The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology

Murray L. Manus
Circuit Court of Cook County, Illinois, County Department, Chancery Division
THE PROPOSED MODEL SURROGATE PARENTHOOD ACT: A LEGISLATIVE RESPONSE TO THE CHALLENGES OF REPRODUCTIVE TECHNOLOGY

Murray L. Manus*

In this Article, Manus proposes a Model Surrogate Parenthood Act. He examines the medical and scientific history of surrogacy and reviews the jurisprudence in the area, specifically the constitutional relationship between procreation rights and surrogacy. The author asserts that surrogate motherhood cannot be, and indeed, should not be, eradicated through legislation criminalizing it. The proposed Model Act, presented here in its entirety, attempts to reduce the problems inherent in the concept of surrogate parenthood by putting the process under strict court supervision and by zealously protecting the rights of the surrogate mother and the child to be conceived.

INTRODUCTION

During the last decade, many couples incapable of having children because of the wife's infertility—and who are either unable or unwilling to avail themselves of alternative methods of conception—have turned to surrogate mothers in order to become parents.1 Typically, the husband, but not his wife, would enter into an agreement with another woman (the surrogate), whereby the latter would be artificially inseminated with his semen, become pregnant, carry the fetus to term, and at birth, turn over the child to the infertile couple,

* B.A. 1975, University of Chicago; J.D. 1979, Stanford Law School; LL.M. 1995, De Paul College of Law. After practicing law for many years, I am currently the law clerk for the Honorable Dorothy Kirie Kinnaird of the Circuit Court of Cook County, Illinois, County Department, Chancery Division. Much of this Article grew out of work I did while a student in the Health Law program at De Paul. I especially want to thank my instructors, Ellen Bublick and Judge Stephen R. Yates, also of the Circuit Court of Cook County, Illinois, for their wisdom, inspiration, and good cheer.

1. In 1990, it was estimated that 750 to 1000 live births occurred in the United States through the use of surrogate mothers. ROBERT H. BLANK, REGULATING REPRODUCTION 75 (1990). Another source put the same figure at more than 2000 surrogate mother births from 1987 to 1990 alone. Andrea Sachs, And Baby Makes Four, TIME, Aug. 27, 1990, at 53. Whatever the current number, the use of surrogate mothers in this country is rising. Thomas S. Bradley, Comment, Prohibiting Payments to Surrogate Mothers: Love's Labor Lost and the Constitutional Right of Privacy, 20 J. MARSHALL L. REV. 715, 719 (1987).
relinquishing all of her rights as biological mother.\textsuperscript{2} In exchange, all of the surrogate's medical and pregnancy-related expenses attendant to the pregnancy would be paid, and she would usually, but not always, receive a fee of several thousand dollars as well.\textsuperscript{3}

Before the early 1990s no state or federal statutes had addressed the validity of these surrogate arrangements. When disputes began arising in the mid-1980s over the legality of surrogate parenting contracts and over the right of the biological father's wife to adopt the child, courts first attempted to resolve these issues by looking for public policy guidelines as evidenced primarily by a state's adoption laws and related statutes.\textsuperscript{4} The results have been inconsistent, however, even where courts were interpreting identical provisions of states' different adoption laws.\textsuperscript{5} The most influential case in this


The wife is not usually a party to the surrogate motherhood agreement because she will in almost all cases not be a biological parent of the child to be conceived. She will have to adopt the child in order to become its legal parent after birth. Her involvement in an arrangement where money is paid to a woman to obtain possession of her child could easily run afoul of most states' statutory prohibition against making such payments in connection with an adoption. John J. Mandler, Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act, 73 GEO. L.J. 1283, 1290 (1985). By omitting the wife's name from the surrogate parenting contract, the parties are able to assert that she was not a participant in the arrangement and did not make any payments to the surrogate mother. See In re Baby M, 537 A.2d 1227, 1241 (N.J. 1988); Katie Marie Brophy, A Surrogate Mother Contract to Bear a Child, 20 J. FAM. L. 263, 264 (1982).

\textsuperscript{3} It is not uncommon for the surrogate to be paid $10,000 or more for her services in addition to reimbursement for all her expenses. BLANK, supra note 1, at 75. The total cost to the sponsoring couple usually ranges from $25,000 to $40,000 or $50,000. Id.; John Robertson, Surrogate Mothers: Not So Novel After All, HASTINGS CENTER REP. Oct. 1983 at 28, 29; Patricia A. Avery, Surrogate Mothers: Center of a New Storm, U.S. NEWS & WORLD REP., June 6, 1983, at 76.

\textsuperscript{4} See infra Part II.

\textsuperscript{5} Compare In re Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 817–18 (N.Y. Sur. Ct. 1986) (ruling in favor of the surrogate mother) with In re Adoption of Paul, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990) (holding that renumeration paid to surrogate violated New York public policy). See infra text accompanying notes 86–96. The Arkansas Supreme Court, however, upheld a Michigan circuit court's judgment that a surrogacy contract was void as against public policy. In re Adoption of K.F.H. and K.F.H., 844 S.W.2d 343, 344 (Ark. 1993). The father had been given custody of the twins born to the surrogate, although the court did award the surrogate visitation rights. Id. The wife's adoption petition was granted subsequently without the surrogate's consent because it was deemed to be in the children's best interests. Id. at 347.
area, In re Baby M, arose in New Jersey in 1988, although a recent decision of the California Supreme Court, Johnson v. Calvert, might gain similar stature. Both rulings dealt with a particularly troublesome issue: the conflict between the sponsoring couple and the surrogate when the latter decides that she does not want to surrender the child after it is born.

Aware of the judiciary's struggle in deciding these cases, some states began considering legislation specifically addressing the validity of such parenting contracts and the rights of the parties thereto. One such law was passed in New York, which invalidates any type of contract involving surrogate mothers and provides substantial fines and criminal penalties for a third party who assists in the formation of a surrogate parenting contract for a fee. In contrast, a Virginia law, permits surrogacy, provided that no compensation is paid to the surrogate, aside from reimbursement for expenses.

In August 1988, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Status of Children of Assisted Conception Act ("Uniform Act"). The Uniform Act's purpose was to define the legal status of children conceived through the use of noncoital reproductive techniques such as artificial insemination, in vitro fertilization, and

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6. 537 A.2d 1227 (N.J. 1988); see infra text accompanying notes 97–132.
7. 851 P.2d 776 (Cal. 1993); see infra text accompanying notes 133–61.
10. VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995). It seems likely that the number of available surrogate mothers would be greatly reduced if they could not charge a fee for their services. Robertson, supra note 3, at 32–33; Sharon L. Tiller, Note, Litigation, Legislation and Limelight: Obstacles to Commercial Surrogate Mother Arrangements, 72 IOWA L. REV. 415, 433 (1987). One commentator has argued that limiting or prohibiting the payment of fees to the surrogate infringes upon the infertile couple's constitutional rights of privacy encompassing the right to procreate, because it reduces their access to surrogate mothers. Bradley, supra note 1, at 732. See infra text accompanying notes 210–14.
12. See infra text accompanying notes 28–33.
13. See infra text accompanying notes 34–43.
surrogacy.\textsuperscript{14} It proposed two alternative provisions with respect to surrogate motherhood, one that made all such arrangements unenforceable\textsuperscript{15} and another that permitted surrogate parenting contracts, provided that they had been judicially sanctioned prior to any attempt to conceive the child.\textsuperscript{16} The Section of Family Law of the American Bar Association also has adopted a separate Model Surrogacy Act, which authorized surrogate parenting arrangements under close judicial scrutiny.\textsuperscript{17}

 Bills to legalize commercial surrogacy have been introduced in several states, including Illinois, California, and Michigan, but none of them has become law.\textsuperscript{18} The California bill passed both houses of the legislature only to be vetoed by Governor Pete Wilson.\textsuperscript{19} At least sixteen states have enacted legislation on the subject of surrogate parenthood, but not one has legalized explicitly the practice of commercial surrogacy, i.e., the practice of paying the surrogate a fee and all of her expenses.\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{14} Massie, supra note 8, at 490.
  \item \textsuperscript{15} UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, § 5, Alternative B.
  \item \textsuperscript{16} Id. §§ 5–9, Alternative A.
  \item \textsuperscript{19} RAGONÉ, supra note 2, at 48. The California legislation was the most comprehensive to date, providing for payment of all the surrogate's medical and legal expenses, requiring that life insurance be purchased for the sponsoring couple plus health and life insurance for the surrogate, mandating psychological counseling for all parties involved, and putting control of the pregnancy as well as the choice of physician in the hands of the surrogate, among other provisions. Id.
\end{itemize}
The statute books of most states are silent on the issue of surrogate parenting. It is the intent of this Article to fill that legislative void by offering a Proposed Model Surrogate Parenthood Act ("the Act"). Part I discusses the general medical background of the field of assisted reproduction. It also addresses the question of why surrogate motherhood is used at all when there are many other types of reproductive methods available to solve the problem of infertility.

Part II shifts the focus from the biological environment of surrogate motherhood to the jurisprudential one. It analyzes several important cases decided over the past ten years in which the courts had to grapple with the legality of this procedure. The courts undertook this effort practically in a legal vacuum because the state legislatures had not stayed abreast of the most current technological developments in infertility treatment that made surrogate motherhood possible. As a result, the courts were forced to decide the legal issues before them within the straitjacket of existing laws governing adoption or the establishment of the legal relationship of parent and child. For obvious reasons, none of these statutes was enacted with the intent that it would apply to surrogate parenthood. Part II ends with a detailed examination of the two major decisions referred to above—In re Baby M,21 decided by the New Jersey Supreme Court in 1988, and Johnson v. Calvert,22 a 1993 opinion of the California Supreme Court. This review of the principal case law in the surrogacy field ultimately demonstrates that the judges themselves believed that the policy questions raised by the surrogacy arrangement should not be determined in a judicial forum but require special legislative attention.

Part III of this Article discusses how constitutional rights in the area of procreation, particularly the right to privacy under the Fourteenth Amendment,23 might limit the scope of permissible legislation affecting surrogate motherhood. This question is analyzed under four different legislative scenarios: (1) where


Recently, two states, Iowa and Nevada, have amended their statutes on child-selling or on payments for adoption to exclude surrogacy agreements from their coverage. IOWA CODE ANN. § 710.11 (West 1993); NEV. REV. STAT. § 127.287 (1995).

23. U.S. CONST. amend. XIV.
surrogacy is banned outright; (2) where payment to the surrogate is prohibited; (3) where surrogacy is restricted to married couples; and (4) where surrogacy is restricted to heterosexuals.

Against this background, Part IV introduces the model statute itself. Part IV is intended to provide a summary of the philosophy and goals of the proposed legislation, which takes the approach that surrogate motherhood cannot be eradicated (nor should it be) simply by making it illegal. Rather, it accepts the existence of surrogacy but attempts to obviate its problematic aspects by putting the entire procedure under strict court supervision and zealously protecting the rights of the surrogate mother and the child to be conceived.

Finally, Part V presents the Proposed Model Surrogate Parenthood Act in its entirety. Each section of the Act is printed in full, followed by commentary and analysis.

I. MEDICAL AND SCIENTIFIC BACKGROUND

In 1988, it was estimated that one couple in six was infertile24 and two to three million couples wanted to have a child but were unable to conceive.25 In an effort to have children, these couples are increasingly turning to reproductive techniques that medical science has developed.26 Commentators attribute the demand for such reproductive techniques to various circumstances: the fact that many couples delay having children until the wife is in her mid- or late-thirties, which decreases her chances of becoming pregnant; the shortage of children available for adoption; and the desire to have a child who is biologically related to at least one of the parents.27

24. BLANK, supra note 1, at 25; see also William W. Handel & Bernard A. Sherwyn, Surrogate Parenting, TRIAL, Apr. 1982, at 57, 58 (finding 15 to 20% of couples infertile).

In 1984, it was estimated that more than two million couples vied for the 58,000 babies placed for adoption. Keith J. Hey, Assisted Conception and Surrogacy—
The most widely used form of assisted reproduction is artificial insemination. With this procedure, semen is deposited by means of a syringe in or near the cervix of the woman’s uterus. Because the exact time of ovulation is unknown, insemination is usually conducted on several consecutive days. The success rate is seventy to eighty percent pregnancies within three to four months of the start of treatment.

There are actually two different types of artificial insemination, depending on who donates the sperm. Artificial insemination homologous (AIH) means that the woman’s husband is the sperm donor. This method is used when the husband has a low sperm count and several ejaculations are pooled together for insemination, or where the husband, for physical or psychological reasons, cannot ejaculate during intercourse. Artificial insemination with donor (AID) usually involves using an anonymous male’s sperm that previously had been donated to a sperm bank; AID also could encompass situations involving a known donor. AID primarily is used when the husband is totally infertile or is known to suffer from a serious genetic disease.

When the woman is infertile because disease or infection has scarred her oviducts and blocked the passage of the sperm to the ovum, in vitro fertilization (IVF) is often used. IVF refers to the procedure by which eggs are removed from a woman’s ovaries by inserting a needle guided by ultrasound imaging through her vaginal wall, or less commonly by laparoscopic surgery after she has been given hormone treatments that


One author claims that the adoption shortage only applies to “intelligent-looking” Caucasian babies, and that comparatively speaking, there is no shortage of older children or of Mexican-American, African-American, or retarded children to adopt. Herbert T. Krimmel, The Case Against Surrogate Parenting, HASTINGS CENTER REP., Oct. 1983, at 35, 37.

28. BLANK, supra note 1, at 25. Blank estimates that more than 500,000 babies have been born in the United States to mothers using this technique. Id.
29. Id. at 26.
30. Id.
31. Id.
32. Id. at 27.
stimulate the ovaries to "superovulate." The eggs are then fertilized outside the body in a petri dish, using her husband's or a donor's sperm. The resulting embryos are transferred via catheter into the woman's uterus once they reach the four-to eight-cell stage. If successful, at least one embryo will implant in the uterine wall within five days, and a pregnancy will result.

There are two common variations on the IVF procedure discussed above. Gamete intrafallopian transfer, also known as GIFT, involves placing the sperm and the egg directly into the fallopian tube where fertilization will occur. Several religious groups, including the Roman Catholic Church, find this method more acceptable than other forms on IVF because fertilization takes place inside the body. The other variation on IVF is called zygote intrafallopian transfer, commonly known as ZIFT. Here, the embryo is placed in the fallopian tube about eighteen hours after fertilization in vitro, after which it travels to and implants in the uterine wall as in a normal pregnancy.

In any form, IVF has several significant disadvantages. The hormone treatment that the woman undergoes can be very unpleasant. In addition, the removal of her eggs through laparoscopic surgery involves making abdominal incisions. This may be painful, and it also implicates the risks associated with any surgery done under general anesthesia. The whole process is very expensive, costing $25,000 or more for a successful pregnancy. Perhaps most important, IVF has a success rate of only around twenty percent in achieving actual pregnancies.

34. BLANK, supra note 1, at 28.
35. Id.
36. Id.
38. BLANK, supra note 1, at 28; Hey, supra note 27, at 785.
39. BLANK, supra note 1, at 28.
41. Shanner, supra note 40, at 12; Robertson, supra note 27, at 943--44.
42. BLANK, supra note 1, at 30; Robertson, supra note 27, at 943 n.6 (estimating that it would cost $38,000 for a 50% chance of a live birth).
43. Robertson, supra note 27, at 943 (reporting that the best IVF programs only report 20–25% pregnancies per treatment cycle); see also BLANK, supra note 1, at 30 (14–17% pregnancies); Shanner, supra note 40, at 13 (18–22% pregnancies).
A procedure similar to surrogate motherhood is surrogate embryo transfer. It involves artificially inseminating a donor woman with the husband's sperm, flushing the fertilized embryo from her uterus via a procedure called uterine lavage, and then implanting the embryo into the body of the infertile wife. The key distinction between surrogate embryo transfer and surrogate motherhood is that in the former the infertile woman actually undergoes a pregnancy to term and delivers a child, albeit one that has none of her genetic material, while in the latter another woman performs that function for her.

With all of the other methods of assisted reproduction available to them, why would an infertile couple enter into a surrogate parenting arrangement? There are several possible reasons. The couple may have tried one or more types of assisted reproduction, gone through hormone treatments, or even had surgery on their reproductive organs, all without success. If the woman previously had a hysterectomy or has suffered several miscarriages, pregnancy would not be a viable option for her. Perhaps the wife has a genetic abnormality that she fears she might pass on to her child. Under these circumstances, surrogate parenting might be the couple's last resort. Of course, they could try to adopt a child, but as discussed above, there are not enough children available for adoption to meet the demand. In addition, an adopted child has no biological relation to either parent, unlike the child born to a surrogate who has been artificially inseminated with the husband's sperm.

What has been discussed so far might be termed "traditional" surrogacy—an arrangement whereby the surrogate is inseminated with the sperm of the husband, becomes pregnant, carries the fetus to term, and turns over the infant to the sponsoring couple, thereby relinquishing all parental rights. There is another type of surrogacy, however, which would be especially appropriate for women who can get pregnant but cannot endure a pregnancy, such as a woman who

44. SHERRM ELIAS & GEORGE J. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 230-31 (1987); BLANK, supra note 1, at 31.
45. For a good discussion of couples' motivation for using a surrogate, see Robertson, supra note 3, at 29-30; Note, supra note 27, at 145-47.
46. For a detailed description of the process of genetic testing and its ramifications, see INSTITUTE OF MEDICINE, ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH AND SOCIAL POLICY (Lori Andrews et al. eds., 1994).
47. See Hey, supra note 27, at 777 n.10. But see Krimmel, supra note 27, at 37.
48. See supra text accompanying notes 2-3.
always miscarries. Here, the woman's eggs can be fertilized by her husband's sperm utilizing IVF. The resultant embryo is transferred to the uterus of the surrogate, who becomes impregnated thereby and gives up custody of the child after birth as in the traditional arrangement.49

This type of surrogacy also would apply to the situation where the woman has had a hysterectomy, including removal of her ovaries. It is now possible to retrieve an immature egg from the removed ovaries, mature it in a petri dish that simulates the medium inside the ovary, and fertilize the now-mature egg with donated sperm.50 The resultant embryo is then implanted into the uterus of the surrogate.51 In both of these situations it is clear that the surrogate's function is solely one of gestation; she simply carries another couple's child, to whom she has no genetic relation, until it is ready to be born.52

Surrogate motherhood also could be an option where the husband and wife are both infertile. Under these circumstances, the surrogate could be artificially inseminated by sperm from an anonymous donor and, in the reverse situation from that described above, she would be carrying a child that has her genetic material but none from the couple to whom she will be relinquishing the baby.

There seems to be no discernible limit to the types of surrogate parenting arrangements.53 A recent example of a novel

49. BLANK, supra note 1, at 66; Belsito v. Clark, 644 N.E.2d 760, 760–62 (Ohio 1994).
51. Id.
52. For additional commentary on gestational surrogacy, see George J. Annas & Sherman Elias, In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family, 17 FAM. L.Q. 199, 216–222 (1983); Alice Hofheimer, Note, Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy, 19 N.Y.U. REV. L. & SOC. CHANGE 571 (1992); Robertson, supra note 3, at 33–34. The legal issues raised by this arrangement were addressed in the courts for the first time with the California Supreme Court decision of Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). See infra text accompanying notes 133–62. For additional case law on the subject, see Belsito, 644 N.E.2d at 760. See also Jeffrey M. Place, Note, Gestational Surrogacy and the Meaning of “Mother”: Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL’Y 907 (1994).
53. Professor Robertson states that through various combinations of artificial insemination with donor, IVF, and surrogacy, there could be as many as six people collaborating in the conception, bearing, and rearing of a child. John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 VA. L. REV. 405, 423 (1983).
approach involved five participants. An infertile California couple had an adopted child and wanted to adopt another one from the same birth parents so that both children would have similar traits and characteristics.\textsuperscript{54} The birth parents agreed to donate their sperm and ovum, which were fertilized in vitro, and the resulting embryo was implanted into the uterus of the adoptive father's daughter from a previous marriage. After birth, the sponsoring couple planned to adopt the child and become its legal parents.\textsuperscript{55}

These various surrogate parenting arrangements all have one element in common: each involves a married couple that is unable to have a child. There is certainly no biological reason why single men or women could not avail themselves of the services of surrogate mothers in order to become parents, however. Nor can one ignore the question of whether homosexual men and women also should have the right to use the services of a surrogate for procreation. These and related issues raised by the practice of surrogate motherhood are examined in depth in the discussion in Part III of the constitutional aspects of surrogacy.

\section*{II. Role of the Judiciary}

Beginning in the mid-1980s, the court system began to address surrogate parenting practices. This involvement took one of two forms. In some cases, courts were called upon to approve a natural father's wife's adoption of a child born to a surrogate.\textsuperscript{56} In addition, the judicial branch began to review cases in which there was a conflict between the surrogate and the infertile couple over custody of the child.\textsuperscript{57} As these judicial decisions are examined below, note the similarity in themes as the various courts struggle to analyze surrogate motherhood within the framework of their existing laws.\textsuperscript{58}

\textsuperscript{54} California Baby Is Group Effort, CHI. TRIB., Aug. 2, 1993, § 1, at 3.
\textsuperscript{55} Id.
\textsuperscript{57} See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); In re Baby M, 537 A.2d 1227 (N.J. 1988).
\textsuperscript{58} The courts' most common mode of analysis is to apply their state's adoption laws. See, e.g., Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986) and dissenting opinions; In re Baby M, 537 A.2d 1227 (N.J. 1988); In re Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990); In re Baby Girl L.J., 505 N.Y.S.2d 813 (N.Y. Sur. Ct. 1986).
This Article will initially examine the first state supreme court decision concerning the legality of the surrogate parenting arrangement, a 1986 opinion of the Kentucky Supreme Court. Next, this Article will compare two subsequent New York decisions that reached opposite results even though applying an identical statute. Finally, it will examine in great detail the influential rulings in the Baby M and Johnson v. Calvert cases.

