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by

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On September 1, 1988, the Michigan Surrogate Parenting Act[1] took effect. It was not the first such law enacted,[2] but it was the most comprehensive. The law enunciated the public policy of the State of Michigan with respect to surrogate contracts and established three legal principles addressing the critical issues raised by the practice.

(1) STATUS OF SURROGATE CONTRACTS.

Surrogate contracts are declared to be null, void and unenforceable in Michigan.

(2) STATUS OF COMPENSATED SURROGACY.

Parties who enter into or arrange surrogate contracts involving the exchange of anything of value are subject to criminal sanctions. The crime is a misdemeanor for parties to the contract and a felony for persons acting as arrangers, brokers or facilitators.

(3) STATUS OF THE CHILD

Disputes arising as to the custody of a child born pursuant to a surrogate contract, will be determined through a circuit court action based on statutory principles reflecting the

"best interest of the child," found in the Michigan Child Custody Act.

Legislative proposals to criminalize, declare void or legalize and regulate surrogate parenting contracts had been introduced in every session since 1983.[3] The interest of a few legislators became the concern of many as the number of surrogate births began to increase dramatically and, though few in number, the drama of broken contracts grabbed national headlines. These events focused legislative, legal and popular attention on this novel and emotionally charged mechanism for establishing a family.

The technique of surrogate parenting has been known since the beginning of time. It involves no new or modern reproductive technology. An absorbing example, with all its attendant ramifications, is documented in the biblical narrative of Abraham, Sara and Hagar.[4] However, in the mid 1970's a dramatic change occurred that forever altered the practice of surrogate parenting. The exchange of substantial sums of money entered the picture, giving a hitherto isolated occurrence exceptional commercial vitality in a demand saturated market. The money not only compensated the surrogate for conceiving, gestating and delivering the child; it had far more consequential objectives. It secured the natural mother's signed release of parental rights. It allowed the wife of the child's biological father to adopt the child. It enabled the biological father and the adoptive mother to form a family unit which thereafter legally excluded the natural mother from any future access, care, custody or enjoyment of that child.

These consequences were legitimatized on the basis of a comprehensive written contract, drawn up by an attorney--also for a substantial fee--signed and agreed to prior to conception. How does a surrogate parenting contract involving a modern-day "Bob & Carol, Ted & Alice" actually work? Does the government, through the courts, have a right to interfere in such contracts? Does the government, through the legislature, have a duty to intervene in such arrangements? What is the appropriate governmental response to contemporary, compensated surrogate parenting agreements? The balance of this article advances a response to those questions which reflects the public policy of Michigan toward surrogacy and which is contained in PA 199 of 1988, the Michigan Surrogate Patenting Act.[5]

SURROGATE PARENTING CONTRACTS

Surrogate parenting can take a variety of forms. Due to considerations of time, space, and popular interest, this discussion of the practice, and the legislative response to it, will be limited to the type of arrangement which accounts for certainly 99% of the contracts and which arouses the greatest moral, legal and ethical concerns; that is, contracts involving compensation of a surrogate who is also the biological mother of the child.[6]

The process typically begins when Carol (the surrogate) responds to a newspaper advertisement offering $10,000 to $15,000 to a woman who will conceive and bear a child for another couple--Ted and Alice. Carol is motivated by the fee as well as an altruistic desire to help another couple have a child.

The fee however, is the sine qua non of her participation. Surrogacy is normally limited to women who have had previous pregnancies, resulting in live births. In short, 'proven producers' who know what they are getting into.

Alice is infertile either from natural or voluntary causes.[7] Ted and Alice must be persons of considerable financial means in order to pay the $25,000 to $30,000 total cost of the process. Usually a face to face meeting with the surrogate occurs, often including pictures of the surrogate's other children, which is the basis for tentative agreement on the part of both parties. After cursory physical and psychological screening of Carol (but not Ted) and an opportunity to have the documents reviewed by her lawyer, the contract is signed and the entire cost is paid to the attorney. Carol then begins the artificial insemination process, often being given fertility drugs to stimulate ovulation and speed conception.[8] The contract deals extensively with matters relating to the pregnancy which, though very interesting, are not relevant to this discussion.

After the child is born the mother is expected, upon leaving the hospital, to surrender physical custody of the child to the biological father and his spouse--Ted and Alice. The surrogate's fee, which the contract recites she has earned exclusively for gestation and not for releasing her parental rights, is nonetheless held in escrow until the surrogate/mother also provides a signed release and consent for adoption.

