

5-1-1989

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Recommended Citation

Jason C. DeMille, *Surrogacy and the Utah Surrogate Parenthood Act: The Need for an Unambiguous Statement*, 3 BYU J. Pub. L. 443 (1989).

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Surrogacy and the Utah Surrogate Parenthood Act: The Need for an Unambiguous Statement

I. INTRODUCTION

State legislatures have been slow to respond to the increasingly popular¹ practice of surrogacy.² However, the publicity surrounding the *Baby M*³ litigation, and Judge Sorkow's decision that surrogate con-

1. A 1985 estimate placed the number of children born to surrogates at around 600 and indicated that the numbers appeared to be growing. Gelman & Shapiro, *Infertility: Babies by Contract*, NEWSWEEK, Nov. 4, 1985, at 74. See also Gest, *Finally, A Ruling — 'M' is for Melissa*, U.S. NEWS & WORLD REPORT, Apr. 13, 1987, at 60. One commentator has suggested that "[a]s surrogate motherhood comes out into the open and is heavily publicized, it comes to seem a more legitimate and more available alternative to people wanting babies." M. FIELD, SURROGATE MOTHERHOOD, 5 (1988)[hereinafter 'FIELD'].

2. For example, by early 1985 only 20 states had considered surrogate mother legislation, but no legislation was enacted. See Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 Fam. L. Rep. (BNA) 3001, 3003 (Jan. 29, 1985) [hereinafter 'Pierce']. As of July 1987, no state had yet banned the practice. *Surrogate Parenthood: Legislative Update*, 13 Fam. L. Rep. (BNA) 1442 (July 14, 1987) [hereinafter '*Legislative Update*']. But cf. KAN. STAT. ANN. § 65-509 (1984), wherein the Kansas legislature amended its adoption code to provide that the prohibition against advertising for adoption shall not extend to a prospective surrogate or a person seeking a surrogate.

For a description of the contemporary practice of surrogacy see *infra* notes 20-31 and accompanying text.

3. *In re Baby M*, 217 N.J.Super. Ct. Ch. Div. 313, 525 A.2d 1128 (1987), *rev'd* 109 N.J. 396, 537 A.2d 1227 (1988).

In 1985, William Stern, a naturalized citizen and his family's sole survivor of the Holocaust, entered into a surrogate contract with Mary Beth Whitehead. Elizabeth Stern, William's wife, suffered from multiple sclerosis, and was unable to have children because she feared bearing a child would exacerbate her illness. Mr. Stern was very interested in begetting a child so that his family name might be preserved.

The surrogate contract provided that Mrs. Whitehead would be artificially inseminated, and upon conception would carry the child to term, then surrender the child to Mr. Stern. She was then required to renounce her parental rights in the child so Mrs. Stern could adopt the child. For her efforts, Mrs. Whitehead was to be paid \$10,000 plus all of her medical expenses.

Mrs. Whitehead gave birth to a girl on March 27, 1986, in New Jersey. What happened following the birth is by now well known as it turned into a major media event. Mrs. Whitehead refused to surrender the child to the Sterns and fled to Florida, where, for three months, she evaded attempts by Mr. Stern to obtain custody of the child by living in roughly 20 different hotels. Finally, the police found her, and forcibly removed the child from her.

After a 32 day trial, the trial judge held that the contract was valid and that sole custody should be granted to Mr. Stern. Mrs. Stern was allowed to adopt the child. The trial judge found that current state laws did not apply to surrogate contracts. The court reasoned that surrogacy was constitutionally protected under the right to privacy, and that the agreement could be specifically enforced.

On appeal, Judge Sorkow's decision was reversed by the New Jersey Supreme Court. The court held the contract invalid because it conflicted with "(1) laws prohibiting the use of money in

tracts are specifically enforceable,⁴ has triggered legislative activity throughout the nation.⁵ The new bills have proposed everything from criminalizing surrogacy to codifying the contractual relationship.⁶ Other states have established commissions to study the practice.⁷

The Utah Legislature recently became one of the few states to adopt legislation prohibiting surrogate motherhood.⁸ The Utah Surrogate Motherhood Act prohibits both commercial and gratuitous surrogacy as violative of public policy, provides criminal punishment for the participants of a commercial surrogacy contract, and defines the status of children born to surrogates.

The premise of this comment is that a combination of several statutes may have already prohibited surrogacy before the Utah Surrogate Motherhood Act was enacted; nevertheless, the Act is a necessary clarification of the state's policy regarding surrogacy. Unfortunately, the Act is automatically repealed in two years, leaving the official policy of the state in just as much doubt as it was before the Surrogate Motherhood Act was adopted.

This comment will examine the current practice of surrogate

connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions." Additionally, the court held that public policy considerations rendered the contract invalid. The court also held that the right to privacy did not include the right to procreate through a surrogate.

The court granted the Stern's custody of Baby M, who was named Melissa, refused to terminate the parental rights of Mrs. Whitehead or to permit the adoption of Melissa by Mrs. Stern, and remanded the case for a determination of visitation and child-custody.

4. *Baby M*, 217 N.J. Super. at 388, 525 A.2d at 1176 (1987).

5. Since the trial court's decision in *Baby M*, at least 64 bills have been introduced in 26 jurisdictions. *Legislative Update*, *supra* note 2.

6. "The extant bills fall into essentially four categories: those that would codify the sort of contractual relationship entered into by Mary Beth Whitehead and William Stern to produce Baby M; those that would permit surrogacy but render contracts for it unenforceable; those that would forbid any payment to the surrogate mother; and those that would outlaw the process altogether." *'Baby M' Decision Creates Flurry of Legislative Activity*, 13 Fam. L. Rep. (BNA) 1295 (Apr. 21, 1987). For a listing of legislative activity regarding surrogacy, see *Legislative Update*, *supra* note 2.

