

Notes

The Surrogate Mother Contract in Indiana

I. INTRODUCTION

The "traditional" family invokes an image of father, mother, and child. However, many couples today have difficulty turning this image into a reality.¹ Consequently, some couples faced with a three to seven year wait for an adoptable infant² are turning to non-traditional methods for having a child. Many couples are choosing to hire a surrogate mother,³ an arrangement in which the couple hires a woman to conceive and carry the child for them.

The typical surrogate mother arrangement is based on a contract. Generally in return for an established fee,⁴ a woman agrees to be artificially inseminated with the semen of the husband, to carry the child to full term and then to relinquish all parental rights.⁵ Then the biological father normally establishes paternity, and the couple adopts the child.⁶ Although artificial insemination itself is not

¹Handel & Sherwyn, *Surrogate Parenting*, TRIAL, Apr. 1982, at 57-58 [hereinafter cited as *Surrogate Parenting*].

²*Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 1, 6 (1975) (statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc.) [hereinafter cited as *Adoption and Foster Care, 1975*].

³A Michigan attorney, Noel Keane, has handled several surrogate mother contracts and has had requests from clients as distant as Ireland and Saudi Arabia. Christopher, *A Judgment for Solomon*, MACLEANS, Apr. 6, 1981, at 33. At least two clinics, Surrogate Parents' Foundation, Inc. in California, and The Surrogate Parenting Association in Louisville, Kentucky, perform screening services to match surrogates with childless couples. Markoutsas, *Women Who Have Babies for Other Women*, GOOD HOUSEKEEPING, Apr. 1981, at 96, 102, 104; Beck, *To My Sister With Love*, MCCALLS, Sept. 1981, at 83, 135.

⁴Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, 147.

⁵Comment, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 611 (1978). Another form of surrogate motherhood is fertilizing the wife's egg with the husband's semen and then transplanting it into the surrogate. This procedure might be used if the wife's reproductive faculties are only partially impaired to the extent that she is fertile, but could not carry the pregnancy to term. See Vieth, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. OF LEGIS. 140, 142 n.15 (1981). This Note will deal only with the first type of surrogate mother, although the same policy arguments generally apply to this second type as well.

⁶Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, 147. If the husband has established his paternity, he would not have to adopt the child. His wife would need to adopt in order to be the child's legal mother.

new, its customary use has been to help a wife conceive when the husband is sterile.⁷ The surrogate arrangement also uses artificial insemination, but because the wife is unable to conceive or carry a child.

Although state legislatures and the courts have begun to recognize and to protect parties involved in the artificial insemination donor (AID) procedure,⁸ the surrogate mother has yet to receive the same protection. Surrogate mother contracts are known to exist in only a few states,⁹ but in the two states which have addressed the legality of surrogate mother contracts, Kentucky and Michigan, the contracts have been found violative of existing state statutes and public policy.¹⁰ In addition to these conflicts, several other legal obstacles are inherent in such a contract under existing statutes and case law: illegitimacy and paternity, custody and adoption, and the rights of the parties in case of a breach of the contract.¹¹

This Note explores these problems and presents an argument for finding the contract valid in Indiana. The Note examines the purpose of the surrogate mother contract as well as its terms, and applies Indiana's statutes and public policy to the contract to determine whether the contract would be valid in this state. An examination of the parties' rights and remedies under Indiana's family laws encompasses both contractual and noncontractual remedies, in the event such a contract is invalid in Indiana. The Note also recommends standard provisions for a surrogate contract that would protect all parties involved and examines the need for new legislation addressing the surrogate mother situation.

II. LEGAL OBSTACLES TO THE CONTRACT

The two primary legal obstacles to a surrogate mother contract

⁷Current estimates show that between 6,000 and 10,000 children are born annually in the United States as a result of artificial insemination. *Id.* at 148 (citing Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979)).

⁸Approximately one-third of the states have addressed the artificial insemination donor (AID) either legislatively or judicially. [1979-1981] REP. ON HUMAN REPRODUCTION AND THE LAW (Legal-Med. Studies) at II A9, II B2 [hereinafter cited as REP. H.R.L.]; see Keane, *supra* note 4, at 153.

⁹Surrogate mother contracts have been reported in Texas, Michigan, California and Kentucky. REP. H.R.L., *supra* note 8, at II A9. Only Kentucky and Michigan have ruled on the contract's validity. See notes 10 & 17 *infra* and accompanying text. California authorities are ignoring the surrogate contracts even though the contract may violate several state statutes. *Surrogate Parenting*, *supra* note 1, at 58.

¹⁰*Kentucky Attorney General Issues Advisory Opinion on Surrogate Motherhood*, REP. H.R.L., *supra* note 8, at II A9; *Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) 3011, *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

¹¹See notes 110-67 *infra* and accompanying text.

in many states are that the contract violates a statute and that it is contrary to public policy.¹² In a few states, artificial insemination is considered adultery and constitutes a crime.¹³ In all fifty states, it is a crime to profit from adoption, or to "sell children."¹⁴ Thus, in states proscribing adultery and child selling as criminal offenses, the surrogate mother contract could violate statutory law, as well as the public policy on which these statutes are based.¹⁵ Therefore, if surrogate mothering is viewed as either child selling or adultery, the result is an illegal contract.¹⁶ In Kentucky and Michigan, the two states that have ruled on surrogate mother contracts, the courts construed the contracts as child selling. In holding that the contracts were illegal, the courts relied on the existing state statutes prohibiting profit from adoption and the underlying public policy.¹⁷ In comparison, Indiana law does not present as great an obstacle to the legality of a surrogate mother contract.

A. Indiana Law

Even if an Indiana court were to define artificial insemination as adultery,¹⁸ Indiana repealed its adultery statute in 1977.¹⁹ Because adultery is not a ground for divorce in Indiana,²⁰ the contract could not be found to promote divorce. Thus, a surrogate mother contract would neither violate an adultery statute nor public policy proscribing adultery.

Profiting from adoption is a crime in Indiana, although excep-

¹²Keane, *supra* note 4, at 148; Vieth, *supra* note 5, at 144; Comment, *supra* note 5, at 612-13.

¹³See Keane, *supra* note 4, at 149.

¹⁴See Vieth, *supra* note 5, at 145.

¹⁵See *Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) at 3013. A modern court probably would not view artificial insemination as adultery because it does not involve sexual intercourse. See Keane, *supra* note 4, at 150-51.

¹⁶6A A. CORBIN, CORBIN ON CONTRACTS §§ 1373, 1375 (1962).

¹⁷See REP. H.R.L., *supra* note 8, at II A9; *Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) 3011. The Kentucky Attorney General concluded that a surrogate contract would violate KY. REV. STAT. §§ 199.500(5) and 199.601 (Supp. 1980). Both prohibit consent to adoption until five days after the birth of a child. He also concluded that the contract would violate KY. REV. STAT. § 199.590(2) (1972), which prohibits unlicensed persons from receiving money for procurement of a child for adoption. REP. H.R.L., *supra* note 8, at II A9. A Michigan court held that the contract violated a Michigan statute, MICH. COMP. LAWS § 710.54 (1981), which prohibits offering, giving or receiving money or other consideration for placing a child for adoption, and for locating a child for adoption. The statute also prohibits the receipt of compensation for a release, consent, or petition for adoption unless approved by the court. *Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) 3011.

