Surrogacy Contracts in the 1990's: The Controversy and Debate Continues

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Surrogacy Contracts in the 1990's: The Controversy and Debate Continues

In this modern age of medical advancements, infertile couples are presented with a variety of solutions which can give them the child of their dreams. Specifically, the option of having a surrogate impregnated with their genetic material often appears as an attractive alternative for infertile couples who wish to have a child that is genetically linked to themselves. With the publicity of the Baby M case, surrogacy contracts have become a dominant topic of talk shows, newspaper articles and magazine stories as well as producing debate and controversy among many different societal groups. Surrogacy contracts

1. Infertility is most commonly defined as an inability to conceive after 12 months of unprotected intercourse. See Karen A. Bussel, Note, Adventures in Babysitting: Gestational Surrogate Mother Tort Liability, 41 DUKE L.J. 661, 662 n.3 (1991).

2. For many couples, recent developments such as artificial insemination and in vitro fertilization, have provided solutions to infertility. Artificial insemination was the first method developed to procure conception without sexual intercourse. CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 58 (1989). This procedure involves simply the injection of sperm into the vagina of a woman. In vitro fertilization, more commonly known by the term test-tube baby, is more complicated and involves removing eggs from the woman's ovaries by a surgical procedure. If the procedure is successful, then the resulting embryo will be placed in the woman's uterus. Other recent medical developments include drug therapy, microsurgery and laser surgery. Bussel, cited at note 1, at 662 n.3.


4. In re Baby M, 537 A.2d 1227 (N.J. 1988). The In re Baby M case was the first nationally publicized case to bring to light the problems which arise from surrogacy contracts. The issue in In re Baby M was whether a surrogacy contract was enforceable under New Jersey law when the contract between the natural father and the surrogate mother required the surrogate to relinquish all parental rights after the child's birth. In re Baby M, 537 A.2d at 1234. See notes 63-74 and accompanying text for further discussion of In re Baby M.

5. While the debate over surrogacy contracts in the media may be a recent development, the actual concept of surrogate motherhood is not. The book of Genesis tells the story of Abraham's wife, Sarah, who could not conceive a child and consequently, arranged with her handmaiden to bear her husband's son, Ishmael. Rene
raise concerns which vary from ethical and moral considerations to concerns that surrogacy arrangements are unconstitutional.

Surrogacy arrangements usually emerge as a result of one of two situations. First, when a married woman cannot carry a fetus to term for medical reasons, but is able to produce healthy eggs, a couple may choose to have a child through a surrogate. In such a situation, the woman's egg can be fertilized with her husband's sperm outside the womb and implanted into a surrogate. This arrangement is referred to as a gestational surrogacy. Second, surrogacy arrangements arise when a married woman is infertile and incapable of producing a healthy egg. In this situation, the husband's sperm will be used to fertilize an egg of the surrogate and the surrogate will then carry the fetus to term. This arrangement is referred to as a traditional surrogacy.

An infertile couple, who wishes to enter into a surrogacy contract, need only find a willing female with no past family history of illness or disease, who has a healthy womb and perhaps also a fertile egg if the childless woman is unable to donate an egg. The surrogate will have to obligate at least nine months of her life to carrying the fetus to term. However, she need not necessarily stop working or participating in her regular daily activities. All of the surrogate's medical expenses will be paid and she will most probably receive a bonus of approximately $10,000 for her time. After nine months, a child is born and

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Lynch, Supreme Court Ends Orange County Surrogacy Fight, LOS ANGELES TIMES, October 5, 1993, at A1.


7. Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893, 894 (Cal. 4th App. Dist. 1994). Gestational surrogacy creates a child that is genetically linked to both members of the married couple. See Moschetta, 30 Cal. Rptr. 2d at 894.

8. Usually, artificial insemination is used to fertilize the surrogate's egg. Lieber, cited at note 6, at 206-07. See also SHALEV, cited at note 2, at 58-60 (describing the artificial insemination procedure).

9. Moschetta, 30 Cal. Rptr. 2d at 894. In a traditional surrogacy, the surrogate is the natural mother and the contracting male is the natural father. Id. The childless couple will most likely view the surrogate as an egg donor who happens to also carry the resulting embryo to term. SHALEV, cited at note 2, at 86.

10. Brokerage agencies that arrange for the meeting of a potential surrogate and a childless couple are not uncommon. These brokerage agencies charge a fee for the services they provide. R. Alta Charo, Legislative Approaches to Surrogate Motherhood, in SURROGATE MOTHERHOOD 88, 92 (Larry Gostin ed., 1990).

11. The most common fee for a surrogate mother is $10,000 in addition to other expenses such as medical bills, life insurance, maternity clothes and transportation. See U.S. Congress, Office of Technology Assessment, Infertility: Medical and
the married couple takes home the child of their dreams.

Consider, however, the situation where the surrogate changes her mind after being impregnated. She feels she can no longer go through with the surrogacy arrangement because she has developed a bond with the child. The childless couple's dream of having a child of their own now turns into a legal nightmare, which will begin before the child is born and last anywhere from the first few months to the first few years of the child's life.

Issues of fundamental importance in the area of parental rights and reproductive freedoms are raised when a surrogate decides to keep the child she is carrying. Therefore, the controversy over surrogacy contracts has produced a wide spectrum of arguments against such arrangements. The first part of this comment addresses the main social and legal arguments against surrogacy contracts. These arguments primarily center on the potential harm that surrogacy contracts cause to women, children and our society. The second part of this comment discusses the judicial response to issues raised by surrogacy contracts. Specifically, the comment analyzes the reasoning behind various state court opinions addressing surrogacy issues. In the third part of the comment, the apparent need for legislative guidance is discussed, along with the various state statutes which have been enacted in an effort to avoid conflicts which arise from surrogacy contracts. Finally, a hypothetical "ideal" surrogacy statute is proposed and evaluated.

LEGAL AND SOCIAL ARGUMENTS AGAINST SURROGACY CONTRACTS

Surrogacy contracts raise issues concerning reproductive freedoms, parental rights to raise a child and rights to maintain the integrity of the family unit. For instance, proponents of surrogacy arrangements claim that a married couple has the right to contract with a willing third party in order to obtain a child who is genetically related to themselves. On the other hand, opponents of such arrangements claim that a surrogate's rights of reproductive freedom and autonomy necessitates that she cannot be compelled, even by a contractual arrangement, to either give birth to a child or alternatively, to relinquish her parental right.


to a child after she has given birth.13 Therefore, both the arguments of proponents and opponents of surrogacy arrangements involve claims that the rights of either the intended parents or the surrogate will be violated. Although the arguments forwarded by surrogacy proponents are numerous, the arguments against surrogacy arrangements are the focus of this comment.

The Money Component

Many opponents of surrogacy arrangements argue that such arrangements constitute baby selling contracts14 and that such contracts turn the child into no more than a commodity, which can be bought and sold like most other consumer products.15 The fear surrounding this argument is that babies, like pedigreed dogs and fresh produce, will become commercial products that can be bought and sold at market prices.16 Concerns over the money component of surrogacy contracts center on the potential harm that money transactions will cause to the child or children involved.17

14. The New Jersey Supreme Court adopted this argument, in In re Baby M, when the court concluded that surrogacy contracts were comparable to baby selling arrangements. In re Baby M, 537 A.2d at 1240. As such, the court held that a traditional surrogacy arrangement involving money was unenforceable. Id. at 1248. The court explained that:

This is the sale of a child, or, at the very least, the sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition of payment of money in connection with adoptions exists here.