The Kentucky Supreme Court set out the essential elements of the dispute over the use of surrogates in Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong. In this case, the Kentucky Attorney General sought to revoke the charter of a company called Surrogate Parenting Associates, Inc., a medical clinic that facilitated the formation of surrogate motherhood arrangements. The suit alleged that the clinic violated existing Kentucky statutes that (i) prohibited the sale, purchase, or procurement for sale or purchase of any child for the purpose of adoption; (ii) prohibited filing a petition for voluntary termination of parental rights prior to five days after the birth of the child; and (iii) specified that a consent to adoption by the natural parent is not valid if given during the same five-day period. The Kentucky Circuit Court dismissed the complaint, but the Kentucky Court of Appeals reversed.

The Kentucky Supreme Court stated in its decision that the case was one of statutory interpretation, presenting the fundamental question of whether the activities of this medical clinic should be construed as participation in the buying and selling of babies. The court concluded that this operation did not constitute the buying and selling of babies as there were fundamental distinctions between surrogate parenthood and the activities prohibited by existing Kentucky law. In the court's view, the critical factor was the difference between a pregnant woman who decides to put her baby up for adoption

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63. 704 S.W.2d 209 (Ky. 1986).
64. Id. at 210.
65. Id.
66. Id. at 211.
67. Id.
and a woman who chooses to be a surrogate mother. The laws were designed to keep baby brokers from overwhelming an expectant mother with financial inducements to part with her child. By contrast, the surrogate parenting arrangement is entered into before the child is conceived. Whereas a pregnant woman who agrees to surrender her child for adoption might be motivated to avoid the consequences of an unwanted pregnancy or the financial burdens of child rearing, the primary motivation for the surrogate is to assist an infertile couple in having a child that is biologically related to the father. The court analogized surrogate parenthood to a situation where the husband is infertile and his wife conceives through artificial insemination. It noted that no court had ever suggested that artificial insemination would violate any of the above cited laws or that it was against public policy, even though artificial insemination “tampers with nature” to the same extent that surrogate motherhood does.

The court had little difficulty analyzing the impact of the Kentucky statute that governed the timing of the consent to adoption and termination of parental rights. It ruled that parties could not by contract vary the time periods that the legislature had mandated. Therefore, as late as the fifth day after birth, a surrogate mother would be free to change her mind about turning over the child, regardless of the terms of the surrogate parenting contract, which was voidable at her election. In that event, the surrogate mother would be in the same position as any other mother with a child born out of wedlock; her parental rights and obligations and those of the biological father would be governed by existing statutes.

Ultimately, the court upheld the legal legitimacy of the defendant corporation in facilitating surrogate parenting arrangements on the basis that no existing legislation prohibited this practice. The court stated that issues of public policy

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68. See id. at 211–12.
69. Id. at 211.
70. Id.
71. Id. at 211–12.
72. Id. at 212.
73. Id.
74. Id. at 212–13.
75. Id. at 213.
76. Id.
77. Id.
78. Id. at 214.
involving health and welfare were the province of the legislature and not the courts. If surrogate motherhood were to be declared illegal, the Kentucky legislature would have to do so.

Two justices dissented. Both believed that the activities of the defendant corporation violated the statute that prohibited the payment of any compensation in connection with the decision to terminate one's parental rights and to give up a child for adoption. Justice Wintersheimer, however, went much further and criticized the entire concept of surrogate motherhood. In his view, it was nothing more than a disguised commercial transaction where the surrogate is paid in exchange for terminating her natural and biological rights in the child. He envisioned the prospect of host-mothers with wombs for hire and believed that the consequences that could arise from exposing a woman's uterus to commercial medical technology did not in any way contribute to the emancipation of women. He also was concerned about such mothers' economic motivations:

Our consideration of public policy in this regard should include the possible exploitation of financially-needy [sic] women. Although there may be some altruistic women who will volunteer as surrogate mothers, the greater prospect is that monetary payment will have to be made to surrogates. The offer of financial payment will undoubtedly persuade financially needy women to sell their reproductive faculties for the benefit of those who can pay. The price at which a woman will sell her reproductive capacity may depend on her financial status.

Shortly after the Kentucky Supreme Court's decision in Surrogate Parenting Associates, the New York Surrogate's Court was confronted with the same issues in the context of an adoption proceeding. In In re Baby Girl L.J., an infertile couple filed a petition for the wife to adopt a child fathered by

79. Id. at 213–14.
80. Id.
81. Id. at 214.
82. Id. at 214–15.
83. Id.
84. Id. at 214–16.
85. Id. at 216.
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her husband and born to a surrogate, who was supposed to be paid a fee of $10,000 pursuant to the contract entered into between the parties. The court had little difficulty ruling on the merits of the proposed adoption. Based upon the facts before it, it held that the child's best interests would be served if its biological father and his wife raised it as their own.

The court had greater difficulty determining whether the surrogate mother should be paid a fee. The court noted that New York had a statutory prohibition against paying or accepting compensation in connection with the placement of a child for adoption. Relying heavily upon the Kentucky Supreme Court's analysis in Surrogate Parenting Associates, the New York court ruled in favor of the surrogate mother on the same basis as that expressed by the Kentucky court, i.e., the absence of any legislation specifically prohibiting this practice. In so doing, it stated:

[B]iomedical science has advanced man into a new era of genetics which was not contemplated by either the Kentucky legislature nor by the New York legislature when it enacted SSL 374(6) prohibiting payments in connection with an adoption. Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under parenting agreements. Accordingly, the court finds that this is a matter for the legislature to address rather than for the judiciary to attempt to determine by the impermissible means of "judicial" legislation. In its absence, this court will not appropriate the function of the legislature and prohibit such arrangements.

Four years later, in a similar adoption proceeding in New York where the propriety of the surrogate's fee was at issue, the New York Family Court reached the opposite conclusion in In re Adoption of Paul and ruled that the statute prohibiting payments in conjunction with placing a child up for adoption was dispositive. It reasoned that any remuneration paid to a mother in exchange for the surrender of her child for adoption

87. Id. at 814.
88. Id. at 815.
89. Id. (citing N.Y. SOC. SERV. LAW §§ 374(6), 389 (McKinney 1994)).
90. 505 N.Y.S.2d at 817–18.
92. Id. at 817.
violated New York's public policy against trafficking in children. Therefore, surrogate motherhood contracts were void, not just voidable. The court agreed to permit the surrender of the child to the adoptive parents and to terminate the surrogate's parental rights if she swore under oath that she had not previously received any part of her contractual fee and would not accept any such payment in the future. The court believed that only in this manner would her decision be truly voluntary and motivated by the child's best interests.

Most, if not all, of the troubling issues raised by the practice of surrogate motherhood were faced by the New Jersey Supreme Court in *In re Baby M.* This famous case involved a dispute between the surrogate, Mary Beth Whitehead, and the sponsoring couple, the Sterns, over the custody of the child to be born to Mrs. Whitehead. During her pregnancy, she changed her mind about turning over the child and wanted to retain custody. Discussions ensued and shortly after giving birth Mrs. Whitehead requested that the Sterns allow her to have possession of the infant for one week, after which she would return it. The Sterns agreed, and Mrs. Whitehead absconded with the child to Florida. It ultimately took four months for the Sterns to regain custody after the intervention of the Florida courts and the local police force.

After Mrs. Whitehead initially refused to return the child to the Sterns, they filed an action in New Jersey to terminate Mrs. Whitehead's parental rights pursuant to the surrogacy contract that the parties had signed and requested that the child be permanently placed in their custody, with Mrs. Stern being permitted to adopt her. A lengthy trial was held subsequent to the baby's recovery, where the trial court ruled in favor of the Sterns in all respects, upholding the contract and permitting Mrs. Stern to adopt the child.

93. *Id.*
94. *Id.* at 817–18.
95. *Id.* at 818–19.
96. *Id.*
98. *Id.* at 1235–37.
99. A copy of that contract is attached to the body of the opinion as Appendix A.
100. *Id.* at 1237.
101. *Id.* at 1237–38.
On direct appeal, the New Jersey Supreme Court disagreed and held that surrogacy contracts violated several state statutes dealing with adoption and also violated the state's public policy. It initially noted that New Jersey had on its books laws prohibiting the payment of compensation in connection with an adoption, requiring proof of parental unfitness or abandonment of the child before termination of parental rights can occur or an adoption is granted, and making surrender of custody and consent to the adoption revocable in private placement adoptions. The court had no difficulty finding that the fee to be paid to Mrs. Whitehead was not for her services, as stated in the contract, but was for purposes of obtaining her baby. It noted that the fee was to be paid only after surrender of custody of the newborn and termination of Mrs. Whitehead's parental rights. Moreover, the Sterns would pay nothing if the child died prior to the fourth month of pregnancy and only $1000 if it were stillborn; to the court, this completely undercut the claim that the fee was for services only. To the court, it "strain[ed] credibility" to claim that this surrogate parenthood contract was anything other than private placement adoption for money, or, in other words, baby selling.

Thus, Mrs. Whitehead's parental rights could only be terminated by strict compliance with the existing statutes governing termination and not by contractual arrangement. New Jersey law provided for such termination only if there were a voluntary surrender of the child to an approved social welfare agency or the Division of Youth and Family Services, accompanied by a formal document acknowledging the termination of such rights, or if there were a showing of parental unfitness or abandonment. The law, however, contains no provision for a written surrender in a private placement adoption.

102. Id. at 1240.
103. Id. (referring to N.J. STAT. ANN. § 9:3-54a, c (West 1993), which prohibits the payment of compensation in connection with an adoption; § 9:3-48c, which addresses termination of parental rights; § 9:2-14, 16, 17, which addresses revocability of consent to an adoption through a private agency; and § 30:4C-23, which addresses revocability of surrender of a child to the Bureau of Childrens Services).
104. Baby M, 537 A.2d at 1241.
105. Id. at 1241.
106. Id.
107. Id.
108. Id. at 1242.
109. Id. (citing N.J. STAT. ANN. §§ 9:2-16, -17, 9:3-41, 30:4c-23 (West 1993)).
110. Id. (citing N.J. STAT. ANN. §§ 9:2-14, 30:4c-23).
Therefore, termination of parental rights in that context re-
quired a showing of "'intentional abandonment or a very
substantial neglect of parental duties. . . .'" A contractual
agreement regarding termination of parental rights was
unenforceable.

The surrogate contract violated other statutory provisions
governing the irrevocability of a mother's consent to have her
child adopted. The court observed that the state legislature
"so carefully circumscribed all aspects of a consent to surren-
der custody—its form and substance, its manner of execution,
and the agency or agencies to which it may be made—in order
to provide the basis for irrevocability. " The surrogacy con-
tract could not achieve a similar level of irrevocability because
it did not comply strictly with those statutes. Therefore,
because the instant contract showed no such compliance, Mrs.
Whitehead was not bound by its terms.

The court next examined the various public policy consider-
ations that militated against recognizing the validity of the
surrogate parenting contract. It noted that the contractual
provisions that governed custody were drafted prior to concep-
tion and birth, in violation of "settled law" that custody ques-
tions must be determined by the best interests of the child, a
determination that cannot be made prior to the child's birth.
Moreover, the contract required permanent separation of the
infant from one of its biological parents, whereas the policy of
the state was to ensure as far as practicable that children are
brought up by both of their natural parents. The arrange-
ment also violated the principle that biological parents have
equal status vis-à-vis their child.

The court saved its strongest condemnation, however, for the
role that money plays in the surrogacy transaction. It saw

111. Id. (quoting § 9:3-48c(1)).
112. Id. at 1243.
113. Id. at 1244 (citing N.J. STAT. ANN. §§ 9:2-14, 2-16 and 2-17).
114. Id. at 1245.
115. Id.
116. Id. at 1245–46.
117. Id. at 1246–51.
118. Id. at 1246 (citing Fantony v. Fantony, 122 A.2d 593 (N.J. 1956)).
119. Id. at 1246–47.
120. Id. at 1247 (citing N.J. STAT. ANN. § 9:17–40).
121. Id. at 1248–49.
the issues as being little different than those involved in the payment of money in connection with adoptions. At its core, surrogate motherhood involves the purchase of a woman’s procreative capacity at great risk to her. Whatever idealism may motivate all or some of the participants, the court opined that it is the profit motive that predominates and governs the transaction, especially when a third party acts as intermediary. The court noted that it was unlikely that the practice of surrogate motherhood would survive without payment to the surrogate. The court stressed the danger that women could be compelled to enter into surrogate motherhood solely because of their economic circumstances—the potential for their degradation apparent.

The court brushed aside any supposed distinction between surrogate parenthood and ordinary adoptions arising from the fact that in the former the pregnancy is intended and the surrogate’s decision to enter into the arrangement is totally voluntary. It held that the essential evil in both situations was the same: taking advantage of a woman’s unwanted pregnancy or need for money in order to take away her child.

With the surrogate parenthood contract held invalid, the dispute narrowed itself to a custody dispute between two couples, each containing a biological parent. Because New Jersey law provided that the claims of a natural mother and natural father carry equal weight, the court’s ruling had to be based upon a determination of the child’s best interests. Thus, after considering the instability of the Whitehead household due to financial problems, Mr. Whitehead’s alcoholism, and Mrs. Whitehead’s “contempt” for the professional counseling that the court thought Baby M might well require, the New Jersey Supreme Court affirmed the trial court’s grant of permanent custody to the Sterns. The court

122. Id.
123. Id. at 1248.
124. Id. at 1249.
125. Id. at 1248.
126. Id. at 1248–50.
127. Id. at 1248–49.
128. Id. at 1249.
129. Id. at 1256 (citing Parentage Act, N.J. STAT. ANN. § 9:17–40).
130. Id. at 1258–59.
131. Id. at 1259.
also awarded visitation rights to Mrs. Whitehead, the details of which were to be determined by the lower court on remand.\textsuperscript{132}

In \textit{Johnson v. Calvert},\textsuperscript{133} the California Supreme Court was called upon to address the surrogacy issue, albeit in a slightly different factual setting. Unlike the cases discussed above, this case involved what has previously been termed gestational surrogacy.\textsuperscript{134} In \textit{Johnson}, the surrogate mother contributed none of the genetic material to the embryo, all of which came from the intended parents via in vitro fertilization of the husband's sperm and his wife's egg; the wife had undergone a hysterectomy several years before, but her ovaries had not been affected.\textsuperscript{135} The surrogate's role was to act as an incubator by gestating the embryo implanted into her, carrying the fetus to term, and relinquishing custody of the resulting child.\textsuperscript{136}

During the course of the surrogate's pregnancy, she and the intended parents had disputes surrounding the payment of expenses to the surrogate and provision of life insurance for her.\textsuperscript{137} The relationship eventually deteriorated to the point that the surrogate threatened to keep the child.\textsuperscript{138} This prompted the intended parents to file suit for a declaration that they were the legal parents of the unborn child.\textsuperscript{139} In response, the surrogate mother filed her own action to be declared the child's legal mother.\textsuperscript{140} The two cases were consolidated for hearing.\textsuperscript{141}

The trial court and court of appeals both ruled in favor of the sponsoring couple.\textsuperscript{142} The California Supreme Court began its analysis by examining the language of the Uniform Parentage Act as adopted in California, which governs the establishment of the legal relationships of parent and child.\textsuperscript{143} The court determined that both the infertile wife and the surrogate mother had presented acceptable proof of maternity under the statute, the former by using the genetic results of blood tests

\begin{flushright}
132. \textit{Id.} at 1263–64.
133. 851 P.2d 776 (Cal. 1993).
134. \textit{See supra} text accompanying notes 49–52.
136. \textit{Id.}
137. \textit{Id.}
138. \textit{Id.}
139. \textit{Id.}
140. \textit{Id.}
141. \textit{Id.}
142. \textit{Id.}
143. \textit{Id.} at 778–79 (analyzing \textit{CAL. CIV. CODE} §§ 7000–7021 (West 1992), which has been repealed and replaced by \textit{CAL. FAM. CODE} §§ 7600–7650 (West 1994)).
\end{flushright}
and the latter by actually giving birth to the child.\textsuperscript{144} Because the law indicated no clear preference for either type of evidence to prove maternity, the court looked beyond the statutory language and based its ruling upon the parties' intent as expressed in their written surrogacy agreement.\textsuperscript{145} That agreement provided that the intended parents were to become the legal parents of the child and that the surrogate had agreed to give birth to facilitate that goal.\textsuperscript{146} Therefore, the court ruled that the genetic mother, not the gestational one, was the legal mother under California law.\textsuperscript{147}

The opinion then addressed the surrogate's argument that the surrogacy agreement violated public policy prohibiting payment to procure consent to the adoption of a child and prohibiting pre-birth waivers of parental rights.\textsuperscript{148} The court disagreed with that contention on the ground that gestational surrogacy was fundamentally different from adoption and therefore not subject to the adoption statutes.\textsuperscript{149} Because the parties voluntarily agreed to participate in IVF and related medical procedures before the child was conceived, the surrogate was not vulnerable to financial inducements to part with her own expected offspring.\textsuperscript{150} The opinion further stated that the payments to the surrogate compensated her for her services in gestating the fetus and not for relinquishing her parental rights, noting that under the contract, these payments were due both during the pregnancy and after the child's birth.\textsuperscript{151} The court also was not persuaded that gestational surrogacy would economically exploit poor women or foster the attitude that children were commodities, citing the lack of evidence to support either proposition (though the court implied that this was a question the state legislature should examine).\textsuperscript{152} Lastly,
it rejected the surrogate's constitutional claim based on the right to privacy and procreative freedom.\footnote{153}

Justice Kennard issued a vigorous dissent, claiming that it was improper to determine the child's legal mother simply by divining the parties' intent as expressed in their surrogate parenting agreement.\footnote{154} She argued that the Uniform Parentage Act did not provide for such a result because that statute, in creating guidelines for establishing the legal relationships of parentage, did not contemplate the advances in technology that would permit the separation of the genetic role in motherhood from the gestational role.\footnote{155} Justice Kennard discussed the proposed Uniform Act.\footnote{156} She contended that it represented a better alternative because it imposed judicial monitoring of surrogacy cases, which would definitively determine who is the legal mother of the child in question.\footnote{157} This statute also would eliminate many of the potential pitfalls of the surrogate parenting arrangement as it requires that the intended mother be infertile, that all parties meet the standards of fitness for adoptive parents, that all parties receive mental health counseling regarding the effect of the surrogacy arrangement, and that legal counsel be appointed for the surrogate and a guardian ad litem for the unborn child.\footnote{158}

Justice Kennard wrote that use of an intent test was appropriate in resolving disputes over contractual or property rights but had no application to determining questions of parentage.\footnote{159} Instead, she would apply the "best interests of the child" standard to determine whether the genetic or gestational mother could best assume the social and legal responsibilities of motherhood.\footnote{160} She would have resolved the dilemma by remanding to the trial court for a factual determination of this issue.\footnote{161}

\footnote{153. \textit{Id.} at 785–87. The surrogate's constitutional claims are discussed \textit{infra} Part III.}
\footnote{154. \textit{Id.} at 788 (Kennard, J., dissenting).}
\footnote{155. \textit{Id.} at 794–95.}
\footnote{156. \textit{Id.} at 793–94, 798, 800–01 (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2–8, 9b U.L.A. 161–76 (Supp. 1995)).}
\footnote{157. \textit{Id.} at 800–01.}
\footnote{158. \textit{Id.} at 794 (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6, 9b U.L.A. 161–76 (Supp. 1995)).}
\footnote{159. \textit{Id.} at 799.}
\footnote{160. \textit{Id.} at 799–800.}
\footnote{161. \textit{Id.} at 801. Cases subsequent to \textit{Johnson} have reached contrary results on the genetic v. gestational mother issue. \textit{See}, \textit{e.g.}, McDonald v. McDonald, 608 N.Y.S.2d
This review of case law demonstrates the great difficulty the courts have faced in resolving surrogate motherhood cases under existing statutory frameworks. This difficulty is reflected in judicial comments about the inadequacy of legislation in this area.\textsuperscript{162}

Before reviewing the provisions of the Proposed Model Surrogate Parenthood Act itself, this Article will first examine the constitutional issues raised by legislative efforts to regulate or even to ban the use of surrogate motherhood.

### III. CONSTITUTIONAL ISSUES

The use of the surrogate parenting arrangement, in addition to facing the statutory obstacles identified in the above cases, also raises several difficult constitutional questions.\textsuperscript{163} For example, if a state chooses to ban surrogacy outright, is there a constitutional right to procreate using any means technologically available to the parties?\textsuperscript{164} May a state determine that the evils of surrogacy originate from the commercial nature of the relationship and pass a law prohibiting payment to the surrogate?\textsuperscript{165} Must the rights accorded to a married couple to use the services of a surrogate also be provided to an unmarried couple or to a single individual?\textsuperscript{166} Does sexual orientation matter?\textsuperscript{167}

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\textsuperscript{162} See text accompanying notes 154–158; In re Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 818 (N.Y. Sur. Ct. 1986) (requesting that the legislature address problems with the current statutory provisions).

\textsuperscript{163} For general commentary on the constitutional issues raised by the use of commercial surrogacy, see Phyllis Coleman, \textit{Surrogate Motherhood: Analysis of the Problems and Suggestions for the Solutions}, 50 TENN. L. REV. 71, 75–82 (1982); Noel Keane, \textit{Legal Problems of Surrogate Motherhood}, 1980 S. ILL. U. L.J. 147, 161–66; Robertson, supra note 27, at 957–67.

\textsuperscript{164} See infra Part III.B.

\textsuperscript{165} See infra Part III.C.

\textsuperscript{166} See infra Part III.D.