¹⁸See Keane, *supra* note 4, at 149-51.

¹⁹IND. CODE § 35-1-82-2 (Supp. 1981) (repealed 1977).

²⁰*Id.* § 31-1-11.5-3.

tions allow some payment to the natural mother.²¹ It is a class D felony in Indiana to receive any property in exchange for the "termination of the care, custody, or control of a person's dependent child."²² However, the law makes an exception for property transferred under Indiana Code section 35-46-1-9(b) pursuant to a supervised adoption.²³ This statute allows payment of reasonable attorney's fees, the mother's hospital and medical expenses for the pregnancy and childbirth, and other fees approved by the court supervising the adoption.²⁴ Two other statutes under Indiana's paternity laws provide for payment to the natural mother; thus, a woman may recover reasonable attorney's fees²⁵ as well as medical and hospital expenses,²⁶ which can include the cost of pregnancy, childbirth, and prenatal and postnatal care.²⁷

Neither the Kentucky nor the Michigan adoption statute is this liberal. The Kentucky statute prohibits any unlicensed person from receiving compensation for procurement of a child for adoption.²⁸ Michigan prohibits offering, giving, or receiving money or other compensation for placing or locating a child for adoption.²⁹ Michigan also prohibits compensation for the release, consent, or petition for an adoption unless approved by the court.³⁰ Thus, the Indiana law differs from both the Michigan and Kentucky statutes by allowing the natural mother to recover, without court approval, her costs incurred for the pregnancy and adoption of the child. Consequently, under existing Indiana statutes the contract would not be a crime if the surrogate's fees were limited to actual medical and legal expenses. A fee subject to these limitations, however, would probably be insufficient consideration for the surrogate's services.

Unless the surrogate is motivated by purely altruistic reasons,³¹

²¹*Id.* §§ 35-46-1-4(b)(2), -9(b).

²²*Id.* § 35-46-1-4(b). A person convicted of a class D felony shall be imprisoned for a fixed term of two years and may be fined up to \$10,000. The court, at its discretion, may enter judgment of a Class A misdemeanor. *Id.* § 35-50-2-7. For a Class A misdemeanor a person shall be imprisoned for not more than one year and may be fined up to \$5,000. *Id.* § 35-50-3-2.

²³*Id.* § 35-46-1-9(b).

²⁴*Id.*

²⁵*Id.* § 31-6-6.1-18.

²⁶*Id.* § 31-6-6.1-17.

²⁷*Id.*

²⁸KY. REV. STAT. § 199.590(2) (1972).

²⁹MICH. COMP. LAWS § 710.54 (1981).

³⁰*Id.*

³¹Women generally say they became surrogates to help a childless couple. However, many also receive a fee. The exceptions include the woman who had a child for her sister, Beck, *supra* note 3, at 134, and another woman who did so out of friendship. Markoutsas, *supra* note 3, at 98. "I wanted to give her a gift, something she could not have." *Id.*

she wants additional compensation for her nine months of service. Although a working surrogate might receive disability benefits during part of the pregnancy,³² the benefits would still be inadequate consideration for the risk and inconvenience of pregnancy and childbirth.³³ In Indiana, the court supervising the adoption would have to approve any supplemental fee paid to the surrogate due to the preclusive nature of the relevant statutes,³⁴ which limit compensation to medical and legal expenses absent court approval.

Because the adoption cannot be effectuated until after the baby is born, the contract is executory and its validity can not be tested until the time of adoption. Therefore, the contract's legality would be uncertain during the entire pregnancy. At the time of adoption the court could uphold the contract on the basis of pure contract law.³⁵ If the court views the contract as allowing the surrogate to profit from the adoption, however, the contract would violate the Indiana statute³⁶ proscribing such activity and, as a result, be void.³⁷ Therefore, whether a surrogate can receive fees other than medical and legal expenses will depend on whether Indiana courts will construe such a contract as "child selling" in violation of both statutory law and public policy.

B. Public Policy Considerations

Several authorities have expressed the view that at least some surrogate mother contracts are against public policy.³⁸ The public policy considerations have centered around baby selling, the exploitation of needy women, the disruption of the natural tie between the surrogate and the child, and the effect surrogate motherhood may have on the traditional family.³⁹

³²42 U.S.C. § 2000(e) (Supp. III 1979) allows disability benefits based on pregnancy. Equal Employment Opportunity Commission regulations provide that a woman does not have to be married in order to qualify for the benefits. 29 C.F.R. § 1604.10(b) (1981) (appendix at 133). The law only applies to those employers that have disability benefit plans. *Id.* § 1604.10(b).

³³Fees range from \$1,000 on up, but the average seems to be between \$10,000 and \$15,000. Markoutsas, *supra* note 3, at 99, 104.

³⁴*See* IND. CODE § 35-46-1-9(b)(4) (Supp. 1981).

³⁵The court might uphold the contract based on reliance by any of the parties or on estoppel. *See generally* 1 A. CORBIN, CORBIN ON CONTRACTS §§ 193-208 (1962).

³⁶*See* IND. CODE § 35-46-1-4(b) (Supp. 1981).

³⁷*See* Brokaw v. Brokaw, 398 N.E.2d 1385 (Ind. Ct. App. 1980).

³⁸*See* Doe v. Kelley, [1980] 6 FAM. L. REP. (BNA) 3011. *See generally* Protection of Human Subjects; HEW Support of Human In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, REP. H.R.L., *supra* note 8, at II B2; Veith, *supra* note 5, at 144-47.

³⁹*See* Veith, *supra* note 5, at 146.

In *Doe v. Kelley*,⁴⁰ the plaintiffs, a childless couple and a potential surrogate who was to receive \$5,000 plus medical expenses for her services, filed for a declaratory judgment to have Michigan's child selling law⁴¹ declared unconstitutional and to prevent their prosecution under the statute. The plaintiffs attacked the Michigan statute as void for vagueness and also alleged that the surrogate contract was within their constitutional "right of privacy."⁴² The court rejected both constitutional claims, holding that the Michigan statute was not void for vagueness⁴³ and that the right to adopt a child for a fee was not a fundamental right.⁴⁴ The trial court viewed the surrogate mother contract as "baby bartering," an activity which the state had a compelling interest in preventing.⁴⁵ The court then discussed this compelling state interest in regulating adoptions for profit based on public policy grounds.

Citing the Michigan statute that parents cannot barter or sell their children, or profit from consent to adoption, the *Kelley* court stated that the purpose of the statute was to prevent "commercialism from affecting a mother's decision to execute a consent to the adoption of her child."⁴⁶ Although the court acknowledged the plaintiffs' argument that they were acting in good faith and with the best intentions, it replied that public policy against child selling applied to all Michigan citizens regardless of intent.⁴⁷ The court concluded that although the surrogate mother arrangement was, in some respects, not the type of action the Michigan legislature contemplated or attempted to proscribe when it enacted the challenged statute, the statute still applied to the plaintiffs.⁴⁸

In concluding that surrogate mothering violated public policy, the court accepted the Michigan Attorney General's argument that the effect of the surrogate agreement is to encourage women to have babies they do not want. According to the attorney general, such an arrangement is "child selling."⁴⁹ The court was not presented with the alternative and completely plausible interpreta-

⁴⁰[1980] 6 FAM. L. REP. (BNA) 3011, *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

⁴¹*See* note 17 *supra*.