Id.

15. Katherine Lieber, in her discussion of feminist approaches to surrogacy contracts, wrote that some feminists “contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation is prohibited.” Lieber, cited at note 6, at 212-13 (citing Shari O’Brien, Commercial Conception: A Breeding Ground for Surrogacy, 65 N.C. L. REV. 127, 143 (1986)). The arguments against the sale of organs parallel the arguments against surrogate contracts for money. Lieber, cited at note 6, at 212-13 (citing O’Brien, at 142-43). First, in both situations the seller is likely to suffer both physical and emotional pain. Lieber, cited at note 6, at 212-13. The buyer is likely to be charged extortionate fees. Id. Finally, the commodity itself, is something that is unique and irreplaceable. Id.

16. O’Brien, cited at note 15, at 144. Shari O’Brien, commenting on the potential harmful commercial aspect of surrogacy contracts, stated that “babies, like automobiles, stocks, and pedigreed dogs, will be viewed quantitatively, as merchandise that can be acquired, at market or discount rates.” Id.

17. Lori B. Andrews, Surrogate Motherhood The Challenge for Feminists, in SURROGATE MOTHERHOOD 167, 176 (Larry Gostin ed., 1990). With surrogacy being considered essentially baby selling, arguments are raised that if surrogacy arrangements for money are allowed then the security children feel within their family life will be disturbed in that they may “worry that they will be sold and wrenched from their existing family.” Id.
Nevertheless, the question of whether a child is harmed by a surrogacy contract involving compensation remains unsettled with authorities split on the issue. Even opponents of surrogacy contracts are faced with admitting that there is no evidence or research to establish that children born of surrogacy arrangements are faced with any different problems than other children. One viewpoint asserted is that “[s]urrogacy is distinguishable from baby selling since the resulting child is never in a state of insecurity” and “[t]here is thus no psychological stress to that child or to any other existing child that he or she may someday be sold.”

However, an opposing viewpoint suggests that children born of surrogacy contracts will be “genetically confused or bewildered by the separation of genetic, gestational, and social parentage.” From a somewhat different perspective, some surrogacy opponents argue that when a surrogate mother receives compensation for handing over a child that she has carried for nine months her children will fear that they too may be sold. Although the emotional effects on a child are for the most part theoretical, this does not diminish the fact that baby selling is generally viewed as immoral and unethical.

Those who argue that surrogacy is no more than baby selling rely on both the Thirteenth Amendment to the United States Constitution and state adoption statutes as authority for the proposition that the payment of money for a child is illegal

18. Gostin, cited at note 12, at 7. Larry Gostin writes that there is “no data to demonstrate that children born as the result of surrogacy contracts are worse off by any measure—that they suffer more neglect, abandonment, and physical abuse, or that they receive less nurturing and love.” Id.


20. John A. Robertson, Procreative Liberty and the State’s Burden of Proof in Regulating Noncoital Reproduction, in SURROGATE MOTHERHOOD 24, 28 (Larry Gostin ed., 1990). John Robertson, in this article on the need to regulate noncoital reproductive techniques, contends that surrogacy, along with gamete donation, are two reproductive technologies that tend to produce children that are confused about their parentage. Id.


22. In In re Baby M, the New Jersey Supreme Court found that the “evils inherent in baby-bartering are loathsome for a myriad of reasons.” In re Baby M, 537 A.2d at 1241. Essentially, the court reasoned that baby selling could result in the exploitation of the parties involved without regard to the mother’s or the child’s best interests. Id. at 1242. It is fear that women and children will be exploited, if babies are allowed to be sold, that has led society to view the practice of baby selling as immoral and unethical.


and immoral. Surrogacy opponents interpret the Thirteenth Amendment, which prohibits involuntary servitude, as prohibiting monetarily induced surrogacy contracts. It has been suggested by at least one writer, that there is no distinction to be made between the selling and disposing of a slave and the selling and disposing of a child. Although the Thirteenth Amendment argument is frequently raised in the surrogacy debate, the courts have generally not relied on this argument in deciding the validity of surrogacy contracts.

A similar yet distinct argument against surrogacy contracts for money centers on the contention that money payments for a child, even in a surrogacy situation, are violative of many state adoption statutes. Surrogacy opponents question how a surrogate can be paid to bear a child for a married couple when the payment of money in an adoption situation is considered a criminal offense. Many surrogacy opponents see little practical difference between a traditional surrogacy situation and an adoption situation, because in a surrogacy arrangement in all

25. The Thirteenth Amendment provides that, "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII.


27. Holder, cited at note 23, at 82. Holder refers to the Civil Code of Louisiana which defined a slave as "a person whose master 'may sell and dispose of his person.' " Id. (citing LA. CIV. CODE art. 35 (1870)).

28. The California Supreme Court in addressing the surrogacy issues in Johnson v. Calvert acknowledged that the Thirteenth Amendment has been the basis of prohibiting criminal punishment for the refusal to work. Johnson v. Calvert, 851 P.2d 776, 784 (Cal. Sup. Ct. 1993), cert. denied, 114 S. Ct. 206 (1993) (citing Pollack v. Williams, 322 U.S. 4, 18 (1944)). However, the California court dismissed the application of the Thirteenth Amendment to surrogacy contracts because the court did not view the surrogacy arrangement as producing a situation of involuntary servitude. Johnson, 851 P.2d at 784. The court wrote "[w]e see no potential for that evil [which arises from involuntary servitude] in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking." Id.

The New Jersey court in In re Baby M did acknowledge that the Thirteenth Amendment could be a plausible argument against surrogacy, but the court declined to specifically rely on it. In re Baby M, 537 A.2d at 1253. The court noted in a footnote that "[o]pponents of surrogacy have put forth arguments based on the thirteenth amendment . . . . [w]e need not address these arguments because we have already held the contract unenforceable on the basis of state law." Id. at 1253 n.12.

29. Larry Gostin, in his article concerning civil liberties involved in surrogacy contracts, notes that there are many state statutes that make it a criminal offense to pay to adopt a child. Gostin, cited at note 12, at 9. Further, Gostin asserts that surrogacy contracts are in many respects similar to paid adoptions. Id. Therefore, it is not difficult to see how state adoption statute could be applicable in surrogacy situations. Id.

30. Id. Gostin writes that, "[i]n both cases the payment is for delivery of a baby: there is no substantive difference between paying a woman to gestate a child and then to deliver it, and paying a woman to deliver an already 'produced' child."
practicality the resulting child will be adopted by the wife of the natural father.\textsuperscript{31} Therefore, if surrogacy is to be viewed as simply an adoption situation, then adoption statutes would very well be applicable.