\textsuperscript{167} See infra Part III.E.
A. Surrogacy and the Right to Privacy

The United States Supreme Court over the years has delineated several areas of personal life in which an individual is constitutionally entitled to be free from most forms of government interference. These include decisions relating to marriage,\(^{168}\) procreation,\(^{169}\) contraception,\(^{170}\) abortion,\(^{171}\) family relationships,\(^{172}\) and child rearing and education.\(^{173}\) As stated in *Roe v. Wade*,\(^ {174}\) when a decision as fundamental as whether to bear or beget a child is involved, the imposition of a burden on that decision by the state may be justified only by the existence of a compelling state interest, and the burden itself must be drawn narrowly to express only that interest.\(^ {175}\)

The Supreme Court has never addressed the specific issue of whether a married couple or a single individual has an unrestricted constitutional right to procreate via access to all available reproductive technology. What the Court has done is to establish clearly the right not to procreate, either through access to contraception\(^ {176}\) or abortion,\(^ {177}\) as part of the overall right to privacy under the Due Process Clause of the Fourteenth Amendment.\(^ {178}\)

It is not clear, however, that this right to privacy, established in a negative context in which the goal was to prevent procreation, applies with equal force to protect the right to go outside the family structure and procreate using methods provided by advanced genetics. After all, the freedom to have sexual relations without reproduction is not the same as the freedom to have reproduction without sexual relations.\(^ {179}\)

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175. Id. at 155–56.
178. U.S. CONST. amend. XIV.
The New Jersey Supreme Court squarely faced this issue in *In re Baby M.* The Sterns asserted that the right to procreate was a protected activity under the Constitution, which meant that the surrogacy contract had to be enforced. The Court agreed up to a point. It stated that the right to procreate consists only of the right to have natural children, whether through sexual intercourse or artificial insemination. Mr. Stern had not been deprived of that right because through the artificial insemination of Mary Beth Whitehead, Baby M was his child. Mr. Stern's right of procreation did not, however, give him the right to custody of the child as well. The court ruled that a father has no constitutionally protected right to custody of a child where it is opposed by the child's mother.

The New Jersey court's narrow interpretation of the Sterns' constitutionally protected right to make decisions regarding childbirth does not comport with the sweeping statements made by the United States Supreme Court regarding the broad scope of the right to privacy. It is certainly plausible that the privacy right would apply to the surrogacy arrangement. For example, it seems unlikely that the Court would uphold a state law banning the use of IVF or artificial insemination on the grounds that the state only wanted to recognize childbearing within the traditional family structure.

In this climate, the Court might find it difficult to distinguish surrogacy and strip away the protection provided by the constitutional right to privacy. Artificial insemination and other new methods are just alternative avenues to procreation, avenues that the advent of technology has made possible. Why should some of them be constitutionally protected while others are not? It is true that only surrogate motherhood involves the planned pregnancy of a third party. But does this distinction rise to the level of a difference of constitutional magnitude?

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181. *Id.* at 1253.
182. *Id.*
183. *Id.*
184. *Id.* at 1254.
185. *Id.*
186. *See supra* text accompanying notes 172–75.
B. Banning Surrogate Arrangements

Assuming for the moment that there is a fundamental constitutional right to have a child using the services of a surrogate, it does not follow that the state is incapable of asserting its legitimate interests in the childbearing process. It can interfere with the procreative right only if its interests are of a compelling nature, however. One such potential interest might be the protection of the surrogate from economic exploitation. The state might conclude that poor women in particular would be susceptible to using their reproductive capabilities to benefit others because of the financial rewards involved. The state also might be legitimately concerned with the psychological harm that could befall surrogate mothers when they are forced to give up their babies. Preventing physical harm to the surrogate is also very important; she must be physically able to undergo the rigors of pregnancy and childbirth without danger to herself.

No doubt these are substantial interests of the state and perhaps they even rise to the level of "compelling." A state would not have to ban surrogacy to further these goals because more narrowly drawn alternatives are available. The state could enact legislation requiring certification by a physician that the surrogate would be physically able to withstand the demands of pregnancy and childbirth. A psychologist could be required to certify that the surrogate fully understands her obligation to give up the child at birth and has the emotional strength to fulfill that obligation. Also, a geneticist might be required to determine the presence of any genetic defects the surrogate could pass along.

To prevent exploitation of poor women, or any other type of surrogate, a system could be put in place for court supervision and approval of the surrogate parenting arrangement prior to the initiation of non-coital reproduction. Through the testimony

187. See supra text accompanying notes 174–75.
189. See id. at 794 (Kennard, J., dissenting) (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6(b), 9b U.L.A. 161–76 (Supp. 1995)).
190. See id.
191. See id.
192. Cf. id.
of the surrogate and examination of other relevant evidence a
judge could verify that the surrogate entered into the trans-
action freely without coercion or duress, fully understands her
duties and obligations, and had the mental capacity to give her
voluntary informed consent to the entire arrangement. 193

Another potential state interest could be based upon grounds of public morality, that the commercialization of producing children is offensive to public mores. 194 Clearly there are certain types of transactions that we as a society will not permit, no matter how agreeable the participants are. One example that often surfaces in the debate over surrogacy is a person who sells an organ to raise money. 195 This is a false analogy: babies are quite different from non-regenerative body parts. They are designed to leave the woman's body and are not necessary for its normal functioning. Removal of the child results in no permanent loss or damage to the surrogate. 196

If using the services of a surrogate mother for procreation is protected under the constitutional right of privacy, the state's moral distaste would not be a sufficient rationale for banning the practice. 197 In Carey v. Population Services International, 198 for example, the Supreme Court held that the state's interest in preventing teens from engaging in immoral sex acts was insufficient to outweigh the fundamental right to decide whether to have a child. 199

Lastly, the state could assert the need to make sure the surrogacy arrangement is in the best interests of the child to be conceived. There is no question that the state has a compelling interest under its parens patriae powers to protect the rights of children. But is it necessary to ban surrogacy to protect the child or are there less burdensome ways of achieving the same objective? The physical safety of the fetus can be protected in the manner already suggested—by a physician's certification that the surrogate is physically able to go through

193. See Bradley, supra note 1, at 742–43; Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (Kennard J., dissenting) (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6(b), 9b U.L.A. 161–76 (Supp. 1995)). The proposed Model Act [hereinafter MODEL ACT] requires all of these protections for the surrogate. See infra §§ 2, 4–7 of the MODEL ACT.
194. See Johnson, 851 P.2d at 785.
195. Bradley, supra note 1, at 742–43.
196. See Johnson, 851 P.2d at 785.
197. Id. at 736.
199. Id. at 687, 694; Bradley, supra note 1, at 736.
pregnancy and childbirth. The other main concern would be the type of home the child would be entering. The issue here is the same as with adoptions, and the solution can be the same as well. A caseworker can visit the parents to determine whether they will be able to provide the child with a wholesome, nurturing environment. In the absence of such a determination, the state might refuse to permit the surrogacy contract from being fulfilled.

C. Prohibiting Payment to Surrogates

The above discussion demonstrates that even if the state can assert compelling interests of its own in the surrogacy relationship, banning the practice altogether is not necessary to further those interests. Less draconian alternatives exist, more narrowly drawn, which would accomplish the same objectives. Rather than attempt to outlaw the practice in its entirety, a state might determine that the real evil is the commercial nature of the transaction and simply prohibit payment to the surrogate beyond her expenses, as in adoption cases.

Indeed, this was the scenario that the Michigan Court of Appeals faced in Doe v. Kelley. A couple desired to engage the services of a surrogate mother because the wife was unable to bear children as the result of an earlier tubal ligation. They proposed to pay all of the surrogate's expenses plus a fee of $5000. They were concerned with a Michigan law that prohibited the exchange of money or other consideration in connection with the adoption of a child, a law that would become relevant when the wife attempted to adopt the child born to the surrogate. Therefore, they filed a declaratory judgment action seeking to have the statute declared unconstitutional.

The court of appeals agreed with the couple that the decision to bear or beget a child is a fundamental interest protected by

200. See infra MODEL ACT § 7(d)(1)(C).
201. See supra notes 18-20 and accompanying text.
203. Id. at 440.
204. Id.
205. Id. at 439.
the right of privacy under the Constitution.\textsuperscript{206} It also noted, however, that this right did not prohibit the state from interfering in the parties' contractual relationship.\textsuperscript{207} The statute in question did not prevent the use of a surrogate mother for procreation; it only prevented the payment of consideration.\textsuperscript{208} The court ultimately upheld the statute on the basis that the parties were trying to use the Michigan adoption code to change the legal status of the child born to the surrogate, a goal that is not within the realm of fundamental interests that were protected by the right to privacy.\textsuperscript{209}

A statute that does not specifically ban the surrogate arrangement but does prohibit payment of a fee to the surrogate mother would have, as a practical matter, virtually the same effect as outlawing the practice outright.\textsuperscript{210} Therefore, the enactment of a prohibition against payment of a fee to the surrogate carries with it the same constitutional difficulties as a prohibition against surrogate motherhood generally.\textsuperscript{211} It is overbroad and not necessary to achieve the legitimate state interests involved.

Consider an analogous situation in the context of abortion and the Supreme Court's "undue burden" analysis.\textsuperscript{212} Suppose a state banned payment to any doctor who performed an abortion. The result presumably would be to limit severely the pool of physicians who would be willing to perform the procedure and therefore place a heavy burden upon a woman's constitutional right to obtain an abortion. Using the undue burden standard,\textsuperscript{213} a law of this nature would almost unquestionably fail. Should not the result be the same when, because of a ban on payment to surrogates, an infertile couple is effectively prevented from having a child?

Until this point, this Part of the Article has focused exclusively on the constitutional rights of the infertile parents. The surrogate presumably is protected under the Constitution's right of privacy as well.\textsuperscript{214} Would a ban of payment to the

\begin{itemize}
\item \textsuperscript{206} Id. at 441.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} See Keane, supra note 163, at 153; Tiller, supra note 10, at 433.
\item \textsuperscript{211} See supra text accompanying notes 176-86.
\item \textsuperscript{212} See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion).
\item \textsuperscript{213} Id.
\item \textsuperscript{214} The surrogate mothers made this argument in \textit{In re Baby M}, 537 A.2d 1227, 1238 (N.J. 1988) and in \textit{Johnson v. Calvert}, 851 P.2d 776, 785-86 (Cal. 1993). The argument was made in a different context: the surrogates were trying to keep the
\end{itemize}
surrogate violate her constitutional rights in the areas of procreation and childbearing? Probably not, because her interests are quite different from the couple desiring to have a child, or even from the individual who wants to use contraceptives or have an abortion. Her motivation is primarily commercial rather than personal: certainly not the type of decision making about family relationships that the Supreme Court has protected in the past. There is quite a difference between a woman's right to have control over her reproductive functions in the exercise of her personal autonomy and her right to receive compensation to become pregnant as part of a negotiated agreement to turn over the child to third parties. It does not seem likely that the Supreme Court would extend the reach of the right of privacy to encompass the decision of a surrogate mother to use her reproductive capacity for pecuniary gain.

D. Limiting Surrogacy to Married Couples

The Uniform Act, by virtue of the definition of "intended parents" limits the right to engage in surrogacy arrangements to married couples. This brings up the question of whether the Constitution protects the reproductive decision-making of an unmarried couple or a single individual to the same extent that it does for a married couple.216

babies and claimed a constitutional right to the companionship of their children based on the right to privacy and procreative freedom. The Johnson court rejected this argument. 851 P.2d at 785-87. The New Jersey Supreme Court avoided the issue. Baby M, 537 A.2d at 1253-55.

Others have claimed that banning surrogacy is a paternalistic denial of a woman's right to make her own choices. For a summary of these arguments, see Lori B. Andrews, Surrogate Motherhood: The Challenge to Feminists, 16 L. MED. & HEALTH CARE 72 (1988).

215. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3), 9b U.L.A. 161-76 (Supp. 1995) ("intended parents' means a man and woman, married to each other").

216. A great deal has been written on this subject. See, e.g., Massie, supra note 8, at 527 ("A legislature...reasonably may distinguish between married couples and unmarried, cohabiting couples when it establishes criteria for access to legalized surrogacy."); Robertson, supra note 53, at 418 ("the legal protection of decisions to conceive and bear a child has traditionally been confined to marriage."); Robertson, supra note 27, at 964 ("While traditions of family and of reproduction within marriage make it difficult for the Court to deny the procreative liberty of married persons, it may be less willing to recognize the right of single persons to reproduce.") (footnotes omitted); Note, Reproductive Technology and the Procreation Rights of the Unmarried,
As far as access to contraceptives is concerned, the Supreme Court has made it clear that no discrimination against unmarried people is permissible. In *Eisenstadt v. Baird*[^217] the Court struck down a Massachusetts law that allowed married but not unmarried people to obtain contraceptive devices. The Court reasoned that whatever the right of the individual to access contraceptives, those rights must be the same for the married and unmarried alike.[^218] In reaching its decision, the Court strongly endorsed the application of the right of privacy to unmarried people: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[^219]

As already stated, protecting the rights of unmarried people to prevent pregnancy is not necessarily the same as according constitutional protection to their desire to have children. In the latter situation, the rights of those children are a legitimate subject of the state’s concern. The state might assert that it is in the best interests of the child that it be raised in a traditional family setting, which would provide greater stability and a more supportive environment overall. And the Supreme Court in the past has indicated its agreement with this view of the family, noting that the institution is deeply rooted in the country’s history and tradition.[^220]

Countervailing considerations exist, however. For example, no state prohibits single people from adopting children.[^221] Therefore, one could assert that the states have made a value judgment that a single parent can provide a proper home for a child just as well as a married couple can. Of course, the state could rationalize that, in an adoption situation, the child

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[^218]: Id. at 453.
[^219]: Id. (emphasis in original).
[^221]: Id. at 518 n.168.
is already present and placing it with a single parent is preferable to keeping it institutionalized.

The adoption analogy might be a persuasive argument until one examines the laws pertaining to the use of IVF for reproduction. Many states provide for using IVF with anonymous sperm donors, but none requires the female participant to be married. Unlike adoption, IVF involves a child yet to be conceived; there is no child in existence at the time the procedure is begun. Therefore, if the primary concern is the child’s well-being, what justification exists for permitting single women to partake in IVF while prohibiting a single male or unmarried couple from using a surrogate mother? Whether or not this violates the privacy rights of the would-be parents, such disparate treatment would seem to call into question the Equal Protection Clause of the Fourteenth Amendment.

Given single people’s access to adoption and IVF, and in light of the Supreme Court’s strong pronouncements about their privacy rights in the area of conception, there should be little debate that the right to privacy encompasses the use of a surrogate mother by unmarried people. If the states had a clear policy in favor of the traditional family as the preferred choice for the placement of children, preventing single people from using surrogate mothers would be a logical extension of that policy, but there is no such clear policy. Under these circumstances, it is difficult to see any compelling state interest in restricting the use of surrogates to married couples.

E. Rights of Homosexuals

Finally, there is the question of the constitutional status of homosexual men or women who desire to use the services of a surrogate mother for procreative purposes. Can the state legitimately restrict surrogacy to heterosexuals?

None of the Supreme Court rulings referenced earlier were made in the context of homosexual rights. It is difficult to imagine the Court supporting the desire of homosexuals to have children, especially after its ruling in Bowers v.

222. Id. at 521; OFFICE OF TECHNOLOGY ASSESSMENT, supra note 25, at 242.
223. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”)
224. See supra notes 168–75 and accompanying text.
Hardwick,\textsuperscript{225} where it upheld the criminal conviction of a homosexual man for violation of Georgia's anti-sodomy statute.\textsuperscript{226} The Court was not the least bit receptive to the argument that there should be constitutional protection for private, consensual sex acts between adults.\textsuperscript{227}

Gays and lesbians have made a great deal of progress over the last few years in the adoption arena, however. There have been approximately 100 court-approved lesbian adoptions during that time, principally in California and other western states.\textsuperscript{228} Courts in Illinois, Massachusetts, and New Jersey, among others, have also approved adoptions by the lesbian partner of the biological mother of a child, who had been impregnated by artificial insemination.\textsuperscript{229} But the states' increased receptivity toward gay and lesbian adoption does not bear upon the constitutional right to privacy as it affects procreation.\textsuperscript{230} Given the Supreme Court's hostility toward homosexual activity\textsuperscript{231} as evidenced by the \textit{Bowers} decision, it is difficult to imagine that the Court would rule that the right to privacy extends to the use of a surrogate mother by gays and lesbians who want to become parents.

\section*{IV. Purpose and Summary of the Proposed Model Surrogate Parenthood Act}

One might argue that, constitutional considerations aside, the simplest solution to the surrogate parenting controversy would be for the legislatures of the various states simply to outlaw the practice in its entirety, or at least the commercial

\begin{itemize}
\item \textsuperscript{225} 478 U.S. 186 (1986).
\item \textsuperscript{226} \textit{Id.} at 196.
\item \textsuperscript{227} \textit{Id.} at 190, 191.
\item \textsuperscript{228} Joseph F. Sullivan, \textit{Court Approves Lesbian's Right to Adopt Partner's Child}, CHI. TRIB., Sept. 12, 1993, \textsection 6, at 6.
\item \textsuperscript{229} Andrew Fegelman, \textit{State Court Says Gays Have Right to Adopt}, CHI. TRIB., July 19, 1995, \textsection 1, at 1.
\item \textsuperscript{230} For an analysis of the rights of homosexual parents in child custody disputes, see Note, \textit{Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis}, 102 HARV. L. REV. 617 (1989).
\item \textsuperscript{231} But see Romer v. Evans, 116 S. Ct. 1620 (1996) (holding invalid, on equal protection grounds, an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals from discrimination).
\end{itemize}
aspects of it; and in fact, states have taken both approaches.\textsuperscript{232} Such a solution, however, is an inappropriate response to the problem. Because the necessary reproductive technology is currently available and because many people desperately want to have children but are unable to have them by any other means,\textsuperscript{233} it appears unlikely that surrogate motherhood is going to be eradicated. One would certainly expect the practice to continue among family members and close friends, at the very least.\textsuperscript{234} Moreover, it is, at its essence, a beneficent arrangement that could potentially bring the joys of parenthood to thousands of people who desperately want a family but are unable to conceive a child or obtain one in any other manner. Prohibiting a practice that is designed to promote and strengthen family life seems counterproductive.

Rather than undertaking the drastic legislative action of prohibition, the public’s interest would be better served by permitting surrogacy arrangements but with careful regulation to insure that the surrogate is not subject to exploitation of any kind, that her decision to give up her parental rights is truly informed and voluntary, and that the interests of all parties to the arrangement, including those of the unborn child, are zealously safeguarded.

The proposed Model Act is designed to accomplish all of these goals. It is intended to cover comprehensively every situation in which a woman bears a child for another, regardless of the genetic relationships between the parties and the fetus, the marital status or sexual preference of the proposed parents, or the manner in which the surrogate is impregnated. The Act attempts to address all issues pertinent to surrogacy, including not only those that have heretofore been so difficult for the courts to resolve but also many others that have not yet found their way into case law.\textsuperscript{235}

\textsuperscript{232} Ten states have outlawed surrogacy completely: Alabama, Arizona, Arkansas, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Utah, and West Virginia. The following states have prohibited commercial surrogacy only: Florida, Kentucky, Nevada, New Hampshire, New York, Virginia and Washington. See supra note 20 and accompanying text.

\textsuperscript{233} See supra text accompanying notes 24–27.

\textsuperscript{234} See, e.g., KEANE AND BREO, supra note 2, at 57–74; RAGONE, supra note 2, at 60.

\textsuperscript{235} Examples of the latter include: situations where one or both of the proposed parents dies prior to the child’s birth (MODEL ACT § 12), the right of the surrogate to obtain an abortion (MODEL ACT § 4(h)), the fee payable to the surrogate in the event of a miscarriage or stillbirth (MODEL ACT § 4(i)), and the child’s right to learn the identity of the surrogate (MODEL ACT § 7(e)).
The underlying policy of the Act is that, within certain carefully defined parameters, surrogacy should be available under strict court supervision and monitoring to anyone who cannot have a child by natural means and has been unsuccessful in obtaining one through non-coital reproduction (e.g., in vitro fertilization, embryo transfer, etc.) or via adoption. In other words, surrogate parenthood is viewed strictly as a remedy of last resort to be used after all other means for obtaining a child have proved inadequate. The law is not intended in any way to encourage the use of surrogate mothers but accepts their existence as the result technological advances in the field of reproductive genetics.

Structurally, the Act bears some similarity to the Uniform Act. Like the Uniform Act, this proposed Model Act requires court approval of the surrogate parenting agreement before it is implemented and mandates that all parties receive psychological counseling, a physical examination, and genetic screening, and that the relevant child welfare agency conduct a home study, before judicial approval will be given. As the forthcoming analysis will reveal, however, there are substantial differences between the two proposed laws, particularly in the termination of the surrogate's parental rights.\textsuperscript{236} The proposed Model Act attempts to combine the benefits of surrogate parenting arrangements with some of the safeguards found in adoption procedures by permitting the surrogate to change her mind and keep the child born to her. Thus, the statute would prevent the type of conflict between the proposed parents and the surrogate that arose in both the Baby M case and in Johnson v. Calvert. This feature of the statute will be examined in much greater detail in the next section, which contains commentary on each provision of the law.

\textsuperscript{236} Compare \textit{Unif. Status of Children of Assisted Conception Act} § 7, 9b U.L.A. 161–76 (Supp. 1995) (preventing surrogate from deciding to terminate the contract and keep the child after 180 days after the last insemination) \textit{with Model Act} § 8 (providing for a continuation of the surrogate's parental rights until 72 hours after birth).
## V. THE PROPOSED MODEL ACT WITH COMMENTARY

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SECTION ONE. SHORT TITLE

This Act may be cited as the Proposed Model Surrogate Parenthood Act.

SECTION TWO. DEFINITIONS

As used in this Act:

"Artificial insemination" means impregnating a woman by the introduction of sperm into her vagina, cervical canal, or uterus by means other than sexual intercourse.

"Donor" means any individual, excluding the proposed father or mother, who contributes sperm or eggs used to impregnate a surrogate through non-coital reproduction.

