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Conceiving for Cash; Is it Legal? A Survey of the Laws Applicable to Surrogate Motherhood

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CONCEIVING FOR CASH; IS IT LEGAL?: A SURVEY OF THE LAWS APPLICABLE TO SURROGATE MOTHERHOOD

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I. INTRODUCTION

As early as 1980, when news of the first surrogate motherhood agreements made headlines, legal and medical practitioners involved in the deals emphasized the urgent need for state regulatory legislation of the practice.[1] Since then, the number of births per year resulting from these arrangements has continued to increase[2] along with the prevalence of other new techniques to assist in human procreation such as in vitro fertilization, embryo transfer, and cryopreservation of embryos, all of which may involve the use of a non-related woman either as a carrier or mother of an artificially produced child. While the subject of "brave new world" reproductive techniques has certainly captured the media's attention and aroused public awareness, state legislators have been slow to respond to the recommendation of legal and medical practitioners in this field to produce the type of comprehensive legislation which will eliminate the legal limbo in which the participants in the new reproductive technologies have been mired. Although new legislation may be advocated by legislators in a majority of states, it is clear that passage of such laws is not a priority on most state legislative agendas.[3] In the

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1. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L. J. 147; Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373 (1981) [hereinafter Black].

2. Although exact numbers are unavailable, estimates are that between 500 and 600 surrogate births have been arranged by formal contracts. *See* Peterson, *Surrogates, Finding No Laws Often Improvise Birth Pacts*, N.Y. Times, Feb. 25, 1987, at C2, col. 1.

3. For a detailed analysis of the proposals, see Andrews, "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood," 17 HASTINGS CENTER REPORT 31 (October 1987) [hereinafter HASTINGS REPORT]. *See also* Lorio, *Alternative Means of Reproduction: Virgin Territory For Legislation*, 44LA. L. REV. 1641, 1659-60 (1984); Freed, *As Surrogate Parenting Increases, States Must Resolve Legal Issues*, Nat'l L. J., Dec. 22,

meantime, state courts are being asked to adjudicate the rights of the parties in these transactions, and existing laws are being used to resolve questions once taken for granted such as, "who is the mother?"[4]

Until new laws are passed, the outcome of these cases will be subject to existing state laws governing adoption, artificial insemination, paternity and custody. This article will analyze the legal risks currently facing the participants in the reproduction technologies using surrogate mothers, including the embryo transfer procedure, and the state laws which may help or hinder the desired outcome. Since regulatory legislation continues to be debated, but not implemented, it is crucial that the participants in both surrogate mother and surrogate carrier arrangements be informed about existing laws and work within their parameters to avoid unintended catastrophes.

II. THE TECHNOLOGY

The burgeoning use of the alternatives to natural procreation has resulted from increasing sophistication in medical technology as well as probable increase in the rate of infertility.[5] Current statistics indicate that one in six persons of childbearing age is infertile.[6] Half of these have been helped by traditional infertility treatments with drugs or surgery, but the remaining group is increasingly seeking a solution to their infertility through use of assisted reproduction technologies. The matching of sperm and ova by the various procedures known as artificial insemination (AI), in vitro fertilization (IVF), embryo transfer (ET) and surrogate mothering have become viable procreative methods.

Artificial insemination is traditionally an option for a couple where the male produces little or no sperm. His wife can be in-

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1986, at 28.

4. *See* Sherwyn & Handel v. California State Dep't of Soc. Serv., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985). In the absence of legislation, some facilitators have unsuccessfully sought court declarations of the applicability of existing laws to surrogate transactions.

5. Infertility rates have increased in younger married couples. Moster & Pratt, *Reproductive Impairments Among Married Couples: United States, Vital Health Statistics* 16 (1982)(Nat'l Center for Health Statistics) [hereinafter Moster and Pratt].

6. L. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS 3, 16 (1984).

seminated with sperm from a donor. Similarly, if the woman cannot provide an egg, she can call on the aid of a female donor to provide an egg, either as a surrogate mother (the woman provides the gestational as well as genetic material) or as a surrogate carrier (the woman provides only the gestational component).[7] The donation of sperm or eggs or both can be done by transferring the sperm or egg into the woman's body for fertilization. In addition, an embryo already fertilized by artificial insemination may be transferred by a lavage procedure into the uterus of another woman who will gestate the embryo.[8]

IVF is now the procedure of choice if a woman has blocked or absent fallopian tubes or her partner has a low sperm count. An egg is removed from the woman's ovary and fertilized with the man's sperm in a petri dish. If fertilization occurs, the resulting embryo is placed in the woman's uterus two days later.

All of these reproduction techniques allow one or both of the rearing parents to have a biological bond to the child (genetic, gestational, or both)—a factor often cited by infertile couples who have turned to these new reproduction alternatives.[9] Another stems from the shortage of babies available for adoption.[10] These factors combine to create a situation where thousands of infertile couples are willing to participate in various arrangements involving third parties in the reproductive process without any legal protection of their respective interests. It is the fact of involving a non-related third party and the emotional bonding associated with a pregnancy which make the surrogate process more risky.

In the majority of cases, the results have been successful births and happy parents, but in the few which may fail, tragic

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7. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. MED. 336 (1981).

8. The first birth from such a procedure was announced on Feb. 3, 1984 at Harbor-U.C.L.A. Medical Center. *See Boys Birth is First From Embryo Transfer*, Wash. Post, Feb. 4, 1984, at A14, col. 1.

9. *Effects of Surrogate Motherhood; Other Child-bearing Options Need Closer Study Says Researcher*, PSYCHIATRIC NEWS, May 18, 1985, at 10. One may speculate, however, that the genetic link is the tie that binds. Although a far less frequent practice, embryo transfer, using surrogate carriers may prove more successful for this reason. No incidences of a surrogate carrier refusing to give up a genetically unrelated child she gestates have been reported.

10. Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978).

consequences may result. These failures have been widely reported by the press, arousing public awareness of the potential problems with such arrangements. The first such case occurred in California and involved an unpaid surrogate, Denise Bhimani, who refused to relinquish the child to the father, James Noyes, and his wife according to the contractual terms.[11] The case was settled out of court and Bhimani kept the child. Another case in which a surrogate mother kept the child occured in Ohio and never went to court.[12] In February of 1983, Judy Stiver contracted with William Malahoff and his wife to bear Mr. Malahoff's child. Unfortunately, in the *Malahoff* case, the child born to Judy Stiver was handicapped with microcephaly. Upon learning this news, Malahoff refused to accept the child and sued Stiver for breach of contract.[13]

The most recent headline-grabbing case is that involving "Baby M."[14] Mary Beth Whitehead, a housewife and mother of two children, contracted with Mr. William Stern and his wife to conceive a child by artificial insemination using the sperm of Mr. Stern, and to subsequently release the child to the Sterns. After the birth, Whitehead refused to follow through on the contract, prompting a bitter suit over the custody of "Baby M."

III. Laws Currently Applicable to Surrogate Mother Arrangements

A. The Typical Surrogate Contract

The facilitators of surrogate contracts take many precautions in an attempt to ensure selection of a stable, mature wo-

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11. *Surrogate Mother Wins Custody of Baby*, Wash. Post, June 5, 1981, at A6. *See also* Galen, *Surrogate Law*, Nat'l L. J., Sept. 29, 1986, at 1, col. 1.

12. Galen, *supra* note 11. *Mother to Keep Baby*, N.Y. Times, May 22, 1983, at A1, col. 3. *Surrogate Mom Feels Bad, But Won't Give Baby Away*, Columbus Citizen J., Nov. 9, 1983, at 2 [hereinafter *Surrogate Mom*].

13. *Surrogate Mom*, *supra* note 12. *Baby Doe Goes Home*, N.Y. Times, Feb. 3, 1983, at A16, col. 1. Later tests indicated, however, that Stiver's husband, and not Malahoff, was indeed the child's genetic father. Malahoff sued the Stivers claiming breach of the contract, for although Stiver and her husband refrained from sexual intercourse after the insemination as the contract required, they apparently had not during the prior week.

14. 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (Apr. 7, 1987). Kantrowitz, *Who Keeps "Baby M,"* Newsweek, Jan. 19, 1987, at 44.

man who is least likely to keep the child. For example, many facilitators prefer to use married surrogates who have children of their own, assuming that knowledge of the pregnancy experience will decrease the woman's desire to keep the child.[15] All require the surrogate to undergo psychological testing and evaluation, as well as a physical exam and genetic evaluation. The potential parents then select a surrogate from a pool of pre-screened women. In many cases, the couple and surrogate mother never meet, but in others, very intimate relationships may develop between the parties.

Once a surrogate is selected, a physician will perform the artificial insemination. If a pregnancy occurs, the surrogate is usually paid a portion of her total compensation,[16] with the balance held in escrow pending the birth and consent to the child's adoption by the wife of the sperm donor. According to some of the early contracts, the surrogate was also required to adhere strictly to all medical instructions given by the attending physician during the pregnancy.[17] The couple is obligated to assume the care and responsibility for the child regardless of any birth defects.

Once the child is born, the surrogate formally terminates her parental rights or consents to adoption of the child by the wife of the sperm donor. This procedure is handled privately by the facilitator, outside of a licensed adoption agency.

The surrogate carrier situation differs in that an adoption is not pursued since the attending physician may simply place the genetic mother's name on the birth certificate. In at least one

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15. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983) [hereinafter Parker].

