

# Surrogate Motherhood Legislation: A Sensible Starting Point

## I. INTRODUCTION

Fifteen to twenty percent of the married couples in the United States have infertility problems.<sup>1</sup> Traditionally, those couples with infertility problems could establish a family only by adopting a child. However, due to the growing demand and decreasing supply of adoptable babies, adoption now involves a long waiting period for the adopting parents.<sup>2</sup>

New reproductive technologies provide many infertile couples with other options. When the husband of a married couple is infertile, the wife may be artificially inseminated by sperm from a sperm bank. When the wife of a married couple is infertile, sperm from the husband may be used to artificially inseminate a woman who is capable of conceiving and carrying a child.<sup>3</sup> The latter option is commonly referred to as surrogate motherhood.

Surrogate motherhood is a technological solution to infertility, but its legal status remains uncertain. Because it is a practice not contemplated by existing state and federal laws, surrogate motherhood currently exists in legal limbo.

The legal issues and conflicts regarding surrogate motherhood have been identified and debated. There is now an urgent need for state legislatures to respond to the debate by enacting laws clarifying the legality of surrogate motherhood. Proposals have been offered in many legislatures but no proposal has been enacted in any jurisdiction.<sup>4</sup>

The purpose of this Note is to present the legal issues and conflicts regarding surrogate motherhood, to discuss the attempts of legislators to resolve those issues and conflicts, and to propose principled legislation to legalize and regulate the practice of surrogate motherhood.

## II. LEGAL ISSUES

The state's ability to regulate or prohibit surrogate motherhood depends upon the state interests at stake and whether or not the practice is protected by the federal constitution.

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<sup>1</sup>L.A. Daily J., May 21, 1982, at 2, col. 2. See also Annas, *Fathers Anonymous: Beyond the Best Interest of the Sperm Donor*, CHILD WELFARE, March 1981, at 164.

<sup>2</sup>Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. OF AM. ACAD. OF PSYCHIATRY & L. 21 (1984).

<sup>3</sup>A third possibility is that a viable sperm may fertilize a viable egg outside of a woman's body (*in vitro* fertilization). The resulting conceptus may then be implanted in the uterus of a woman who is capable of carrying the child.

<sup>4</sup>See *infra* note 60.

### A. Constitutional Right To Privacy

The United States Supreme Court has recognized procreative freedom as a fundamental right that falls within the broader constitutionally protected right to privacy.<sup>5</sup> Proponents of surrogate motherhood argue that the practice falls within this constitutionally protected area and, therefore, cannot be prohibited by the state.

The right to privacy was first applied to the marital relationship in *Griswold v. Connecticut*.<sup>6</sup> In *Griswold*, the Supreme Court invalidated a Connecticut statute that forbade the use of contraceptives. In its opinion, the Court identified various "zones of privacy"<sup>7</sup> guaranteed by the Constitution,<sup>8</sup> and stated that marriage "deal[t] with a right of privacy older than the Bill of Rights. . . ."<sup>9</sup> Therefore, the state could not achieve its goals by means that would be destructive to the marriage relationship.<sup>10</sup>

The scope of constitutional protection of procreation was defined in cases following *Griswold*. In *Eisenstadt v. Baird*,<sup>11</sup> the Court expanded the scope of procreative freedom to include unmarried individuals. At issue in *Eisenstadt* was a Massachusetts statute that made distribution of contraceptives to unmarried individuals a criminal offense. In finding the Massachusetts statute unconstitutional, the Court stated, "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."<sup>12</sup>

Further expansion of the scope of constitutional protection came in *Roe v. Wade*,<sup>13</sup> where the Court held that a woman's decision to abort

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<sup>5</sup>See *infra* notes 6-19.

<sup>6</sup>381 U.S. 479 (1965).

<sup>7</sup>*Id.* at 484.

<sup>8</sup>Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

381 U.S. at 484.

<sup>9</sup>381 U.S. at 486.

<sup>10</sup>*Id.* at 485.

<sup>11</sup>405 U.S. 438 (1972).

<sup>12</sup>*Id.* at 453.

<sup>13</sup>410 U.S. 113 (1973).

a pregnancy was within the right to privacy.<sup>14</sup> Therefore, the right to privacy encompassed both the decision to become pregnant and the decision to terminate that pregnancy. However, the Court noted that the right to personal privacy was not absolute and that the state could still regulate the right upon showing a "compelling state interest".<sup>15</sup> When a "compelling state interest" was shown, the standard for state regulation was the least restrictive means possible, which meant that the state could not impose regulations broader than necessary to protect its own "compelling interest".<sup>16</sup>

The state's limited ability to intervene into matters of procreative freedom was further explained in *Carey v. Population Services International*.<sup>17</sup> In invalidating a New York statute restricting the sale, distribution and advertising of contraceptives, the Court stated that the outer bounds of the right of privacy have not been determined.<sup>18</sup> The Court explained that an individual's right to make decisions involving procreation is not protected from all governmental intrusions; rather, it is protected from unjustified governmental intrusions.<sup>19</sup>

The relation of these cases to surrogate motherhood has been explained by professor John Robertson of the University of Texas at Austin:

The principle underlying these holdings [referring to the line of cases from *Griswold* through *Roe v. Wade*] includes the right of a married couple to have children coitally. If so, it is difficult to see how noncoital, collaborative reproduction by married persons can be treated differently. If married persons have a right to have and raise children, it should follow that they have the right to enlist the support of physicians and others to obtain reproductive factors (sperm, eggs or uterus) that will enable them to do so.<sup>20</sup>

Professor Robertson's argument is forceful, but how far does the right extend? Does it extend to paying the surrogate mother a fee for her role as a surrogate mother? A circuit court in Michigan addressed this question in *Doe v. Kelley*.<sup>21</sup> The plaintiffs in *Doe v. Kelley* were an infertile couple, John and Mary Doe, and a surrogate mother, Mary

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<sup>14</sup>*Id.* at 155.

<sup>15</sup>*Id.* (quoting *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969)).

<sup>16</sup>410 U.S. at 155.

<sup>17</sup>431 U.S. 678 (1977).

<sup>18</sup>*Id.* at 684.

<sup>19</sup>*Id.* at 687.

<sup>20</sup>Billig, *High Tech Earth Mothering*, 9 DISTRICT LAWYER 56, 57 (1985).

<sup>21</sup>6 Fam. L. Rep. (BNA) 3011 (Cir. Ct. Mich. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

Roe. The surrogate mother had agreed to an arrangement whereby she and John Doe would conceive a child through artificial insemination. Upon birth of the child, Mary Roe would relinquish the child to John and Mary Doe for adoption. Mary Roe would receive medical expenses and a payment of five thousand dollars from the Does for her part in the arrangement.

The plaintiffs alleged that the Michigan adoption statute prohibiting the payment of fees (other than court approved fees) in connection with an adoption infringed upon their right to privacy.<sup>22</sup> The court held that the Michigan statute did not infringe upon the plaintiffs' right to privacy.<sup>23</sup> The court explained that

[t]he right to adopt a child based upon the payment of five thousand dollars is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the court) are not constitutionally infirm.<sup>24</sup>

Even assuming that the plaintiffs' arrangement was within the right to privacy, the state still could interfere because it has a compelling interest in preventing the commercialism of babies. According to the court, the surrogate was at least partly induced to participate in the surrogate arrangement by the payment of the five thousand dollar fee, and such commercialism violated state public policy.<sup>25</sup> Consequently, while use of a surrogate mother *per se* was found to be within the constitutionally protected right to privacy, the state could prohibit payment of a fee to the surrogate. The court considered such a restriction appropriately narrow to protect only the state interest in preventing the commercialism of babies.<sup>26</sup>

### B. Fourteenth Amendment Equal Protection

Another constitutional argument raised by proponents of surrogate motherhood is based upon the equal protection mandated by the Fourteenth Amendment. The artificial insemination of women by sperm received from a sperm bank is now widely accepted and twenty-eight states have laws providing that a sperm donor recipient and her husband are the legal parents of a child conceived and born from artificial

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<sup>22</sup>*Id.* at 3012.

<sup>23</sup>*Id.* at 3013.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 3014.

