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## Enforcement of Surrogate Mother Contracts: Case Law, the Uniform Acts, and State and Federal Legislation

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**ENFORCEMENT OF SURROGATE MOTHER CONTRACTS:  
CASE LAW, THE UNIFORM ACTS, AND STATE  
AND FEDERAL LEGISLATION**

JAMES T. FLAHERTY\*

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Surrogate motherhood is possibly the most viable family issue in today's society, and especially in the law. It is also the subject of current legislation in Congress.<sup>1</sup> A "surrogate" generally is one who has been elected in the place of another; a substitute; a person appointed to act for another.<sup>2</sup> When dealing with "surrogate motherhood", it is somewhat more complicated. As stated by the court in *In re Baby M* (hereinafter "*Baby M*"):

[I]ssues that need legislation are: establishing [the] standards for sperm donors, legitimacy of the child, rights of the biological father's spouse, rights of the biological mother's spouse, rights of the two biological actors as to each other and to the child, qualifications [of] the surrogate, the allowance of compensation to the surrogate, and concerns regarding the imperfect child.<sup>3</sup>

In addition to the issues expressed by that court, there are also numerous other contract issues, such as the right of either party to terminate at any time, and the right of the principals to continuing biological and psychological monitoring.<sup>4</sup>

As used in this Article, a "surrogate" means:

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<sup>1</sup> H.R. 2433, 100th Cong., 1st Sess. (1987).

<sup>2</sup> BLACK'S LAW DICTIONARY, 1296 (5th ed. 1979).

<sup>3</sup> *In re Baby M*, 217 N.J. Super. 313, 334, 525 A.2d 1128, 1138 (1987).

<sup>4</sup> *Id.* at 342-43, 525 A.2d at 1142-43.

[A] female person at least eighteen years of age, whether married or unmarried, who agrees to be inseminated with the semen of a natural father and who, if she should conceive a child through such insemination, voluntarily agrees to bear the child and to terminate [her parental rights and responsibilities to the child] in favor of the natural father and his wife . . . .<sup>5</sup>

The process has evoked much discussion: medical, biological, sociological, philosophical, psychological, religious, economic, logical, emotional, and legal. It has been variously characterized by its proponents as, inter alia: the "wave of new technology, an alternative whose time has come, an alternative which is here to stay, an alternative for childless couples, 'the outer crest of reproductive technology'," a "gift of life" to childless couples, one that alleviates the needs of childless couples, implementation of the principal's right to obtain a baby, and one that is sensitive to the needs of infertile couples. As to the surrogate herself, proponents have classified her as: one who has volunteered to give the gift of life to another, an "alternative production vehicle", a "therapeutic modality", and a "handmaid". As to the brokers,<sup>6</sup> they have been characterized by the proponents of surrogacy as ones who are merely providing a needed service.<sup>7</sup> It has been suggested that one reason for the increase in the fact of, and need for, surrogacy arrangements is the decline in available children for adoption due to the impact of contraception and abortion.<sup>8</sup>

<sup>5</sup> As defined in the UNIFORM SURROGATE PARENTHOOD ACT § 1(f). There is of course no official Act, but one has been proposed in Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1300-01 (1985). See *infra* note 13.

<sup>6</sup> As used herein, "brokers" has the same meaning as used in the Hearings. See *infra* note 7. The attorneys, doctors, and/or the private agencies act as "brokers" in the sense that each or all may be involved in some part of the initial transaction of contact and/or agreement between the prospective "surrogate" and the "principals" (the parties who will eventually pay the fee and take custody and possession of the child born from the transaction).

<sup>7</sup> These proponent characterizations are from the written and submitted statements of witnesses at the hearing on H.R. 2433, *supra* note 1. The same and similar statements were made by Panel Participants in the 1987 ABA Convention: (Panel) Surrogacy, Alternate Means of Human Reproduction & The Baby M Case—Debate and Commentary, *Section of Family Law*; (Panel) Reproductive Technology and the Law, *Section of Individual Rights and Responsibilities*; and (Panel) Babies-by-Contract, Procreative Liberty vs. the Mother Machine, *Committee on Domestic Relations and Family Law*.

<sup>8</sup> Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 466 (1983) (emphasizing the decline is applicable to adoptive children); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 423 (1983); Note, *The Need For Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055 (1985) (stating there are about 20,000 such procedures per year, and about 20% of married couples are infertile). See also, *supra* note 7, statements of William L. Pierce, Ph.D., President of the National Committee for Adoption, Richard M. Levin, M.D., President, Surrogate Parenting Associates Inc. (a commercial surrogate practice), and

The opponents have characterized surrogacy as, *inter alia*: the illegal and unconstitutional purchase and sale of human beings, babies for profit, "rent a womb", industrialized reproduction, illegal black market babies, surrogate mother mills, commercial baby brokerage, and a threat to human dignity. Opponents have classified the surrogate as: a class of breeders, commercial slaves, victims of the exploitation of low income women, incubatory servitude, emotionally victimized, brutalized, and abused. Opponents consider brokers to be commercial entrepreneurs, underground brokers, and baby brokers for profit in the commercial enterprise of baby selling.<sup>9</sup>

Very little has been said about the surrogate children, except proponents stress that there have been no studies proving any physical or psychological harm to the children. Indeed, as one writer suggested, there should not be any more psychological harm to a surrogate child than to a child sent out for adoption; the impact on each child should be the same.<sup>10</sup> Although unstated therein, the suggestion is there, and in the other proponent articles, that even if there were such harm to the child, that should not be sufficient to warrant negative legislative intervention on the rights of the adult parties. Opponents agree with the fact that there are no studies, but they suggest that this lack of studies does not mean that there is no harm. Rather, this lack proves only that there are no studies, possibly because there are not enough aged surrogate children available for testing and research. Opponents further suggest that it will be predictably difficult for siblings to reconcile the fact that their brother/sister has been sold by their mother for cash.<sup>11</sup>

It is not the purpose or intent of this Article to debate those philosophical, social, moral and ethical issues; rather, they have been introduced to stress the highly emotional aspects of a legal issue that is about to come full force against a possible legal vacuum.<sup>12</sup> Surrogacy will be treated

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Harriet Blankfeld, Executive Director, National Center for Surrogate Parenting, Inc. (a commercial surrogate practice).

<sup>9</sup> These opponent characterizations are from the same Hearing and Convention source as noted *supra* note 7. See also *infra* note 33 and accompanying text.

<sup>10</sup> Robertson, *supra* note 8, at 434.

<sup>11</sup> Robert D. Arenstein, Esq., at the Hearing, *supra* note 7. Note that all agree that there are no studies to prove harm or lack of harm. Thus, proponents can argue that there are no studies, hence, there is no harm. The problem for opponents is complicated by the same lack of studies. Their concerns for the psychological harm are dismissed as "undifferentiated fear" with no basis in fact. Considering the confidentiality attached to these transactions, it is highly unlikely that any substantial objective studies will ever happen. Indeed, how can a surrogate child know of its origins when the birth records show an adoption, again, confidential? Based on these factors, it is unlikely that any VALID study will ever be forthcoming.

<sup>12</sup> To date, there are only two reported cases involving the legality and/or enforcement of "surrogate motherhood" contracts: *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987) *rev'd*, 109 N.J. 396, 537 A.2d 1227 (1988); *In re Adoption of Baby Girl L.J.*, 132

here solely as a fact of life, and examined solely from the point of view of its legal status under the appropriate Uniform Acts, existing and proposed legislation outside Ohio, and existing Ohio law.<sup>13</sup>

It may sound strange that Ohio was chosen as an example, in that a search of Ohio law will not show any law directly dealing with surrogacy.<sup>14</sup> But then, that is the point. Ohio is one of only three states that have adopted both relevant Uniform Acts, which are effectively public policy statements, and does not yet have any statutes dealing with surrogate motherhood, either by artificial insemination or embryonic implant, even though at least the former procedure is current in the state. With very few exceptions, this lag is the rule in the country.<sup>15</sup> There are already existing laws that apply to surrogacy, without mentioning it *per se*. That fact is a major emphasis of this Article. The balance will be on proposed surrogacy legislation.

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Misc.2d 972, 505 N.Y.S.2d 813 (1986). The former was appealed to the appellate court while the latter was not appealed. All other cases involving surrogate mothers apply to those situations where someone had cared for an existing child in the place of the parent, either *de jure* or *de facto*.

As for related law review articles, noting the "vacuum," not otherwise reported herein, see Stumpf, *Redefining Mother: A Legal Matrix For New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Non-coital Reproduction*, 18.4 J. L. Reform 865 (1985); Note, *supra* note 5; Keane, *Surrogate Motherhood*, 1980 So. ILL. L.J. 155; Robertson, *Surrogate Mothers: The Case For and Against*, 13 Hastings Center Rep. 35 (1983); Note, *Surrogate Parenthood—An Analysis of the Problems and a Solution: Representation for the Child*, 12 WM. MITCHELL L. REV. 143 (1986); Note, *Artificial Insemination and Surrogate Motherhood—A Nursery of Unresolved Questions*, 17 WILLAMETTE L. REV. 913 (1981); Note, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978); Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of New Reproduction*, 59 S. CAL. L. REV. 501 (1986); Note, *Surrogate Motherhood: The Outer Limits of Protected Conduct*, 4 DET. C.L. REV. 1131 (1981).

