

Although a trend toward adopting Section 102(b)(7)-type provisions is not yet evident, its widespread proposal signifies Delaware corporate board confidence that it will ease director concerns over personal liability. Moreover, widespread enactment of Section 102(b)(7)-type provisions by state legislatures and a corresponding adoption of indemnity provisions by corporations nationwide could remove the need of many directors to retain costly indemnity insurance.

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THE URGENT NEED FOR SURROGATE MOTHERHOOD LEGISLATION

I. INTRODUCTION

An estimated ten to fifteen percent of all married couples are infertile.¹ The rate of infertility has increased dramatically over the past 20 years.² The rise in infertility is due to a variety of causes including use of certain drugs and contraceptive devices,³ sexually transmitted diseases,⁴ chemi-

1. L. ANDREWS, *NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS, INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD*, 2 (1984). Approximately 15% of couples are unable to conceive after one year of unprotected intercourse. R. HATCHER & G. STEWARD, *CONTRACEPTIVE TECHNOLOGY 1986-1987* (13th rev. ed. 1986).

2. The overall infertility rate in the United States is almost three times as much as it was 20 years ago. *The Saddest Epidemic*, TIME, Sept. 10, 1984, at 50. The National Center for Health Statistics compared a 1965 survey with a 1976 survey and found an 83% increase in infertility among married couples in which the wife was 20-24 years old, a group which is considered most fertile. L. ANDREWS, *supra* note 1, at 2.

3. A variety of drugs including high blood pressure and ulcer medications can lower a man's sperm production. Sons and daughters of women who took DES (di-ethyl-stilbestrol) have a higher incidence of certain types of fertility problems. L. ANDREWS, *supra* note 1, at 23-25. Use of the IUD sometimes leads to infertility by causing severe inflammation of the uterine lining or by increasing a woman's risk of pelvic inflammatory disease which causes scarring and blockage of a woman's fallopian tubes. *Id.* at 25-26. Abortion can also cause infections which can lead to infertility. *Id.* at 26.

4. According to Centers for Disease Control, one million people contract sexually transmitted diseases each year. Infertility results in 150,000 to 200,000 of those cases. Sexually transmitted diseases lead to infertility by scarring the woman's fallopian tubes or the man's sperm ducts. *Id.* at 29.

cal pollutants,⁵ and postponement of childbearing.⁶ While the rate of infertility has risen, adoption, the traditional option for childless couples, has become less available. The widespread use of contraception and the legalization of abortion has led to fewer unwanted births. In addition, the increased acceptance of single parenthood has resulted in more unwed mothers keeping their children rather than giving them up for adoption.⁷ Consequently, an infertile couple must often wait several years to adopt an infant.⁸

Many couples are turning to new reproductive techniques to achieve conception.⁹ A surrogate motherhood arrangement is an option that a couple may choose if the wife is infertile,¹⁰ unable to carry a child,¹¹ or in

5. Certain herbicides have been connected with an increased rate of miscarriages. Furthermore, many chemical pollutants in the environment are responsible for lowering men's sperm production. The workplace can also pose fertility hazards. Health care workers, exposed to radioactive materials and anesthetic gas, are at risk. Other workers who deal with various chemicals may also suffer adverse effects. *Id.* at 21-23.

6. Men and woman are most fertile between the ages of twenty and twenty-five; after twenty-five the ability to conceive a child tapers off. Many young couples, because of the educational and career opportunities available to women, are postponing child bearing. The likelihood of a woman conceiving after six months of trying to conceive decreases significantly once over age 25. A twenty-five year old woman has a 75% chance to conceive, a woman in her late twenties has a 47% chance to conceive, in her early thirties, a 38% chance to conceive, and a 25% chance to conceive in her late thirties. *Id.* at 30.

7. Note, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICKINSON L. REV. 227 (1985). In 1971, 13% of unwed teenage mothers chose adoption, while in 1978 only 4% chose adoption. L. ANDREWS, *supra* note 1, at 3.

8. In 1975, it was reported that the wait for a healthy infant was from three to seven years. *Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 6 (1975).

9. New reproductive techniques which help infertile couples to have a baby include in vitro fertilization, artificial insemination by husband or donor, egg donation, artificial embryonation, embryo adoption, surrogate carrier, and surrogate motherhood. For a detailed description of these reproductive techniques see The Ethics Committee of the American Fertility Society, *Ethical Considerations of the Reproductive Technologies*, 46 FERTILITY & STERILITY, Supplement 1, 32S-48S, 58S-68S (1986).

10. A woman's infertility may be caused by an inability to produce eggs from the ovaries, damage to the fallopian tubes, or she may have had a hysterectomy, a removal of the uterus which sometimes includes removal of the ovaries and fallopian tubes. L. ANDREWS, *supra* note 1, at 198.

If a woman's infertility is caused by damage to the fallopian tubes and she is able to ovulate, another reproductive option is available. She may choose to undergo in vitro fertilization which involves surgical removal of the eggs, incubation of sperm and eggs in a laboratory culture, then transfer of the resulting preembryo into the uterus. See The Ethics Committee of the American Fertility Society, *supra* note 9, at 32S.

11. Some women are unable to carry a child to term and experience miscarriage and spontane-

situations in which a wife would pass on a genetic defect to the child.¹² This option requires the participation of a surrogate mother.¹³ A surrogate mother is a woman who agrees to be artificially inseminated with the sperm of a man whose wife is unable to have a child.¹⁴ The surrogate mother contractually agrees to terminate her parental rights and allow the infertile couple to adopt the child following birth.¹⁵

This Development will describe the typical provisions in surrogate motherhood agreements, discuss the judicial response to surrogate motherhood arrangements, present an overview of existing legislation which affects surrogate motherhood arrangements, and will evaluate current surrogate motherhood legislative proposals and suggest a comprehensive legislative approach to surrogate motherhood arrangements.

II. JUDICIAL RESPONSES TO SURROGATE MOTHERHOOD AGREEMENTS

The surrogate motherhood agreement between the surrogate mother

ous abortion. Some women are advised by their physician not to become pregnant because of health conditions such as severe high blood pressure or diabetes. L. ANDREWS, *supra* note 1, at 198.