<sup>26</sup>*Id.* at 3013-14.

insemination.<sup>27</sup> These laws were enacted to protect an anonymous donor to a sperm bank from legal responsibility for the child conceived from his sperm.<sup>28</sup> Proponents of surrogate motherhood argue that the absence of an analogous law allowing a natural father and his wife to be the legal parents of a child conceived from the artificial insemination of a surrogate mother (the egg donor) violates the equal protection mandated by the Fourteenth Amendment.<sup>29</sup> This Fourteenth Amendment argument is problematic because the genetic analogy of the sperm-donating anonymous insemination donor to the egg-donating surrogate mother is inaccurate. The role of the sperm donor through a sperm bank is detached and anonymous. However, the role of the surrogate mother is intimate. The surrogate mother carries the child through nine months of gestation. For those nine months the developing fetus is intimately biologically connected to the surrogate. Also, the physiological and psychological

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<sup>27</sup>ALA. CODE § 26-17-21 (1986); ALASKA STAT. § 25.20.045 (1986); ARK. STAT. ANN. § 61-141 (1971); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. §§ 45-69f (1981); FLA. STAT. ANN. § 742.11 (West 1986); GA. CODE ANN. §§ 74-101.1 (Harrison 1981); IDAHO CODE § 39-5405 (1985); ILL. ANN. STAT. ch. 40, § 1453 (Smith-Hurd 1981); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West 1984); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MD. GEN. PROV. CODE § 20-214 (1982); MICH. COMP. LAWS ANN. §§ 333.2824, 700.111 (West 1980); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. § 126.061 (1985); N.J. STAT. ANN. § 9:17-44 (West 1987); N.Y. DOM. REL. LAW § 73 (Consol 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West 1987); OR. REV. STAT. § 109.239, .243, .247 (1983); TEX. FAM. CODE ANN. § 12.03 (Vernon 1986); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (1986); WIS. STAT. ANN. § 767.47(9) (West 1981), § 891.40 (1987); WYO. STAT. § 14-2-103 (1986).

<sup>28</sup>Section 5 of the Uniform Parentage Act provides:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician 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.

UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592-93 (1979). See also Billig, *High Tech Earth Mothering*, 9 DISTRICT LAWYER 56, 58 (1985).

<sup>29</sup>Craig v. Boren, 429 U.S. 190, 197 (1976), has settled the standard for review ("[C]lassification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

changes that occur in a woman during pregnancy are unique. Therefore, Fourteenth Amendment support for surrogate motherhood based upon the anonymous insemination donor statutes is doubtful.

### C. Family Integrity

The right to family integrity is protected by both the United States Constitution and by state laws. On the federal level, the Supreme Court has interpreted the Fourteenth Amendment to the Constitution as protecting family integrity.<sup>30</sup> Because protection for family integrity is rooted in the Constitution, the state must have a "compelling interest"<sup>31</sup> to regulate family matters. The state has a compelling interest in the welfare of children,<sup>32</sup> and the family law statutes are designed to protect children and the integrity of the family. For example, Indiana Code § 31-6-1-1 states that "[i]t is the policy of this state and the purpose of this article . . . to strengthen family life by assisting parents to fulfill their parental obligations,"<sup>33</sup> and Indiana Code § 31-6-6.1-11 provides that in child custody cases "[t]he court shall determine custody in accord with the best interests of the child."<sup>34</sup>

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<sup>30</sup>*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children."); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953).

<sup>31</sup>*Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>32</sup>*In re Joseph*, 416 N.E.2d 857, 860 (Ind. Ct. App. 1981).

<sup>33</sup>IND. CODE § 31-6-1-1 (1982).

<sup>34</sup>IND. CODE § 31-6-6.1-11 (Supp. 1986) provides:

- (a) The court shall determine custody in accord with the best interests of the child. In determining the child's best interests, there shall be no presumption favoring either parent. The court shall consider all relevant factors, including:
- (1) the age and sex of the child;
  - (2) the wishes of the child's parents;
  - (3) the wishes of the child;
  - (4) the interaction and interrelationship of the child with his parents, and his siblings, and with any other person who may significantly affect the child's best interest;
  - (5) the child's adjustments to his home, school, and community; and
  - (6) the mental and physical health of all individuals involved.
- (b) The custodial parent may determine the child's upbringing, which includes his education, health care, and religious training, unless the court determines that the best interests of the child require a limitation on his authority.
- (c) The court may order the probation department, the county department of public welfare, or any licensed child-placing agency to supervise the placement to insure that the custodial or visitation terms of the decree are carried out if:

Opponents of surrogate motherhood contend that surrogate motherhood psychologically damages children by treating them as commercial objects.<sup>35</sup> Critics also contend that surrogate motherhood destroys the family unit by displacing the child from one of his biological parents.<sup>36</sup>

(1) both parents or the child request supervision; or

(2) the court finds that without supervision the child's physical health and well-being would be endangered or his emotional development significantly impaired.

(d) The court may interview the child in chambers to ascertain his wishes. The court shall permit counsel to be present at this interview, which must be on the record.

(e) The court may modify an order determining custody rights whenever modification would serve the best interests of the child.

(f) If an individual who has been awarded custody of a child under this section intends to move to a residence (other than a residence specified in the custody order) that is outside Indiana or one hundred (100) miles or more from the individual's county of residence, that individual must file a notice of that intent with the clerk of the court that issued the custody order and send a copy of the notice to each noncustodial parent (as defined in section 12.1 [31-6-6.1-12.1] of this chapter).

IND. CODE § 31-3-1-6 (1982) provides:

(a) Except as otherwise provided in this section, a petition to adopt a child under eighteen [18] years of age may be granted only if written consent to adoption has been executed by:

(1) each living parent of a child born in wedlock;

(2) the mother of a child born out of wedlock and the father of such a child whose paternity has been established by a court proceeding;

(3) any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought;

(4) the court having jurisdiction of the custody of the child, if the legal guardian or custodian of the person of the child is not empowered to consent to the adoption;

(5) the child to be adopted, if more than fourteen [14] years of age; or

(6) the spouse of the child to be adopted.

A parent under the age of eighteen [18] years may consent to an adoption without the concurrence of his parent or parents, or the guardian of his person unless the court, in its discretion, determines that it is in the best interest of the child to be adopted to require such a concurrence.

(f) A consent to adoption may not be withdrawn after the entry of the decree of adoption. 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.

<sup>35</sup>Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 235 (1985).

<sup>36</sup>Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & Soc. PROBS. 1, 17 (1986) ("It is the basic working assumption of our society that children belong with their biological parents whenever possible.").

Conversely, proponents of surrogate motherhood contend that infertile couples who are willing to have children by means of a surrogate mother, despite the potential problems involved, are just as capable of forming and nurturing a strong family unit as any fertile married couple.<sup>37</sup>

#### D. *Baby Selling*

The greatest legal obstacle to surrogate motherhood is the state's prohibition of child selling.<sup>38</sup> A natural mother is prohibited from receiving any fee in connection with an adoption or termination of her parental rights.<sup>39</sup> Some property may be transferred in a supervised adoption, such as reasonable attorney's fees, medical expenses, and other court approved fees.<sup>40</sup> Such payments are for the reasonable expenses that are incurred in connection with the adoption process; it is the transfer of additional funds to entice a mother to give up her child for adoption that is prohibited.

The paradigm situation contemplated by the law is where an unwed mother, faced with an unwanted pregnancy, is approached by "baby brokers" who offer her a fee to induce her to give up her child for adoption. Offering a fee to a mother in this situation can be an un-

<sup>37</sup>Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 815 (1982).

<sup>38</sup>See, e.g., IND. CODE § 35-46-1-4 (1982) which provides:

(b) Except for property transferred or received:

(1) under a court order made in connection with a proceeding under I.C. 31-1-11.5 or I.C. 31-6-5; or

(2) under I.C. 35-46-1-9(b); a person who transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child commits child selling, a Class D felony.

(IND. CODE § 31-1-11.5-1 to -26 (Supp. 1986) governs dissolution of marriage. IND. CODE § 31-6-5-1 to -6 (Supp. 1986) governs termination of the parent-child relationship).

<sup>39</sup>See, e.g., IND. CODE § 35-46-1-9 (1982) which provides:

(a) Except as provided in subsection (b), a person who, with respect to an adoption, transfers or receives any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption commits profiting from an adoption, a Class D felony.

(b) This section does not apply to the transfer or receipt of:

(1) reasonable attorney's fees;

(2) hospital and medical expenses concerning childbirth and pregnancy incurred by the adopted person's natural mother;

(3) reasonable charges and fees levied by a child placing agency licensed under I.C. 12-3-2 or by a county department of public welfare; or

(4) other charges and fees approved by the court supervising the adoption.