⁴²*Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) at 3012. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy included a woman's decision to have a child. *Id.* at 152-54.

⁴³[1980] 6 FAM. L. REP. (BNA) at 3012.

⁴⁴*Id.* at 3013.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.* at 3014.

⁴⁸*Id.*

⁴⁹*Id.* at 3013.

tion that a woman is selling her childbearing capability only as a service to a couple who desires to have a child.⁵⁰ This view of the surrogate mother is comparable to the artificial insemination donor who sells his biological services so infertile couples might have children.⁵¹

Many courts and legislatures no longer view the fathering of children for married couples by anonymous male donors as being against public policy.⁵² Yet the same forums may find it against public policy to compensate a woman who goes through "the inconvenience, discomfort, and dangers of pregnancy and childbirth."⁵³ The Michigan court's reasoning seems to be that, but for the surrogate agreement, the child would not be born and that it is money which induces the surrogate to carry the child. Ironically, however, the same rationale applies to artificial insemination donors. But for the donor's sperm, there would be no child, and it is money that induces the donor to become involved. Although not articulated in the trial court opinion, the difference between the two is that the surrogate actually produces a child which is then given up for adoption. It is the adoption rather than the services that triggers the child selling statutes. Technically, it is consenting to the adoption for money which is illegal, not bearing the child.

The Michigan Court of Appeals did make this distinction between the surrogate's childbearing services and her consent to adoption. The appellate court held that the use of a surrogate mother was within the plaintiffs' constitutional right of privacy, but that compensation paid in connection with Michigan's adoption statutes was not constitutionally protected.⁵⁴ Because the statute did not *directly* prohibit the plaintiffs from having the child as planned, the court upheld the statute.⁵⁵ The appellate court refused to apply the compelling state interest standard to determine whether the burden the statute imposed on the plaintiffs' rights was justified.⁵⁶ Rather,

⁵⁰William Handel, a California attorney and a member of Surrogate Parents' Foundation, Inc. says, "We are negotiating payment for a woman's service." Beck, *supra* note 3, at 135. This is also the way women who have served as surrogates feel. See Markoutsas, *supra* note 3, at 98-99.

⁵¹See Keane, *supra* note 4, at 153 n.54. A recent survey showed that donors are paid between \$20 and \$35 per ejaculation. *Id.*

⁵²See notes 7 & 8 *supra*.

⁵³*Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) at 3013-14 (citing the Executive Director for the Program in Law, Science and Medicine at Yale Law School in A. HOLDER, LEGAL ISSUES AND PEDIATRICS AND ADOLESCENT MEDICINE 7-8 (1977)). The constitutionality of this unequal treatment of AID and surrogate mothers has been questioned, but is beyond the scope of this Note. See Keane, *supra* note 4, at 166.

⁵⁴*Doe v. Kelley*, 106 Mich. App. at 173, 307 N.W.2d at 441.

⁵⁵*Id.*

⁵⁶*Id.* For a discussion on the constitutional aspects of *Kelley* see Note, *Surrogate*

the court found that the statute was a reasonable regulation without even exploring whether it was rationally related to the surrogate arrangement.⁵⁷

The rationale behind laws forbidding compensation to a natural mother is to prevent the sale of children through black market adoptions, where the potential for harm to the child, mother, and couple is great.⁵⁸ In such transactions, the profit motive of the middleman often will prevail over the best interests of any of the parties. By circumventing the state adoption regulations, the black market adoption has none of the safeguards of the regular adoption procedure.⁵⁹ The child is not protected from being placed in an unsuitable home,⁶⁰ nor is the couple protected from unscrupulous "salespersons." Further, the natural mother, who is probably young, unmarried, and unaware of her legal rights, may be subject to exploitation because she is in a position which she neither bargained for nor contemplated.⁶¹

This rationale does not apply to the surrogate mother arrangement. First, the adoption is not taking place between strangers, because the biological father is retaining custody of his natural child. Consequently, the best interests of the child will be of paramount concern to the adopting couple, and the adoption is more likely to be successful. Second, the biological mother has planned the pregnancy so she should be emotionally and physically fit to carry the child. Because she has entered the contract prior to the pregnancy she is more likely to be in an equal bargaining position with the couple than a woman carrying an unplanned or unwanted child. Finally, the surrogate mother arrangement is conducive to state regulation just as is any adoption, child custody case, or paternity action. Such regulation would protect the interests of all the parties.

Because the rationale for the child selling laws does not apply to the surrogate mother contract, the public policy for *allowing* such contracts must be explored. Some critics have been concerned with the break in the natural bond between a mother and child in the surrogate arrangement.⁶² Although this may be a legitimate concern,

Motherhood: The Outer Limits of Protected Conduct, 1981 DET. C.L. REV. 1131, 1139-41.

⁵⁷*Doe v. Kelley*, 106 Mich. App. at 173, 307 N.W.2d at 441.

⁵⁸*See Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) at 3014. In the normal "child selling" arrangement a middleman arranges for the adoption between the natural mother, usually unwed, and the adopting couple. The middleman receives a fee. *Adoption and Foster Care*, 1975, *supra* note 2, at 4.

⁵⁹*See generally Adoption and Foster Care*, 1975, *supra* note 2.

⁶⁰*See id.*; IND. CODE § 31-3-1-3 (1976).

⁶¹*See Adoption and Foster Care*, 1975, *supra* note 2, at 5-7.

⁶²*Vieth*, *supra* note 5, at 146.

the trauma is no greater for the surrogate mother than for a mother who is forced to give up a child for adoption or who loses custody of her child in a divorce action. In fact, the trauma of breaking the bond should be less because the surrogate mother enters the pregnancy knowingly, with the intent of relinquishing all parental rights.⁶³ Additionally, although the bonding between the surrogate mother and child is broken, the bonding between the child and its natural father is fostered.

Another strong policy consideration is the effect the surrogate arrangement may have on the traditional family. The *Kelley* court said "[m]ercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community."⁶⁴ As has already been noted, the AID procedure also creates a parent-child relationship based on monetary consideration, but this procedure has not destroyed the family or the community. To the contrary, these unconventional methods of reproduction may help strengthen the family and community by allowing more couples to have children and, in addition, by having the children be biologically related to one of the parents. The surrogate mother option is especially relevant to many childless couples because adoption has become so difficult.⁶⁵

Society is interested in furthering strong family units. The surrogate mother contract serves this goal. Persons who are willing to take this unconventional route, with all of its inherent problems,⁶⁶ to "create" a family should be capable of building as strong a family unit as those persons conceiving a child in the conventional way. The surrogate mother contract is not something one should enter into lightly, without any thought or consideration for the results of the contract.⁶⁷ Because the surrogate arrangement can create and enhance a family unit, it is entitled to the same legal deference that other family arrangements are given.

⁶³Interviews with surrogates support this view. One woman said she felt more like a caretaker than a mother. She felt the baby was God's, not her own. "I just never felt the same toward him that I did toward my own sons." Beck, *supra* note 3, at 135. Others have admitted they feel an emotional bond, but that it is kept in perspective because they know they are providing a service. Markoutsas, *supra* note 3, at 100. The Surrogate Parenting Association in Louisville discourages single, childless women from being surrogates because of the possible emotional bond. *Id.* at 104.

⁶⁴*Doe v. Kelley*, [1980] 6 FAM. L. REP. (BNA) at 3013.