16. Attorney Bill Handel has dealt with over 60 couples and surrogates at costs exceeding $20,000 each, which included the $10,000 service fee plus $4-6,000 in legal expenses, $2,000 for psychological counseling, $1,000 for the insemination, $1,000 for life insurance, and as much as $7,000 in medical expenses if the surrogate has no health insurance. SURROGATE PARENTING NEWS 5 (April 1983).

17. The original contract used by the Surrogate Parenting Associates, Inc. of Kentucky went so far as to incorporate a provision prohibiting the surrogate from smoking, drinking alcoholic beverages, and using illegal drugs or non-prescription or prescribed drugs unless consented to by the physician. *See* Surrogate Parenting Associates, Inc. v. Kentucky, 704 S.W. 2d 209, 214 (Ky. 1986) [hereinafter Surrogate Agreement]. This type of provision is inadvisable and probably unenforcable, given existing constitutional protections of a woman's choice not to bear a child. *See* Robertson, *Procreation and the Control of Conception, Pregnancy, Childbirth*, 69 VA. L. REV. 45 (1983).

situation, the parental couple obtained a court declaration of paternity and maternity prior to the birth, subject to obtaining the appropriate tissue matching tests after the birth as evidence.[18]

B. The Potential Problems

Since lawyers and doctors are venturing into this forum as facilitators of the assisted reproduction techniques, they must be informed about the potential risks of their endeavors, not only to themselves, but to the other participants as well. The parties embarking on this process enter it with the highest hope that it will proceed according to the planned contract, but should the arrangements run awry, the potentially applicable laws will not adequately resolve the problems.

The legal issues raised by the surrogate mother arrangement will vary from state to state, explaining in some measure why facilitating clinics have flourished in some jurisdictions and not in others. Fundamentally, the existing laws may dictate: (a) whether the surrogate may be paid, (b) whether the contract is enforceable, (c) whether a legal adoption by the non-related mother is possible, and (d) whether the father and mother may establish their paternity and maternity, respectively. For example, some states simply ban private adoptions altogether.[19] Even where private adoptions are allowed, there may be laws prohibiting a consent to an adoption or the termination of rights to a child prior to the birth of the child.[20] Others may limit private adoptions to situations where the natural parent or parents do the placing directly. By far the most serious obstacle relates to the payment terms of the agreement because most states outlaw the payment or receipt by any party to an adoption agreement in exchange for the placement of a child for adoption.[21] Furthermore, most states with artificial insemination laws prevent a sperm donor from asserting rights to the child of a woman other than his wife, thus making recognition of the husband as the legal father more uncertain.

In addition, the paternity laws of most states presume that

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18. Smith v. Jones, No. 85-532014 DZ (Cir. Ct. Wayne Co., Mich. Mar. 14, 1986).
19. *See infra* text accompanying note 24.
20. *See infra* text accompanying notes 71-77.
21. *See infra* text accompanying note 31.

the husband of the surrogate is the legal father, rather than the man who contracts for the child and provides the sperm. If the surrogate mother decides to keep the child, the biological father may be prevented from ever bringing a paternity action because he has no standing. Some states allow only the mother, child, "presumed father" or the state to institute such suits.[22] The remainder of this article will discuss each of these issues in depth and analyze the currently applicable state laws.

C. *The Adoption Laws and Surrogate Mother Contracts*

Certain surrogate mother arrangements fall within the parameters of the adoption codes of some states. The restrictions in some jurisdictions make the typical surrogate arrangement illegal. For example, a lawyer planning a surrogate arrangement must determine first, whether independent or non-agency adoptions are allowed in the state; second, what kind of payments may be transferred in connection with those adoptions; and finally, whether or not a consent to an adoption may be given prior to the child's birth.

If the state allows private placements and an intermediary (the facilitator) can do the placing then at least this obstacle is removed. At least nineteen states and the District of Columbia are in this category.[23] However, most states require that anyone, other than the natural parents, who places a child for adoption must be licensed as an adoption agency in the state.[24] However,

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22. *See infra* text accompanying notes 105-6.

23. Alaska, Arkansas, Idaho, Illinois, Iowa, Kansas, Maine, Mississippi, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, West Virginia and the District of Columbia, have no laws prohibiting private placements. In Utah, private placements are allowed so long as no fees are charged. UTAH CODE ANN. § 55-8a-1(3) (1986). In Washington, private placements are allowed if filed with state agency before the child is placed with adoptive parents. WASH. REV. CODE. ANN. § 9A.64.030 (1986-87).

24. ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1986); CAL. CIV. CODE § 224q (West 1987); COLO. REV. STAT. § 19-4-108 (1986); CONN. GEN. STAT. § 17-49a (West Supp. 1986); DEL. CODE ANN. tit. 13, § 904 (1981); FLA. STAT. ANN. § 63.212 (West Supp. 1985); GA. CODE ANN. § 19-8-3(a)(4) (1986); HAW. REV. STAT. § 346-17 (Supp. 1984); IND. CODE ANN. § 31-3-1-3 (Burns 1980); KY. REV. STAT. ANN. § 199.473(3) (Michie/Bobbs-Merrill 1986); MD. FAM. LAW CODE ANN. § 5-507(a) (1984); MASS. ch. 210 § 2A (1981); MICH. COMP. LAWS ANN. § 722.124 (Supp. 1982-83); MINN. STAT. ANN. § 259.22 (West 1982); MONT. CODE ANN. § 53-4-402 (1981); NEB. REV. STAT. § 43-701 (1978); NEV. REV. STAT. 127.240.1 (1985); N.H. REV. STAT. ANN. § 170B:8 (1978); N.J. STAT. ANN. § 9:3-39 (West 1986-87); N.M. STAT. ANN. § 40-7-19 (1978); N.Y. SOC. SERV. LAW § 374(2) (McKinney 1983); N.D. CENT.

the majority of these exempt adoptions by a step-parent from this licensing requirement while other states allow the private placement only if the parents place the child directly with the adopting couple.[25] Where private placements are absolutely prohibited, surrogate contracts would be illegal and consequently unenforceable. The facilitator may also face criminal penalties if convicted of violating such provisions.[26]

In the states which require the natural parent to place the child directly, the surrogate arrangement would have to be structured such that the surrogate mother and adopting couple would actually meet. If this should be contrary to the parties wishes it may be possible to circumvent this problem by the facilitator designating an "agent" for the surrogate mother, who then places the child in accordance with the statute.[27] The diffi-

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CODE § 50-12-17 (1982); OHIO REV. CODE. ANN. § 5103.16 (1981); OR. REV. STAT. § 418.300 (1981); R.I. GEN. LAWS § 15-7-1(a) (Supp. 1982); S.D. CODIFIED LAWS ANN. § 26-6-8 (1984); TENN. CODE ANN. § 36-1-135 (1984); VA. CODE ANN. § 63.1-231 (Supp. 1986); WIS. STAT. ANN. § 48.60 (West Supp. 1986); WYO. STAT. § 1-22-109 (Supp. 1986).

25. Statutes allowing private placement with a step-parent include: ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1986); CONN. GEN. STAT. ANN. § 17-49a (West Supp. 1986); DEL. CODE ANN. tit. 13, § 904(2) (1981); FLA. STAT. ANN. § 163.212 (West Supp. 1985); IND. CODE ANN. § 31-3-1-3 (Burns 1980); KY. REV. STAT. ANN. § 199.473(3) (Michie/Bobbs-Merrill 1986); MASS. ch. 210 § 2A(C) (1981); MICH. COMP. LAWS ANN. § 722.124 (Supp. 1982-83); MINN. STAT. ANN. § 259.22(2)(b) (West 1982); N.H. REV. STAT. ANN. § 170B:12 (1978); N.J. STAT. ANN. § 9:3-39 (West 1986-87); N.M. STAT. ANN. § 40-7-19B (1978); N.C. GEN. STAT. § 48-48-4(b) (1976); OHIO REV. CODE. ANN. § 5103.16 (Baldwin 1986); OR. REV. STAT. § 418.300 (1985); R.I. GEN. LAWS § 15-7-1(a) (Supp. 1982); S.D. CODIFIED LAWS ANN. § 26-6-8 (1984); VA. CODE ANN. § 63.1-196 (Supp. 1986); WIS. STAT. ANN. § 48.60(2)(a) (West Supp. 1986-87).

Some states permit parents to privately place the child directly with the adopting couple. ALA. CODE § 26-10-7 (1985); LA. REV. STAT. ANN. § 422.3 (West Supp. 1983); MD. FAM. LAW. CODE ANN. § 5-507(b)(2) (1984); MONT. CODE ANN. § 408-109 (1981); NEB. REV. STAT. § 43-701 (1978); NEV. REV. STAT. 127.240 (1981); N.J. STAT. ANN. § 9:3-39 (West 1986-87); N.M. STAT. ANN. § 40-7-19 (1978); N.Y. SOC. SERV. LAW § 374(2) (McKinney 1983); N.D. CENT. CODE § 50-12-17 (1982)—parent may place child with relative only after written notice to state; R.I. GEN. LAWS § 15-7-1(a) (Supp. 1982); S.D. CODIFIED LAWS ANN. § 26-6-8 (1984); TENN. CODE ANN. § 36-1-114 (Supp. 1986). If adopting parents who receive a child from natural parents determine they no longer want the child, they relinquish the child to a licensed agency without notice to the natural parents; VA. CODE ANN. § 63. 1-204 (Supp. 1986); WIS. STAT. ANN. § 48.835 (West Supp. 1982-83).

26. *See e.g.*, Idaho Code § 18-1511 (1986).