7. *Id.* In its 1988 session, the Utah Legislature established a Surrogate Parenthood Study Committee. See *infra* note 159. Delaware, Indiana, Louisiana, and Texas have also set up surrogacy study committees. *Legislative Update*, *supra* note 2.

8. The Utah Surrogate Parenthood Act will be codified at UTAH CODE ANN. § 76-7-204 (1989). For a complete discussion of the Utah Act, see *infra* notes 146-59 and accompanying text. To date only three other states have enacted surrogate legislation. Louisiana, Michigan and Nebraska have enacted legislation making surrogate contracts unenforceable. See LA. REV. STAT. ANN. § 9:2713 (West Supp. 1988); 1988 Mich. Legis. Serv. 189 (West) (to be codified at MICH. COMP. LAWS ANN. § 722.851 (West 1988)); NEB. REV. STAT. § 25-21,200 (Supp. 1988).

By judicial decision, the highest courts of Kentucky and New Jersey have also prohibited surrogacy agreements. See *Surrogate Parenting Assocs., Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. 1986); *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

motherhood (Part II), discuss the principal arguments both for and against surrogacy (Part III), determine whether surrogate legislation was necessary to prohibit surrogacy in Utah (Part IV) and analyze Utah's Surrogate Motherhood Act (Part V).

II. THE NEED FOR SURROGACY

Infertility affects a large segment of American society and has disappointed the parental aspirations of millions of American couples.⁹ Infertility creates emotional distress and often creates marital conflict.¹⁰ Before the Supreme Court's decision in *Roe v. Wade*¹¹ adoption was a feasible alternative to childlessness. However, the increased use of contraceptives,¹² the availability of abortion on demand,¹³ and the destigmatization of unwed or teenage motherhood¹⁴ has severely reduced the number of adoptable, white,¹⁵ healthy infants.¹⁶ One study

9. It has been estimated that almost ten percent of married couples in the United States are infertile. Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 *Women's Rts. L. Rep.* (Rutgers Univ.) 107 (1982). One half of this number is attributable to the wife. *New Bedfellows: Freedom and Infertility*, *SCI. NEWS*, May 31, 1980, at 341 [hereinafter '*Bedfellows*']. A 1986 study by the American Medical Association estimated that over 6 million American women have difficulty conceiving. Fuchs & Perreault, *Expenditures for Reproduction-Related Health Care*, 255 *J. A.M.A.*, Jan. 3, 1986, at 76, 79. This number becomes more striking when one stops to consider that infertility strikes about 14% of married women of child bearing age. Mosher & Pratt, *National Center for Health Statistics: Fecundity and Infertility in the United States, 1965-1982*, Vital and Health Statistics No. 104, at 5 (Feb. 11, 1985). A couple is considered infertile if the wife fails to conceive after having been sexually active, without having used contraception, for a year. *Id.* at 4.

Infertility is not just a problem common to women, however. About one-third of couple infertility is attributable to the husband. *Bedfellows*, at 341. It has been estimated that one in ten men are sterile. *Immaculate Conceptions*, *NEW WEST*, Aug. 25, 1980, at 28.

10. Robertson, *Surrogate Mothers: Not So Novel After All*, 13 *HASTINGS CENTER REP.* 28, 29 (1983) [hereinafter '*Robertson*'].

11. 410 U.S. 113 (1973).

12. The right of an individual to use contraception is well established. *See Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

13. It is estimated that the annual number of abortions performed in the United States exceeds one and one-half million. *NAT'L COMM. FOR ADOPTION, ADOPTION FACTBOOK 18* (1985) [hereinafter '*ADOPTION FACTBOOK*'].

14. It has been reported that in California "[a]pproximately 97 percent of the unwed mothers who carry their pregnancy to term are now keeping their children." Handel & Sherwyn, *Surrogate Parenting: Coming to Grips with the Future*, 18 *TRIAL* 57 (Apr. 1982). *See also* Perry, *Surrogate Contracts: Contractual and Constitutional Conundrums in the Baby "M" Case*, 9 *J. LEGAL MEDICINE* 104, 106-07 (1988) [hereinafter '*Perry*'].

15. A study performed by the National Committee for Adoption found that "[b]lack children constitute 14 percent of the child population, 34 percent of foster care, and 41 percent of children free for adoption." *ADOPTION FACTBOOK*, *supra* note 13, at 11. Consequently there are "thousands of black and bi-racial children who wait for permanent homes" who may be adopted in a relatively short period of time. *Id.* at 32.

16. Because adopting parents normally want to adopt a healthy infant, "special needs" children are frequently difficult to place. There is no shortage of the availability of these children. *See generally* STAFF OF THE SUBCOMMITTEE ON CHILDREN AND YOUTH OF THE COMMITTEE ON

estimated that in 1984 the chance of a childless couple adopting a healthy infant was thirty-five to one.¹⁷ Today, infertile couples have few options to end their childlessness.¹⁸ To many the most attractive, indeed, the only feasible alternative is surrogacy.¹⁹

Surrogacy most often represents an attempt by an infertile married couple to bear a child who is biologically related to the father.²⁰ Typically, the infertile couple enlists the services of a surrogacy agency²¹—usually called a surrogate broker—that is paid²² to match the couple with a woman who is willing to act as a surrogate.²³ The surrogate²⁴ contracts²⁵ to be inseminated with the father's sperm,²⁶ to

LABOR AND PUBLIC WELFARE, 94th Cong., 1st Sess. (Comm. Print 1975). For example, in 1982 there were 274,000 "special needs" children available for adoption. Only 9,591 of these children were adopted. ADOPTION HANDBOOK, *supra* note 13, at 41.