<sup>40</sup>See, e.g., IND. CODE § 35-46-1-9(b) (1982). IND. CODE § 31-6-6.1-17 (1982) provides: The court may order the father to pay reasonable and necessary expenses of the mother's pregnancy and the childbirth, including the cost of prenatal care, delivery, hospitalization, and postnatal care.

conscionable inducement to give up a child, and is therefore prohibited.<sup>41</sup> The primary argument made by opponents of surrogate motherhood is that offering a fee to women to conceive, carry and bear children encourages those women to have children they do not want.<sup>42</sup> Proponents of surrogate motherhood distinguish the surrogate motherhood situation by responding that the surrogate mother is really being paid a fee for her services in assisting the infertile couple in having a child and not for giving up her child for adoption.<sup>43</sup>

Recently, the Supreme Court of Kentucky faced the child selling issue.<sup>44</sup> In a challenge by the attorney general of Kentucky to surrogate motherhood contracts, the court held that surrogate motherhood contracts did not violate Kentucky laws governing child selling.<sup>45</sup> Central to the court's holding was its finding that the surrogate's decision to bear a child was made prior to conception. The court stated:

The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedures are *not* avoiding the consequences of an unwanted pregnancy for fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.<sup>46</sup>

While the argument is well made that the surrogate mother is being paid a fee for her services rather than being paid to give up her child for adoption, the fee does necessarily inject some commercialism into the child bearing process.<sup>47</sup>

### *E. Consent to Adoption*

The state's policy governing parental consent to an adoption is connected to the state's interest in preventing baby selling and protecting family integrity. For example, in Indiana, a mother cannot consent to

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<sup>41</sup>*Surrogate Parenting v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986); *Doe v. Kelley*, 6 Fam. L. Rep. (BNA) 3011, 3013 (Cir. Ct. Mich. 1980); Bitner, *supra* note 35, at 235; Note, *supra* note 37, at 814.

<sup>42</sup>6 Fam. L. Rep. (BNA) at 3014; Note, *supra* note 37, at 812.

<sup>43</sup>Bitner, *supra* note 35, at 235.

<sup>44</sup>*Surrogate Parenting v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986).

<sup>45</sup>*Id.* at 211.

<sup>46</sup>*Id.* at 211-12.

<sup>47</sup>Katz, *supra* note 36.

an adoption until the child she is carrying is born.<sup>48</sup> The statute is potentially fatal to the surrogate motherhood agreement. The surrogate may, prior to conception, agree to consent to the adoption of her child but may revoke that agreement anytime during the pregnancy because the statute forbids her from validly consenting to the adoption of her child prior to the child's birth.<sup>49</sup> The purpose of the law is to prevent an expectant mother from making a hasty and later regretful decision to give up her child for adoption. However, surrogate motherhood falls outside of this purpose because the surrogate mother decides before becoming pregnant that she will assist an infertile couple to have a child of their own.<sup>50</sup>

### F. Legitimacy and Paternity

Finally, the state also has an interest in establishing paternity and the legitimacy of children. The legitimacy issue comes into play when a child is born to an unmarried surrogate mother. Such a child would be illegitimate under present law<sup>51</sup> and would suffer the stigma of being illegitimate. The child's inheritance rights would also be affected.<sup>52</sup> If

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<sup>48</sup>IND. CODE § 31-3-1-6 (1982) provides:

(b) The consent to adoption may be executed at any time after the birth of the child either in the presence of the court, in the presence of a notary public or other person authorized to take acknowledgements, or in the presence of a duly authorized agent of the state or county department of public welfare or licensed child-placing agency.

<sup>49</sup>*Id.*

<sup>50</sup>See *Surrogate Parenting*, 704 S.W.2d at 211-12.

<sup>51</sup>See 10 C.J.S. *Bastards* § 1 (1938):

<sup>52</sup>*E.g.*, IND. CODE § 29-1-2-7 (1982) provides:

(a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, and the making of family allowances.

(b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

The testimony of the mother may be received in evidence to establish such paternity and acknowledgment but no judgment shall be made upon the evidence of the mother alone. The evidence of the mother must be supported by corroborative evidence or circumstances.

When such paternity is established as provided herein such child shall be treated the same as if he were the legitimate child of his father, so that he and his issue shall inherit from his father and from his paternal kindred, both

the child is born to a married surrogate, then present law would presume that the surrogate's husband is the father.<sup>53</sup>

In the case of the unmarried surrogate mother, if all goes as planned in the surrogate motherhood arrangement, then subsequent adoption of the child by the natural father and his wife would solve the legitimacy problem.<sup>54</sup> It is when the unmarried surrogate wants to keep the child that the legitimacy problem arises. If the unmarried surrogate is successful in keeping the child, then the child would be illegitimate.<sup>55</sup>

descendants and collateral, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his father for the purpose of determining homestead rights, and the making of family allowances.

<sup>53</sup>*E.g.*, IND. CODE § 31-6-6.1-9 (Supp. 1986) provides:

(a) A man is presumed to be a child's biological father if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) he and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void under I.C. 31-7-6-2, I.C. 31-7-6-3, I.C. 31-7-6-4, or I.C. 31-7-6-6, or is voidable under I.C. 31-7-7, and the child is born during the attempted marriage or within three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) after the child's birth, he and the child's biological mother marry, or attempt to marry, each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void under I.C. 31-7-6-2, I.C. 31-7-6-3, I.C. 31-7-6-4, or I.C. 31-7-6-6, or is voidable under I.C. 31-7-7, and he acknowledged his paternity in writing filed with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health.

(b) If there is no presumed biological father under subsection (a), a man is presumed to be the child's biological father if, with the consent of the child's mother:

(1) he receives the child into his home and openly holds him out as his biological child; or

(2) he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health.

The presumption of paternity may be rebutted by "direct, clear, and convincing evidence." *R.D.S. v. S.L.S.*, 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

<sup>54</sup>*E.g.*, IND. CODE § 29-1-2-8 (1982) provides:

For all purposes of intestate succession, including succession by, through or from a person, both lineal and collateral, an adopted child shall be treated as a natural child of his adopting parents; and he shall cease to be treated as a child of his natural parents and of any previous adopting parents: Provided, that if a natural parent of a legitimate or illegitimate child shall have married the adopting parent, the adopted child shall inherit from his natural parent as though he had not been adopted, and from his adoptive parent as though he were the natural child; and Provided further, That if a person who is related to a child within the sixth degree adopts such child, such child shall upon the occasion of each death in his family have the right of inheritance through his natural parents or adopting parents, whichever is greater in value in each case.

<sup>55</sup>*See* 10 C.J.S. *Bastards* § 1 (1938).

In the case of the married surrogate, current law provides a solution to the paternity problem. Paternity of the natural father could be acknowledged in the surrogate motherhood contract and adjudicated before birth of the child.<sup>56</sup>

### III. LEGISLATIVE PROPOSALS

Recently, *In re Baby M*<sup>57</sup> raised national awareness of the problems surrounding surrogate motherhood. *Baby M* involved a surrogate motherhood contract between William Stein, the natural father of "Baby M", and Mary Beth Whitehead, the surrogate mother. The contract obligated the natural father to pay the surrogate a fee of 10,000 dollars plus all medical expenses. In exchange for these payments, the surrogate was obligated to relinquish the newborn child to the natural father and to terminate her parental rights. However, after "Baby M" was born, the surrogate mother refused to relinquish the child and terminate her parental rights. The natural father then sued the surrogate to enforce the surrogate motherhood contract. The case was decided by Judge

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<sup>56</sup>*E.g.*, IND. CODE § 31-6-6.1-2 (Supp. 1986) provides:

(a) A paternity action may be filed by the following persons:

- (1) The mother, or expectant mother.
- (2) A man alleging that he is the child's biological father, or that he is the expectant father of an unborn child.
- (3) The mother and a man alleging that he is her child's biological father, or by the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly.
- (4) A child.

A person under the age of eighteen [18] may file a petition if he is competent except for his age. A person who is otherwise incompetent may file a petition through his guardian, guardian ad litem, or next friend.

(b) The state department of public welfare or a county department of public welfare may file a paternity action if:

- (1) the mother;
- (2) the person with whom the child resides; or
- (3) the director of the county department of public welfare; has executed an assignment of support rights under Title IV-D of the federal Social Security Act (42 U.S.C. 651 et. seq.).

(c) In every case, the child, the child's mother, and any person alleged to be the father are necessary parties to the action.

In *Syrkowski v. Appleyard*, 8 Fam. L. Rep. (BNA) 2139 (Cir. Ct. Mich. 1981), the plaintiff Syrkowski filed for an order of filiation under the *Michigan Paternity Act* alleging that pursuant to a surrogate motherhood arrangement he was the father of the defendant Appleyard's unborn child. The circuit court held that it had no jurisdiction in the case because the subject matter was beyond the scope of the *Michigan Paternity Act*. *Id.* The Michigan Court of Appeals affirmed the decision, 122 Mich. App. 506, 333 N.W.2d 90, 93-94 (Mich. App. 1983); however, the Michigan Supreme Court reversed and remanded, holding that the plaintiff's request was within the scope of the *Paternity Act*. 420 Mich. 367, 362 N.W.2d 211, 214 (1985).

<sup>57</sup>13 Fam. L. Rep. (BNA) 2001 (Super. Ct. N.J. 1987).

Sorkow of the New Jersey Superior Court in Bergen County. In Judge Sorkow's opinion, surrogate motherhood contracts were not within the current adoption statutes and, therefore, could be specifically enforced.<sup>58</sup> However, the child custody decision was not based upon the surrogate motherhood contract but upon the best interests of the child, and in this case the best interests of the child were served by granting custody to the natural father.<sup>59</sup>

The *Baby M* case highlights the urgent need for a legislative solution to the problems posed by surrogate motherhood. Legislators in many jurisdictions have offered proposals to legalize and regulate the practice of surrogate motherhood,<sup>60</sup> and although the proposed regulations have been aimed at protecting the state interests at stake, none of the proposals have been enacted.<sup>61</sup> The proposals vary in complexity and requirements. The following is a summary of the important features of many of these proposals.