Courts have been more willing to adopt the argument that surrogacy contracts involving compensation contradict state adoption laws than they have been to assert that the contracts are in violation of the Thirteenth Amendment. In the \textit{In re Baby M} case, the New Jersey Supreme Court concluded that a traditional surrogacy contract was unenforceable partially on the basis that the surrogacy arrangement could not be distinguished from an adoption arrangement.\textsuperscript{32} The New Jersey Supreme Court explained that a surrogacy arrangement, where both parties know that money was being paid for a child, cannot be differentiated from a situation where money was paid to adopt a child.\textsuperscript{33} Therefore, the court found that the payment of money in a surrogacy arrangement was contrary to New Jersey public policy, because New Jersey law prohibited the payment of money to adopt a child.\textsuperscript{34} Thus, the argument that surrogacy contracts should be unenforceable when they involve the exchange of money is an argument for which a compelling statutory basis

\textit{Id.} See also Holder, cited at note 23, at 77.

\textsuperscript{31} Holder, cited at note 23, at 77. Angela Holder writes that, "[a]doption law, of course, is directly relevant to surrogacy agreements, since in each case the father's wife will presumably seek to adopt the surrogate's child." \textit{Id.}

\textsuperscript{32} \textit{In re Baby M}, 537 A.2d at 1240-42.

\textsuperscript{33} \textit{Id.} at 1240-41. The court dismissed the argument that the money was being paid for the surrogate to provide a service to the married couple. \textit{Id.} at 1241. Specifically, the court wrote:

\textit{As for the contention that the [married couple is] paying for services and not for an adoption, we need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only $1,000 if the child were stillborn, even though the "services" had been fully rendered.}

\textit{Id.}

\textsuperscript{34} \textit{Id.} at 1246. Other courts have also determined that surrogacy contracts, which involve money, conflict with state adoption statutes. \textit{See Doe v. Kelly}, 307 N.W.2d 438 (Mich. Ct. App. 1981), \textit{cert. denied}, 459 U.S. 1183 (1983). \textit{Doe} was one of the earliest cases to address the issue of whether compensation can be paid in a surrogacy arrangement. \textit{See Doe}, 307 N.W.2d at 439. In \textit{Doe}, the Court of Appeals of Michigan held that the right to privacy and the right to procreative freedom could allow a childless couple to contract with a surrogate, but that the state could still regulate such contracts by prohibiting the payment of money in such an arrangement. \textit{Id.} at 441; see also \textit{In re Paul}, 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct. 1990).

The purpose behind most adoption statutes, which prohibit the use of money in an adoption, is the concern that the sale of a child will result in the exploitation of all parties involved. \textit{In re Baby M}, 537 A.2d at 1242.

The Kentucky Supreme Court was one of the only state courts to find that commercial surrogacy did not violate state laws prohibiting baby selling. \textit{See Surrogate Parenting Associates, Inc. v. Commonwealth}, 704 S.W.2d 209, 211 (Ky. 1986).
Waiver of Parental Rights and Reproductive Freedoms

Another argument against surrogacy contracts is that such arrangements are harmful to a woman's parental rights and reproductive freedoms. It is argued that a surrogate mother cannot, by simply signing a contract, waive her right to make her own decision as to whether to parent a child or whether to choose to have an abortion. Further, it has been suggested that a woman's right to make future decisions related to her body and her lifestyle is of such fundamental importance that such rights should not be overridden by a surrogacy contract.

Indeed, a woman's right to reproductive freedom has been firmly established by the United States Supreme Court. The Court's decisions have recognized a woman's right to use contraceptives to avoid pregnancy and a woman's right to terminate a pregnancy through abortion. The Supreme Court's rationale has been that reproductive rights are fundamental and protected by a gleaned constitutional right to privacy.

Further, the Supreme Court has acknowledged a woman's right to control her body and lifestyle without interference. Even in situations where the husband of a woman wishes to intervene in the woman's decision to seek an abortion, the Supreme Court has held that a husband could not compel his wife to carry a fetus to term against her will. The Supreme Court has also found a Massachusetts statute that required a pregnant minor to have her parent's permission before seeking an abortion unconstitutional. Therefore, a woman's right to make her own

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36. Id. at 14.
38. Griswold, 381 U.S. at 485-86.
39. Roe, 410 U.S. at 154-56. In Roe, the Supreme Court concluded that the right to privacy encompassed the right of a woman to choose to have an abortion. Id. at 154.
40. See Roe, 410 U.S. at 152. The Supreme Court has established that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Id. Furthermore, the Roe decision recognized that the right to privacy extended to activities related to the marital relationship. Id.
42. See Bellotti v. Baird, 443 U.S. 622, 647 (1979). In this case, the Supreme Court found that a minor female had to be given the opportunity to go directly to the courts without first seeking her parent's permission to have an abortion. Bellotti, 443 U.S. at 647. Before the courts would allow the minor to have an abortion without her parent's consent, the court had to determine that the minor was "mature
health decisions has been highly guarded by the Supreme Court. Although a woman's right of reproductive freedom is protected by the Constitution, there still remains a question of whether her rights can be waived by a surrogacy contract. Generally, if a right is recognized as constitutionally protected, then there is a presumption that such a right cannot be waived absent evidence of voluntariness and knowledge. Surrogacy contracts are, theoretically, entered into freely. However, surrogacy opponents argue that it is not reasonable to assume that a woman can give an advanced waiver of her right to make choices involving her body and lifestyle.

Not surprisingly, advanced waivers of constitutional rights have been construed very strictly by courts. Surrogacy opponents take the position that when a surrogate signs a contract, before she has even been impregnated, she cannot waive her right to parent a child or to terminate a pregnancy. It is argued that a woman's parental rights have not even been created when the contract is entered into. Those rights are created only at the birth of the child and therefore, a contract waiving the surrogate's rights prior to the surrogate being impregnated

and well enough informed to make intelligently the abortion decision." Id.

43. Gostin, cited at note 12, at 13 (citing Brady v. U.S., 397 U.S. 742, 748 (1970)). Gostin's article suggests there is a "voluntariness and knowledge" standard that is applied by the courts to determine if an individual has freely waived a constitutionally protected right. Gostin, cited at note 12, at 13. There are, of course, situations where individuals cannot waive their constitutional rights under any circumstances. Id. Gostin, citing an example of a situation where constitutional rights cannot be waived, states, "criminal defendants cannot irrevocably waive the right to be present at trial in a capital case, to raise a plea of incompetence to stand trial, or to assert a privilege against self-incrimination." Id. at 14.

44. Surrogate mothers decide for themselves whether to bear a child for a married couple. However, some feminist scholars argue that surrogacy contracts are a "form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of self-sacrifice, or both." Lieber, cited at note 6, 211 (citing Anita L. Allen, Surrogacy, Slavery, and the Ownership of Life, 13 HARV. J.L. & PUB. POLY 139, 147-48 (1990)). Under such arguments, the surrogate is viewed as not acting freely. Lieber, cited at note 6, at 211.

45. Lori Andrews, in her article on feminist responses to surrogacy, asserted that many feminists believe that "women cannot give an informed consent until they have had the experience of giving birth." Andrews, cited at note 17, at 172.

46. Gostin, cited at note 12, at 14 (citing Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982)). Gostin's article cites to the Federal Court of Appeals decision of Rivera, for the proposition that there are some rights which will not be allowed to be waived until they can, in fact, be invoked. See Gostin, cited at note 12, at 14 (citing Rivera, 696 F.2d at 1026). In Rivera, the federal court refused to find that a woman had waived her due process right by signing a foster-care contract, because the right that the woman apparently agreed to waive was not in existence at the time the contract was signed. Rivera, 696 F.2d at 1026.

