IS SURROGACY AGAINST PUBLIC POLICY? THE ANSWER IS YES.

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The most prevalent method for an eager, childless couple to have a child is through adoption. The laws governing adoption guidelines are promulgated to protect all parties involved, yet childless couples are increasingly utilizing other alternatives.[1] This is due in large part to the shortage of adoptable children and a lengthy adoption process. There are many who maintain they have been denied the right to adopt because of their age, religion, sexual preference or marital status.

Some couples have turned to surrogacy to fulfill their desires for a child. The term surrogacy refers to an arrangement whereby a woman, "the surrogate,"[2] carries a child for a couple, usually for money. The surrogate and the childless couple negotiate the terms of their arrangement with the help of "baby brokers," the agents who run infertility centers and make a large profit by matching the surrogate with the childless couple. This arrangement, which I refer to as "reproductive prostitution," contravenes the public policy against buying and selling children, and was properly declared unlawful by the Supreme Court of New Jersey in *In re Baby M.*[3]

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[1] Other methods are *in vitro* fertilization and artificial insemination by donor and embryo transfer. *See also* NEW YORK STATE BAR FAMILY LAW SECTION COMMITTEE, REPORT ON SURROGATE PARENTING (1987). The report stated that:

> [t]he production of a child for those of means, by use of the body and the genetic material of another, that other being, in most instances, an educationally and financially disadvantaged person, for the profit of a broker, is viewed by the majority of this Committee as demeaning the value and the dignity of life and as an unacceptable commercialization of the reproductive process.

Id.

[2] There has been increasing antagonism to the use of the word "surrogate" in reference to the biological mother. In actuality the wife of the man donating the sperm, the woman who intends to adopt the child, is the true surrogate. *See* Annas, *Death Without Dignity to Commercial Surrogacy*, 121 N.J.L.J. 317, 318 (1988).

[3] 109 N.J. 396, 537 A.2d 1227 (1988).

Many states in the United States and many European nations oppose surrogacy, yet there is a scarcity of legislation addressing surrogacy arrangements. Currently eight states have enacted laws that pertain to surrogacy: Louisiana;[4] Arkansas;[5] Nevada;[6] Nebraska;[7] Indiana;[8] Kentucky;[9] Michigan[10] and Florida.[11] Louisiana was the first state to pass a law providing that surrogacy-for-pay contracts are absolutely null and void and unenforceable as contrary to public policy.[12] The Arkansas statute provides that if a couple contracts with an unmarried surrogate, the couple, not the surrogate, are the legal parents of the child.[13] The Nevada law exempts surrogacy from the prohibition on payment in connection with the placement of a child for adoption.[14] The *Baby M* decision has spurred other states to propose legislation restricting surrogacy arrangements.[15]

Courts have attempted to regulate the two most offensive aspects of surrogacy: failure to give the surrogate time to change her mind after the birth, and payment to the surrogate for the sale of the child. In *Baby M*, the Supreme Court of New Jersey held that surrogacy-for-pay contracts were "illegal, perhaps criminal, and potentially degrading to women."[16] Moreover the decision underscores a woman's right to change her mind before giving up her child. In 1986, the Kentucky Supreme Court ruled that surrogacy arrangements must give the birth mother the right to change her mind after the birth of her child.[17] As early as 1982, the Michigan Court of Appeals in *Doe v. Kelley*,[18] upheld a

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4 LA. REV. STAT. ANN. § 9:2713 (West Supp. 1989).

5 ARK. STAT. ANN. § 34-721(B) (Supp. 1985).

6 NEV. REV. STAT. § 127.287 (1987).

7 NEB. REV. STAT. § 25-21,200 (Supp. 1988).

8 IND. CODE ANN. § 31-8-2-1 (West Supp. 1988).

9 KY. REV. STAT. ANN. § 199.590 (Baldwin 1988).

10 MICH. COMP. LAWS § 722.B63 (Supp. 1989).

11 FLA. STAT. ANN. § 63.212 (West 1988).

12 *See supra* note 4.

13 *See supra* note 5.

14 *See supra* note 6.

15 *See* Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTING CENTER REPORT (1987); *see also* Adler, *Baby M Revisited: Surrogacy Weaker Around Nation*, 123 N.J.L.J. 241 (1989); Rotholz, *Most Legislatures Reluctant to Act So Far: Ruling May Prod Lawmakers Across the Nation*, 121 N.J.L.J. 257 (1988).

16 *In re* Baby M, 109 N.J. 396, 411, 537 A.2d 1227, 1234 (1988).

17 Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky *ex rel.* Armstrong, 704 S.W. 2d 209 (Ky. Sup. Ct. 1986).

18 Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

statutory prohibition on payments to a surrogate mother in connection with adoption proceedings.