"Embryo" means the organism resulting from the union of sperm and egg.

"Embryo transfer" means the implantation of a viable embryo into a woman's uterus.

"Infertile" means:

(a) the inability of a man or a woman to conceive a child after one year of unprotected sexual intercourse;
(b) the inability of a woman to carry a pregnancy to term;
(c) the inability of a woman to undergo pregnancy or childbirth without serious medical risk to herself or the fetus; or
(d) one or more of the proposed parent(s) being at risk for transmitting a genetic disease or defect to any child they conceive.

"Informed consent" means a knowing and voluntary decision made by a person with legal capacity to consent, which is based upon a reasoned evaluation of all relevant factors, including the availability of alternatives to achieve the same objective.

"In vitro fertilization" means all medical procedures used to impregnate a woman by the fertilization of an egg with
sperm outside the body and the implantation of the embryo into the woman for gestation.

"Non-coital reproduction" means any method used to impregnate a woman other than sexual intercourse.

"Parenting fee" means a fee paid by the proposed parent(s) to the surrogate to compensate her for her services under the surrogate parenting agreement, separate and apart from reimbursement for her expenses.

"Proposed father" means a male, at least 25 years of age, who is either unmarried or married to the proposed mother, and who will be the legal father of a child conceived pursuant to a surrogate parenting agreement.

"Proposed mother" means a female, at least 25 years of age, who is either unmarried or married to the proposed father, and who will be the legal mother of the child conceived pursuant to a surrogate parenting agreement.

"Proposed parent(s)" means no more than two individuals, comprised of the proposed father or the proposed mother or any combination thereof.

"Related surrogacy" means a surrogate parenting agreement where the surrogate is the mother, mother-in-law, grandmother, aunt, great aunt, daughter, daughter-in-law, granddaughter, niece, sister, sister-in-law, or cousin of the first degree of one or more of the proposed parent(s), whether by blood or marriage.

"Surrogate" means a female who agrees, pursuant to a surrogate parenting agreement, to bear a child for the proposed parent(s) and who, at the time of execution of the agreement:

(a) is at least 25 and not more than 35 years of age;
(b) has experienced at least one live vaginal birth without complication within the previous 5 years;
(c) has never had a miscarriage, ectopic pregnancy, medically necessary abortion, given birth to a stillborn or premature baby, or experienced any other pregnancy related condition that was dangerous to her health or that of the fetus; and
(d) is otherwise mentally and physically capable of carrying out her duties and obligations under the surrogate parenting agreement.
"Surrogate parenting agreement" means a written agreement between the proposed parent(s), the surrogate and her spouse, if any, whereby the surrogate agrees to:

(a) become pregnant by non-coital reproduction using the sperm of the proposed father or donor and her own egg, that of the proposed mother, or donor;
(b) to carry the resulting fetus to term; and
(c) to turn over to the proposed parent(s) the custody of any child born to her, relinquishing all of her parental rights under law, unless she chooses to keep the child within seventy two (72) hours after birth.

"Surrogate's expenses" means all costs and expenses incurred by the surrogate arising out of or related in any way to her participation in the surrogate parenting agreement, including without limitation:

(a) legal fees;
(b) court costs;
(c) all medical expenses of whatever nature, including expenses for physical examinations, genetic testing, psychological testing and evaluation, procedures for non-coital reproduction, prenatal care, difficult pregnancy, miscarriage, medically necessary abortion, childbirth, and post-partum complications up to six months after birth;
(d) lost wages and benefits;
(e) child care expenses; and
(f) travel and lodging costs.

"Unlawful surrogacy arrangement" means any oral or written agreement where a female agrees to bear a child for another and to relinquish her parental rights to that child without first obtaining approval by the court as provided in this Act.

COMMENTS TO SECTION TWO

The definitions contained in Section Two of the proposed Model Act provide the framework for the substantive provisions
to follow and give the reader a preview of the philosophical bases of the statute. For example, the definition of "infertile" goes beyond the notion of the inability to conceive a child through sexual intercourse. Infertility under this statute also includes cases where a woman can conceive a child but cannot complete the pregnancy, e.g., she might suffer from miscarriages or perhaps is diabetic and pregnancy is too dangerous for her. The possibility of transmitting a genetic disease or defect to one's offspring is also included in the category of "infertile." In other words, any known impediment to a woman's or a couple's ability to produce a healthy child without substantial risk to the health of any of the parties renders them "infertile" for purposes of the statute. The significance of this designation will be seen in Section 6(b)(6)(D) of the Act, which requires that one or more of the proposed parent(s) be infertile in order to obtain court approval of the surrogate parenting agreement.

"Parenting fee" is clearly identified as a fee paid to the surrogate for her services, completely separate from reimbursement for her expenses. The statute not only contemplates payment of such a fee but makes it a mandatory feature of the surrogate parenting agreement in Section 4(b) and even sets a minimum amount for surrogate compensation. The proposed Model Act thus rejects the reasoning of the New Jersey Supreme Court in the Baby M case, Justice Wintersheimer's dissent in the Kentucky Surrogate Parenting Associates case, and several commentators that the payment of a fee to the surrogate will exploit women's financial needs, commercialize their reproductive capacities, turn children into commodities, and amount to nothing more than baby selling.

The Act has intentionally been structured to avoid these results. Numerous protections are inserted into various parts of the statute to ensure that the surrogate is not exploited in

237. Some proposals, rather than setting a floor on surrogate compensation, establish a ceiling instead. See, e.g., Field, supra note 2, at 62; Mandler, supra note 2, at 1307.

238. See supra notes 121–28 and accompanying text.

239. See supra notes 83–85 and accompanying text.

any way. These protections include a requirement that she have separate counsel to represent her in the drafting of the surrogate parenting agreement and in the judicial proceedings to approve the agreement; a requirement that a physician and mental health professional certify that she has the proper physical and mental health to undergo pregnancy and childbirth and the emotional stability to give up the child, judicial supervision of the entire procedure, and the surrogate's limited option to decide to keep the child after giving birth. In addition, by requiring that the surrogate be paid part or all of her fee in the event of a medically necessary abortion, miscarriage, or stillbirth, the Act makes clear that the proposed parent(s) are paying for the surrogate's inconvenience, health risk, and rigors of pregnancy and childbirth, and not for the purchase of a baby. The fact that the surrogate has the option to keep the child is perhaps the strongest evidence of the true purpose of her remuneration.

Even assuming that the surrogate mother is paid only for her "services," the Act still leaves open the issue of whether permitting parties to contract for the use of reproductive services is appropriate. Does this not commercialize a woman's reproductive capacity, even if it does not exploit her financially? That result would seem inherent in a transaction where payment is made to the surrogate to have a child for someone else. Even if it can be justified on the basis of a woman's control over the use of her body, as some have asserted, there is no denying the significance of the financial element involved.

Because of this financial element, some people might find the practice of commercial surrogacy offensive, even if it were regulated and all parties guarded against exploitation. Ideally, there would be enough children for all childless couples to adopt. We have seen, however, that this is not the case. Moreover, the technological advances in reproductive genetics that make all of this possible are not going to be reversed, and technology will not stop advancing. Researchers continue to

241. MODEL ACT §§ 3(d), 6(a).
242. Id. § 6(b)(6).
243. Id. §§ 6, 7.
244. Id. § 9.
245. Id. §§ 4(h), (i).
246. See Andrews, supra note 214, at 73.
247. See supra note 27 and accompanying text.
discover new reproductive techniques that will be attractive to childless couples. Recall the previous example of the newly discovered ability to extract immature eggs from a woman's ovaries and cause them to mature in a petri dish, thus making them available for fertilization by IVF.²⁴⁸ In that example, since the wife had to have a hysterectomy because of cancer, the couple will need a surrogate mother to gestate the now frozen embryos.²⁴⁹ Other recent examples of how the technology permits those who are otherwise incapable to have children involve a fifty-nine-year-old British woman and a sixty-two-year-old Italian woman who underwent IVF using egg donors, became pregnant, and gave birth.²⁵⁰

In short, if the medical technology exists to produce children where it would not otherwise be possible, people who need it will take advantage of that technology. Passing laws declaring that surrogacy contracts are void and unenforceable is not going to stop the practice; it will just drive it underground, resulting in more cases like Baby M. Even if surrogacy is criminalized, as in Michigan where it is a felony punishable by a fine of up to $50,000 and/or up to five years in prison to enter into a surrogate parenting agreement,²⁵¹ it seems doubtful that the practice will be curtailed. It is difficult to imagine that law enforcement officials will make this a top priority, or that prosecutors will be especially eager to bring these cases to court. How severely will a judge treat a defendant whose crime consists of trying to have a baby?

It is more plausible that criminalization will cause people to go to other states where the atmosphere is not so hostile. This may help the state of Michigan, but it does nothing to reduce the frequency of surrogate motherhood on a national level. The Act anticipates this conflict of laws problem and addresses it in Section 19.²⁵²

The definitions of proposed mother, father, and parent(s) under the statute should make it clear that the Act does not restrict the right to use a surrogate to married couples. Any

²⁴⁸ See supra text accompanying note 50.
²⁴⁹ See Callahan, supra note 50, at 6.
²⁵¹ MICH. COMP. LAWS ANN. § 722.857(b) (West 1993).
²⁵² For a thorough analysis of the issue, see Susan Frelich Appleton, Surrogacy Arrangements and Conflicts of Laws, 1990 Wis. L. REV. 399.
person or couple, married or unmarried, heterosexual or homosexual, who otherwise meets the statutory requirements is eligible. As previously discussed, the recognized constitutional rights of the unmarried and of homosexuals to procreate using the latest in reproductive technology has not been established by the Supreme Court. The rights that are granted to these parties under the proposed Model Act are not based upon any recognized constitutional considerations but rather are premised upon notions of equity and fundamental fairness.

The term "related surrogacy" refers to what might be called a family surrogate arrangement, where a female relative of the childless couple volunteers to have a baby for them. Many of the concerns about commercial surrogacy relationships do not apply to this situation and the statute exempts a related surrogacy from many of its requirements.

A "surrogate" is defined in Section 2 as a woman who agrees to bear a child for others pursuant to a surrogate parenting agreement and who is between twenty-five and thirty-five years of age. The surrogate must have experienced at least one live vaginal birth without complication in the previous five years and must not have ever had a miscarriage, ectopic pregnancy, medically necessary abortion, given birth to a stillborn or premature child, or experienced any other pregnancy related condition that was dangerous to her health or that of the fetus. The intent of these provisions should be clear: the surrogate should be someone old enough to possess sufficient maturity to be able to make a meaningful decision about becoming a surrogate mother, she must have demonstrated the ability to experience pregnancy and childbirth without undue difficulty, and she should be in her prime child-bearing years.

The "surrogate parenting agreement" sets forth the terms of the surrogacy relationship between the parties. Those terms

254. For ease of reference, the terms "couple," "intended parents," and "proposed parents" will be used interchangeably to refer to those who desire to use the services of a surrogate mother. These terms are for convenience only and carry no implication whatsoever that only married heterosexual couples are eligible to participate in a surrogate parenting arrangement.
255. For example, in related surrogacies there is no requirement that the surrogate be represented by counsel in the negotiation of the parenting agreement (MODEL ACT § 3(d)) or at the judicial hearing (MODEL ACT § 6(a)), that she be paid her expenses or a parenting fee (MODEL ACT § 4(b)), or that the proposed parents purchase term life insurance for themselves and for her (MODEL ACT § 4(k)).
are severely circumscribed by the statute in Section 4, however, and there is very little left for the parties to negotiate. A detailed discussion of those terms will be postponed until the provisions of Section 4 are analyzed.

An "unlawful surrogacy arrangement" is one that does not follow the dictates of the statute. The penalty for carrying out such an agreement is not criminal, but it frustrates the essential purpose of the arrangement. As provided in Section 15, the situation is treated as one where the woman has given birth to a child fathered by a man who is not her husband. The surrogate is considered the legal mother of the child, the proposed father is the legal father, and the court is required to determine questions of support and visitation under existing state parentage laws.

SECTION 3. EXECUTION OF THE SURROGATE PARENTING AGREEMENT

(a) The surrogate parenting agreement shall be executed by the surrogate, her husband, if any, and by the proposed parent(s).

(b) In the event the surrogate or a proposed parent is legally separated from his or her respective spouse or involved in proceedings for dissolution of marriage under [this state's dissolution of marriage laws], then that person's spouse need not be a party to the surrogate parenting agreement.

(c) Every individual executing the surrogate parenting agreement shall have his or her signature notarized by a notary public licensed in this state.

(d) Except in cases of related surrogacy, the surrogate shall be represented by counsel in the negotiation and drafting of the surrogate parenting agreement, as well as in all judicial proceedings under this Act. The proposed parent(s) shall be represented by separate counsel, if any.

(e) Notwithstanding the fact that pursuant to Section 4(b) the proposed parent(s) shall be required to pay all of the surrogate's legal fees (as part of the surrogate's expenses defined in Section 2), counsel for the surrogate mother shall represent the interests of the surrogate mother only, to the exclusion of any other party. Providing
legal representation to the surrogate mother pursuant to
the provisions of this statute shall not be considered a
violation of [this state’s canons of legal ethics] in any re-
spect. No disciplinary action of any nature shall be initiat-
ed nor prosecuted against an attorney solely by reason of
his or her performance of such legal services.

(f) The provisions of Section 3(e) shall not apply to an
attorney who performs any legal services relating to an
unlawful surrogacy arrangement as defined in Section 2.

COMMENTS TO SECTION 3

This section addresses the technical requirements of execut-
ing the surrogate parenting agreement and also provides
assurance that any attorney representing the surrogate moth-
er will not have a conflict of interest because his or her fee is
paid for by the proposed parent or parents. The surrogate’s
husband, if any, is made a party to the contract to show his
consent to his wife’s becoming pregnant by someone other than
himself and to her giving up custody of the child she bears.
Note that the proposed mother is required to be a signatory to
the contract, which is not typically the case. The rationale
for including her in the contractual relationship among the
parties is that because the proposed Model Act does not con-
template a separate adoption proceeding where the proposed
mother becomes legal mother of the child, there is no reason
to exclude her from active participation as a party to the
agreement.

All parties are to be represented by separate counsel, unless
the proposed parent(s) choose not to have an attorney. The
cost of the surrogate’s attorney is to be paid for by the par-
ent(s). Recognizing the distinct nature of a related surrogacy,
this section dispenses with the requirement of counsel for the
surrogate in situations of that nature.

Section 3(e) is intended to clarify any confusion regarding
the role of the attorney for the surrogate mother that might
arise because the proposed parent(s) are responsible for pay-
ment of his fees. The entire statutory scheme would be tainted
unless the surrogate’s attorney owed a duty of undivided fealty

See supra note 2.
to her. Moreover, it would be very difficult for the surrogate to obtain representation if her attorney faced potential liability for violation of the state's code of professional ethics. Therefore, the Act insulates the surrogate's counsel against such claims. This protective shield only applies, however, if the surrogate parenting arrangement is one sanctioned by this statute. Under Section 3(f), if the parties enter into an unlawful surrogate arrangement, any attorney who is involved in a professional capacity would be subject to the full panoply of the law's sanctions for ethical violations.

SECTION 4. MANDATORY TERMS OF SURROGATE PARENTING AGREEMENT

No surrogate parenting agreement shall be approved by the court pursuant to this Act unless it provides as follows:

(a) That the surrogate agrees to undergo non-coital reproduction using the sperm of the proposed father or of a donor in order to become pregnant, carry the fetus to term, give birth, and turn over custody of the child to the proposed parent(s) within seventy-two (72) hours after the birth, irrevocably giving up all of her parental rights under law, unless she chooses to keep the child as provided in Section 9 hereunder;

(b) That except in cases of related surrogacy, that the proposed parent(s) shall pay all of the surrogate's expenses as they become due and shall also pay a parenting fee to the surrogate of not less than $10,000.00. The manner and method of payment of the parenting fee shall be determined by the parties to the agreement; provided, however, that at least one-half of the parenting fee must be paid to the surrogate by the onset of the seventh month of pregnancy. In the event that the surrogate and/or her husband have health insurance that would pay for all or any part of her medical expenses, the parties may agree to what extent her expenses shall be paid by her insurance or by

257. See, e.g., N.Y. JUD. LAW app., Code of Professional Responsibility, Canon 5, EC 5-22 (McKinney 1996); CAL. CIV. AND CRIM. R., Rules of Professional Conduct of the State Bar of California, R. 3-310(F) (West 1995).
the proposed parent(s). The surrogate parenting agreement shall state that the parenting fee does not constitute payment to produce a child or for the relinquishment of the surrogate's parental rights but is to be paid solely for her rendering the services described thereunder;

(c)(1) That the surrogate shall undergo a complete physical examination by a licensed physician of her choice to determine the state of her general physical health, whether she has any sexually transmitted diseases or is infected with the HIV virus, the existence of any physical condition that would interfere with her ability to become pregnant, and whether going through pregnancy and childbirth would pose any unreasonable risk to her health or that of the fetus;

(2) That the proposed parent(s) shall undergo a complete physical examination by a licensed physician to determine the state of their general physical health and whether they have any sexually transmitted diseases or are infected with the HIV virus;

(3) That the proposed parent(s) shall undergo psychological evaluation and counseling from a psychiatrist or psychologist licensed in this state regarding the consequences and responsibilities of surrogate parenthood, and to determine their ability to raise a child born pursuant to a surrogate parenting agreement, whether they are capable of giving their informed consent to the agreement, and whether they suffer from any mental illness, defect, or disorder that would impair their ability to raise a child;

(4) That the surrogate and her husband, if any, shall undergo psychological evaluation and counseling from a psychiatrist or psychologist licensed in this state regarding the potential psychological consequences of the surrogate's performance of her responsibilities under the surrogate parenting agreement, whether she and her husband are capable of giving their informed consent to the agreement, whether she suffers from any mental illness, defect, or disorder and whether she is mentally and emotionally capable of carrying a child and giving it up at birth;

(5) That any party to the surrogate parenting agreement whose sperm or egg will be used to impregnate the surrogate, and the donor, if known, shall undergo genetic screening and testing to determine whether any of them is capable of transmitting a genetically based disease or
defect to the child to be conceived, including testing the sperm or egg itself for the presence of any abnormalities or genetic defects;

(6) That the parties to the surrogate parenting agreement shall obtain written reports from all health care professionals listed in sub-sections (1) to (5) describing the results of all such examinations, tests, evaluations, and counseling which shall be made available to all other parties and attached as exhibits to the agreement. By their execution of the surrogate parenting agreement, all parties thereto irrevocably waive any and all privileges against disclosure of such information as may otherwise be provided by law;

(d)(1) That except in cases of related surrogacy, each party to a surrogate parenting agreement, except the surrogate's husband, if any, shall execute a written statement describing all non-routine medical illnesses and injuries that they have experienced in the previous ten years or since the age of maturity, whichever is longer, whether they are currently or have ever in the same time period been engaged in the habitual use of drugs or alcohol and any current or prior treatment therefor, whether they have ever been exposed to radiation or any toxic substances and all details thereof, and whether they have ever been convicted of a crime, excluding minor traffic offenses. The surrogate shall additionally provide all relevant details concerning the outcome of all pregnancies she has experienced. Each party's statement shall be made under oath, shall be notarized, and shall contain written authorization for the release of any and all medical and legal records pertaining thereto. All such statements shall be attached as exhibits to the surrogate parenting agreement;

(2) That the proposed parent(s) and the surrogate have authorized the release of such information to each other, which has been reviewed by the parties prior to execution of the agreement, or that one or more of the parties has waived the right to review such information;

(e)(1) That the surrogate agrees to surrender custody of the child or to accept the legal obligations of parenthood if she elects to keep the child as provided in Section 9;

(2) That the surrogate's husband, if any, agrees to surrender custody of the child or to accept the legal obligations
of parenthood if the surrogate elects to keep the child as stated above;

(f) That the surrogate agrees to submit to reasonable medical evaluation and treatment during the course of the pregnancy and to adhere to reasonable medical instructions about her prenatal health and otherwise not to behave in a manner so as to endanger the fetus. Notwithstanding the foregoing, the surrogate shall not be required to, but may voluntarily, undergo any procedure intended to determine the sex of the fetus or whether the fetus exhibits any mental or physical impairment. The surrogate parenting agreement may provide for the payment of an amount in addition to the parenting fee to the surrogate if during the pregnancy she adheres to all reasonable medical instructions regarding prenatal care, refrains from smoking, ingesting alcoholic beverages, or abstains from any other specified behavior, or undergoes any of the procedures listed in the preceding sentence;

(g) That the proposed parent(s) agree to take custody of the child born to the surrogate and immediately accept all parental rights and responsibilities for the child which are imposed by law regardless of the existence or degree of any physical or mental impairment the child may exhibit;

(h) That the surrogate and her physician of choice have the sole decision-making authority with regard to the management of the pregnancy, including the decision to terminate that pregnancy as the surrogate may determine; provided, however, that:

(1) Except in the case of related surrogacy, if the pregnancy is terminated for medical reasons upon the recommendation of the surrogate's physician, the surrogate shall receive one-half of the parenting fee plus all of her expenses incurred to date, including those generated in terminating the pregnancy; and

(2) If the pregnancy is not terminated for any medical reasons but at the election of the surrogate, the surrogate parenting agreement may provide that the proposed parent(s) are not liable for any of the surrogate's expenses incurred pursuant to the agreement nor for the payment of the parenting fee.

