SOCIAL RESPONSIBILITY IN HIGH TECH CUSTODY CASES:
SURROGATE PARENTHOOD

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ABSTRACT

Technological advances and biological research in reproductive medicine have produced a new breed of parent that confuses our legal system -- the surrogate mother. Judges in Montana are without statutes and case law as guidance for their decisions in high tech child custody cases. Whether or not one agrees with surrogate parenting as an alternative family construct, there are health and ethical-legal risks for the people involved that could create a burden on society.

Each society views its own patterns of marriage, family and kinship as obviously right and proper. Research in the literature on family values and attitudes, demonstrating their religious roots, enables us to have a better understanding of the problems surrounding surrogate motherhood.

A discussion of alternatives to surrogacy introduces us to genetic engineering in reproductive medicine and to the need to consider some of the social issues that result from this high tech medicine, now a part of the twentieth century. But our legal system presents many obstacles to the surrogacy alternative that thwart the arrangement. Among these is the fact that many state legislatures have not addressed surrogacy, thus leaving the issues to be settled in the courts on a case-by-case basis with no clear statutory guidance. Case law itself is confusing, raising issues over the enforcement of the surrogacy contract, and the legal status of the child.

A more complete understanding of the surrogate motherhood arrangement comes from the stories of those surrogate contracts that have failed. From these failures an understanding of a better surrogacy system evolves which provides criteria for recommendations to state legislators. This paper demonstrates that without legislative direction to the courts, surrogacy is uncontrolled and may be misused.
CHAPTER 1

INTRODUCTION

Technological advances and biological research in reproductive medicine have produced a new breed of parent that confuses our legal system -- the surrogate mother. Traditionally, the tragedy of divorce was that the child lost a parent. In surrogacy, however, the child has one too many parents, and there is no disjoining of the parents from the manner in which they were socially joined prior to the child's conception. Hence, traditional child custody cases deal with a set of legal circumstances different from that of the high tech custody cases discussed in this essay. As a result, judges in Montana are without statutes and case law as guidance for their decisions in high tech child custody cases. The people involved in the infertility triad are themselves confused regarding their rights and responsibilities. Consequently, the child's best interest in a custody case may be difficult to ascertain.

Whether or not one agrees with surrogate parenting as an alternative family construct, there are health risks, physical and mental, for the people involved in the triad that could create a burden on society. Equally as important is the fact that technological advances in
reproductive medicine outpace changes in accepted concepts of social responsibility. According to a 1983 government study, more than three million married women wanted to have babies but could not conceive. Many of these infertile women are eager at least to have a child with their husband's genes, and a growing number of other females wish to oblige these infertile women. Just as important as the woman's desire to have a child genetically related to her husband is the male's desire to fulfill his societal notion of virility by being able to pass his genes to his offspring.

This professional paper will survey literature on the relationship of surrogacy to Western religion and religious values. The family patterns of our modern culture challenge the older assumptions about the nature of marriage, family, children, child rearing, kinship, divorce and adultery. In Chapter 2 these assumptions will be discussed in an attempt to relate them to the religious values of our Western culture. Because surrogacy is not the only modern alternative to involuntary infertility, a synopsis of other genetic engineering options in reproductive medicine today will be discussed in Chapter 3. Artificial insemination, embryo freezing, in vitro fertilization and embryo transplant will be defined to demonstrate other alternatives that are currently being used or may be used in the near future. Because adoption remains a current option for
the childless couple, this traditional alternative will also be included in the discussion of alternative options to surrogacy in Chapter 3.

Surrogate motherhood, another modern alternative to involuntary infertility, will be the subject of Chapter 4. Past and present concepts of surrogacy, issues surrounding the current use of surrogate mothers and family values which may be questioned because of surrogacy are addressed.

Certainly, the national newspapers and television have helped to indoctrinate the public about the court's involvement with surrogacy, but a more inclusive study of the law, the statutes and their failures is also important. Therefore, in Chapter 5 the common law inadequacies and the constitutional questions which arise from the surrogate arrangements are discussed. The legal questions surrounding the surrogacy issue are very complex, and their answers remain very much a debated subject. In Chapter 6 there will be a divergence from the procedural law of Chapter 5 to a presentation of the failures of surrogacy from the human perspective -- that of the surrogate mother.

Finally, in the concluding chapter, Chapter 7, a recommendation for Montana legislative guidelines will be offered. This recommendation will answer such questions as: Who will be the surrogate mother? Who will make the surrogate arrangements? Who will pay? What will be the rules of the arrangement? The purpose of this
recommendation is to improve the rate of success of this high tech parenting triad now considered, by this author, a part of accepted twentieth century parental practices.
"And God blessed them; and God said unto them, 'Be fruitful and multiply'" (Genesis 1:28). This quotation from the Bible is a tenet of family life in Western societies. Family values, family roles and family purpose in society rally around religious dogma. An understanding of this close relationship of family and religion allows an understanding of the nature of the problems surrounding surrogacy.

The main function of the family has been to produce, nurture and socialize the next generation. Each society views its own patterns of marriage, family and kinship as obviously right and proper, and usually God-given as well. In Western culture, it is necessary to reach back into religious history in order to grasp the influence of religion on modern society's conception of the family.

In Rome, by the fourth century A.D., divorce and marital disruption had reached a stage of public scandal, and both premarital and extramarital sex relations had become sources of official embarrassment. The birth rate fell and childlessness increased to a frightening extent;
infanticide and abortion became commonplace in spite of many legal restrictions.\\(^1\)

In the year 312 A.D., Christianity was given legal recognition. This proved to be of benefit to the family as a social institution. Followers of this new religion believed that marriage was instituted for His purpose rather than for the purpose of sexual gratification, or for the purpose of pleasing one's ancestors. In the eyes of God, the followers believed, marriage was a permanent relationship between one man and one woman -- "till death us do part."

Unlike the Hebrews, Christians sanctioned only monogamy; unlike the Greeks and Romans, Christians condemned all sexual activities outside of marriage; and, unlike so many of the neighboring peoples, Christians preached against divorce.

Thus premarital chastity and postmarital fidelity were established as strong, positive religious values; fornication and adultery were condemned. In addition, the new Church also was vehemently opposed to infanticide.

The attitudes of the early Christian Church were certainly influenced by the predecessors, the Hebrews. The Hebrews, in an attempt to compete with their neighbors in social reform, placed restrictions on sexual activity such as premarital coitus, adultery, homosexuality, masturbation, etc. To this list the Christians added contraception, abortion, singing wanton songs, bathing in
mixed company and suggestive dancing, to name but a few restrictions. With these prevailing sexual attitudes, it is understandable that virginity was held to be a divine state.

Chastity symbolized purity of the soul and dignity of a person. Society reenforced this value by considering those who renounced sex as select individuals. Sexual abstinence came to be recognized as one of the hallmarks of spiritual dedication. In fact, vows of celibacy as Christian dogma would later become part of the grounds for a Protestant Reformation.

It is evident that the teachings of the early Christian Church have had a lasting effect on modern Western sexual attitudes. There remains debate as to the positive or negative consequences of this effect. For example, some would argue that enjoyment of sexual activity (outside the religious intent for procreation) is accompanied by guilt feelings. The guilt of sinning may be felt so strongly by either one of the marital partners as to cause them to be dysfunctional in their family role. The conflict between the role of self and the roles of either the wife or husband may cause this dysfunction. The structure of such a family is in question. Yet others would argue that the Judeo-Christian sex code promotes and maintains a strong set of family values -- a set of family values which gives the family priority over the self.
The family became a sacred institution when, at the Council of Trent (1545-1563), the Church announced that marriage was a sacrament. That is, marriage is a divine creation which only the Church, as an instrument of God, could validate. It followed from this holy origin that the marriage vows were not to be dissolved for any reason -- no divorce. The Catholic Church takes this position today toward the sanctity of marriage. Traditional marriage, then, in Western culture means loyal monogamy.

**Early Family Values in the United States**

Early family life in the United States was shaped by older European traditions, older European traditions which had their origins in Christian religion. Intellectually, at least, one can note the patriarchal nature of a religion that addresses its god as "the Father," or refers to its deity with the masculine pronoun, or has as one of its rules "Obey thy Father in His Kingdom." It logically follows from this particular religious base that the colonists, who left Europe for religious freedom, were steeped in patriarchal tradition. By a natural religious learning, the husband was to head the household and to consider the wife and children as subordinates.

With the sacramental cloak that marriage possessed, colonial attitudes toward adultery are understandable. The
colonists thought that adultery was a more serious offense than premarital coitus. The Connecticut Code of Laws included compulsory marriage in its consolidated list of punishments for adultery. There is no misunderstanding that premarital sex was severely dealt with by the Puritans. But adultery was more offensive and punishable by death; both sexes received the same punishment. However, this radical approach to adultery was later reduced to flogging, imprisonment, banishment and branding.