⁶⁵*See Adoption and Foster Care, 1975, supra* note 2.

⁶⁶*See* notes 110-67 *infra* and accompanying text.

⁶⁷The Surrogate Parenting Association screens all potential surrogates and couples before they enter the contract. Parties must undergo complete physicals and an examination of their genetic history, as well as psychological evaluations to determine their emotional stability and motivation. Markoutsas, *supra* note 3, at 104.

C. *Indiana Public Policy*

The United States Supreme Court has recognized the importance and integrity of the family unit, giving it protection under the fourteenth amendment.⁶⁸ The "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."⁶⁹ As a result, the nature of the family and the personal decision to have children are protected constitutional interests, subject to regulation only when a compelling state interest so dictates.⁷⁰

Indiana's interest in promoting the family unit is demonstrated by Indiana statutory and case law. Preservation of the family and protection of the child are evident throughout the family law statutes. Indiana adoption statutes provide for protection of the natural parent's rights when those rights are terminated involuntarily, protection of the adopting couple or "new" family unit, and protection of the child.⁷¹ The primary concern in a custody action is the child's best interests,⁷² and one of the stated purposes of the Juvenile Code is "to strengthen family life by assisting parents to fulfill their parental obligations."⁷³ Thus, family law statutes attempt to promote the family structure and protect the child.

The importance of the family in Indiana is also demonstrated by the divorce laws. Impotency at the time of the marriage is a ground for divorce under Indiana's "No-Fault Divorce" statute.⁷⁴ That the legislature has specifically identified impotency as a ground for divorce reflects the state's public policy on the importance of children to a marriage.

The courts also have shown a deference to the family unit coupled with a desire to preserve the family and protect the best interests of the child. In *In re Joseph*,⁷⁵ an Indiana appellate court said "[a] fundamental right to family integrity means that our federal constitution, as a matter of substantive due process, protects the private ordering of interpersonal relationships from state intrusion."⁷⁶ At the same time, the case indicates that the court does

⁶⁸Stanley v. Illinois, 405 U.S. 645 (1972).

⁶⁹Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

⁷⁰See Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

⁷¹IND. CODE § 31-3-1-6 (Supp. 1981); *Id.* § 31-6-5-1. For cases applying the adoption laws see Graham v. Star, 415 N.E.2d 772 (Ind. Ct. App. 1981); *In re Hewitt*, 396 N.E.2d 938 (Ind. Ct. App. 1979).

⁷²IND. CODE § 31-6-6.1-11 (Supp. 1981).

⁷³*Id.* § 31-6-1-1(5).

⁷⁴*Id.* § 31-1-11.5-3(a)(3).

⁷⁵416 N.E.2d 857 (Ind. Ct. App. 1981).

⁷⁶*Id.* at 859.

have a compelling interest in protecting the best interests of a child.⁷⁷ The courts have acknowledged, however, that this protection requires flexibility. The court in *Collins v. Gilbreath*,⁷⁸ said that "[w]hen the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."⁷⁹

The *Collins* court allowed a stepfather visitation rights despite the natural father's objections. The natural father had been given custody after the natural mother's death. In granting the stepfather visitation rights, the court refused to apply the general rule that third party visitation will be denied if the natural parent objects.⁸⁰ Instead, the court examined the relationship between the children and the stepfather and found that denying visitation would be unfair to both the children and the stepfather.⁸¹ *Collins* demonstrates the Indiana courts' willingness to explore the benefits of different family relationships without blindly following general rules. Therefore, Indiana courts may be willing to examine the underlying benefits and problems of a surrogate arrangement instead of arbitrarily applying the label "child selling" to the contract.

As previously discussed, the surrogate mother arrangement has the potential to enhance and strengthen the family. There are, however, some negative aspects. The moral and psychological issues surrounding the surrogate arrangement are not within the scope of this Note,⁸² but a primary legal concern is whether the child's best interests are being served by the surrogate arrangement.

One major drawback to allowing surrogate contracts is the probability that the child will be born illegitimate. If the surrogate mother is single, the child would definitely be illegitimate.⁸³ If the surrogate mother is married, there is a statutory presumption that her husband is the child's natural father,⁸⁴ making the child legitimate.⁸⁵ This statutory presumption is based on Indiana's policy of protecting the child in order to allow it the social acceptance

⁷⁷*Id.* at 861.

⁷⁸403 N.E.2d 921 (Ind. Ct. App. 1980).

⁷⁹*Id.* at 923.

⁸⁰*Id.*

⁸¹*Id.*

⁸²The same moral arguments used for AID and abortion could be applied to the surrogate mother. Psychological screening and evaluation would solve some of the psychological concerns. See note 67 *supra*.

⁸³10 C.J.S. *Bastards* § 1 (1938).

⁸⁴IND. CODE § 31-6-6.1-9 (Supp. 1981). Married surrogates are preferred over single women. See note 63 *supra*.

⁸⁵*R.D.S. v. S.L.S.*, 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

associated with legitimacy.⁸⁶ However, the presumption of legitimacy may be rebutted by "direct, clear, and convincing evidence."⁸⁷ Such evidence may be proof that the husband was impotent, sterile, or had no access to the mother.⁸⁸ In *H.W.K. v. M.A.G.*,⁸⁹ the court found the testimony of the mother regarding sexual intercourse with the putative father, coupled with the probability of conception at that time, to be sufficient evidence to rebut the presumption that the husband was the father of the child.⁹⁰ Although lack of access seems to be an important factor,⁹¹ the existence of a surrogate contract also would be strong evidence to rebut the presumption of legitimacy.⁹² Consequently, even if the surrogate is married, the child would still be illegitimate.

That the surrogate contract could be promoting the conception of illegitimate children is a public policy concern. If the couple refuses to adopt the child, this probability of illegitimacy could affect the child's inheritance rights⁹³ and child support in the event of a divorce between the surrogate and her husband.⁹⁴ Although this is a serious consideration, the surrogate agreement, to a large extent, can preclude the problem. Indiana law allows paternity to be established prior to birth.⁹⁵ If paternity were acknowledged in the contract and established in a court action prior to birth, then the child, who would be illegitimate at birth,⁹⁶ would have the same legal protection afforded legitimate children; that is, the child would be entitled to child support⁹⁷ and inheritance rights⁹⁸ through the biological father. Of course, once the child is adopted by the couple, they have legal responsibility for the child's support⁹⁹ and the child

⁸⁶*L.F.R. v. R.A.R.*, 269 Ind. 97, 100, 378 N.E.2d 855, 857 (1978); *R.D.S. v. S.L.S.*, 402 N.E.2d 30, 31 (Ind. Ct. App. 1980) (Buchanan, J., dissenting).

⁸⁷*R.D.S. v. S.L.S.*, 402 N.E.2d at 31.

⁸⁸*H.W.K. v. M.A.G.*, 426 N.E.2d 129, 131-32 (Ind. Ct. App. 1981).

⁸⁹426 N.E.2d 129 (Ind. Ct. App. 1981).

⁹⁰*Id.* at 133.

⁹¹*Id.* at 132.

⁹²Part of the fee paid to the surrogate is compensation for loss of consortium. See Markoutsas, *supra* note 3, at 104.

⁹³See IND. CODE § 29-1-2-7 (1976).