(i)(1) Except in the case of related surrogacy, that in the event the surrogate suffers a miscarriage during the course of the pregnancy, the proposed parent(s) shall pay all of the
surrogate's expenses, including those incident thereto and shall also be liable for payment of one half of the parenting fee;

(2) That should the child be stillborn or die during or immediately after birth, the surrogate shall be entitled to receive the entire parenting fee in addition to all of her expenses;

(j) That upon the termination of the surrogate's pregnancy for any reason or the occurrence of a miscarriage or a stillbirth, the surrogate parenting agreement shall be considered null and void and of no further legal effect;

(k) That except in cases of related surrogacy, the proposed parent(s), in addition to the surrogate's expenses and parenting fee, shall bear the cost of providing the following insurance coverage:

(1) Term life insurance on the life of each of the proposed parent(s), as applicable, totaling _____Dollars ($ ), payable in trust to the unborn child, and

(2) Term life insurance on the life of the surrogate in the minimum amount of _____Dollars ($ ), payable to a beneficiary named by the surrogate.

Such insurance shall remain in effect for the term of the pregnancy and for a period of six months after the birth of the child;

(l) That the surrogate and her husband, if any, assume all risks associated with conception, pregnancy, childbirth, and postpartum complications and waive and release all claims they might have against the proposed parent(s) for any damage to the surrogate's health or her death which occurs as a result of participating in the surrogate parenting agreement; and

(m) That it is governed by this Act, the provisions of which are incorporated therein, and that any term of the agreement in conflict with the provisions of this Act is null and void.

COMMENTS TO SECTION 4

Section 4 is probably the most important part of the statute, because it is here that the proposed Model Act spells out in great detail the required terms and provisions that must
appear in any surrogate parenting agreement. Section 4(a) contains the basic agreement of the surrogate to become impregnated, carry the fetus to term, give birth, and turn over the child to the proposed parents, irrevocably giving up her parental rights in the process unless she chooses to retain possession of the child under the procedure spelled out in Section 9.

The timing of the termination of the surrogate’s parental rights has proved to be a difficult issue in other contexts. For example, the fact that the surrogate parenting agreement in *In re Baby M*\(^{258}\) called for the termination of the surrogate’s parental rights prior to the birth of the child, which is typical in surrogacy contracts,\(^{259}\) proved quite problematic for the New Jersey Supreme Court.\(^{260}\) The proposed Model Act makes termination of the surrogate’s rights co-extensive with turning over custody of the child to the proposed parent(s); obviously, if she keeps the baby, there is no termination of the surrogate’s rights as a parent.

Section 4(b) imposes a mandatory requirement that the proposed parent(s) pay all of the surrogate’s expenses incident to the surrogacy arrangement as well as a separate parenting fee of not less than $10,000. The parties may choose whether her expenses are to be paid by the surrogate’s health insurance or in some other manner and are free to determine how the parenting fee is to be paid, with the proviso that the surrogate must receive at least one-half of the parenting fee by the onset of the seventh month of pregnancy.

The Act requires that a fee be paid, rather than permit the parties to negotiate over the issue, primarily for equitable reasons.\(^{261}\) A woman who turns over the use of her body to produce another’s child deserves substantial compensation for what she has experienced, and the Act in Section 4(b) is making a specific statement of public policy to that effect. The propriety of rewarding the surrogate financially seems particularly compelling when one considers that sperm donors used in artificial insemination and ovum donors in surrogate embryo transfer

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258. 537 A.2d 1227, 1235 (N.J. 1988).
260. See *supra* text accompanying notes 102–07.
261. For a discussion of the controversy over payment of a fee to a surrogate mother *see supra* text accompanying notes 201–13.
are paid for their efforts.\textsuperscript{262} To insure that the surrogate mother receives more than just a de minimis payment, the Act establishes a $10,000 threshold, although there is nothing sacrosanct about this particular figure.

Section 4(b) also makes clear that the proposed parent(s) are not contracting to purchase a child, but only to purchase the surrogate's reproductive services. Indeed, the additional requirement that she be paid at least half of her parenting fee prior to the birth was included to demonstrate that producing a viable infant is not a prerequisite to being paid. Besides, making this payment at that time also will provide for the surrogate's needs to the extent she requires some additional income during the course of the pregnancy.

Section 4(c) covers all the physical, psychological, and genetic testing that the parties to the surrogate parenting agreement must undergo as a prerequisite to obtaining the court's approval of the contract. The purposes of such testing are:

(i) to ensure that the parties have the capacity to give their informed consent to the surrogate parenting agreement;
(ii) to be certain the surrogate is in proper physical and emotional condition to undergo pregnancy and childbirth;
(iii) to make sure the proposed parent(s) are in good physical and emotional condition so they can properly raise a child;
(iv) to ascertain whether all the parties are emotionally prepared for the surrogacy process itself; and
(v) to rule out the possibility that any of them carry any sexually transmitted diseases or genetic defects or diseases that could be passed along to the child.

It is particularly important that the surrogate mother, although she does have the right to keep the child, receive a thorough psychological examination to determine if she can part with the child, since that is the expectation of the parties and the whole purpose of the agreement.

\textsuperscript{262} Mandler, \textit{supra} note 2, at 1307.
Section 4(d) is designed to provide all parties with full disclosure about the medical and criminal backgrounds of each other. This is to ensure that the proposed parent(s) have been made aware of any factor in the surrogate's background that might disqualify her to be a surrogate mother and, correspondingly, the surrogate can learn what kind of home the child will be raised in. This will prevent what occurred in Johnson v. Calvert, where the surrogate failed to reveal, prior to becoming pregnant, that she had suffered several stillbirths and miscarriages.

Section 4(e) mirrors those provisions of the statute that give the surrogate the right to retain custody of the child. It makes explicit what is otherwise implicit—under the surrogate parenting agreement, i.e., the surrogate's and her husband's undertaking to relinquish custody of the child to the proposed parent(s), unless the surrogate mother decides to keep the child, in which case she and her husband agree to accept all legal obligations of parenthood.

Pursuant to Section 4(f) of the proposed Model Act, the surrogate is required to submit to necessary medical treatment and to adhere to medically appropriate prenatal behavior, which could include refraining from smoking, drinking, or other behaviors agreed to by the parties. While the Act espouses the desirability of such behavior, however, it also recognizes the impossibility of enforcing a contractual provision mandating the same. Courts traditionally have avoided specifically enforcing personal service agreements because of the difficulty of closely monitoring an individual's behavior to make sure he complies with the court's directive. Although it has been suggested that this type of provision should be the subject of an action for specific performance, permitting this remedy would be a misguided and ultimately fruitless effort to attain a socially appropriate result.

Rather than put the courts into an intrusive role, requiring that they keep close watch over the individual, the proposed

263. 851 P.2d 776 (Cal. 1993).
264. Id. at 778.
266. Mandler, supra note 2, at 1312.
Model Act employs monetary incentives to encourage the surrogate mother to give the fetus proper prenatal care. Section 4(f) permits the parties to the agreement to stipulate contractually to pay the surrogate a bonus if she provides all the care that is required.

Under Section 4(g), the proposed parents have no choice but to accept custody of the child after birth, regardless of its physical or mental condition. This is intended to avoid the case where the parents decide they do not want a developmentally disabled child and attempt to decline responsibility for it. There have been several such cases involving surrogates. The Act attempts to impress upon the proposed parents the seriousness of their obligation by also providing in a subsequent section that as a condition of obtaining judicial approval of the surrogacy agreement, they must post a surety bond or letter of credit with the court to indemnify the state for all costs incurred in the care and placement of the child if they refuse to accept custody.

Section 4(h) addresses who is in control of the surrogate's pregnancy and her right to have an elective abortion. This Section requires that the surrogate parenting agreement provide that the surrogate and her physician have the sole decision-making authority in this regard. This language is intended to put to rest any notion that the surrogate mother sacrifices her right to control her bodily integrity just because she has agreed to have a baby for someone else's benefit.

The practical consequence of this section is that not only is the surrogate's right to an abortion upheld, but also that she retains the right to make whatever medical decisions are necessary during the course of the pregnancy just as if it were her own child. Only the surrogate can determine ultimately whether she should undergo any particular procedure or treatment. Indeed, Section 4(f) does not even require her to submit to procedures, such as ultrasound and amniocentesis, designed to determine the sex of the fetus or to determine whether it exhibits any mental or physical defects. She may do so voluntarily, and the proposed parent(s) are permitted to compensate her for her cooperation.

267. See Keane & Breo, supra note 2, at 300–01; Tiller, supra note 10, at 420 & n.50. On the issue of custody, see Coleman, supra note 163, at 103–07 (describing the “best interests of the child” standard).

268. Model Act § 7(c).

269. Id.
The approach taken by the Act on the issue of decision making during pregnancy is consistent with the position of the courts in other cases involving bodily integrity. In *Curran v. Bosze*, the Illinois Supreme Court refused to compel three-year-old twins to submit to a bone marrow harvesting procedure in order to determine whether they could donate bone marrow to their half brother, who suffered from leukemia. Because the children were not old enough to have developed the power of self-determination and were not capable of making an informed, rational decision, the court would not apply the doctrine of substituted judgment, which is used to make decisions based on the presumed wishes of an incompetent patient. Instead, the court decided that the procedure was not in the best interests of the children, primarily because their mother objected. In so ruling, it affirmed the doctrine that a patient must consent to medical treatment of any kind before it can be administered and has the corresponding right to refuse any proposed treatment.

Perhaps even more relevant is the decision by the District of Columbia Court of Appeals in *In re A.C.* A hospital sought authority to perform a caesarean delivery of the fetus of a terminally ill patient, whose views on the subject could not be determined with any degree of accuracy. The court held that a patient has the right to decide what is to be done on behalf of herself and her fetus, and that substituted judgment should apply because the patient was not capable of giving informed consent. In announcing its decision it stated that any patient has the right to make an informed choice to accept or forego medical treatment and that courts should not balance the rights of the woman against the interests of the state. The duty of the court is to determine the patient’s wishes by any means available, and it must abide by those wishes unless there are truly extraordinary or compelling reasons to override them.
Initially, it may appear incongruous to permit a surrogate to have an abortion when to do so would defeat the entire purpose of the surrogate parenting agreement. The rationale is actually quite straightforward. Because the United States Supreme Court has decreed that a woman has a right to undergo an abortion under certain circumstances, the Act is not going to impinge upon the surrogate’s constitutionally protected freedom of choice. Even if the surrogate were agreeable, it is far from clear that a person could waive such a constitutional right contractually. The debate over this issue is academic for purposes of the Act, however, because it is predicated on the notion that a woman should not be required to give up any of her constitutional rights in order to become a surrogate mother. Moreover, because the surrogate can deprive the proposed parent(s) of custody of the child by exercising her right to keep her baby within the first seventy-two hours after birth, the proposed parent(s) are no worse off if the surrogate decides to abort.

(Mass. 1983) (refusing to order operation on pregnant woman to save the pregnancy when she was opposed to it for religious reasons); Susan Goldberg, Medical Choices During Pregnancy: Whose Decision Is It Anyway?, 41 Rutgers L. Rev. 591, 623 (1989) (delineating policy reasons against overriding choice of treatment, such as creating incentives against seeking medical treatment); Robertson, supra note 53, at 442 (arguing that a woman who decides to bring a child into the world loses the bodily freedom to harm it).

280. In the most recent decision on the subject, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), the Court for the first time moved away from strict adherence to the trimester analysis announced in Roe v. Wade, 410 U.S. 113 (1973), and toward a standard based upon whether an undue burden has been placed on the woman’s right to have an abortion. Planned Parenthood, 505 U.S. at 876, 877.

281. See Field, supra note 2, at 64–65; Coleman, supra note 163, at 85 & n.70; Mandler, supra note 2, at 1313–16.

282. Contrast the Act’s approach to decision making during pregnancy and the right to have an abortion with the approach of the Surrogate Parenting Agreement at issue in the Baby M case. Section 13 of the Surrogate Parenting Agreement prohibited the surrogate mother from having an elective abortion unless the child was physiologically abnormal. In re Baby M, 537 A.2d 1227, 1268 (N.J. 1988). The Agreement also required her to undergo testing to determine whether the fetus had any genetic or congenital defects, and, if so, required that she abort the fetus upon the proposed father’s demand. Id.

283. It is true that in ending the pregnancy she will deprive the proposed parent(s) of custody of the child and their own rights of parentage, but even if one were inclined to prohibit the surrogate from exercising this right, there is no way to enforce such a prohibition. If the surrogate wanted an abortion badly enough, she would simply go out and get one; how could she be prevented from doing so, short of keeping her in custody for the entire pregnancy?
While the statute therefore does not interfere with the surrogate's ability to exercise her right to have an abortion, it allows the parties to create a financial disincentive by forfeiting her parenting fee. This solution represents another attempt by the statute to accommodate reasonably the interests of the parents in obtaining a child as a result of the surrogacy relationship and the surrogate mother's right to control what goes on in her own body. This tension is an inherent element in the surrogacy process, a tension that the Act recognizes and seeks to ameliorate to the greatest extent possible.

Section 4(i) addresses the payment of the surrogate's fee in the event of physical misfortune, an issue that has caused much difficulty for the courts and commentators who attempt to determine the true purpose of her compensation.\textsuperscript{284} It states that, in the event the surrogate suffers a miscarriage, the proposed parents shall pay all expenses incident thereto and half of the parenting fee. Under Section 4(i)(2), when a stillbirth occurs, or the child dies after birth, the surrogate receives all of her expenses and her fee.

Medically necessary abortions and miscarriages are treated alike under Sections 4(h)(1) and 4(i)(1), respectively, because they are viewed as unintended events for which no particular party is responsible but which nevertheless result in the ultimate failure of the surrogacy relationship. Under these circumstances it is difficult to provide an equitable adjustment of the various parties' interests because no one is at "fault." The statute's approach is simply to apportion the financial detriment on an equal basis by awarding the surrogate one-half of her fee. She is entitled to some part of that fee because she partially performed the services for which she was to receive payment—to become pregnant, carry a child to term, and give birth. On the other hand, the proposed parent(s) should not have to pay the entire amount because they did not receive everything to which the parties agreed.

Others have tried to develop more complicated schemes for compensating a surrogate where a miscarriage occurs, with the payment depending upon the stage of the pregnancy. For example, one author has suggested that the proposed parent(s) be required to pay one-third of the surrogate's fee to her if the miscarriage happens within the first thirteen weeks and must pay two-thirds of the total fee in the event that the miscarriage

\textsuperscript{284.} See supra text accompanying notes 67–71, 81–85, 89–96.
occurs between the fourteenth and twenty-seventh weeks of gestation. This or a similar approach easily could fit within the conceptual framework of the Act. The Act’s requirement of an even division of the financial loss between the proposed parent(s) and the surrogate chiefly has the virtue of simplicity of administration, but it could be modified if the need to do so became apparent.

In the event of a stillbirth or the death of the baby during or after childbirth, the surrogate mother has fulfilled all of her obligations under the surrogate parenting agreement, and thus Section 4(i)(2) requires that the proposed parents pay her in full. Although this would be a great tragedy for all parties involved, it is unfortunately one of the risks of surrogate motherhood to which the proposed parent(s) are subject, as with any other pregnancy, and it should have no bearing upon their duty to compensate the surrogate mother.

Section 4(k) imposes additional financial duties upon the proposed parent(s) for the benefit of the surrogate or the child to be conceived. They must purchase term life insurance for themselves, payable in trust to the unborn child, plus term insurance on the life of the surrogate payable to a beneficiary of her choice. This insurance must stay in effect for six months after the birth of the child. The purpose of the former is to make sure there are sufficient financial resources to care for the newborn if one or both of the proposed parent(s) has died. The latter is to protect the surrogate’s family if she should not survive the rigors of pregnancy and childbirth. The statute does not use any particular figures for the amount of insurance required, leaving that determination to each state that adopts the law.

Although the provisions of all relevant statutes are deemed incorporated into the terms of any contract, Section 4(m) is added to impress upon the parties that they are not simply entering into a private, consensual arrangement to have a baby, but that the public policy of the state, as expressed in the proposed Model Act, is an integral part of their agreement.

285. Mandler, supra note 2, at 1309.
SECTION 5. PETITION FOR PRELIMINARY APPROVAL

(a) Within ninety (90) days after entering into a surrogate parenting agreement, and prior to commencement of any non-coital reproductive techniques to impregnate the surrogate, all parties to the agreement shall jointly file a petition with the court seeking preliminary approval of the agreement. The signature of a party to the petition shall constitute the entry of a general appearance in the action and that party's consent to the jurisdiction of the court to enter the various orders described in this Act.

(b) The petition shall contain the following:

1. The names and current place of residence of the petitioners;
2. The date of birth of all petitioners;
3. A statement that one or more of the proposed parent(s) is infertile, a description of the nature of the infertility, and a description of all efforts to have a natural or adopted child, including the length of time spent for each method;
4. A statement by the surrogate giving the name and address of counsel who represented her in negotiating the agreement, the date of birth of all of her natural children that she has given birth to without complication within the previous five years, and a description of any complications during pregnancy or childbirth that she has experienced at any time in the past;
5. The method by which the surrogate will be impregnated and the names of the physicians and facility where the procedure will be performed;
6. The fees to be paid to the surrogate; and
7. The relation, if any, between the proposed parent(s) and the surrogate.

(c) As exhibits to the petition, the parties shall attach an executed copy of the surrogate parenting agreement and copies of the results of all required physical, genetic and psychological examinations, testing and counseling.

(d) The petition shall be verified under oath by each of the petitioners.
(e) At the preliminary and final hearings on the petition described in Sections 6 and 7, the proposed parent(s) shall have the burden of proof on all issues.

COMMENTS TO SECTION 5

Section 5 is the first part of the statute that concerns itself with the method for judicial review and approval of the surrogate parenting arrangement among the parties. The need for such oversight before the surrogate becomes pregnant is exemplified by the conflicts that arose in In re Baby M and Johnson v. Calvert. Surrogate motherhood cannot be treated as an ordinary contractual relationship between private parties who only look to the courts as an arbiter of last resort. The lives of several people are profoundly affected, including that of a child yet to be conceived, and the vagaries of the marketplace are ill-equipped to order the relationships among them.

Therefore, it is the intent of the proposed Model Act to analyze the situation as a family law matter and treat it as much as possible as an adoption proceeding, with the concomitant protections for the birth mother and the child, as noted in Surrogate Parenting Associates Inc. v. Commonwealth ex. rel. Armstrong and In re Baby M. Obviously, there still must be a recognition of the differences between surrogate motherhood and adoption, principally in the pre-planning of the birth and payment of a fee to the mother, which occurs in the former. But by providing for advance judicial approval of the parenting contract and of the parties to the surrogate arrangement, as well as requiring a home visit by an investigator to the proposed parent(s) and permitting the surrogate mother to retain the child after birth, the statute attempts to ensure that the newborn ends up in a good home with nurturing parents who will provide a positive environment for raising a child.

The Act contemplates a two-part judicial procedure, with the court first holding a preliminary hearing to approve the surrogate parenting agreement and then, after the home visit, holding a final hearing sixty to ninety days after its

289. 704 S.W.2d 209 (Ky. 1986).
290. 537 A.2d 1227 (N.J. 1988).
initial order of approval. Although one of the purposes of this procedure is to give the investigator time to make the home visit and prepare his or her report prior to the court's final review, another purpose of the delay in judicial approval is to give the parties a "cooling off" period where they can re-think their commitment to the endeavor and withdraw if need be at an early stage when less is at stake.

Under Section 5, within ninety days after executing the surrogate parenting agreement, all the parties are required to file a petition with the court to obtain preliminary approval of that document. The petition must show on its face that the parties qualify for surrogate parenthood, i.e., that one or more of the proposed parent(s) is infertile and that the surrogate is of the proper age and has not experienced any problems with a pregnancy within the last five years. It also requires that the agreement itself, plus the results of all genetic, physical, and psychological testing, be attached as exhibits to the petition. The petition must be verified as true and correct by each of the petitioners. Because the proposed parent(s) are the primary parties interested in obtaining the court's approval of the surrogate arrangement, it is appropriate that they have the burden of proof on all factual matters.

SECTION 6. PRELIMINARY HEARING ON PETITION

(a) The court shall hold a preliminary hearing on the petition within thirty (30) days after filing. It shall appoint a guardian ad litem to represent the interests of the child to be conceived under the surrogate parenting agreement. The court shall also appoint counsel for the surrogate if she is not already represented by counsel, except in cases of related surrogacy, where the surrogate need not be represented by counsel.

(b) The court shall enter an order granting preliminary approval of the surrogate parenting agreement if it finds, upon a preponderance of the evidence that:

(1) The court has jurisdiction over the petitioners.

(2) The proposed parent(s), the surrogate, and surrogate's husband, if any, meet all the eligibility requirements contained in this Act.

(3) The proposed parent(s), the surrogate, and the surrogate's husband, if any, have each executed the surrogate
parenting agreement in the exercise of their informed consent and understand all of its terms and provisions and the purpose and effect thereof.

(4) The surrogate parenting agreement contains all the provisions required by Section 4 of this Act and includes no provision in conflict with the terms hereof or which the court otherwise finds unconscionable.

(5) All terms of the surrogate parenting agreement have been agreed upon by the parties thereto as the result of negotiations conducted in good faith. No party has been induced to become a signatory to the agreement as the result of any misrepresentation, omission of material fact, coercion, or duress.

(6) All required physical, genetic, and psychological examinations, testing and counseling required hereunder have been completed by the petitioners and disclose that:

(A) The proposed parent(s), surrogate, and surrogate’s husband, if any, are physically and psychologically capable of performing their duties and responsibilities under the surrogate parenting agreement;

(B) There is less than a twenty-five percent chance that a genetic disease, defect or abnormality will be passed on to the child to be conceived under the surrogate parenting agreement;

(C) None of the parties to the agreement are currently in treatment for alcoholism or chemical dependency or have received such treatment within three years prior to the execution of the agreement;

(D) One or more of the proposed parent(s) is infertile;

(E) The surrogate is in good physical health, is not infected with any sexually transmitted disease or the HIV virus, is physically and psychologically able to undergo pregnancy and childbirth without serious risk to her physical or mental health or that of the fetus, and both she and her husband, if any, are psychologically capable of turning over the child to the proposed parent(s), thereby relinquishing her parental rights;

(F) The proposed parent(s) and donor, if known, are in good physical condition and are not infected by any sexually transmitted disease or the HIV virus, and
(G) The proposed parent(s) do not have any mental illness, defect, or disorder that would impair their ability to raise a child.