<sup>13</sup> The UNIF. ADOPTION ACT, adopted in 7 States (Ala., Ark., Mont., N.M., N.D., Ohio, Okla.); The UNIF. PARENTAGE ACT, adopted in 16 States (Ala., Cal., Colo., Del., Haw., Ill., Kan., Minn., Mont., Nev., N.J., N.D., Ohio, R.I., Wash., Wyo.); and the Proposed Uniform Surrogate Parenthood Act, which is not really an official Act, but is an excellent proposal, and will be used herein on the grounds that it essentially tracks the one that may inevitably be adopted. See *supra* note 5. (A review of the *Baby M* decision indicates that the judge evidently followed this proposed Act.) The Uniform Acts have been adopted by various states, some as written, some modified. To allow this paper to be more precise as to statutory construction, a particular state that has adopted two of the relevant acts, slightly modified, has been used to allow the use of the language precision appropriate to construction of this issue of first impression, where there is no statute in point. Note that relevant state statutes will generally track the UPI, but not necessarily *verbatim*, which is another reason for the introduction of a relevant and active state statute.

<sup>14</sup> There is one statute that uses the term "surrogate mother", OHIO REV. CODE ANN. § 3111.31 (Page Supp. 1987)(non-spousal artificial insemination), but the term is used solely to indicate that the statute *does not apply* to surrogate motherhood.

<sup>15</sup> As to legislative matters, see discussion, *infra*.

## I. THE SURROGATE CONTRACT

To understand how these various laws apply, it is appropriate to create as a working example a hypothetical factual situation involving the implementation of a surrogacy contract.

Assume Harold is potent, Winnie cannot carry a child, and both are domiciled in Ohio.<sup>16</sup> By agreement of Harold and Winnie through their lawyer Larry and doctor Don, sperm from Harold is artificially inseminated into a third party, Sara, who has agreed to carry the child to term on behalf of Harold and Winnie.<sup>17</sup> The contract performance calls for the surrogate to transfer the child to principals Harold and Winnie by a closed consent adoption, in exchange for a fee of \$10,000.<sup>18</sup> At this point (prior to the delivery date), the arrangement is a purely medical procedure, resulting from a private party contract, and there is no involvement with legislation,<sup>19</sup> only with lawyers. When the child is born, and the

<sup>16</sup> This domicile status is set in Ohio to conform with the intent expressed in note 13.

<sup>17</sup> This technique is the artificial insemination procedure; the other procedure is the embryonic implant technique. Either way, if the sperm of the male principal is used, he would be a genetic parent. In the embryonic implant, the egg may be that of the female principal or a female third party donor. In the artificial insemination procedure, the egg must be that of the surrogate. This is one reason that principals, in searching for a surrogate, prefer to select on various physical traits. As to the latter, see the study reported in a Los Angeles Times News Service Report, June 9, 1981, written by Lois Timmick.

The artificial insemination procedure is the preferred method for lesbians who wish to have a fatherless child. See Shah, Walters, & Clifton, *Lesbian Mothers*, NEWSWEEK, Feb. 12, 1979, at 61 (discussion of fatherless children of lesbian pairs Bobbi & Lynn, Karen & Nancy, Janis & Barbara); *Lesbians Fight Over Custody*, The Plain Dealer, Apr. 23, 1983, (Mary & Linda). For male homosexuals where this procedure is not directly available, see *Law: And Now, Gay Family Rights?*, TIME, Dec. 13, 1982, at 74.

Virtually every article on surrogacy has a discussion on the various techniques and procedures. Artificial insemination is relatively easy to discuss, as there are only two possible combinations, and one of them is absurd. Embryonic implants have at least six rational combinations, and are rarely discussed at this time, since the latter discussion can only follow the resolution of the issues of the former. See, e.g., Wadlington, *supra* note 8, at 468, 486-96 (discussion of the various combinations); Rice, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055 (1985). For excellent discussions in the vernacular, see Andrews, *Embryo Technology*, PARENTS MAGAZINE, May, 1981, at 163.; *The Grueling Baby Chase*, NEWSWEEK, Nov. 30, 1987, at 78.; and *The New Origins of Life*, TIME, Sept. 10, 1984, at 46.

<sup>18</sup> There seems to be little question that this figure is the standard surrogate fee, as verified by the Hearing Written Statements and Oral Testimony and Convention Panels indicated in note 7. See also *In re Baby M*, 217 N.J. Super. 313, 377, 525 A.2d 1128, 1160 (court found the \$10,000 fee was not unconscionable); *In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S.2d 813 (1986)(\$10,000.00 fee approved). Such was the standard fee in 1982, although some were as low as \$5,000. See also Wadlington, *supra* note 8, at 475. The UNIF. SURROGATE PARENTHOOD ACT § 4(f), *supra* note 5, does not state any amount, but does put a limit of \$25,000 for all expenses.

<sup>19</sup> While it appears that *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny stand for the principle that a woman can choose to have an abortion, the decisions also indicate that it

delivery procedures for the child have begun (or not), the applicable statutes arise.

If Sara and Harold/Winnie complete the agreement, there will be no issue of legal enforcement or enforceability of the surrogate contract. Enforcement becomes a legal issue only when one party elects to breach the contract, and the other party seeks its legal enforcement.

If it is Harold/Winnie who choose to breach the contract, they would merely refuse to accept the child from Sara, for any reason,<sup>20</sup> or no reason, and Sara would seek legal enforcement of the contract. There is really very little that Sara could do to force Harold/Winnie to take the child, as one cannot be forced to accept a child for adoption against his/her will. Even so, Sara can exercise her rights to pursue a juvenile court parent/child "paternity" complaint, to have Harold found the father for legitimacy and support purposes.<sup>21</sup> However, the usual surrogate fee could not be enforced by Sara at this time, absent some legislation authorizing such enforcement.<sup>22</sup> Although the Ohio law is silent, as are other states (except

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may be a medical decision. Since there is no case law in point as to surrogates, it can reasonably be inferred that the *Roe* principles would apply here. Even *Baby M*, 217 N.J. Super. at 375, 525 A.2d at 1159, noted this principle, as well as a "right to procreate," which the court also found to apply to surrogates. *Id.* at 386, 525 A.2d at 1163. The court further found that a denial of such right was a violation of the Equal Protection Clause, citing the fourteenth amend ment. *Id.* at 388, 525 A.2d at 1165. See also Robertson, *supra* note 8, at 405 (discussion of womans right to control biological destiny), 408 ("procreative rights").

<sup>20</sup> While there is no reported case law in point, certain examples have been reported in the media. See *Noyes v. Bhimani* (1981) Pasadena California Superior Court (mother refused to deliver when she discovered that the principal wife was a transsexual; (case not reported as it was dropped by the principals on the day of the hearing); News Item, *The Plain Dealer*, May 21, 1983 (mother refused to deliver the child to principal; \$10,000 fee still in escrow; contract evidently permitted rescission); *In re Stiver*, Lansing Michigan Probate Court (1983)(principles refused to accept the child when it was discovered that the child was a microcephalic). See also the incidents discussed in Mandler, *Developing a Concept of the Modern Family: A Proposed Uniform Surrogate Parent Act*, 73 GEO. L. J. 1283, 1285 (1985).

In the proponent articles, this problem area is only lightly touched and there are as yet no really "opponent" publications. While the reasons vary, one must take the examples of rejection where they are found.

<sup>21</sup> UNIF. PARENTAGE ACT § 15, 9B U.L.A. 324 (1987); OHIO REV. CODE ANN. § 3111.13 (Baldwin 1987).

<sup>22</sup> Such fees are not authorized in the UNIF. PARENTAGE ACT, which specifies in § 15: past support, future support, and reasonable expenses of the pregnancy and confinement; § 16, which specifies reasonable fees of counsel, experts, . . . guardian ad litem, . . . costs of action . . . blood tests; and § 17 which authorizes reasonable expenses of pregnancy, confinement, education, support, or funeral. There is no reasonable room available therein for the surrogate contract fee. The related Ohio statute, OHIO REV. CODE ANN. § 3111.14, (Baldwin 1987) allows for fees for experts and court costs; but with no authorization for anything else, including attorney fees. OHIO REV. CODE ANN. § 3111.13 allows for expenses of pregnancy and confinement, costs of birth, past child support, future child support, but no authorization for anything else, including attorney fees. Attorney fees were not at issue in

Louisiana), it is most likely that both sides of the contract would be unenforceable for public policy reasons, as will be demonstrated from further discussion.

## II. BABY M

The most common litigation would center on the situation where the surrogate refuses to deliver the child, or more precisely, refuses to consent to the adoption. For all practical purposes, this is the now famous New Jersey *Baby M* situation, where the natural father, Mr. Stearns, brought suit against the natural and legal surrogate mother, Mrs. Whitehead, for enforcement of the delivery provisions of the surrogate contract.<sup>23</sup>

The *Baby M* complaint was essentially one by the putative father to establish paternity and to award custody to the father based on "best interests", and one could assume the natural legal process would follow. "Paternity" proceedings would normally be accompanied by a motion for custody pendente lite for the "alleging" or putative father and a motion for a temporary restraining order (hereinafter "TRO").<sup>24</sup> The New Jersey judge was convinced that it was necessary to issue an ex parte order against Whitehead to deliver the child pendente lite to the putative father, Stearns.<sup>25</sup> The order was delivered to Whitehead by five police-

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*Baby M*, but were allowed in *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986).

<sup>23</sup> It parallels, in that it was by artificial insemination rather than an embryonic implant. It was this factor that gave the New Jersey putative father (Stearns) standing to sue, and submit his HLA test showing a 99.96% probability, as well as submit Mr. Whitehead's prior vasectomy, and failure or refusal to consent to the procedure. *Baby M*, 217 N.J. Super at 327, 525 A.2d at 1135.

<sup>24</sup> The traditional motion for custody pendente lite is used in both juvenile and domestic relations (family law) courts. It is generally used by the father, as the mother usually has possession. In the instant cases, the mother would have possession as both natural and legal parent. If the surrogate is single, and there is to be a contest, she would list the father as "PNE" (paternity not established, euphemism for 'unknown'), while if married, she would list her husband as the father. Thus, in a contest, the natural father (sperm donor) is legally a stranger to the child until after the paternity hearings. Thus, although the motion is filed, it is more psychological and tactical than that real or expectant.