⁹⁴See IND. CODE § 31-1-11.5-12 (Supp. 1981). This section provides that a parent must pay support for a child of the marriage. Indiana Code section 31-1-11.5-2(c) defines "child" as a child of "both parties to the marriage." *Id.* (Supp. 1981) (emphasis added). If the child is not the husband's either biologically or by adoption, he has no duty to pay support. *R.D.S. v. S.L.S.*, 402 N.E.2d at 34.

⁹⁵IND. CODE § 31-6-6.1-2 (Supp. 1981).

⁹⁶See notes 83-92 *supra* and accompanying text.

⁹⁷IND. CODE § 31-6-6.1-10 (Supp. 1981).

⁹⁸IND. CODE § 29-1-2-7 (1976).

⁹⁹See note 94 *supra*.

can inherit through them.¹⁰⁰ Therefore, by establishing paternity prior to birth, one of the major drawbacks to the surrogate mother contract can be eliminated. In addition, the best interests of the child would be ensured, and the social stigma associated with illegitimacy would be eliminated.¹⁰¹

Another policy consideration is ensuring that the child will have a home that is both emotionally and financially suitable. Because the state can regulate surrogate mother contracts just as it regulates ordinary adoption proceedings,¹⁰² this concern can be eliminated through appropriate legislation. Even without additional legislation, the courts can supervise surrogate arrangements on the basis that court approval is required for the fee paid to the surrogate.¹⁰³ Further, because the child will be with its natural father, there will be a blood relationship in addition to the legal one of adoption. Thus, the very nature of the arrangement serves to ensure that the child's best interests are served, while helping to promote the family unit.

A contract made among three consenting adults that does not violate existing law or public policy should be upheld. The surrogate mother contract neither violates any of Indiana's statutes, nor seems to violate the state's public policy. On the contrary, the surrogate mother arrangement is capable of furthering the state's policy of strengthening families. The surrogate mother, like the artificial insemination donor, is providing a service which enables a couple to have a child and form a family unit.

The Indiana courts have said that the power of the court to declare a contract void for being in contravention of public policy "should be exercised only in cases free from doubt."¹⁰⁴ It also has been said that public policy must change with the times.¹⁰⁵ It is time to distinguish the surrogate arrangement from black market adoptions and baby selling, and to recognize the surrogate mother arrangement as a new method of reproduction that deserves the same constitutional protections accorded other family matters.

In *Schleiffer v. Meyers*,¹⁰⁶ the United States Court of Appeals

¹⁰⁰IND. CODE § 29-1-2-8 (1976).

¹⁰¹Even if the couple failed to adopt the child, illegitimacy does not carry the same stigma it once did. An increasing number of unwed mothers are now keeping their children. See *Surrogate Parenting*, *supra* note 1, at 58.

¹⁰²See IND. CODE § 31-3-1-3 (1976). Legislation legalizing and regulating the surrogate mother contract has been introduced into the Michigan House of Representatives. [1982-1985] REP. H.R.L., *supra* note 8, at 2.

¹⁰³IND. CODE § 35-46-1-9(b) (Supp. 1981).

¹⁰⁴*American Underwriters, Inc. v. Turpin*, 149 Ind. App. 473, 477, 273 N.E.2d 761, 764 (1971) (citing *Corns v. Clouser*, 137 Ind. 201, 204, 36 N.E. 848, 849 (1894)) (quoting *Richmond v. Dubuque R.R.*, 26 Iowa 191, 202 (1868)).

¹⁰⁵6A A. CORBIN, CORBIN ON CONTRACTS § 1375 (1962).

¹⁰⁶644 F.2d 656 (7th Cir.), *cert. denied* 102 S. Ct. 110 (1981).

for the Seventh Circuit, recognizing the uniqueness of the family's role in society, said that constitutional principles should be applied with "sensitivity and flexibility to the special needs of parents and children."¹⁰⁷ Although the *Schleiffer* court was dealing with the rights of parents and a child already born, the same constitutional principles should be applied flexibly to a couple's decision to have a child. The couple should be able to enter a surrogate arrangement in order to create a family, subject only to sensitive state regulation.¹⁰⁸ Similarly, the surrogate mother should be able to offer her biological services for a fee, subject to regulation. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁰⁹

The state does have a compelling interest in seeing that the unborn child's best interests are protected; therefore, regulating the contract is valid. However, the couple and the surrogate have the right to create a child and form a family subject to rational, relevant regulation, not regulation that is unrelated to the nature and terms of the surrogate arrangement. Therefore, profiting from adoption statutes should not be construed as barring surrogate mother contracts.

Additionally, a surrogate mother agreement which includes additional fees to the surrogate should be upheld on the basis of Indiana public policy which places importance on children in the family unit, which allows flexibility in dealing with the family and which shows deference to individual decisions regarding the family. Even if the contract is valid, however, problems still remain with enforcing the contract and with providing a remedy in case of a breach. If a surrogate contract is not valid, the parties may be forced to resort to noncontractual remedies in the event of a breach.

III. RIGHTS AND REMEDIES OF THE PARTIES

The possibility of a breach by one party exists in any contractual agreement, but the surrogate mother contract presents some special problems under existing family law. The parties to a surrogate arrangement may breach the contract during three distinct time periods: prior to the artificial insemination, during the pregnancy, and after the baby is born. The remedies available to the parties are dependent upon when the contract is breached and whether the con-

¹⁰⁷*Id.* at 660.

¹⁰⁸See notes 171-78 *infra* and accompanying text.

¹⁰⁹*Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis deleted).

tract is valid. If the contract is valid, the courts can rely on basic principles of contract law in fashioning remedies. However, noncontractual remedies provided by Indiana family law statutes are available whether the contract is valid or not.

A. *Breach of the Contract Prior to Insemination*

If the surrogate breaches the contract by refusing to be artificially inseminated, the couple's remedy would be limited. If the contract is valid, the couple can sue for damages and recover expenses incurred such as legal, medical, and travel.¹¹⁰ It would be difficult, however, to measure the value of their lost expectation. Because there has been no physical harm, the couple would not be able to recover for pain and suffering.¹¹¹ Generally, when damages are difficult to measure or the remedies at law are inadequate, equity will specifically enforce a contract.¹¹² Such a remedy is impossible for a breach prior to insemination because courts are reluctant to specifically enforce personal service contracts.¹¹³ More importantly, forcing a woman to bear a child violates her constitutional right of privacy.¹¹⁴ Therefore, if the contract is valid, the couple's remedy would be limited to recovery of their expenses.

If the contracting couple breaches by refusing to proceed with the artificial insemination, the surrogate can sue on the contract and recover damages. The measure of damages might be the contract price minus her projected costs because the breach was prior to the surrogate's actual performance of the contract.¹¹⁵ Although damages are not quite as speculative here as they would be if the surrogate breached, the costs and benefits would be difficult to measure, and specific performance would be impossible because it would violate the donor's right of privacy.¹¹⁶

Of course, if the contract were declared illegal or against public policy, the court would leave the parties where it found them. The contract would be void and neither party could receive damages.¹¹⁷ Because there are no applicable statutes at this point of the transac-

¹¹⁰See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 15-3, -4 (2d ed. 1977).

¹¹¹See *McCormick Piano & Organ Co. v. Geiger*, 412 N.E.2d 842 (Ind. Ct. App. 1980); *Charlie Stewart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 357 N.E.2d 247 (1976).

¹¹²5A A. CORBIN, *CORBIN ON CONTRACTS* § 1142 (1964).