47. Gostin, cited at note 12, at 14.

48. Id.
cannot be recognized as an advanced waiver.  

A woman's decision to raise a child to whom she gave birth, although not absolute, is perhaps as fundamental as her right to make health decisions which relate to her pregnancy. Opponents of the enforcement of surrogacy contracts argue that a surrogate's feelings toward a fetus may change as she nurtures the fetus over the nine month period. In support of their contention that a surrogate should have the right to change her mind, opponents cite to adoption statutes, that allow for a time period in which a woman who gives up her child for adoption can change her mind and keep the child. Furthermore, opponents argue that a woman cannot give her informed consent to relinquish her parental rights until after she has experienced childbirth.

An alternative viewpoint, however, is that under the doctrine of informed consent an individual is normally required to predict in advance of actually experiencing something whether she wishes to go through with the particular experience. Under the reasoning of surrogacy opponents, individuals would also not be able to consent to operations such as sterilization, abortions, sex changes and heart surgery until they had experienced the particular procedure.

Furthermore, the argument that a woman cannot consent to giving up her child prior to birth conflicts with the advances of the women's movement. For example, one feminist writer stated that "[i]t would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing

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49. Id.
50. In In re Baby M, the New Jersey Supreme Court contended that a parent's right to the companionship of his or her child was not absolute. In re Baby M, 537 A.2d at 1255 n.14. The right has been found not to be absolute when a natural parent did not step forward and try to establish a relationship with a child. Id. (citing Lehr v. Robertson, 463 U.S. 248, 258-62 (1983)). Further, if there is a substantial state interest then the right to parent a child can be restricted or even terminated. In re Baby M, 537 A.2d at 1255 n.14 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).
52. Id. at 14.
53. Andrews, cited at note 17, at 172. In In re Baby M, the New Jersey Supreme Court acknowledged this argument when the court asserted "[q]uite clearly any decision prior to the baby's birth is, in the most important sense, uninformed." Id. (citing In re Baby M, 537 A.2d at 1248).
54. Andrews, cited at note 17, at 172.
55. Id.
56. Id. at 173.
women for so long." Therefore, there is a strong presumption, at least among feminists, that surrogacy contracts should not be opposed merely based on the argument that women cannot give their informed consent to relinquishing their parental rights.

Although a woman may have a protected right to parent a child, that right is not absolute. If a woman gives her informed consent to relinquish that right, the waiver of the parental right could be upheld. Clearly, arguments that surrogacy contracts violate a woman’s constitutional right of reproductive freedom are accepted to a greater extent by the courts than arguments that surrogacy contracts are not enforceable because a woman cannot give her informed consent to relinquish her parental right prior to the birth of the child.

JUDICIAL RESPONSES TO SURROGACY CONTRACTS

Although various court battles over surrogacy agreements have received widespread media attention, only one percent of surrogate mothers change their minds and decide to keep the child. Nevertheless, this one percent have forced state courts to respond to issues raised by surrogacy contracts. The state court decisions, although scarce in number, have generally relied on state adoption or parenting statutes to reach their conclusions.

57. Id.
58. Id.
60. The New Jersey Supreme Court in In re Baby M, would not decide the issue of a parent’s right of companionship with a child. In re Baby M, 537 A.2d at 1255. Instead, the court found the contract invalid on other grounds, namely that the contract was violative of statutory law and public policies of the state. Id. at 1240. Further, the California Supreme Court in Johnson refused to recognize that the surrogate had a protected parental right. See Johnson, 851 P.2d at 785-88. In Johnson, the court’s reasoning was that the surrogate was not genetically related to the child and thus could not assert any parental right. Id.
61. Andrews, cited at note 17, at 171. The one percent of surrogate mothers who change their minds can be put in perspective by comparing it to the 75% of biological mothers who change their minds after giving up their child for adoption. Id.
62. See Moschetta, 30 Cal. Rptr. 2d at 898 n.13. The California court acknowledged that surrogacy was an area of the law where there were significantly more law review articles written concerning the subject than judicial decisions. Id.
The Best Interest of the Child Approach

The most famous case to address the issue of the validity of surrogacy contracts was *In re Baby M*. In *In re Baby M*, a surrogate mother contracted with a childless couple and agreed to be artificially inseminated with the husband's sperm. The surrogate was to bear a child for the intended parents for $10,000. However, before the birth of the child, the surrogate decided she could not give up the child and took legal action to retain custody of the child. The ensuing legal battle lasted almost two years.

The New Jersey Supreme Court held that the surrogacy contract was unenforceable because it was counter to existing:

1. laws prohibiting the use of money in connection with adoptions;
2. laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and
3. laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

Additionally, the court concluded that the contract was unenforceable because it conflicted with public policy. The court further asserted that the contract was unenforceable because a woman could not contract away her parental right. The court listed the following reasons to explain why the contract was contrary to public policy:

1. The surrogate contract guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Id. The court further contended that "[t]he contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interest shall determine custody." Id. at 1246. The court noted that harmful consequences of surrogacy contracts "appear to us all too palpable." Id. at 1250.

Id. at 1247-48. The court noted that because a surrogacy contract required
concluded that the surrogate’s parental right could only be extinguished by a showing of parental unfitness.\textsuperscript{71}

After deciding that the contract was unenforceable, the court turned to the practical issue of who should have custody of the child.\textsuperscript{72} The court decided the parental rights of the parties as if the case was a child custody dispute and invoked the best interest of the child standard.\textsuperscript{73} The court ultimately held that the intended parents should raise the child and that the surrogate should have visitation rights.\textsuperscript{74}

More recently, the New York Family Court, in \textit{In re Paul},\textsuperscript{75} held that a surrogacy contract was void because it violated public policy against the acceptance of compensation in exchange for the adoption of a child.\textsuperscript{76} In \textit{In re Paul}, the surrogacy contract provided for the payment of $10,000, plus expenses, if the surrogate would agree to be artificially inseminated with the sperm of the contracting male.\textsuperscript{77} The conflict in this case arose when the surrogate petitioned the court to judicially consent to the adoption of her son by the natural father and his wife.\textsuperscript{78}

The court concluded that because New York’s adoption laws prohibited payment in connection with an adoption, any payment made in a surrogacy situation was also prohibited.\textsuperscript{79} The court would not accept the surrender and termination of the

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\textsuperscript{71} \textit{Id.} at 1256-57. The court again cited child custody principles to support this conclusion. \textit{Id.} at 1257. The court found controlling the principle that it was “desirable for the child to have contact with both parents.” \textit{Id.} at 1263. Therefore, because the surrogate was not found to be an unfit parent, the court ruled that the surrogate should be awarded visitation rights. \textit{Id.}

\textsuperscript{72} \textit{Id.} at 1255.

\textsuperscript{73} \textit{In re Baby M}, 538 A.2d at 1256. The best interest of child standard involved evaluating the fitness of both parents and deciding which life would be more suitable for the child. \textit{Id.} at 1257.

\textsuperscript{74} \textit{Id.} at 1261. The trial court examined and heard testimony from experts as to the stability of family life in both the Stern and Whitehead households. \textit{Id.} at 1258.

\textsuperscript{75} 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).