17. In 1984 over two million couples competed to adopt 58,000 infants Wilson, *Adoption: It's Not Impossible*, BUS. WK., July 8, 1985, at 112.

18. Childless couples must either "come to terms with childlessness; tolerate a very long period of waiting for an adoption placement; or pursue the adoption of a special needs child. Other couples, frustrated and desperate, will buy babies from black market brokers, who apparently do a brisk business in today's society." Comment, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. REV. 127, 129 (1987) [hereinafter '*Commercial Conceptions*'].

19. See Robertson, *supra* note 10, at 29.

20. Robertson, *supra* note 10, at 29. In some cases, however, surrogacy is used because "the couple wants to isolate the wife's genetic component because she carries a genetic disease." Keane, *Legal Problems of Surrogate Motherhood*, 1980 S.ILL.U. L.J. 147, 147-48 [hereinafter '*Keane*']. This was one of the reasons why the Stern's sought the services of Mary Beth Whitehead.

21. In 1985 there were two dozen or so organizations providing surrogacy mother services in the United States. *Wrong Mothers, Wrong Babies*, ECONOMIST, Apr. 20-26, 1985 at 63. They appear to be full service organizations. They locate the surrogate by advertising through papers, match infertile couples to willing surrogates, maintain a medical staff to supervise the artificial insemination, and a legal staff to draft the contract.

22. The surrogate organization requires a fee of between \$5,000 and \$10,000 for the service which they provide. Robertson, *supra* note 10, at 28-29. The Infertility Center of New York, which was the surrogate organization involved in the *Baby M* case, received a fee of \$7,500 from William Stern. *In re Baby M*, 109 N.J. 396, 476, 537 A.2d 1227, 1271 (1988).

23. The surrogate is typically found by responding to newspaper advertisements. For example, Mary Beth Whitehead responded to the following ad: "SURROGATE MOTHER WANTED. Couple unable to have child willing to pay \$10,000 fee and expenses to woman to carry husband's child. Conception by artificial insemination. All replies strictly confidential." *Behind the 'Baby M' Decision: Surrogacy Lawyering Reviewed*, 13 Fam. L. Rep. 3019 (BNA) (June 2, 1987). One surrogate organization in Southern California has published an extensive directory of women who are willing to function as surrogates. Davis & Brown, *Artificial Insemination by Donor (AID) and the Use of Surrogate Mothers*, 141 WEST. J. MED. 127, 128 (1984) [hereinafter '*Davis & Brown*'].

24. Typically these surrogate brokers limit surrogate candidacy to married women who have already borne at least one healthy child. *Commercial Conceptions*, *supra* note 18, at n.35. Limiting surrogacy to married women may also eliminate the perception that the arrangement is adulterous. In most states surrogacy is not adulterous unless the surrogate was impregnated through sexual intercourse by a man other than her husband. In a minority of states, however, surrogacy could possibly be adulterous because it involves the "surrendering of the reproductive function." Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 Women's Rts. L. Rep. (Rutgers Univ.) 107, 112 (1982). In addition a requirement of at least one birth is justifiable because it helps to

carry the fetus to term, to relinquish the child immediately after birth and to renounce all parental rights in the child by giving her advance consent to the child's adoption by the wife of the natural father.²⁷ The surrogate receives a fee,²⁸ that usually averages \$10,000,²⁹ for her time and inconvenience.³⁰ In addition, the father must pay for all of the expenses associated with the insemination and the pregnancy. The total cost of the procedure may be anywhere between \$20,000 and \$25,000.³¹

In spite of its purported biblical origins,³² surrogacy is still a

ascertain the physical ability of the surrogate to carry the child and her psychological ability to give the child up for adoption. Comment, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 201-02 (1986) [hereinafter '*Redefining Mother*'].

25. Surrogate contracts typically provide that the surrogate may not smoke, use alcohol or drugs, or take aspirin without the overseeing obstetrician's written consent. These contracts also provide that the surrogate cannot abort the fetus without the father's consent. A copy of the surrogate contract between William Stern and Mary Beth Whitehead is found in Appendix A of the court's decision in the *Baby M* case. *Baby M*, 109 N.J. at 470-74, 537 A.2d at 1265-69. See generally Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982).

26. Ordinarily the surrogate is artificially inseminated with the father's sperm, although occasionally insemination will occur through intercourse. Artificial insemination is the manual introduction, by a physician, of a man's sperm into the surrogate's vagina. See generally W. FINEGOLD, *ARTIFICIAL INSEMINATION* 5-7 (2d ed. 1976). There are many different forms of artificial insemination. A discussion of these is beyond the scope of this comment.

27. See generally W. WADLINGTON, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 443 (1984).

28. A fee is not always part of the agreement. Gratuitous surrogacy occasionally occurs, but is a rare event. *Commercial Conceptions*, *supra* note 18, at n.30.

29. A surrogate's fees normally range from \$5,000 to \$13,000. Some couples have indicated that they are willing to pay as much as \$40,000 to \$50,000 for a surrogate. Comment, *Surrogate Mothering: Medical Reality in a Legal Vacuum*, 8 J. LEGIS. 140, 147 (1981) [hereinafter, '*Surrogate Mothering*'].