¹¹³See *Lindsay v. Glass*, 119 Ind. 301, 21 N.E. 897 (1889); 5A A. CORBIN, *CORBIN ON CONTRACTS* § 1204 (1964).

¹¹⁴See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

¹¹⁵See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14-4 (2d ed. 1977).

¹¹⁶See note 114 *supra*.

¹¹⁷See *Hogston v. Bell*, 185 Ind. 536, 553, 112 N.E. 883, 888 (1916); *Hiatt v. Yergin*, 152 Ind. App. 497, 510, 284 N.E.2d 834, 841 (1972); *Van Orman Fort Wayne Corp. v.*

tion, none of the parties have any noncontractual remedies. Thus, for the injured party to recover any damages resulting from a breach of the contract prior to insemination, the contract must be valid.

B. Breach of the Contract During Pregnancy

The possibility exists that the surrogate will breach the contract during the pregnancy by having an abortion. She could do so in the first trimester of the pregnancy without the consent of either her husband or the biological father.¹¹⁸ The couple's remedy in this situation would be the same as a pre-pregnancy breach; that is, the couple may sue on the contract and recover special damages, which may be greater based on incurred expenses. In addition to the disappointment of not getting a child, the couple would have the pain of knowing the child had been aborted. Some surrogate contracts provide for a tort action of intentional infliction of emotional distress if the surrogate breaches the contract.¹¹⁹ The couple could attempt to pursue this remedy, but success is doubtful because Indiana requires contemporaneous physical impact before allowing recovery for an action of this type.¹²⁰ Consequently, the couple could only recover their actual expenses as damages.

If the contract were declared illegal, the court would refuse to enforce the contract and the couple would receive no damages.¹²¹ Nor would they have any noncontractual remedies because no statutes apply to this situation. Therefore, as in pre-insemination breaches, the contract must be valid for the couple to recover any damages for a breach of the contract during pregnancy.

Because most couples use the surrogate mother as a last resort, it is unlikely the couple would reject the baby in utero and, thus, breach the contract. It is possible, however, that the couple may change their minds, especially if the fetus is unhealthy or has a defect.¹²² Although the surrogate could sue on the contract, assuming it is valid, and recover the contract price, this would be an in-

Edwards Motor Co., 148 Ind. App. 66, 69, 263 N.E.2d 746, 748 (1970). See generally 6 I.L.E. Contracts §§ 81-84 (1960).

¹¹⁸IND. CODE § 35-1-58.5-2(a) (Supp. 1981); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

¹¹⁹ See *Surrogate Parenting*, *supra* note 1, at 60.

¹²⁰See *Elza v. Liberty Loan Corp.*, 426 N.E.2d 1302 (Ind. Ct. App. 1981).

¹²¹See note 117 *supra*.

¹²²The surrogate contract may call for the surrogate to submit to amniocentesis to determine whether the fetus is normal. Amniocentesis is a prenatal test to determine the status of the fetus. Amniotic fluid is removed from the amniotic cavity with a needle. The fluid is then analyzed for any abnormalities. H. GRAY, 4B ATTORNEY'S TEXT-BOOK OF MEDICINE ¶ 305.13(5) (1981).

adequate remedy if the mother is left with a child she does not want. Consequently, the surrogate's superior option is to seek satisfaction under the following noncontractual statutory remedies, rather than suing on the contract.

The surrogate could abort the fetus if she were in the first trimester of the pregnancy.¹²³ If abortion is unacceptable to her, or if the pregnancy is too far advanced, she could deliver the child and give it up for adoption.¹²⁴ This avenue allows the surrogate to be reimbursed for her medical and legal expenses¹²⁵ and also provides satisfaction if the contract is declared illegal.

Another noncontractual remedy would be to establish the child's biological father through a paternity suit.¹²⁶ Once paternity is established, the father would be responsible for the surrogate's legal¹²⁷ and medical expenses, both prenatal and postnatal.¹²⁸ The father would also be liable for child support.¹²⁹ Thus, a paternity suit would provide the surrogate with a remedy in addition to damages, under a valid contract, or a remedy in lieu of the contract if it is declared invalid.

Proving paternity is not difficult generally. Indiana courts require that paternity be proven by a preponderance of the evidence.¹³⁰ However, in *D.M. v. C.H.*¹³¹, the mother's statement that she had sexual intercourse with the alleged father during the probable time of conception was enough to prove paternity.¹³² In *Johnson v. Ross*,¹³³ the putative father had signed an affidavit acknowledging his paternity; however, during the action for support, both the mother and putative father testified that he was not the father.¹³⁴ The court upheld the support order based on the signed affidavit. The court said that the uncontradicted testimony of the parents need not be accepted as true where the duty of support is involved,

¹²³See note 118 *supra*.

¹²⁴See IND. CODE § 31-3-1-6 (Supp. 1981).

¹²⁵See *id.* § 35-46-1-9(b).

¹²⁶See *id.* § 31-6-6.1-2(a).

¹²⁷See *id.* § 31-6-6.1-18.

¹²⁸See *id.* § 31-6-6.1-17.

¹²⁹See *id.* § 31-6-6.1-10. This Note assumes that a child conceived by artificial insemination would be treated the same as one conceived by sexual intercourse, although Indiana has no statutory or case law on this issue. See notes 176-77 *infra* and accompanying text for a discussion of the treatment of AID in those states adopting the Uniform Parentage Act.

¹³⁰See *Sandoval v. Hamersley*, 419 N.E.2d 813, 817 (Ind. Ct. App. 1981) (Hoffman, J., dissenting).

¹³¹380 N.E.2d 1269 (Ind. Ct. App. 1978).

¹³²*Id.* at 1270.

¹³³405 N.E.2d 569 (Ind. Ct. App. 1980).

¹³⁴*Id.* at 572.

especially when the testimony conflicts with prior statements.¹³⁵ Consequently, a signed contract by the husband of the couple, stating that he is the biological father, should be sufficient to prove paternity.

A married surrogate would have to rebut the statutory presumption that her husband is the father of her child.¹³⁶ As previously noted, though, the terms of the contract and the surrogate's testimony should be sufficient to overcome the presumption.¹³⁷

Once paternity is established, the surrogate can recover her medical and legal expenses and hold the natural father liable for child support even if the contract is invalid. Therefore, if the contract were breached at this point by the couple, the surrogate has the noncontractual remedies of abortion, adoption, and paternity in addition to the possible contract action. If the surrogate breaches, however, the couple is limited to a contract action allowing meager damages and a possible tort remedy.

C. *Breach of the Contract After Birth*

The most likely time for a breach of the surrogate mother contract is after the baby is born, because the surrogate may decide to keep the baby, or the couple may refuse to accept it. If the couple refuses to accept the child, the surrogate's remedies would be the same as some of the remedies for a breach during the pregnancy. She could sue on the contract, if it were valid, and recover the contract price because she had fully performed her contract obligations.¹³⁸ Although these damages would be inadequate, specific performance of the contract would not be possible. Once the baby is born, the best interests of the child are paramount.¹³⁹ Forcing the child on unwilling parents would not serve the child's best interests. However, the surrogate would also have the noncontractual remedy of a paternity action for support or of adoption.