### A. Who May Participate

Alaska H.B. Nos. 497 and 498 are, together, the simplest and broadest proposals regulating surrogate motherhood.<sup>62</sup> The proposals

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<sup>58</sup>*Id.* at 2018. Conversely, in a recent adoption case in Indiana, *Miroff v. Surrogate Mother*, a Marion County Superior Court judge ruled that surrogate mother contracts were within the Indiana Adoption Statutes and that the contracts violated those statutes by providing for payments to the surrogate in excess of the allowable medical expenses and attorneys fees. 13 Fam. L. Rep. (BNA) 1260 (Super. Ct. Ind. 1987). The judge also ruled that surrogate motherhood contracts violated "the public policy prohibiting baby-selling." *Id.*

<sup>59</sup>13 Fam. L. Rep. (BNA) at 2026.

<sup>60</sup>H.B. 497, Alaska (1981); H.B. 498, Alaska (1981); Assembly Bill 3771, Cal. (April 6, 1982; amended May 18, 1982; amended June 17, 1982; amended August 2, 1982); Comm. B. 5316, Conn. (1983); H.B. 1009, Haw. (1983); S.B. 361, Kan. (1983); S.B. 485, Kan. (1984); H.B. 1552, Md. (1985); H.B. 1595, Md. (1984); H.B. 4555, Mich. (1985); H.F. 534, Minn. (1983); H.B. 2693, Or. (1983); H.B. 3491, S.C. (1982).

Ala. H.B. 593 (1982) would make surrogate motherhood a class A misdemeanor. Freed and Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L. Q. 289, 299 (1983).

Ky. H.B. 668 (1986) would amend the Kentucky statute on child selling, KY. REV. STAT. ANN. § 199.590 (Michie 1986), to include the following subsection:

(3) No person, agency, institution, or intermediary shall be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. No person, agency, institution or intermediary shall receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection are void.

The Kentucky proposal did not reach the floor of the General Assembly.

<sup>61</sup>"Currently, legislatures in at least 13 states (California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, and Rhode Island) and the District of Columbia have bills pending that relate to surrogate parenthood." 13 Fam. L. Rep. (BNA) at 1260.

<sup>62</sup>H.B. 497, Alaska (1981); H.B. 498, Alaska (1981).

simply permit the enforceability of surrogate motherhood contracts without further elaboration.<sup>63</sup> Seven states' proposals require the natural father (artificial insemination donor) to be married,<sup>64</sup> and two of those proposals require that the natural father and his wife be an infertile couple.<sup>65</sup> Four states' legislative proposals allow a single natural father to participate in a surrogate motherhood arrangement.<sup>66</sup>

Some proposals do not specify an age requirement for the participants.<sup>67</sup> When specified, the age requirements for a surrogate mother<sup>68</sup> and the natural father<sup>69</sup> are eighteen years of age or older. One proposal does require the surrogate to be at least twenty-one years old.<sup>70</sup>

### *B. Physical and Psychological Examination; Investigation of the Home*

Nearly every proposal requires that the surrogate mother and natural father submit to physical examination and genetic screening.<sup>71</sup> These examinations are required to evaluate the capacity of the natural father and the surrogate to produce a normal, healthy child, free of genetic defects.<sup>72</sup> The surrogate is also required to undergo psychological eval-

<sup>63</sup>*Id.*

<sup>64</sup>Assembly Bill 3771 §§ 7501, 7502(a), Cal. (amended Aug. 2, 1982); S.B. 361 §§ 1, 6(a)(1), Kan. (1983); S.B. 485 § 1, Kan. (1984); H.B. 1552 § 5-209(1), Md. (1985); H.B. 1595 § 5-209(A), Md. (1984); H.B. 4555 § 2(b), Mich. (1985); H.B. 3491 §§ 20-7-3640(B)(5), (B)(7), 29-7-3680(C), S.C. (1982).

<sup>65</sup>Assembly Bill 3771 §§ 7501, 7502(a), Cal. (amended Aug. 2, 1982); H.B. 4555 § 4(1)(e), Mich. (1985).

<sup>66</sup>Comm. B. 5316 § 8(a), Conn. (1983); H.B. 1009 § 9(a)(13), (19), Haw. (1983); H.F. 534 § 4, Minn. (1983); H.B. 2693 § 5(3), Or. (1983).

<sup>67</sup>H.B. 497, Alaska (1981); H.B. 498, Alaska (1981); H.B. 4555, Mich. (1985); H.F. 534, Minn. (1983).

<sup>68</sup>Assembly Bill 3771 § 7505(b)(6), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 1(3), Conn. (1983); H.B. 1009 § 1(8), Haw. (1983); S.B. 485 § 5(a)(3), Kan. (1984); H.B. 1552 § 5-209(2), Md. (1985); H.B. 1595 § 5-209(B), Md. (1984); H.B. 2693 § 5(2), Or. (1983); H.B. 3491 § 20-7-3620(F), S.C. (1982). California Assembly Bill 3771 § 7505(d)(7) (amended May 18, 1982) required the surrogate to be at least twenty-one years of age, but the proposal was later amended on Aug. 2, 1982 requiring the surrogate to be at least eighteen years of age.

<sup>69</sup>Comm. B. 6316 § 1(2), Conn. (1983); H.B. 1009 § 1(5), Haw. (1983); H.B. 1552 § 5-209(1), Md. (1985); H.B. 1595 § 5-209(A), Md. (1984); H.B. 2693 § 5(1), Or. (1983); H.B. 3491 § 20-7-3620(E), S.C. (1982). The South Carolina proposal also requires the natural father's wife to be at least eighteen years of age. H.B. 3491 § 20-7-3620(H), S.C. (1982).

<sup>70</sup>S.B. 361 § 5(a)(6), Kan. (1983).

<sup>71</sup>Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(10), (13), Conn. (1983); H.B. 1009 § 9(10), (14), Haw. (1983); S.B. 361 § 4(a)(3) (required of the surrogate only), Kan. (1983); S.B. 485 § 4(a)(1) (required of the surrogate only), Kan. (1984); H.B. 1552 § 5-216(6), (8), Md. (1985); H.B. 1595 § 5-216(6), (8), Md. (1984); H.F. 534 § 10(1)(j), (2)(c), Minn. (1983); H.B. 2693 § 7(1), Or. (1983).

<sup>72</sup>*Id.*

uation to determine whether or not she has any mental disability that would prohibit her from successfully abiding by the terms of the surrogate motherhood contract.<sup>73</sup>

Michigan House Bill No. 4555 mandates counseling of the natural father and his wife by a registered marriage counselor, a licensed psychologist, a psychiatrist, or a qualified employee of a licensed child placement agency. The counselor must sign a statement certifying that he has explained "the consequences and responsibilities of surrogate parenthood"<sup>74</sup> to the natural father and his wife and in the counselor's professional judgment the natural father and his wife understand these consequences and are prepared to undertake the responsibility.<sup>75</sup> With respect to the prospective surrogate, the Michigan proposal requires a qualified counselor (a licensed psychologist, physician, or qualified employee of a licensed child placement agency) to sign a statement attesting that the counselor has discussed the "potential psychological consequences of her consent"<sup>76</sup> to termination of parental rights and responsibilities and that the surrogate mother is capable of such consent.<sup>77</sup> Also, in the surrogate motherhood agreement, the surrogate must agree to submit to reasonable medical, psychiatric, or psychological exams or genetic screening requested by the natural father with the test results released to him.<sup>78</sup>

Under Maryland House Bill 1595 a natural father may reasonably request a surrogate to undergo pre-insemination psychiatric or psychological evaluation and may then require the surrogate to undergo psychological counseling prior to and after the birth of the child if recommended as a result of the psychiatric or psychological evaluation.<sup>79</sup>

Hawaii House Bill 1009 and Connecticut Committee Bill 5316 regulate the role of the inseminating physician.<sup>80</sup> The physician may not inseminate a surrogate mother unless he is satisfied that the natural father and the surrogate are mentally and physically suitable.<sup>81</sup>

In California Assembly Bill 3771 it is unclear whether the parties may choose to proceed with the surrogate motherhood arrangement if a physical, genetic, or psychological defect or problem is revealed by

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<sup>73</sup>Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(5), Conn. (1983); H.B. 1009 § 9(a)(5), Haw. (1983); S.B. 361 § 4(a)(2), Kan. (1983); S.B. 485 § 4(a)(3), Kan. (1984); H.F. 534 § 10(1)(e), Minn. (1983).

<sup>74</sup>H.B. 4555 § 4(1)(c), Mich. (1985).

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* § 4(1)(f).