We are all familiar with the famous letter "A" in the novel, *The Scarlet Letter*. So, too, we are familiar with the present-day label of "puritanical" for those who support traditional moral codes.

In the colonial era, matrimony was viewed as an economic necessity as well as a holy event. Marriages were arranged affairs made by the parents; romantic love was not emphasized. These mores held their ground until the late nineteenth century. At the end of the nineteenth century, women were presumed to be spiritually and morally superior to men. As the fair sex, they needed the male protection, undoubtedly to keep their good name. There existed such prudishness at this time that the novel, *Huckleberry Finn*, was branded as a dirty book.

By the World War II era, the dainty-lady role was abandoned. Women began to smoke, to drink, to use male vocabulary and to wear modern clothes. Socially, the
dating game had started. In earlier generations, courtship was initiated with matrimonial aims in mind; now courtship was looked upon as an end in itself. In addition to this new attitude toward courtship, children could choose whom they would marry without parental consent. We had come full circle since Roman times. Industrialization, urbanization, commercial amusements (movies, dance halls, bars) and the decline of the authoritarian tradition were unraveling the social garment spun from religious dogma. The only indispensable prerequisite to marriage now was "romantic love."

With the dissipation of authoritarian rule, the attitudes toward children in the family changed also. "Spare the rod, spoil the child," a helpful Biblical hint in child rearing, was discredited. Parents now were not to overdiscipline their children. Parental interests in their child's personality development allowed the child more free rein from strict parental discipline. Nevertheless, the mother remained the nurturing parent and the father the disciplinarian in their roles toward the child.

With the increased availability of contraceptives and the relatively quick cure for venereal diseases there came a change in the sex codes and a change in the number of children a woman had to bear. World War II women did not have to have children at random. In traditional society, children just came, and preferring not to have them at all
was unthinkable. Earlier in this century, family planning efforts still focused on the timing of children and family size rather than on whether to have them at all. However, with the advent of contraception, marital coitus came to be regarded as pleasurable for the wife as well as the husband. Publicly, phrases such as "sexual compatibility" and "sexual adjustment" were heard.

Although women were freed in such areas as dress, dating and sexual behavior, after World War II, they were still accorded subordinate status in the social, legal and economic areas. Within the home there was little doubt that the wife was subservient. Eventually, as women swarmed into the industrial job market, some legal and political rights were granted to them.

When our society industrialized, the family structure changed as well. There are two sociological categories of family: the extended family and the nuclear family. In the extended family, more than two generations of the same kinship line either live together or in nearby dwellings. The eldest adult male is head of the extended family and all adult members shared responsibility for child-rearing. Many major roles undertaken by the modern welfare state were at one time the major responsibility of the family. With more adults in the household, it could absorb responsibilities created by death, illness, unemployment,
separation and divorce. Thus, the extended family was quite stable.

In our preindustrial and traditional era, the extended family was common. It also was very large. In contrast, the nuclear family includes only the parents and their dependent children, and they live apart from their relatives. As the extended family offered stability, the nuclear family is highly unstable. The pressures of rearing the children, of financing the family, of caring for the ill and of supporting other members are felt by two people rather than by the large number of people found in the extended family. Unable to endure, families break under these pressures. This type of family unit is the most common in our modern industrialized society.

These changes in the family pattern have involved a basic shift in people's loyalties. Basically, people have decided to focus less on their responsibilities toward their relatives and families, and more on their desires for self-fulfillment as individuals. With this shift of responsibilities, the extended family, in general, has been replaced by the nuclear family pattern. Because the nuclear family relies more on the relationship of the two adults in the family, a patriarchal union may be replaced by a more egalitarian union.

What is unique about these family trends is that people's entire way of thinking about marriage has changed.
Marriage has become less an economic arrangement, or kinship alliance, and more an alliance of companionship based on the emotional commitment of two individuals. "The family is one of the critical links in the capitalist economy, as it both produces 'labor power' and consumes goods and services."  The future labor power is children. As a valued entity, today parents shower their children with love and affection in an effort to provide a happy childhood. The colonial parents were apparently less demonstrative with their affection toward their children. Instead, parental love was demonstrated by the parents teaching skills, rules of conduct, industriousness, a belief in God and economic values. As urbanization evolved, child-rearing practices changed. Families became smaller and formal education became more important. With these two changes the patriarchal tone of the family ebbed somewhat. Discipline and respect for authority were less severely imposed on the child.

But the most dramatic changes in child-rearing practices came after World War II with the influence of the work of Sigmund Freud. He emphasized the importance of infancy and childhood as determinants of adult personality. There are many who would beg to differ with Freudian concepts, but one fact is certain: We can credit Freud with bringing modern society to its knees, enabling it to see the importance of the young child.
The Role of Parent in Society

Of all the social roles, few are as important as the role of the parent. Parents more than any other individuals are responsible for preparing children for adulthood. Our values and our basic skills are inculcated into us by our parents, and without these we experience insurmountable difficulties. Today, the child-rearing responsibilities are expected to be a joint effort of both parents. That is not to say that, in spite of the sociological changes, some couples will not deliberately choose traditional role arrangements because of their religious convictions or personal preferences. But the cultural expectation of submissive females, restricted to taking care of home, husband and children, has waned. Today, one way or another, many couples try to avoid division of labor based on gender. Nevertheless, though she may not be the submissive caretaker, today's woman does see motherhood as the central role and an important ingredient in a marriage.

Motherhood is not only essential to marriage in the mind of the wife, but to her parents, her friends and her work associates as well. Although these pressures are less so than in the past, our society has a pronatalist bias. That is, having children is taken for granted and not having them must be justified -- especially to the couple's parents. In an attempt to reduce the conflict
between what we believe and what we see in our society, we immediately try to cubbyhole a couple's infertility. That is, we rationalize that a couple is infertile because he is a sterile male or she is a sterile female, or she fooled around too much before she married, or (God forbid!) one or the other member of the couple is gay.

Some sociologists, like Joan Huber and Janet and Larry Hunt, would argue the opposite. Since "parenting couples are disadvantaged in comparison to nonparenting couples," American society is structural antinatalism. The Hunts would say that corporate institutions are committed to masculine values of power and profit instead of family well-being. Not only are the corporations antifamily, but neighborhoods are posing problems for the family construct by refusing to set up daycare facilities. The government cannot go unscathed for its actions either. "Between 1981 and 1983 military spending increased by $55 billion, while $10 billion was cut from federal programs that provided health care, nutrition, and education to our youth." All of these instances reflect the antinatalism present in contemporary American society.

Psychoanalyst Erik Erickson has yet another concern for the antinatalism sentiment in American society. He believes couples will become self-absorbed and neglect their responsibilities for generations to come. We are losing a sense of historical continuity.
There are social pressures in our society to have children and not to have children. Either kind of pressure can influence a person's choice and act as a source of guilt or self-doubt. The final decision should not only reflect external social pressures, but our own needs, values and attitudes about becoming parents. In our society children provide a sense of continuity of self, and provide purpose and meaning to the people within a marriage. The birth of a child brings the husband and wife a lot closer.

In summary, Western culture has a strong religious base to its notion of family and all the ramifications that accompany this notion. Family patterns and roles within these patterns have changed because of industrialization, commercial inventions and political strides such as the Women's Movement. But actions speak louder than words. We pay a great deal of lip service to modern attitudes while our values are really reflected in our actions. "And God blessed them; and God said unto them, 'Be fruitful and multiply.'" This is still central to a woman's worth in the imagination and actions of many people and in the imagination and actions of the woman herself. A knowledge of what we hold to be true to our beliefs will clarify the problems a new family construct poses.

In the next chapter there will be a discussion of the methods available for procreation for the woman whose womb
is unable to "be fruitful and multiply" her species. The collected knowledge of what society regards as beliefs about the family, marriage, children and rearing children, and premarital and postmarital sexual activity will assist in the understanding of the problems a new family construct, such as surrogacy, poses.
Endnotes


2Ibid., p. 57.

3Sources for the following discussion are:


4Kephart and Jedlicka, p. 386.


6Lamanna and Riedmann, p. 386.

7Ibid., p. 387.
CHAPTER 3

IN VOLUNTARY INFERTILITY: CAUSES, REMEDIES AND RAMIFICATIONS

What was once referred to as infertility is now more appropriately spoken of as involuntary infertility. This semantic change reflects the fact that it is now acceptable for women to choose not to bear children in a marriage. Because it is involuntary infertility that often leads to surrogacy parenting, the concept warrants definition.

Involuntary infertility is the condition under which a couple wanting to conceive and bear a child is physically unable to do so. Involuntary infertility includes cases in which a man may have relatively few sperm in his semen; this condition is medically referred to as a "low sperm count." A woman may have blocked fallopian tubes, either as a result of disease or of a congenital anomaly. Interestingly, there may be some cases where either partner may be able to conceive with another partner, but not with his or her own spouse.