30. The fee arrangement is perhaps the only reason why surrogacy exists. Even surrogacy proponents admit that "a prohibition on compensation for surrogate motherhood [would] be equivalent to a prohibition of the practice," because few women would be willing to become a surrogate without an attractive financial reward. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983)[hereinafter '*Parker, Initial Findings*']. See also Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 380 (1981) [hereinafter '*Black*'].

31. This cost includes the fee paid to the surrogate and the surrogate broker, in addition to the necessary medical and legal fees. See Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZ. L. REV. 539, 542 (1983) [hereinafter '*Baby Sitting Consideration*']. See also *Commercial Conceptions*, *supra* note 18, at n.37.

32. Proponents of surrogacy recall the story of Abraham and Hagar in an effort to legitimize the practice. See generally *Genesis* 16:1-6; 30:1-10.

While proponents of surrogacy attempt to legitimize the practice by citing its biblical origins, they fail to recount the difficulties the arrangement created for the parties involved. For a discussion of those problems see *Commercial Conceptions*, *supra* note 18, at 133-34. Similar problems have also occurred with the modern practice of surrogacy. The *Baby M* case provides an excellent illustration of the complexities involved with this practice. See *supra* note 3. The Malahoff-Stiver dilemma is also instructive. See *infra* note 79.

Proponents also fail to recognize that an important difference between biblical surrogacy and

rather new and infrequently used innovation;³³ nevertheless, the evidence suggests that its use is rising.³⁴ Before the popularity of surrogacy increases further, it is necessary that the states determine their policy regarding the practice. To date, Louisiana, Michigan, Nebraska and Utah are the only states to have come to grips with this duty.³⁵ Other states, by default, have left resolution of the important issues involved in surrogacy to the courts.³⁶

Although most states do not have specific surrogacy legislation,³⁷ all states have laws governing adoption and baby-selling.³⁸ In the absence of surrogacy legislation, these are the laws that courts must use to determine the rights of the parties to the surrogate contract in the event of a breach.³⁹ Many commentators have argued that specific surrogacy legislation is necessary in order to formally establish a state's policy regarding surrogacy because adoption and baby-selling laws were not intended to cover the surrogate arrangement.⁴⁰ Furthermore, the absence of surrogate legislation allows the courts to disregard the unique factors that prompted the surrogate contract and to treat an indivisible transaction like a more typical adoption or child-custody battle.⁴¹ Others argue that new legislation is unnecessary because present laws can be construed to cover the practice.⁴²

contemporary surrogacy is that the former was a gratuitous arrangement and the latter is a commercial transaction where the surrogate receives a substantial fee. *See infra* note 29.

33. The fact that only about 600 children have been born by surrogate mothers indicates that the practice is still very limited. *See supra* note 1. *See also* Robertson, *supra* note 10, at 28.

34. *See supra* note 1.

35. *See supra* note 8.

36. In spite of legislative inaction, there is case law in several states that has either mildly endorsed or banned surrogacy. *See In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988)(declared surrogacy against public policy); *Yates v. Keane*, 14 Fam. L. Rep. (BNA) 1160 (Mich. 1988)(surrogate contract invalid under Michigan law and United States Constitution); *Surrogate Parenting Assocs., Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. 1986)(surrogacy does not violate state adoption or baby-selling laws, but a surrogate has the right to withdraw her consent to the contract for five days after birth); *Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (N.Y. Sur. Ct. 1986)(New York law does not presently preclude surrogacy, however this is a question for the legislature).

37. *See supra* note 1

38. Pierce, *supra* note 1. Utah's baby-selling statute is discussed *infra* at note 100.

39. There are three ways in which the surrogate contract can be breached by the surrogate. She could refuse to be inseminated, she could exercise her right to an abortion, and she could refuse to allow the child to be adopted. The father can breach the contract by refusing to pay the surrogate or refusing to accept the child.

40. Redefining Mother, *supra* note 24 at 192. They argue that adoption laws are inadequate to handle the surrogate arrangement. For this reason courts are incompetent to deal with surrogacy because they can only do so on an ad hoc basis.

41. *Id.*

42. *See* Comment, *Contracts To Bear a Child*, 667 CALIF. L. REV. 611 (1978).

III. THE ARGUMENTS OVER SURROGACY

The arguments both for and against the practice of surrogacy are compelling. Proponents argue that any governmental attempt to regulate or forbid the practice is unconstitutional because it involves a fundamental right that is inferred from the right to privacy. Opponents argue that state tolerance of the practice violates public policy because it makes a child the object of commerce. What follows is an analysis of the basic arguments presented both for and against surrogacy.

A. *Surrogacy as a Constitutionally Protected Right*

1. *The right of privacy*

It is now firmly entrenched in our constitutional jurisprudence that certain relationships are protected by the right to privacy.⁴³ Proponents of surrogate motherhood contend that the right to obtain or to bear a child by surrogacy is a fundamental right that is entitled to constitutional protection.⁴⁴ This contention is grounded in a long line of cases that protect the individual from unwarranted intrusions by the state into matters that pertain to child-bearing and child-rearing.⁴⁵ Both the right of an individual to be free from governmental interference in the use of contraceptives⁴⁶ and the right of a woman to have an abortion⁴⁷ are rights protected by the right to privacy.⁴⁸ The Supreme Court's decisions establishing these rights suggest that not only does an individual have a constitutional right *not* to procreate, but that the constitution also protects the individual's right *to* procreate.⁴⁹ Proponents of surrogacy argue that the right to procreate necessarily implies the

43. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

44. Surrogacy is constitutionally justified because "the attempt involves an aspect of the marital relationship that the right to privacy has protected since its earliest articulations: raising children. Surrogate parenthood is generally nothing more than an attempt by couples who cannot bear children by ordinary means to share in that experience." Keane, *supra* note 20, at 155-56.