(7) The proposed parent(s) have attempted to have a child through means other than sexual intercourse, whether via adoption or otherwise, for at least two (2) consecutive years prior to entering into the agreement.

(8) The surrogate's expenses incurred prior to filing the petition and any part of her fee earned to date have been paid in full by the proposed parent(s).

(9) All petitioners understand the nature, purpose, and effect of the proceedings before the court.

(c) At the hearing, in addition to the evidence presented by the parties, the court may require the submission of such additional information or documentation about the petitioners or the agreement, require the testimony or further testimony of any of the petitioners, or require the parties to produce any other individual for examination, as the court determines is necessary.

(d) After having reviewed all the evidence, the court shall enter an order either granting or denying preliminary approval to the surrogate parenting agreement. If the court enters an order denying the petition, it shall specify the reasons therefor. If in the court's judgment the bases for denial of the petition can be remedied by the petitioners, then the denial shall be without prejudice, and the court shall grant the petitioners such additional time as it deems appropriate for the filing of an amended petition. Should the court determine that the bases for denial of the petition are not capable of being remedied the order denying the petition shall be with prejudice.

**COMMENTS TO SECTION 6**

The preliminary review provided for in Section 6 is intended to ensure that the parties have met all the initial requirements imposed by the statute—that the surrogate parenting agreement was voluntarily executed without duress, that it contains all of the provisions required by Section 4, that the results of the various tests and examinations do not exclude any of the petitioners from participation in surrogate parenting, and
similar matters. Under Section 6(a), the court is required to hold the preliminary hearing within thirty days after the petition is filed, with a guardian ad litem appointed to represent the unborn child and counsel appointed for the surrogate if she is not already represented by counsel of her own choosing. Although this section is silent on this point, the cost of the surrogate’s counsel is to be borne by the proposed parent(s) pursuant to Section 4(b).

Under Section 6(b), the court is authorized to enter preliminary approval of the surrogate parenting agreement provided each of the following conditions is met:

(1)–(3) The court has jurisdiction over the parties, who meet all of the eligibility requirements of the proposed Act and who have each executed the agreement in the exercise of their informed consent. The term “eligibility requirements” is a reference to the definitions of surrogate, proposed mother, and proposed father contained in Section 2.

(4) The surrogate parenting agreement contains all of the terms required by this Act and none of them conflict with the provisions hereof; in addition, there are no other contract terms that the court finds to be unconscionable. This last requirement gives the court the means to invalidate contractual language that, although not specifically contrary to the statute, is determined to be onerous, one-sided, or especially unfair. It is contemplated that the court would strike a provision as unconscionable in order to protect the child or the surrogate; it seems quite unlikely that the proposed parent(s) would need the protection of the court for this purpose.

(5) There is a separate requirement that the surrogate parenting agreement have been negotiated in good faith in the absence of any coercion, duress, or misrepresentation.

(6) The results of the physical and psychological tests must show that all parties are physically and emotionally able to perform their duties and responsibilities under the parenting agreement. Part of this requirement, which is made explicit in Section 6(b)(6)(E), is that the surrogate is in proper physical condition to undergo the rigors of childbirth. Additionally, she and her husband, if she has one, must be psychologically able to part with the child, even though she has the right to change her mind and retain custody of it.

A separate requirement is that the genetic tests must reveal a less than twenty-five percent chance of a genetic disease or defect being passed on to the child to be conceived. The Act
does not attempt to list the objectionable genetic defects that would qualify under this section because there are so many possible types of genetic abnormalities, with more being discovered all the time, that it would be impossible to keep the statute up to date. Also, it would be inappropriate to choose which genetic defects were permitted in the child and which were not. A blanket prohibition is a far more equitable way of handling the issue and has the advantage of steering clear of the whole subject of eugenics. The standard of a less than twenty-five percent chance of passing along a genetic defect is not written in stone, but anything higher seems to carry too much of a risk to the child.

None of the participants is permitted to be in treatment for alcoholism or chemical dependency or to have received any such treatment in the three years prior to execution of the parenting agreement. This is designed as a prophylactic measure to weed out individuals who have had recent alcohol or chemical dependency problems. If a person had such difficulties in the past, three years without the need for treatment seemed to be a reasonable period to indicate that she has overcome these particular problems.

At least one of the parent(s) must be infertile. Recall that that term is defined very broadly to include the inability to conceive a child during one year of sexual intercourse as well as being at risk for transmitting a genetic disease or defect. For women, this also includes the inability to carry a pregnancy to term or to undergo pregnancy and childbirth without serious medical risk to herself or the fetus. The reason for the inclusion of this prerequisite is simple: the philosophy of the Act is that surrogacy is intended only to be used by people who cannot obtain a child in any other way. Those who desire to use the services of a surrogate mother simply because they do not want to undergo the inconvenience of pregnancy and childbirth will not be permitted to do so, even though some commentators believe that it would be constitutionally impermissible to bar the use of a surrogate in that situation.

(7) This overall philosophy is also apparent in the requirements imposed by Section 6(b)(7), which provides that the proposed parent(s) have attempted to have a child through

291. Model Act § 2. The traditional definition of infertility is the inability to conceive after one year of unprotected intercourse. Hey, supra note 27, at 776 n.5.
292. Robertson, supra note 53, at 429–32.
means other than sexual intercourse for at least two consecutive years prior to entering into the surrogate parenting agreement. This can include adoption or any means of assisted reproduction, such as IVF or artificial insemination.

(8) All of the surrogate’s expenses to date must have been paid in full.

(9) The petitioners understand the nature and purpose of the proceeding.

The court under Section 6(c) may require the submission of any evidence it deems necessary to assist it in rendering its decision or require the testimony of any of the petitioners or third persons. The purpose is to give the court very wide latitude in determining exactly what kind of evidence it needs in order to find all of the elements listed above before granting its preliminary approval of the agreement. The Act contemplates that in ruling upon a petition to approve a surrogate parenting contract, the judge will take a very active role in the proceeding, far more active than is normally the case.

The court shall thereafter issue its ruling. If the petition is denied, the reasons for the denial must be stated for the record. To the extent the deficiencies in the petition can be remedied, denial should be without prejudice and the petitioners granted leave to file an amended petition. Otherwise the denial of the preliminary approval should be with prejudice.

SECTION 7. FINAL HEARING ON PETITION

(a) If the court enters an order granting preliminary approval of the surrogate parenting agreement, it shall set the matter for final hearing sixty (60) to ninety (90) days thereafter. Except in a related surrogacy, the court shall order an investigation, to be completed prior to the final hearing, into the fitness of the proposed parent(s) in the same manner as under [the adoption laws of this state], including a home visit to the proposed parent(s)’ residence. The marital status of the proposed parent(s) or their sexual orientation shall not be considered in making a fitness determination. The information obtained as a result of the investigation shall be presented to the court in a written report that shall be made available to all the parties. In no event shall any facts set forth in the report be considered
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at the final hearing unless established by competent evidence. The proposed parent(s) shall be given the opportunity to rebut any adverse findings of the report, including the right to examine the individual(s) who made the investigation. The report shall be filed with the record of the proceeding.

(b) At the final hearing, each of the petitioners shall testify regarding their continued desire to proceed with the surrogate parenting agreement, their understanding of and agreement with the terms thereof, and their ability to carry out their obligations thereunder, including the surrogate's agreement to give up her parental rights in the child to be conceived under the agreement. The proposed parent(s) shall submit evidence that the required life insurance policies have been obtained. The court may require any other evidence or testimony from the petitioners or any other persons that it determines is necessary. Except in cases of related surrogacy, as a condition of obtaining final approval of the surrogate parenting agreement, the proposed parent(s) must deposit the following with the court:

1. A surety bond from a surety company licensed to do business in [this state] or a letter of credit from a financial institution regulated by [this state] or the United States government in the minimum amount of _____Dollars ($__) to guaranty payment of all the surrogate's expenses and the parenting fee.

2. A surety bond or letter of credit from like sources in the minimum amount of _____Dollars ($__) to indemnify [this state] and its agencies, instrumentalities, and subdivisions for all costs incurred in the care and placement of a child born to a surrogate where custody is refused by the proposed parent(s) or where they are unable to accept custody for any reason.

3. The court may, in its discretion, after an order of final approval has been entered, order the proposed parent(s) to increase the amount of any surety bond, letter of credit, or life insurance policy required hereunder if the circumstances warrant.

(c)(1) The court shall enter a final order of approval of the surrogate parenting agreement upon finding, based upon a preponderance of the evidence, that:

(A) There has been no material change in any of the petitioners' physical or psychological condition since the
entry of the order granting preliminary approval to the surrogate parenting agreement that would affect their eligibility for surrogate parenting under this Act;

(B) All life insurance and surety bonds or letters of credit required by Sections 4(k) and 7(c) are in place in the proper amounts;

(C) The proposed parent(s) will provide a nurturing and wholesome environment for the child who is to be born to the surrogate and will be able to meet all of the child's physical, emotional, and financial needs;

(D) All amounts owing to the surrogate under the surrogate parenting agreement have been paid; and

(E) All requirements of this Act have otherwise been met.

(2) The court's order shall discharge the guardian ad litem and any counsel appointed for the surrogate and authorize the parties to the agreement to begin procedures for non-coital reproduction. It shall further provide for the termination of the surrogate's parental rights effective seventy-two (72) hours after she gives birth, or up to thirty-three (33) days after giving birth if the provisions of Section 9(g) apply, unless the surrogate mother elects to keep the child as provided in Section 9, in which case her parental rights shall remain in full force and effect. The order shall also include the written address of all parties for any notices to be sent pursuant to Sections 8 or 9 hereof.

(d) Except in cases of related surrogacy, confidentiality of the preliminary and final hearings conducted under Sections 6 and 7, and the child's right to learn the identity of the surrogate shall be governed by the same standards as provided in [the adoption laws of this state].

(e) Except in cases of related surrogacy, if the court enters an order denying either preliminary or final approval of the surrogate parenting agreement, the proposed parent(s) shall remain liable for payment of all the surrogate's expenses incurred through the date of the order; provided, however, that if the court's denial was predicated upon the surrogate's current physical condition, medical history, prior experience with pregnancy and childbirth, or any other factor concerning her eligibility to serve as a surrogate, and such facts were not previously disclosed or were misrepresented to the proposed parent(s), then the proposed parent(s) shall not be required to pay any of the
surrogate’s expenses and the court shall order the surrogate to repay all such amounts expended on her behalf as well as any part of the parenting fee she had received. In addition, the surrogate shall reimburse the proposed parent(s) for all of their medical and other expenses, including reasonable attorneys’ fees, incurred since the execution of the surrogate parenting agreement.

(f) After entering a final order approving the surrogate parenting agreement, the court shall retain jurisdiction of the matter until the child born to the surrogate has reached the age of three (3) months.

(g) Except in cases of related surrogacy, after entry of a final order of approval, the petitioners may not alter or amend the surrogate parenting agreement without the court’s consent, except as otherwise provided in Section 8 regarding termination of the agreement.

(h) The marriage, legal separation, or divorce of a surrogate subsequent to the final order of approval of the surrogate parenting agreement shall have no effect upon the validity of the court’s order, and the surrogate’s new husband is not required to consent to the parties’ agreement.

COMMENTS TO SECTION 7

If the court preliminarily approves the surrogate parenting agreement, a final hearing is scheduled for sixty to ninety days thereafter. During that time, an investigation will be made into the fitness of the proposed parent(s) in the same manner as under the state’s adoption laws, including a home visit to their residence. The purpose of this is to make sure that the proposed parent(s) will be proper parents for the child, able to provide a wholesome environment that meets the child’s physical, emotional, and financial needs. This section underscores the point that the state has a vital interest in the surrogate parenting process and in protecting the child to be conceived as part of that process under its parens patriae power.

Section 7(a) makes clear that neither the marital status of the proposed parent(s) nor their sexual orientation is to be considered in determining fitness. This language was included not
because of a belief that unmarried and homosexual people have a constitutional right to have access to all available technology in aid of reproduction but because of fairness and equity considerations. If they otherwise meet all the tests for being good parents, what is the justification for excluding them from participation in surrogate parenting arrangements? As explained in the discussion of constitutional issues, no state bars single people from adopting, and no state that permits the use of IVF with sperm donors requires the woman to be married. This hardly lends credence to the notion that the states have shown a preference for married couples as parents rather than unmarried individuals, at least as far as adoption and assisted reproduction are concerned.

Section 7(b) requires that each of the petitioners testify at the final hearing so the court can determine whether they still intend to proceed with the surrogate parenting arrangement and whether they understand the terms of the contract and can carry them out. As with the preliminary hearing, the court can consider any other evidence it deems relevant to the issues.

Section 7(c) requires the posting of two surety bonds or letters of credit with the court by the proposed parent(s). The amounts have not been specified in order to allow each state to determine for itself what it considers appropriate. The first is to guarantee payment of all of the surrogate's expenses and her parenting fee. The other is for the benefit of the state in the event the proposed parent(s) refuse custody of the child; it is intended to cover all expenses of caring for that child until a suitable permanent home can be found for it. The court is also given the authority in §7(3)(c) to order the proposed parent(s) to increase these amounts if needed.

Under Section 7(d)(1) the court will enter an order of final approval of the surrogate parenting agreement if it finds that there has been no material change in any of the petitioners' physical or psychological condition since the entry of the order of preliminary approval, all life insurance and the surety bonds or letters of credit are in place, the proposed parent(s) have been determined to be fit, all amounts owed by them to

293. See supra text accompanying notes 216–31.
294. See generally supra Part III.
295. See supra text accompanying note 221.
296. See supra text accompanying notes 222–23.
297. See MODEL ACT § 11 regarding the ramifications of the parents' refusal to take custody of the child.
the surrogate have been paid to date, and all requirements of the statute have otherwise been met. The order of final approval will discharge the guardian ad litem and authorize the parties to begin procedures for non-coital reproduction. The order also will terminate the surrogate's parental rights effective seventy-two hours after the birth of the child unless Section 9(g) applies, which extends for up to thirty days the surrogate's right to decide to keep the child if she suffers from some physical or psychological condition which prevents her from making this choice during the initial seventy-two hour post-partum period. If she chooses to keep the baby as provided in Section 9, then her parental rights will not be affected by the court's order. After entry of the final order, the parties cannot amend the agreement in any manner without first obtaining the court's consent, though they may terminate it by following the procedures set forth in Section 8.

Section 7(e) addresses confidentiality of the proceedings and the child's right to know the identity of the surrogate. These are quite complex issues that involve the possibly conflicting interests of several parties. These are also issues which are not especially unique to surrogate parenthood per se. Therefore, it would be appropriate simply to incorporate the state's confidentiality laws as they apply to adoptions rather than having an entirely separate confidentiality statute applicable to surrogate parenting arrangements. The legislatures have already gone through the process of determining where the public interest lies in the area of confidentiality of adoptions, and there is no good reason to upset that prior judgment.298 The court retains jurisdiction of the matter after the child is born in order to implement Section 9 of the Act if the surrogate mother exercises her right to keep the child. The three-month period provided for in Section 7(g) is sufficient for the court to hold the hearing required by Section 9(d) within the time frame stated therein and to accommodate a hearing delayed by the application of Section 9(g).

298. For example, the California Family Code provides, inter alia, that records of adoption proceedings are not available for inspection to anyone except the parties and their attorneys, unless authorized by a judge upon a showing of good cause in exceptional circumstances. CAL. FAM. CODE § 9200-06 (West 1994). With the written consent of the adoptee's birth parents, their identity and location may be disclosed to the adopted person once she has reached the age of 21. Id. § 9203(a)(1). Likewise, parents who have given up a child for adoption can learn the adopted name and whereabouts of their child once she has reached age 21 and has given her consent in writing. Id.
Finally, under Section 7(i), the proposed Model Act provides that the subsequent marriage, legal separation, or divorce of the surrogate will have no effect on the validity of the court's final order of approval, and the consent of the surrogate's new husband to the agreement is not needed. This provision was added to simplify matters in the event the surrogate's marital status changed during the course of the parenting agreement; it would be too cumbersome procedurally if further court hearings were needed every time this occurred. Moreover, it would add an unnecessary level of uncertainty for the proposed parent(s). To the extent the surrogate's new husband prefers that she not give up the child, he could try to convince her to exercise her rights to retain custody in the first seventy-two hours after birth.

SECTION 8. TERMINATION OF AGREEMENT

Except in cases of related surrogacy:
(a) Prior to the entry of an order of final approval of a surrogate parenting agreement by the court pursuant to Section 7(d), the surrogate or the proposed parent(s) may terminate the agreement by serving written notice upon the other parties by personal delivery, certified mail, return receipt requested, or by any other method for delivery of documents generally accepted in commercial practice, to the address stated in the final order of approval or any subsequent address filed with the court upon notice to all parties. Termination will be deemed effective upon personal delivery to any of the parties themselves, or three days after deposit in the United States mail or with such delivery service, whichever is applicable. Service may be made by any of the parties to the surrogacy agreement, their counsel, or anyone eighteen years of age or older who has not previously been declared mentally incompetent. If there is a pending proceeding in court for approval of the agreement, a copy of the notice of termination also shall be provided to the court within seven days after delivery, with an affidavit of service. Upon such termination the surrogate parenting agreement will be considered null and void, and all parties thereto will be relieved of any further duties and obligations thereunder. The agreement may provide, in the
event of termination prior to court approval, for any financial adjustment between the parties as they may agree, which provision shall survive the termination of the agreement.

(b) The surrogate has the right to terminate the surrogate parenting agreement at any time after court approval and prior to the birth of the child as stated in this Section 8(b). She shall provide written notice of termination to other parties to the agreement, with a copy thereof filed with the court, as stated in Section 8(a). The court shall thereupon enter an order terminating the surrogate parenting agreement and vacating its previous order(s) of approval. If the surrogate is pregnant at the time, she shall be considered the legal mother of the child to be born to her and her husband, if a party to the parenting agreement, shall be considered the legal father, unless a different individual is established as the father in a paternity proceeding. The entry of such an order of termination will relieve all parties to the agreement from any further duties and obligations thereunder. The proposed parent(s) shall not be liable for any of the surrogate’s expenses nor for the parenting fee, and the surrogate shall repay all such amounts previously paid on her behalf plus all costs incurred by the proposed parent(s) to date, including reasonable attorneys’ fees.

The surrogate’s right to terminate the surrogate parenting agreement after the birth of the child is governed by the procedure set forth in Section 9.

(c)(1) After court approval, but prior to the surrogate’s becoming pregnant, the proposed parent(s) may terminate the surrogate parenting agreement by sending written notice of termination to the surrogate and to the court in the manner provided for in Section 8(a). The court shall thereupon enter an order terminating the agreement and vacating its prior order(s) of approval, which shall relieve all parties of any further duties and obligations thereunder. The entry of such an order is expressly conditioned upon proof of payment to the surrogate of all her costs and expenses to date, including any attorneys’ fees incurred by virtue of the termination proceeding hereunder.

(2) The surrogate parenting agreement shall not be terminated by the proposed parent(s) subsequent to the surrogate becoming pregnant unless with the consent of the surrogate and the court that entered the order of final
approval of the agreement. Written notice of any such intended termination and filing a copy thereof with the court shall be required by Section 8(a). The court shall conduct a hearing and permit such termination only if it finds that the consent of the surrogate was made voluntarily and without coercion or while under duress. Upon making such a finding and determining that the proposed parent(s) have paid all the surrogate’s costs and expenses to date, including whatever portion of the parenting fee has been earned and reasonable attorneys’ fees, the court shall vacate the previous orders approving the agreement, reinstate the surrogate’s parental rights, and declare the surrogate parenting agreement to be terminated. Upon entry of the order, the proposed parent(s) shall be relieved of all legal responsibility for the child to be born to the surrogate. Parentage of the child shall be as stated in Section 8(b).

COMMENTS TO SECTION 8

Section 8 governs the procedures for termination of the surrogate parenting agreement by the parties. These procedures vary depending upon whether the termination occurs before or after the court’s final order of approval and whether the surrogate or the proposed parent(s) wish to terminate the agreement. The easiest situation is that described in Section 8(a) where termination occurs prior to the approval order. All that is required is that one party notify the other in writing; if a proceeding in court has already been initiated, a copy of the notice is also sent to the judge. No meaningful judicial involvement is contemplated however; this particular procedure is entirely self-effectuating. Upon receipt of the notice, the surrogate parenting agreement is deemed null and void. Rather than restricting the acceptable methods of service of notice to personal delivery or through the use of the U.S. mails, Section 8 (along with Section 9(b) regarding notice of intent to retain the child) permit service by any generally accepted method of delivering original documents used in general commerce (e.g. U.P.S., Federal Express, etc.).

The only possible issue at this juncture would be the proposed parent(s)’ expenses to date, the surrogate’s expenses that they have paid, and payment of any portion of the parenting
fee. These are not deemed of sufficient importance to require any particular treatment by the proposed Model Act. Rather, the parties are left to determine for themselves whether there will be any financial adjustment between them.

The rights of the surrogate and proposed parent(s) to terminate the agreement subsequent to the entry of the order of final approval are treated differently. Section 8(b) gives the surrogate the absolute right to terminate at any time prior to the birth of the child. She must provide written notice to the proposed parent(s) using any of the methods stated therein and file a copy with the court. The court will thereupon enter an order terminating the agreement and vacating its prior orders of approval. If the surrogate is pregnant at the time, she is to be considered the legal mother of the child, and her husband, if he was a party to the parenting agreement, becomes the legal father, unless paternity is established in another individual who was not a party to the agreement. In this situation, the statute does require that the surrogate repay the proposed parent(s) all amounts they have spent on her behalf and on their own behalf, including reasonable attorneys’ fees.