Involuntary infertility, whatever the medical problem, has increased in recent years. Because of technological advances in the last five to six years, involuntary infertility was declining. However, it is now argued that
it is beginning to increase again. "It is estimated that one in five couples in this country have some kind of infertility problem."

This may be because, while for both men and women, maximum fertility occurs in their mid-twenties and earlier, the tendency these days is for couples to postpone childbearing until their thirties or forties. Paradoxically, the health habits of both smoking and engaging in excessive exercise, because they have an effect on ovulation, are also contributors.

It is suggested that even more significant in accounting for involuntary infertility is the use of two contraceptive devices which are referred to by some as the causes of the sexual revolution: oral contraceptives and IUD's, which freed women from unwanted pregnancies. The new sexual freedom allowed women in contemporary society exposes them to many infections, medically phrased, "sexually transmitted diseases." The more sexually active men and women are, the higher the risk that one or the other will contract an infection of their reproductive tract which, in turn, will result in scarring damage. Thus, the future choice of conceiving a child is eliminated.

An additional cause of involuntary infertility is exposure to various drugs, chemicals and radiation. For example, a young person exposed to low doses of radiation at the work site may be rendered infertile as a result of
the exposure. Unsafe working conditions at a nuclear plant could provide such radiation exposure.

There is one assumed cause of involuntary infertility whose role has been challenged -- abortion. Earlier studies argued that abortions could damage the cervix, resulting in the inability to carry a subsequent pregnancy to term, but later studies have shown that abortion, using the methods common since 1973, has no effect on infertility.²

Another possible cause of involuntary infertility in our society may be the pressure women feel from society to become a mother. Living in our Western culture where there exists a strong pronatalist bias (the ideology that having a baby is necessary and good) places a greater emotional burden on the infertile couple, particularly the female member of the couple. Also, as part of the ideology of romantic love, there is the notion that it is a woman's greatest desire to present her husband with his offspring. These kinds of cultural expectations, reinforced by the economic structure, pressure women to "choose" motherhood.

### Emotions Associated with Involuntary Infertility

Involuntary infertility can be devastating because a woman can, and often does, feel a choice has been taken from her. When told of their involuntary infertility,
individuals or the couple experience a loss of control over their life plans. This feeling of loss of control can produce a sense of helplessness, a sense of anger, a sense of guilt and, perhaps considerably worse, a sense of being damaged or defective. An infertile partner soon questions his or her self-esteem.

Besides hurting the partner's self-esteem, the situation can hurt the relationship and create a marital crisis as well. For many couples, involuntary infertility not only calls the procreative function of marriage into doubt, but challenges the social function of marriage as providing some control over a private life. Slowly the involuntary infertile couple is confronted with the social stigma that, while other couples are having their successful pregnancies, they cannot conceive. Under these social conditions, the involuntary infertile couple begins the quest for a medical answer to their problem.\(^3\)

The high tech reproductive alternatives for involuntary infertility include artificial insemination, in vitro fertilization, embryo transplants, embryo freezing and surrogate motherhood. All of these advanced reproductive techniques raise the question of whether and to what extent technology should be involved in human creation. Adoption, of course, is a way of becoming a parent without conceiving. Because some people view adoption as a more
comfortable alternative to surrogate motherhood, it will be discussed along with the genetic engineering techniques.

Adoption

Couples who wish to adopt through more traditional channels face a very long wait for a child. The scarcity of adoptable children is attributed to the increased availability of abortions, the widespread effective use of birth control methods, and the social acceptance in contemporary society of an unwed woman keeping her pregnancy. In addition, more women are postponing their families until their thirties and forties, and discovering at that age that they are infertile. With the delay inherent in adoption, many adoption agencies consider their age too advanced for them to be considered for parents.

Because of the long wait and the scarcity of babies, many couples have turned to foreign adoptions or to independent adoption. An independent adoption is arranged directly with the mother or her agent, usually a lawyer. There is much criticism in our country of independent adoption because it renders both the biological mother and the adopting parents vulnerable to exploitation and expense. Nevertheless, the ratio of independent to agency adoptions is now 50:50, whereas 10 years ago it was 30:70. The advantage of an agency is that agencies carefully screen prospective parents and assure the consent of the
biological mother. However, they are criticized for having cumbersome bureaucratic procedures. Also, until recently, the adoption process was shrouded in secrecy, with the adoptive parents and the natural parents prevented from knowing each other. Adoptive agencies have released their grip on this sort of information and this allows for a more healthy separation of child and mother, now and in the child's future.

For some women adoption continues to meet the need for motherhood. But high tech reproductive techniques have trickled out from the research laboratories and into the decisions of some involuntary infertile women. The genetic connection to the child through either spouse makes these technological advances more appealing than the traditional adoption. The availability of insemination, in vitro fertilization, embryo transplants, embryo freezing and surrogate motherhood (discussed in the following chapter) in reproductive choices make it necessary to acquaint ourselves with each.

Alphabet Soup of Genetic Engineering
(AL, IVF, GIFT, ET)

Artificial insemination (AI) may be indicated when a woman is presumably fertile but her husband is not. For this procedure, live male sperm is injected into a woman's vagina when she is ovulating. The sperm may be her
husband's or a donor's or a mixture of the two. Although this procedure is not publicized, it is used far more often than the public is aware. "Estimates indicate that each year almost one percent of all births or between 6,000 and 10,000 children are born in the United States as a result of artificial insemination." Artificial insemination is expensive and legally complicated. Some states technically regard the practice as adultery and the child as illegitimate. A husband may feel demasculated and may even feel jealous of the donor's and the wife's fertility.

While in artificial insemination the baby is conceived inside the woman's body, with in vitro fertilization (IVF) a baby is conceived outside the woman's body — in a laboratory dish. The egg is surgically removed from the woman's ovary and placed in the laboratory dish with her husband's or a donor's sperm. After conception, the fertilized egg is transferred into the woman's uterus to develop into a mature fetus. This procedure was originally used for women who had blocked or diseased fallopian tubes. Centers for IVF's are usually private clinics with some having university affiliation. Still another modern technique similar to IVF's is gamete intra-fallopian transfer (GIFT), where eggs and sperm are collected, mixed and immediately placed back into the woman's fallopian tube to make the natural journey to her uterus for implantation. Last in this group is embryo freezing. After being
fertilized in vitro, the embryos are frozen to be placed in the woman's uterus days or even months later.  

Genetic engineering exemplified in its extreme would be the ovum transplant or embryo transplant. The recipient of the embryo is an infertile woman. Initially, the ovum or egg of another woman is fertilized with the infertile husband's sperm by artificial insemination. Physicians then remove the embryo from the donor woman five days later and implant it into the infertile woman. This high tech reproductive technique is used for women who have no ovaries or who wish not to pass a genetic disease to their offspring. The ovum donor is matched with the infertile woman's phenotype (someone similar in appearance). A couple will be charged $4,000 to $7,000 to receive a fertilized egg from a donor. Embryo transplant is still in the research stage and not part of general practice in reproductive medicine.  

Artificial insemination and in vitro fertilization are more common in reproductive medicine than embryo transplant, and as such require further discussion. In spite of their obvious benefits to the infertile married couple, these high tech reproductive techniques raise serious social implications. As an example in point, a single woman need never develop a relationship of any sort with a male to conceive a child. The institution of marriage would be deprived of its societal role, that of
procreation. A child, on the other hand, could be conceived without parents. Consider the ethical, medical, economic and legal questions about the child's life which society would have to answer. Just such an example of a parentless child occurred in Australia. Future parents of a frozen and not yet implanted fertilized egg were killed in an accident, leaving others to decide the moral implications of what to do with the embryo.

Feminist Concerns About Genetic Engineering

A pattern has emerged revealing the way new reproductive technology is subtly promoted. At first, any genetic advancement in research is medically to be used by a few women who meet specific criteria. But physicians soon expand the indications for the use of this research technique to a majority of women and, in this subtle manner, it becomes part of common practice in reproductive medicine. For example, electronic fetal monitoring was introduced for those women considered to be at high risk for obstetrical complications. Now fetal monitoring is used on most birthing women.

In vitro fertilization, too, was originally proposed for use on a small group of women -- those who had either blocked or absent fallopian tubes. Physicians have extended the indications (under what medical situations in
a female would IVF be recommended) for IVF to include married women whose husbands have low sperm counts. Even though this was a dramatic switch from the original indication for IVF, artificial insemination has been used for a long period of time to correct for low sperm count. Artificial insemination has much less risk to the female than does the surgical procedure of IVF. These same physicians have predicted that in the near future people may use sperm and eggs of genetically healthier people to produce children for themselves via IVF's.  