27. One contract used by Kentucky's Surrogate Parenting Associates specifically stipulates that both the surrogate and her husband, as well as the natural father and his wife, must agree that they will "not seek to learn the identity" of the other parties or "contact the same if their identity is learned." *See* Surrogate Parenting Associates, Inc. v. Kentucky, 704 S.W.2d 209, 214 (Ky. 1986).

culty here is drawing the line between a so-called "agent" and an unlicensed intermediary who essentially serve the same functions. The restriction on placements by third party intermediaries is ostensibly devised to protect against undesirable placements, pressures exerted by intermediaries on parents and potential profit making.[28]

Assuming that the state has no prohibition on private placements, a greater problem looms in determining what fees may be charged in connection with the surrogate adoption. Licensed adoption agencies generally may assess certain fees for their services provided in arranging a normal adoption, but it is not clear whether an unlicensed intermediary may be granted the same privilege. Of course it is possible for a facilitator to avoid the problem by charging merely for legal or medical expenses, but few women are likely to volunteer to be surrogate mothers without compensation. In fact most women interviewed by one psychiatrist cited the money as the prime motivator in their decision to become surrogate mothers.[29] Only a few statutes deal specifically with the issue of payments to intermediaries and these generally provide for reasonable fees for services paid.[30]

Although the typical contract provides for the surrogate mother to receive a fee averaging about $10,000, it is arguable that the fee constitutes a service payment in exchange for the surrogate's promise to relinquish the child at birth; or payment for surrogate's donation of an egg and reasonable compensation for her services in carrying the child for nine months. The payment could also be viewed as consideration for the sale of a child.

The majority of states have statutory provisions which prohibit the payment or receipt of anything of value in connection

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28. MEEZAN, KATZ & RUSSO, ADOPTION WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 167 (1978) [hereinafter MEEZAN, KATZ & RUSSO].

29. Parker, *supra* note 15.

30. FLA. STAT. ANN. § 63.097 (West 1985) (intermediary physician's or lawyer's fees exceeding $500 must be reported to the court); ILL. ANN. STAT. ch. 40 § 1704 (Smith-Hurd 1986) (intermediaries' salaries and medical fees are permissible payments); IOWA CODE ANN. § 600.9 (West 1981) (fees for legal or medical services allowed); NEV. REV. STAT. § 127.285 (1981) (legal fees may be assessed only, no placement by an attorney is allowed; attorney may charge only legal fees and no placement fees); PA. STAT. ANN. tit. 23 § 2533(b) (Purdon Supp. 1987)(all money paid or received must be reported to the court); UTAH CODE ANN. § 55-8a-1(2) (1986) (attorneys or physicians may charge for legal or medical services not for locating or placing the child).

with placing a child for adoption or which require reporting all payments to the court ruling on the petition.[31] On their face these statutes are aimed at preventing the growth of a highly profitable "black-market" for babies resulting from the current shortage of readily adoptable babies.[32] They also seek to prevent abuses stemming from the increased use of independent adoptions where private intermediaries, as well as parents, might seek to profit from an adoption transaction.[33] These policies are reinforced by the overall goal of protecting the best interests of the child.[34]

In the states which have adopted such regulations, any facilitator must advise the participants that the typical paid surrogate arrangement is probably illegal and the contracts voidable.[35] However, the transactions continue because the facilitators characterize the surrogate's fee as a payment in exchange for the "consent" to give up the child and the surrogate's services and,

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31. *See* CAL. PENAL CODE § 273 (West 1970). *See also* ALA CODE § 26-10-8 (1986); ARIZ. REV. STAT. ANN. § 8-114(B), 8-126(4)(C)-(F) (1986); ARK. STAT. ANN. § 56-211 (Supp. 1985); CAL. PENAL CODE § 273(a) (West Supp. 1983); COLO. REV. STAT. § 19-4-115 (1986); DEL. CODE ANN. tit. 13 § 928 (1981); FLA. STAT. ANN. § 63.212(1)(d) (West 1985); GA. CODE ANN. § 19-8-19 (1986); IDAHO CODE § 18-1511 (1986); ILL. REV. STAT. ch 40 §§ 1526, 1701, 1702 (1986); IND. CODE ANN. § 35-46-1-9 (West Supp. 1984-85); IOWA CODE ANN. § 600.9 (West 1981); KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill 1986); MD. FAM. LAW. CODE ANN. § 5-327 (1984); MASS. GEN. LAWS ANN. ch. 210 § 11A (West 1986); !Mich. Stat. Ann. § 25-358 (Callaghan 1986); NEV. REV. STAT. 127.290 (1983); N.J. STAT. ANN. § 9:3-54 (West 1986-87); N.Y. SOC. SERV. LAW § 374(b) (McKinney Supp. 1983); N.C. GEN. STAT. § 48-37 (1984); OHIO REV. CODE. ANN. § 3107.10(A) (Baldwin 1986); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (Supp. 1984); TENN. CODE ANN. § 36-1-135 (1984); UTAH CODE ANN. § 76-7-203 (1986); WIS. STAT. ANN. § 946.716 (West Supp. 1982). However, since the statutes in the states of Arizona, California, Florida, Illinois, Iowa, and New Jersey exempt stepparents from the statutory reporting requirements for payment in connection with an adoption, it may be possible to circumvent the ban in these states so long as the man who provided the sperm can prove that he is the biological father and thus that his adopting wife will be a stepparent.

32. *See* Moster & Pratt, *supra* note 5, at 3.

33. Crane, *New Strategies in the Adoption Game*, Los Angeles Herald Examiner, Feb. 26, 1984, at E1, col. 1. *See also* Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341, 372 (1981) [hereinafter Comment, *Surrogate Motherhood*].

34. Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975).

35. One lawyer, William Handel, who specializes in surrogate mother arrangements, routinely advises his clients that because of the uncertainty in application of the laws to surrogate arrangements, all parties could be subject to criminal and civil violations. Crane, *Raising a Family Raises New Questions*, Los Angeles Herald Examiner, Feb. 28, 1984, at D1, col. 1.

therefore, outside the scope of the adoption codes. Other proponents argue that a surrogate arrangement is no different than a typical artificial insemination where the male donor is paid for his sperm.[36] This argument, however, fails to note the essential distinction between a sperm or ova and a fully developed child, which is what the surrogate actually relinquishes.[37]

A more accurate analysis recognizes that the surrogate mother is paid for her services of gestating the child and as insurance against incurred health risks. No health risks are incurred by the sperm donor, whereas a surrogate mother's entire physiology is altered as a result of the pregnancy and she assumes the attendant risks. It is only fair that she receive some commensurate compensation. In addition, the Washington legislature has recognized that "child-selling" cannot be accomplished between parents.[38] Viewing the surrogate's fee as payment for the sale of her child ignores the equal interest the sperm donor has in the child. The surrogate mother is not selling her child, but merely transferring custody to the natural father. Assuming a surrogate receives compensation for these services and risks, a ceiling on the fee could be calculated on the basis of these criteria alone and, consequently, the potential profit-making abuses might be avoided.[39]

The first judicial interpretation of the applicability of adoption statutes payment prohibitions to surrogate mother transactions arose in the case of *Doe v. Kelly*.[40] In the *Kelly* case, the parties to a surrogate mother contract sought a preconception court declaration that the "anti-black market" provisions in Michigan's adoption code constituted an unconstitutional infringement of the right of the sperm donor father and his wife to bear a child. The lower court determined:

> [the] primary purpose of the proposed [payment] is to encourage women to volunteer to be surrogate mothers. . . . In all but the rarest situtions, the money which the plaintiffs seek to pay the surrogate mother is

36. Black, *supra* note 1, at 384.
37. Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 981.
38. WASH. REV. CODE. ANN. § 9A.64.030 (1986-87).
39. Comment, *Surrogate Motherhood*, *supra* note 33, at 378.
40. 106 Mich. App. 169, 307 N.W. 2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

> intended as an inducement for her to conceive a child she would not normally want to conceive . . . and to relinquish her parental rights to a child that she bore.[41]

The court was clearly concerned about the potential development of a market of surrogate mothers wherein a bright, beautiful, and talented woman could sell her services at a higher rate than one who may be dull-witted or unattractive.

The court saw these dangers as sufficiently great to justify state regulation of surrogate mother arrangements through the adoption codes in order to prevent such undesirable practices from emerging. The circuit court judge stated that "mercenary 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."[42] Furthermore, the court felt "it may not be in the child's best interests psychologically to be given up by a mother who was paid to do so."[43] The Michigan Court of Appeals affirmed the lower court decision that such an arrangement was not part of a couple's fundamental constitutional right "to bear or beget" a child and that the state statute could stand.[44]

In contrast, the Kentucky Supreme Court has held that payments to a surrogate cannot be prohibited under the anti-black market statute in Kentucky. In a 5-2 decision, with vigorous dissents, the court overruled two lower court decisions interpreting the Kentucky adoption statute as banning payments to a surrogate mother, thus determining that the services of Surrogate Parenting Associates, Inc. were not illegal.[45]

A New York court has recently issued a similar ruling allowing a surrogate mother to be paid despite an adoption provision prohibiting such payments.[46] The court shared the views of the Kentucky Supreme Court in the Surrogate Parenting case and held that:

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41. 6 Fam. L. Rep. (BNA) 3011, 3013 (Cir. Ct., Wayne Co., Mich., Jan. 28, 1980).
42. *Id.*
43. *Id.*
44. 106 Mich. App. at 173-74, 307 N.W. 2d at 441.
45. Surrogate Parenting Associates, Inc. v. Kentucky, 704 S.W. 2d 209, 214 (Ky. 1986).
46. *In re* the Adoption of Baby Girl, L.J., 132 Misc. 2d 972, 505 N.Y.S. 2d 813 (Sur. Ct., Nassau Co. 1986).