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* § 7(1)(a).

<sup>79</sup>H.B. 1595 § 5-216(7)(I), Md. (1984); H.B. 1552 § 5-216(7)(I), Md. (1985) (This provision is analogous to Maryland H.B. 1595 § 5-216(7)(I), but the request may be made by the natural father or his spouse.).

<sup>80</sup>Comm. B. 5316 § 9, Conn. (1983); H.B. 1009 § 10, Haw. (1983).

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

the required evaluation.<sup>82</sup> Five of the proposals, however, specifically leave the decision to proceed with the surrogate motherhood arrangement up to the parties themselves.<sup>83</sup> On the other hand, the Oregon proposal explicitly forbids insemination of a potential surrogate mother if the medical examinations reveal that a genetic defect or disease could be transmitted to the child,<sup>84</sup> and the Connecticut and Hawaii proposals forbid insemination of the surrogate unless the "physician is professionally satisfied with the mental and physical suitability of the surrogate and the natural father."<sup>85</sup>

As a precondition to judicial approval of a surrogate motherhood contract, several proposals require an investigation of the home of the natural father and his wife by a social welfare agency to determine the suitability of the home for a child.<sup>86</sup> The purpose of the investigation is to determine the capacity of the natural father and his wife to love, care and provide for the child born to the surrogate.<sup>87</sup> The probate judge reviews the agency's report, and if the report recommends that adoption of the child born to the surrogate be permitted, then the judge has ten days to certify the home of the natural father and his wife as suitable for the child. If the report recommends that adoption of the child born to the surrogate not be granted, then the judge must conduct a hearing to review the report and receive any additional evidence concerning suitability of the home. Based upon this hearing, the judge then certifies the home of the natural father and his wife as either suitable or unsuitable for adoption of the child born to the surrogate.<sup>88</sup>

### C. *The Contract*

Most legislative proposals require the parties to a surrogate motherhood contract to be represented by independent legal counsel. The requirement removes the potential for conflicts of interest that the attorney could encounter by representing both sides to the contract.<sup>89</sup> These

<sup>82</sup>Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982).

<sup>83</sup>S.B. 361 § 4(b), Kan. (1983); S.B. 485 § 4(b), Kan. (1984); H.B. 1552 § 5-216(6), (8), Md. (1985); H.B. 1595 § 5-216(6), (8), Md. (1984); H.B. 4555 § 5(1)(a), Mich. (1985).

<sup>84</sup>H.B. 2693 § 7, Or. (1983).

<sup>85</sup>Comm. B. 5316 § 9, Conn. (1983); H.B. 1009 § 10, Haw. (1983).

<sup>86</sup>Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); H.F. 534 § 3, Minn. (1983); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); S.B. 485 § 6, Kan. (1984).

<sup>87</sup>H.F. 534 § 3, Minn. (1983); Comm. B., 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); S.B. 485 § 6, Kan. (1984).

<sup>88</sup>H.F. 534 § 3(3), Minn. (1983); Comm. B. 5316 § 7(c), Conn. (1983); H.B. 1009 § 3(c), Haw. (1983).

<sup>89</sup>Assembly Bill 3771 § 7504, Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 5, Conn. (1983); H.B. 1009 § 8(b), Haw. (1983); H.B. 1552 § 5-215, Md. (1985); H.B. 1595 § 5-215, Md. (1984); H.B. 4555 § 10, Mich. (1985); H.F. 534 § 9(2), Minn. (1983).

proposals also require the contract to establish the expenses associated with the surrogate's pregnancy that will be paid by the natural father and his wife and to specify the fee that will be paid to the surrogate when she completes contract performance.<sup>90</sup> The surrogate agrees to terminate her parental rights in the child that she bears,<sup>91</sup> and the natural father<sup>92</sup> and his wife<sup>93</sup> agree to accept the child born to the surrogate, regardless of the child's condition.

Five legislative proposals require the contract to contain certain medical provisions.<sup>94</sup> Three of the proposals require the surrogate to agree to once a month prenatal exams for the first seven months of her pregnancy and twice a month prenatal exams for the last two months of her pregnancy.<sup>95</sup> The surrogate also agrees to follow any instructions from her physician.<sup>96</sup>

Three of the legislative proposals contain a potentially unconstitutional provision. Minnesota H.F. 534 requires the surrogate to contractually waive her constitutional right to an abortion unless it is necessary to save the surrogate's life.<sup>97</sup> Hawaii House Bill 1009 and Connecticut Committee Bill 5316 contain similar provisions, but the standard for permitting the abortion is lower because the abortion need only be necessary for the physical health of the surrogate.<sup>98</sup> Such a contractual provision restricting a woman's right to abort a pregnancy probably

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<sup>90</sup>Assembly Bill 3771 § 7506(c)-(f), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(11)-(12), Conn. (1983); H.B. 1009 § 9(a)(12)-(13), Haw. (1983); H.B. 1552 § 5-216(11), Md. (1985); H.B. 1595 § 5-216(11), Md. (1984); H.B. 4555 § 7(3), Mich. (1985); H.F. 534 § 10(2)(a)-(b), Minn. (1983).

<sup>91</sup>Assembly Bill 3771 § 7506(a), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(3), Conn. (1983); H.B. 1009 § 4(c), Haw. (1983); H.B. 1552 § 5-212, Md. (1985); H.B. 1595 § 5-212, Md. (1984); H.B. 4555 §§ 4(1)(d),6(1), Mich. (1985); H.F. 534 § 6, Minn. (1983); H.B. 2693 § 6, Or. (1983).

<sup>92</sup>Comm. B. 5316 § 3(16), Conn. (1983); H.B. 1009 § 9(a)(18), Haw. (1983); H.F. 534 § 10(3)(b), Minn. (1983).

<sup>93</sup>Assembly Bill 3771 § 7506(h), Cal. (amended Aug. 2, 1982); H.B. 1552 § 5-211(B), Md. (1985); H.B. 1595 § 5-211(A), Md. (1984); H.B. 4555 § 4(1), Mich. (1985); H.B. 2693 § 6(3), Or. (1983).

<sup>94</sup>Comm. B. 5316 § 3(7)-(8), Conn. (1983); H.B. 1009 § 9(a)(7)-(8), Haw. (1983); H.B. 1552 § 5-216(5)-(7), Md. (1985); H.B. 1595 § 5-216(5)-(7), Md. (1984); H.F. 534 § 10(1)(g)-(h), Minn. (1983).

<sup>95</sup>Comm. B. 5316 § 3(8), Conn. (1983); H.B. 1009 § 9(a)(8), Haw. (1983); H.F. 534 § 10(1)(h), Minn. (1983). *See also* H.B. 1552 § 5-216(7)(I)(3), Md. (1985), and H.B. 1595 § 5-216(7)(I)(3), Md. (1984) (requiring the surrogate mother to submit to prenatal medical care upon the natural father's reasonable request).

<sup>96</sup>Comm. B. 5316 § 3(7), Conn. (1983); H.B. 1009 § 9(a)(7), Haw. (1983); H.F. 534 § 10(1)(g), Minn. (1983); H.B. 1552 § 5-216(5), Md. (1985); H.B. 1595 § 5-216(5), Md. (1984).

<sup>97</sup>H.F. 534 § 10(1)(i), Minn. (1983).

<sup>98</sup>Comm. B. 5316 § 3(9), Conn. (1983); H.B. 1009 § 9(a)(9), Haw. (1983).

violates *Roe v. Wade*.<sup>99</sup> It has been argued that a woman's constitutional right to an abortion is inalienable and, therefore, cannot be restricted by contract.<sup>100</sup>

Four of the bills provide a mechanism for early termination of the contract. Connecticut Committee Bill 5316, Hawaii House Bill 1009, and Minnesota H.F. 534 allow the natural father and his wife to terminate the contract upon written notice to the surrogate if the surrogate has not become pregnant within a reasonable time.<sup>101</sup> Kansas Senate Bill 485 additionally permits the surrogate to terminate the contract if she has not become pregnant within a reasonable time.<sup>102</sup>

Finally, most of the proposed bills require the natural father, his wife, the surrogate, and her husband, if she is married, to sign the contract.<sup>103</sup>

#### D. Technical Requirements

Some of the proposals require court approval of the surrogate motherhood contract prior to artificial insemination of the surrogate.<sup>104</sup> The Michigan bill requires signed statements by the medical professionals involved to be filed in probate court.<sup>105</sup> Many of the bills also require the natural father and his wife to establish an escrow account for all expenses and fees to be paid to the surrogate.<sup>106</sup> Once all of the statutory requirements have been met, the court approves the surrogate motherhood arrangement.<sup>107</sup>

Some bills also require paternity testing following the birth of the child.<sup>108</sup> The natural father and the husband of the surrogate, if she is married, are required to undergo paternity testing to establish that the

<sup>99</sup>Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986).