The Temporary Restraining Order ("TRO") is an order to either party to refrain from doing something which the moving party suspects may disrupt the status quo in the pending hearing. The general rule of both juvenile and domestic court judges is to maintain the status quo pending hearing, unless there are exceptional or unusual reasons that would bring harm to the child. An order to not leave the jurisdiction is quite common, but is very difficult to enforce, except as noted in *Baby M*, 217 N.J. Super. at 349, 525 A.2d at 1145, where the judge initiated an interstate search and arrest for violation of the TRO.

<sup>25</sup> The case report indicates the issuance of a TRO, *Baby M*, 217 N.J. Super at 326, 525 A.2d at 1134. This effectively restrained the Whiteheads from interfering with the Stearns right to custody pendente lite, which had already been granted prior to the TRO. It is at



men apparently with drawn guns.<sup>26</sup> This was allegedly Whitehead's first contact with the litigation.<sup>27</sup>

This ex parte order and police actions are what precipitated the mother and child flight into hiding (in Florida), causing the Judge to institute an order to hunt and arrest a fugitive who had failed to comply with the court order.<sup>28</sup>

The media treatment of this fiasco put the issuing judge in the position of having to justify his actions before the national media, which turned the case into a cause celebre, or more appropriately, into a media and legal circus. The unfortunate aspect of *Baby M* is the fact that it was in law a simple case of "paternity" and "custody," based on the "best interests of the child". As to these elements, the surrogate contract was irrelevant, in that these could have been decided without any discussion or consideration of the surrogate contract. In this respect, it would seem that the court went beyond what was necessary to resolve the case in chief, except for the element of the surrogate's fee.<sup>29</sup>

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least a 'do not leave the jurisdiction' type order. Then, it was brought to the court's attention that the Whiteheads had listed their home for sale, and that they might be relocating to Florida, and that Mrs. Whitehead had indicated that if challenged, she might leave the country. *Id.* at 349, 525 A.2d at 1145. At that point, Mr. Stearn had requested permission "to hold" the baby "one more time." She refused. Practically, if she had granted the request, there would have been no flight, as it is most probable that she would never have seen the baby again. In any event, the court elected to use this information to bring a "show cause," which was not answered (because respondent was in "parts unknown"). The court responded by holding respondent in contempt, with the sanction of a "turnover order" of the child to the legal strangers, a most unusual sanction to say the least. But then, so too was the order granting custody pendente lite to the legal strangers in the first place.

<sup>26</sup> This was the oral and written testimony of Mary Beth Whitehead at the hearings. See *supra* note 7. It was corroborated by the oral testimony of another witness, who was evidently her attorney at that time, Robert D. Arenstein, Esq. None of the other panelists familiar with the *Baby M* case indicated any error in the testimony, or offered contrary statements. Even so, during the mele, Mrs. Whitehead "took the child into a bedroom at the rear of the house and passed the child out the window to her waiting husband," *Baby M*, 217 N.J. Super. at 350, 525 A.2d at 1145, and then fled to Florida. This is what precipitated the interstate search.

<sup>27</sup> Oral and written testimony of Mary Beth Whitehead at the Hearings, uncontradicted. *Supra* note 7. Even so, there was testimony of personal service on defendants. *Baby M*, 217 N.J. Super at 326, 525 A.2d at 1134. Even so, it was acknowledged in court that the Whiteheads were somehow "aware" of some kind of proceedings.

<sup>28</sup> *Baby M*, 217 N.J. Super. at 349, 525 A.2d at 1145. (Note that the *validity* of the violated ex parte order is not a valid issue, as it is a TRO, which is neither challengeable nor appealable at that point.)

<sup>29</sup> For the record, it is not the intention of this writer to object to the decision in the *Baby M* case, at least as to its outcome. The reported findings in the case certainly justify the factual and legal basis for petitioner Stearns to have been found the natural father, under any paternity statutes, and then, as between the natural parents, to award custody to the father based on the 'best interests' of the child. There are certain procedural aspects which 'raise eyebrows', with the note that being procedural and temporary, there is never any

In a companion case currently in litigation, the surrogate mother obtained legal counsel after execution of the surrogate contract, but prior to birth and delivery, she precipitated the litigation, and following appropriate law and rules, has been routinely granted custody pendente lite as against the putative father.<sup>30</sup> Putting only these two cases together, it would appear that the surrogacy custody pendente lite rule is a "hare-tortoise" situation, with the winner being the person who won the race to the courthouse.<sup>31</sup>

As of September, 1987, there were at least fifteen amicus briefs filed in the *Baby M* appeal, expressing the views of numerous organizations and individuals.<sup>32</sup> Although ostensibly focused on that case, the views expressed in the briefs were for the most part philosophical and/or policy positions and statements of the individuals and organizations submitting the brief as to surrogacy and commercial surrogacy. All but two requested that the Supreme Court reverse the trial court decision. The Rutherford Institute<sup>33</sup> argued that surrogacy harms the child, depersonalizes the mother, seriously threatens the integrity of marriage and of the family unit, denigrates human dignity, is contrary to the black market baby laws, and allows an elite economic group to exploit the poor. Concerned United Birthparents Inc.<sup>34</sup> argued that a mother has a constitutional right to maintain parental ties, and that Stearns' rights do not supersede the mother's rights. The Catholic League for Religious and Civil Rights argued that the proceedings of termination and adoption are void for non-compliance with adoption and custody laws, and that a third party (Mr. Stearns) cannot purchase a baby for another (Mrs. Stearns). The

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basis for appellate review. Observation and commentary herein, as to that case, are limited to the substantive law aspects of the courts review and to analysis of the legality and enforceability of the surrogate contracts. Even realizing that the decision is on appeal, it would still appear that the judge went beyond what was necessary to determine the case, and there was no reason for him to adjudicate the contract issue. Stearns did not need a determination of the legality of the contract in order for the paternity and custody determinations. Whitehead was not seeking enforcement of the contract. It just appears to this reader of that report that either petitioner Stearns, Attorney Skoloff, and/or Judge Sorkow for some reason, used this case to litigate the irrelevant contract fee issue.

<sup>30</sup> Testimony of Witness Laurie Yates, hearing, *supra* note 7. After this Article was submitted, the case in point was reported in 56 L.W. 2482, as *Yates v. Keane*, \_\_\_\_\_ Mich. \_\_\_\_\_ (1988). The Michigan Supreme Court ruled that surrogate contracts are void, in that surrogacy denigrates human dignity. It also suggested that such contracts are a violation of the Thirteenth Amendment.

<sup>31</sup> Observation at the hearing, *supra* note 7, by Chairman Thomas A. Luken, House of Representatives, Ohio.

<sup>32</sup> As reported by Kathy Barrett Carter, *Sunday Star Ledger*, Sept. 13, 1987, § 1 at 33.

<sup>33</sup> The Rutherford Institute is an organization that assists litigants in significant first amendment cases.

<sup>34</sup> Concerned United Birthparents Inc. is an organization of parents who have given up children for adoption, adoptees, adopting parents, and adoption professionals.

Committee for Mother and Child Rights, Inc. objected to the TRO proceedings, which gave the baby to Sterns prior to any hearings. The Hudson County Legal Services & National Center on Women and Family Law contended that the judge acted improperly in using the economic and educational status of the parties as a determining factor. The Odyssey Institute International Inc.<sup>35</sup> argued that the court-appointed guardian did not represent the baby's interests, and that the contract was invalid as the courts did not follow New Jersey law. The Gruter Institute for Law & Behavioral Research<sup>36</sup> asserted that the maternal consent should not be valid unless given after the birth of the child, and the father should not have the right to specific performance on the contract. The Rutgers Women's Rights Litigation Clinic took the position that parental rights can only be terminated on existing laws and argued that the judge's decision was flawed in that it was infused with sex-based stereotypes and it denied equal protection. The American Adoption Congress<sup>37</sup> has expressed concern with the adverse impact on the child, and suggested that even if Stearns is given custody, maternal rights should not be terminated.<sup>38</sup>

A proponent brief was submitted by the National Association of Surrogate Mothers, which wants to be assured that surrogate parenting will be kept as a viable option for couples who need it. Likewise, Resolve, Inc.<sup>39</sup> argued that the pain, depression, and anguish suffered by infertile couples should be considered by the court.<sup>40</sup>

### III. ENFORCEMENT/COMPLIANCE: "MATERNITY"

As to surrogate Sara attempting to enforce the contract by having Winnie found to be the mother, it would appear that such a maternity suit by Sara could be possible under both the Uniform Parentage Act (hereinafter "UPA") and the Ohio Revised Code (hereinafter "ORC"). UPA § 1 provides that the UPA include the mother-child relationship as well as the father-child relationship. UPA § 21 indicates that anyone may bring the action to determine maternity, but does not give any guidelines as to criteria. Ohio Revised Code Section 3111.17 permits any "interested

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<sup>35</sup> The Odyssey Institute International Inc. is an organization of persons with one natural and one adoptive parent.

<sup>36</sup> The Gruter Institute for Law & Behavioral Research is an organization whose purpose is to stimulate research in law and behavioral sciences.

<sup>37</sup> The American Adoption Congress is an organization dedicated to promoting "openness and honesty" in adoption.

<sup>38</sup> *Id.*

<sup>39</sup> Resolve International provides medical, counselling, referrals, etc. to infertile men and women.