But what about Bob and the obstacle presented by the long-standing legal presumption that a child born to a married woman during wedlock

is the legitimate child of her husband?[9] Once the child is born, Ted will utilize Bob's handwritten statement indicating he did **not** consent Carol's artificial insemination,[10] which is part of the contract documentation, as well as the Michigan Paternity Act[11] to intitiate a circuit court action for the purpose of setting aside these presumptions and establishing himself as the legal father of the child.

Once the release and consent is in hand, the baby is eligible for adoption by Alice, under the more lenient provision states usually apply to step-parent adoptions. Ted, of course need not adopt as he has established himself as the child's biological father. However, because Michigan adoption law prohibits (as does nearly every other state, in statutes generally labelled as prohibitions against baby-selling) the type of payment involved in a surrogate agreement and, in fact, imposes a criminal sanction for such fees,[12] the final step in the process necessary to make Alice the child's mother and cut off Carol's right cannot occur in Michigan.[13]

This cursory exposition of the typical contract demonstrates how existing law, intended for the protection of children and the preservation of families, is either being debased or circumvented to effect the aims of these contracts.

An examination of a standard surrogate parenting contract discloses its commercial bases and biases. It was not surprising that the overwhelmingly adverse popular reaction to Marybeth Whitehead's effort to reclaim her child was met with statements like, "she's over 21" and "she signed the contract after all." People's early feelings about the rights of each party to the child

were guided by general rules appropriate to commercial transactions. It was only when people began to reflect on the nature of the contract and exactly what was being bought and sold, that attitudes began to change, and to change rapidly.

THE ROLE OF THE COURTS IN SURROGATE PARENTING CONTRACTS

Even where the parties comply with the terms of the contract, court action is necessary to establish paternity and finalize the step-parent adoption. An even more vital basis for court intervention occurs when a party decides **not** to comply with the terms of the contract. The most important issue about surrogate contracts, that is, whether they are valid and enforceable, was settled by the New Jersey Supreme Court Decision, *In the matter of Baby M,* 109 NJ 396; 537 A2d 1227 (1988). In addition to finding that the contract violated that state's adoption laws, which are similar to Michigan's with respect to compensation, it also determined the contracts themselves to be null, void and unenforceable for several public policy reasons. These included matters related to the rearing and custody of the child, parental rights in general and payments to the surrogate.

Because the contract was found to violate state statute, the Court did not reach constitutional issues raised by the parties and various *amici* questioning whether or not the practice of compensated surrogacy is a fundamentally protected right. Proponents argue that the United States Constitution implicitly protects compensated surrogacy as an extension of the right of privacy existing within the word "liberty" in the Due

Process Clause of the Fourteenth Amendment. Opponents argue that surrogacy is expressly prohibited by the Thirteenth Amendment's abolition of slavery and involuntary servitude.[14]

Michigan has two cases directly addressing compensated surrogate parenting contracts. In *Yates v Keane*, (Hearing on January 21, 1988, File Nos. 9758, 9722) the surrogate plaintiff changed her mind about surrendering custody of the children and brought an action in the Gratiot County Circuit Court challenging the validity of the contract. At a hearing on a motion for summary judgment, the court held that surrogate parenting contracts are against public policy and thus invalid and unenforceable based on the fact that such contracts do nothing to protect the fundamental rights of children or promote their welfare; and, the contracts belittle the human dignity of all the parties involved.[15]

Michigan courts had previously addressed the constitutional issue of a state statute prohibiting compensation in exchange for release of parental rights.[16] In the case of *Doe v Kelly*, 106 Mich App 169; 307 NW2d 438 (1981),[17] a surrogate was paid $5,000 in exchange for termination of her parental rights, enabling plaintiffs to adopt the child. Plaintiffs' argued that Michigan Adoption Law invaded their right to privacy established by the United States Supreme Court in the case of *Carey v Population Services International*, which held that a couple's decision to have or not have children is a constitutionally protected right. The Michigan Court of Appeals upheld the validity of the Adoption Code finding that the parties intended use of it to change the legal status of the child was not within the fundamental interests protected by the right to

privacy.