> biomedical science has advanced man into a new era of genetics which was not contemplated by either the Kentucky legislature nor by the New York legislature when it enacted SSL374(6) prohibiting payments in connection with an adoption. Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under parenting agreements.[47]

Both courts emphasized that the social, ethical, and public policy implications of the practice should be resolved by the legislature.[48]

In New Jersey, the trial judge in *In re Baby M* held that the state's "adoption laws do not apply to surrogacy contracts" on the rationale that the practice did not exist when such laws were passed.[49] The court deemed "contract law principles and *parens patriae* concepts" to be the only appropriate analytical guidelines in these cases.[50]

In states which opt to follow the Michigan court's interpretation in *Doe v. Kelley,* the parties to the typical surrogate contract should be advised that their contract may be voidable because of the payment provision. However, other forms of consideration such as a bargained for promise for performance may be adequate to support the validity of the contract.[51] Also, in ten states which require that all payments made in connection with the adoption be reported in the petition for court approval,[52] one might argue before the hearing judge that a fee paid to the surrogate for her services is indistinguishable from the fee paid to a lawyer for his preparation of the legal documents or the compensation paid to a physician for performing an artificial insemination. This view may prevail only if the sperm donor father, his adopting wife, and the surrogate mother are in agreement, and a challenge is brought by the state. How-

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47. *Id.* at 978, 505 N.Y.S. 2d at 817-18.
48. *Id. See also* 704 S.W. 2d at 213.
49. 217 N.J. Super. at 372, 525 A.2d at 1157.
50. *Id.*, 525 A.2d at 1158.
51. Comment, *Surrogate Motherhood, supra* note 33, at 376.
52. ALASKA STAT. § 25.23.090 (1983); ARK. STAT. ANN. § 56-211 (Supp. 1985); DEL. CODE ANN. tit. 13, §§ 912, 928 (1981); FLA. STAT. ANN. § 63.097 (West 1985); MONT. CODE ANN. § 40-8-121 (1981); N.D. CENT. CODE § 14-15-10 (1981); OHIO REV. CODE ANN. § 3107.10 (Baldwin 1986); OKLA. STAT. ANN. tit. 21 § 866 (West 1987); PA. STAT. ANN. tit. 23 § 2533(b)(8) (Purdon Supp. 1987); VA. CODE ANN. § 63.1-223(d) (7) (Supp. 1986).

ever, if a *Baby "M"* scenario develops, a judge will be forced to analyze the case as one in which the best interest of the child should be the only consideration.

Many of the states which regulate payments in connection with adoption generally exempt natural or stepparents from the prohibitions.[53] Presumably, the reason for such an exemption lies in the fact that no money would normally change hands when a child is adopted by a stepparent, who in this case would be the natural father's wife, and the father already has custody of the child. Washington, for example, has a statute which prohibits child-selling, but in its definition of what constitutes a sale, the legislature chose to exclude any transactions between parents.[54] If the surrogate arrangement were viewed as a stepparent adoption, the exemption would seem to permit a payment to the surrogate.

However, receipt of a fee by the surrogate may in fact vitiate her consent to the adoption.[55] This is a particular problem to the couple in the event the surrogate decides to renege on the contract and keep the child. The couple would have to prove first that the surrogate's decision was not a result of overbearing financial enticements. The law in this area favors the mother in normal adoption cases.[56]

Certain statutory provisions imply that the respective legislatures were concerned with what they viewed as the potential harm stemming from certain influences on a mother consenting to her child's adoption. This is illustrated by the Alabama provision preventing anyone from "holding out inducements to par-

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53. Statutes exempting stepparent adoptions from expense reporting requirements include: ALASKA STAT. § 25. 23.090(b) (1983); ALA. CODE § 26-10-7 (1986); ARIZ. REV. STAT. ANN. § 8-114(A),(B)(Supp. 1986); ARK. STAT. ANN. § 56-211(b) (Supp. 1985); CAL. CIV. CODE § 224 (1982); FLA. STAT. ANN. § 63.132 (West 1985); ILL. ANN. STAT. ch. 40 § 1517 (1986) and § 1703 (1980); N.J. STAT. ANN. § 9:3-55 (West 1986-87); N.Y. SOC. SERV. LAW § 116 (McKinney 1976); N.D. CENT. CODE § 14-15-10(2) (1981); OHIO REV. CODE § 3107.10(E) (Baldwin 1986); PA. STAT. ANN. tit. 23 § 2531(c) (Purdon Supp. 1987).

54. WASH. REV. CODE ANN. § 9A.64.030 (Supp. 1986-87).

55. Franklin v. Biggs, 14 Or. App. 450, 513 P. 2d 1216 (1973), *discussed in* Comment, *Artificial Insemination & Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 947 (1981).

56. *See* DeBernardi v. Steve B.D. & Linda Sue D., 111 Idaho 285, 723 P. 2d 829 (1986), in which the court held that a natural mother could revoke her consent to an adoption unless estopped by facts which run counter to the best interests of the child.

ents to part with their offspring."[57] Oklahoma and South Carolina require that the petition contain any "facts which may excuse" the mother's consent.[58] Certainly a surrogate's fee, particularly if paid to a woman facing financial hardship, might provide such an "excuse" to her consent.

Not all states have placed the same restrictions on the payee of a fee in connection with an adoption as those imposed on the payors. For example, Alabama forbids the couple from inducing the mother to part with her child by paying the money, but says nothing about the surrogate accepting the fee.[59] Massachusetts prohibits accepting payment in connection with adoption except in the case of payment to a licensed agency.[60] Idaho makes anyone who sells or barters any child for adoption or any other purpose subject to a felony charge.[61]

It may be possible, however, to structure an agreement using the laws, which exist in almost every state, permitting a parent to voluntarily terminate his or her parental rights either before or after the child's birth.[62] These statutes are not always

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57. ALA. CODE § 26-10-8 (1986).

58. OKLA. STAT. ANN. tit. 10, § 60.12(g) (West 1986); S.C. CODE ANN. § 20-7-1730(A)(7) (Supp. 1986).

59. ALA. CODE § 26-10-8 (1986).

60. MASS. CODE ch. 210 § 11A.

61. IDAHO CODE § 18-1511 (1986); *See also* FLA. STAT. ANN. § 63.212(1)(d) (West 1985).

62. ALA. CODE § 26-10-4 (1986); ALASKA STAT. § 25.23.180 (1983); ARIZ. REV. STAT. ANN. § 8-533 (Supp. 1986); ARK. STAT. ANN. § 56-128 (Supp. 1985); CAL. CIV. CODE § 7017 (West 1987); COLO. REV. STAT. § 19-4-101 (1986); CONN. GEN. STAT. § 45-61(c) (1981); DEL. CODE ANN. tit. 13, § 1103(1) (1981); D.C. CODE ANN. § 16-2353 (1981); FLA. STAT. ANN. § 63.072 (West 1985); GA. CODE ANN. § 19-8-4 (1986); IDAHO CODE § 16-2005 et seq. (1986) ;IND. CODE ANN. § 31-6-5-2(a) (Burns Supp. 1982); IOWA CODE ANN. § 600A.5 (West 1981); KAN. STAT. ANN. § 38-1584 (1986); KY. REV. STAT. ANN. § 199.500(1)(b) (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 9:402 (West. 1987); ME. REV. STAT. ANN. tit. 19 § 533-A (1986); MICH. COMP. LAWS ANN. § 710.29 (Supp. 1982-83); MINN. STAT. ANN. § 260.221(a) (1982); MISS. CODE ANN. § 93-15-101 (1973); MO. ANN. STAT. § 211.447.2 (Vernon Supp. 1987); MONT. CODE ANN. § 53-4-402 (1981); NEV. REV. STAT. 128.150 (1981); N.H. REV. STAT. ANN. § 170-C:5 (Supp. 1981); N.J. STAT. ANN. § 9:2-16 (West 1986-87); N.M. STAT. ANN. § 40-7-3 (1978); N.Y. SOC. SERV. LAW § 615 (McKinney 1976); N.C. GEN. STAT. § 7A-288 (1981); N.D. CENT. CODE § 14-15-19 (1985); OKLA. STAT. ANN. tit. 10, § 1130 (West 1987); OR. REV. STAT. § 419.523 (1981); PA. STAT. ANN. tit. 23 § 2511 (Purdon Supp. 1987); R.I. GEN. LAWS § 15-7-7 (1981); S.C. CODE ANN. § 20-7-1560 (Supp. 1986); S.D. CODIFIED LAWS ANN. § 25-5A-2 (1984); TENN. CODE ANN. § 36-1-110 (1984); TEX. FAM. CODE § 15.03 (Vernon Supp. 1986); UTAH CODE ANN. § 78-3a-48 (Supp. 1985); VT. STAT. ANN. tit. 15 § 432 (Supp. 1986); VA. CODE ANN. § 16.1-283 (Supp. 1983); WASH. REV. CODE ANN. § 26.33.100 (Supp. 1986-87); W. VA. CODE § 49-3-1 (1986); WIS. STAT.

limited to terminations made in connection with an adoption. Some facilitators have viewed these provisions as a means to circumvent the adoption laws which prohibit payments outside of normal expenses and services.