<sup>40</sup> *Id.*

party" to bring a "maternity" action, but any litigant will be faced with the guideline definition of ORC Section 3111.02, which defines the mother as the one who gives birth. The UPA does not have any such definition. Even if it is possible to construe a legal basis for a "maternity" suit under the UPA or ORC, Sara could not possibly have Winnie found to be the mother, as Sara carried and delivered the child, and the current status of the law makes her the legal mother.<sup>41</sup>

Interestingly, the Uniform Surrogate Parenthood Act<sup>42</sup> (hereinafter the "USPA") does not mention the word "mother." This is not surprising in that the proposed act is one that is totally in favor of the surrogate arrangement as part of the "modern family"; the act considers surrogacy to be a straight contractual "rent-a-womb", and the introduction of any emotional language, such as "mother," might be problematic. At all times, the mother is referred to as "The Surrogate," and there is no reference to maternity or maternity procedures. The USPA does acknowledge one element not available in the usual surrogate contract, namely the provision that the surrogate has an automatic fourteen day stay of performance on delivery in order to bring legal proceedings to rescind the contract.<sup>43</sup> This provision would have to be included in any Model or Uniform Act to get approval. This is contrary to public policy expressed in both the Uniform and State Adoption Acts, which provide that there is no legal consent to the transfer of "title" unless the mother actively consents 72 or more hours after the birth.

One may certainly note that since the state legislature has expressly spoken on the consent issue, it would be very unusual for a trial judge to reverse this express public policy, unless the judge resorted to the loose constitution boilerplate route, i.e., the finding that the public policy violates one of the numerous amendments available for that purpose. This would mean that the state supreme court would have to face the issue as to whether the expressed public policy in the act violates public policy in general.

#### IV. ENFORCEMENT/COMPLIANCE: PATERNITY

As to paternity, Harold has standing,<sup>44</sup> even if Winnie does not. Under the UPA, there is a conceptual standing problem. UPA § 4(a) provides

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<sup>41</sup> UNIF. PARENTAGE ACT § 3(1), 9B U.L.A. 297 (1987)(proof of having given birth); OHIO REV. CODE ANN. § 3111.02 (Page Supp. 1987)(proof of having given birth); *Stumpf, Redefining Mother: A Legal Matrix For New Reproductive Technologies*, 96 YALE L.J. 187 (1986)(proof of birth).

<sup>42</sup> See *supra* note 5.

<sup>43</sup> UNIF. SURROGATE PARENTHOOD ACT, *supra* note 5, at 6(a) (for the mother) and 7 (for the father).

<sup>44</sup> Note that since it was an artificial insemination, and that Stearns was the biological father, then under all paternity statutes, this makes him the "alleging father." UNIF.

that the husband of the woman who gives birth is presumed to be the natural father. UPA § 5(a), indicates that the husband of the surrogate is presumed to be the father if he has consented to the insemination. However, where there is no consent, the UPA does not specify the status of the surrogate's husband. Under UPA § 5(b), a third party sperm donor is a legal stranger to the child. There is the confusion. Under the example here, if the husband consented, he is presumed the father; if he did not consent, he is not presumed the father.<sup>45</sup> But on the other hand, the sperm donor to a married woman is a legal stranger to the child.<sup>46</sup> The problem is solved in a very logical manner, since all parties have standing to commence the suit<sup>47</sup> and the question of presumptions does not arise until the hearing on the facts. Unfortunately for the child, this means that the child has no father at all, presumed or otherwise, until after the hearing, if there is one.

This procedure makes irrelevant the issues of contract enforcement and the cash performance,<sup>48</sup> and once paternity is established, it is a simple

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Parentage Act § 4(a)(1) 9B U.L.A. 298 (1987), and OHIO REV. CODE ANN. § 3111.04(A)(1) (Baldwin 1987). Both presume the husband of the (surrogate) mother to be the natural father, but they are rebuttable presumptions. Of interest, is that neither state with certainty that the "natural" father is the "legal" father, even though it must follow. Even so, OHIO REV. CODE ANN. 3113.13 states that the result of the proceedings as to the parent child relationship is determinative for all purposes, and UNIF. PARENTAGE ACT § 1, 9B U.L.A. 296 (1987) indicates that the natural parent status has "incidents to which the law confers or imposes rights, privileges, duties, and obligations". The natural corollary of these is to convert the "natural" parent into the "legal" parent.

<sup>45</sup> See OR. REV. STAT. § 109.239 (1987)(donor a legal stranger), § 109.243(1987)(husband of surrogate is father if he consented to procedure); OHIO REV. CODE ANN. § 3111.37 (Page Supp. 1987) (accord). See also *People v. Sorensen*, 68 Cal.2d 280, 437 P.2d 495 (1968) (decided prior to any legislation; husband consented to procedure, found to be the father based on contract law, contradictory blood test held inadmissible); In *re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *rev'd*, 109 N.J. 396, 537 A. 2d 1227 (1988) it was found that the husband of the surrogate (Mr. Whitehead) did not consent to the insemination, and that under New Jersey Statutes, was not presumed to be the natural father. Then, since the principal (Stearns) was not the presumed father, Baby M legally had no father at all at birth, at least until after the paternity proceedings.

<sup>46</sup> The statutes do not state that the sperm donor is a legal stranger, rather they state that when the sperm is donated to a married woman, the husband of the donee is deemed to be the natural (and perforce) legal father if he had consented to the procedure. See, ILL. REV. STAT. Ch. 40, § 1453 (1988); OHIO REV. CODE ANN. § 3111.03(A) (Baldwin 1987); OKL. STAT. tit. 10, §552 (1987); OR. REV. STAT. § 109.243 (1987); MINN. STAT. § 257.56 (1982); MO. REV. STAT. Ch. 193.085 (1988); N.M. STAT. ANN. § 40-11-6 (1986); N.C. GEN. STAT. § 49A-1 (1984); TENN. CODE ANN. § 68-3-306 (1987); TEX. FAM. CODE ANN. § 12.03 (Vernon 1986). The Uniform Acts are silent on the matter. Further, there is also silence in the statutes as to sperm donors to unmarried women. The UNIF. SURROGATE PARENTAGE ACT § 1(d), defines the "Natural Father" as the sperm donor, whether the donee is married or not. It also specifies that there is no requirement that donor or donee be married.

<sup>47</sup> *Supra* note 44.

<sup>48</sup> In paternity proceedings, the threshold issue is the fact of biological paternity, from

question under all acts and legislation as to the procedure used to determine which parent gets custody, based on the "best interests of the child".<sup>49</sup>

Under the UPA and the Ohio "Uniform Parentage Act", Harold (the male principal) could file a paternity complaint as the "alleging" father, and since the mother (surrogate Sara) is in fact and in law the natural and legal mother,<sup>50</sup> and since her husband is presumed to be the natural and legal father,<sup>51</sup> and since the putative father (Harold) is a "stranger" in fact and in law at this point, it would be most unusual for any juvenile judge to issue a "turnover order" from the natural mother and presumed father to the putative father. Even if there were an existing imminent danger to the child, the law, rules, procedure, and practice would turn the child over to county welfare or to a relative, but only after a hearing, and certainly not to a legal stranger.<sup>52</sup>

The Uniform Surrogate Parentage Act resolves this issue by a reversal of another traditional public policy. Under those USPA provisions, the natural father is defined therein as the sperm donor and contract male principal, and will get physical possession of the child from the moment of birth, unless the natural father or surrogate petitions the court for relief from the contract,<sup>53</sup> for whatever reason. (The Act does not specify criteria or guidelines for the judge to grant or refuse rescission, except, as noted above, the fourteen day rule which appears to be merely a device to stay proceedings for fourteen days, for no particular reason, and for no real advantage). Not only does this immediate possession clause resolve the possession problem, but it assures both parties that no more natural

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which "legal" paternity follows; after this finding, the remaining issue is custody. In neither event is the contract or its enforceability in issue. In this respect, the case could have been decided without considering the validity of the contract, and it may be said that the contract enforcement issue in *Baby M* is either dicta or the basis for an opportunity for involvement in a landmark decision. See *supra* note 29.

<sup>49</sup> U.P.A. § 15(c) gives authority for a custody and visitation award, but does not note any criteria, such as "best interests"; OHIO REV. CODE ANN. § 3111.13(C) (Baldwin 1987) permits the (now) newly found father to then bring an action for custody and/or visitation, but still does not use the criteria of "best interests". All states will have some sort of companion statute to the U.P.A. to specify the "best interests" test in a custody dispute. See OHIO REV. CODE ANN. § 3109 (Baldwin 1987), where the term is used numerous times, and stated as controlling. Even so, in fact and law, this is the recognized criteria for any jurisdiction.

<sup>50</sup> *Supra* note 41.

<sup>51</sup> UNIF. PARENTAGE ACT § 4(a)(1); OHIO REV. CODE ANN. § 3113.03(A)(1) (Baldwin 1987).

<sup>52</sup> The UNIF. PARENTAGE ACT does not provide any pretrial procedures in point, but the Ohio R. Juv. P. 6(B) provides that (1) the child shall be released to a parent, guardian, or custodian; or (2) if sent to a shelter, then may after investigation, be released to a parent, guardian, or custodian, or back to the facility. Prior to the paternity determination, the male principal (Harold and Mr. Stearns) was none of the above.

<sup>53</sup> UNIF. SURROGATE PARENTHOOD ACT § 10, *supra* note 5, at 1328.

mother-child "bonding" rises to interfere with the contract.<sup>54</sup> Before a state can enact such USPA provisions, it is obvious that this is another major traditional public policy consideration which must be expressly reversed.

#### V. ENFORCEMENT/COMPLIANCE: ADOPTION

It is now appropriate to examine the procedures for transfer of "title" to the child. Assume first, that the parties intend to comply with the terms of the contract. Surrogate Sara would carry the child to term, and child Cara is born. If the parties proceed with the adoption, there is, of course, no enforcement or compliance problem. If the surrogate balks, the sperm donor father has another immediate remedy.

Clearly, if Harold is the sperm donor, then he may use the state versions of the Parentage Act to establish his parentage status and rights. However, this does not make principal Harold's wife Winnie the mother of child Cara, as surrogate Sara is still the natural and legal mother. At this point, Winnie is at best the step-mother. To transfer "title" of child Cara from surrogate Sara to wife Winnie, the proper vehicle is the adoption statute.<sup>55</sup> Winnie would apply for adoption of Cara, and Sara and Harold would consent.<sup>56</sup> So far, there is no legal problem. However, the statute which provides the adoption vehicle, also provides a problem.