THE ROLE OF THE LEGISLATURE IN SURROGATE PARENTING CONTRACTS

By 1987, the incentive for the Michigan legislature to deliberate the issue of surrogate parenting contracts was twofold. The nation's most well known promoter of compensated surrogate contracts, Noel Keane, had his primary business operation in Dearborn, Michigan. This resulted in a larger number of surrogate births than were occurring in other states. Not surprisingly, it also produced more situations in which disagreements over custody or repudiation of the contract became an issue for Michigan courts to resolve.[18] Also, in the absence of express legislation, the prospect of non-uniform judicial outcomes loomed large, as did the opportunity for legislating on the part of the courts. As publicity about surrogate cases became more widespread, persons who were contemplating entering into such arrangements became uneasy about whether or not they were paying their money or producing a child with the result being nothing more than additional costly and controversial legal battles. In the face of such uncertainty, it is no longer the choice but the duty of the legislature to respond so that the "rules of the game" would be clearly known to everyone.

The public policy of the State of Michigan is unmistakable upon reviewing the contents of PA 199 of 1988.

* As to surrogate contracts where no compensation occurs other than payment of reasonable and necessary medical expenses of

pregnancy, **all** contracts are "void, and unenforceable as contrary to public policy."[19] If any party does not comply with the provisions of the agreement, there is no access to any Michigan court to enforce the terms of the contract.

In most cases it seems the parties comply fully with the terms of the contract. Therefore, if parties are willing to assume the risks associated with noncompliance, compensated surrogacy would remain a viable and probably a statistically insurable option had the law gone no further.

* As to the contracts for which compensation of any kind is extended to the surrogate, the statute makes contracts illegal. A misdemeanor penalty of up to 1 year in jail and/or $10,000 fine is applicable to parties to the contract. A felony of up to 5 years imprisonment and/or $50,000 fine is applicable to others who "induce, arrange, procure or otherwise assist in the formation of the contract."[20]

The state clearly has no interest in establishing a "surrogacy police" or in sending to jail couples who engage in this behavior out of a desperate desire to have a family. However, because most citizens are law-abiding, and this is no doubt especially true of the kind of individuals who heretofore entered into or considered surrogate parenting, the criminalizing of this conduct sends a clear and unequivocal message that compensated surrogacy will not be tolerated in Michigan.

These provisions alone are insufficient to resolve the surrogate contract issue. Despite their stringency, children already have been born as the

result of surrogate contracts and can still be, if the arrangement is not for compensation. If the mother decides not to release her parental rights, how is a court to decide the resulting controversy?

* As to custody disputes, the law provides that the party with physical custody shall retain it during pendency of the dispute and directs the circuit court to award legal custody based on a determination of the "best interest of the child."[21]

This statute embodies a good deal of compromise, which is the essence of the legislative process, especially in the custody provision. Its primary focus remains the child who is the "product" of such a contract. It declares that the optimal societal goal is for a child to have the opportunity to be raised, influenced and cared for by each of its natural parents and that any choice to the contrary should in nowise be influenced or effected by money. This is particularly important because of the disparate financial standing of the parties to a surrogate parenting contract, the questionable impact surrogacy has on the status of women and the profound belief that in a just society not everything is for sale.

Neither this philosophy nor its espousal in the Surrogate Parenting Act is unique. Already cited are similar provisions in the Michigan Adoption Act. It is likewise contained in those provisions of the Public Health Code prohibiting the sale of human organs.[22]

Objections to this prohibitory statute have been raised by women, in particular surrogates themselves or those who wish to be surrogates, who claim it deprives consenting adults of the

opportunity to make and live by their choices, which are not only valid and personal economic choices, but the retention of which are essential to the fundamental concepts of a democratic society.

In an ordered society there are numerous examples of so-called "protectionist" legislation through which the government deprives individuals of the ability to make choices for themselves because of a belief that the alternative is more beneficial to the society as a whole. Laws prohibiting prostitution, certain kinds of gambling and child labor laws, as well as minimum wage standards, are representative examples. None of these however involves an innocent third party as does a surrogate parenting contract.

THE CHALLENGE TO THE STATUTE

For a year Michigan's Surrogate Parenting Act has been in effect despite two challenges by the American Civil Liberties Union on behalf of various pseudonamed plaintiffs who are actual husbands, wives and surrogates.