Concern has been expressed, especially by feminists, about "baby farms" and about selectivity -- conceiving a number of fetuses from whom only the best are to survive. A final point made by feminists is that the reproductive technology offers the possibility of extending the definition of a "fit mother" to include the "fit reproducer." At the same time, they argue, there is no corresponding "fit father" role.

**Summary**

New high tech reproductive processes such as those discussed in this chapter increase people's options for conception of a child. At the same time, high tech reproductive medicine raises tremendously difficult ethical and social questions. Surrogate motherhood is yet another
of these high tech reproductive processes and receives consideration in the next chapter.
Endnotes


2 Jennie Kline et al., eds., "Induced Abortions and the Chromosomae Characteristics of Subsequent Miscarriages (Spontaneous Abortions)," *American Journal of Epidemiology* 123 (1986): 1066.


6 Ibid.

CHAPTER 4

SURROGACY PAST AND PRESENT

The publicity and much of the discussion surrounding the surrogate mother has been emotive and reactionary. Examining surrogacy in the past, realizing that it is not an aberration of the twentieth century, may dissipate some of the threat that it poses. Actually examining its current application and learning facts about this application can assist in judging the merits of the current programs. Finally, an awareness of how this new idea of family fits with current family values is developed in this chapter to resolve some of the conflict between our beliefs and our observations. Having addressed this conflict, examination of surrogacy for its own value to society may be questioned.

Most often surrogate motherhood involves an arrangement between a married couple who cannot have a child because of the wife's infertility and a fertile woman who agrees to conceive and carry a child for the couple to term and then surrender all parental rights to the child.

The notion of surrogacy, of course, is not a uniquely modern idea. Using a substitute biological mother dates back at least to the Old Testament days of Abraham.
But Sarai and Abram had no children. So Sarai took her maid, an Egyptian girl named Hagar, and gave her to Abram to be his second wife. 'Since the Lord has given me no children,' Sarai said, 'you may sleep with my servant girl, and her children shall be mine.' And Abram agreed. So he slept with Hagar, and she conceived. . . . (Genesis 16)

In modern surrogacy, conception is achieved through artificially inseminating the surrogate mother with the sperm of the biological father. Conception, although usually achieved through artificially inseminating the surrogate mother, can be achieved by in vitro fertilization of the wife's egg and a subsequent embryo transplantation in the surrogate mother. An example in which the latter procedure may be an option is when a woman's uterus has been removed by hysterectomy but still ovulates (emits an ovum) if the ovaries remain, as in the case of a hysterectomy for uterine fibroids. Eggs may be surgically removed, fertilized by the husband's semen in a laboratory dish to produce an embryo, then transplanted into another woman for gestation (maturing the fetus until term).

This paper will consider only the first form of surrogacy, artificially inseminating a surrogate mother who will carry the pregnancy to term and then voluntarily relinquish her parental rights.

Although the practice of surrogacy dates back to the Old Testament, it has only been in the last five to ten years that the high tech surrogate motherhood arrangement
has become popular in our society. "In 1986 it was estimated that 500 children have been born to surrogate mothers since 1976."\(^2\) Recently, the practice of surrogacy has been highly publicized by the "Baby M" trial (Sterns vs. Whitehead), and this publicity has raised some fundamental issues, especially those related to the law.

Application of Surrogacy in Our Times

Nationwide there are surrogate agencies in Michigan, Pennsylvania, Kentucky, California, Massachusetts and Kansas. For the sake of brevity, surrogacy practice in Kansas and Michigan will be discussed in detail to demonstrate an application of this new reproductive concept.

The state of Michigan has been one of the primary centers of activity for surrogate motherhood in the United States. Michigan is a primary surrogate center due to the pioneering efforts of attorney Noel Keane, who has been making arrangements for surrogates and parental applicants for over 11 years and is a legal expert in the surrogate motherhood triad (the surrogate mother, the infertile couple and the child). He was instrumental in the September 1987 drafting of Michigan House Bill H-4753. In the House Committee on Judiciary, the Bill:

\[\ldots\] allows and regulates surrogacy contracts; establishes the parental rights and responsibilities of a societal father and
mother for a child conceived or born through surrogate parentage procedures or surrogate gestation procedures; establishes the legal status of such child; prohibits agreements to conceive a child through artificial insemination of a surrogate mother or to gestate a child except as provided by the act; and other provisions.

In addition to the Michigan legislation on surrogate motherhood, it behooves us to examine the application of the surrogate contract. The Michigan surrogate arrangements have been exemplary for other states.

The surrogate parenting contract used in Michigan serves as a model for contracts of surrogacy elsewhere. The contract attempts a contractual agreement on what is normally left to an implied understanding between the mother and the father for the care of a child. The agreement attempts to allocate the responsibilities imposed by law for the benefit of the child. Therefore, the surrogate parenting contract must distinguish the relationships proposed by the infertile triad from those which are normally understood to follow from the birth of a child. This contract, by denoting these relationships, ensures that the surrogate child will receive the care which the community has a right to insist will be provided.³

To accomplish these goals, the surrogacy contract has six major tasks. First, it establishes the paternity of the natural father. Second, the contract seeks to terminate the parental rights and responsibilities of the
surrogate mother. Third, it tries to create a relationship of "mother and child" between the natural father's wife and the surrogate's child. The wife must go through an adoption if she wishes to be more, legally, than a stepmother. Fourth, the contract provides compensation to the surrogate for her expenses and services. Fifth, the parenting contract also attempts to regulate the conduct of the pregnancy. Sixth, because every pregnancy bears the possibility of risks, the contract tries to allocate the burdens which will result if the child suffers from birth defects, if the surrogate is injured, or if the adopting couple die or divorce. The enforceability of this unique parenting contract will depend on common law prescribed by the judge in whose court the breach of contract is heard.

Michigan had another first in surrogate motherhood arrangements. It developed the first perinatal support program in the country, offering maternity nursing care designed for the new obstetrical population. Services rendered this group of surrogate mothers are peer group support, childbirth education, telephone "hotlines," and labor coaching at the time of the surrogate's delivery. Coping strategies that come from the peer support group relate to marital stresses, interacting with the adoptive couple, explaining the pregnancy to the surrogate's family, and the relinquishment of the child.
The above mentioned accomplishments in Michigan were the reasons Beth Bridgman, founder and director of the Hagar Institute in Topeka, Kansas, came to study with Noel Keane, who had become the most important national legal expert on the subject of surrogate motherhood agreements.

The Hagar Institute was so named because of the biblical connection of the practice of surrogacy that was noted at the onset of this chapter (Genesis 16). The philosophical emphasis of the Hagar Institute is on the screening process, both for the surrogate mother and the infertile couple. The screening process can take up to two years. A successful screening process ensures a successful surrogate contract, informs Bridgman.

Application of the screening process at the Hagar Institute (a private organization founded in 1982) involves several steps for both the adopting couple and the surrogate mother. These parties to the surrogate arrangement are first made to understand the Kansas statute under which they must operate.

Under the state statute the surrogate mother would have 48 hours to choose whether to keep the baby. After that time the child would automatically become the child of the biological father and his wife.

Once the law is understood, the screening begins. The couples applying for the program must be at least 22 years of age and have been married at least two years. The marriage has to be stable. The couple goes through a
battery of tests and a social study -- similar to the home study performed by adoption services. This study takes two days; one of its important findings is how the couple plan to tell the child of its origin. Reference checks on the couple are also done. Finally, there is psychological testing and counseling.

The surrogate candidate faces a more thorough screening process. Aside from being 21 years of age, she must be healthy and have had a child. The surrogate must be a resident of Kansas so that Kansas law will apply to her. Then, the surrogate goes through the same social study, reference check, and counseling as did the infertile couple. If the surrogate is married or living with someone, the mate must accompany her through the screening process to make sure he understands the implications this arrangement will have for his life. While the couple's screening process may take one week, the surrogate's process may take over a month. After the candidates undergo the screening process, an elaborate approval process is begun.

Once accepted, a couple chooses from the available surrogates. The couple is shown pictures of the surrogate and her child. A profile featuring information on weight, height, color of hair and eyes, whether the surrogate drinks (alcohol or coffee), if the surrogate exercises, any mental, dental or vision problems, family health, and
education level of the surrogate and her kinship for four to five generations back is shown the couple. While appearance is a concern, so that the child will fit into its prospective family, health is the most important issue. After the information about the potential surrogates is reviewed by the couple, they make their selection. However, the process does not end there. Once the surrogate is chosen, she must approve of the couple. When both have chosen, the surrogate arrangements begin.

The Hagar Institute claims the elaborate screening process is the reason for its success. They have had no surrogate motherhood arrangements fail.