\textsuperscript{76} \textit{In re Paul}, 550 N.Y.S.2d at 818.

\textsuperscript{77} \textit{Id.} at 815-16.

\textsuperscript{78} \textit{Id.} at 816. The court addressed two separate issues. \textit{Id.} First, the court found it necessary to address the issue of whether the surrogate’s contract with the natural father was legal under New York law. \textit{Id.} Second, the court determined whether the surrogate’s surrender of her parental rights could only be accepted “if she foreswears acceptance of the benefit of her bargain and thus assures this court that such surrender is truly voluntary and is motivated by her concern for the best interest of her child and not the promise of financial gain.” \textit{Id.}

\textsuperscript{79} \textit{Id.} at 818.
surrogate's parental rights unless the surrogate agreed to swear under oath that she would not accept or receive the money promised to her. 

In reaching its decision, the court looked directly to the New Jersey Supreme Court's decision in *In re Baby M.* The New York court found that only by giving up the monetary compensation could the surrogate be "motivated exclusively by Paul's best interest." Therefore, the New York court, like the New Jersey court, based its conclusion concerning surrogacy contracts on a combination of statutory law and public policy considerations. The overriding consideration in each of these cases, however, was the best interest of the child.

**Statutory Law Approach**

Both the New Jersey Supreme Court and the New York Family Court held, respectively in *In re Baby M* and *In re Paul,* that surrogacy contracts concerning traditional surrogacy arrangements were unenforceable primarily because the surrogacy contracts were not in the best interest of the child and therefore were violative of public policy. This approach, however, has not been taken by all state courts which have been confronted with the issue of the legality of surrogacy contracts. For example, California courts have based their decisions solely on California statutory law, thus neglecting any public policy considerations.

The California Supreme Court in *Johnson v. Calvert* was the first court to address the issue of whether a surrogate mother, with no genetic connection to a child to whom she gave birth, had a parental right with respect to that child. In this landmark

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80. *Id.* at 819. Additionally, the natural father and his wife would have to swear that they also would not pay compensation in exchange for the child. *Id.*
81. *In re Paul,* 550 N.Y.S.2d at 817. The court stated that it found "the analysis and conclusion reached by the New Jersey Supreme Court compelling." *Id.*
82. *Id.* at 819.
83. In *In re Baby M,* the court stated that the contract was invalid first because it conflicted with existing adoption and parenting statutes which require that the best interest of the child control adoption matters. *In re Baby M,* 537 A.2d at 1240-41. Second, the court recognized that the contract was in conflict with state public policies which required that the best interest of the child should be controlling in custody matters. *Id.* at 1240, 1246. Further, in *In re Paul,* the court had refused to recognize the adoption of the surrogate's child until it was clear that the surrogate had the best interest of the child in mind. *In re Paul,* 550 N.Y.S.2d at 819.
85. *Johnson,* 851 P.2d at 778. This case involved a gestational surrogacy arrangement where a couple, Mark and Crispina Calvert, entered into a contract with a surrogate, Anna Johnson. *Id.* Under the contract, the surrogate was to be impregnated with an embryo created by the sperm of Mark and the egg of Crispina. *Id.* The resulting child was to be Mark and Crispina's and the surrogate was to
case, the California Supreme Court held that the surrogate mother had no parental rights to the child who was not genetically related to her.\textsuperscript{86} The court reasoned that custody should be awarded to the couple who supplied the fertilized egg and "intended" to raise the child.\textsuperscript{87}

The court, in reaching its decision, discussed whether a surrogacy agreement, which required a surrogate to relinquish her parental rights, was barred on either a public policy or constitutional basis.\textsuperscript{88} The surrogate argued that the surrogacy contract could not be upheld because it was violative of several state social polices.\textsuperscript{89} First, she relied on the public policy in the California Penal Code, which prohibited money payments with regard to an adoption.\textsuperscript{90} The court disagreed with the surrogate's reliance on the Penal Code and stated that "surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes."\textsuperscript{91} The court distinguished a surrogacy contract from an adoption arrangement by concluding that when a surrogate entered into a contract, she was not in such a position as to be vulnerable to offers of substantial sums of money in exchange for her child.\textsuperscript{92} In other words, the court found that the surrogate was not in a position where she had a child to sell.\textsuperscript{93} She was

relinquish "all parental rights." \textit{Id.} The surrogate would be paid $10,000 for fulfilling her obligations. \textit{Id.} As the pregnancy progressed, the relationship between Mark, Crispina and Anna deteriorated and Anna eventually threatened to keep the child if the balance of her fee was not paid. \textit{Id.} Mark and Crispina then initiated a lawsuit in which they sought a court declaration of their parental rights. \textit{Id.} \textsuperscript{86} \textit{Id.} at 777-78.\textsuperscript{87} \textit{Id.} at 782. The court first addressed the question of who was the natural mother of the child. \textit{Id.} The surrogate's basis for claiming maternity rested on the fact she had given birth to the child. \textit{Id.} at 779. Alternatively, the married couple contended that the genetic link of the married women to the child was the determining factor. \textit{Id.} The court concluded that both women had presented "acceptable proof of maternity" under the California Uniform Parentage Act and as such, the court decided to defer to the parties' intentions in entering the contract. \textit{Id.} at 782. \textsuperscript{88} \textit{Id.} at 783-87.\textsuperscript{89} \textit{Id.} at 783-84.\textsuperscript{90} \textit{Johnson,} 851 P.2d at 783-84. The surrogate cited California Penal Code, section 273, which makes it a misdemeanor for money or anything of value to be paid in an adoption situation. \textit{Id.} at 784 n.11 (citing CAL. PENAL CODE § 273 (1993)). The surrogate further cited Penal Code section 181 which provides a punishment of imprisonment of two to four years for anyone who "holds, or attempts to hold, any person in involuntary servitude . . . or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody . . . of another." \textit{Johnson,} 851 P.2d at 784 n.11 (citing CAL. PENAL CODE § 181 (1993)).\textsuperscript{91} \textit{Johnson,} 851 P.2d at 784.\textsuperscript{92} \textit{Id.} The court specifically found that the surrogate would not be "vulnerable to financial inducements to part with her own expected offspring." \textit{Id.} \textsuperscript{93} \textit{Id.}
merely entering into a contract in which the money was compensation for her services.\textsuperscript{94}

The court also discussed the public policy argument that surrogacy contracts harmed women by exploiting and even dehumanizing them.\textsuperscript{95} The court acknowledged that it would seem to make sense that women of a lower economic class would more often serve as surrogates.\textsuperscript{96} However, the court was unpersuaded by this argument because the court found no factual basis for concluding that surrogacy contracts exploited poor women to any greater extent than society in general exploited poor women.\textsuperscript{97}

The court also was not persuaded by the constitutional arguments raised by the surrogate mother.\textsuperscript{98} The court refused to find that the surrogate had any constitutional right to the child.\textsuperscript{99} Specifically, the court was not persuaded by the surrogate's reliance on case law recognizing the right of natural parents to have custody of their children under the theories of privacy and reproductive freedom.\textsuperscript{100} The court reasoned that such cases were applicable only to natural parents and because the court had already determined that the surrogate was not the natural parent of the child, she could not rely on those constitutional rights conferred on natural parents.\textsuperscript{101} Further, the

\textsuperscript{94} \textit{Id.} The court asserted that, "the payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child." \textit{Id.}

\textsuperscript{95} \textit{Id.} The court, in addressing Anna's argument that surrogacy contracts are harmful to women, concluded that:

Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth.