Another reproductive option is available to a woman who is unable to carry a child to term. If the woman's ovaries are functioning, her egg could be fertilized with her husband's sperm in a laboratory culture, then the resulting preembryo could be transferred to a surrogate carrier. This option has the advantage of producing a child who is biologically related to both the husband and wife. *Id.* See The Ethics Committee of the American Fertility Society, *supra* note 9, at 58S.

12. Some genetic disorders are transmitted by the mother to male offspring, such as hemophilia and a form of muscular dystrophy. J. WYNGAARDEN & L. SMITH, JR., *TEXTBOOK OF MEDICINE* 25 (16th ed. 1982).

13. A surrogate mother may be obtained through an advertisement or with the help of a surrogate mother program which matches infertile couples with surrogate mothers. N. KEANE & D. BREO, *THE SURROGATE MOTHER* 281 (1981). Noel P. Kearne is a Michigan Attorney who helps to bring infertile couples together with potential surrogate mothers. He is also founder of Surrogate Family Services in Dearborn, Michigan. Note, *supra* note 7, at 229 n.17. Surrogate mother programs also exist in California, Kansas, Maryland, Ohio, and Pennsylvania. L. ANDREWS, *supra* note 1, at 317-318.

14. L. ANDREWS, *supra* note 1, at 198. One advantage of the surrogate motherhood arrangement over adoption is that the child will be biologically related to the natural father who donates his sperm to the surrogate mother. *Id.*

The number of children born by surrogate motherhood arrangements was recently estimated at 600. Gelman & Shapiro, *Infertility: Babies by Contract*, *Newsweek*, Nov. 4, 1985, at 74. Demographic studies of surrogate mothers have revealed that the average age of a surrogate mother is 25 years old, over one-half are married, one-fifth divorced, and about one-fourth single. Over one-half have graduated from high school, and one-fourth have had education beyond high school. About 57% are Protestant and 42% are Catholic. See The Ethics Committee of the American Family Society, *supra* note 9, at 62S.

15. L. ANDREWS, *supra* note 1, at 6.

and the infertile couple usually provides for payment of the surrogate mother's medical, living expenses related to the pregnancy, and a substantial fee in exchange for the surrogate mother's promise to relinquish the child.¹⁶ The contract may include detailed provisions concerning medical, psychological, and genetic screening of the surrogate mother and the infertile couple. The contract may also deal with a multitude of contingencies which may arise such as the surrogate's desire to have an abortion, miscarriage of the child, the surrogate's death during childbirth, birth of an abnormal infant, or the surrogate's refusal to give consent to adoption.¹⁷ Although the surrogate motherhood agreement often includes provisions which clearly spell out the rights and responsibilities of each party, these contract provisions may not survive judicial scrutiny.

Generally, courts have rejected surrogate arrangements on the basis of law not specifically regulating surrogate motherhood arrangements. Few courts have considered surrogate motherhood arrangements. Those that

16. Note, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 2, 3 (1986).

There may be no contractual agreement if private, informal arrangements are made, such as arrangements between sisters or friends. For a sample contract between the infertile couple and a volunteer surrogate mother see N. KEANE & D. BREO, *supra* note 13, at 290.

The standard fee paid to surrogate mothers is \$10,000 plus expenses. See Gelman & Shapiro, *supra* note 14, at 74 and N. KEANE & D. BREO, *supra* note 13, at 16. Payment of the surrogate is believed to be necessary to compensate the surrogate mother for her significant involvement in the reproductive process. Unlike an artificial insemination donor, who merely donates his sperm, the surrogate mother's contribution is more significant. She donates not only her egg, but also her womb. She carries the child for nine months and assumes the risk of pregnancy and child birth. Payment of the surrogate mother is necessary because there are not enough voluntary surrogate mothers to meet the needs of infertile couples. See The Ethics Committee of the American Fertility Society, *supra* note 9, at 66S. See *infra* note 67 and accompanying text.

17. For a sample surrogate motherhood agreement see N. KEANE & D. BREO, *supra* note 13, at 291-96. A contract should require the surrogate mother and the sperm donor to undergo physical and genetic evaluations. The surrogate mother should also be required to undergo a psychiatric evaluation. This contract would forbid abortion unless the abortion is necessary for the physical health of the surrogate mother or the child is determined to be abnormal. *Id.* at 294. This contract would provide for no compensation if the surrogate miscarried the child prior to the fifth month of pregnancy. The infertile couple would also have to pay the cost of term life insurance on the surrogate mother's life, which would be payable to the surrogate's named beneficiary if the surrogate died during pregnancy, childbirth or within six weeks subsequent to the birth. *Id.* at 293. The infertile couple is bound by the contract to assume parental responsibilities for an abnormal child if they have been advised of the risk of such abnormalities. *Id.* at 294. The surrogate mother and her husband, if she is married, agree to surrender custody of the child and to relinquish any parental rights upon the birth of the child. *Id.* at 292. The contract may also contain the surrogate mother's agreement to not smoke cigarettes, drink alcohol, or use any illegal drugs and to follow a prenatal medical examination schedule. *Id.* at 294. See also L. ANDREWS, *supra* note 1, at 234-35 (advocating use of contracts with detailed provisions spelling out the rights and responsibilities of the parties).

have generally viewed the arrangements with disfavor; however, no court has conducted an extensive evaluation and most have rejected the arrangements on the basis of existing legislation not specifically aimed at regulating surrogate motherhood arrangements.