45. "If 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." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

46. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

47. *Roe v. Wade*, 410 U.S. 113 (1973).

48. The origins of the right to privacy remain unclear. In *Griswold*, Justice Douglas said that the right may be implied from the first, third, fourth, fifth and ninth amendments. 381 U.S. at 484-85. In *Roe*, Justice Blackmun said that the right is implied from the fourteenth amendment's "concept of personal liberty." 410 U.S. at 153.

49. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to procreate is a fundamental right. To sterilize criminals convicted of certain felonies, while not sterilizing other criminals guilty of equally grave offenses, is a denial of due process).

existence of another right, namely the right to use any available means to enjoy one's right of procreation.⁵⁰

If this characterization is true, any statute prohibiting surrogacy would be an unconstitutional violation of the privacy⁵¹ expectations of both the surrogate mother and the man who hired her to bear his child, unless the state could demonstrate that prohibiting the relationship would further a compelling state interest and that the prohibition is narrowly drawn to achieve that interest.⁵²

2. *Equal protection*

Another constitutional impediment to prohibiting surrogacy may be found in the equal protection clause of the fourteenth amendment.⁵³ All states currently allow men to receive payment for sperm donations,⁵⁴ yet all states also have baby-selling statutes that prevent a woman from selling her reproductive capability.⁵⁵ Proponents of surrogacy contend that the two services are indistinguishable. Both involve the sale of that which is created by reproductive organs.⁵⁶ For a state to

50. *Commercial Conceptions*, *supra* note 18, at 139-40.

51. However, the right to privacy is not absolute. This was made quite clear in *Bowers v. Hardwick*, 106 S. Ct 2841 (1986), where the Supreme Court rejected the argument that the right to privacy conferred a broad right of sexual privacy. The Court said,

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Id. at 2846. In addition, Justice Blackmun noted in *Roe* that the right of privacy and the "unlimited right to do with one's own body as one pleases are not the same." *Roe*, 410 U.S. at 154.

52. *See Carey v. Population Serv. Int'l.*, 431 U.S. 678, 686 (1977). Admittedly, this is a test which the government can seldom pass. However, opponents of surrogacy argue that surrogacy does not involve the right of privacy, therefore, any regulation of the practice need only be rationally related to a legitimate government objective. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 581-84 (1978). Opponents argue that the right of privacy is not an issue with surrogacy because the right "is intended to guarantee the right of an individual to control his or her own reproductive faculties, not to commission and monitor the pregnancy of a third party." *Commercial Conceptions*, *supra* note 18, at 152. Additionally, the parties to the surrogate contract are not, as *Roe* requires, "isolated in [their] privacy." *Id.* at 141.

53. The equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

54. Sperm donors usually receive as much as \$20 to \$35 for a vial of sperm. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 *NEW ENG. J. MED.* 585, 586-87 (1979).

55. *See supra* note 38.

56. Black, *supra* note 30, at 380. This argument ignores that there is a difference between semen donation, pregnancy and childbirth. "Pregnancy and childbirth are hazardous, time-consuming, painful conditions which few women can be expected to experience for the sake of someone else unless they receive meaningful compensation." Keane, *supra* note 20, at 153. However, if a surrogate does have a greater risk than does a sperm donor then perhaps the surrogate and sperm donor are not similarly situated, and there is no equal protection argument.

permit a man to receive compensation for the sale of his reproductive capability but deny a woman the same opportunity is to discriminate on the basis of sex, which is forbidden under the equal protection clause unless the prohibition is substantially related to an important governmental objective.⁵⁷

B. Surrogacy as Violative of Public Policy

Opponents of surrogacy find many of its aspects objectionable. Most of those objections are grounded in public policy concerns.

1. Public policy considerations

a. *Baby-selling statutes.* Opponents of surrogacy are perhaps most offended by the practice because of the large fees that are paid to the broker and the surrogate mother.⁵⁸ Proponents of the practice argue that surrogacy is indistinguishable from a personal services contract or a rental agreement, and that the fee paid to the surrogate can be either considered as payment for nine months of her services or as a rental fee for nine months use of the surrogate's womb.⁵⁹ Opponents, however, assert that the label given the contract does not disguise the fact that the transaction is, in essence, one for the sale of a child.⁶⁰ There are several factors that point to this conclusion.

Baby-selling statutes typically provide that a person who sells or attempts to sell a child for any purpose, including in connection with an adoption, is guilty of a criminal offense.⁶¹ The surrogate contract

57. *Craig v. Boren*, 429 U.S. 190 (1976). Gender based discrimination is only entitled to an intermediate level of scrutiny under the equal protection clause. Accordingly, laws which discriminate on the basis of gender satisfy the clause if they are substantially related to an important governmental objective. More recently, the Court has demonstrated a willingness to increase the scrutiny given to gender based discrimination, by adding the requirement that there must be an "exceedingly persuasive justification" for the gender based classification. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 731 (1982).

58. They argue that the payment of fees for the birth of a child commodifies the child, oppresses the mother, and denigrates the value of human life. See generally *Commercial Conceptions*, *supra* note 18, at 142-47.