In Kentucky, this method was attempted by Surrogate Parenting Associates, but it came under fire from the Kentucky Attorney General who claimed such an arrangement violated public policy.[63] Although at the time no statutory equivalent to the payment prohibition in adoptions existed in the termination statute, the Attorney General stated: "It is our opinion that the courts of this Commonwealth will not allow persons to receive monetary consideration for the procurement of a child, regardless of whether it is referred to as an adoption proceeding or as a termination of parental rights."[64] The Kentucky legislature subsequently amended the statute to include a ban on payments in connection with terminating parental rights.[65] When the Kentucky Attorney General subsequently sought to enjoin the business practices of Surrogate Parenting Associates, Inc., the court disregarded the prior opinion of the Attorney General and held that the surrogate contracts were not illegal because a natural father "does not (and cannot) buy the right to adopt a child with which he already has a legal and natural relationship."[66] The Court of Appeals, in its reversal, viewed the legislature as speaking directly to surrogate motherhood contracts and, therefore, any payment to the surrogate was not for the "sale" of a child.[67] However, using a novel theory, the Kentucky Supreme Court deemed the legislature to have approved a "tampering with nature in the interest of assisting a childless couple to conceive" by its exclusion of *in vitro* fertilization from the statutory

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ANN. § 48.41 (West Supp. 1986); WYO. STAT. § 14-2-309 (Supp. 1986).

The court in *Baby M*, however, held that such laws are inapplicable to surrogate contracts. 525 A.2d at 1157.

63. Ky. Op. Att'y Gen. 81-18 at 2 (1981).

64. *Id.* at 4. The counter argument has been made that this payment prohibition applies only to the "procurement of a child for adoption," and that a surrogate contract is not one for adoption at all, but rather a contract for custody. Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877, 897-98 (1981).

65. KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill 1986).

66. Kentucky v. Surrogate Parenting Assoc. Inc., 10 Fam. L. Rep. 1105, 1106; 704 S.W.2d 209 (Ky. Cir. Ct. 1983).

67. *Id.*

prohibition on payments.[68]

A facilitator attempting to use this form of termination provision must avoid running afoul of any provisions similar to another Kentucky law requiring that after such a termination or relinquishment of parental rights, a licensed child-placing agency must take custody of the child or the child may be placed by any other person only after making "written application to the Secretary (Cabinet for Human Resources) for permission to place or receive the child."[69] So although a termination statute may have no direct prohibition on payments, the execution of the contract could be hampered by the requirement that a licensed agency place the child.

The case of *In re Baby Girl*,[70] illustrates this point. The judge ruled that a surrogate mother may not terminate her parental rights to a child which she bore for pay and then transfer custody to the adopting couple without permission of the Cabinet for Human Resources.[71] The above proviso is not, however, applicable to a stepparent adoption in Kentucky. There, if the father can obtain custody, the surrogate may be paid.[72]

An additional adoption law problem involves the timing of the requisite consent of the surrogate mother to her child's adoption by the donor's wife.[73] The typical contract requires the surrogate mother to consent to an adoption or to terminate her parental rights prior to the birth of the child. Most states' adoption laws have a provision which invalidates any consent to an adoption granted prior to a child's birth. These provisions are based on the theory that a mother may not have adequately reflected upon the decision or that it may be viewed in a different light following the child's birth. Several states have therefore adopted a requirement that the mother wait three days follow-

68. 704 S.W. 2d at 212.

69. KY. REV. STAT. ANN. § 199.473(1) (Michie/Bobbs-Merrill 1986). This provision then allows the state office to investigate the situation for suitability, thus insuring against the potential abuses discussed *supra* at text accompanying note 20. *See also* MEEZAN, KATZ & RUSSO, *supra* note 28, at 167.

70. 9 Fam. L. Rep. 2348 (BNA) (Cir. Ct. Jefferson Co. Ky. 1983).

71. *Id.*

72. This may became a moot point following the Kentucky Supreme Court's decision in Surrogate Parenting Associates, Inc., 704 S.W.2d 209.

73. This waiting period must be distinguished from the waiting periods courts require between the time of filing an adoption petition and a home study is made and the final adoption decree.

ing a child's birth before consenting to its adoption.[74] Several other states will validate the consent as long as it is given any time after the child's birth.[75] Massachusetts has a four day waiting period[76] and Kentucky, Louisiana, and South Dakota have instituted a five day rule.[77] Virginia requires a mother to wait ten days before consenting to an adoption of her child[78] and Rhode Island's wait is the longest, requiring a full fifteen days to pass after the birth before a consent may be signed.[79]

If applied to a surrogate mother arrangement, these restrictions on a mother's right to consent to an adoption would invalidate the pre-contractual intent of the parties. This raises two problems for the parties involved in the contract: (1) without consideration and an enforceable contract, the surrogate could legally renege on her obligations and keep the child; or (2) even if the surrogate goes through with the agreement, she could be found guilty of child selling in certain states.[80]

Laws governing the timing of an adoption consent are, however, aimed at insuring that the mother's consent is given without any duress or coercion by third parties. A surrogate mother is easily distinguished from a woman who decides to give up her child for adoption in that the latter's pregnancy is usually unplanned and the ability or desire of the mother to raise the child is a major consideration in a decision to consent to her child's adoption. The surrogate mother, on the other hand, makes her decision prior to conception with full knowledge of her circumstances and obligations, and, thus, such pressures become irrele-

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74. ARIZ. REV. STAT. ANN. § 8-107(B) (Supp. 1986); ILL. ANN. STAT. ch. 40 § 1511 (Smith-Hurd 1986); MICH COMP. LAWS ANN. § 710.27(5) (Supp. 1982-83); MISS. CODE ANN. § 93-17-5 (1973); N.H. REV. STAT. ANN. § 170-B:7 (1978); OHIO REV. CODE ANN. § 3107 (Baldwin 1986).

75. ALASKA STAT. § 25.23.060(a) (1983); FLA. STAT. ANN. § 63.082(1) and (4) (West 1985); GA. CODE ANN. § 19-8-4(a) (1986); IND. CODE ANN. § 31-3-1-6(b) (1980); NEV. REV. STAT. § 127.020.1 (1980); N.M. STAT. ANN. § 40-7-8 (1978); N.D. CENT. CODE § 14-15-07 (1981).

76. MASS. GEN. LAWS ANN. ch. 210 § 2 (West 1986).

77. KY. REV. STAT. ANN. § 199.500(5) (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 9:422.7 (West Supp. 1987); S.D. CODIFIED LAWS ANN. § 25-5A-4 (1984).

78. VA. CODE ANN. § 63.1-225 (Supp. 1986).

79. R.I. GEN. LAWS § 15-7-6 (1981).

80. *See supra* text accompanying notes 32-33. Other forms of consideration such as the bargained-for promise of performance may be sufficient for the contract's enforceability. *See* Comment, *Surrogate Motherhod, supra* note 33, at 376 (1981).

vant. In contrast, the mother giving up a child for adoption may feel that even three to ten days is not a sufficient length of time to guarantee that her decision was made without duress.[81] It is the emotional experience of the pregnancy and birth which usually overcomes a natural mother who subsequently chooses not to give up her child for adoption and a surrogate who chooses to renege on her contract.[82]

D. Artificial Insemination Laws and the Presumptions of Paternity

Since the surrogate mother is impregnated by artificial insemination, laws governing this procedure can also affect the parental rights of the parties to a surrogate contract. The process of artificial insemination has been widely used for decades as a solution to male infertility. The process involves using the sperm of an anonymous donor to impregnate a woman whose husband is infertile or an unmarried woman who desires to raise a genetically-related child. Some early cases imposed the stigma of adultery on the woman who had been artificially inseminated with the sperm of an anonymous donor and declared the resulting offspring as illegitimate.[83] At least between 6,000 and 10,000 children are born annually through artificial insemination by a donor,[84] and thirty states now regulate the procedure in varying degrees.[85] All of the artificial insemination statutes legitimize the child resulting from the artificial insemination as the legally recognized offspring of the woman who was artificially inseminated

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81. MEEZAN, KATZ & RUSSO, *supra* note 28, at 155. The authors also note that in Great Britain consent to the adoption of a child is not allowed until 6 weeks after the birth of a child.

82. Mary Beth Whitehead did not anticipate the attachment she may have developed to "Baby M" and desired the experience of caring for an infant again. Span, *The Fierce War of Longing Over Baby M.*, Wash. Post, Oct. 14, 1986, at E1, col. , E4, col. .

83. *See* Doornbos v. Doornbos, 23 U.S.L.W. 2308 (1984), *dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E. 2d 844 (1986); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1963).

84. Curie-Cohen, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979) [hereinafter Curie-Cohen].

85. With increased public awareness of genetically and sexually transmitted diseases, a growing number of proponents are urging expanded regulation of the procedure. *See* Comment, *The Need for Regulation of Artificial Insemination by Donor*, 22 SAN DIEGO L. REV. 1193 (1985). *See also* Council of District of Columbia Sperm Bank Licensure and Regulatory Act of 1985 (Proposed Bill 6-131).

and her husband.[86] As beneficial as such provisions are for the child, these statutes have the effect of totally foreclosing the desired outcome of the surrogate contract, *i.e.*, that the sperm donor be recognized as the father with parental rights in the offspring.