The most obvious change occurred in the newspaper advertisements placed by Noel Keane soliciting surrogates. Even this was only effected after intervention by the Wayne County Prosecuting Attorney. Where once the $10,000 fee was prominently displayed, now the offer is to be a surrogate in exchange for payment of medical expenses. A fact of life is that this law applies only in Michigan; and, because Noel Keane operates in several other states, as do other attorney-brokers, it is difficult to tell whether the statute has actually stopped surrogacy or has only stopped the formation of contracts within the confines of the state.

The litigation has raised more interesting issues which this article will discuss only briefly as they pertain to the constitutionality and the legislative intent of the Act. The initial case, *Doe et al v Attorney General*,[23] was filed on September 9, 1988, requesting application of the statute be enjoined and a declatory judgment as to the constitutionality of the Act be rendered. These challenges were based on the Due Process and Equal Protection clauses in both the United States and Michigan Constitutions. As a close observer of this litigation because of significant participation in the formation of the statute, I found perplexing both the course of the litigation and the opinion of the judge.

Deflecting the constitutional challenge by suggesting an absurd construction of the statute--that the prohibition against compensated surrogacy did **not** encompass gestation service contracts,[24]--the Attorney General obtained a stipulation from the ACLU of the constitutionality of the Act, if so interpreted and applied. The matter was disposed of on a summary judgment motion in which Judge John Gillis determined that the constitutional question was mooted by the ACLU stipulation. Interpretation of the statutue was limited to a restatement of the definition with "and" underlined and no comment made as to the validity of compensated gestation services contracts. In all fairness, the plaintiffs never raised this option. Their goal was to be able to continue traditional surrogacy, a critical element of which is securing the mother's release, through a ruling that the statutory prohibition of compensated contracts was unconstitutional. The case is currently on appeal to the Michigan Court of Appeals.

A second case, *Coe et al v Attorney General*,[25] was filed on March 21, 1989. This case squarely puts before the court the question of whether or not the parties to a contract, by specifying that compensation to the surrogate is solely and exclusively for gestation services and not contingent on release of the child, can avert the prohibitions of the statute. This litigation is bogged down in deciding an issue raised by the Attorney General who argues that the very same issue was already decided for essentially the same plaintiffs, by the same court and is also the same issue that is on appeal to the Court of Appeals.

While the sponsors, drafters and legislators are confident that the statute as written is sufficient to withstand the use of legal fictions or contrivances created to circumvent it, a clear statement of its intent is expressed in subsequent legislation. Senate Bill 100 provides that even where the parties specify that payment is exclusively for gestation services, the law will presume it is also for release of parental rights. This bill passed the Senate on March 1, 1989 and awaits House action.

Any judge, lawyer or citizen who reads the statute cannot avoid the conclusion that its intent and effect was to absolutely ban compensated surrogacy and strongly discourage uncompensated surrogacy. There is an unresolved issue as to whether such a prohibition reinforces or contravenes existing constitutional provisions. That is an issue for honest debate and an appropriate legal challenge. The current litigation frankly is not. Passage of the Surrogate Parenting Act does not end the debate nor does it address the underlying desire of individuals to form families. It does state for the record that

within what the legislature of the State of Michigan considers a just society, only certain practices are allowed in pursuit of those goals.

NOTES

1. S.228, introduced by Senator Connie Binsfeld on April 28, 1987, became Act No. 199 of the Public Acts of 1988 when approved by the Governor on June 27, 1988, and is §§ 722.851 to 722.863 of the Michigan Compiled Laws.

2. Louisiana, in 1987, as well as Indiana, Kentucky, and Nebraska in 1988, have statutes either banning surrogate contracts or declaring them void.

3. See Final Status, 1983-84 Regular Session, 82nd Legislature of the State of Michigan; 1985-86 Regular Session, 83rd Legislature of the State of Michigan; and 1987-88 Regular Session, 84th Legislature of the State of Michigan for bills, sponsors, subject matter and legislative history.

4. Genesis 16:1-15.

5. This legislation received overwhelming support in the Michigan legislature, passing in the Senate with a vote of 33 to 3, and in the House of Representatives with a vote of 90 to 10.

6. Because no required reporting exists as to number of contracts, number of births, number of releases signed by mothers or number of babies mothers refused to release, the numeric references contained herein are based on the comments of Noel Keane, a Michigan attorney who has arranged the largest number of surrogate contracts. The data concerning contracts provisions is likewise from surrogate contracts issued by Mr. Keane.