Two state courts of appeals have held that payment in connection with surrogate motherhood arrangements violates state statutes which prohibit baby selling.¹⁸ In *Kentucky v. Surrogate Parenting Associates, Inc.*,¹⁹ the Kentucky Circuit Court held that the Surrogate Parenting Association did not violate the Kentucky statute prohibiting payment in connection with adoption by arranging surrogate motherhood transactions.²⁰ The circuit court reasoned that because the statute was designed to prevent the sale of children, it could not apply to the natural father who donated his sperm to the surrogate mother since a father cannot buy the right to adopt his natural child.²¹ The court believed that payment in connection with a surrogate motherhood arrangement was not for the child, but for the surrogate mother's services in carrying the child and agreement to terminate her parental rights. Further, the court stated that the policy underlying the baby-selling statute was to prevent arrangements between the mother and strangers, not arrangements between the mother and the natural father of the child.²²

On appeal,²³ the Kentucky Court of Appeals reversed and held that surrogate motherhood arrangements violate the Kentucky baby-selling statute.²⁴ The court pointed out that the Kentucky legislature had amended the baby-selling statute to authorize in vitro fertilization²⁵ and that the legislature considered, but refused, to amend the statute to au-

18. See *infra* notes 41-48 and accompanying text for a description of the baby-selling statutes.

19. 10 FAM. L. REP. (BNA) 1105 (Franklin Cty. Cir. Ct. 1983) *rev'd sub nom.* Kentucky ex rel. Armstrong v. Surrogate Parenting Assocs., Inc., 11 FAM. L. REP. (BNA) 1359 (Ky. Ct. App. 1985).

20. 10 FAM. L. REP. (BNA) at 1107.

21. *Id.* at 1106.

22. *Id.*

23. Kentucky ex rel. Armstrong v. Parenting Assocs., Inc., 11 FAM. L. REP. (BNA) 1359 (Ky. Ct. App. 1985).

24. *Id.* at 1360. The Kentucky statute, KY. REV. STAT. § 199.590(2), provided, in pertinent part, as follows:

No person, agency, institution, or intermediary may sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights.

Id. at 1359.

25. The amendment provided that nothing in the baby-selling statute "shall be construed to prohibit in vitro fertilization." *Id.*

thorize surrogate motherhood arrangements.²⁶ The court interpreted this legislative inaction as an indication that the legislature believed that surrogate motherhood arrangements are contrary to the statute's policy against the sale of children for adoption.²⁷ The court rejected the lower court's assumption that the sperm donor was the legal father of the child and therefore could not adopt his own child. The court stated that absent strong proof otherwise, the sperm donor was a stranger to the child because of a legal presumption that the surrogate's husband is the legitimate father.²⁸ In addition, the court believed that payment to the surrogate mother was payment in connection with an adoption and thus violated the statutory prohibition because adoption of the child by the infertile wife was an integral part of surrogate motherhood agreements arranged by the Surrogate Parenting Association.²⁹ Finally, the court concluded that the Surrogate Parenting Association violated the Kentucky baby-selling statute because it profited from arranging surrogate motherhood transactions.³⁰

In *Doe v. Kelley*,³¹ an infertile couple who had entered a surrogate motherhood agreement sought a declaratory judgment that the Michigan baby-selling statute violated their constitutional right to privacy. The couple argued that the statute interfered with their right to decide whether to bear or beget a child.³² The Michigan Court of Appeals affirmed a denial of the declaratory judgment and held that although the infertile couple's right to have a child may be constitutionally protected,

26. The legislature considered amending the baby-selling statute to provide that it should not be "construed to prohibit surrogate parenting" and to define surrogate parenting. *Id.*

27. The court cited no legislative reports, debates, or hearings to support its position; the court merely pointed out that the in vitro fertilization amendment was adopted and the surrogate parenting amendment was not, and stated the following:

Obviously, the legislature considered the two processes and rejected the former while approving the latter, as the language regarding surrogate parenting was not adopted into law. We interpret this recent legislative history as a clear signal that surrogate parenting, as discussed herein, violates the current statute's predecessor and its policy against the unauthorized purchase and sale of children for adoption purposes.

Id.

It is possible that the legislature did not adopt the surrogate parenting amendment, not because surrogate arrangements are contrary to the policy underlying the baby-selling statutes, but because the legislature believed that the matter required further consideration and a more comprehensive approach.

28. *Id.* at 1359-60. See *infra* note 35 and accompanying text.

29. *Id.* at 1360.

30. *Id.*

31. 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

32. *Id.* at 172, 307 N.W.2d at 440.

payment in connection with the surrogate motherhood arrangement which contemplated use of the state adoption procedures was not constitutionally protected and thus was subject to reasonable regulation by the state.³³

The Kentucky Circuit Court in *In re Baby Girl*³⁴ refused to terminate the parental rights of a surrogate mother and her husband and transfer custody of the child to the sperm donor because of the strong common-law presumption that a child born in wedlock is the husband's legitimate child.³⁵ The court stated that an affidavit concerning the occurrence of artificial insemination, without blood tests or other evidence, was not sufficient proof that the sperm donor was the natural father of the child. The court further stated that even if paternity could be established, the court would not grant an order of termination because the surrogate mother had ignored the requirements of the Adoption Act by making private arrangements with the infertile couple.³⁶

III. EXISTING LEGISLATION

Although several states are considering surrogate motherhood legislation,³⁷ no state has enacted a statute regulating surrogate arrange-

33. The court stated its conclusion as follows:

While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, (citation omitted), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiff's contractual agreement discloses a desire to use the adoption code to change the legal status of the child. . . . We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

Id. at 173-74, 307 N.W.2d at 441.

34. 9 FAM. L. REP. 2348 (BNA) (Jefferson Cty. Cir. Ct. 1983).

35. The court cited several Kentucky cases which support this presumption including *Vanover v. Steele*, 174 Ky. 114, 190 S.W. 667 (1917), which provided "[e]vidence that the child's mother is married and that there was opportunity for procreation within the period of gestation raises a conclusive presumption that the child is the husband's legitimate child." 9 FAM. L. REP. at 2348.