\ldots

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. \textit{Id.} at 784-85.

\textsuperscript{96} \textit{Id.} at 785.

\textsuperscript{97} \textit{Id.} The court reasoned that, "there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment." \textit{Id.}

\textsuperscript{98} \textit{Id.} at 785-87. The court first dismissed the procedural due process and equal protection arguments. \textit{Id.} at 785.

\textsuperscript{99} \textit{Id.} at 787.

\textsuperscript{100} \textit{Id.} at 785-86.

\textsuperscript{101} \textit{Johnson}, 851 P.2d at 786. The court discussed the surrogate's constitutional arguments that she had the right to parent a child and concluded that:

Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law because she, not Anna, provided the ovum for the in vitro fertilization procedure, intending to raise the child as her own, it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother.
court noted that if it was to conclude that the surrogate was entitled to enjoy a liberty interest in the child, such a conclusion would clearly infringe on the liberty interest of the genetic parents. Therefore, the court concluded that a surrogate in a gestational surrogacy arrangement was not exercising her own procreative choices, but simply agreeing to provide a service.

In reaching its decision, the California Supreme Court addressed both the public policy and constitutional arguments against surrogacy contracts, but nevertheless, dismissed all such arguments and upheld the validity of the contract. The court never questioned directly the validity of the contract. Instead, the court was concerned with determining who was the natural mother of the resulting child. Most notably, however, the court refused to rely on the policy argument that custody should be decided by the best interest of the child standard.

The court, instead, discussed and attempted to rely on statutory law. The court first tried to determine the issue of maternity under the Uniform Parentage Act (the “Act”), which encompases a section of the California Family Code. The court ac-

Id.

102. Id. at 786.
103. Id. at 787.
104. Id. at 783, 785-86. The Johnson court asserted that, “in our view [the gestational surrogacy agreement] is not on its face, inconsistent with public policy.” Id. at 783.
105. Id. at 777-78. The court outlined the issues it would address at the beginning of its opinion and the validity of the contract was not among these issues. Id.
107. Id. at 782 n.10. The court asserted that a decision based on the best interest of the child:
[R]aises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody . . . the best interest standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child.
Id.
108. Id. at 778-82.
109. Id. at 779 (citing CAL. FAM. CODE §§ 7600-7650 (West 1994)). The California Uniform Parentage Act was enacted as a result of the United States Senate proposing a bill entitled the Uniform Parentage Act as part of legislation introduced in 1975. See Johnson, 851 P.2d at 778. The proposed legislation in the U.S. Senate came about as a result of United State Supreme Court decisions which had eliminated the legal distinction between legitimate and illegitimate children. Id. (citing Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guarantee Co., 391 U.S. 73 (1968)). The main portions of this Senate Bill became part of the California Family Code, which was entitled the Uniform Parentage Act. See Johnson, 851 P.2d at 778 (citing CAL. FAM. CODE §§ 7600-7650).
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knowledged that it had been "invited to disregard the Act and decide this case according to [the surrogate's] criteria, including constitutional percepts and our sense of the demands of public policy." Nevertheless, the court refused to disregard the Act. The Act, however, did not provide a clear cut answer for the court because under the Act maternity could be established by either giving birth to a child or by being genetically related to a child. Therefore, the court could not specifically decide maternity based on the Act and so the court turned to the intentions of the parties.

At first blush, it may seem as if Johnson and In re Baby M are directly at odds. However, Johnson involved a gestational surrogacy arrangement, while In re Baby M involved a traditional surrogacy. The California court was, thus, addressing the issue of who was a child's natural mother under California law rather than whether a natural mother could waive her parental right prior to the birth of a child. In a more recent California case, Moschetta v. Moschetta, a traditional surrogacy contract in California was found to be unenforceable.

In Moschetta, a California court of appeals held that a traditional surrogacy contract was unenforceable because the contract was incompatible with the parentage and adoption statutes of the state. The court asserted that the surrogate had not consented to an adoption by the intended mother when she signed the surrogacy contract. The dispute in Moschetta arose when the surrogate discovered that the married couple for whom she was

110. Johnson, 851 P.2d at 779.
111. Id.
112. Id. at 780 (citing Cal. Fam. Code §§ 7600-7650).
113. Johnson, 851 P.2d at 782.
114. The issue in Johnson was "when pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife was implanted in the uterus of another woman, who carried the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's 'natural mother.' " Johnson, 851 P.2d at 777-78. However, in In re Baby M, the issue to be resolved was "the validity of a contract that purports to provide a new way of bringing children into a family." In re Baby M, 537 A.2d at 1234.
116. Moschetta, 30 Cal. Rptr. 2d at 894-95.
117. Id. Moschetta involved a couple, Robert and Cynthia Moschetta, who contracted with a surrogate, Elvira Jordan, to bear their child. Id. at 895. Elvira Jordan was artificially inseminated with Robert Moschetta's semen. Id. Jordan was to be paid $10,000 in " 'recognition' of Robert's obligations to support [the] child and his right to provide [Jordan] with living expenses." Id.
118. Id. at 900. The court concluded that the surrogacy contract was not an adoption agreement and therefore, the surrogate had not given her consent to give the child up to the intended parents. Id.
bearing a child was having marital difficulties. The surrogate learned that the husband had asked his wife for a divorce the day before the child was born. The surrogate reconsidered the arrangement, but still relinquished the child to the married couple several days after the birth. However, within seven months the married couple’s relationship was severed and the husband left the residence with the child. The husband, wife and the surrogate all filed petitions to establish custody of the child.

The court’s decision relied on both the Johnson decision and the parenting and adoption statutes of California. The court examined the reasoning of the Johnson case, which had relied on the Uniform Parentage Act, to determine maternity. In Moschetta, however, the terms of the Uniform Parentage Act were controlling because the surrogate mother was both the genetic and birth mother. Therefore, the court only had to decide whether the surrogacy agreement could be considered a waiver of the surrogate’s parental rights. Ultimately, the court refused to view the surrogacy agreement as an adoption agreement entered into prior to the child’s birth because the consent to adopt was not given in conformity with statutory law.

119. Id. at 895.
120. Id.
121. Moschetta, 30 Cal. Rptr. 2d at 895. The child was born on May 28, 1990, but the surrogate did not allow the married couple to take the child home until May 31. Id.
122. Id. at 895.
123. Id. The actions were consolidated but three separate issues were to be decided so the case was ordered trifurcated for trial. Id. The three phases of the trial were as follows: (1) the parental rights of Cynthia Moschetta and Elvira Jordan were to be determined; (2) custody and visitation rights were to be determined; and (3) the marital dissolution case was to be decided separately from the custody dispute. Id.
124. Id. at 898-901.
126. Moschetta, 30 Cal. Rptr. 2d at 898-99 (citing Johnson, 851 P.2d at 780). In Johnson, the court found that the Act, which defined maternity both in terms of genetics and birth, did not resolve the issue of maternity. Johnson, 852 P.2d at 782. The Johnson court, faced with statutory authority that supported both the surrogate’s and the childless women’s claim of maternity, decided that the initial intentions of the parties should control. Id.
127. Moschetta, 30 Cal. Rptr. 2d at 900.
128. Id.
129. Id. at 900-01. The court asserted that the adoption statute required the birth parents to consent to an adoption before a social worker. Id. at 900. In Moschetta, the contract obviously had not been consented to before a social worker. Id. Therefore, the California court essentially refused to recognize the contract as an advanced waiver of the surrogate’s parental rights. Id.
The California court in *Moschetta* did not base its holding on public policy reasons. Instead, the court looked to statutory authority to resolve the issues raised by the surrogacy contract, similarly to what the court had done in *Johnson*. Not surprisingly, both the *Johnson* and *Moschetta* courts acknowledged the need for legislative guidance to address surrogacy issues.