Unfortunately, for would-be parents under a surrogate arrangement in sixteen states, the laws specifically sever all the donor's rights to the child;[87] in three of these, however, the man providing the sperm is allowed to contract to be the legal father.[88] These statutes also confer legitimate status on the child where the consent of both natural mother and her husband is given. In addition, many of the statutes require that the insemination be performed only by a licensed physician or someone under his order or supervision.[89] The only plausible reason for

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86. ALA. CODE § 26-17-21 (1986); ALASKA STAT. § 25.20.045 (1983); ARK. STAT. ANN. § 34-720 (Supp. 1985); CAL. CIV. CODE § 7005 (West 1987); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. § 45-69i (1985); FLA. STAT. ANN. § 742.11 (West 1986); GA. CODE ANN. § 19-7-21 (1986); IDAHO CODE § 39-5401 et seq. (1986); ILL. ANN. STAT. ch. 40 § 1453(3)(a) (Smith-Hurd 1986); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. REV. STAT. ANN. § 188 (West Supp. 1987); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974) and MD. GEN. PROV. CODE § 20-214 (1982); MICH. COMP. LAWS ANN. § 333.2824 (1980) and § 700.111 (1980); MINN. STAT. ANN. § 257.56 (1982); MONT. REV. CODE ANN. § 40-6-1-6 (1985); NEV. REV. STAT. 126.061 (1986); N.J. STAT. ANN. § 9:17-44 (West 1986-87); N.M. STAT. ANN. § 40-11-6 (1986); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OHIO REV. CODE ANN. tit. 31 § 3.111.37 (Page Supp. 1986); OKLA. STAT. ANN. tit. 10, § 551-553 (West 1987); OR. REV. STAT. §§ 109.239, 109.243, 677.355, 677.365, 677.370 (1985); TENN. CODE ANN. § 68-3-306 (Supp. 1983); TEX. FAM. CODE ANN. § 12.03 (Vernon 1986); VA. CODE ANN. § 64.1-7.1 (Supp. 1986); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WIS. STAT. ANN. § 767.47(9) (West 1986-87) and § 891.40 (West 1986-87); WYO. STAT. § 14-2-103 (1986).

87. ALA. CODE § 26-17-21(b) (1986); CAL. CIV. CODE § 7005(b) (West 1987); COLO. REV. STAT. § 19-6-106(2) (1986); CONN. GEN. STAT. ANN. § 45-69(J) (WEST 1985); IDAHO CODE § 39-5405 (1986); ILL. REV. STAT. ch. 40 § 1453(3)(b) (Smith-Hurd 1986); MINN. STAT. ANN. § 257.56(2) (1982); MONT. REV. CODE ANN. § 40-6-106(2) (1985); NEV. REV. STAT. § 126.061(2) (1986); N.J. STAT. ANN. § 9:17-44(b) (West 1986-87); N.M. STAT. ANN. § 40-11-6(B) (1986); OHIO REV. CODE ANN. tit. 31 § 3.117.37(B) (Page Supp. 1986); OR. REV. STAT. § 109. 239(1)(2) (1985); TEX. FAM. CODE § 12.03(B) (Vernon 1986); WASH. REV. CODE ANN. § 26-26050(a) (West 1986); WIS. STAT. ANN. § 891.40(2) (West Supp. 1986-87); WYO. STAT. § 14-2-103(b) (1986).

88. N.J. STAT. ANN. § 9:17-44(b) (West 1986-87) (unless woman and donor have entered into a written contract to the contrary);N.M. STAT. ANN. § 40-11-6(B) (1986) (unless the woman and donor have agreed in writing to the contrary); WASH. REV. CODE ANN. § 26-26.050(2)(West 1986)(unless the woman and donor have agreed in writing to the contrary).

89. ALASKA STAT. 25.20.045 (1983); ARK. STAT. ANN. § 34-722 (Supp. 1985); CAL. CIV. CODE § 7005(a) (West 1987); COLO. REV. STAT. § 19-6-106(1) (1986); CONN. GEN. STAT.

such a requirement is that it provides a reliable third party to document the act and to verify the consent of the parties, and in some cases to perform the appropriate genetic screening.[90] However, there appears to be no medically significant justification for the stipulation, since any woman is capable of performing the relatively simple procedure herself. In fact, the first publicized surrogate mother did just that by using a paper cup and drug store syringe.[91]

In the states in which the paternity presumptions are involved, a sperm donor father faces a host of obstacles to surmount. In one such instance, a Michigan court rejected one couple's attempt to bypass the statutory presumptions of paternity under the artificial insemination statutes by having the husband of the surrogate withhold his consent and expressly state such "non-consent" in an affidavit.[92] The plaintiff in the case, George Syrkowski, sought a declaration under the Michigan Paternity Act that a child conceived by him through the artificial insemination of defendant, Corinne Appleyard, should be legally recognized as his own. He sought an order of filiation pursuant to the paternity statute and the entry of his name on the birth certificate as the child's natural father. The defendant admitted all the allegations and submitted a sworn statement by the physician that the defendant was inseminated with the sperm of Mr.

ANN. § 45-69(g) (West 1981); GA. CODE ANN. § 43-34-42 (1986); MINN. STAT. ANN. § 257.56 (1982); MONT. CODE ANN. § 40-6-106(1) (1981); NEV. REV. STAT. § 126.061 (1981); N.Y. DOM. REL. LAW § 73(2) (McKinney 1977); OHIO REV. CODE ANN. tit. 31 § 3111.32 (Page Supp. 1986); OKLA. STAT. ANN. tit. 10, §§ 551, 553 (West 1987); OR. REV. STAT. § 677.370 (1981); VA. CODE ANN. § 64.1-7.1 (Supp. 1986); WASH. REV. CODE ANN. § 26.26.050(1) (West 1986); WIS. STAT. ANN. § 891.40 (West 1986-87); WYO. STAT. § 14-2-103(a) (1977). The laws in California, Colorado, Minnesota, Montana, and Virginia state a physician's supervision is necessary in order to legitimate the child. Washington, however, specifically stipulates that a failure of a physician to file his certification with the state willnot affect the father-child relationship.

90. Unless specifically requested by the parties involved, very little genetic screening is performed, and data regarding family histories are only superficial. Record-keeping on artificial inseminations has generally been very haphazard. *See* Curie-Cohen, *supra* note 82.

91. Griffin, *Womb for Rent*, 9 STUD. LAW. 28 (Apr. 1981). In at least one state, however, this would be grounds for a criminal charge of practicing medicine without a license, although enforcement of such a statute would seem virtually impossible. A penalty of up to 30 days imprisonment or a fine of $250 is possible under OR. REV. STAT. § 677.990 (1981).

92. Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W. 2d 90 (1983), *rev'd* 420 Mich. 367, 362 N.W. 2d 211 (1985).

Syrkowski. The Appleyards offered an affidavit in support of Syrkowski's motion that they "voluntarily abstained" from sexual intercourse during the period in issue.[93] However, the Michigan Attorney General intervened, claiming the action sought was beyond the scope of the Paternity Act and alleged that, pursuant to the Michigan artificial insemination statute, Mr. Appleyard must be deemed the father of the child.[94]

In reply, Mr. Syrkowski offered Mr. Appleyard's "Statement of Non-Consent" which was made in an attempt to circumvent the statute's declaration that with a husband's consent to an artificial insemination, the child is considered the legitimate offspring of that marriage. The attorney general pointed out the incongruity between Appleyard's "statement of Non-Consent" and affidavit that he and his wife "voluntarily" abstained from sexual intercourse for purposes of the insemination. The lower courts refused to accept this statement as evidence to rebut the paternity presumption and held the request was beyond the scope of the Paternity Act, which was intended only to establish child support obligations.[95] However, the Michigan Supreme Court reversed the lower court decision and held that the court did have subject matter jurisdiction to determine the status of the child and the father's biological paternity under the Paternity Act since both are necessary prerequisites to the enforcement of a support obligation under the Act.[96]

In a context outside the realm of surrogate parenting, however, other courts have supported denials of other petitions for paternity declaration on a narrow jurisdictional reading. For example, in a New York case, a man claiming to be the natural father of a child already being supported and cared for by the mother's former husband sought a declaration of his rights as father of the child. The court held that no basis for jurisdiction existed under the paternity statute's proceedings.[97] The court further held that the paternity statute was intended only for determination of support obligations and not paternity status.[98]

93. 122 Mich. App. at 507, 333 N.W. 2d at 91.
94. *Id.* at 508, 333 N.W. 2d at 92.
95. 420 Mich. at 369, 362 N.W. 2d at 213.
96. *Id.* at 370, 362 N.W. 2d at 214.
97. Czajak v. Varonese, 104 Misc. 2d 601, 428 N.Y.S. 2d 986 (1980).
98. *Id.* at 609, 428 N.Y.S.2d at 991.

The court would only allow the proceeding if the putative father established a prima facie case that the child was in need of support.[99] Decisions of this latter type clearly do not favor a sperm donor or any putative father who seeks to have his parental rights in his offspring legally recognized.

In Washington, New Jersey, and New Mexico, however, a sperm donor may counter the paternity presumption by claiming his paternity rights in writing.[100] This is a dramatic departure from the approach taken by those states which have adopted artificial insemination statutes which sever the donor's rights explicitly, or which do so implicitly by presuming the woman's husband to be the natural or legitimate father if he has consented to the procedure.[101]

The artificial insemination statutes also raise questions about the applicability of artificial insemination to an unmarried surrogate mother. Of the nine states which enacted a version of the Uniform Parentage Act ["UPA"], a few have implied that the law could apply to single women. Subsection 2 of § 5 of the UPA provides that "[t]he 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 the child thereby conceived."[102] In California, Colorado, and Wyoming, the reference to a "married" woman has been omitted,[103] thus opening the door to permit the insemination of a single woman without a presumptive father, protecting the donor from a potential paternity action to care for and support the child. This implication becomes especially important in the surrogate agreement where it may be desirous to use an unmarried surrogate in order to avoid the problems of rebutting the husband's presumed paternity.[104] This produces a result opposite that desired by the sperm donors in a surrogate situation who want their paternity rights to be legally recognized.