59. See generally *Baby Sitting Consideration*, *supra* note 31.

60. FIELD, *supra* note 1, at 164 n.5. "Most contracts . . . provide for no payment to the mother if she miscarries, even after many months of pregnancy; instead they condition payment upon the handing over of a live child. Clearly, such restrictions are incompatible with the characterization of payment for "services" or "rent". The contract involved in the *Baby M* case is indicative of this. *In re Baby M*, 109 N.J. 396, 470-74, 537 A.2d 1227, 1265-69 (1988). Considering this, the court said, "[i]t strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money." *Id.* at 1241.

61. See for example the discussion of Utah's baby selling statute, *infra* notes 100-07 and accompanying text. Payment of a woman's reasonable maternity, medical and necessary living

itself illustrates that the contract is one for the sale of a child instead of for rent or personal services. Surrogate contracts typically provide that the surrogate's fee will be withheld until the surrogate has fully complied with the contract by terminating her parental rights in order to facilitate adoption.⁶² In addition, these contracts also provide that if the child is stillborn the agreement terminates even though her services have been fully rendered.⁶³ Under this arrangement it is virtually impossible to separate the services component of the contract from the goods component.⁶⁴ If the child is not delivered in good condition, the money is not paid, even though the service has been performed.⁶⁵ Therefore, to argue that this transaction does not constitute baby selling is misleading because it ignores the substance of the agreement.⁶⁶

Another fact points to the transaction as one for the sale of a baby instead of one for personal services. Research has shown that women ordinarily will not become surrogates unless they are paid. This, coupled with the contractual provisions, suggests that the surrogate fully realizes that she is being paid solely to manufacture and market a good.⁶⁷

b. Lack of voluntary or informed consent. Surrogacy opponents also argue that the fee arrangement exploits surrogates.⁶⁸ They argue

expenses is generally held not to violate baby-selling statutes. Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 n.54 (1984) [hereinafter 'Surrogate Act'].

62. See *supra* note 60. See B. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 62-71 (unpublished manuscript available in Journal of Public Law office, Brigham Young University, J. Reuben Clark Law School) [hereinafter 'Atwell'], where the author argues that the surrogate is paid a "success fee" which clearly constitutes baby-selling.

63. Atwell, *supra* note 62.

64. *Commercial Conceptions*, *supra* note 18, at 142-48.

65. Atwell, *supra* note 62 and accompanying text.

66. Perhaps a more convincing argument can be made that the transaction involves, not the sale of a child, but rather the sale of parental rights to a child. There is little practical difference. As one commentator has noted, the "[s]ale of [a surrogate's] parental rights is the equivalent of sale of the child." Means, *Surrogacy v. The Thirteenth Amendment*, IV N.Y. LAW SCH. HUM. RTS. ANN. 445 (1987) [hereinafter 'Means'].

67. There are, however, a few women who are willing to function as surrogates for purely altruistic reasons. They are motivated out of compassion and want to give infertile couples "the gift of life". Parker, Initial Findings, *supra* note 30 at 118. Mary Beth Whitehead claimed this was her motivation in becoming a surrogate. This statement, however, lacks credibility because she became a surrogate at the same time the second mortgage on her house was being foreclosed. *In re Baby M*, 109 N.J. 396, 440, 537 A.2d 1227, 1249 (1988). Some women, many of whom are single, wish to become surrogates to experience pregnancy without having to accept the responsibilities attendant with motherhood. Robertson, *supra* note 10, at 35. Others become surrogates to atone for a prior abortion and attempt to eliminate any feelings of guilt. Parker, Initial Findings, *supra* note 30, at 118. However, it is clear that the vast majority of surrogates participate in surrogacy for the money. *Id.*

68. See generally *Commercial Conceptions*, *supra* note 18. See also *In re Baby M*, 109 N.J. 396, 434-44, 537 A.2d 1227, 1246-50 (1988).

that the promise of high fees lure many into the arrangement without fully appreciating the consequences of the contract.⁶⁹ Despite the fact that she consents to give up her child, the promise of \$10,000 may prevent an impoverished⁷⁰ surrogate from making a totally voluntary decision.⁷¹ Indeed, any consent that is given before the child is actually delivered, let alone conceived, is not voluntary or informed with regard to the child because it is impossible to predict how the surrogate will feel after the child is born.⁷²

c. The child as a commodity. Perhaps the most important objection to the fee arrangement is that it degrades human life because it creates the opportunity for the parties to treat the child as a commodity.⁷³ The child is not created for his own sake, nor are the child's best interests considered;⁷⁴ indeed, they cannot be before the child is born.⁷⁵ The only factor considered is that of promoting the happiness of an infertile couple.⁷⁶ The substantial investment⁷⁷ that the father makes in his child only commercializes the child further because that investment brings with it an expectation of product quality.⁷⁸ Nothing prevents a disappointed father from rejecting a deformed or retarded infant when his expectations are not met. This possibility was tragically illustrated in a 1983 surrogacy agreement.⁷⁹

69. "This financial incentive may be sufficient to induce a woman to enter into the surrogacy agreement — an agreement she probably would not otherwise make and one that she may later regret." Atwell, *supra* note 62, at 60.

70. A study of the motivations of potential surrogates revealed that most were financially needy. Parker, *Initial Findings*, *supra* note 30, at 118.

71. See *infra* notes 121-40 and accompanying text.

72. *Id.*

73. *Commercial Conceptions*, *supra* note 18, at 142-48.

74. *But see* Keane, *supra* note 20, at 156, which suggests that it is perhaps a good thing that normal parental motivation is not subject to the scrutiny given to a surrogate's motivation. Indeed, is a child ever created because his parents are looking out for the child's best interests?