It is an essence of the surrogate contract that the surrogate will sign the consent form only on, and conditioned on, the performance of payment of all medical bills and the fee for services performed. It may reasonably be assumed that absent payment of the fee, the surrogate will not sign the consent.<sup>57</sup> However, if the principals Harry/Winnie pay the fee, and

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<sup>54</sup> Even the author of the surrogacy-oriented UNIF. SURROGATE PARENTHOOD ACT recognizes the fact of the mother-child 'bonding' as a natural and biological fact. See *supra* note 5 at 1305. See also Tegeler, *Advertising for Adoption Placement: Gray Market Activities in a Gray Area of Constitutional Protection*, 25 DUQ. L. REV. 129 (1986); Beyer & Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233 (1986)(although not maternal bonding per se, it does recognize it and also "family bonding"). See also *infra* note 95.

<sup>55</sup> A problem concerning the maternal consent procedure arises at this point. If the surrogate performs, then there are no *Baby M* conflicts. But if not, absent the contract consent, there is no way to force the mother to consent. The U.S.P.A. resolves the problem by having the consent executed at the time of the contract. Even so, after birth waiting periods routinely appear in the various adoption statutes. Here again is the situation where the push to get surrogacy legislatively approved is going to require the legislators to reverse an already existing public policy. U.S.P.A. § 4(a). See also Note, *supra* note 5, at 1325.

<sup>56</sup> Even though a step-parent adoption, the consent of both parents is necessary. UNIF. ADOPTION ACT § 6; OHIO REV. CODE ANN. § 3107.06 (Baldwin 1987).

<sup>57</sup> See *supra* note 18. After the consent to adoption has been given, it would hardly be rescinded on the mother's complaint that she had not been paid, especially since this would

surrogate Sara takes it, it is a direct violation of statutes originally passed to frustrate the "black market" babies,<sup>58</sup> due to a prohibition on any cash transfers on expenditures other than those within express categories.<sup>59</sup> The sections are essentially jurisdictional, in that any such transfers or expenditures not expressly permitted, terminate the juris-

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be a violation of Ohio Rev. Code § 3107.10. Although not clear, it would appear that the U.P.A. procedure would also be res judicata as to that issue.

<sup>58</sup> All fifty states have enacted legislation to regulate adoptions, and due to the great demand for "desirable" children, many of these states impose criminal sanctions for compensation for an adoption. These criminal sanctions are the legislatures' response to a growing "baby black market" where children are often auctioned to the highest bidder. With profit as their priority, there is little concern for the well being of the child by the parties involved. Case Note, *Surrogate Motherhood: the Outer Limits of Protected Conduct*, 4 *DET. C.L. REV.* 1131 (1981). *Matter of Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (1986). See also, *In re Baby Girl D.*, 512 Pa. 449, 517 A.2d 925 (1986); *A.L. v. P. A.*, 213 N.J. Super. 391 (1986); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *Temple v. Tucker*, 277 Ark. 81, 639 S.W.2d 357 (1982); *In re Nadler*, 91 Ill.2d 326, 438 N.E.2d 198 (black market baby practice, attorney malpractice, suspension)(1982); *In re Roger B.*, 84 Ill.2d 323, 418 N.E.2d 751 (1981); *Adoption Hotline Inc. v. State Dept. of Health*, 385 So.2d 682 (Fla. App. 1980)(advertisement of an adoption "baby hotline"); *Matter of Adoption of Baby Girl Chance*, 4 Kan. App.2d 576, 609 P.2d 232 (1980); *Montana Dept. Soc. & Rehab. Services*, 176 Mont. 293, 577 P.2d 1223 (1978); *Las Vegas Sun v. Franklin*, 74 Nev. 282, 329 P.2d 867 (1958)(newspaper charge of black market babies business as libel). See generally Mandler, *Developing a Concept of the Modern 'Family': A Proposed Uniform Surrogate Parenthood Act*, 73 *Geo. L.J.* 1283 (1985); Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 *FAM. L.Q.* 141 (1985); Howe, *Adoption Practice, Issues, and Laws 1958—1983*, 17 *FAM. L.Q.* 173 (1983); Frieden, *Constitutional Rights of Natural Parents Under New York's Adoption Statutes*, 12 *N.Y.U. REV. L. SOC. CHANGE* 617 (1983); OHIO REV. CODE ANN. § 3107.06; UNIF. ADOPTION ACT § 10(a)(4).

The Uniform Surrogate Parenthood Act § 12 avoids this problem with specific entries that permit such a transaction. This section specifies that any payments to the surrogate "are not illegal notwithstanding any other contrary provision of law". U.S.P.A. § 13 "legalizes" payments to others, including agencies, finders, medical personnel, and attorneys.

<sup>59</sup> The Uniform Adoption Act § 10(4) permits expenditures "for services related to the adoption or the placement of the minor for adoption which were received by or on behalf of the petitioner, either natural parent of the minor, or any other person". Broad/liberal construction would certainly consider the "services" of the surrogate as "services received by or on behalf of the petitioner", if the judge is in favor of surrogacy adoptions, (or not, if the judge is not). The Ohio Rev. Code § 3107.10 specifies certain expenditures as allowed: physician expenses, hospital expenses, attorney fees, and § 5103.16 Agency expenses. The \$10,000 fee to the surrogate would certainly be difficult to hide, unless buried under one of the above. In that event, it is up to the court to determine the "reasonableness" of such expenses. The added \$10,000 may appear to be somewhat higher than "usual & customary". See *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *rev'd*, 109 N.J. 396, 537 A.2d 1227 (1988) and *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986)(where both courts approved of the adoption, and specifically approved of the \$10,000 surrogate fee). In the latter case the surrogate was granted with stated "reservations" over the moral and ethical aspect of the practice. In *Baby M*, the fee grant was based solely on hard contract law.



diction of the court as to the adoption process. It may be fair to state that they act to prevent the surrogate process where there is a cash payment; but since there is no surrogacy absent the cash, then these sections would act to eliminate surrogacy contract performance.

However, the same statute then indicates that the section does not apply to an adoption by a step-parent whose spouse is the biological parent to the child.<sup>60</sup> This must mean that the payment to the surrogate is not only not reportable to the court at all, but may not be relevant to the adoption proceedings. Even so, this still leaves the surrogate as the mother and Winnie as the stepmother, unless there are sufficient facts to involuntarily terminate the maternal relationship. Note however, that this saving feature applies only where the principal is also the sperm donor. There are third party donors and various embryonic implant procedures where the principal is not the sperm donor, and thus cannot become the father through use of the Parentage Acts. In this event, the proscriptions of the "black market baby" statutes apply so as to prevent either principal from proceeding with the adoption, even assuming the surrogate wishes to proceed.

Even so, Harold cannot have it both ways. If the contractual "all parties agree" route is used, the step-parent exception rule does not apply because at that time he has not been established as a parent, his wife Winnie is thus not a step-parent, and the (fee) proscription applies. To avoid the proscription, and comply with the law, Harold would establish his parentage rights under the Uniform Parentage Act rather than under the contract, and he takes as a matter of parental right rather than contract right. Winnie, who now is the step-parent, would then take under the *Baby M* procedure: establishment of paternity, custody battle, "best interest rule", termination of maternal rights, and child adopted by Winnie under the stepparent exception.

As to the statutory proscription, where there is a will, there is a way. The parties merely elect not to report the cash payment (or include it under legal or medical fees). Of course this is a fraud on the court, but only if someone tells the court, or if the court discovers the fact on its own. Either of these is highly unlikely in such a professionally planned and orchestrated scenario. One may assume that there have been at least some surrogate transfers in states that have enacted the public policy "proscription" clause of the Uniform Adoption Act, as in Ohio, and one may also wonder how it was done in the face of this type of express negative proscription<sup>61</sup> against "black markets" and "baby selling".

Assume that the court had this extra cash payment brought to its attention subsequent to the hearing. The result appears to depend on the

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<sup>60</sup> OHIO REV. CODE ANN. § 3107.10(E)(Page 1980).

<sup>61</sup> OHIO REV. CODE ANN. § 3107.10.

time of the judicial discovery. Once the order is final, it cannot be set aside "in any manner or upon any ground, including fraud. . . ."<sup>62</sup> However, if discovered prior to the hearing, or after hearing but before the final order, the proscription applies. Thus, as to the legality of the surrogate adoption process, the acts and Ohio law appear to also have a "race-fraud" statute.<sup>63</sup>

The Uniform Surrogate Parenthood Act easily resolves this problem also, as with the other problem areas, by the simplest of legal expedients: it changes the definition of terms, by expressly making any payments from the natural father to the surrogate "not illegal notwithstanding any other contrary provision of law".<sup>64</sup> This is obviously another reversal of express public policy against any payments related to the sale of children.<sup>65</sup> The USPA indicates that such authorization also redefines other payments to agents, finders, intermediaries, attorneys, and physicians as "not illegal". It further provides that the express terms of the surrogate contract shall prevail in the event of any dispute, "unless the court determines that extraordinary circumstances require otherwise".<sup>66</sup> The insertion of the modifier "extraordinary" shows the intent of the USPA, and further makes any attempt at escape by the surrogate through invoking this apparent escape clause a virtual impossibility.

## VI. ENFORCEMENT/COMPLIANCE: CONSENT

Another disqualification for enforcement of the surrogate contract is the statute that specifies that maternal consent is not valid unless executed no sooner than seventy-two hours after the birth of the child.<sup>67</sup> Since the surrogate contract is always executed prior to the birth, in fact, prior to conception, it would be very difficult for a court to accept the consent executed prior to conception, since by any exercise of mathematics, this is at least prior to seventy-two hours after the birth of the child.