36. The Adoption Act required an investigation of the prospective adoptive couple, prior to placement of the child, by a licensed adoption agency to determine the couple's suitability to receive the child. *Id.*

For a discussion of the surrogate motherhood case decided by the New Jersey Superior Court see Galen, *Surrogate Law: The Decision in a Novel Case in New Jersey could have Wide-Reaching Implications for Infertile Couples and Surrogate Motherhood*, NAT'L L.J., Sept. 29, 1986, at 1, col. 1. The trial judge has awarded temporary custody of the child to the infertile couple pending trial. *Id.*

37. Legislative consideration of surrogate motherhood arrangements has taken place in the District of Columbia and in the following twenty-one states: Alabama, Alaska, California, Connecticut,

ments.³⁸ As illustrated by the cases discussed above,³⁹ existing legislation cannot deal adequately with surrogate motherhood arrangements. Baby-selling, adoption, and artificial insemination statutes initially did not contemplate and were not designed to handle surrogate motherhood arrangements.⁴⁰

A. *Baby-selling Statutes*

Twenty-four states have enacted baby-selling statutes that prohibit payment in connection with an adoption.⁴¹ These statutes are aimed at preventing black-market sales of babies.⁴² In a black-market adoption, the legal channels for adoption are circumvented.⁴³ Since no licensed adoption agency is involved in a black-market adoption, the natural mother receives no counseling and no evaluation of the adoptive couple's fitness is performed. Instead, a baby-broker offers to sell the infant to an adoptive couple who is able and willing to pay an exorbitant fee.⁴⁴ The baby-broker is not concerned with the welfare of the child, the natural mother, or the adoptive parents. The broker's primary concern is profit-making and, thus, no procedures are undertaken to protect the interests of the parties involved. The natural mother, often young and unwed,

Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, and Virginia. *Pierce, Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA) 3001, 3003 (1985).

38. *Id.* See also *Who Keeps 'Baby M'?* Newsweek, Jan. 19, 1987, at 45.

Recently the Vatican issued a statement on reproductive ethics which forbids use of various reproductive techniques including surrogate motherhood arrangements. See Mandel & Paul, *Infertility-Vatican Constraints Debated*, St. Louis Post-Dispatch, March 12, 1987, at 1, col. 1.

39. See *supra* notes 18-33 and accompanying text.

40. L. ANDREWS, *supra* note 1, at 226.

41. For a listing of the state baby-selling statute citations see Note, *supra* note 16, at 8 n.34.

42. Black-market adoptions arose because of the decreased supply of adoptable infants coupled with the increased demand for children. See *supra* notes 7 & 8 and accompanying text concerning the reasons for the decreased availability of adoptable infants.

43. There are two major types of adoption, agency adoptions and independent or private adoptions. In an agency adoption, a licensed agency makes arrangements for the adoption, providing counseling for the natural mother and conducting a thorough investigation of the adoptive couple. In an independent adoption, an intermediary, such as a lawyer or doctor, makes the arrangements. Generally, a thorough investigation of the adoptive couple is not made in an independent adoption. The adoptive couple pays for the natural mother's medical expenses and legal fees. In a black-market adoption, the adoptive couple pays the mother for the infant. C. DAKIN, H. ROSSEN & W. SOGG, *FAMILY LAW* 97-98 (1975).

44. In addition to charging exorbitant fees, some baby-brokers auction off a child to two or more couples, giving the child to the highest bidder. Note, *supra* note 16, at 16.

may be coerced by economic and social pressures into giving up her child.⁴⁵

Although the baby-selling statutes were enacted to deal with black-market adoptions, the statutes may serve as an obstacle to surrogate motherhood arrangements which provide for a substantial fee to be paid to the surrogate mother. The surrogate fee can be viewed as compensation to the surrogate mother for her services of carrying and bearing the child.⁴⁶ Some courts, however, have viewed the fee as an illegal payment in connection with an adoption.⁴⁷

Surrogate motherhood arrangements differ from black-market adoptions because the surrogate is not pressured into giving up her child after becoming pregnant, but rather, voluntarily chooses to enter into an agreement to relinquish parental rights *before* she becomes pregnant.⁴⁸ The interests of the child are better protected by a surrogate arrangement because the child is not merely going to the highest bidder, but will be adopted by her natural father and his wife. In addition, surrogate motherhood arrangements, unlike black-market adoptions, can be regulated to provide further safeguards, such as psychological, medical, and genetic screening of the parties.

B. Adoption Statutes Governing Consent

Adoption statutes which provide for a mandatory waiting period following birth before consent to adoption⁴⁹ also conflict with the typical surrogate arrangement. The statutory waiting period gives the natural mother an opportunity to consider her decision to relinquish parental rights and tends to ensure that consent to adoption is voluntary.⁵⁰ In a typical surrogate motherhood arrangement, however, the surrogate mother consents to termination of parental rights when she signs the sur-

45. See generally Note, *Black-Market Adoption*, 22 CATH. LAW 48 (1976).

46. Note, *Surrogate Motherhood in Ohio: A Dangerous Game of Baby Roulette*, 15 CAP. U.L. REV. 93, 98 (1985) (arguing that payment to the surrogate is "compensation of her loss of work, the inconvenience of pregnancy, and the stress of childbirth").

47. See *supra* notes 23-33 and accompanying text.

48. See Note, *supra* note 16, at 21. See also Note, *supra* note 7, at 253; Note, *supra* note 46, at 98.

49. See, e.g., the Pennsylvania statute which provides in pertinent part that "[n]o consent shall be valid if it was executed prior to or within 72 hours after the birth of the child." 23 PA. CONS. STAT. § 2711(c) (1982). See also KY. REV. STAT. § 199.601 (1981) (5 day waiting period); OHIO REV. CODE ANN. § 3107.08(A) (Page 1980) (72 hour waiting period).

50. Note, *supra* note 45, at 51 n.13.

rogate motherhood agreement.⁵¹ Technically, the surrogate mother's consent would be invalid in a state requiring a mandatory waiting period; however, these provisions were designed to prevent a mother from being coerced into giving up her child for adoption. The surrogate mother's position is unlike the natural mother's position in a traditional adoption, because the surrogate mother makes a conscious decision to relinquish her child before she becomes pregnant and therefore is unlikely to feel coerced into giving up her child because of economic and social pressures.⁵²

C. *Artificial Insemination Statutes*

Twenty-six states have enacted laws which provide that the husband of an artificially inseminated woman is considered by law the legal father of the child conceived through this process.⁵³ Although these statutes may be appropriate where the husband is infertile and a couple wants to have a child by artificial insemination, these statutes conflict with surrogate motherhood arrangements.