75. See *infra* notes 138-40 and accompanying text.

76. Often the reason that the couple is unable to have children is because the wife has postponed child-rearing to pursue professional aspirations. FIELD, *supra* note 1, at 60-61.

77. Although it varies from organization to organization, a couple will pay on the average \$25,000 for a child born by a surrogate. This cost includes the fee paid to the surrogate and the baby broker as well as the surrogate's medical costs, psychological fees, legal fees, life insurance costs, etc. *Baby Sitting Consideration*, *supra* note 31, at 542-43.

78. *Commercial Conceptions*, *supra* note 18, at 146.

79. In 1982, Judy Stiver and Alexander Malahoff entered into a surrogate contract. Under the terms of the contract, Mrs. Stiver was to abstain from sexual intercourse until she conceived by artificial insemination. In January 1983, she gave birth to a boy. The child, however, was born with microcephaly, the symptom of which is an abnormally small head. Microcephaly frequently results in mental retardation.

Malahoff refused to accept the impaired child. He claimed it was not his, and demanded blood tests to determine the child's paternity. The Stivers also did not want the child. Blood tests were administered and the results announced on the Donahue television program. The tests indicated that Malahoff was not the father. Malahoff was relieved but had already decided that if he

2. Contractual provisions

Opponents of surrogacy also find the contractual provisions of the arrangement offensive. They claim that the contract violates public policy because it purports to eliminate the surrogate's right to an abortion and because it attempts to circumvent adoption laws.

a. Abortion. Typically, surrogate contracts provide that the surrogate waives her right to abort.⁸⁰ Opponents of surrogacy ironically⁸¹ argue that the purported waiver of a woman's fundamental right to an abortion is invalid.⁸² They argue that if a husband cannot veto his wife's decision to have an abortion,⁸³ this veto power cannot be given to a father in the surrogate context.⁸⁴ Furthermore, specific performance of this contractual provision constitutes state action which violates the surrogate's right to privacy⁸⁵ and the thirteenth amendment's prohibition against involuntary servitude.⁸⁶

b. Prenatal consent to adoption. The surrogate contract also violates public policy by attempting to terminate the parental rights of the mother before those rights have even vested.⁸⁷ Many states preclude prenatal consent to adoption, generally requiring a certain number of days after birth before the mother may voluntarily terminate her parental rights.⁸⁸ Indeed, even after those rights have been terminated, termi-

was the father he would give the child up for adoption. Later Mr. Stiver revealed that in a previous marriage he had fathered a microcephalic child who had died.

This is a tragic example of a situation where a child was viewed as a commodity. It is a tragedy not only because of the reaction of the parents, (there is currently a multimillion dollar lawsuit pending between Malahoff and the Stivers) but more importantly because no one was concerned with the interests of the child. See Surrogate Act, *supra* note 61, at 1285-86.

80. "Abortions are not generally allowed [under the contract] unless such action is necessary for the physical health of the surrogate." *Baby Sitting Consideration*, *supra* note 31, at 544.

81. Many opponents of surrogacy feel that the practice should be prohibited in order to preserve the traditional family structure. See Perry, *supra* note 14, at 108. It is ironic that they invoke the right of privacy, which has the potential of forever altering the traditional family structure, to argue that surrogacy is against public policy. Additionally, it is ironic that both proponents and opponents use the right of privacy to justify their views.

82. See generally Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, (1986) [hereinafter '*Rumpelstiltskin*'].

83. "Clearly since the State cannot regulate or proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . ." *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

84. *Rumpelstiltskin*, *supra* note 82, at 1940

85. Comment, *Constitutional Analysis of the Baby M Decision*, 11 HARV. WOMEN'S L.J. 19, 51 (1988) [hereinafter '*Constitutional Analysis*'].

86. The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Forcing the surrogate to bear a child which she does not want to bear would place her in involuntary servitude to the father.

87. See *supra* notes 138-40 and accompanying text.

88. Atwell, *supra* note 62, at 31-34.

nation may be revocable for several months.⁸⁹ In addition, many states have specific procedures that must be followed before a termination of parental rights is permitted.⁹⁰ Typically, those procedures provide that absent some showing of parental neglect parental rights will not be terminated,⁹¹ because it is the policy of the state to leave children with their natural parents.⁹² To allow termination to occur without complying with the statutory provisions is to deny the surrogate her constitutionally protected liberty interest in her child.⁹³ The surrogate contract, however, purports to circumvent this legislative intent through a simple contract.

3. *Surrogacy v. adoption*

Opponents also argue that because the long term effects of surrogacy on the participants are unknown, the practice should be prohibited. Surrogacy could affect the surrogate's mental health,⁹⁴ alter her relationship with her other children⁹⁵ and create difficulties for the adopting couple as well.⁹⁶ In addition, the transaction may dramatically affect the child who is the subject of the surrogate transaction. Proponents of surrogacy are likely to deny that learning one was conceived through a surrogacy arrangement is any more stressful than learning that one was adopted. There may be some merit to this argument.

89. "[M]any states provide that even if the biological parents give consent after the child's birth, that consent may be revoked with relative ease within a short period of time." *Id.* at 32. *See also In re Baby M*, 109 N.J. 396, 429-31, 537 A.2d 1227, 1244 (1988).

90. UTAH CODE ANN. § 78-3a-48 (1985). For a description of the effect of this statute on surrogacy *see infra* notes 100-07 and accompanying text.

91. *Id.*

92. *See State ex rel Winger*, 558 P.2d 1311 (Utah 1976).

93. *See generally Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

94. The surrogate may feel a deep sense of loss and guilt upon relinquishing the child. Depression may last for weeks, *Robertson, supra* note 10, at 29, and may necessitate psychiatric counselling. *Davis & Brown, supra* note 23, at 129.