<sup>100</sup>*Id.*

<sup>101</sup>Comm. B. 5316 § 3(15), Conn. (1983); H.B. 1009 § 9(a)(17), Haw. (1983); H.F. 534 § 10(3)(a), Minn. (1983).

<sup>102</sup>S.B. 485 § 9(b)(5), Kan. (1984).

<sup>103</sup>Comm. B. 5316 §§ 5, 6(b)(3), 8(b)(3), Conn. (1983); H.B. 1009 § 8, Haw. (1983); S.B. 361 § 8(a), Kan. (1983); S.B. 485 § 9(a), Kan. (1984); H.B. 1552 § 5-216(1), Md. (1985); H.B. 1595 § 5-216(1), Md. (1984); H.F. 534 § 9, Minn. (1983); H.B. 2693 § 6, Or. (1983).

<sup>104</sup>Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); H.F. 534 § 3, Minn. (1983).

<sup>105</sup>H.B. 4555 §§ 4(1)(c), (e), (f), 9, Mich. (1985).

<sup>106</sup>Assembly Bill 3771 § 7506(f), Cal. (amended Aug. 2, 1982); H.B. 1009 § 9(a)(12), Haw. (1983); Comm. B. 5316 § 3(11), Conn. (1983); H.B. 1552 § 5-216(11), Md. (1985); H.B. 1595 § 5-216(11), Md. (1984); H.F. 534 § 10(2), Minn. (1983).

<sup>107</sup>Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); H.F. 534 § 3, Minn. (1983).

<sup>108</sup>Comm. B. 5316 § 13, Conn. (1983); H.B. 1595 § 5-216(10), Md. (1984); H.B. 1552 § 5-216(10), Md. (1985).

natural father is a potential father of the child born to the surrogate.<sup>109</sup>

### *E. Responsibilities and Risks*

Some of the proposed bills explicitly lay out the responsibilities of all parties to the surrogate motherhood contract and the risks that each party assumes in agreeing to the surrogate motherhood arrangement. For instance, Maryland House Bill 1552 makes it clear that during the period from conception to birth, parental rights and responsibilities for the child lie with the natural father and the surrogate; then starting at birth, parental rights and responsibilities for the child belong to the natural father and his wife.<sup>110</sup> Under Connecticut Committee Bill 5316, Minnesota H.F. 534, and Hawaii House Bill 1009, when the surrogate's sixth month of pregnancy is complete, the court issues an interim order giving child custody to the natural father and his wife.<sup>111</sup> The natural father and his wife have "exclusive authority to consent to all medical, surgical, psychological, educational and related services for the child."<sup>112</sup> This interim order becomes effective upon birth of the child.<sup>113</sup> The surrogate also agrees that she will not attempt to form a parent-child relationship with the child.<sup>114</sup> In addition, these three proposals state that the surrogate assumes the risk of potential complications and death from the pregnancy.<sup>115</sup>

Four bills also have rules that govern in the event that one or more parties to the contract dies. Connecticut Committee Bill 5316, Hawaii House Bill 1009, and Oregon House Bill 2693 establish that if one member of the contracting infertile couple dies before the child is born, then the other member assumes full responsibility for the child born to the surrogate.<sup>116</sup> The Connecticut and Hawaii bills establish that if both members of the infertile couple die before the child is born, then the surrogate has the option of either keeping the child or giving it up for adoption.<sup>117</sup> Michigan House Bill 4555 addresses the event of death to

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<sup>109</sup>*Id.* The Connecticut bill does not require the surrogate's husband to submit to paternity testing.

<sup>110</sup>H.B. 1552 § 5-211, Md. (1985).

<sup>111</sup>Comm. B. 5316 § 12, Conn. (1983); H.B. 1009 § 6, Haw. (1983); H.F. 534 § 7, Minn. (1983).

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>Comm. B. 5316 § 3(2), Conn. (1983); H.B. 1009 § 9(a)(2), Haw. (1983); H.F. 534 § 10(1)(b), Minn. (1983).

<sup>115</sup>Comm. B. 5316 § 3(4), Conn. (1983); H.B. 1009 § 9(a)(4), Haw. (1983); H.F. 534 § 10(1)(d), Minn. (1983).

<sup>116</sup>Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983); H.B. 2693 § 10, Or. (1983).

<sup>117</sup>Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983).

both members of the infertile couple but requires the surrogate to assume full responsibility for the child in that event.<sup>118</sup>

*F. Revocability; Remedies on Breach;  
Statutory Noncompliance*

Although these legislative proposals allow and regulate surrogate motherhood, not all proposals require enforcement of the surrogate motherhood contract. Michigan House Bill 4555 permits the surrogate at any time to revoke her consent to the termination of parental rights,<sup>119</sup> and Kansas Senate Bill 485 allows the surrogate to declare the contract void.<sup>120</sup>

The opposite position is taken by California Assembly Bill 3771, which permits the infertile couple to require specific performance from the surrogate if the surrogate breaches the contract.<sup>121</sup> In three proposed bills, the court decides whether or not the surrogate may keep the child, but the burden of proof is upon the surrogate to show by clear and convincing evidence that it is in the best interests of the child to remain with her.<sup>122</sup>

Surrogate motherhood arrangements that comply with the proposed bills are excepted from all conflicting state statutes,<sup>123</sup> and some of the proposed bills impose penalties for statutory noncompliance. Violation of Michigan House Bill 4555 is a misdemeanor punishable by imprisonment of up to ninety days, a fine of up to \$40,000, or both.<sup>124</sup> Violating Kansas Senate Bill 361 is a class C misdemeanor,<sup>125</sup> while Hawaii House Bill 1009 establishes a first violation of the proposal as a misdemeanor and the second violation as a class C felony.<sup>126</sup>

IV. SURROGATE MOTHERHOOD LEGISLATION: A SENSIBLE STARTING  
POINT

*A. Who May Participate*

It has been argued that surrogate motherhood falls within the constitutionally protected right to privacy and procreative freedom.<sup>127</sup> If the

<sup>118</sup>H.B. 4555 § 4(2)(3), Mich. (1985).

<sup>119</sup>*Id.* § 6(3).

<sup>120</sup>S.B. 485 §§ 2(b), 9(b)(4), Kan. (1984).

<sup>121</sup>Assembly Bill 3771 § 7551, Cal. (amended Aug. 2, 1982).

<sup>122</sup>Comm. B. 5316 § 14(d), Conn. (1983); H.B. 1009 § 7(c), Haw. (1983); H.F. 534 § 8(5), Minn. (1983).

<sup>123</sup>*See supra* note 60.

<sup>124</sup>H.B. 4555 § 3(2), Mich. (1985).

<sup>125</sup>S.B. 361 §§ 5(b), 6(b), Kan. (1983).

<sup>126</sup>H.B. 1009 § 8(c), Haw. (1983).

<sup>127</sup>*See* notes 6-20 *supra* and accompanying text.

practice is within this constitutionally protected area, then the state must show a "compelling state interest"<sup>128</sup> to regulate the practice. The United States Supreme Court has determined that states have a compelling state interest in protecting the best interests of children and in protecting the integrity of the family unit.<sup>129</sup> The tension between the right to privacy and the state's interests in children and family integrity makes legislative resolution of surrogate motherhood difficult. Also, because of the increasing demand and decreasing supply of adoptable children,<sup>130</sup> prohibiting surrogate motherhood would effectively deny many infertile couples the opportunity to have a family or would encourage those couples to seek a child through black market adoption.<sup>131</sup> Therefore, allowing the practice of surrogate motherhood serves the best interests of both the state and infertile couples who desire to use the practice. However, the precise impact of surrogate motherhood upon children born to the surrogate and upon family integrity is not yet known. Because unknown territory is being explored, a sensible, cautious first step approach to allowing the practice of surrogate motherhood would be to limit the practice to married couples with diagnosed infertility problems.

Surrogate motherhood could be restricted to married couples with diagnosed infertility problems and remain consistent with the Fourteenth Amendment to the Constitution. The reasoning adopted by the United States Supreme Court in *Katzenbach v. Morgan*<sup>132</sup> supports this approach. In that case, the Court upheld the constitutional validity of Section 4(e) of the Voting Rights Act of 1965, which provided that no person who had completed the sixth grade in a Puerto Rican public or accredited private school in which the classroom language was other than English could be denied the right to vote in federal, state, or local elections due to the inability to read or write English.<sup>133</sup> Section 4(e) precluded enforcement of the New York state election laws "requiring an ability to read and write English as a condition of voting."<sup>134</sup> One argument made by the plaintiffs, registered voters in New York City, was that because Section 4(e) applied only to Puerto Rican schools, it violated the Fourteenth Amendment by discriminating against non-"American-flag schools . . . in which the language of instruction was other than English."<sup>135</sup> The Court viewed Section 4(e) as a permissible limitation because rather than denying rights to a particular group (persons from

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<sup>128</sup>Roe v. Wade, 410 U.S. 113, 155 (1973).