Commercialism in the surrogacy arrangement, *i.e.*, payment to the surrogate beyond the necessary medical and maternity expenses, should be declared unlawful despite the surrogate's consent.[19] The abuse which occurs in the commercialism aspect of surrogacy is evident. Children are sold to couples without consideration for their qualifications or suitability as parents,[20] and, as a result, there has been a surge of lawsuits lodged against infertility centers. De-commercialization will ensure that a woman who volunteers to act as a surrogate will be motivated not by monetary concerns, but by altruistic motives.[21]

European countries have espoused a strong public policy against surrogacy. Great Britain, as a result of the Warnock Committee Report,[22] has banned "commercial" surrogacy. The ban was passed by the British Parliament in 1985.[23] Commercial surrogacy is prohibited in Israel, France and West Germany as well.[24]

A surrogate mother should not be required to terminate her parental rights prior to the birth of her child. Such a requirement is inhumane and inconsistent with adoption statutes giving the mother a period of time after the birth in which to change her mind. Termination of parental rights is valid only with the in-

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[19] *See Baby M*, 109 N.J. at 440, 537 A.2d at 1249. The *Baby M* court stated: "There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was 'voluntary' did not mean that it was good or beyond regulation and prohibition." *Id.* (citing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

[20] BAKER, BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTION (1978).

[21] *See Baby M*, 109 N.J. at 438, 439, 537 A.2d at 1248, 1249.

> [A]ll parties concede that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few. . . . In the scheme contemplated by (surrogacy-for-pay contracts) . . . a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction.

Id.

[22] COMMITTEE OF INQUIRY INTO HUMAN FERTILIZATION AND EMBRYOLOGY, ENG. DEP'T OF HEALTH & SOC. REP. § 8.17 (1984).

[23] United Kingdom Surrogacy Arrangements Act, Ch. 49 (1985). Two years later, in a dispute between a surrogate mother and a surrogate father and his wife, a British court awarded custody of twins to the surrogate mother, according to a "welfare of the child" analysis, instead of on the basis of the surrogacy agreement regardless of the surrogate father's superior economic position. *See In re* P, 2 Fam. 421 (1987).

[24] Adler, *Baby M Revisited*, 123 N.J.L.J. 421, 436 (1989).

formed consent of the parents. Consent is informed only if the parent has a full understanding of both the terms and the conditions of the surrogacy agreement, and of the personal psychological consequences of this decision. Furthermore, there is no statute in this country which has upheld a pre-birth termination without a ratification after the birth.

The Supreme Court of the United States has recognized, on numerous occasions, that the relationship between parent and child is constitutionally protected.[25] Far more precious than property rights, parental rights have been deemed to be among those essential to the happiness of free men and women. Parental rights should be more significant and priceless than liberties which derive merely from shifting economic arrangements.

The Supreme Court, while never expressly declaring parental rights to be absolute and fundamental, has nonetheless implied that the right to family integrity is indeed fundamental. Parental rights are premised on principles of liberty and privacy. The Court has held that the fourteenth amendment encompasses the right of the individual to marry, establish a home and bring up children.[26] The Court has also declared that the state may not interfere with the liberty of parents to direct the upbringing and education of their children.[27] This suggests that the rights of parents in matters concerning their children is highly regarded.

Under the privacy rationale, the Supreme Court has intimated that the right to family integrity is an important interest. Where a fundamental right is at issue, it must be shown that a well-defined, compelling state interest is served by legislation infringing on a liberty and that a no less onerous alternative is available to achieve the statutory objective.[28] Clearly, requiring a surrogate to terminate parental rights prior to the birth of her child does not serve any state interest, and therefore would not pass constitutional muster.

Much has been said about the psychological consequences resulting from forcing a woman to relinquish her child against her will. Little attention has been given to surrogacy's effect on the children involved. The potential for psychological harm attendant to surrogacy agreements touches the lives not only of

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[25] Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 173 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also* Santosky v. Kramer, 445 U.S. 754 (1982).

[26] Meyer v. Nebraska, 262 U.S. 390 (1964).

[27] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[28] *See* Roe v. Wade, 410 U.S. 113 (1973).

those born of such arrangements but their siblings as well. Obviously, under antagonistic circumstances, the child born of a surrogacy agreement will have to contend with the feelings of insecurity associated with unstable family relationships. The child will also have to reconcile his or her existence within the unique dynamics of the family situation.

Minimal consideration has been given to the siblings of the surrogate child. The psychological effect of watching a mother's pregnancy terminate with the giving away, or worse yet, the selling of an offspring, can be disastrous. Ostensibly, the siblings of the surrogate child will wonder if they too are soon to suffer the same fate, that is, whether they will be taken away from their mother for some incomprehensible reason. They may suffer an unbearable guilt reaction when they learn that their brother or sister was sold for funds that were put aside for their education or welfare. Siblings are also frequently jealous of the mother's pregnancy. They may wish for the death or illness of the unborn child. When, as in a surrogacy arrangement, the child is mysteriously given away, the siblings may assume that it is their fault. They may develop devastating guilt complexes. If for no other reason than the welfare of the children involved, surrogacy arrangements should be prohibited.