Even so, the statutes that provide the proscription also provide the appropriate variance, in that they permit consent to adoption given by the court. Depending on the jurisdiction involved, it may be two different courts. Juvenile court may terminate the parental relationship, and give

<sup>62</sup> UNIF. PARENTAGE ACT § 15(b); OHIO REV. CODE ANN. § 3107.16(B)(page 1980).

<sup>63</sup> This is clearly an author's conclusion only, but paraphrasing Representative Lukens' observation. See *supra* note 31.

<sup>64</sup> UNIF. SURROGATE PARENTAGE ACT § 12.

<sup>65</sup> OHIO REV. CODE ANN. § 3107.10; UNIF. ADOPTION ACT; States cited *supra* notes 58 and 59.

<sup>66</sup> UNIF. SURROGATE PARENTAGE ACT § 15.

<sup>67</sup> UNIF. PARENTAGE ACT § 8; OHIO REV. CODE ANN. § 3107.08 (Page 1980). The Uniform Surrogate Parenthood Act avoids this issue in § 4(g) by requiring the purchasing party to deposit the agreed funds with the court along with the executed contract, or with any other escrow or trust account. See *supra* note 5.

consent, but the probate courts usually control adoption.<sup>68</sup> Even so, there must have been law and a procedure to terminate the legal custody of the mother and turn it over to the court for further disposition.<sup>69</sup> Assume that this has been done, usually by one of the many provisions of the juvenile codes, which all have some reciprocal action between an endangerment to the child and an unfitness of the parent. It may be assumed that the mere existence of the surrogate contract is not grounds for such termination, albeit evidently an essential element of the *Baby M* procedure, ostensibly to determine the enforceability of the fee.<sup>70</sup>

The USPA also easily overcomes this contingency. Section 3(a) requires the contract to be filed with the court after execution; then USPA § 3(d) mandates that within sixty days after the filing, the court shall issue an order verifying that the contract complies with the provisions of the law.<sup>71</sup> Although this appears to be a routine order, it does have the effect of *res judicata* as to all legal and factual issues, so as to estop the surrogate from rescission of the contract for any other reason than the innocuous "fourteen day" rule. Since the paternity determination provisions are still available under the UPA and USPA, the use of this procedure really means that in the event of contest, the only issue remaining is custody. In that event, it is certain that the fact of the sale aspect of the contract will be introduced as an element of maternal unfitness, while the element of "purchaser" will be advanced as an element of "fitness" and "best interests".

Even if the surrogate relies on a contest on the contract, the USPA requires that the contract shall include provisions that the surrogate,

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<sup>68</sup> Probate courts generally have jurisdiction, but occasionally "Surrogate" Courts, and Juvenile courts will also have jurisdiction. In *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), 109 N.J. 396, 537 A.2d 1227 (1988) the judge who heard the paternity case also had jurisdiction to grant the adoption petition of the (now) step-mother, evidently on the same day announced the paternity decision.

<sup>69</sup> As to parental termination rights and the Due Process requirements, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979); and their progeny say it all: such rights, however, are not absolute. See *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 460 U.S. 248 (1983).

<sup>70</sup> Note how the surrogate contract, as proposed in model form (requiring commercial contract maximums), specifies in at least three different places that the intended mother agrees in advance to surrender the child for a cash payment. UNIF. SURROGATE PARENTAGE ACT § 1(f), § 1(g), and § 4. In the event of a contest, all may be assured that when the "best interests of the child" comes to issue, the father will certainly introduce those factors to prove the unfitness of any parent who has agreed to sell her own child. This would be very persuasive. The issue may then come before the court as to whether this really is a purchase-sale agreement as the opponents advocate. If it is not, then relevance is lacking. Also of note is that the person accusing the other of being involved in the sale of a baby human being is the other party to the transaction. An impartial novice might suggest the application of "in pari delicto", but in fact it is just the not uncommon application of different standards, one for buyer, one for seller.

<sup>71</sup> UNIF. SURROGATE PARENTAGE ACT § 3(a).

inter alia, agrees "to terminate her parental rights and responsibilities to the child effective immediately on the child's birth through a written consent *executed at the same time as the surrogate parenthood contract*" (emphasis added),<sup>72</sup> which again, based solely on contract, would mean that even the "stay of execution" relief afforded by the "fourteen-day" rule has nothing to do with rescission. In short, based on USPA contract law, the consent is given prior to conception, and cannot be revoked for any reason. This provision would certainly require express legislative reversal of existing express public policy, as stated in the Uniform Adoption Act (hereinafter "UAA") and the ORC version of the UAA, ORC § 3107.

## VII. EXISTING AND PROPOSED LEGISLATION

The starting point is the basic rule of law in a democracy, that any conduct is legal, or at least not illegal, unless there is specific legislation either prohibiting or regulating it. As of this writing, only one state has legislation respecting the surrogate procedure, and that one declares the entire surrogate contract to be absolutely null and void.<sup>73</sup> The pending federal legislation, H.R. 2433, does not state that such contracts are null and void, but rather subjects anyone who engages in or brokers commercial surrogacy to criminal penalties.<sup>74</sup> Strictly speaking, it does not ban surrogacy arrangements per se, but limits the proscription to those which have a commercial aspect, where the person or broker receives or expects to receive, directly or indirectly, any payment for such conduct.<sup>75</sup> It further makes any advertising of surrogacy arrangements or brokerage a criminal offense, subject to a fine of up to \$5000, or up to six months imprisonment, or both.<sup>76</sup>

Although not banning surrogacy arrangements per se, it is fair to say that banning the commercial aspects of surrogacy practically eliminates the surrogacy process, since the elimination of the economic advantage to the surrogate eliminates almost any motivation to be a surrogate. It is also fair to state that this is the intent of the legislation.

It has been reported that a number of countries are currently involved

<sup>72</sup> UNIF. SURROGATE PARENTAGE ACT § 4(a).

<sup>73</sup> Louisiana H.B. 327, enacted July 9, 1987 states, "[T]o provide that a contract for surrogate motherhood shall be absolutely null, void, and unenforceable as contrary to public policy . . .". Section 2713(A): A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy. Section 2713(B) defines the standard surrogacy contract.

<sup>74</sup> *Supra* note 1. Proposed enactment to be added to Chapter 89 of Title 18 U.S.C. by adding § 1822, which makes participants and brokers of surrogacy arrangements subject to fine or imprisonment or both.

<sup>75</sup> *Id.* at § 1822(b)(2).

<sup>76</sup> *Supra* note 1, Proposed revision of Section 12, F.T.C. Act, 15 U.S.C. 52 (c)(1).

in investigating the possibilities and practicalities of making commercial surrogacy illegal.<sup>77</sup> To this end, there is an international organization of women whose objective is to make surrogacy illegal internationally. The "Feminist International Network of Resistance to Reproductive and Genetic Engineering" (FINRRAGE) has been actively working to make it illegal, at least in Sweden, Austria, England, Australia, Brazil, Ireland, Canada, Germany, and Belgium.<sup>78</sup> According to that report, it has been determined to be illegal in Britain, Sweden, France, and the Vatican, and is actively being considered for banning in West Germany, Norway, the Netherlands, and Australia.<sup>79</sup>

As stated above, there is only one state with surrogacy legislation; however, there are at least 27 states with some kind of proscriptive legislation pending.<sup>80</sup> Twenty-one of these states either ban surrogacy outright, or have such proscriptions as to make it impractical or impossible. Some ban surrogacy payments and/or require psychological screening of surrogates, licensing of surrogate lawyers and doctors, prior court approval of agreements, or proof that the female principal is infertile. Some require a policy to grant the surrogate the option to change her mind and keep the child. Obviously, some proscriptions are intended to eliminate surrogacy arrangements, and some are intended to make them easier to implement, and less open for dispute.<sup>81</sup> The report also notes that one Texas surrogate died of a heart attack in her eighth month, and one surrogate/child who has AIDS, has been rejected by both the surrogate and principals. These latter incidents only add to the numerous possibilities of complications needing some kind of legislative regulation of the process, and protection for all parties involved, including the child.

This proliferation of proposed legislation is the aftermath of *Baby M*, and only adds to the scope of the problem of attempting to proscribe and regulate at the state level. The conflicting proposals, if enacted, will only exacerbate an already serious situation. For one state to prohibit the process while an adjoining state has attempted to make it easier merely increases the stated reason for the proposed federal legislation as the only practical solution, whatever it may be.

The balance of this Article will examine the current federal legislation, its intent, practicality, and possible outcome, and present a logical and workable compromise.

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<sup>77</sup> *Supra* note 7. Written testimony of a witness at the hearing, Gena Corea, Co-Chair of the National Coalition Against Surrogacy, author of *The Mother Machine*, and Co-Editor of the North American edition of *Reproductive and Genetic Engineering; International Feminist Viewpoints*, Pergamon Press.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> I. Peterson, N.Y. Times, Dec. 13, 1987, at 31.

<sup>81</sup> *Id.*

As a practical matter, it is highly unlikely that this proposed federal legislation could pass as written. In the first place, commercial surrogacy is already a massive business. Consider, for example, that during the Seminars at the ABA Convention in San Francisco, in August 1987, it was reluctantly conceded by a major surrogate contract attorney that he had received income over the past ten years of about twelve million dollars, solely from the commercial surrogate contract business.<sup>82</sup> It is logical to assume that the brokers and medical personnel have received similar prodigious benefits. It may reasonably be assumed that the AMA and ABA will not take a position to outlaw such a massive business, for whatever reason, although it may be assumed that the stated position would be to rely on and reinforce the rights asserted in *Roe v. Wade*,<sup>83</sup> (and progeny), of a woman to control her own body, or any of the other rights to liberty or privacy noted below. It is unlikely that any feminist or civil rights group will support elimination, as such elimination would be contrary to the *Roe* derived right of the woman to absolute control of her own body.<sup>84</sup> It is more likely that these latter groups will actively oppose any such legislation.