Arkansas is the only state which has passed a law which

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99. *Id.* at 609, 428 N.Y.S.2d at 991.

100. *See supra* note 79.

101. *Id.*

102. UNIFORM PARENTAGE ACT, § 5(2); MINN. STAT. ANN. § 257.56 (1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. § 126.061 (1981).

103. CAL. CIV. CODE § 7005(6) (West 1987); COLO. REV. STAT. § 19-6-105 (1978); WYO. STAT. § 14-2-103 (1978).

104. *See infra* text accompanying notes 107-30.

specifically contemplates the use of a surrogate mother. The Arkansas statute presumes a child born to a single mother impregnated by artificial insemination to be "the child of the woman giving birth, except in the case of a surrogate mother in which event the child shall be that of the woman intended to be the mother."[105]

In states not utilizing a UPA format, the laws legitimizing the child speak in terms of "husband" and "wife" and require consents of both parties. In a few of these states, consent is presumed by the mere existence of a husband and need not be in writing. For example, according to the Maryland statute which legitimates a child conceived through the artificial insemination of a "married woman with the consent of her husband . . . consent of the husband is presumed."[106] Even if a surrogate's husband wanted to file a "statement of non-consent" to avoid the paternity presumption, it may be held invalid under a strict statutory reading.[107]

All this leaves the sperm donor father who wants to claim his legal rights as father of the child conceived through artificial insemination pinned against the wall of legal presumptions which favor the paternity of the surrogate's husband and prevent the donor from acknowledging and claiming his paternity. Some states do allow a putative father to acknowledge his paternity in writing, prior to the birth of a child born out of wedlock, when no other presumed father exists.[108] If the mother doesn't dispute it, the natural father should be allowed to assert his rights.

If the surrogate mother is married, the paternity presumption problem further erodes the contracting parties' intentions because of the near impossibility of rebutting the presumption in favor of her husband. In UPA states, a man may be consid-

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105. ARK. STAT. ANN. § 34-721(B) (Supp. 1985). The statute presumes, however, the birth mother to be the natural mother for birth registration purposes, and a court order must issue to show the surrogate as the mother on a birth certificate.

106. MD. EST. & TRUSTS CODE § 1-206 (1974).

107. *See supra* text accompanying notes 90-94.

108. ALA. CODE § 26-11-2 (1986); ALASKA STAT. § 25.20.050 (1983); ARK. STAT. ANN. § 61-141(d) (Supp. 1985); IDAHO CODE § 16-1510 (1986); MASS. GEN. LAWS ANN. ch. 210 § 2 (West 1986); MICH. COMP. LAWS ANN. § 710.33(2) (West Supp. 1982-83); OR. REV. STAT. § 109.070(5) (1981); PA. STAT. ANN. tit. 23 § 8302 (Purdon Supp. 1987); UTAH CODE ANN. § 78-30-4(3)(b) (Supp. 1985); VA. CODE 1 20-61.1 (Supp. 1983).

ered a presumed father if he brings the child into his home and holds out the child as his natural offspring.[109] When two presumed fathers exist, then the law states that "the presumption which on the facts is founded on weightier considerations of policy and logic controls."[110] In the surrogate case where the parties adhere to their contract, these provisions present no problem. As long as the surrogate mother freely gives the child to the natural father, he can establish the presumption under §4(a)(2) of the UPA. It is reasonable to assume that with the contract as evidence and affidavits regarding the artificial insemination by the physician that policy and logic would favor a paternity declaration in favor of the natural father. This would consequently enable his wife to adopt the child under the less restrictive stepparent adoption rules.[111]

However, in the scenario in which the surrogate mother refuses to give up the child as stipulated in the contract, the natural father may not even bring an action under most paternity statutes' rules of standing. The majority of states have a law similar to California's UPA which only allows "a child, the child's natural mother or a man presumed to be [the child's] father" to bring an action for a declaration of paternity.[112] This same provision in Colorado's version of the UPA[113] has been declared unconstitutional by the Colorado Supreme Court on grounds that it violates the equal protection rights of natural fathers not married to the mothers of their children. That case involved a natural father, R. McG., seeking determination of his status as natural father to the child, C.W., who was born to the mother, J.W., as a result of an extramarital affair.[114] Serological testing of the claiming father indicated a 98.89 percent probability that he was in fact C.W.'s natural father.[115] The presumed father, W.W., refused to be tested. The lower court

109. Uniform Parentage Act § 4(a)(2).

110. Uniform Parentage Act § 4(b).

111. *See supra* note 25.

112. *See, e.g.*, ARK. STAT. ANN. § 34-716 (Supp. 1985); CAL. CIV. CODE § 7006 (West Supp. 1983); GA. CODE ANN. § 19-7-43 (1986); IND. CODE ANN. § 31-6-6.1-2 (Burns 1980); MINN. STAT. ANN. § 257.57 subdiv. 2 (1982); NEB. REV. STAT. § 43-104.02 (1981).

113. COLO. REV. STAT. § 19-6-107 (1986).

114. R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980). *See also In re* M.P.R., 123 P. 2d 743 (Colo 1986).

115. 200 Colo. at 347, 615 P. 2d at 668.

granted summary judgment for the defendants based on the plaintiff's lack of standing under the UPA to bring the action. Since R. McG. was not "presumed to be the child's father" under the Colorado statute, he was not authorized to bring an action claiming the existence of a father-child relationship.[116]

The natural father, R. McG., appealed, arguing that his fourteenth amendment, equal protection rights were violated because the statute "impermissibly discriminated between natural mothers and claiming natural fathers." This argument was upheld by the Colorado Supreme Court. As the court stated, the statutory scheme of the UPA "creates more than a difference in treatment of natural mothers and fathers. It establishes contrary treatment."[117]

The majority opinion utilized the intermediate standard of judicial scrutiny applicable to gender-based classifications enunciated in *Caban v. Mohammed*, which holds that such a statutory "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[118] While the court recognized the state's interest in preserving the integrity of families, and maintaining harmonious settings in the home, it also noted that the statute permits a natural mother to bring a paternity action which may be damaging to the stability of a natural father's family relationships, even if he is married to someone else and has other children. On the other hand, the court further noted the natural father is prevented from establishing his own claim of paternity as well as from rebutting the statutory presumption that the husband of the natural mother is the father. Thus the court held that if the natural mother may bring a paternity suit against a natural father under the statute, the plaintiff as a claiming father should be given the same right.[119]

In a concurring opinion, Judge Dubofsky said that the state could show a preference for the mother's family unit without vi-

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116. *Id.* at 347-48, 615 P.2d at 668-69.

117. *Id.* at 350, 615 P.2d at 671.

118. Caban v. Mohommed, 441 U.S. 380, 391 (1979)(quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

119. 200 Colo. 350, 615 P. 2d at 671.

olating equal protection guarantees because the mother's identity is generally not questioned, while the father's paternity is not so easy to establish.[120] Consequently, Judge Dubofsky preferred a due process justification for invalidating the statute based on the case of *Stanley v. Illinois*.[121] In that case, the U.S. Supreme Court recognized a due process right of a natural father which required that he be given an opportunity to be heard in order to protect his fundamental right to conceive and bear children.[122] In the Colorado case, R. McG. had "no alternate remedy for protecting his interest as the child's natural father" and this interest, coupled with his desire to support the child, outweighed the state's interest in protecting the integrity of the child's present family unit.[123]

In a later case, however, brought in Wyoming, challenging the same UPA provision,[124] the state supreme court reached the opposite result. Though the facts were remarkably similar and the statutory language identical to that in the Colorado case, the Wyoming court found no denial of equal protection or due process, claiming that any classifications made by the statute "realistically reflects the fact that the sexes are not similarly situated in the circumstances."[125] The court found that the natural father's interest in claiming paternity did not involve a fundamental right, but even if it did, the classification could withstand strict scrutiny although the court did not really apply the test. The court further attempted to characterize the classification as non-gender based and as a "distinction between those within the family unit and those without, regardless of gender."[126] The apparent gist of the court's opinion is that the state's overriding concern in protecting a solid family unit outweighs the interest of a stranger to that relationship, in this case, the natural father. The court feared that recognition of the standing of a claiming natural father to establish his paternity would "invite similar ac-

120. *Id.* at 352, 615 P.2d at 673.

121. 405 U.S. 645 (1972).

122. 200 Colo. 352, 615 P. 2d at 673; *cf.*, *In re Baby M*, 217 N.J. Super. at 388, 525 A.2d at 1165-66.

123. *Id.* at 352-53, 615 P.2d at 673-74.

124. *See* WYO. STAT. § 14-2-104 (1977).