The Problem of Acceptance

In contrast to the successes in Kansas, the surrogate motherhood arrangements have not been readily accepted elsewhere. To some, accepting surrogacy jeopardizes family values held so strongly by the modern family. Recently, the publicity surrounding the surrogate mother, Marybeth Whitehead, posed a threat to middle class family values.

The middle class is larger than either the upper or lower classes and covers a much broader social spectrum. Because the middle class is larger, they have, by sheer number, the opportunity to sway public opinion on various social issues. Understanding the beliefs most valued in this sector of the social spectrum is a step in
understanding the discord surrogacy generates in our society. There are certain values that pervade the middle class family, and "respectability" is the most important. To be apprehended by the police, or to be in a drunken stupor in public, causes the average middle class kinship group to feel shame or a loss of respectability within their social peer group. Needless to say, a woman having another man's baby while married to her husband is an insult to middle class respectability.

Religion is another hallmark of the middle class family. Some sociologists regard the middle class to be the most regular of churchgoers. As we have seen, religion plays a major role in determining what society considers acceptable family relations and sexual conduct. Despite news media cynicism about middle class morality, it is still true that these people's attitudes have a major influence on such issues concerning sexual behavior, divorce, obscenity, personal ethics and pornography.

Considering typical middle class mores, the judgment that surrogacy is immoral is easily understood; images of adultery and illegitimacy of the child easily come to mind and produce thoughts of disrespectability. The religious commandment, "Thou shalt not commit adultery," burns deep on the conscience of these people. Indeed, the arguments against surrogacy address issues surrounding the fundamental meaning of motherhood and the role of woman's
sexuality, concepts whose very definitions were derived mainly from our patriarchal, religious, white, middle class, male society. Examples of some of these concepts, according to feminists Patricia Spallone and Deborah Steinberg, are as follows:

(1) To introduce a third party into the process of procreation, which should be confined to the loving partnership between two people, is an attack on the value of the marital relationship.

(2) Surrogacy is inconsistent with human dignity.

(3) The relationship between mother and child is itself distorted by surrogacy.

(4) This is the wrong way to approach pregnancy.

(5) Since there are some risks attached to pregnancy, no woman ought to be asked to undertake pregnancy for another, in order to earn money; nor, it is argued, should a woman be forced by legal sanctions to part with a child, to which she has recently given birth, against her will.⁶

Apparently rooted in religious principles, a mixture of middle class values and middle class social consciousness is pervasive in these arguments against surrogacy.

Another problem with accepting surrogacy is not the exploitation of the female, but rather the fact that the surrogate mother has no respectable role in society. There exists no respectable role because the dominant mores
portray motherhood as a natural, biological, inevitable and inviolable process. Choosing to give up the child challenges the "natural" mother-child bond. This definition, feminists would say, keeps womanhood in a strictly defined place. Feminists also argue that traditionalists view surrogacy as interfering with the concept of exclusivity within marriage; no pregnant woman could be socially accepted outside the marriage institution. The very foundation of the family, marriage, is at risk with this new family construct. Feminists argue, then, that rather than be concerned for the woman who is a surrogate, society at large is concerned about the image of motherhood.  

**Governmental Responses**

Thus far, some historical and social issues surrounding surrogacy have been discussed. But what of the governmental responses on behalf of society? Surrogate parenting bills have been introduced in 27 states and the District of Columbia. Generally, the bills can be separated into three categories:

1. those that would regulate surrogate contracts, establish minimum standards or make specific provisions for these contracts;
2. those that would prohibit surrogacy contracts or declare such contracts unenforceable or to be contrary
to public policy and null and void, and/or would
criminalize surrogate arrangements; and

(3) those that would establish a task force, an interim
study committee, a joint legislative committee, or a
commission to study the issue of surrogate parenthood.

Summary

The notion of surrogacy has been with us since
biblical times, and the modern version of the high tech
reproductive technique of surrogacy is definitely part of
our modern society. Fears of misuse of this technique
abound. The fear that the move to regulate surrogate
mothers' behaviors during their pregnancies may spread to
regulation of all pregnant women or women in general is not
unfounded. But just as modern technological advances have
opened up options for the infertile couple, this same
technology is at work attempting to find ways to decrease
the fertility of men and women so that they need NOT worry
about the risks of pregnancy. Because of advances in
contraception the adoption of Caucasian infants, an option
in the past for involuntary infertile couples, is disap¬
ppearing as an option in the United States. If surrogacy is
available as a medical option to the involuntary infertile
couple, why does it fail as a social option?

Surrogate motherhood, like other reproductive methods
discussed in this paper, can be emotionally complex.
Jealousy on the part of the wife, possessiveness on the part of the surrogate mother, and the couple's feeling that the child is not completely theirs are a few of the complex emotions that could arise with this arrangement. Chapter 5 will discuss these feelings surrounding surrogacy as they pertain to court cases involving surrogacy failures.
Endnotes


3 Noel D. Keane and Dennis L. Breo, The Surrogate Mother: The Surrogate Parenting Contract (New York: Everest House, 1981), p. 1. [Discussion in this chapter pertaining to the surrogacy contract is to be credited to the above citation, unless specifically cited otherwise.]


7 Ibid., p. 9.
CHAPTER 5
INADEQUACIES IN THE LAW

There are numerous legal obstacles that thwart the surrogate motherhood arrangements. Among these is the fact that many state legislatures have not addressed surrogacy, thus leaving the issues to be settled in the courts on a case-by-case basis with no clear statutory guidance. A discussion of case law dealing with the rights of the infertile triad will provide the groundwork for a recommendation on legislation.

Legal Status of the Surrogate Child

A basic legal impediment to the surrogate parenthood arrangement is in determining the legal status of the child. The child is born by artificial insemination, historically a practice used when a male was infertile. Early legal resistance to artificial insemination was not uncommon; judges held that artificial insemination was "tantamount to adultery."¹ Since these early cases arose from a husband's refusal to pay child support on grounds of adultery, the adultery consideration led to questions of the paternity of the child and the child's legitimacy. Eventually the courts began to recognize a child born of
artificial insemination as legitimate. The law of most jurisdictions these days focuses on sexual intercourse rather than conception in determining whether adultery has taken place.

The Uniform Parentage Act, a model act intended to provide uniformity among the courts on issues dealing with parenting, addresses the matter of insemination. The Act provides:

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

A critical point that the Act fails to deal with, however, is the distinction between anonymous and identified semen donors.

In Michigan, the paternity issue was contested in Syrkowski v. Appleyard (420 Mich. 367, 362 NW2d 211, 1985). Syrkowski was involved in a surrogate motherhood arrangement wherein none of the parties contested the semen donor's paternal rights. However, two Michigan statutes had established the presumption that the surrogate mother's husband was the father. Pursuant to these statutes, the semen donor (the biological father) sought an order from
the Court that his name be entered on the birth certificate. The state attorney general intervened and sought accelerated judgment to have the action dismissed. The statutes, argued the attorney general, deprived the Court of jurisdiction to decree otherwise. The Michigan Supreme Court noted that the paternity statutes required the consent of the husband to artificial insemination, and it noted that none of the parties involved contested the semen donor's claim of paternity. Further, the Court noted that the order of filiation, to establish the paternity of the child, was meant to establish who is to support the child. Therefore, the Michigan State Supreme Court stated that the Court had jurisdiction to grant relief

... in spite of the lower court's objection that the surrogate motherhood arrangement was contrary to public policy and was not covered by established procedures for securing order of filiation.

While the decision did not do away with the statute which presumes the surrogate husband as the father of the child, it does establish that it may be rebutted in cases of surrogate motherhood arrangement.

Case precedents show the confusion surrounding the assumed maternal adoption of the surrogate child by the biological father's wife. The courts are basing their decisions upon artificial insemination statutes, trying to adapt these statutes to the surrogate motherhood arrangement for lack of better guidance for their decisions. If
filiation is not determined, the infertile wife remains the surrogate child's stepmother rather than its legal maternal parent, and that would not be an acceptable outcome of the arrangement.

Children as the Subject of a Contract

Another major legal obstacle to the commercial practice of surrogate motherhood is "the long standing legal principle and public policy that children are not chattel and therefore may not be the subject of a contract or gift." These statutes were established in response to the concern over the black market for adoptive babies. Because adoptable babies were scarce, many unwed mothers exchanged their babies for large sums of money. Baby brokers and black market adoptions were flourishing. Besides protecting the unwed mother, the courts wanted to protect and preserve the family, which they held to be the very foundation of society.

It is argued, however, that the surrogate mother is not an innocent succumbing to pressure, but an adult who makes an informed rational decision prior to conception. Further, surrogacy advocates argue that surrogate motherhood does not undermine the family structure, but strengthens it. Rather than wresting a child away from its mother after birth, surrogate motherhood prearranges to bring a child into the world for its biological parent and
his wife. The decision to give up the child is not the result of adverse circumstances, nor has adultery occurred. In spite of the fundamental differences between black market baby selling and surrogate mothering, some courts have applied the laws prohibiting one as a result of the other. Cases that have addressed the issue of surrogate mother compensation are Doe v. Kelly (106 Mich. App. 169, 307 NW2d 438, 1981) and Sterns v. Whitehead (New Jersey State Supreme Court, 1987).