The issue of at what point a surrogate mother can terminate a parenting agreement is a complex one because it is inextricably tied in with the related question of termination of her parental rights under the agreement. The proposed Act essentially treats the two as co-extensive. In other words, because the surrogate mother has the right to change her mind for seventy-two hours after childbirth (or up to thirty-three days after birth if Section 9(g) applies) and can effectively terminate the agreement at that point by retaining custody of the newborn, it follows logically that she should have the same right prior to the birth to end the contract simply by sending notice. This is also true for those provisions of the proposed Model Act that give her and her physician of choice the sole decision-making authority concerning the management of the pregnancy, including the right to an elective abortion.299 Having an abortion is an extra-contractual method of terminating the pregnancy, but again, the end result is the same. That is also why the court’s final order of approval entered under Section 7(d) provides that the surrogate’s parental rights with regard

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299. MODEL ACT § 4(h).
to the child to be conceived remain in effect until seventy-two hours or thirty-three days after birth, whichever is applicable, when they automatically terminate unless she elects to retain custody under Section 9.

The entire statutory framework is predicated upon the notion that, except for certain financial reimbursements to the proposed parent(s), the surrogate mother can freely back out of the agreement after going through childbirth, within certain time parameters. These provisions of the statute have been included to give her the maximum degree of leeway possible, so that she is never made to feel that the child is being taken away from her involuntarily. To reiterate, the proposed Model Act does not view the surrogate parenting agreement under traditional contract standards, which would not put the proposed parent(s) in such a relatively precarious position, but analyzes the proposed transaction under the auspices of family law using the adoption analogy.

In contrast, the Uniform Act is structured differently. Prior to pregnancy, the surrogate can terminate the contract for any reason, with proper notice. Once pregnant, however, the surrogate who has provided the egg for assisted conception under the parenting agreement has the right to decide to terminate and keep the child only up to 180 days after the last insemination pursuant to the agreement. The Comments to these sections of the Uniform Act reject both the contract and adoption models for surrogate parenting arrangements and use the 180-day period because it roughly approximates the time during which a surrogate has the constitutional right to have an abortion, i.e., during the first two trimesters of the pregnancy. Beyond that time, the surrogate is irrevocably bound to go through with the agreement.

The problem with this arrangement, aside from the obvious fact that it does not permit withdrawal by the surrogate mother after giving birth, is that it is unclear when the surrogate's parental rights are extinguished. No statement is made in the Uniform Act to that effect. Section 5, entitled "Surrogacy

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300. A contract that permits one of the contracting parties to withdraw unilaterally would be unenforceable because it is based upon an illusory promise. Restatement (Second) of Contracts § 77 cmt. a (1979).
302. Id. § 7(b).
303. Id. § 7 cmt.
Agreement," describes it as a written agreement, *inter alia*, whereby the surrogate relinquishes all of her rights and duties as a parent of a child to be conceived through assisted conception. The court order provided for in Section 6 is also silent on the timing of the relinquishment of parental rights, although it does state in 6(b) that the order approving the surrogacy agreement also should declare that the intended parents are the parents of a child to be conceived through assisted conception pursuant to that agreement.

Does the foregoing language mean that the parties can agree that the surrogate's parental rights end at the time of conception of the child? Apparently not, because the Comments noted earlier discuss the surrogate's constitutional right to an abortion. Perhaps her parental rights terminate exactly 180 days after conception. If that is the case, it would seem that the proposed parent(s) would have the right to manage the pregnancy during that entire last trimester. This could easily lead to conflicts between them and the surrogate that the Uniform Act fails to address. For example, what if the surrogate does not obtain proper prenatal care during this time? What if she began smoking or drinking alcoholic beverages? Would the proposed parent(s) have redress in the courts? It seems doubtful that the surrogate mother would be subject to the traditional methods by which courts enforce their orders, that is, through their contempt powers. Yet the Uniform Act seems to contemplate such a procedure because it provides in Section 6(e) that the court conducting the proceedings has continuing jurisdiction of all matters arising out of the surrogacy until the child is 180 days old.

More serious conflicts could arise between the parties during the last trimester. What if during the pregnancy unforeseen problems develop that put the surrogate in danger, and her physician recommends an emergency cesarean section in the twenty-seventh week? Do the proposed parent(s) have the right to choose the appropriate medical procedure in lieu of the surrogate? Can they get an injunction if the surrogate insists on following her doctor's advice? Scenarios such as these have generated much criticism of the entire surrogacy procedure.

304. *Id.* § 5(a), Alternative A.
305. *Id.* § 6(b).
306. See id. § 7 cmt.
307. *See Dougherty, supra* note 240, at 1587; *Krimmel, supra* note 27, at 37.
Yet the Uniform Act fails to clarify what would occur in that situation and leaves open the possibility that a private medical decision involving a perfectly competent adult could be subject to the veto of a third party or made by a court of law. Such a result should not be permitted under any circumstances, and that is one reason Section 7(d)(2) of the proposed Model Act makes it clear that the surrogate's parental rights remain in full force and effect throughout the course of the pregnancy.

Section 8(c) of the proposed Model Act covers the situation in which the proposed parent(s) desire to terminate the agreement after the court has entered its final order of approval. Under Section 8(c)(1), the termination is sought prior to the time the surrogate becomes pregnant, and the procedure mirrors that described in Section 8(b). Written notice must go to the surrogate as well as to the court that entered the final order of approval. There is no hearing as such, but the court only enters the termination order upon proof that all the surrogate's expenses have been paid.

It is conceivable that after the surrogate becomes pregnant, the parties might agree mutually to terminate the agreement and permit the surrogate to keep the child. The procedure set forth in Section 8(c)(2) is designed for this situation. Here, the court has a more active role and does hold a hearing to ensure that the surrogate mother voluntarily agreed to abandon the contract without coercion or while under duress, because she is the one who will now have to accept legal responsibility for the child. Upon making such a finding, the court will enter an order of termination of the surrogate parenting agreement, vacate the final order of approval, and reinstate the surrogate's parental rights. The proposed parent(s) no longer will have any responsibility for the child. The surrogate mother will be considered the legal mother. Her husband, if he was a party to the parenting agreement, will be the legal father unless paternity is established in an individual who was not a party to the agreement, in a separate proceeding under the state's parentage laws.

**SECTION 9. SURROGATE'S RIGHT TO RETAIN CUSTODY OF CHILD**

(a) For the first seventy-two (72) hours after giving birth, the surrogate mother shall be entitled to remain with the
child to the exclusion of the proposed parent(s), unless she waives this right.

(b) During that period, the surrogate has the right to exercise her choice to keep the child permanently as its legal mother, notwithstanding the provisions of the surrogate parenting agreement. To effectively assert this right, she shall provide written notice to either of the proposed parent(s) (if more than one) at the address stated in the final order of approval or to any subsequent address filed with the court upon notice to all parties. Such written notice of intent to retain the child shall be delivered in person, by certified mail, return receipt requested, or in any other manner of delivery of documents generally accepted in commercial transactions. The surrogate's signature on such notice must be witnessed or notarized. The notice must actually be delivered personally within the seventy-two (72) hour period after birth, or deposited in the United States mail or with such other delivery service within the same time. A stamped receipt showing the date and time of deposit of the surrogate's written notice shall be prima facie evidence thereof. Service may be effected by the surrogate herself, her spouse, her attorney, or any other individual eighteen (18) years of age or older, who has not been previously adjudged mentally incompetent. The failure to adhere to all of the requirements contained in this section will result in a waiver of the surrogate's right to retain custody of the child, except as provided in Section 9(g).

(c) The surrogate shall also provide a copy of the written notice, with affidavit of service, to the court that entered the final order of approval within seven days after service of the notice.

(d) Upon receipt of such notice, the court shall schedule a hearing to determine whether the surrogate mother has exercised her right to keep the child in conformity with the requirements of this Section. The surrogate mother shall be represented by counsel at such hearing in the same manner as described in Section 6(a). Such hearing shall be placed on the court’s calendar on an expedited basis and will take precedence over all other matters. The court’s final order in such hearing shall be entered within thirty (30) days after the commencement thereof. The surrogate mother shall retain custody of the child during the hearing.
(e) If the court determines that the surrogate mother has complied with the notice provisions of Section 9(b) it shall enter an order as follows:

(1) Vacating its previous order terminating the parental rights of the surrogate;

(2) Declaring the surrogate parenting agreement to be void ab initio;

(3) Providing that the surrogate mother is the legal mother of the child under [the parentage laws of this state];

(4) Stating that the proposed parent(s) have no legal responsibility for the child;

(5) Providing that if the surrogate is married and has the same husband that she did at the time of entering into the surrogate parenting agreement, her husband is the legal father of the child, unless another individual, excluding the proposed father or donor, is shown to be the legal father in a paternity proceeding;

(6) Ordering [the applicable state agency] to issue a birth certificate in the name of the surrogate as mother and her husband, if any, as father, unless a different father has been established, who shall be named on the certificate; and

(7) Requiring the surrogate to repay all costs and expenses paid on her behalf by the proposed parent(s), including her parenting fee, plus all costs incurred by the proposed parent(s) on their own behalf pursuant to the surrogate parenting agreement, including reasonable attorneys' fees.

(f) If the court determines that the surrogate has not complied with the notice provisions of Section 9(b), it shall order the surrogate to immediately turn over custody of the child to the proposed parent(s).

(g) Notwithstanding anything stated to the contrary in Sections 9(a)—9(f), the surrogate mother may deliver notice of her intent to retain custody of the child beyond the period set forth in Section 9(b) if she has experienced any medical or psychological condition that prevents her from acting within the seventy-two (72) hour period after birth. In that case, the beginning of the seventy-two (72) hour period is tolled until the precipitating event or condition has been ameliorated to the point that she has become capable of providing the required notice, provided, howev-
er, that the tolling provided herein shall not exceed thirty (30) days from the date of the child’s birth. If the surrogate mother has not provided written notice of her intent to keep the child within a maximum of thirty-three (33) days from the date of birth, the provisions of Section 9(g) shall no longer apply and the proposed parent(s) shall be entitled to immediate custody of the child regardless of the surrogate’s mental or physical condition.

COMMENTS TO SECTION 9

Section 9, which has been referred to several times previously, is consciously patterned after adoption laws. After the child’s birth, the surrogate is entitled to spend the first seventy-two hours with the newborn to the exclusion of the proposed parent(s) unless she agrees to let them see the baby. During that period, notwithstanding anything that has transpired previously, the surrogate has the right to decide to keep the child as its lawful mother. In order to take advantage of this choice, she must strictly comply with the notice and other provisions set forth in Section 9(b). Compliance may be had by providing written notice to either of the proposed parent(s) in the manner provided. The notice must bear the notarized or witnessed signature of the surrogate mother; otherwise the statute does not prescribe any particular form of notice. A statement to the effect of, “I’ve changed my mind” or “I want to keep my baby” is sufficient.

Section 9(b) does not require that the attempt at service be successful in order for the surrogate to have complied with the statute. In other words, if she sends notice of her election by certified mail or other delivery service to the address of the proposed parent(s) stated in the final order of approval within the seventy-two hour period, she has met the requirements of

308. Cf. Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 212–13 (Ky. 1986) (citing KY. REV. STAT. ANN. §§ 199.601(2) (repealed by Acts 1986, Ch. 423, § 198; current version at § 625.040), 199.500(5) (Michie 1995), which give the biological mother five days after birth to change her mind about surrendering her child for adoption). Likewise, section 9B of the Illinois Adoption Act, 750 ILL. COMP. STAT. ANN. 50/9 (West 1995), which does not permit a birth mother to consent to adoption within the first 72 hours after birth, and permits the natural father of the child to revoke his prior consent to the adoption by written notice within that initial 72 hour period.
the law. The fact that service was refused or even that the notice was delivered to the wrong address by mistake has no effect upon its validity. The law requires only that the surrogate mother take certain actions to change her mind effectively about keeping the baby; once she has done that, events that are out of her control will not change the result. Notice also must be sent to the court within seven days of the delivery to the prospective parent(s).

A hearing will be scheduled on an expedited basis and must be completed within thirty (30) days. This time limit was inserted to avoid situations where a child is temporarily in the custody of one "parent" for a lengthy period of time and then is given over to a different "parent" pursuant to court order. Should the court determine that the surrogate mother did not properly exercise her statutory right to retain the child, the transfer of custody to the proposed parent(s) should occur within the first six or seven weeks of life and hopefully will minimize any psychological disruption that the child might experience. At the hearing, the court will determine whether the surrogate has complied with all of the requirements of Section 9(b) but is not allowed to second-guess her reasons for wanting to keep the child.

If the court makes the requisite findings, it will enter an order vacating the final order of approval of the surrogate parenting agreement, restoring the surrogate's parental rights, providing that the surrogate is the legal mother of the child, declaring that her husband, if he is the same man to whom she was married when the parenting agreement was executed, is the legal father, unless paternity is established in another individual who was not a signatory to that agreement, and requiring that the surrogate repay the proposed parent(s) for all amounts previously paid on her behalf and for all expenses they incurred on their own behalf, including reasonable attorneys' fees. The court will then order the appropriate state agency to issue a birth certificate establishing the surrogate as the legal mother and her husband (or whomever else) as the legal father, as the case may be.

If the surrogate mother is unable to demonstrate to the court's satisfaction that she provided notice of her decision to retain custody of the child in a timely manner, the court will order her to relinquish possession to the proposed parent(s). There is no special significance to the seventy-two hour period provided for in the proposed Act; it could be increased or even
decreased as each state determines. The exception built into the statute in Section 9(g), an exception that could increase that time period in the event of special medical circumstances, is intended to cover the unusual situation in which the surrogate mother is physically or psychologically unable to provide the notice within the initial seventy-two hours. For example, situations could arise where, because of complications in the pregnancy or delivery, she is heavily medicated for the entire three-day period and is incapable of making a rational choice. Or perhaps the child is delivered by a last-minute caesarean section and complications result, leaving her unconscious for several days. There are many possible scenarios in which the surrogate would be incapable of delivering the notice of her decision within the statutory time limit. If that does occur, the court will have to determine at what point in time she recovered sufficiently so as to regain the ability to act, up to a maximum tolling period of thirty (30) days after birth. This time limit also represents an additional effort to reduce the potential psychological disruption experienced by the child.

**SECTION 10. PRESUMPTION OF PATERNITY**

(a) A child born to the surrogate is presumed to have resulted from non-coital reproduction using the proposed father’s or donor’s sperm, as the case may be. Provided that the surrogate has not chosen to retain custody of the child, within ten (10) days after the time period for making such a choice has terminated under Section 9(b) or 9(g), whichever is applicable, the proposed parent(s) shall file written notice of the birth with the court that entered the final order of approval. The clerk of the court shall thereupon send notice to all parties to the surrogate parenting agreement advising them that in thirty (30) days the court shall enter a judgment of parentage declaring the proposed parent(s) to be the legal parent(s) of the child and terminating any claim to paternity by the surrogate’s husband, if any, or by any other party. The notice shall further state that any party objecting to the entry of such an order must file a written objection with the court no later than seven (7) days prior to the proposed date of entry and serve copies thereof upon all parties to the surrogate parenting
agreement. The clerk of the court shall also publish such notice in a newspaper of general circulation in the county once each week for two (2) consecutive weeks prior to the proposed date of entry of the order.

(b) If no timely objection is received by the court, then on the date set forth in the notice it shall enter a judgment declaring the proposed parent(s) to be the legal parent(s) of the child born to the surrogate and shall direct [the appropriate state agency] to issue a birth certificate naming the proposed parent(s) as the parent(s) of the child.

(c)(1) If a timely objection to the entry of such an order is filed with the court, it shall conduct proceedings pursuant to [the parentage laws of this state] to determine the biological father of the child.

(2) If the court determines that the objecting party is not the biological father, it shall enter a judgment as stated in Section 10(b) and direct the issuance of a new birth certificate. In such event, the objecting party shall pay all costs and expenses, including reasonable attorneys' fees and costs of blood or other tests, incurred by the proposed parent(s).

(3) If the court determines that the objecting party is the biological father of the child, it shall enter a judgment of parentage naming the surrogate and such party as the child's legal parents, direct that a birth certificate be issued accordingly, and vacate its prior order terminating the surrogate's parental rights. If the biological father is not married to the surrogate, the court shall determine issues of custody, support, and visitation as otherwise provided in [the parentage laws of this state].

(4) Where a donor was not used to impregnate the surrogate mother, and the proposed father objects to the entry of an order of parentage on the grounds that he is not the biological father, this section shall apply in lieu of Sections 10(c)(2) and 10(c)(3). In such event, the court shall conduct proceedings to determine parentage as in any other case. If the court determines that the proposed father is the biological father of the child, it shall enter an appropriate order of parentage and direct the issuance of a birth certificate in the names of the proposed parent(s). Should the court determine that the proposed father is not the biological father of the child, it shall order the surro-
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gate's husband to undergo whatever blood or other tests as are authorized by law to determine paternity [in this state].

(A) If the test results show the biological father to be the surrogate's husband, the court shall enter an appropriate order of parentage naming the surrogate and her husband as legal parents of the child, vacate its order terminating the surrogate's parental rights, and award custody of the child to the surrogate and her husband.

(B) If the test results do not show that the surrogate's husband is the biological father, or if the surrogate is unmarried, the court shall take the testimony of the surrogate mother regarding the identity of the biological father.

(C) If the court is able to determine the identity of the biological father, it shall enter an appropriate order of parentage, vacate its order terminating the surrogate's parental rights, and decide issues of custody, child support, and visitation as in all other cases under [this state's parentage laws].

(D) If the court is unable to determine the identity of the child's biological father, it shall award custody to the surrogate mother, enter an order of parentage naming her as legal mother without a designation of the father, and vacate its order terminating her parental rights.

(E) In all proceedings under Section 10(c)(4), the proposed parent(s) shall retain custody of the child until final disposition is made by the court.

(5) Except where a donor's sperm was used to impregnate the surrogate, should the court determine that the proposed father is not the biological father of the child, it shall order the surrogate to repay the proposed parent(s) all of the surrogate's expenses previously paid by them, to return the parenting fee, and to reimburse the proposed parent(s) for all of their legal and medical expenses, including reasonable attorneys' fees incurred as a result of entering into the surrogate parenting agreement.
COMMENTS TO SECTION 10

As discussed earlier, typical surrogate parenthood arrangements omit the proposed mother as a party to the surrogacy contract. Once the child is born and the surrogate mother gives up custody, the proposed mother and father initiate adoption proceedings so that the law will recognize the former as the baby's legal mother. Recall that it was during these adoption proceedings that the courts in In re Adoption of Paul, and In re Baby Girl L.J., were confronted with the public policy issues raised by surrogate motherhood.

Conflicts with state adoption laws that prohibit giving consideration in connection with transferring custody of a child is not the only area in which the practice of surrogacy runs into difficulties with current statutory schemes. The determination of the child’s paternity is another area of concern, one that Section 10 of the Act is designed to remedy. The Uniform Parentage Act, originally promulgated in 1973, establishes that a man is presumed to be the natural father of a child if he and the child's mother are or have been married to each other and the child is born or conceived during such marriage. This presumption may be rebutted only by clear and convincing evidence. Thus, if a surrogate mother is married, then her husband, rather than the proposed father, is considered the legal father of the child. An action under the Act would have to be brought to determine the correct child-and-father relationship.

Section 10 of the proposed Model Act seeks to simplify the parenting question by providing for a streamlined procedure to take care of all these issues at one time. It presumes that the child born to the surrogate resulted from non-coital reproduction pursuant to the surrogate parenting agreement. The

309. See supra note 2.
313. UNIF. PARENTAGE ACT § 4(a).
314. Id. § 4(b).
315. Id. § 6.
court that entered the final order of approval is to be notified within ten days of the child’s birth. An order is to be automatically entered in thirty days declaring that the proposed parent(s) are the legal parents of the child. Public notice is also to be given by publication in a newspaper of general circulation.

The order of parentage will be entered and a birth certificate issued in the name of the proposed parent(s) unless there is an objection filed at least seven days prior to the proposed date of entry, in which event the court is to hold hearings to determine whether the objector is the biological father, as provided in the state’s parentage laws. If those tests reveal that the objector is the natural father, the court will enter an order naming him and the surrogate mother the legal parents and will vacate its prior order terminating her parental rights; if he and the surrogate are not married, the court will also determine issues of custody and child support as in other cases under the applicable laws of the state. Section 10(c)(4) establishes a separate procedure for the proposed father to object where he believes he is not the biological father of the child.

In either event, where it is determined that the proposed father is not the biological father and custody is turned over to the surrogate, she must not only repay all amounts that the proposed parent(s) paid to her but also must reimburse them for all of their expenses incurred as a result of entering into the parenting agreement, including their attorneys’ fees.

Others have proposed that as a means of avoiding problems of this nature, the parenting contract could contain the surrogate’s agreement to refrain from sexual intercourse until she becomes pregnant. While such a provision may be well-intended, it involves the same enforcement problems as the surrogate’s agreement to obtain proper prenatal care. If courts shy away from enforcing the provisions of personal service contracts in general, it is doubtful that they would be inclined to get involved in a controversy over whether, how often, and with whom the surrogate had sexual intercourse.

The surrogate is certainly aware that becoming pregnant in any manner other than as contemplated by the surrogate parenting agreement will defeat the purpose of the whole arrangement and will be quite costly to her as well. One has

316. RAGONÉ, supra note 2, at 144 app. B.
317. See supra note 265 and accompanying text.
to assume a certain amount of good faith on the part of all the participants in an endeavor of this nature, and this is one of those areas where good faith is about all that can be relied upon. Inserting contract terms of this nature and attempting to use the courts to enforce them are not likely to improve surrogacy arrangements.

**SECTION 11. REFUSAL TO ACCEPT CHILD**

(a) Should the surrogate choose to turn over custody of the child, the proposed parent(s) have an absolute duty to accept custody regardless of its physical or mental condition.