If the court views the contract as one for services rendered, the surrogate should be able to recover not only the contract price, but also child support after establishing paternity. If the contract were invalid, either the paternity action or an adoption would allow the surrogate to receive legal and medical fees,¹⁴⁰ but adoption would be

¹³⁵*Id.* at 572-73.

¹³⁶See IND. CODE § 31-6-6.1-9 (Supp. 1981).

¹³⁷See notes 87-92 *supra* and accompanying text.

¹³⁸See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14-4 (2d ed. 1977).

¹³⁹See *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980); *Unwed Father v. Unwed Mother*, 379 N.E.2d 467 (Ind. Ct. App. 1978).

¹⁴⁰See IND. CODE §§ 31-6-6.1-17,-18 (Supp. 1981); *Id.* § 35-46-1-9(b).

preferable to a paternity action if the surrogate did not want to keep the child. Adoption would avoid a legal suit and still reimburse the surrogate for her out-of-pocket expenses.

At this point, the rights of the child have to be considered. Due to the likelihood that the child would be illegitimate,¹⁴¹ the couple's refusal to adopt him could threaten his inheritance and support rights.¹⁴² If the child were adopted by someone else, these problems would be cured. However, if the surrogate decided to keep the child, or the child could not be placed in an adoptive home, his rights and interests would need to be protected. Because the child was not a party to the contract, the child or a guardian ad litem could not sue on the contract, even if it were valid.¹⁴³ However, the child could institute a paternity action. Indiana paternity law allows a child, his guardian, or next friend to file a paternity suit.¹⁴⁴ Under certain conditions the state or county welfare department may also file an action.¹⁴⁵ Once the child's paternity is established, the putative father may be required to pay support, depending on the result of the court hearing.¹⁴⁶ Establishing paternity would also allow the child to inherit from both his natural mother and father.¹⁴⁷

If the surrogate breaches the contract by refusing to give up the child, the couple would be in the best position to have the contract specifically enforced in equity. Again, monetary damages would be difficult to measure and would be inadequate. In this situation, both sides would desire the child. By placing the child with the couple, the child would be with his natural father and in a suitable home. Thus, requiring the surrogate to give up custody could serve the best interests of the child and provide a remedy for the breach of contract. However, under current family laws the couple would face several obstacles.

First, although the surrogate may have contracted to give up all parental rights, under the adoption statutes actual consent to adoption cannot be signed until after the child is born.¹⁴⁸ In addition, the courts have refused to broadly interpret the adoption consent statute. In *Krieg v. Glassburn*,¹⁴⁹ the child's grandparents contested

¹⁴¹See notes 83-92 *supra* and accompanying text.

¹⁴²See notes 93-94 *supra*.

¹⁴³There is no privity of contract between the child and the other parties. See 1 A. CORBIN, CORBIN ON CONTRACTS § 124 (1964).

¹⁴⁴IND. CODE § 31-6-6.1-2(a)(4) (Supp. 1981).

¹⁴⁵*Id.* § 31-6-6.1-2(b).

¹⁴⁶See *id.* §§ 31-6-6.1-10, -13.

¹⁴⁷If the paternity of the child is established by law during the lifetime of the father, the child will be treated the same as a legitimate child for inheritance purposes. *Id.* § 29-1-2-7(b) (1976).

¹⁴⁸*Id.* § 31-3-1-6(b) (Supp. 1981).

¹⁴⁹419 N.E.2d 1015 (Ind. Ct. App. 1981).

the adoption of the child. The court said that the adoption statute¹⁵⁰ did not require the consent of noncustodial grandparents; consequently, the court could not impose such a requirement.¹⁵¹ Therefore, if the surrogate refuses to sign the consent, it is unlikely the court would force her to give up her rights based only on the contract.

The couple could try to have the surrogate's rights terminated involuntarily.¹⁵² However, the court will strictly construe the provision for involuntary termination of parental rights, protecting the natural parent's interests.¹⁵³ Before parental rights are involuntarily terminated, it must be shown that continuing parental custody is "wholly inadequate for their [the children's] very survival."¹⁵⁴ Consequently, a court is unlikely to terminate the surrogate's parental rights unless the couple could prove that the surrogate was unfit.

The couple is in a much better position to obtain custody if the surrogate has signed the adoption consent before changing her mind. Although consent may be withdrawn prior to entry of the adoption decree, the court must order the withdrawal based on the best interests of the child.¹⁵⁵ In addition, the burden of proof is on the person seeking to withdraw the consent.¹⁵⁶ Thus, the surrogate would have to prove that the consent was void based on fraud, duress or undue influence, or that it would be in the child's best interests to withdraw the adoption consent.¹⁵⁷

The courts do not favor the withdrawal of consent. In *In re Snyder*,¹⁵⁸ the court said that allowing a parent to arbitrarily withdraw consent would discourage adoption, making adoptive parents the prey of unscrupulous persons.¹⁵⁹ The court added that "a parent who executes a voluntary relinquishment of parental rights is bound by the consequences of such action, unless the relinquish-

¹⁵⁰IND. CODE § 31-3-1-6 (Supp. 1981).

¹⁵¹419 N.E.2d at 1020.

¹⁵²See IND. CODE § 31-3-1-6(f), (g) (Supp. 1981).

¹⁵³See *In re Gray*, 425 N.E.2d 728, 729 (Ind. Ct. App. 1981). ("With the refusal to give consent, an adoption proceeding becomes adversarial in nature, and the natural parent is entitled to a fair opportunity to establish his or her right to the custody of the child before an impartial tribunal.")

¹⁵⁴*In re Miedl*, 425 N.E.2d 137, 141 (Ind. 1981).

¹⁵⁵IND. CODE § 31-3-1-6(f) (Supp. 1981) provides in part that:

A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.

¹⁵⁶See *In re Hewitt*, 396 N.E.2d 938, 942 (Ind. Ct. App. 1979).

¹⁵⁷See *id.*

¹⁵⁸418 N.E.2d 1171 (Ind. Ct. App. 1981).

¹⁵⁹*Id.* at 1180.

ment was procured by fraud, undue influence, duress, or other consent-vitiating factors."¹⁶⁰ To prove undue influence, duress, or fraud, the surrogate must show that her own volition was overcome.¹⁶¹ Emotional stress, tension, or pressure is insufficient "unless they rise to the level of overcoming one's volition."¹⁶² Consequently, the surrogate would have difficulty proving that the consent was involuntary.

In determining the child's best interests in a petition to withdraw consent, the court must treat the interests of all the parties fairly. The judge "must balance the interest of the natural parents and their sacred relationship to their child against the hope, expectation, reliances, and desires of the adoptive parents"¹⁶³ Because the surrogate arrangement involves a natural parent as one of the adoptive parents, the couple's interest should carry more weight than that of a conventional adopting couple. The additional fact that the surrogate entered the agreement with the intent to give up the child should tip the balance in favor of the couple.

To protect their rights, however, the couple should have the husband establish paternity during the pregnancy.¹⁶⁴ He would then have parental rights, such as visitation and custody, when the child is born.¹⁶⁵ If the surrogate attempted to withdraw her adoption consent, the natural father would have a stronger argument for enforcing the consent. More importantly, if the surrogate refused to consent to the adoption, the natural father could file for custody of the child.¹⁶⁶ The parties in the proceeding would be the natural father versus the natural mother, rather than an adoptive parent versus a natural parent.