Surrogate motherhood arrangements have been described as the reverse of artificial insemination.⁵⁴ Both reproductive techniques involve the assistance of a third person in the reproductive process. In the case of artificial insemination, however, the couple cannot conceive because of the male's infertility and, thus, the assistance of a sperm donor is required.⁵⁵ The artificial insemination statutes recognize that the parties in this situation intend that the husband of the artificially inseminated woman, rather than the sperm donor, be considered the legal father. To the

51. Note, *supra* note 7, at 243.

52. *Id.* at 253.

53. For a listing of the artificial insemination statute citations see *id.* at 234 n.52.

The Uniform Parentage Act provides, in pertinent part, as follows:

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.

UNIFORM PARENTAGE ACT § 5 (1979).

In some states, a common-law presumption exists that a child conceived during wedlock is the legitimate child of the husband. See *supra* notes 28 & 35 and accompanying text.

54. Note, *supra* note 7, at 231.

55. Technically, there are two types of artificial insemination: (1) artificial insemination by donor, which involves a donor's semen because the husband is infertile; and (2) artificial insemination by husband, which involves use of the husband's sperm in the artificial insemination process because the husband is unable to achieve ejaculation within the vagina or has a poor sperm production. See The Ethics Committee of the American Fertility Society, *supra* note 9, at 34S-38S.

In this discussion, artificial insemination is used to refer to artificial insemination by donor.

contrary, in the surrogate motherhood arrangement the couple cannot conceive because of the female's infertility and therefore require the assistance of a surrogate mother. Artificial insemination statutes undermine the parties' intentions in a surrogate motherhood agreement because the purpose of the contract is not to make the surrogate's husband the legal father, but to make the infertile couple the legal parents of the child.

It is apparent that legislation which was enacted to deal with issues and problems arising in the contexts of black-market adoption, traditional adoption and male infertility cannot adequately address the unique issues that arise in surrogate motherhood arrangements. Legislative guidelines specifically directed to surrogate motherhood agreements are needed.

IV. SURROGATE MOTHERHOOD LEGISLATIVE PROPOSALS

Four basic approaches have been taken by states considering surrogate motherhood legislation.⁵⁶ A few bills have been aimed at prohibiting surrogate motherhood arrangements entirely by making such arrangements void.⁵⁷ The remaining bills permit surrogate motherhood arrangements but vary as to the degree of regulation imposed.

One commentator has characterized the various legislative approaches as streamlined, detailed and moderate.⁵⁸ The streamlined bills simply legalize surrogate motherhood arrangements but do not provide any guidance on what terms should be included in a surrogate motherhood contract or on how various contingencies should be handled and do not contain any psychological, medical or genetic screening requirements.⁵⁹ The detailed approach provides for extensive regulation of surrogate motherhood arrangements. These bills specify numerous detailed provisions which must be included in the surrogate motherhood agreement concerning psychological and medical evaluations, relinquishment of the surrogate's parental rights, the infertile couple's assumption of parental responsibilities, and the surrogate's rights and responsibilities during

56. For a listing of the states which have considered surrogate motherhood legislation, see *supra* note 37.

57. See Ky. H.B. 668, 1986 Reg. Sess. (1986). See also Note, *supra* note 16, at 41-43 (discussing legislative proposals prohibiting surrogate motherhood arrangements).

58. Note, *supra* note 16, at 44-51.

59. *Id.* at 44.

pregnancy.⁶⁰ In addition, the detailed bills also provide for extensive court involvement, requiring compliance with legal proceedings similar to those required under the adoption laws.⁶¹ Finally, the moderate bills take a middle-of-the-road approach to surrogate motherhood arrangements, requiring the parties to undergo limited medical and psychological evaluations and to include some specified provisions relating to their respective rights and responsibilities in their contract.⁶²

V. A SUGGESTED APPROACH

A comprehensive legislative approach to surrogate motherhood arrangements is necessary. The legislation should specify the rights and responsibilities of the infertile couple and the surrogate mother, protect the best interests of the child, and provide for limited judicial involvement. Existing legislation should also be amended to reflect the special nature of surrogate motherhood arrangements.

A. *Infertile Couples' Rights and Responsibilities*

To ensure that an infertile couple actually needs the surrogate motherhood option, legislation should require couples to undergo fertility testing to determine whether they are unable to conceive a child or are likely to have a child with a significant genetic impairment.⁶³ The couple should also be made aware of the various reproductive techniques avail-

60. These bills also provide solutions for various contingencies such as death of the infertile couple. If the husband or wife dies prior to the child's birth, then the survivor assumes custody. If both die, the surrogate would still receive the compensation fee and could choose to keep the child or give the child up for adoption. *Id.* at 47.

61. The legislation may require the infertile couple to file a petition for judicial permission to enter into a surrogate motherhood arrangement. The court may order an investigation of the infertile couple to evaluate their suitability as prospective parents prior to granting the petition. When the surrogate becomes pregnant, notice is filed with the court. After the child is born, the infertile wife adopts the child. There is no need for her husband to adopt the child because as the sperm donor he is deemed the natural parent of any child born as a result of this arrangement. *Id.* at 45.

62. *Id.* at 48-57.