Possibly the greatest source of available data to support this opposing proposition is the numerous law review articles written by various law professors, all of which support the *Roe* and progeny asserted position of the absolute control.<sup>85</sup> Their general theme is acknowledgement and acceptance of the new technology as an inevitable fact of life, but, as is typical of law professors' writings, the reliance base is generally some phase or aspect of civil rights, such as the right to privacy, the inalienable rights of the surrogate mother, right of a woman to control her body, procreative rights, procreative liberty, no state interest, no compelling state interest, no rational basis, right to liberty, and right of free speech.

These articles are generally conclusive as to the fact of commercial

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<sup>82</sup> American Bar Association August 1987 Convention, *supra* note 7.

<sup>83</sup> 410 U.S. 113 (1973).

<sup>84</sup> *Roe v. Wade* never stated this proposition, nor did any of the progeny cases. It is a desired conclusion from the collection of cases that the decision to have an abortion is exclusive to the mother (in consultation with medical advice), and free from the interference from husband, parents, or state, up to a certain time. From these decisions, it has been advanced that *ergo*, any woman can do anything with her own body, as being her private right, free from interference of anyone including the state. It is at least a non-sequitur with mind boggling corollaries.

<sup>85</sup> See the twelve law review articles cited in notes 8, 12, 41, and 54. See also, Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Tiller, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415 (1987); Note, *Rumplestiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986); Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984); Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173 (1983); Keane, *Legal Problems of Surrogate Motherhood*, 1980 SO. ILL. L.J. 147, 155 (1980).

surrogacy and absolute rights of the parties, and are ultimately directed to developing various ways and means to accommodate the asserted absolute private rights and this new technology. Even though there is no way to determine if the individual authors are engaged in a mere academic exercise,<sup>86</sup> or whether each is acting as an advocate, a public reader will accept them at face value. Thus, it may be assumed that these articles will be introduced at the impending Senate hearings, and if the legislation passes, then certainly into the federal courts to support an asserted violation of the one or more various civil rights noted above, or one newly created for the occasion. This expected barrage of purposeful law review articles by law professors, if not conclusive per se, is at least a potent and potentially persuasive opposition force.

If the purpose of the legislation is based on philosophy, theology, ethics, and/or morality, it is equally doomed in a humanistic and hedonistic society where the rights of an individual are generally superior to the rights of society. This does not mean that legislation cannot control human conduct at all, but rather means that legislation controls only to the extent that the state and judiciary can and will sanction individuals for violations. Where the gentry is willing to take the risk, and where the judiciary is reluctant to sanction, for whatever the reason, external legislative controls will not prevail. The criminalization of commercial surrogacy would be as ineffective, merely creating another area for scofflaw.

In a democracy, individuals can be legislatively controlled only to the extent that there is voluntary and collective internal consent to be controlled. Considering all the aspects of commercial surrogacy, the extent of the business, those for and against legislative control, the tolerant attitude or at least lack of immediate concern of the gentry, and the expected reluctance of any judge who does not have masochistic tendencies to publicly sanction for violation of "unpopular" laws either the surrogate or the principals, it is fair to say that the intended proscription legislation, even if passed, would be generally ignored, and eventually found to be violative of one or more of the many items in the rights menu.

The various bases of surrogacy proscription—philosophy, theology, ethics, morality—are offset by surrogacy's prospect as a multi-million dollar business, with ready consumers and the support of medical and legal writers, feminists, civil rights groups, and the numerous law review

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<sup>86</sup> It eventually became quite clear during the Robert Bork 1987 confirmation hearings, where massive amounts of time were spent examining the nature and purpose of legal writings, that law professors write articles where the motivation is directed, persuasive, or merely exploring new areas of the law with the intent of creating an area of controversy for discussion. Many articles are in the latter category, which is a very legitimate motivation. However, even though an article may be lengthy, outstanding, and brilliant, it is still legitimate to question of the real intent of the author.

articles. The cash payers are relatively determined childless parents or individuals who have the ability to pay from \$25,000 to \$50,000 to purchase a child,<sup>87</sup> and the payee consumers are generally the under-educated and lower economic-class women in need of the money.<sup>88</sup> This is an almost impossible combination to beat by mere proscriptive legislation, and its ultimate lack of success is predictable.

Putting aside the philosophical, theological, moral, and ethical issues, consider the individuals that the intended legislation would be designed to protect. Since the principals, the parties who are the purchasers to the contract, are able to spend between \$25,000 and \$50,000 to complete the contract,<sup>89</sup> it is highly unlikely that they need any legal protection. They already have it: they can afford the best and can afford to scofflaw if necessary. Then there are the attorneys who negotiate or broker the agreement, and the doctors who perform the procedures. No one could be rationally or logically convinced to suggest that legislation is needed to "protect" them. Even so, one may inquire, protection from whom and from what?

The child is, of course, a consideration, and one may inquire as to the protection needed for the child. There is sufficient parallel between the commercial transaction procedure of surrogate children and black market children to note that the child is the least of all the considerations. "These criminal sanctions (for compensations paid) are the legislature's response to a growing 'baby black market' where children are often auctioned to the highest bidder. With profit as their priority, there is little concern for the well-being of the child by the parties involved."<sup>90</sup> However, there is also a critical difference. In the black market business, the child is already born. The parties have the opportunity to "inspect the goods" and accept or reject with no greater consequence to the child than that on children offered by adoption agencies. With surrogate children, exceptional care is taken to assure the perfect product, but nature has its own rules. There is a litany of possibilities of types and kinds of imperfections and defects. There are no laws, state, federal, or model acts, which "protect" this rejected child, and it is even questionable whether there ever should be or could be. The rejected surrogate child is another matter. The principals will very likely have reserved the right to monitor the status of the embryo,<sup>91</sup> and

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<sup>87</sup> Written and oral testimony at the hearing, *supra* note 7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *In re Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S.2d 813 (1986).

<sup>91</sup> Apparently this is a standard procedure. See hearing testimony, *supra* note 7; *In re Baby M* 217 N.J. Super. 313, 525 A.2d 1128 (1987).



may even have the contractual consequent right to demand abortion<sup>92</sup> or reject on birth.<sup>93</sup>

The USPA § 4(i) specifies that the principals will take the child "regardless of any impairment." Whether it is the USPA or strictly the private contract that controls, it is quite obvious that the child is not a party to any of this. Even so, in the event of defect or "impairment," the USPA provision makes the most logical sense. Consider that the mother is already on record not only as not wanting the child, but as having agreed to sell it for a price. If the child is then born imperfect, the impact on the child could be disastrous. Consider the social and economic status of the principals: they are in an unquestionably better economic position to provide for the child whether or not perfect. Even if the principals as principals reject the damaged goods, the imperfect child is still somewhat protected in the sense that a paternity suit can still be brought for determination of paternity and support.

No law can protect the child from the mother as a surrogate, any more than it can protect a child from its otherwise natural mother. If at some later time, it is found that she is an unfit mother, then an applicable juvenile code, found in all states, will protect the children from her. By that time, any surrogacy issue is moot. Certainly the child does not need protection from the lawyer or doctor. Considering the economics involved, and that the child is a specific valuable commodity, it is most likely that they will do all in their power to assure a "perfect" child, followed by a fast, smooth, and peaceful transfer of possession and title. This then leaves the principals as parents. Considering that the typical principals are a childless couple desperate for a child, willing to pay up to \$50,000 to get one, it is unlikely that they will be obtaining an "unwanted child". No one could suggest in advance that the child needs protection from them any more than an adopted child needs some kind of protection from adopting parents.<sup>94</sup>

The only idea that separates the psychological impact on the surrogate child from the adopted child is the devastating news that he was once a commercial commodity, who was raised in a "rented womb", and then sold for cash. All the proponents' arguments cannot rationally or seriously rebut this psychological damage.<sup>95</sup> Rebuttal has and will be made,

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<sup>92</sup> *Baby M*, 217 N.J. Super. at 345, 525 A.2d at 1143.

<sup>93</sup> Although possible by contract, it is not a provision of the Proposed Uniform Surrogate Parenthood Act and apparently was not in the *Baby M* contract.

<sup>94</sup> It is apparent from the reading of *Baby M* that this appeared to be a primary consideration and motivation of the trial judge and guardian ad litem. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *rev'd*, 109 N.J. 396, 537 A.2d 1127 (1988).

<sup>95</sup> There is at least one proponent who recognized this as a problem. See Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173 (1983).

but it must be remembered that all the literature to date effectively represents the principals, lawyers, doctors and "legal rights" of the surrogate. The needed protection for the surrogate child is at least the continued confidentiality of the adoption records.<sup>96</sup>

While many or most states provide for adoption record confidentiality, it is generally written as being a matter subject to judicial discretion. This is certainly not adequate protection for the surrogate child. Maintaining confidentiality for surrogate children, and maintaining discretion for the others, would be patently absurd. If the law is to condone surrogacy, then the least protection for the children is the trade off of confidentiality for all adoption records. The USPA has no provision for such confidentiality, at least because it is not an adoption statute, but because the best interests of the child are not a major consideration in the commercial surrogacy business.

As between the principals and the surrogate, it would take an exceptionally strong argument that it is in the best interests of the child for it to be with the surrogate rather than with the principals as parents.<sup>97</sup> Considering the efforts and costs expended by the principals to obtain a child, it would be very difficult for anyone to present any reasonable or rational argument that they would not be excellent parents.