**LEGISLATIVE RESPONSE TO SURROGACY ISSUES**

The courts both want and need legislative guidance on surrogacy issues. However, because of the sensitive nature and fundamental rights involved with surrogacy contracts, even the legislatures are dragging their feet. The issues that must be resolved include: who is the natural mother of a child born of a gestational surrogacy arrangement; can surrogacy contracts require a surrogate to relinquish her established reproductive freedoms; and can compensation be legally paid to a surrogate mother. The answers, although not easily derived, depend on societal views of parental and reproductive rights. Therefore, it seems logical that the legislature, which has traditionally been the forum for resolving public policy issues, should enact legislation which would seek to avoid the conflicts that arise out of surrogacy contracts.

**Current Legislation**

State statutes concerning surrogacy contracts can be divided into four categories. First, there are the state statutes which simply make all surrogacy contracts void and unenforceable.
However, these statutes are flawed because they disregard the fundamental constitutional rights of the parties involved in a surrogacy arrangement. Such rights include "the rights to privacy in making an intimate personal decision on reproduction; the right to autonomy in decisions affecting the health and welfare of the mother and the offspring; and the right to association with future offspring." 

Further, the legislatures are presuming that because surrogacy contracts are unenforceable couples will be less likely to enter into such arrangements. The reality is that as long as there are infertile couples, surrogacy situations are going to exist. The legislatures, by seeking to ban surrogacy contracts, are not dealing with the underlying issues raised by surrogacy arrangements. Instead, the legislatures are again leaving parties to surrogacy arrangements to turn to the courts when their agreements fall apart.

The second category of surrogacy statutes are those that have not only banned surrogacy arrangements but have criminalized such arrangements. Only Michigan, thus far, has taken this extreme position and criminalized surrogacy contracts. The Michigan approach to surrogacy arrangements will certainly act as a bar to anyone in Michigan entering into a surrogacy arrangement because of the criminal penalties that parties will be subject to for entering such a contract. For the same reasons discussed in reference to statutes that ban surrogacy contracts, Michigan's statute is flawed in that it violates the contracting parties' constitutional rights. Additionally, criminalizing surrogacy arrangements will not stop couples from crossing state boarders and entering into contracts in states that do not ban such arrangements.


137. Id.
140. MICH. STAT. ANN. § 25.248(159). Fines and imprisonment under the Michigan statute range from $10,000 and one year imprisonment for entering a surrogacy contract to $50,000 and five years imprisonment for arranging or assisting in making a surrogacy contract. Id.
141. See notes 131-33 and accompanying text for discussion of why statutes that seek to ban surrogacy arrangements fail to address the issues raised by surrogacy arrangements.
Further, one must question if criminal penalties are really the answer. It is the minority of surrogates who change their minds. Therefore, should we bar all women from being able to make a childless couple’s dreams come true?

Third, there is the West Virginia statute which appears to recognize as legal the acceptance of surrogacy fees related to a surrogacy contract. The West Virginia statute may be unique but it hardly presents a solution to the problems that arise from surrogacy arrangements. The West Virginia statute is part of the state’s adoption law and presents only an exception to the general rule that money payments in adoptions are prohibited.

Finally, there are a minority of state statutes which make surrogacy contracts legal, but not necessarily enforceable. This fourth category legalizes surrogacy contracts only when they have been judicially approved. New Hampshire’s statute falls into this last category and presents the most workable legislation for dealing with the problems that arise from surrogacy contracts.

The New Hampshire Surrogacy Statute

The New Hampshire statute, enacted in 1990, provides for a regulatory process whereby the surrogacy arrangement is only legal if it has been judicially preauthorized. Before obtaining the court’s approval, all the parties must complete both medical and non-medical evaluations, and attend counseling sessions.

142. See note 61 for discussion of the percentage of surrogates who change their minds after signing a surrogacy contract.

143. See W.V. CODE ANN. § 48-4-16-(e)(3) (Michie Supp. 1993). The West Virginia statute provides for an exception to the rule that compensation cannot be given in an adoption situation by providing that with respect to a surrogate her “fees and expenses” can be paid without violating the law. W.V. CODE ANN. § 48-4-16-(e)(3).

144. Id.


146. See FLA. STAT. ANN. § 63.212(1)(i); N.H. REV. STAT. ANN. § 168-B; VA. CODE ANN. § 20-100.

147. N.H. REV. STAT. ANN. § 168-B:16(b). A court hearing occurs in order for the contract to be validated. Id. § 168-B:23.

148. Id. § 168-B:16(a). The medical evaluation involves the surrogate and the intended parents, if it is a gestational surrogacy. Id. § 168-B:19(I). If it is a traditional surrogacy, then only the surrogate and the natural father must undergo a medical evaluation. Id. Each party undergoes a nonmedical evaluation by a psychiatrist, psychologist, pastoral counselor or social worker, who is licensed in New Hampshire. Id. § 168-B:18(I). The parties must waive any confidentiality rights in relation to these nonmedical evaluations. Id. The nonmedical evaluation determines the fitness of the intended parents and the ability of the parties to assume the risks and problems of the contract. Id. §§ 168-B:18(I)-(II). Finally, the nonmedical evalu-
Additionally, the surrogacy contract must conform to certain mandatory requirements which seek to spell out the rights of all parties to the contract. Finally, the court must determine whether the surrogacy arrangement is in the best interest of the child.

If the surrogacy contract is judicially approved, the contract will act as a court order which will automatically terminate both the surrogate's and her husband's parental rights after birth. However, the surrogate can at any time until seventy-two hours after the birth exercise her rights to keep the child. If the surrogate chooses to exercise her right, then the contract will act as a court order which will automatically terminate the parental rights of the intended parents.

**The Adequacy of the New Hampshire Statute**

The New Hampshire statute does not differentiate between a traditional and gestational surrogacy. Even if the intended parents are both genetically related to the child, the surrogate can exercise her right and retain custody of the child. The New Hampshire statute, therefore, places more significance on gestation and birth rather than on genetics. Of course, the

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149. *Id.* § 168-B:25. The mandatory terms include a provision that the surrogate will surrender the child or accept the obligation to raise the child if she gives notice any time prior to 72 hours after the birth. *Id.* §§ 168-B:25(I), (IV). Also, if the surrogate is married, her husband must consent to surrendering the child or alternatively, taking responsibility for the child. *Id.* § 168-B:25(II). The contract must include a provision stating that the intended parents will provide for the child. *Id.* § 168-B:25(III). Further, if the surrogate is to receive a fee that must be outlined in the contract. *Id.* § 168-B:25(V). However, the fee must be limited to medical expenses incurred with the pregnancy, actual loss of wages during the pregnancy, life and health insurance payments, reasonable attorney fees and counseling fees. *Id.*

150. *Id.* § 168-B:23(III)(d).