<sup>129</sup>See *supra* note 30.

<sup>130</sup>Parker, *supra* note 2.

<sup>131</sup>Katz, *supra* note 36, at 7-8.

<sup>132</sup>384 U.S. 641 (1966).

<sup>133</sup>*Id.*

<sup>134</sup>*Id.* at 644.

<sup>135</sup>*Id.* at 656.

non-American flag schools), it *extended* rights to a group who were previously denied those rights by state law.<sup>136</sup> In speaking for the majority of the Court, Justice Brennan stated:<sup>137</sup>

[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did,"<sup>138</sup> . . . and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."<sup>139</sup>

Therefore, state legislation legalizing surrogate motherhood need not, at least initially, extend to all individuals both married and unmarried, but may be restricted to married couples with diagnosed infertility problems. If this initial legislation proved successful in protecting the state's interests in children and family integrity, then the state could consider *extending* the right to unmarried individuals. Both California Assembly Bill 3771 and Michigan House Bill 4555 are consistent with this approach in that those bills restrict surrogate motherhood to married couples with infertility problems.<sup>140</sup>

Another cautious part of the legislation would be a requirement that both members of the infertile couple and the surrogate be at least twenty-one years of age to participate in a surrogate motherhood arrangement. No other proposed bill requires the natural father, his wife, and the surrogate mother to be twenty-one years of age to participate in a surrogate motherhood arrangement. The rationale for requiring the minimum age is maturity level. A person twenty-one years of age or older is likely to be more mature than an individual who is under twenty-one years of age. This added maturity helps insure that the parties to the surrogate motherhood contract will be better able to fully appreciate the risks and responsibilities that they are undertaking in the surrogate motherhood arrangement. Support for the age requirement may be found by analogizing to the state's prohibition of the use or consumption of alcoholic beverages by a minor.<sup>141</sup> The state has authority under its police powers to impose such a restriction,<sup>142</sup> and part of the rationale for the prohibition is to protect minors from the harmful effects of intoxicating

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<sup>136</sup>*Id.* at 657.

<sup>137</sup>*Id.*

<sup>138</sup>*Roschen v. Ward*, 279 U.S. 337, 339 (1928).

<sup>139</sup>*Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1954).

<sup>140</sup>*See supra* note 65.

<sup>141</sup>*E.g.*, IND. CODE § 7.1-5-7-8 (Supp. 1986) provides:

“(a) It is a Class C misdemeanor for a person to recklessly sell, barter, exchange, provide, or furnish an alcoholic beverage to a minor.”

<sup>142</sup>*See Crane v. Campbell*, 245 U.S. 304 (1917).

liquors.<sup>143</sup> Analogously, the state would want to protect minors from the harmful effects of entering into a surrogate motherhood arrangement that they were not mature enough to successfully complete. However, the rationale for providing an age requirement in the surrogate motherhood arrangement extends beyond the rationale for prohibiting the use or consumption of alcoholic beverages by minors. The state must also protect the interests of the child that will be born to the surrogate, and it would not be in a child's best interest to be born to parents who were too immature to fully appreciate the responsibilities of parenthood. Therefore, the age requirement would be another cautious restriction designed to protect the state's interests and to enhance the probability of a successful surrogate motherhood arrangement.

*B. Physical and Psychological Examination;  
Investigation of the Home*

A valid surrogate motherhood agreement should be based upon the informed consent of the parties to the contract.<sup>144</sup> Physicians, psychiatrists (or licensed psychologists) and lawyers should be involved in the process, but only to counsel. It should be up to the parties themselves to make the choices involved.<sup>145</sup> Five of the proposed bills use this approach by permitting the parties to decide for themselves whether or not to proceed with the surrogate motherhood arrangement after the required medical and psychological evaluations have been performed.<sup>146</sup>

To fulfill the informed consent standard, the prospective surrogate mother and the prospective natural father should undergo a physical examination and genetic screening administered by a licensed physician to determine the likelihood that a normal, healthy child free of genetic abnormalities will be born.<sup>147</sup> The physical examination and genetic screening results should be reviewed, evaluated and discussed in a conference with the physician, the prospective surrogate, and the infertile couple.

Likewise, the prospective surrogate and the infertile couple should undergo psychological counseling administered by a licensed psychiatrist or psychologist.<sup>148</sup> In the case of the prospective surrogate mother, the psychiatrist or psychologist should evaluate the surrogate's ability to complete the surrogate motherhood process and ultimately relinquish the

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<sup>143</sup>Elder v. Fisher, 247 Ind. 598, 603, 217 N.E.2d 847, 851 (1966).

<sup>144</sup>Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 21, 25-26 (1984).

<sup>145</sup>Parker, *Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry*, 5 INT'L J.L. & PSYCHIATRY 341 (1982).

<sup>146</sup>See *supra* note 83.

<sup>147</sup>See *supra* note 71.

<sup>148</sup>H.B. 4555 § 4(1)(c), (f), Mich. (1985).

child to the infertile couple, and counsel the surrogate mother about the physiological and emotional ramifications of being pregnant, and the potential emotional complications that may result upon relinquishing the child to the infertile couple.<sup>149</sup>

In the case of the infertile couple, the psychiatrist should evaluate the infertile couple's capacity to complete the surrogate motherhood process and to accept, love and raise a child born from the surrogate, particularly if the child is handicapped. The psychiatrist should also counsel the infertile couple concerning any potential emotional conflicts that may result from accepting and raising a child born from the surrogate.<sup>150</sup> The results of the psychological exams should be reviewed, evaluated and discussed in a conference with the psychiatrist or psychologist, the prospective surrogate, and the infertile couple.

Nearly all of the proposed bills require physical exams and genetic screening,<sup>151</sup> and many of the proposed bills also require some psychological evaluation<sup>152</sup> and counseling,<sup>153</sup> but those proposals do not go far enough to insure informed consent of the parties. Informed consent is based upon a goal of full disclosure of the information necessary to make a decision and a full understanding of that information.<sup>154</sup> A face to face meeting of the infertile couple, the prospective surrogate, and the medical professional can best accomplish that goal because questions and concerns that would be addressed in such a conference are material to all parties.

Several proposed bills also require an investigation of the home of the natural father and his wife by a social welfare agency.<sup>155</sup> The purpose of the investigation is to determine the capacity of the natural father and his wife to love, care and provide for the child born to the surrogate.<sup>156</sup> However, an investigation into the home of the infertile couple should not be required because the psychological counseling process is designed to identify the infertile couple's capacity to love and care for the child born to the surrogate. Also, an infertile couple that is financially able to go through with the surrogate motherhood process would almost certainly be able to provide for the child's physical (food, clothing, shelter) and educational needs.

Another important requirement expands an idea found in Maryland House Bills 1595 and 1552. Under those proposals a natural father may

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<sup>149</sup>H.B. 4555 § 4(1)(f), Mich. (1985).

<sup>150</sup>H.B. 4555 § 4(1)(c), Mich. (1985).

<sup>151</sup>See *supra* note 71.

<sup>152</sup>See *supra* note 73.

<sup>153</sup>H.B. 4555 § 4(1)(c), (f), Mich. (1985).

<sup>154</sup>See *supra* note 144, at 25-27.

<sup>155</sup>See *supra* note 86.

<sup>156</sup>See *supra* note 87.

request a surrogate to undergo psychological counseling prior to and after the birth of the child if recommended as a result of the initial psychological evaluation.<sup>157</sup> It would be important for the surrogate and the infertile couple to receive continued counseling throughout the surrogate's pregnancy because the surrogate or the infertile couple may have second thoughts about going through with the arrangement after committing themselves to it. Continued counseling is important to identify and resolve these second thoughts and any other psychological problems that the parties may encounter.

Psychological counseling should also continue for the surrogate for six weeks after the birth of the child. This period of counseling should be required for the surrogate to aid her in coping with the medical phenomenon known as postpartal depression, which can occur during a period of about six weeks after childbirth.<sup>158</sup>

### C. *The Contract*

Following the initial requisite medical exams and counseling sessions, if the infertile couple and the prospective surrogate want to proceed with the surrogate motherhood process, then they should obtain independent legal counsel to negotiate a contract. Most of the legislative proposals contain this requirement so that each party's interests will be adequately protected.<sup>159</sup> The contract should specify all medical and legal expenses of the surrogate that will be paid by the infertile couple and the surrogate's fee for services in conceiving, carrying and giving birth to a child for the infertile couple.<sup>160</sup>

Most proposed bills also require the surrogate's husband, if she is married, to sign the contract.<sup>161</sup> However, the contract should go further with respect to the surrogate's husband. The contract should explicitly state that the surrogate's husband understands that his wife will be a surrogate mother, that he understands the terms of the contract and the legal rights, responsibilities and risks that flow to the surrogate, and that he consents to the surrogate motherhood arrangement. The surrogate's husband should further agree that he will abstain from sexual intercourse with his wife during the artificial inseminating process. These requirements are important to prevent any friction between the surrogate mother and her husband that would adversely affect the surrogate motherhood arrangement and to prevent the possibility that the surrogate's

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<sup>157</sup>H.B. 1595 § 5-216(7)(I)(2), Md. (1984); H.B. 1552 § 5-216(7)(I)(2), Md. (1985).