This leaves only the surrogate. The general classification of the surrogate is that she is a member of the lower social, educational, and economic classes, and generally one who is in need of the funds.<sup>98</sup> The logical question here is protection from what or from whom. The major problem for the surrogate is biological and psychological, and is one that is beyond the law. Once conception takes place, there are certain biological and resultant psychological changes that take place in the mother, where the natural maternal "instinct", sometimes referred to as "bonding", rises, and are generally not within the control of the mother.<sup>99</sup> This is the factor that produces the serious psychological problems that result in the post-conception or post-birth desire to rescind the contract and keep the child. It is, for practical purposes, an emotion controlled by nature, beyond the logic and rationality of the mother. Thus, if there is any logical reason legislatively to protect any of the parties to the contract, it is the surrogate.

Another area of needed protection is the current experience of surro-

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<sup>96</sup> UNIF. ADOPTION ACT § 16 (relevant, but not exactly fully confidential, as it permits inspection by discretionary court order); OHIO REV. CODE ANN. § 3107.17 (Baldwin 1986) (originally tracking the U.A.A., but recent 1986 Amendments permitting voluntary disclosures by either set of parents, or by the child at maturity, effectively moot the effectiveness of true confidentiality).

<sup>97</sup> See *supra* note 94.

<sup>98</sup> Written and oral testimony at the hearing, *supra* note 7.

<sup>99</sup> KLAUS, & KENNEL, PARENT-INFANT BONDING (1982).

gates indicating the lack of independent legal advice. In most instances, the surrogate relies on the legal advice of the principals' attorney, or on the advice of the surrogacy brokers or agencies.<sup>100</sup> While there is no way to correct this arrangement with legislation, there is room for legislative protection after birth of the child.

#### VIII. RECOMMENDED LEGISLATION

As to the recommendations, it is again noted that it is not the purpose of this Article to engage in any discussion of the philosophical, theological, moral, or ethical aspects of either surrogacy per se, or commercial surrogacy. Nor is it the intent of this Article to judge the wisdom of the proscription per se, but only to note that the proposed federal legislation, written as a proscription, is practically unenforceable.<sup>101</sup> It has also been assumed that the legislation as written will not be enacted, and if it is, will be ignored and/or eventually declared a violation of some civil or private rights. This merely means that the parties are back to "square one" as to individual protection. Even assuming that all the arguments pro and con are perfectly valid, they are totally irreconcilable in philosophy, law, and ethics. As a practical matter, there is legislation pending, and the law appears to have, at least, an inferrable dual purpose: (1) proscription of the commercial aspects of surrogacy and (2) protection of those individuals who may be hurt in the process, at least to the extent that legislation can grant and enforce such protection.

Commercial surrogacy obviously does not and cannot injure the principals, lawyers, doctors, or hospitals.<sup>102</sup> There is some possible serious harm to the children, and immediate possible harm to the surrogate. If legislation is intended to protect them, then it can be done by appropriate amendment. The basic and only possible and needed protection is to keep the child from ever learning that he was not conceived as a person, but as a commercial commodity. The proponents may argue with that statement, but it is still the most likely view of the child when he discovers the

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<sup>100</sup> *Baby M*, 217 N.J. Super. at 345, 525 A.2d at 1143.

<sup>101</sup> Although Louisiana has banned commercial surrogacy, this merely means that the clinical procedures and advertisements will take place elsewhere, most likely an adjoining state, making the enforcement moot. A national ban would merely move the procedures to another country.

<sup>102</sup> In fact, it is virtually impossible to injure the doctors and lawyers. Obviously, both will have themselves initially protected against any possible malpractice against the surrogate by the inclusion of waiver clauses in the contract. One surrogate attempted to avoid this waiver by bringing a case in federal court against a leading surrogate attorney and the doctors in his clinic, asserting a case of negligent tort and malpractice based on the thirteenth amendment. The federal court determined that the thirteenth amendment does not grant private rights and dismissed for lack of subject matter jurisdiction. *Doe v. Noel Keane*, 658 F. Supp. 216 (W.D. Mich. 1987).

fact. This is where protection is needed. The only way to provide protection is to have some sort of legislation to keep certain adoption facts confidential. Granted, this is a state concern rather than a federal concern, but this is merely a challenge to the congressional staff writers to develop a proposition of some sort of traditional money grant to "encourage" compliance. If there is no practical way to keep this information from the child, then it would appear to be "in the best interests" of the child to proscribe commercial surrogacy.<sup>103</sup>

Even this slight protection would meet with some opposition, as there is a strong movement by adopted children seeking knowledge of their origins, as well as by natural parents who surrendered the child, to obtain current information about the child. This requires the elimination of the confidentiality of adoption records. The argument is not so couched, rather it is advanced as based on the private right to knowledge of the public records and information. The only real problem here is that the child, the natural parents, and the adopting parents each have a separate right of privacy. It is a classic situation that each of these private rights are in direct conflict.

As to the surrogate,<sup>104</sup> she has two problems, one legal, the other biological/psychological. Both of these can be resolved by a legislative provision that any surrogate contract must provide an escape clause for the surrogate which, to date, none of the proponents have given serious consideration. The major emphasis has been on the rights of the principals, and the sanctity of contracts. The only escape clause currently available for the surrogate consists of the right to abortion, absolutely available under *Roe v. Wade*.<sup>105</sup> That is one way. But there is no available escape clause during the last trimester or once the child is born. A provision that gives the surrogate mother the same consent rights as the natural mother in an adoption, that no surrogate consent is valid unless executed more than seventy-two hours after birth, would provide effective relief for the forgotten rights of the surrogate mother.<sup>106</sup>

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<sup>103</sup> While it is the express position of this writer that there would be no observations or comments on the philosophical, theological, moral, or ethical issues of commercial surrogacy, this one breach is based on the best interests of the child. It is just not plausible to suggest that any child would not be devastated by such discovery of his origins.

<sup>104</sup> As used here, it makes little difference whether the procedure was artificial insemination to the surrogate by the sperm of the principal male or a third party, or whether it was an embryonic implant. The surrogate is still a natural mother, and the laws of nature will prevail.

<sup>105</sup> *In re Baby M*, 217 N.J. Super. 313, 375, 525 A.2d 1128, 1159 (1987).

<sup>106</sup> The reference to the three day period is not suggested as being the best available. It may be that more time is necessary in order to be assured that the surrogate has made a decision based on full knowledge and consent. A week or two may even be better. It is also possible that the longer period of time may cause more problems because during that time, physical "bonding" may occur, which is stronger than the biological.

The other legislative right that can be conceded to the surrogate is to acknowledge any lack of separate and independent legal counsel, which is easily solved, even without legislation. There is no reason why this lack of separate and independent legal counsel cannot be a factor to be considered as to the informed consent issue in the event of the surrogate's option to rescind the contract. Considering how this basic right to counsel was ignored in *Baby M*, it is apparent that the remedy must be legislative.<sup>107</sup>

The prior discussions were based on an assumption that any legislature would want to permit commercial surrogacy, and, at the same time, protect the individual rights and interests of the parties most likely to be harmed. The legislation so designed would obviously be quite a morass, but possible. Suppose, on the other hand, that the legislative intent is to avoid all the real problems of commercial surrogacy, but to permit it to proceed under some kind of *laissez faire* concept. The solution has already been proposed.

The Louisiana Statute<sup>108</sup> has inadvertently done this by its adoption of a law that makes surrogacy contracts legally unenforceable. Note that this does not actively *ban* commercial or non-commercial surrogacy, but merely makes the contract *unenforceable* in a court of law. Thus, non-commercial surrogacy can continue as it may have, if at all, and commercial surrogacy may also continue, except for provision for lack of ability to enforce the contract in a court of law.

Under these circumstances, the essential personal problems of the injurable parties are protected. If the surrogate wishes to proceed with the transfer of possession and title, she may still do so, with the appropriate reconsideration time, and the delivery aspects are more in line with informed consent. Granted, this may cause some problems with the principals, in that they have risked some financial liability. But in the eyes of equity, as between the principals and surrogate, the principals are in a better position to sustain any financial risk as opposed to the possible severe physical and psychological harm to the surrogate. This is totally in line with the philosophies of hedonism, humanism, and the superior rights to privacy. The financial risk to the surrogate is the problems in collection of the fee, absent an enforceable written contract. As noted above, under the problems and practices with respect to "consent", it is hard to believe that the experts in this commercial business will not be able to develop ways and means to accomplish the same results.

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<sup>107</sup> Considering the serious legal and psychological consequences of the combination of lack of informed consent, coupled with the effects of "bonding", and how it can be judicially ignored, or disregarded, it is certainly an area for legitimate legislative concern. See *Baby M*, 217 N.J. Super. at 345, 525 A.2d at 1143.

<sup>108</sup> See *supra* note 73.

This approach causes no more additional harm to the child than as mentioned above, except that the record will show routine birth and adoption procedures, such that the adoption confidentiality problems become more remote. There is also the possibility that in the event of a less than perfect product, the principals have retained the right to reject the child, which is no real problem for them and no worse problem than with children who follow the regular pre-inspection procedure of a routine adoption. The fact that the surrogate may have to keep the imperfect child is a risk to her. Considering the advantages compared with this risk, the equities lie with the Louisiana procedure, and the possible complaints of the surrogate as to this "problem" should fall on deaf ears.

Finally, it can be noted that absent the enforceable contract, which has the express elimination of liability clauses for the broker, attorney, and doctor,<sup>109</sup> the surrogate may now follow the normal and regular legal channels for medical and legal malpractice. Again, weighing the various relative gains and losses, this procedure, which voids the surrogate contract, would avoid the problems of the surrogate as to malpractice waivers.

*Author's Note*

After this Article was submitted, the New Jersey Supreme Court decided the *In re Baby M*<sup>110</sup> case. It noted virtually all of the criticisms of the procedures noted in this Article, and reversed for those reasons. It also supported the paternity decision and the custody decision, and reversed to permit the mother to have visitation rights. The author stands by all critique in this Article.

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<sup>109</sup> For an example of this situation, see the medical malpractice case cited in *supra* note 102.

<sup>110</sup> 109 N.J. 396, 537 A.2d 1227 (1988).