151. *Id.* § 168-B:23(IV).

152. *Id.* § 168-B:25(IV). To exercise this right, the surrogate must sign a writing expressing her intentions and must deliver the writing to the intended parents and the attending physician or hospital. *Id.*

153. *Id.* § 168-B:23(IV). The intended parents will, however, still have to provide financial support for the child. *Id.*

154. The New Hampshire statute's definition of a "surrogacy arrangement" provides that, "any arrangement by which a woman agrees to be impregnated using either the intended father's sperm, the intended mother's egg, or their preembryo with the intent that the intended parents are to become the parents of the resulting child after the child's birth." *Id.* § 168-B:1(XII). This definition thus includes both gestational and traditional surrogacy arrangements.

155. *Id.* § 168-B:23(d).

156. This is in contrast with *Johnson*, which held that the intended mother in a gestational surrogacy should be considered the natural mother, because without
parties know the risks and have undergone counselling to deal with the situation that might arise if the surrogate decides to keep the child. Nevertheless, the New Hampshire statute is flawed to the extent that it fails to distinguish between traditional and gestational surrogacy.

The California Supreme Court in *Johnson* presented a compelling argument that genetics should determine a child's parents in a gestational surrogacy situation. The California Supreme Court explained that it was the intended parents who desired to have a child and without their efforts to create a child, the surrogate would not have given birth. The court found that it was the intention of the parties to bring the intended parent's child into the world, and not for intended parents to donate a zygote to the surrogate. Therefore, it appears that a surrogacy statute must differentiate between traditional and gestational surrogacies in order to provide a fair solution for those couples who are both genetically related to the child.

Additionally, the New Hampshire statute provides no recourse for parties who do not obtain judicial approval. Under New Hampshire law, a surrogacy contract that has not been approved will not be recognized. This requires parties who enter a surrogacy contract without court approval, to turn to the courts if the surrogate changes her mind. The New Hampshire courts will then have to find the contract unenforceable, but will still be faced with a custody dispute over the child.

the actions of the intended parties the child would not have been brought into this world. See *Johnson*, 851 P.2d at 782.

157. See *Johnson*, 851 P.2d at 782-84.

158. Id. at 782.

159. Id. The court further contended that although the surrogate preformed a necessary gestational function, "it is safe to say that [the surrogate] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother." *Id.*


161. The Virginia statute, which in many respects is similar to the New Hampshire statute, does provide for non-court approved surrogacy arrangements. See VA. CODE ANN. § 20-182(A). In Virginia, the parties must conform their contract to the requirements set forth in the statute, but the contract can be legal without prior court approval. *Id.*
A PROPOSAL FOR AN “IDEAL” SURROGACY STATUTE

The Starting Point

Despite its deficiency, the New Hampshire statute is a good starting point for surrogacy legislation. New Hampshire’s requirement of prior judicial approval of a surrogacy contract\textsuperscript{162} may help to avoid later conflicts. The parties will know from the outset what effect the contract will have and how each party stands in relation to the other.

The New Hampshire statute requires the parties to be fully informed and capable of both mentally and physically facing the risks of entering such a contract.\textsuperscript{163} This requirement reduces potential conflicts which might arise after the surrogate is impregnated. Of course, even extensive counselling may not necessarily avoid a situation where the surrogate develops a bond with the child and refuses to relinquish custody. It does, however, at the very least allow the parties to recognize from the outset that the surrogate could potentially change her mind and exercise her right to keep the child. Therefore, mandatory counselling should be a part of every surrogacy statute.

Further, a requirement of nonmedical evaluations, which will determine if the surrogate and the intended parents can provide both financially and emotionally for the child’s needs, should be a part of any ideal surrogacy statute. Such a requirement will help avoid the potential exploitation of women\textsuperscript{164} and diminish any potential harm to the child.\textsuperscript{165}

Clearly, any fees paid to a surrogate should be limited, as they are in the New Hampshire statute.\textsuperscript{166} By limiting the fees to necessary medical expenses, counselling fees and attorney fees, the principle argument against surrogacy is dispelled. Surrogacy arrangements, which involve compensation to the surrogate, create problems by raising issues of baby selling and exploitation of the women.

\textsuperscript{162} N.H. REV. STAT. ANN. § 168-B:16.
\textsuperscript{163} Id.
\textsuperscript{164} As stated earlier, a common argument that arises against surrogacy arrangements is that surrogacy arrangements have the potential of exploiting women, since for the most part surrogates are women of the lower economic classes. See note 44 for discussion of the argument against surrogacy based on the theory that surrogacy arrangements exploit women.
\textsuperscript{165} Opponents of surrogacy argue that the child born of a surrogacy arrangement may be potentially harmed, although the research in this area is limited. See notes 19-22 and accompanying text for further discussion of this argument.
\textsuperscript{166} N.H. REV. STAT. ANN. § 168-B:25(V).
Additional Suggested Requirements

Any ideal surrogacy statute should also distinguish between a traditional and a gestational surrogacy. Although a surrogate may develop a bond with a fetus that she is carrying, the genetics of the child will not be changed by the surrogate's feelings towards the child. A child who is genetically related to the two intended parents should be placed with those parents, regardless of whether the surrogate changes her mind. The Supreme Court's refusal to review the Johnson decision\textsuperscript{167} may have ended the legal battle of the parties involved in the Johnson suit, but the Court's decision perpetuates the nationwide debate as to gestational surrogacy.

An ideal surrogacy statute should also attempt to address situations where the parties have failed to obtain prior court approval. Desperate couples will continue to enter surrogacy arrangements and as such, the legislatures cannot simply assume every party will seek court approval. Requiring the surrogacy contract to conform to the certain statutory requirements, even if entered into without court approval, will allow for an equitable remedy for those parties that fail to obtain prior court approval.

Finally, allowing the surrogate to change her mind up until the 72 hours after the birth of the child\textsuperscript{168} is not entirely practical. The intended parents in a traditional surrogacy will be held in limbo until the birth of the child. A better solution would be to allow the surrogate anywhere from three or five months after she is impregnated to decide if she wants to keep the child. Therefore, on the birth of the child the parties will know what their relationship to the child will be.

CONCLUSION

Legislation can provide some of the answers to surrogacy issues but, fundamentally, parties entering into such arrangements must understand and anticipate what kinds of problems may arise. Surrogacy can bring joy to both a childless couple and a surrogate, who enables the couple to have the child of their dreams. However, surrogacy arrangements cannot be entered into haphazardly and without serious considerations of all the

\textsuperscript{168} N.H. REV. STAT. ANN. § 168-B:25(IV).
potential problems that might arise. The ideal solution to avoiding potential problems with surrogacy arrangements would be to have uniform state statutes that require the parties to obtain judicial approval of surrogacy contracts. Under such statutes, the parties should be required to satisfy certain obligations before the surrogacy is even begun. By requiring the parties to undergo certain procedures before the surrogacy begins, there is a greater chance that the end result of the surrogacy will be a happy new family rather than an endless legal battle.

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