7. In the most well publicized cases, the wife of the biological father was not infertile. Elizabeth Sterns of the Baby M case, is a physician, who did not want to become pregnant for career reasons or because of concerns about an incipient medical problem. In two of Michigan's most controversial surrogacy cases, the "infertile" women had children by prior marriages but, due to voluntary surgery, were no longer able to bear a child.

8. This accounts for the abnormally high incidence of fraternal twin births to surrogates.

9. See Stewart v. Stewart, 91 Mich App 602, (1979), apt. 604, "Lord Mansfield's Rule was judicially incorporated into Michigan law in *Egbert v Greenwalt*, 44 Mich 245; 6 NW 654 (1880). The rule was first uttered by Lord Mansfield in *Goodright v Moss*, 2 Cowp 591-594; 98 Eng Rep 1257-1258 (1777), which was a rule of evidence that parties to a marriage could not testify concerning nonaccess when the issue is paternity of a child born during their marriage. This rule was abolished in Michigan in *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977), although the Supreme Court held that a child is guarded by the still viable and strong, though rebuttable, presumption of legitimacy."

10. MCL 333.2824 (6) A child born to a married woman as a result of artificial insemination, with consent of her husband (emphasis added) is considered to be the legitimate child of the husband. See also MCL 700.111 regarding legitimacy for purposes of intestate

succession.

11. P.A. 1956, No. 205, as amended, being sections 722.711 et seq. of the Michigan Compiled Laws. See especially MCL 722.711 (a) "Child born out of wedlock" means a child...or a child which the court has determined to be a child born or conceived during a marriage but not the issue of that marriage (added by P.A. 1980, No. 54).

12. See MCL 710.54 (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:

(a) The placing of a child for adoption. ...
(b) A release.
(c) A consent. ...

and MCL 710.69 A person who violates any of the provisions of Sections 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon subsequent conviction shall be guilty of a felony.

13. Florida was the forum of choice for all surrogate adoptions. A recently enacted six month jurisdictional residency requirement has undoubtedly affected this choice somewhat.

14. See also 1963 Michigan Constitution, Article I, §9 which states: "Neither slavery, nor involuntary servitude unless for the punishment of a crime shall ever be tolerated in this state." For a comprehensive discussion of the applicability of the XIII Amendment to surrogate contracts see Means, *Surrogacy v. The Thirteenth Amendment*, Vol.IV

NYLS Human Rights Annual 445 (1987).

15. Mi LSB Research Report: *Surrogate Parenting in Michigan*, Vol 8, No 1 (1988).

16. MCL 710.54 *supra.*

17. *Leave to appeal denied*, 414 Mich 875 (1982). *Certiorari denied*, 459 US 1183 (1983).

18. Though few in number, Michigan courts have had to resolve surrogate cases presenting all of the "imaginary horribles" that could arise from such an arrangement. These include a child born with severe handicaps where the contracting couple were divorcing. A birth involving fraternal twins, a girl and a boy, where the contracting couple already had three boys and wanted only the girl, not the boy. A case where the surrogate wished to have the contract set aside prior to the birth and have herself delcared the custodial parent of the subsequently born twins. A case where a surrogate, deeply regretting her decision, is attempting to regain parental rights to her son by challenging the Florida adoption.

19. MCL 722.855.

20. MCL 722.859.

21. MCL 722.861. "best interest of the child" means that term as defined in §3 of the Child Custody Act of 1970, Act No. 91 of the Public Acts of 1970, being §722.23 of the Michigan Compiled Laws.

22. See MCL 333.9121.

23. Full case name: *Jane Doe, John Doe, Rena Roe, Richard Roe, Carol Coe, Carl Coe, Paula Poe, and Nancy Noe v Attorney General of Michigan.* American Civil Liberties Union Fund of Michigan serving as attorneys for the Plaintiffs. Wayne Circuit Docket No. 88-819032-cz.

24. The essence of the contention is the consequence (legislative intent) of the word **and** in the statute's definition of a Surrogate Parentage Contract as "a contract, agreement or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation **and** to voluntarily relinquish her parental rights to the child" (MCL 722.853 (i)).

25. Full case name: *Carol Coe, Carl Coe, Jane Doe, John Doe, Tom Toe, Terri Toe and Hannah Hoe v. Attorney General of Michigan.* Plaintiffs are again represented by the American Civil Liberties Union Fund of Michigan. The action was again filed in the Wayne County Circuit Court, Docket No. 89-908112-cz. This time the case was assigned to Judge Kaye Tertzag.