63. *See, e.g.*, Mich. H.B. 4555, § 4(1)(e) (1985); N.Y. S.B. 1429, §§ 119(1), 123(2)(b) (1987). The Michigan bill requires that the infertile couple obtain a medical certificate stating that they are unlikely to conceive or are likely to have a child with a significant mental or physical impairment. Under the New York bill, an infertile couple would have to include a physician's affidavit, along with their petition to the court for approval of the surrogate motherhood arrangement, which stated that the couple has been unable to conceive for one year or more while not using birth control, or that pregnancy would pose significant health risks to the mother or child, or that the wife is sterile. *See also* The Ethics Committee of the American Fertility Society, *supra* note 9, at 63S (emphasizing the proper medical indications for the use of the surrogate mother option).

able to them so that they can make an informed choice regarding the surrogate motherhood option.⁶⁴

The couple should receive psychological counseling to make them aware of the responsibilities of surrogate parenthood and to evaluate their suitability as parents.⁶⁵ The husband should undergo medical and genetic examinations to screen for any sexually transmitted disease or genetically transmitted condition.⁶⁶ The infertile couple should pay for the surrogate mother's medical and legal costs connected with the pregnancy and the surrogate arrangement and should also pay a reasonable fee to compensate the surrogate mother for her services.⁶⁷

64. See *supra* notes 10 & 11 describing other reproductive options.

65. See, e.g., Cal. Assembly 1707, §§ 7518(a), 7519(j), 1985-86 Reg. Sess. (1985); Mich. H.R. 4555, § 4(1)(c) (1985); N.Y. S.B. 1429, § 124(2) (1987). The Michigan bill requires that a mental health professional sign a written acknowledgement that the couple has been counseled, fully understands the responsibilities of surrogate parenthood, and is ready to assume these responsibilities. The California bill requires the infertile couple, the surrogate mother, and the surrogate's husband, if any, to obtain psychological counseling at least 30 days prior to entering a surrogate motherhood contract. The California bill is unique in that it also requires continued psychological counseling, for all parties, which may end no earlier than two months after the child's birth.

66. Some bills only require the surrogate mother to undergo medical and genetic screening. Because the sperm donor plays an important role in the reproductive process, he should also be required to undergo screening. The following bills require the sperm donor to undergo medical evaluation: Cal. Assembly 1707, § 7519(b), 1985-86 Reg. Sess. (1985); D.C. Council Bill 6-152, § 5(a)(1) (1985); Haw. H.B. 1009, § 9(14) (1983); N.Y. S.B. 1429, § 122(1)(i) (1987).

67. The bills vary as to which expenses should or may be paid by the infertile couple and as to whether the surrogate should receive a compensation fee. Some bills require that the infertile couple pay for medical or psychological expenses connected with the surrogate's pregnancy. See, e.g., Haw. H.B. 1009, § 9(13) (1983). Other bills provide that the parties may agree upon who will be responsible for medical expenses. See, e.g., Cal. Assembly 1707, 7519(c), 1985-86 Reg. Sess. (1985); D.C. Council Bill 6-152, § 5(c) (1985); Kan. S.B. 485, § 9(b)(2) (1984).

The D.C. Council bill states that the infertile couple may also agree to pay the surrogate's legal expenses related to the surrogate motherhood agreement and for special clothing, food, and medicines required by the pregnancy. The bill, however, prohibits payment of a compensation fee to the surrogate mother. D.C. Council Bill 6-152, §§ 5(d) (1985). The New York bill provides that the infertile couple must pay legal expenses and for life and health insurance for the surrogate mother. N.Y. S.B. 1429, § 122(1)(f), (2) (1987). The California bill also requires that life and health insurance be procured, but allows the parties to agree upon who will be responsible for payment of these costs. Cal. Assembly 1707, § 7519(d), 1985-86 Reg. Sess. (1985). Two bills provide that the infertile couple are not liable for wages that the surrogate loses as a result of the pregnancy unless the surrogate agreement expressly provided for payment of lost wages. See Cal. Assembly 1707, § 7519(i), 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 9(13) (1983).

Several bills require that the infertile couple pay the surrogate a reasonable fee for her services in addition to any payment of medical expenses. See, e.g., Cal. Assembly 1707, § 7519(e), 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 9(12) (1983); Kan. S.B. 485, § 9(2) (1984); N.Y. S.B. 1429, § 122(1)(g) (1987); R.I. Assembly 6132, § 1, 15-16-2(B) (1983). The South Carolina bill requires court approval of any fees and expenses agreed to by the parties. S.C. H.B. 2098, 20-7-3760 (1982).

Moreover, the legislation should require the couple to assume all parental rights and responsibilities upon the child's birth *regardless* of the child's condition.⁶⁸ If the husband or wife dies prior to the child's birth, the survivor should take responsibility for the child.⁶⁹ Following the child's birth, the husband should submit to blood or tissue-typing tests to conclusively establish the paternity of the child.⁷⁰

B. Surrogate Mother's Rights and Responsibilities

The legislation should require the surrogate mother to undergo medical and genetic screening to ensure that she is in good health and to decrease the probability of the birth of a genetically impaired child.⁷¹ The surrogate mother and her husband, if married, should receive psychological counseling prior to signing the surrogate motherhood agreement to ensure that they understand the potential psychological consequences of the surrogate motherhood arrangement and are able to voluntarily consent to the arrangement.⁷²

When the surrogate motherhood agreement is signed, the surrogate mother should give written consent to relinquish parental rights upon the birth of the child.⁷³ It would also be advisable for the husband of the

Two bills prohibit payment of a compensation fee. *See* Conn. Assembly 5816 (1987); D.C. Council Bill 6-152, § 5(d) (1985).

68. *See, e.g.*, Cal. Assembly 1707, § 7512, 1985-86 Reg. Sess. (1985); Mich. H.R. 4555, § 5(1)(b) (1985); N.J. Assembly 3038, § 6(c) (1986); R.I. Assembly 6132, § 1, 15-16-2(c) (1983). The California bill contains a caveat, the infertile couple will assume custody of the child regardless of any disease or defect, "unless the disease or defect is the result of some act or failure to act by the surrogate in violation of the surrogate contract."

69. *See, e.g.*, Cal. Assembly 1707, § 7511, 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 9(18) (1983); Mich. H.R. 4555, § 4(2) (1985).

70. *See, e.g.*, Cal. Assembly 1707, § 7519(m), 1985-86 Reg. Sess. (1985); D.C. Council Bill 6-152, § 6(a) (1985); Kan. S.B. 485, § 9(b)(3) (1984); Mich. H.R. 4555, § 8(1) (1985). The sperm donor, surrogate mother, and the surrogate's husband, if any, must submit to blood or tissue-typing tests.

71. *See, e.g.*, Cal. Assembly 1707, § 7519(b) 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 9(a)(6); Mich. H.B. 4555, § 7(1)(a) (1985); N.J. Assembly 3038, § 5 (1986); S.C. H.B. 1098, § 20-7-3770 (j) (1982). The Michigan bill directs that medical and genetic screening of the surrogate mother should take place at the sperm donor's option. Mandatory screening is preferable.