125. A. v. X., Y., & Z., 641 P. 2d 1222, 1225 (Wyo. 1982), *cert. denied*, 459 U.S. 1021 (1982).

126. 641 P.2d at 1226.

tions by those whose only purpose is to break up a family unit in order to satisfy a jealous or revengeful feeling."[127]

This point is truly untenable because rare would be a situation in which anyone but a true biological father would seek out the responsibilities of support and care which come with the territory of a paternity suit. A far more reasoned approach was taken by the chief justice of the Wyoming court in his dissent:

> [T]he court could deny the putative father the right to pursue his parental rights under his established relationship for the reason that it would not be in the child's best interests, but this result could only be reached after the putative father is provided with a hearing on the matter. Since [the statute] fails to provide for such a procedure it is a denial of the biological father's rights of due process.[128]

Yet another approach to this problem was assumed by an Illinois appellate court in the case of *Pritz v. Chesnul.*[129] Although that case involved a natural father claiming paternity of an illegitimate child, the statutory provision on standing provided that only the mother of the child or the Illinois Department of Public Aid could bring a declaratory action to establish paternity and enforce liability for support and welfare of the child.[130] Instead of flatly declaring the statute unconstitutitonal, the court held that the father of an illegitimate child has a "constitutional right to a legal forum with due process procedures to establish his natural parentage and his parental rights" and that the statute should not be construed to bar the father's action.[131] Essentially, the court ignored the very plain meaning of the language of the statute and construed it to allow the father's pater-

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127. *Id.* at 1225. A commentator on the Colorado case stated:

> [It] should be not be assumed that many extra-marital fathers will use this new avenue simply because it is now open to them. Only the most persistent and concerned claiming fathers are likely to pursue an action which may destroy their own family units and will, if successful, require substantial support obligations.

Note, *Bastardizing the Legitimate Child*, 59 DEN. L.J. 157, 171 (1981).

128. 641 P. 2d at 1235.

129. 106 Ill. App. 3d 969, 436 N.E. 2d 631 (App. Ct. 1982).

130. *See* ILL REV. STAT. ch. 40 § 1354 (Smith-Hurd 1986).

131. 106 Ill. App. 3d at 972, 436 N.E. 2d at 634. *See also In re* Sullivan, 134 Ill. App. 3d 455, 480 N.E. 2d 1283 (App. Ct. 1985).

nity action.[132]

A related problem was presented in a California case in which the issue involved the ability of a purported father and natural child, through a guardian ad litem, to present blood test evidence in order to prove his paternity by rebutting the conclusive presumption of the Evidence Code §621.[133] The situation involved a child, Michelle, born as the result of an extramarital affair between her mother and natural father. After the child's birth, the mother and presumed father divorced and the mother then married the plaintiff-the natural father. In that case, the plaintiffs were not allowed to present blood test evidence and, consequently, the presumption against the plaintiff according to §621 became irrebuttable.[134] Although the plaintiffs alleged a due process violation, the California Supreme Court held that the public interest in protecting a family unit outweighed the plaintiff's interest. In addition, the court distinguished the case from *Caban* in that the California statute did not exclude the rights of a father altogether, but rather, required that the father's rights be conditioned upon the mother's.[135]

The conclusion to be drawn from these cases is that only the most compelling interests will justify statutory presumptions which would preclude a natural father from establishing his paternity rights to a child he has sired. These interests are limited to protection of the child's welfare and preserving an already intact family unit. However, even these compelling interests are constitutionally insufficient justifications for such statutory presumptions when a claiming father is denied all other recourse to establishing his paternity.[136]

Some states have statutorily recognized the right of a natural father to assert his paternity rights and have provided a

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132. 106 Ill. App.3d 973, 436 N.E. 2d at 635. The court said the words are "plain but their reach and the limits of their application are not defined."*Id.*

133. Michelle W. v. Ronald. W., 139 Cal. App. 3d 24, 188 Cal. Rptr. 413 (1983), *aff'd*, 39 Cal. 3d 354, 703 P. 2d 88, 216 Cal. Rptr. 748 (1985)(en banc), *appeal dismissed sub nom.*, Michelle Marie W. v. Riley, 106 S. Ct. 774 (1986). CAL EVID. CODE § 621(a) (West 1987) states that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." The presumption may be rebutted by blood tests which can only be offered by the husband or natural mother.

134. 139 Cal. App. 3d at 28, 188 Cal. Rptr. at 417.

135. 39 Cal. 3d 354, 703 P. 2d 88, 216 Cal. Rptr. 748 (1985).

136. *See* R. McG. v. J.W., 200 Colo. 345, 615 P. 2d 666 (1980).

mechanism for such an assertion. For example, Washington has modified the UPA by adding that any interested party may bring an action to determine the existence or nonexistence of paternity regardless of the source of the paternity presumption.[137]

Indiana also permits the presumed father, the mother, or an alleged father to bring a paternity action, even if the mother and presumed father were married at the time of conception.[138]

In Minnesota, the biological parents may declare they are parents of a child "born out of wedlock" which would be conslusive evidence of paternity.[139]

Based on all the potentially applicable statutes currently enacted, Washington is one state in which surrogate contracts would escape the legal challenges previously discussed. Private adoptions are allowed; the surrogate could be paid for her services since such payment should not be considered an unlawful "sale" of the child; no waiting period is required before which the surrogate may consent to the adoption; the artificial insemination statute provides for recognition of the donor's rights in the child if so desired; and should the surrogate or her husband breach their obligations in giving up the child, at least the natural father may bring an action to establish his paternity.

IV. LAWS APPLICABLE TO SURROGATE CARRIERS AND EMBRYO TRANSFER

Although the Kentucky Supreme Court has declared it legal for a woman to conceive a child *in vivo* and give birth to that child for a fee, in some states it is against the law to be paid for transferring an embryo to another woman who may subsequently give birth to the child. In ten states which prohibit a woman from selling a fetus for purposes of experimentation, the

137. WASH. REV. CODE § 26.26.060(2) (1986).

138. IND. CODE § 31-6-6.1-2 (Burns 1980).

139. MINN. STAT. ANN. § 257.34 (1982). The Baby M case illustrates that establishing paternity is only a step in the process of the AI donor's goal to obtain custody of his offspring. While asserting his paternity rights bolsters his custody case, the outcome of such decisions vary from case to case and predicting an outcome is nearly impossible, since so many non-legal factors will enter into a court's analysis of the child's best interests. Goodman, *Baby M trial sends disturbing messages about America's class structure*, Chicago Tribune, Mar. 1, 1987, § 5, at 3, col.1.

statutory language may be broad enough to potentially ban payment to a woman who transfers her embryo.[140] Florida has enacted a law specifically forbidding the sale and purchase of embryos.[141]

The embryo transfer technique may also run afoul of certain statutes which prohibit embryo research done in connection with an abortion which may also encompass the lavage technique used in embryo transfer.[142] In addition, where donor *in vitro* fertilization is employed and an unrelated surrogate carrier is paid, the same legal issues are raised as in the typical surrogate mother situation. Despite the fact that the woman "who gives birth to the child is genetically unrelated to the child," it is conceivable that our existing perceptions of maternity stemming from the woman who gives birth would favor a surrogate carrier who was determined to keep the child. However, one court has recognized that the woman who provides an egg to be fertilized *in vitro* and implanted in the womb of a surrogate carrier, may be the "legal" mother of the child, provided tissue samples from mother and child can be matched following the birth.[143]

Any facilitator who uses donor *in vitro* must be cognizant of the laws applicable to the technology of *in vitro* fertilization. While *in vitro* fertilization is a more commonly used technique and may no longer be considered experimental, some fetal research laws could impose special duties of care upon those involved in transferring and implanting embryos.[144]

V. CONCLUSION

There is no doubt that new legislation must be adopted to adequately protect the interests of the parties to surrogate

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140. ME. REV. STAT. ANN. tit. 22 § 1593 (West 1980); MASS GEN. LAWS ANN. ch. 112 § 12J(a) IV (West 1983); MICH. COMP. LAWS ANN. § 333.2690 (West 1980): NEB. REV. STAT. § 28-342 (1985); N.D. CENT. CODE § 14-02.2-02 (1981); OHIO REV. CODE ANN. § 2914 (Baldwin 1983); OKLA. STAT. ANN. tit. 63, § 1-735A (West 1984); R.I. GEN. LAWS § 11-54-1(f) (1981); TENN. CODE ANN. § 39-4-208(b) (1982); UTAH CODE ANN. § 76-7-311 (1978); WYO STAT. § 35-6-115 (1977). Nebraska, Ohio, Oklahoma, and Wyoming cover only aborted fetuses.

141. FLA. STAT. ANN. § 873.05 (West 1986).

142. Andrews, *The Legal Status of the Embryo*, 32 LOYOLA L. REV. 357, 377 (1986).

143. Smith v. Jones, 85-532014 DZ (3d Jud. Dist., Mich. Mar. 14, 1986).

144. *See generally* Andrews, *supra* note 135, at 398-400.

motherhood and surrogate carrier agreements.[145] Only Arkansas and Louisiana have passed laws specifically dealing with surrogate contracts, but no states have enacted the comprehensive legislation that is necessary to address the concerns of society-at-large and the parties involved in all of the current reproductive technologies.[146] Consequently, courts have been forced to resolve the legal problems in this area. Although most courts thus far have adopted positions favoring the legality of these new arrangements, they have done so reluctantly.[147] Therefore, while "conceiving for cash" may indeed be legal today in such jurisdictions as Washington, because its statutes, on their face, do not prohibit the surrogate mother arrangement, or in Kentucky and New Jersey, because courts have voiced their approval of the transactions, this conclusion is by no means certain in other jurisdictions. Until new legislation is adopted, the participants must continue to assume the risks of the statutory uncertainties.

145. *See* HASTINGS REPORT; *see, supra*, note 3.

146. *Id.*; Freed, *As Surrogate Parenting Increases, States Must Resolve Legal Issues*, Nat'l L. J., Dec. 22, 1986, at 28.

147. The New York court ruling in *In re* Adoption of Baby Girl, L.J., 132 Misc. 2d 972, 978, 505 N.Y.S.2d 813, 817 stated: "this court, in spite of its strong reservations about these arrangements both on moral and ethical grounds, is inclined to follow the majority opinion."