(b) Notwithstanding the foregoing, if the proposed parent(s) for any reason refuse to accept custody, the proposed father, if any, shall be considered the legal father of the child unless proceedings to determine paternity brought under Section 10(c) determine otherwise.

(c) In all such cases, except where paternity is established in someone other than the proposed father, the order terminating the surrogate's parental rights shall be vacated, the surrogate shall be considered the legal mother of the child, and custody shall be awarded to the surrogate. Issues of child support and visitation shall be determined under [the parentage laws of this state] as in all other cases.

(d) In the event that the surrogate also declines to accept custody, the child shall be turned over to [the appropriate state agency] for placement for adoption. All costs incurred by the state relative thereto shall be reimbursed from the surety bond or letter of credit deposited by the proposed parent(s) with the court.

**COMMENTS TO SECTION 11**

It is unfortunate that the proposed Model Act must include a section governing the results of the proposed parent(s)' refusal to accept the child born to the surrogate. As already
pointed out, however, this situation has arisen more than once in the short history of surrogate motherhood and could certainly occur again.\textsuperscript{318}

Section 11(a) sets forth the absolute obligation of the proposed parent(s) to accept custody of the child once the surrogate has decided not to keep it during the first seventy-two hours after birth. Should the proposed parent(s), in violation of the statute, decline to accept the child, the statute will undo the transaction and attribute parenthood along biological lines, i.e., the proposed father will become the legal father, unless paternity proceedings prove otherwise, and the surrogate will be the legal mother. Basically, the proposed Act treats this situation no differently than any other case where two people who are not married to each other have a child together. Custody is awarded to the surrogate if she will accept it, and the court is to determine issues of child support and visitation under applicable state law.

It is possible under these circumstances that the surrogate might also refuse custody. After all, she entered into this arrangement for the express purpose of giving up the child after it was born. She may feel that she already has enough children of her own to care for or, for any other reason, might not want another child. The proposed Model Act respects her right to make this choice and does not attempt to force a child upon her. In Section 11(d), where the surrogate mother will not accept custody, the child is to be put up for adoption. The proposed parent(s), who violated their statutory duty initially by refusing custody, will reimburse the state for all costs incident to placement for adoption using the surety bond or letter of credit deposited with the court pursuant to Section 7(c).

\textbf{SECTION 12. DEATH, LEGAL INCAPACITY}

(a) If prior to the birth of the child, one of the proposed parent(s) of a married or unmarried couple dies, is declared legally incompetent, is voluntarily or involuntarily committed to a mental health facility, or suffers any other

\textsuperscript{318} See \textit{supra} note 267–69 and accompanying text.
seriously debilitating form of physical or mental impairment, the surrogate parenting agreement shall still remain in full force and effect and the parental rights of the parties thereto shall remain the same.

(b) If both proposed parent(s) of a married or unmarried couple, or if an unmarried proposed parent experience(s) any of the events described in Section 12(a) prior to the birth of the child, and the surrogate thereafter declines to retain custody pursuant to Section 9, the surrogate parenting agreement shall be considered null and void and upon the surrogate's so advising the court, it shall arrange for the transfer of the child to [the appropriate state agency] for placement for adoption. The expenses incurred by the state in placing the child for adoption shall not be reimbursed by the surety bond or letter of credit supplied by the proposed parent.

(c) In any case under Section 12(a) where one of the proposed parent(s) dies before the child is born, and the surrogate does not retain custody, the child shall be considered the natural offspring of the deceased proposed parent and shall share in his or her estate in the manner provided by law.

COMMENTS TO SECTION 12

This section is intended to deal with profound changes in the physical or mental condition of one or more of the proposed parent(s) between the time of final court approval of the surrogacy contract and the birth of the child.

Section 12(a) deals with a situation where one member of the proposed parent couple dies or becomes mentally or physically incapacitated. This is not viewed as a sufficient reason to disturb the surrogacy arrangement because there is a remaining parent who is available to take care of the child. The situation described in Section 12(b) is different, however. Here both members of the parenting couple, or the single proposed parent, have either died, been declared legally incompetent, are committed to a mental health facility, or have otherwise become mentally or physically disabled. In this scenario, no one is available to care for the newborn.
One solution is that the surrogate can exercise her right to keep the child as her own. But there is no guarantee that this will occur, and it would be inappropriate to compel her to do so for the same reasons given in the comments to Section 11(b)—she did not enter into this arrangement for the purpose of having another child of her own, and the fortuitous circumstances affecting the proposed parent(s) should not change that fact. In this situation, the proposed Model Act simply provides that the child will be put up for adoption.

Consistent with these concepts, in the event of the death of one proposed parent of a married or unmarried couple, the child is considered the legal offspring of the deceased parent and can inherit from him or her with the same rights as natural children.

**SECTION 13. LEGAL SEPARATION, DIVORCE**

The child born to a surrogate shall be considered the legal child of the proposed parent(s) notwithstanding that they shall separate or file an action for dissolution of marriage under [this state's dissolution of marriage laws] prior to the child's birth. In such case, custody of the child, support obligations, visitation rights, and all other issues concerning the child shall be determined in the same manner as with any other child in a proceeding brought under such laws.

**COMMENTS TO SECTION 13**

The legal separation or action for dissolution of marriage of the proposed parent(s) prior to the birth of the child will have no impact on the surrogacy arrangement. Assuming the surrogate does not assert her right to retain the child, the issues of custody, child support, and visitation are no different than in any other divorce situation with an infant. The issues can be resolved under the state's existing dissolution of marriage laws.
SECTION 14. INABILITY OF SURROGATE TO CONCEIVE

Notwithstanding any language to the contrary contained in a surrogate parenting agreement, a surrogate shall not be required to undergo non-coital insemination more than six (6) times over an eighteen (18) month period in an effort to become pregnant. The surrogate may voluntarily agree to undergo such additional procedures as often as she chooses. If at any time after participating in at least six (6) such attempts to be impregnated within this time period the surrogate refuses to undergo any further procedures, the surrogate parenting agreement shall be considered terminated by operation of law and without further order of court. In that event, all of the surrogate's expenses to date shall be paid by the proposed parent(s), but the surrogate shall not be entitled to any part of the parenting fee.

COMMENTS TO SECTION 14

Naturally, there is no guarantee that the surrogate will be able to become pregnant. Therefore, there must be some outside limit on the extent to which she is required to attempt to do so. This limit could be expressed in terms of a time commitment, such as the one proposed in the Uniform Act, which speaks of the court authorizing non-coital insemination for up to one year.\(^\text{319}\)

The proposed Model Act rejects that approach because a temporal limit standing alone does not fully protect the surrogate's interests. In its place, the Act prefers to restrict the number of attempts at non-coital reproduction that can be undertaken within a specified period. There is no magic to the formula of six attempts within an eighteen-month time frame; people could certainly disagree about the reasonableness of those numbers without violating the integrity of this statutory section. But the overall approach of Section 14 provides a

better means of preventing the surrogate from being exploited in the conception process.

**SECTION 15. EFFECT OF UNLAWFUL SURROGACY ARRANGEMENT**

In the event that a child is conceived under an unlawful surrogacy arrangement, the following shall apply:

(a) Any agreement between the parties to such arrangement shall be void and unenforceable;

(b) The purported surrogate's parental rights shall not be terminated, and she shall have no duty to surrender custody of the child;

(c) The purported proposed father of the child, including any known donor, and the purported surrogate who gave birth shall be considered the legal parents of the child unless paternity is established in another individual in a proceeding brought pursuant to [the parentage laws of this state]; and

(d) Legal custody of the child, visitation, support obligations, and all other issues concerning the child shall be determined in accordance with the applicable provisions of [the parentage and dissolution of marriage law of this state], as applicable.

**COMMENTS TO SECTION 15**

Even if the Act were to become law in every state in the country, that would be no guarantee that some people would not enter into surrogacy relationships on their own without judicial sanction, in contravention to the requirements of the statute. Section 15 makes it clear that any such agreements will not be recognized. Instead, it treats the situation as if the surrogacy arrangement did not exist. The proposed father and the surrogate mother are the legal parents of the child absent a different result established in a paternity proceeding. Issues of custody, child support and the like are to be determined as in any other case under applicable state law.
SECTION 16. STATUTORY CONFLICT

In the event of a conflict between any of the provisions of this Act and any other statute of this state, the provisions of this Act shall govern.

COMMENTS TO SECTION 16

The purpose of Section 16 is to deal with the conflicts between the Act and those provisions of state adoption and parentage laws which have already been discussed.320 In particular, this section is intended to avoid the effect of laws that: (i) prohibit the payment of money or other consideration in connection with obtaining a child for adoption (even though technically there is no adoption under Section 10(b)); (ii) prohibit agreeing to terminate one's parental rights prior to the birth of a child;321 (iii) those provisions of the parentage laws that presume that a man is natural father of a child if he and the mother are married;322 and (iv) laws providing that where a married woman is artificially inseminated, her husband is considered to be the father.323

There are undoubtedly additional provisions in existing state laws that are inconsistent with one or more sections of the Act. The explicit language of Section 16 providing for the superiority of the Act's provisions over those of any other law should be a sufficiently clear statement of policy to resolve any possible disputes in statutory interpretation.

320. See supra notes 8, 18–20 and accompanying text.
321. No state currently allows a prospective parent to consent to her child's adoption before the child's birth. Mandler, supra note 2, at 1292.
SECTION 17. BREACH; REMEDIES

(a) Regardless of any language to the contrary contained in a surrogate parenting agreement, the following are the sole and exclusive remedies available to an aggrieved party for breach of that agreement:

(1) Except in cases of related surrogacy, and notwithstanding the provisions of Section 4(i), if the surrogate fails to adhere substantially to reasonable medical instructions about her prenatal health, to submit to reasonable medical evaluation and treatment during the course of her pregnancy, or engages in other behavior that is detrimental to the fetus, and the surrogate miscarries or the child is stillborn or is born mentally or physically impaired as a direct and proximate result thereof, then the surrogate is not entitled to payment of any part of the parenting fee or expenses and shall repay any such amounts previously paid to her. She shall also pay all of the proposed parent(s)' expenses incurred on their own behalf under the surrogate parenting agreement, including reasonable attorneys' fees. In any action brought by the proposed parent(s) under this Section, the court shall not find in their favor unless the surrogate's responsibility for the condition of the fetus or the child, as the case may be, has been established by the testimony of her physician or other expert medical testimony to a reasonable degree of medical certainty. For purposes of this Section, the surrogate is deemed to have waived any physician-patient testimonial privilege otherwise provided by law.

(2) If the surrogate fails to turn over physical custody of the child more than seventy-two (72) hours after its birth without having elected to retain custody as provided in Section 9, or within any additional time period provided by Section 9(g), the proposed parent(s) shall be entitled to obtain an order of court directing the surrogate to surrender custody forthwith. Any such order entered by the court shall also provide that the surrogate shall have forfeited the right to be paid any part of the parenting fee and shall direct her to refund any portion thereof previously paid.

(3) Except in cases of related surrogacy, if the proposed parent(s) fail to pay any of the surrogate's expenses in a
timely manner or fail to pay the parenting fee in the manner required under the surrogate parenting agreement, the surrogate may obtain an order of court authorizing her to seek payment thereof under the surety bond or letter of credit posted with the court by the proposed parent(s) pursuant to Section 7(c) of this Act.

(b) Any action filed by the proposed parent(s) or the surrogate for breach of the surrogate parenting agreement as provided in this Section 17 shall be brought in the court which entered the final order of approval of the agreement. The prevailing party in such proceeding shall be awarded its costs and reasonable attorneys' fees.

COMMENTS TO SECTION 17

The unique nature of the surrogate parenting arrangement means, among other things, that many traditional doctrines of contract law will not be appropriate in this context. Moreover, unless restrained by statute, the proposed parent(s) have a strong incentive to provide in the surrogate parenting agreement that the surrogate waives her right to an abortion, that the parents are entitled to specific performance of the surrogate's agreement to obtain proper prenatal care, and other unenforceable provisions. The proposed Model Act will not permit language of this nature, as already has been discussed in some detail.324

As a corollary, the Act in Section 17 establishes its own limited scheme of recovery for breach of the surrogate parenting agreement. These remedies are in addition to those other provisions throughout the law that require the surrogate to forfeit her fee, repay all expenses paid on her behalf, and even reimburse the proposed parent(s) for their own expenses. This result ensues, for example, if the proposed father is determined not to be the biological father of the child, if the surrogate chooses to keep the child, or if the surrogate terminates the agreement after the order of final approval.325

324. For a discussion of these issues, see supra text accompanying notes 265–66 and 268–83.
325. See MODEL ACT § 8(b).
Section 17(a)(1) addresses the problem of prenatal behavior on the part of the surrogate mother. As noted earlier, the Act relies upon economic incentives to achieve the desired behavior and does not provide for the use of the court's equitable powers. To the extent the surrogate does not get proper prenatal care during pregnancy, and a miscarriage, stillbirth, or mentally or physically disabled child is the direct result, as established to a reasonable degree of medical certainty by her physician or other medical expert, the surrogate will suffer severe financial consequences.

This part of the statute mirrors Section 4(f), whereby the parties may provide in the parenting agreement for a monetary reward if the surrogate does obtain proper care and refrains from behavior that would endanger the fetus. The use of these monetary incentives does not represent any philosophical bias towards freedom of contract or market-type mechanisms in the surrogacy context. Rather, these methods are viewed as the least objectionable method of achieving the goals in question. As already demonstrated, to have the court intervene by issuing an injunction is a useless act because the personal nature of the behavior involved makes it impossible to enforce.\(^{326}\)

Ultimately, whether or not the surrogate mother gets proper prenatal care depends primarily on whether she acts in good faith in carrying out her duties and responsibilities under the Act as a whole. The real solution here lies in the choice of the proper surrogate by the proposed parent(s). The Act gives them plenty of opportunity to make that choice by requiring disclosure of considerable information about the surrogate in the preliminary and final hearings in court. Once that final approval is granted, as a practical matter there is very little anyone can do to make sure the parties live up to the non-monetary responsibilities provided for in their agreement.

Under Section 17(a)(2), the proposed parent(s) can obtain an order of court where the surrogate refuses to transfer custody of the child after the seventy-two hour period has passed subsequent to the child's birth, or if Section 9(g) applies, custody is not turned over after any extension of that time period. In this context the court's intervention is appropriate because there is no other mechanism by which the parent(s)

\(^{326}\) See supra text accompanying note 265.
can get the child back; obviously, damages for breach of contract are not sufficient to make them whole.

Section 17(a)(3) provides a remedy to the surrogate if the proposed parent(s) fail to live up to their obligation to pay her expenses or parenting fee. Upon application to the court, the surrogate can obtain payment by proceeding directly against the surety bond or letter of credit posted with the court pursuant to Section 7(c).

SECTION 18. HEALTH CARE PROFESSIONALS

Any health care provider who performs health care services for any party pursuant to a surrogate parenting agreement that has been given final approval by the court hereunder shall not be liable in any manner, nor face any penalty or sanction solely as a consequence of acting in that capacity; provided, however, that (s)he shall remain liable as in all other cases for acts of negligence or intentional misconduct.

COMMENTS TO SECTION 18

Section 18 is designed to protect health care providers from the imposition of liability or any other sanction, such as professional censure, for providing services to a participant in an approved surrogacy agreement. Should they commit any acts of negligence while acting in that capacity, they will remain liable as otherwise.

SECTION 19. JURISDICTION; VENUE

The circuit courts [of this state] shall have jurisdiction of all actions brought under this Act, provided that the proposed parent(s) and surrogate have been residents [of this state] for at least two (2) years. The action may be brought in the county in which any petitioner resides.
COMMENTS TO SECTION 19

This section on jurisdiction performs the important function of obviating any conflict of laws problem by virtue of its two-year residency requirement for the proposed parent(s) and the surrogate. It is not inconceivable that parents who are desperate to have a child will travel to any state where the requirements for surrogate motherhood have been relaxed somewhat. A woman who very much wanted to be a surrogate mother might also do the same. The Act is not intended to promote interstate trafficking in would-be proposed parent(s) and surrogate mothers looking for a hospitable legal environment. The two-year residency requirement ought to be long enough to ensure that the party has resettled in the state for legitimate reasons having nothing to do with surrogate motherhood.

SECTION 20. APPLICATION OF ACT

This Act shall apply to all surrogate parenting agreements entered into after its effective date, regardless of the genetic relationships between the child to be conceived under the agreement and any of the parties thereto.

COMMENTS TO SECTION 20

By virtue of the language of Section 20, the Act will apply only to surrogate parenting agreements entered into after its effective date; it will not be applied retroactively. To the extent there are any parenting agreements in existence at the time the Act becomes law, it would be difficult to apply its provisions to such contracts, especially if the surrogate is already pregnant. Only allowing for prospective application will make the new law easier to administer. A state could provide that the law also applies to any parenting agreement in existence where the surrogate has not yet conceived because the time constraints of an ongoing pregnancy are not a factor in that situation.
The latter half of the Section is intended to make it clear that genetic relationships are irrelevant to the application of the Act. In other words, there is no requirement that the proposed father be the biological father of the child. This may be the most common surrogacy situation, but it is not the only type. A sperm donor might be used in conjunction with a surrogate mother where both members of a couple are infertile. Recall that in *Johnson v. Calvert* the surrogate was carrying a child that bore no genetic relationship to her at all; it had been conceived using IVF with the husband's sperm and the wife's egg. As far as the proposed Model Act is concerned, it makes no difference how the surrogate becomes pregnant. Once a surrogate mother is involved in any capacity, the statute will apply.

**SECTION 21. EFFECTIVE DATE**

This Act takes effect on ____________.

**COMMENTS TO SECTION 21**

The effective date of the Act is left blank because the enactment of the law presumably would occur at different times in the various states and each can decide for itself when the Act is to take effect.

**CONCLUSION**

Ideally, there would be no need for surrogate motherhood, and all people who wanted children could have them without difficulty. But the law cannot afford the luxury of sitting on the sidelines, wishing for a more idyllic state of nature while in the real world men and women continue to enter into surrogate parenting arrangements with potentially disastrous

327. 851 P.2d 776 (Cal. 1993).
328. *Id.* at 778.
Proposed Surrogate Parenthood Act results. It has only been a short time since advances in medical technology first made assisted reproduction a realistic alternative for the treatment of infertility. Yet in that short time tragic results have already ensued when the technology was put to use in a surrogacy context.

It is perhaps understandable that in an effort to prevent the recurrence of situations which arose in In re Baby M and in Johnson v. Calvert, some state legislatures would react by outlaws commercial surrogate motherhood, even to the extent of subjecting the participants to civil or criminal penalties. This is an overly simplistic approach, however, which fails to take into account how desperate some people become in their effort to have children. It will succeed only in either driving the practice underground or compelling people to go to states where surrogacy has not been outlawed. Either result will guarantee the occurrence of future tragedies similar to those already seen.

Even if we could eliminate surrogacy, are there compelling reasons to do so? It would seem that society has an interest in fulfilling the desires of people who want to have children so badly. In marked contrast to the problem of unwanted children who can be subjected to terrible abuse, one would think that the children of surrogacy arrangements would be especially cherished by their parents. The creation of new families where the bond between the parent and child is so powerful furthers the societal goal of strengthening family life.

It is the commercial nature of the typical surrogacy arrangement and the potential treatment of children as mere commodities that causes this practice to come under such criticism and

331. FLA. STAT. ANN. ch. 63.212(5) (Harrison 1994); MICH. COMP. LAWS ANN. § 722.857(2) (West 1993); N.H. REV. STAT. ANN. § 168-B:16(IV)(1995); N.Y. DOM. REL. LAW § 123(2)(a) (McKinney Supp. 1996); VA. CODE ANN. § 20-165 (Michie 1995). These laws ban the activities of commercial brokers who for a fee act as middlemen by matching childless clients with surrogate mothers. The above New York law, for example, imposes a fine of $10,000 for the first such offense; any subsequent offenses are punishable as felonies. N.Y. DOM. REL. LAW § 123(2)(b). The Act takes no position on the activities of commercial brokers because the resolution of this issue involves policy considerations that go well beyond the scope of this Article.
has led to efforts to make it illegal.334 This Article is based upon the premise that we must accept the fact that commercial surrogacy is a fait accompli. Instead of engaging in futile efforts to eliminate it, we ought to act to minimize its objectionable aspects while retaining its positive qualities. This can be accomplished by imposing judicial supervision in a manner similar to an adoption proceeding while at the same time recognizing the unique aspects of the surrogacy relationship, which call for special protections to be provided for the surrogate mother.

Consistent with that philosophy, the Act does not apply traditional principles of contract law to the surrogate parenting agreement. The proposed parent(s)' rights created by that agreement are limited by the surrogate mother's desire to keep the child she bore. In this way, the Act makes clear that surrogacy arrangements are not equivalent to ordinary commercial transactions precisely because fertile women, and children, are not fungible commodities that can be bought and sold.

Unfortunately, to a certain extent the proposed parent(s) are the innocent victims of this legislative scheme. No doubt it would be emotionally devastating to go through the whole surrogacy process only to lose all rights to the child once it is born. But the same risks are inherent in the adoption process and indeed in natural conception as well—pregnant women have miscarriages, stillbirths, etc. At least under the Model Act, if the surrogate mother decides to keep her baby, Section 9 requires that she repay the proposed parent(s) for all expenses they have incurred since the beginning of the relationship. This provision is another example of the statute's intent to balance the benefits and hardships experienced by all parties to the surrogate arrangement.

It can hardly be gainsaid that surrogate motherhood is an imperfect solution to the problem of infertility. The Proposed Model Surrogate Parenthood Act is one attempt to remedy those imperfections so as to minimize their negative impact upon people's lives. Hopefully, by promoting humanistic values over commercial ones, the statute will contribute to a prevailing ethos that treats all people with dignity, respect, and

compassion as modern technology continues to forge ahead into the uncharted waters of human reproduction.