Indiana makes no presumption favoring one natural parent over the other and determines custody solely on the child's best interests.¹⁶⁷ Although a determination of which custodial parent would serve the child's best interests might be difficult, some weight should be given to the role the surrogate is playing. She entered the agreement intending that the father take the child. Therefore, if the couple is in a position to give the child a suitable home, they should prevail.

Although this procedure might give the couple custody of the

¹⁶⁰*Id.*

¹⁶¹*See id.*

¹⁶²*In re Hewitt*, 396 N.E.2d at 942.

¹⁶³*Id.*

¹⁶⁴*See* IND. CODE § 31-6-6.1-2(a)(2) (Supp. 1981). This statute provides that a man claiming to be the father of an unborn child may file a paternity action.

¹⁶⁵*See id.* § 31-6-6.1-10(a).

¹⁶⁶*See id.*

¹⁶⁷*Id.* § 31-6-6.1-11(a).

child, the natural father's wife would not have parental rights to the child without adopting it. The wife would be a stepmother, not the legal mother, unless the surrogate consented to adoption. To avoid some of these pitfalls inherent in a surrogate contract, the parties need to carefully draft a comprehensive agreement. Specific provisions can offer a degree of protection to the parties and can help provide a remedy in the event either party breaches the contract.

IV. RECOMMENDED CONTRACT PROVISIONS

To protect all of the parties, a surrogate contract should require the biological father to establish his paternity prior to the birth of the child. The contract should provide for adequate consideration for the surrogate, including insurance benefits for herself and the child. It should also stipulate that the couple will take the child regardless of its condition.¹⁶⁸ To this end, the couple may want to require amniocentesis.¹⁶⁹ If this test is required, the contract should set forth what is to be done if the unborn fetus is defective. Also, the contract should stipulate that the surrogate will make a good faith effort to keep herself and the fetus healthy. Because either party might breach the contract, and damages are so difficult to measure, the parties may want to provide for reasonable liquidated damages.¹⁷⁰

Although these provisions can protect the surrogate, the couple, and the child to a certain extent, there are some problems the contract cannot resolve due to existing family law. These can only be solved by legislation.

V. PROPOSED LEGISLATION

The biggest obstacle in Indiana to the surrogate mother contract is the statute proscribing child selling.¹⁷¹ Although the rationale behind the law does not apply to the surrogate mother situation, the courts might construe the statute as a bar to the contract. Because Indiana public policy supports a strong family unit and the surrogate's services can help create that family, the contract should be valid. The uncertainty of the law, however, leaves the parties entering such an arrangement in a precarious situation. Even if the contract is valid, Indiana's presumption of paternity law¹⁷² creates a problem if the surrogate is married. Another obstacle is the adop-

¹⁶⁸The Surrogate Parenting Association contracts require the adopting couple to take the child regardless of its health. See Markoutsas, *supra* note 3, at 104.

¹⁶⁹See note 122 *supra*.

¹⁷⁰See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14-31 (2d ed. 1977).

¹⁷¹IND. CODE § 35-46-1-4(b) (Supp. 1981).

¹⁷²*Id.* § 31-6-6.1-9.

tion statute prohibiting a mother from consenting to adoption prior to the child's birth.¹⁷³

Protecting the child and mother is the policy underlying these statutes. These statutes, however, harm rather than protect the contracting parties and child in the surrogate mother situation. The legislature needs to examine the surrogate mother arrangement and to draft appropriate regulations that deal specifically with it.¹⁷⁴ Prohibiting the arrangement raises constitutional questions of invasion of privacy and unequal protection,¹⁷⁵ although failing to regulate surrogate mothering can jeopardize the interests of all the parties, especially those of the child.

Therefore, the legislature must draft statutes that apply to the surrogate mother arrangement. Exceptions to the presumption of paternity and consent statutes can be applied when a surrogate mother is involved. These exceptions would allow the surrogate to execute a valid consent which terminates her parental rights when the parties first enter the contract, not after the baby is born. An exception to the paternity presumption would make it easier for all parties, including the child, to establish the child's paternity and thus protect its inheritance rights.

The Uniform Parentage Act¹⁷⁶ addresses the status of an artificial insemination donor. It provides, in part, that a "donor of semen provided . . . for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."¹⁷⁷ The adoption of this section by Indiana might affect adversely the noncontractual remedies available to the parties to a surrogate mother contract, because the donor would not be considered the natural father, if the surrogate is married.¹⁷⁸ This provision might prevent the couple, the surrogate, and the child from establishing paternity; and, as a result, prevent a custody action by the couple or a support action by the surrogate in the event the contract is breached. If the surrogate is single, however, this provision of the Uniform Parentage Act seems to pose no obstacle because it is specifically directed to married women. The Uniform Parentage Act can serve as a model, however, for appropriate surrogate mother legislation.

Viewing the surrogate mother in the same manner as an artifi-

¹⁷³*Id.* § 31-3-1-6(b).

¹⁷⁴*See* [1982-1985] REP. H.R.L., *supra* note 8, at 2 for proposed legislation in Michigan.

¹⁷⁵*See* notes 42 & 53 *supra*.

¹⁷⁶9A U.L.A. 579 (Supp. 1982). Eight states have adopted the Uniform Parentage Act. Indiana is not one of them.

¹⁷⁷*Id.* § 5(b) at 593.

¹⁷⁸*See generally* Comment, *supra* note 5, at 614; *Surrogate Parenting*, *supra* note 1, at 59.

cial insemination donor would eliminate many of the legal problems inherent in a surrogate mother contract. That is, if the surrogate were considered only a carrier and not the legal mother of the child, she could not claim parental rights. If the biological father's wife consented to the surrogate arrangement, she could then be deemed the legal mother with parental rights and obligations to the child.¹⁷⁹ This treatment would eliminate the possibility of legal battles between the couple and the surrogate over adoption, paternity and custody. Furthermore, it could serve to make the child legitimate from conception by defining the biological father and his consenting wife as the legal parents. Finally, such a law would ensure that the couple would be liable for the child's care and support from the beginning of the pregnancy.

In addition to the proposed legislation, the state should require the licensing of any agencies specializing in matching surrogates with childless couples. The surrogate contract also should be subject to approval by a court. These provisions would be similar to traditional adoption laws.

All of these legislative proposals for a surrogate mother arrangement would eliminate the legal obstacles posed by existing family law. At the same time, the state would exercise enough control over the contract to protect the interests of all the parties.

VI. CONCLUSION

Indiana law does not create a complete barrier to the surrogate mother contract. A woman can be reimbursed for the legal and medical expenses of pregnancy and childbirth. But, whether she is allowed to receive additional fees will depend on the discretion of the Indiana courts. This Note has attempted to show that the surrogate mother contract does not violate public policy. Rather, it can further Indiana's policy of strengthening the family unit. Consequently, the Indiana courts should uphold the validity of the contract and allow additional fees to the mother.

Indiana's family laws also can help or hinder the contracting parties. While the paternity and adoption laws may protect the child, they also can create legal difficulties for the parties and, ultimately, the child. By drafting regulations that recognize the surrogate mother as providing a service, similar to the artificial insemination donor, the state can exercise control over the arrangement without infringing on the parties' rights of privacy.

BETTE J. DODD

¹⁷⁹Uniform Parentage Act § 5(a) treats a consenting husband as the child's natural father. 9A U.L.A. 592 (1979). See Keane, *supra* note 4, at 150.