An interesting result came from the case of Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky (Op. Att'y Gen. 81-18, at 5, 1981). The Kentucky Supreme Court recognized that not only was the role of the surrogate mother's male counterpart (the sperm donor) sanctioned, but that the role has legislative recognition in some jurisdictions and that the sperm donor is routinely paid for his services.

While altruism may be a motivating factor for some women to become surrogate mothers, it must realistically be expected to be one of several motivating factors. For most women, it is argued, the principal motivation for surrogacy is compensation. Whether state laws preventing compensation in order to prevent baby selling will be inappropriately applied to surrogate motherhood must await adjudication.
The Problem of Contract Enforcement

The legal issues thus far discussed are fundamental in nature, but there are other more complex legal questions to be answered; those entailing contract enforcement. The courts will not enforce a contract that violates the law or public policy. (International Dairy Queen v. Bank of Wadley, 407 F. Supp. 1270, M.D. Ala., 1976; and Board of Education v. Surety Developers, Inc., 24 Ill. App. 3d 638, 321 NE2d 99, 1974.)

Aside from not wishing to violate public policy, what is the problem of the courts in enforcing the surrogate contract? If the couple breaches the contract, it is simpler to remedy than if the surrogate breaches the contract. That is, if the couple refuses to reimburse expenses to the surrogate mother, she could sue for damages. Also, if the couple changed their minds regarding wanting the child, the child could be placed for adoption. But the surrogate's breach of contract poses a significantly more difficult problem.

First, if the surrogate refuses to allow or continue with insemination, the courts would probably not force her to perform. The courts are reluctant to enforce personal service contracts because they view such as involuntary servitude. (Such could be argued since the surrogate would have to carry the pregnancy for nine months.) The courts
also frown on enforcing a contract if it involves their supervision over a period of time. Finally, an order to force insemination would violate the surrogate's right to privacy. Thus, specific performance or monetary damages are not available to the couple for remedy. To calculate the financial loss resulting from not getting the promised child would not only go against public policy, but would be impossible to do.

During pregnancy the surrogate may also have the opportunity to breach her contract with the infertile couple. For example, it may require her to seek regular medical care. However, even though it may force the surrogate mother to do something against her will, the interest of the unborn child would prevail in court. So, the couple could require the surrogate not to drink alcohol or smoke tobacco under the auspices of interest of the unborn child.

The most expected breach the surrogate could make is her refusal to surrender or terminate her parental rights to the child when the child is born. Any disputes over the child's custody would probably be settled according to the ordinary rules of custody. The courts jealously protect their right to decide custody according to the best interest of the child. The mother's greater intimacy and bonding with the child at this point would carry weight in the court's decision. But the U.S. Supreme Court has held
that "maternal and paternal roles are not invariably different in importance," and therefore gender based discrimination is inappropriate. The father in a surrogate arrangement has a more compelling right to exercise than the father in a traditional custody case otherwise would. The child exists because of the efforts of the biological father and his infertile wife in initiating the surrogate arrangement. His expectations of fatherhood stand on equal footing with the parental feelings of the surrogate mother.

**Constitutional Issues**

Besides the common law considerations surrounding surrogate motherhood, there are distinctly separate issues concerning the constitutional rights accorded the surrogate triad. The basis for an argument on the constitutionality of surrogate parenting is a determination that a fundamental right is at stake.

Fundamental rights have been found to exist in areas of personal decision-making such as marriage, procreation, conception, abortion, family-relationships, child rearing and whether to bear or beget a child. These fundamental rights are protected from governmental intrusion by the Constitution because they are seen to be manifestations of the right to privacy that the Constitution safeguards. (See Stanley v. Georgia, 394 U.S. 557, 1969; Griswold v.

Conception is at the core of matters protected by the constitutional right to marital privacy. Thus the surrogate parenting arrangement is a constitutionally protected fundamental right. As a fundamental right, surrogate parenting is only susceptible to state regulations that are rationally related to a compelling state interest. Even if a compelling state interest were found in a surrogate parenting case, the court would have to balance this finding against the parties' fundamental rights. Any restrictions must be narrowly drawn in order to cause the least amount of infringement.

Another constitutional issue gleaned from the surrogate motherhood arrangement relates to the equal protection doctrine. Two instances in the surrogate parenting arrangement which could challenge the equal protection clause are: semen donor's compensation versus surrogate mother's lack of compensation; and the fact that while an infertile man has a procreation choice of the artificial insemination of his wife, the infertile woman's choice may be prevented by undue regulation of surrogate motherhood. The equal protection doctrine requires that the state afford equal treatment to those who are similarly situated. The state may draw classifications (men versus women), but these classifications must withstand the
doctrine of strict scrutiny which must see a compelling state interest justifying the classifications that the state proposes. Some would argue that custody of a minor is a compelling state interest.\textsuperscript{5}

Surrogate motherhood arrangements should not and cannot by our Constitution be prohibited or made onerous by state adoption laws. This would be imposing conditions that cut some individuals off from means of surrogate motherhood. The state would be infringing upon the individual's fundamental rights. At present, adoption, a basic method of effectuating basic decisions about family affiliations that is monopolized by the state, is the only means of achieving the main goal of the surrogate arrangement.

Surrogate motherhood is undeniably a family construct which is oozing in through the cracks of our societal structures -- the court system. We must ask ourselves if the courts are the appropriate place to determine public policy toward the family.

Surrogate motherhood, like other reproductive methods discussed in this paper, can be emotionally complex. Jealousy on the part of the wife, possessiveness on the part of the surrogate mother, and the couple's feeling that the child is not completely theirs are a few of the complex emotions that could arise with this arrangement. Chapter 6
addresses these feelings in the context of the inadequacies of the surrogacy arrangement as it exists.
Endnotes


Examining of contested surrogate custody cases which have received public attention lately have some lessons to teach us -- positive or negative -- about surrogate motherhood. Rather than approach these contested custody cases from a point of law, this chapter focuses on the failure of surrogacy arrangements from the perspective of the surrogate mother. There are some common experiences in the surrogacy arrangement that these women share. By deduction, then, one can speculate on some necessary elements to make a surrogate motherhood arrangement viable, if that is a vision the public is seeking.

Sterns v. Whitehead

Probably the most familiar of the surrogate motherhood cases is the "Baby M Trial" (Sterns v. Whitehead) in the New Jersey courts. Marybeth Whitehead agreed to be a surrogate mother to the Sterns, but when the child was born she did not relinquish her parental rights as contracted with the Sterns. A custody battle over the baby ensued between the biological father and the surrogate mother.
According to Marybeth, she answered an advertisement in the newspaper via telephone. The Infertility Center of New York, the advertisers, sent her an application by mail and requested Marybeth to send them pictures of herself and her children. Her husband was against it at first. But knowing what kind of person she was -- one who enjoyed doing things for people -- he eventually agreed. She sent the application on Friday and on Monday an infertile couple wanted her, so she went to the Center. It was then that Marybeth learned that one of her own "eggs" would be used for the surrogacy. Previous to this meeting, Marybeth thought it was merely her uterus that was to be used and that the other woman's egg would already be fertilized and would be transferred into Marybeth's uterus. A week later the surrogate received two hours of counseling and went over the contract briefly with the Center's lawyer. No discussion about not relinquishing the surrogate child was held and Marybeth never thought of it. She tried for eight months to conceive for the couple and finally gave up.

The second couple whom the Infertility Center wanted Marybeth to meet was the Sterns. As their surrogate, Marybeth tried for five months to conceive by artificial insemination before she was successful. At the birth of the surrogate baby, Marybeth became attached to the female child both emotionally and physically, and was unable emotionally to relinquish the surrogate child per contract.
Marybeth was a high school dropout, in a low socioeconomic group, and had an unstable marriage.

The First Surrogate Mother

The story of Marybeth Whitehead's decision to keep the surrogate child was on television and in the newspapers nationwide. Elizabeth Kane, the first legal surrogate in America, learned from television of the surrogate mother who refused to relinquish the child. Relinquishing of her baby had been the cause of Elizabeth Kane's grief for seven years. In 1980 she became an instant celebrity when she told the world she would be a surrogate mother. Elizabeth was proud and wanted to set an example so that others might follow her lead. How did Elizabeth Kane decide to become a surrogate mother and why did she feel that she and Marybeth Whitehead were "sisters in pain?"