72. The California bill requires that the surrogate and her husband, if any, as well as the infertile couple receive counseling which would begin at least 30 days prior to entering a surrogate motherhood agreement and continuing until two months after the child's birth. Cal. Assembly 1707, § 7518(a), 1985-86 Reg. Sess. (1985). The Michigan bill requires psychological counseling of the surrogate mother to ensure that she understands the psychological consequences of the surrogate arrangement and is able to consent. Mich. H.R. 4555, § 4(1)(f) (1985). *See also* D.C. Council Bill 6-152, § 3(b)(5) (1985); Kan. S.B. 485, § 4(a)(3)(B) (1984); N.Y. S.B. 1429, § 124(2) (1987).

73. Most bills require that the surrogate mother agree in the surrogate motherhood agreement

surrogate mother to release any legal rights to the child to overcome any common-law presumption that a child born in wedlock is the legitimate child of the husband.⁷⁴

If unforeseen circumstances such as the death of the infertile couple occurs prior to the birth of the child, the surrogate mother and her husband should be given the opportunity to assume parental rights and responsibilities for the child.⁷⁵ After the child's birth, the surrogate could decide whether to keep the child or place the child for adoption with another couple. The surrogate and her husband should be required to assume custody of the child or place the child for adoption if the infertile couple challenges the paternity of the child and the court determines that the sperm donor is not the biological father of the child.⁷⁶

The legislation should specifically state that payment in connection

to relinquish parental rights. *See, e.g.*, Cal. Assembly 1707, § 7519(a), 1985-86 Reg. Sess. (1985); Mich. H.B. 4555, § 6(1) (1985); N.J. Assembly 3038, § 6(c) (1986); N.Y. S.B. 1429, § 122(1)(b) (1987). Some bills expressly require the consent of the surrogate's husband as well. *See, e.g.*, D.C. Council Bill 6-152, § 3(b)(4) (1985); Haw. H.B. 1009, § 4(c) (1983); S.C. H.B. 2098, § 20-7-3780(c) (1982). The bills differ, however, as to the effect of this consent. Under the D.C. Council bill, the consent, permanently relinquishing parental rights to the child, is effective upon the birth of the child. D.C. Council Bill 6-152, § 4(c) (1985). Under the Kansas bill, however, the surrogate mother may void the surrogate motherhood agreement within forty-eight hours after the birth of the child. Kan. S.B. 485, § 9(b)(4) (1984). The Hawaii and New Jersey bills employ more subjective standards and provide that the infertile couple will assume custody of the child upon birth unless the surrogate demonstrates that the "best interests of the child" are not served by termination of the surrogate's parental rights or the court finds that "extraordinary circumstances require otherwise." Haw. H.B. 1009, § 7(c) (1983); N.J. Assembly 3038, § 15 (1986).

The Michigan bill permits the surrogate mother to revoke her consent and initiate a custody action within twenty days after the child's birth. A provision permitting the surrogate mother to revoke her consent and to initiate child custody proceedings is at odds with the purpose of the surrogate motherhood agreement, which is to allow the infertile couple to assume custody upon the birth of the child. A right to revoke consent is not necessary for the protection of the surrogate mother. The psychological counseling provided to the surrogate mother prior to entering into the surrogate motherhood agreement adequately protects her interests. The counseling helps to ensure that the surrogate's consent to relinquishment of parental rights is voluntary and makes the surrogate aware of the potential psychological consequences of the arrangement. A provision directing that the surrogate assume parental rights of the child is found not to be the biological child of the sperm donor, provides additional protection for the surrogate's rights. *See infra* notes 87 & 88 and accompanying text.

74. *See supra* notes 28, 35 & 73 and accompanying text.

75. Some bills permit the surrogate mother to assume parental rights, under these circumstances, at her option. *See, e.g.*, Cal. Assembly 1707, § 7511(c), 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 9(a)(19) (1983). Other bills provide that the surrogate mother will automatically have all parental rights and responsibilities for the child under these circumstances. *See, e.g.*, D.C. Council Bill 6-152, § 3(c) (1985); Mich. H.R. 4555, § 4(3) (1985).

76. *See, e.g.*, Cal. Assembly 1707, § 7522(a), 1985-86 Reg. Sess. (1985); D.C. Council Bill 6-152, § 4(d) (1985); Mich. H.R. 4555, § 11(1) (1985).

with surrogate motherhood arrangements is permissible.⁷⁷ The surrogate mother should receive payment of medical and legal expenses and also a reasonable fee to compensate her for undertaking the risks and discomfort of carrying and bearing a child.⁷⁸ The legislature may wish to set a reasonable limit on the fee to prevent surrogate arrangements from becoming an option that only the wealthy can afford.⁷⁹

The surrogate mother should be permitted to update the information in the surrogate motherhood documents to reflect her current name and address.⁸⁰ And the child born through a surrogate motherhood arrangement should have complete right of access to these records when he or she reaches eighteen years old.⁸¹

C. *Judicial Involvement*

Surrogate motherhood legislation should provide for court involvement for the purpose of collecting and maintaining the documents and records pertinent to the transaction and for overseeing the surrogate motherhood agreement.⁸² Court involvement may also be necessary when the surrogate mother and her husband terminate parental rights, in accordance with the promise in the contract, following the child's birth, and the infertile wife adopts the child.⁸³

77. This statement of the legality of the surrogate motherhood fee is necessary to rebut any contention that payment of the fee is in violation of a baby-selling statute. *See supra* notes 47-48 and accompanying text and *infra* notes 84 & 85 and accompanying text.

78. *See supra* notes 46 & 47 and accompanying text and *infra* note 83 and accompanying text.

79. The Hawaii bill, for example, provided that the courts should establish a maximum fee of not less than \$10,000 to be reviewed every two years.

80. *See, e.g.*, Mich. H.B. 4555, § 9(5) (1985).