In *Baby M*, the New Jersey Supreme Court invited a legislative response to the surrogacy issue, "subject only to constitutional constraints."[29] Since then, legislators have had the opportunity to consider guidelines proffered by the Family Law Section of the American Bar Association's (ABA) Model Surrogacy Act.[30] As proposed, the act validates and legalizes surrogacy agreements that comply with its state regulatory scheme. In addition, it provides certain legal remedies in the event of a breach. The ABA's house of delegates rejected the proposed act at its February 1989 meeting. This is not surprising in light of the fact that the draft was deficient in many respects. The most glaring deficiency was that the act did not provide for a birth mother's right to change her mind. The Supreme Court of New Jersey recognized this as a vital right. This omission certainly contravened the adoption laws in this country, and it blatantly ignored the doctrine of informed consent. Furthermore, although the act set forth stringent requirements for psychologi-

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[29] *Baby M*, 109 N.J. at 469, 537 A.2d at 1264.

[30] ABA MODEL SURROGACY ACT (draft 1988), *reprinted in* 22 FAM. L. Q. 123 (1988).

cal evaluation of the parties to the contract, it failed to address the potential psychological ramifications resulting from a surrogate mother's post-birth relinquishment of her child. Moreover, while its stated purpose was to safeguard the best interests of the child born of a surrogacy agreement, the act failed to consider surrogacy's effect on the siblings of the surrogate child. To have approved the Model Surrogacy Act would have been a disservice to infertile couples, surrogate mothers and the children involved in surrogacy arrangements. The act's protection simply did not extend to all the parties involved in the surrogacy process. For example, the surrogate mother's rights are protected only to the extent that they have been negotiated in the agreement and upheld by a court after the birth of the child. Furthermore, the act required the licensure of agencies, but it failed to provide a limitation on the fees charged.

In rejecting the rather lengthy and complex Model Surrogacy Act,[31] the ABA House of Delegates approved the Uniform Status of Children of Assisted Conception Act (Uniform Act) a measure expressing a sensitivity to the treatment of all parties involved in surrogacy, but "designed primarily to effect the security and well being of those children born and living in our midst as a result of assisted conception."[32] Through its narrow scope and focus, the Uniform Act offers two alternative approaches to surrogacy arrangement, something akin to a Chinese restaurant menu.

Alternative A allows the parties to enter into a written agreement, wherein the surrogate mother relinquishes her rights to the child, subject to court approval. The core of this alternative is a broad pre-conception authorization procedure that the parties must follow if the agreement is to be approved. While it requires that all parties enter into the agreement voluntarily and that they meet applicable state standards of fitness, it fails to provide for mandatory psychological screening of any of the parties.

Provisions governing the parties' rights to terminate the contract are troublesome. After the court order approving the surrogacy agreement has been entered, all parties to the agreement have the right to terminate the agreement by written notice before conception. Once the surrogate has conceived, she has

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[31] *Id. See* MODEL SURROGACY ACT (draft 1988), *reprinted in Draft ABA Model Surrogacy Act*, 22 7 Am. L.Q. 123 (1988).

[32] Uniform Status of Children of Assisted Conception Act, prefatory note, *reprinted in* 15 FAM. L. REP. 2009, 2010 (Feb. 21, 1989).

180 days from the date of the last insemination to terminate the agreement. The most blatant defect in the Uniform Act, however, is that it is devoid of any recognition of a surrogate mother's right to satisfy or recant her decision after the birth of the child. Unless the surrogate mother has exercised her right of recantation within the first 180 days of her pregnancy, on the birth of the child, the intended parents will be deemed the parents of the child. They will be able to walk away with the child leaving the surrogate mother with absolutely no legal recourse.

There is an additional provision in Alternative A that allows for the payment of consideration ostensibly as a means of avoiding attack under baby-selling statutes. In light of the *Baby M* court's admonition that "[t]here are, in a civilized society, some things that money cannot buy,"[33] it is most unlikely that this provision will survive a challenge before the New Jersey Supreme Court.

Alternative B, on the other hand, is consistent with *Baby M*, because it declares that in the event that a woman changes her mind after the birth of her child, surrogacy agreements are null and void.

Ideally, any legislation pertaining to surrogacy arrangements should provide the following:

1. A presumption of the biological mother as the "legal mother."

2. A period of time after the child is born for the biological mother to change her mind about termination of her parental rights. This provision would consider the psychological and emotional bond between the birth mother and the child.

3. Intense psychological evaluation and ongoing psychological counseling of the surrogate prior to insemination.

4. Screening of the childless couple, prior to insemination, to ensure that they will meet state-approved standards of fitness.

5. Prohibition of any payment to the surrogate mother beyond necessary medical and maternity expenses.

6. Licensing, screening and regulating of any clinics involved in the surrogacy process, and of the centers used to test and inseminate the surrogate mother.

7. A provision wherein fertile women would not be allowed to utilize the surrogacy process as a substitute for pregnancy.

Surrogacy has been described as "a crude contract, drafted

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[33] *Baby M*, 109 N.J. at 440, 537 A.2d at 1249.

by greedy attorneys, to try to circumvent the (states') laws regarding adoption, termination of parental rights, and baby selling."[34] The arrangement in *Baby M* was therefore properly banned as against public policy in New Jersey. Surrogacy-for-pay contracts should be declared illegal. If surrogacy arrangements are to be legalized, states should regulate the process so as to ensure the greatest protection for all parties involved.

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[34] Annas, *supra* note 2, at 318.