Like Marybeth Whitehead, Elizabeth read an ad in the newspaper about an infertile couple in Louisville, Kentucky who were searching for a surrogate mother. Elizabeth had a deep desire to help those who could not conceive a child of their own, and with this attitude responded to the newspaper advertisement. Elizabeth related her joy of surrogacy to the public through TV talk show appearances and interviews with the press. Unfortunately, Elizabeth's enthusiasm was not shared by her friends and neighbors in the small, conservative town in which the Kanes lived.
Kent Kane, the surrogate's husband, lost his job and Elizabeth's own three children had difficulty with their schoolmates who shunned them from their social group and called them names.

The family pressures increased with the delivery and subsequent relinquishment of the surrogate baby. Not only did Elizabeth's neighbors and friends shun her, but her daughters resented what she had done in giving up their "brother." They never got to hold him or see him or say goodbye. Her husband, Kent, was no different in his anger over the situation than Elizabeth's children, but this would not be known to her until years later when Elizabeth Kane discovered notes Kent had written about his wife's decisions. "If I don't go along with her I feel we will break up anyway because she feels so strongly about it. I have accepted the idea but I still don't like it and I never will." Elizabeth states the closeness of her relationship with her husband has irretrievably diminished since the surrogacy arrangement.

The aggrieved Elizabeth Kane read Marybeth Whitehead's story in *People Magazine*. Her thoughts then were, "So you fell in love with your baby, Marybeth, and nobody told you it would happen. Well so did I. So do we all!" Elizabeth rallied to Marybeth's side and flew to New Jersey to be of assistance in any way she could. She had now come full circle. She told the New Jersey Supreme Court via an
affidavit that surrogate motherhood should be banned nationwide and that surrogate motherhood causes irreparable damage to surrogate mothers and their families.

The lesson Elizabeth Kane learned from her ordeal was that infertile couples should not expect medicine and science to solve "their every problem." She also suggested that the motives of the attorneys and physicians who are arranging surrogate mothers be examined; exorbitant fees of $30,000 to $40,000 prohibit a majority of infertile couples from hiring surrogate mothers. In addition, infertile couples must be aware of the risks of asking a complete stranger to sign a contract. Elizabeth believes that there is a "human factor" involved that should make that contract unenforceable if the surrogate changes her mind after the baby is born. Elizabeth now heads a group that counsels women who "regret having been surrogates."

**Huber v. Yates**

Laurie Yates, like the previous two women, was a surrogate mother who could not relinquish her parental rights to her babies at the time of their birth. Laurie Yates dreamed of having children. Imagine her despair at finding that her husband, Rich, was sterile from working in a uranium mine before their marriage. Surrogacy was a joyful solution to their problem. Laurie Yates would earn the money they needed for her to be artificially
inseminated by donor sperm, by being a surrogate first. The Yates, too, answered an ad in the Detroit newspaper for surrogate mothers who would be paid $10,000. Noel Keane, a Detroit attorney, made the surrogacy arrangements. The Yates sought the approval of their pastor who found no biblical evidence against surrogacy. The Yates filled out the forms and mailed them back to Mr. Keane.

Mr. Keane later telephoned the Yates, informing them that three infertile couples wanted to see them. When they arrived in Detroit, Mr. Keane arranged for the Yates to be evaluated by a psychiatrist, chosen by Mr. Keane, and Mr. Keane arranged for the Yates to be evaluated by a gynecologist. Laurie was told that she needed Clomid to regulate her periods but, in fact, Clomid causes ovulation. The hormonal therapy worked, but it was soon to no avail because Laurie miscarried. Not knowing that she was no longer bound by the surrogacy contract, Laurie again went through the insemination ordeal and conceived twins; often a side effect with Clomid is multiple births. While she was pregnant both she and her husband lost their jobs, and they were in dire financial straits. Upon learning that she was carrying twins, Laurie Yates began to reconsider her agreement with the Hubers, the infertile couple who had hired her to be their surrogate mother.

At this time of indecision, Laurie Yates read of Marybeth Whitehead's trial and wondered if she were strong
enough to face what Marybeth was enduring. Laurie did win primary custody of the twins, but eventually a judge in Michigan granted the Hubers "expanded visitation." At the time this story was written, issue of custody for the twins was undecided.

There are other unsuccessful surrogate motherhood stories, but for the sake of brevity, they will not be presented in this paper. There is enough information in these three related stories to glean some common themes.

**What Do These Surrogate Failure Cases Have in Common?**

If the success of the surrogate motherhood arrangement is measured by the completion of the contractual arrangement of the infertile triad, Kansas laws and, in particular, the Hagar Institute methodology for surrogate motherhood arrangements, serve as models to emulate. It is interesting to note that both Marybeth Whitehead and Laurie Yates entered surrogacy agreements arranged by attorney Noel Keane. In direct contrast to the Hagar Institute's methodology, Mr. Keane seemed to have done very little to screen these candidates and to instruct them as to what to expect and what their rights were in the surrogate arrangement.

These women would not have passed the screening process in Kansas, and if they had, they would by law have
had the opportunity to change their minds for 48 hours after they delivered the surrogate baby. These women were in unstable marriages, financially cramped and thus financially motivated, and in the end ill prepared for the relinquishment of the baby. The feelings of their husbands were ill considered, and thus a detriment to the success of the surrogate family. Certainly poor screening tools and minimal counseling, which may have contributed to these women's failure to carry out their surrogate agreements, are factors to bear in mind when recommendations for criteria for legislative guidelines are discussed.
Endnotes

1Discussion in this chapter came from the following newspaper and journal articles about the surrogate mothers' stories:


CHAPTER 7

RECOMMENDATIONS FOR LEGISLATIVE GUIDELINES
IN THE STATE OF MONTANA

Introduction

At least 27 states have considered regulation of surrogates but, to date, state and federal statutes neither legalize nor ban third-party birth related arrangements. Some argue that in our pluralistic society it would be impossible to write a fair national law which could accord with all people's rights and principles while serving the general welfare of society. What is more important, however, is that regulations regarding surrogacy be established in a legislative as opposed to a judicial forum. In the legislative forum the public, representing diverse values, has an opportunity to participate. The courts may consider special situations on a case-by-case basis, attempting to balance all individuals' rights, but the judges, as individual decision makers, should not take the place of the state legislatures in determining the legalities of such a complex social issue as surrogate motherhood.
The State of Montana has an opportunity to set high standards with regard to surrogacy regulations, which in turn may serve as models for other states. Before giving some recommendations for legislative guidelines, the health issues that are involved with surrogate motherhood and the importance of public education on surrogacy will be discussed.

**Health Issues**

The notion that not just any woman can be a surrogate is not a prejudicial one; it is medically defined. Most women seeking a pregnancy will be in a low-risk category. Early in the assessment of the historical, physical, and laboratory findings, however, factors may be recognized that place a particular woman at "high risk" for maternal or fetal complications and subsequent morbidity or mortality. In the *Manual of Obstetrics*, the factors that categorize a woman as high risk are listed as follows:¹

**Medical Factors:**

a) Diabetes mellitus  
b) Thyroid disorder  
c) Cardiac disease  
d) Hypertension  
e) Thrombophlebitis  
f) Anemias (sickle cell, thalassemia; iron deficiency)  
g) Idiopathic thrombocytopenic purpura  
h) Asthma  
i) Tuberculosis  
j) Hepatitis  
k) Seizure disorder  
l) Renal disease  
m) Obesity
n) Syphilis
o) Systemic lupus erythematos
p) Psychiatric disorder

Obstetrical Causes for High-Risk Pregnancy:
a) Habitual abortion
b) Incompetent cervix
c) Age greater than 35, less than 17
d) Previous cesarean section
e) Multiple gestation (twins, etc.)
f) Previous stillborn
g) Premature labor or rupture of membranes
h) Uterine anomaly
i) Previous fetal anomalies
j) Spine bifida, trisomy
k) Enzyme deficiency
l) Rh sensitization

These lists indicate those factors that would put a woman at a high risk for being a surrogate mother candidate and simultaneously put the surrogate child at risk. Acknowledging those factors which would put a potential candidate for surrogacy at high risk, what can be acknowledged about the surrogate's primary caretaker -- the obstetrician?

Obstetrician's Guidelines on Surrogacy

Addressing the intense interest in surrogate motherhood and the complex questions surrounding it, in May 1983, the American College of Obstetricians and Gynecologists (ACOG) published its guidelines for physicians, entitled "Ethical Issues in Surrogate Motherhood." The document identifies the special ethical issues attached to the health problem of surrogate arrangements.

In one section of the document, ACOG addresses specifically financial transactions, pointing to the
illegality and immorality of selling infants. This section also warns the physician against "accepting payment for recruiting or referring potential surrogates or parents; or investing in enterprises specializing in surrogate arrangements." Payment to surrogates, other than for expenses, is exploitation.