81. *See* Kan. S.B. 485, § 10(c) (1984); Mich. H.B. 4555, § 9(4) (1985). *See also* D.C. Council Bill 6-152, § 7(d) (1985); *but see* S.C. H.B. 1098, § 20-7-3730(D) (1982) (permitting disclosure of only nonidentifying information regarding family health and general background).

82. The type of information which may be filed with the court includes the following:

(1) the surrogate motherhood agreement; (2) the medical and psychological evaluations of the infertile couple, the surrogate mother and her husband; (3) the name and address of the surrogate mother; (4) any separate written consent by the surrogate and her husband relinquishing parental rights; (5) petition for adoption filed by the infertile wife.

See, e.g., D.C. Council Bill 6-152, § 7 (1985); Kan. S.B. 485, § 10 (1984); Mich. H.B. 4555, § 9 (1985).

83. Some state bills require the infertile wife to petition the court for formal adoption of the child. *See, e.g.*, Cal. Assembly 1707, § 7510(a), 1985-86 Reg. Sess. (1985); Haw. H.B. 1009, § 2 (1983); S.C. H.B. 2098, § 20-7-3640 (1982). Other state bills provide that the child born pursuant to a surrogate motherhood agreement is the legitimate child of the infertile couple if the legislative requirements are met. *See, e.g.*, D.C. Council Bill 6-152, § 3(b) (1985); N.Y. S.B. 1429, § 126 (1987).

D. *Amendment of Existing Laws*

Baby-selling statutes should be amended to explicitly exempt surrogate motherhood arrangements from the prohibition. These statutes were enacted to deal with the special problem of black-market adoptions and to prohibit the illegal purchase and sale of children.⁸⁴ Because the dangers of black-market adoption are not present in a regulated surrogate motherhood arrangement, the fee in the surrogate motherhood arrangement may be properly viewed as compensation for the surrogate mother's services. Without reasonable compensation, the surrogate mother probably would not be willing to assume the risks and discomfort of pregnancy and childbirth.⁸⁵ Thus, in order for surrogate motherhood to remain a viable option, reasonable compensation of the surrogate mother is necessary.

Adoption statutes which provide for mandatory waiting periods between birth and adoption⁸⁶ should also be amended to exempt surrogate motherhood arrangements. Pre-adoption waiting periods are designed to give the natural mother time to consider her decision to place her child for traditional adoption and to ensure that consent to adoption is voluntary and not coerced. Under surrogate motherhood arrangements, however, the surrogate agrees to terminate her parental rights and to consent to adoption *prior* to conception. A mandatory waiting period following the child's birth is unnecessary in the surrogate motherhood context because surrogate motherhood legislation would provide for psychological counseling of the surrogate prior to entering the surrogate motherhood agreement to ensure that the surrogate understands the consequences of the arrangement and has voluntarily consented to termination of parental rights.⁸⁷

Imposition of the mandatory waiting period in the surrogate motherhood context would also interfere with the parties' intentions that the infertile couple assume custody upon the birth of the child.⁸⁸ Moreover, application of the mandatory waiting period to the surrogate motherhood arrangement may conflict with the best interests of the child. If the surrogate mother is given an opportunity to withhold her consent to adoption, a custody battle may ensue. The child's status will remain un-

84. See *supra* notes 41-48 and accompanying text.

85. The Ethics Committee of the American Fertility Society, *supra* note 9, at 66S.

86. See *supra* notes 49-52 and accompanying text.

87. See *supra* notes 72 & 73 and accompanying text.

88. Note, *supra* note 7, at 254.

certain during the proceedings and the child may be placed with and become attached to the couple that does not ultimately prevail in the custody action.⁸⁹

Finally, the artificial insemination statutes should declare the husband of an artificially inseminated woman the legal father of the child only in circumstances where the couple intends to conceive through artificial insemination *because* of the husband's infertility.⁹⁰ Additionally, a provision should be added to artificial insemination statutes providing that a child born as a result of a surrogate motherhood arrangement is the legitimate child of the sperm donor.⁹¹ This provision would also be helpful in rebutting any common-law presumption that the surrogate's husband is the legal father of the child.⁹²

VI. CONCLUSION

Because of the rise in the infertility rate, more couples are turning to reproductive techniques to assist them in the conception process.⁹³ The surrogate motherhood arrangement is a reproductive option which raises complex legal issues. The likelihood of litigation is much greater in the context of surrogate motherhood arrangements than in other reproductive arrangements because of the surrogate mother's significant involvement in the reproductive process.⁹⁴ Leaving resolution of disputes to the courts, without any legislative guidance, is likely to lead to piecemeal solutions and inconsistent results. Existing legislation, which was enacted to deal with other concerns, cannot adequately address the issues raised by surrogate motherhood arrangements.⁹⁵

The surrogate motherhood arrangement is a complex legal arrangement. Because it requires the cooperation of several individuals in the reproductive process and involves relinquishment of parental rights and the exchange of money, the potential for abuse exists. Infertile couples or surrogate mothers, entering the arrangement without sufficient thought or commitment, may attempt to back out when the baby is born. Furthermore, unscrupulous intermediaries may bring infertile couples and

89. *Id.*

90. *See supra* notes 53-55 and accompanying text.

91. *See, e.g.*, Mich. H.B. 4556, § 111(7) (1985); N.Y. S.B. 1429, § 733 (1987).

92. *See supra* notes 28, 35, 74 and accompanying text.

93. *See supra* notes 1-15 and accompanying text.

94. *See supra* note 16.

95. *See supra* notes 41-55 and accompanying text.

surrogate mothers together solely to make a profit without concern for the welfare of the parties. The evil, however, does not lie in surrogate motherhood arrangements per se, but in the lack of regulation.⁹⁶ Carefully drafted surrogate motherhood legislation would reduce the probability of legal disputes and protect the interests of all parties to the surrogate motherhood arrangement.

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96. Several commentators agree that regulation of surrogate motherhood arrangements is necessary. See, e.g., L. ANDREWS, *supra* note 1, at 237; N. KEANE & D. BREO, *supra* note 13, at 264; Note, *supra* note 16, at 41.