<sup>158</sup>E. FITZPATRICK, S. REEDER & L. MASTROLANNI, *MATERNITY NURSING* 305 (12th ed. 1971).

<sup>159</sup>See *supra* note 89.

<sup>160</sup>See *supra* note 90.

<sup>161</sup>See *supra* note 103.

husband would be the real biological father of the child born to the surrogate.

As required by most proposed surrogate motherhood bills, the contract should be signed by the parties.<sup>162</sup> The signed document operates as a continuing offer by the infertile couple that is accepted by the surrogate upon successful artificial insemination (insemination that results in conception) of the surrogate. Until successful artificial insemination of the surrogate, any party (including the surrogate's husband) may, upon written notice to the other parties, back out of the proposed arrangement. This escape hatch for the parties operates similarly to the provision for early termination of the contract found in four of the legislative proposals.<sup>163</sup> However, power to preclude acceptance of the offer before successful insemination of the surrogate should be extended to include the surrogate's husband so that conflicts between the surrogate and her husband that would adversely affect the surrogate motherhood arrangement may be avoided.

#### D. *Technical Requirements*

Some of the proposed bills require court approval of the surrogate motherhood arrangement.<sup>164</sup> Such a procedure is important in insuring that the parties have given informed consent to the surrogate motherhood contract.

The infertile couple, the prospective surrogate, the medical professionals, and the attorneys should submit affidavits to the probate court judge. These affidavits should demonstrate that the required examinations and counseling have been conducted and that the infertile couple and the prospective surrogate have given their informed consent to the surrogate motherhood contract. The contract should also be presented to the judge to insure that the required provisions are included in the contract and that all necessary parties (including the surrogate's husband) have signed the contract.

If the probate judge determines that the statutory guidelines have been met and the parties have given their informed consent to the contract, then the judge shall approve the contract. Once judicial approval has been given, the prospective surrogate may undergo artificial insemination, administered by a licensed physician.<sup>165</sup> Once successful insemination of the surrogate is achieved, the contract becomes enforceable.

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<sup>162</sup>*Id.*

<sup>163</sup>Comm. B. 5316 § 3(15), Conn. (1983); H.B. 1009 § 9(a)(17), Haw. (1983); S.B. 485 § 9(b)(5), Kan. (1984); H.F. 534 § 10(3)(a), Minn. (1983).

<sup>164</sup>*See supra* note 104.

<sup>165</sup>*Id.*

### E. Responsibilities and Risks

Once the surrogate has conceived, the infertile couple should have all legal rights and responsibilities for the developing embryo and fetus; and when the child is born, the infertile couple should be the legal parents of the child.<sup>166</sup> Placing these rights and responsibilities with the infertile couple solves several problems. First, placing legal parenthood in the infertile couple avoids the problem of statutes like the Indiana statute governing consent to an adoption in which a mother cannot validly consent to an adoption until the child is born.<sup>167</sup> Because the infertile couple would be the legal parents of the child born to the surrogate, adoption would be unnecessary. Second, the problem of shifting responsibilities for the child found in other proposed bills would be avoided.<sup>168</sup> In Maryland House Bill 1552, parental rights and responsibilities for the child during the period from conception to birth lie with the surrogate mother and the natural father. When the child is born, these parental rights and responsibilities shift to the natural father and his wife.<sup>169</sup> Under Connecticut Committee Bill 5316, Hawaii H.B. 1009 and Minnesota H.F. 534, when the surrogate's sixth month of pregnancy is complete, the court issues an interim order giving custody to the natural father and his wife.<sup>170</sup> Rather than shifting parental rights and responsibilities, these rights and responsibilities should always lie with the infertile couple. The surrogate mother conceives, carries and bears a child *for the infertile couple*. Therefore, the infertile couple should always be the legal parents of the child and have all the legal rights and responsibilities normally accorded to parents.

Establishing the infertile couple as the legal parents of the child from the moment of conception does not, however, restrict the surrogate's constitutional right of privacy, which encompasses her decision to abort the pregnancy.<sup>171</sup> Three of the proposed bills have required the surrogate to contractually waive her right to abort the pregnancy.<sup>172</sup> However, the surrogate's constitutional right to abort a pregnancy probably cannot be waived by contract.<sup>173</sup>

Three of the proposed bills place the risk of complications and death that may result from the pregnancy upon the surrogate.<sup>174</sup> This risk

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<sup>166</sup>Bitner, *supra* note 35 at 254.

<sup>167</sup>*See supra* note 48.

<sup>168</sup>*See supra* notes 110-11.

<sup>169</sup>H.B. 1552 § 5-211, Md. (1985).

<sup>170</sup>*See supra* note 111.

<sup>171</sup>*Roe v. Wade*, 410 U.S. 113, 155 (1973). *See also supra* note 99 and accompanying text.

<sup>172</sup>*See supra* notes 97-98.

<sup>173</sup>*See supra* note 99.

<sup>174</sup>*See supra* note 115.

should be placed upon the surrogate because it would be unfair to make the infertile couple insurers of the pregnancy.

Finally, two of the proposed bills address the event of death of one or both members of the infertile couple.<sup>175</sup> These bills establish that if one member of the infertile couple dies before the child is born, then the other member assumes full responsibility for the child born to the surrogate. If both members of the infertile couple die before the child is born, the surrogate has the option of either keeping the child or giving the child up for adoption. However, if the infertile couple are legal parents of the child from the moment of conception of the child, then the death of one member of the infertile couple during the surrogate's pregnancy would still leave legal parenthood in the surviving member of the infertile couple. If both members of the infertile couple die, then the surrogate mother should have the option of either keeping the child or giving the child up for adoption because the surrogate is the biological mother of the child.

*F. Revocability; Remedies on Breach;  
Statutory Noncompliance*

The surrogate could breach the contract by aborting the pregnancy. As mentioned above,<sup>176</sup> the surrogate's right to an abortion most likely cannot be restricted by contract. In fairness to the infertile couple, if the surrogate aborts the pregnancy, then she should be required to reimburse the infertile couple for the expenses that the infertile couple have paid for the surrogate.

Michigan House Bill 4555 allows the surrogate to revoke her consent to the termination of parental rights,<sup>177</sup> and Kansas Senate Bill 485 allows the surrogate to declare the contract void.<sup>178</sup> Allowing the surrogate these options is unfair to the infertile couple. Unless the surrogate is within her constitutional right to abort the pregnancy, the infertile couple should be permitted to require specific performance of the contract when the child is born. The purpose of the surrogate motherhood statute should be to permit infertile couples to have children by means of a surrogate mother. This purpose is seriously undercut if the surrogate mother is permitted to keep the child. The surrogate mother's purpose is to conceive, carry and bear a child *for the infertile couple*. The infertile couple should be the legal parents of the child born to the surrogate *ab initio*. The infertile couple have the same responsibilities of any parents and if they do not want the child, then they would still have a duty to find

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<sup>175</sup>Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983).

<sup>176</sup>See *supra* note 99.

<sup>177</sup>H.B. 4555 § 6(3), Mich. (1985).

<sup>178</sup>S.B. 485 §§ 2(b), 9(b)(4), Kan. (1984).

a good home for the child. The duty is no different for any parent.<sup>179</sup>

Also, if paternity testing reveals that the husband of the infertile couple is not a potential father of the child, then there would be no contract at all. The contracting document operates as a continuing offer which is accepted only by successful artificial insemination of the surrogate. If the husband of the infertile couple is not a potential father of the child, then there has been no successful artificial insemination of the surrogate and, therefore, no acceptance of the offer.

Finally, surrogate motherhood contracts that do not comply with this statute should be forbidden as constituting child selling, a criminal offense.<sup>180</sup> Making noncompliance with the statute a criminal offense provides strong incentive for all parties to the contract to comply with the statute, and because one of the greatest concerns of the state is child selling, it is logical to regard an illegal surrogate motherhood contract as child selling.

## V. CONCLUSION

The practice of surrogate motherhood provides a technological solution to the infertility problems of many infertile couples. The state should not prohibit the practice just because it is uncharted legal ground. However, the state should proceed cautiously in mapping out the legal boundaries of this area in which there are still so many unresolved questions. The proposed legislation is a sensible, cautious first step in providing a logical and workable legal solution to the practice of surrogate motherhood, a solution that aids infertile couples in establishing a family and furthers the state's interest in protecting family integrity and the welfare of children.

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<sup>179</sup>Ramsey v. Ramsey, 121 Ind. 215, 216, 23 N.E. 69, 70 (1889).

<sup>180</sup>See IND. CODE § 35-46-1-4, *supra* note 38.