ACOG not only expresses its concern over possible financial exploitation, but possible misuse of surrogacy for eugenic manipulations as well. In the end, the guidelines leave the physician to make his/her final decision about participation in surrogate arrangements. Physicians are cautioned to consider the ethical, legal, societal, and medical factors. And, although the physician may decline to participate in a surrogate arrangement, the document advises:

When a woman seeks medical care for an established pregnancy, regardless of the method of conception, she should be cared for as any other obstetric patient or referred to a qualified physician who will provide that care.  

Finally, the guidelines provide that the surrogate mother is the "source of consent" with respect to clinical intervention and management of the pregnancy, and that adoptive parents should play a role in decision making only with the surrogate mother's consent.

To know how ACOG views its responsibility toward surrogate motherhood is critical because this document
informs us as to how the doctor will approach the health issue of surrogate motherhood.

**Recommendations for Legislative Guidelines**

*Who Is Best Qualified to Arrange the Surrogate Triad?*

A licensed health agency needs to be responsible for the advertising, screening, educating and counseling of the surrogate triad. Primarily attorneys, as mentioned, have been instrumental in the surrogate motherhood arrangement. Most attorneys are not qualified either in counseling or in the health field to adequately prepare the surrogate triad for their impending agreement. This argument is supported in this paper by the discussion of the surrogate motherhood arrangements that failed; for example, telephone arrangements for the surrogates to meet their infertile couples, lack of knowledge on the medical techniques of surrogacy, etc.

Second, the reason that the surrogate arrangement needs regulation through our health care system is to ensure distributive justice to people wishing and needing to seek surrogacy. Arrangement through a licensed health-related agency which is accountable to state health regulations, as opposed to an independent arrangement through a lawyer seeking fees, makes the surrogate arrangement more accessible to all infertile couples.
Presently the rich pay the economically disadvantaged to have their children for them; the average cost to infertile couples for the surrogate arrangement is $25,000. Involuntary infertility, however, is not a condition solely of the affluent, but all people in our society should have the opportunity to satisfy their culturally determined beliefs about procreation and family. Financial exploitation would be less likely to exist at a licensed health agency. Regulations set by state statute would discourage financial exploitation.

Third, an agency such as proposed has trained staff who can educate and counsel the obstetrical patient, and are qualified to do in depth social histories, such as those performed for adoption proceedings. The adaptation of the surrogate motherhood program could be easily assimilated through health agencies.

Who Will Pay for This Program?

A fee scale should be set for the surrogate triad to cover the costs incurred for obstetrical and psychological care obtained through the agency. The payment of this fee could then be part of the agreement between the members of the surrogate triad. However, it is recommended that no direct monies be appropriated simply for the woman's agreement to carry a child for another woman regardless of either woman's financial circumstances. This would avoid
the pressure that the need for money can bring to bear on an individual's choice to become a surrogate mother, as was shown in the Huber v. Yates case. It has been argued that no woman would be a surrogate without receiving payment for her services, and requiring payment for such services may be society's self-regulating mechanism. More of an optimist, this author believes that people can be persuaded to help those in need, particularly if society begins to value the role of the surrogate and praises her efforts rather than degrades them.

Who Can Be a Surrogate Mother Candidate?

The surrogate mother candidate must be a resident of Montana, to allow Montana statutes to cover the candidate, who is at least 17 years of age and not older than 35 years of age. Medically, age has been defined as a "high risk" factor. No woman who has been properly screened and found to be at high risk for pregnancy complications should be a candidate. The same sort of medical discretion is exercised for those candidates giving blood.

Also, a woman who cannot conceive without the intervention of hormonal therapy (i.e., Clomid) should not be considered for surrogacy without previously addressing the issue of responsibility for multiple births and birth defects. In the Saturday, April 23, 1988, Billings Gazette, a story applicable to this recommendation.
appeared. Patty Nowakowski agreed to be a surrogate mother and gave birth to twins, a boy and a girl. Nowakowski was given fertility drugs. Subsequently, Patty found out that the infertile couple wanted just the girl. Her comments to the Michigan special legislative panel looking into surrogacy were, "I was not aware of how carelessly the program is run. . . . When I entered it, I thought it would be a wonderful thing to do for someone. . . ." In the end, the Nowakowskis kept the male child instead of placing him in a foster home. "It just didn't seem fair to him," Patty said. Finances, custody, and any variation in the surrogate agreement that multiple births or birth defects may present should be addressed for the welfare of the offspring, and welfare of society, so that they might not be an undue burden. The selection procedure should include an evaluation of the surrogate's ability to serve "the best interest of the child" as a parent, should the surrogate refuse to relinquish the child. The doctrine of "best interest of the child" is currently used in Montana for adoption procedures and child custody in divorce proceedings. There should be no weaker standard for the child in a surrogate arrangement.

Who Can Be the Infertile Couple?

Since the couples will not only be those affluent couples who can afford to pay the surrogate, the procedure
used for an adopting couple can also be applied to the infertile couple. That is, the social and medical history taking procedure does not have to be reinvented for surrogacy. However, involuntary infertility would have to be established as the sole reason for use of a surrogate mother. The consequences of genetic research given in this paper and the fears of genetic manipulation and female degradation to the state of reproductive vehicles must be legitimately considered in order to protect the health and welfare of our society.

Who Decides for the Unborn Child?

The guidelines proposed by ACOG address this in insisting that the surrogate mother is the origin of consent. Because the surrogate mother and the surrogate child are a biologically interrelated unit, a medical decision in a pregnancy or a delivery complication may affect the life or health of either one or both of them. Therefore, until this interrelated biological link is severed with the birth of the surrogate child, this author agrees with the ACOG perspective of the surrogate mother as the origin of consent.

The biological consent is put forth as a separate recommendation from that of the surrogate mother's relinquishment consent 48 hours after the birth of the surrogate child. The biological consent addresses the
position of the biological mother and the biological father in the medical care of the surrogate child in utero, and at delivery; while the relinquishment consent addresses the psychic-social relinquishment of the surrogate child by the surrogate mother. Each consent has a specific purpose in the surrogate motherhood arrangement.

Who Informs the Public?

In order for an individual in society to make an informed decision about his/her health care, he/she must be educated. For people to decide to enter into the surrogate motherhood arrangement, they must have correct information. The uninformed are easily duped. There exist several ways of dispersing information to the public on the subject of surrogacy.

Recently television, both on news and programming, has provided exposure via the Marybeth Whitehead story. Important to note regarding television programming is that these programs can be emotionally oriented to appeal to the largest television audience; thus the facts may be somewhat skewed. Nevertheless, the public may become indoctrinated with the idea of surrogacy just by repeated exposure.

Even a more appropriate forum for education regarding surrogate motherhood is through the National Organization of Women (NOW). This organization definitely has a stake in informing the public on genetic engineering involving
the female and her organs. The networking available in NOW, the Montana organization and the national organization, promotes a wide distribution of information. The incentive to spend money on such a cause would be present in a woman's organization.

Another, and final, suggestion for an educational forum to meet the needs of informing the public on surrogate motherhood arrangements is the Montana Nurses Association which, like NOW, has a national organization—the American Nurses Association. From these organizations the education could trickle down from association to small laymen workshops on the subject. The one-on-one workshop would provide opportunity for guest speakers in the field of sociology and psychology to discuss attitudes, values, beliefs, and fears associated with the subject of surrogacy.

The suggestions made have been to use private organizations, but this does not relieve the State of assuming its share of the responsibility in educating the public. The Department of Health and Human Services may find it worthwhile to address the issue of surrogacy and provide flyers to its various organizations to encourage these agencies (i.e., Family Planning) to incorporate in their educational programs the information regarding surrogate motherhood as an option to infertility. What
could be more important for the State than the status of reproducing its human beings?

Summary

Surrogate motherhood, as well as other genetic manipulations, is being offered as an alternative for the involuntary infertile rich couple. But it exploits, without accountability to the public, the institution of motherhood and the poor women in need of financial solutions to their problems. Surrogacy is not a totally mercenary endeavor. To suggest this would erase, with one stroke of the pen, the serious dedication many surrogate mothers have displayed in sharing the gift of life with women less fortunate than themselves. Given the risks to her health, and the emotional stress she endures, the surrogate mother surely deserves credit for her undertaking. Legislative regulations do not regulate morality, but they do have an effect on the public's behavior. Subsequently, there is a phenomenon of the unconscious which needs to reduce the conflict between one's belief and one's behavior. As a result, one begins to rationalize or justify why one's behavior is such. Positive attitudes can come about from legislation. History has shown that people are persuaded by legislation to change attitudes. The court's initiative in desegregation of the schools is an example of the law precipitating changes in attitudes.
Later, various state and federal statutes followed suit to the court's position on desegregation. Without direction, surrogacy is uncontrolled and misused; guidelines from state statutes are critically needed.
Endnotes


3 Ibid.

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