982).
20 Frederick, W.R., Delapenha, R., Gray, G., et al., "HIV Testing on Surrogate 'Mothers," *New England Journal of Medicine* 317:1351-1352, *1987.*
21. Freed, D. J., and Walker, T.B., "Family Law in the Fifty States: An Overview," *Family Law Quarter@* 19:331-442, *1986.*
22. Gallagher, J., "The Fetus and the Law–Whose Life Is It Anyway?" *Ms. Magazine,* November 1984.
23. Gallagher, J., "Prenatal Invasions & Interventions: What Wrong With Fetal Rights," *Harvard Women Law Journal* 10:9-58, *1987.*
24. Gladwell, M., and Sharpe, R., "Baby M Winner," *The New Republic,* Feb. 16, 1987, pp. 15-18.
25. Graham, M. L., "Surrogate Gestation and the Protection of Choice, *Santa Clara Law Review* 22:291, *1982.*
26 Hanifin, H., "Surrogate Parenting: Reassessing Human Bonding," paper presented at the Annuai Meeting of the American Psychological Association, New York, August 1987.
27. *Haro v. Munoz,* as reported by Associated Press, June 10 and Nov. 29, 1987.
28. Hubbard, R., Department of Biology, Harvard University, personal communication, Sept. 15, 1987.
29. *In the Matter of Adoption of Baby Girl, L.J.,* 505 N.Y.S. 2d 813, 132 Misc. 2d 172) (Surr. Ct. Nassau Cty. 1986).
30. *In the Matter of Baby M,* 525 A.2d 1128, 217 N.J. Super. 313 (Superior Ct. Chancery Division 1987), reversed on appeal, 1988 West Law 6251 (N.J. Supreme Court, Feb. 3, 1988).
31. *In the Matter of James Noyes, No.* CF 7614, California Superior Court, Feb. 1, 1981.
32. Jaeger, A., and Andrews, L., American Bar Foundation, personal communication, Nov. 24, 1987.
33. Johnsen, D. E., "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equality," *Yale Law Journal 85: 599-625, 1986.*
34 Johnsen, D. E., "A New Threat to Pregnant Women's Authority," *Hastings Center Report* 17(4):33-38, *1987.*
35 Kansas Attorney General Opinion No. 82-150, 1982.
36 Katz, A., "Surrogate Motherhood and the Baby Selling Laws," *Columbia Journal of Law and Social Problems* 20:1-53, *1986.*
37. Keane, N., "60 Minutes," CBS Television, Sept. 20, 1987.
38. Keane, N., and Blankfeld, H., "ABC World News Tonight," Feb. 24, 1987.
39. Keane, N., and Breo, D., *The Surrogate Mother (New* York, *NY:* Everest House, 1981).
40. King, P., "Reproductive Technologies," *BioLaw,* J. Childress, P. King, K. Rothenberg, et al. (eds.) (Frederick, MD: University Publications of America, 1986).
41. Kolder, V. E. B., Gallagher, J., and Parsons, M. T., "Court ordered obstetrical Interventions," *New England Journal of Medicine* 316:1 192-1196, 1987.
42. Kern, H., "The Choice-of-Law Revolution: A Critique)" *Columbia Law Review 12: 772-973, 1983.*
43. Linkins, K., and Daniels, H., McLean Hospital, Belmont, MA, personal communication, Jan. 8, 1988.
44. Louisiana Attorney General Opinion *No.* 83-869, *1983.*
45. Mason J. K., and MacCall-Smith, R. A., Law *and Medical Ethics,* 2d ed. (London, UK: Butterworths, 1987).
46. *Miroff v. Surrogate Mother,* Marion Superior

Court, Probate Division, Marion County, Indiana (October 1986).
47. National Committee for Adoption, ***Adoption Factbook: United States Data, Issues, Regulations and Resources*** (Washington, DC: 1985).
48. National Committee for Adoption, personal communication, Oct. 13, 1987.
49. Ohio Attorney General Opinion No. 83-001, 1983.
50. O'Brien, S., "Commercial Conceptions: A Breeding Ground for Surrogacy," ***North Carolina Law Review*** 65:127-153, ***1986.***
***51.*** Parker, P.J., "Motivation of Surrogate Mothers: Initial ***Findings, "American Journal of Psychiatry and Law*** 140:1-4, ***1983.***
***52.*** Parker, P.J., "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy," ***Bulletin of the American Academy of Psychiatry and Law*** 12:21-39, ***1984.***
***53.*** Pierce, W., "Survey of State Activity Regarding **Surrogate Motherhood ,"** *Family* **La w** *Reporter* 11:3001, **1985.**
**54.** ***Reams v. Stotski,*** **as reported by Associated Press, Aug. 12, 1987.**
**55. Reimer, R., Legal** *Right of an Adopted Child to Learn the Identity of His or Her Birth Parents* **(Washington, DC: U.S. Congress, Congressional Research Service, American Law Division, Nov. 30, 1984).**
**56. Reimer, R.,** *Adoptees' Right to Receive Medical Information on Their Birth Parents* **(Washington, DC: U.S. Congress, Congressional Research Service, American Law Division, Dec. 24, 1984).**
**57. Richardson, R., McLean Hospital, Belmont, MA, personal communication, Dec. 12, 1987.**
**58. Rhoden, N., "The Judge in the Delivery Room: The Emergence of Court-Ordered Cesarean,"** *California Law Review* 74:1951-2030, **1986.**
***59.*** **Robertson, J., and Schulman, J., "Pregnancy and Prenatal Harm to Offspring: The Case of Mothers With PKU,"** ***Hastings Center Report*** 17(4):23-28, ***1987,***
***60.*** **Robinson, R.C., Chair, National Conference of Commissioners on Uniform State Laws Committee on the Status of Children, Portland, ME, personal communication, Oct. 17, 1987.**
**61. Rushevsky, C. A., "Legal Recognition of Surrogate Gestation,"** ***Women's Rights Law Reporter 7:107-143, 1982.***
***62. Smith v. Jones,*** **CF** ***025653*** **(Los Angeles (CA) Superior Court, 1987).**
**63.** ***Smith & Smith v. Jones & Jones, 85-532014*** **DZ, Detroit MI, 3d Dist. (Mar. 15, 1986), as reported in** *BioLaw*, **J. Childress, P. King, K. Rothenberg, et al. (eds.) (Frederick, MD: University Publishers of America, 1986).**
**64,** ***Surrogate Parenting Associates v. Commonwealth of Kentucky, ex rel Armstrong, 704*** **S.W. 2d** 209 (1986).
***65*** Sutton, **J., paper presented to the Pennsylvania State Legislature on Behalf of the National Association of Surrogate Mothers, 1987.**
***66.*** ***Tarasoff v. Regents of the University of California,*** **17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).**
**67. U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Transportation, Tourism, and Hazardous Wastes, Hearings on H.R. 2433 ("The Anti-Surrogacy Act of 1987"), Oct. 16, 1987.**
**68. Wadlington, W., "Artificial Conception: The Challenge for Family Law,"** ***Virginia Law Review 69:465-514, 1983.***
***69. Yates v. Huber,*** **as reported by Associated Press, Sept. 2, 3, and 10, 1987, and Jan. 22, 1988.**