95. Presumably other children of a surrogate mother must be told something when the mother does not come home from the hospital with a baby. A child is not likely to understand if he is told that his mother gave the baby away. Indeed, he may begin to question whether he, like his sibling, is equally expendable. *See generally Krimmel, The Case Against Surrogate Parenting*, 13 HASTINGS CENTER REP. 35 (1983) [hereinafter 'Krimmel'].

96. The natural father may "concentrate his love on the child, thereby excluding the wife from the familial relationship. Alternatively, as the child matures the father may resent the child or develop guilt feelings with the realization that his satisfaction in the child might not be shared by his spouse." *Surrogate Mothering, supra* note 29, at 105. On the other hand the adoptive mother is likely to feel guilty about her nonparticipatory role in giving the child life and may "develop feelings of jealousy and animosity for the [child]." *Id.* at 154. Both parents, however, must be prepared to cope with having been participants in a "relationship that many consider to be immoral or deviant." *Robertson, supra* note 10, at 29.

Adoptees typically have difficulty adjusting to this knowledge.⁹⁷ However, an adopted child and a child born to a surrogate may not be similarly situated because the child born to a surrogate bears the added burden of knowing that her mother gave her up for a \$10,000 fee.

Surrogacy is not the same as adoption. They may appear to be similar, nevertheless, they have different purposes.⁹⁸ Justifying the practice of surrogacy by its similarity to adoption ignores their difference. One commentator has expressed the difference as follows:

Traditional adoptions are child rescue operations, not palliatives for disappointed parents. The current adoption system allocates lives in being; the child is already in crisis. In short, adoption poses the least detrimental alternative for the child. In marked contrast, the host mother in a surrogate parenting contract conceives the child intentionally for the very purpose of exchanging the child for money. Rather than centering on the needs of a child, the surrogate model exists primarily to satiate the psychic and financial needs of adult parties.⁹⁹

This is perhaps one of the most compelling reasons why surrogacy should not be condoned.

IV. ANALYSIS OF UTAH LAW

Whether the Surrogate Motherhood Act was needed depends on the present status of surrogacy under Utah law. An analysis of the existing laws indicates that surrogacy was prohibited even before the adoption of the Act.

A. *Baby-Selling*

Utah law specifically prohibits the sale of children¹⁰⁰ by providing that persons guilty of selling or attempting to sell or otherwise dispose of a child for money or other consideration are guilty of a third degree

97. See generally J. TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCES OF ADOPTED PEOPLE (1973).

98. Krimmel, *supra* note 95, at 35.

99. *Commercial Conceptions*, *supra* note 18, at 144-45.

100. UTAH CODE ANN. § 76-7-203 (1973) provides:

Any person, while having custody, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree; provided, however, this section shall not make it unlawful for any person, agency, or corporation to pay the actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to the adoption, or cooperate in the completion of the adoption.

Id. There is no case law interpreting this statute.

felony.¹⁰¹ An exception allows for the payment of the actual and reasonable expenses connected with the pregnancy and birth of the child, however, such payment must be charitable in nature.¹⁰² Therefore, it appears that the statute is violated if payment of the bills associated with the pregnancy are for the purpose of inducing the mother to cooperate in the placement of the child for adoption.

This statute alone may prohibit the entire surrogacy arrangement.¹⁰³ Under the surrogate contract the surrogate is promised a fee to release the child to the father. It appears that if she complies with the contract that she has violated the statute. However, the statute only prohibits commercial surrogacy. A woman who is willing to bear the child gratuitously does not violate the statute.

But what about the father?¹⁰⁴ The statute speaks only in terms of the seller of the child; it appears that under this statute the father cannot be prosecuted for having purchased the baby.¹⁰⁵ It can be argued that because his payment for the surrogate's medical expenses are not charitable that the statute also reaches his purchase. However, it can just as easily be argued that even though the statute precludes a person paying medical expenses, if such payment is for the purpose of inducing the mother to place the child for adoption, that the statute fails to specify any punishment for doing so.

However, the fact that the surrogate may be prosecuted under this law and the father cannot may be of little significance. The fact that

101. *Id.* The maximum penalty for a third degree felony is five years imprisonment. UTAH CODE ANN. § 76-3-203 (1983).

102. The requirement of a charitable purpose appears to place a motivational limitation on the person paying the expenses. It appears that unless this payment was motivated out of a genuine concern for the woman's health, safety or financial well being, that the statute would be violated. This would preclude the natural father in a surrogacy contract from paying the surrogate mother's medical expenses, because his motivation does not go to the mother, rather it goes solely to the child produced under the contract.

103. *But see* Surrogate Parenting Assocs., Inc. v. Kentucky, 704 S.W.2d 209 (Ky. 1986)(surrogacy does not violate the state's baby-selling law).

104. There is some question as to whether baby-selling statutes apply in this context. Arguably, these statutes were enacted to prevent someone other than the natural father from purchasing his own child. It has been questioned whether the father can violate these statutes at all because it seems axiomatic that one cannot buy that which is already his. However, the agreement could be characterized as one for the sale of parental rights, which may violate the statute. *See generally* Means, *supra* note 66 and accompanying text. Clearly these statutes would apply if the natural father's wife were the party to the contract. Therefore, the reason the wife is always left out of the contract between the father and the surrogate is to eliminate the appearance of a third party buying a baby.

105. Failure to direct this statute at the purchaser of the child makes only the sale of the child a criminal violation. Because the purchaser is under no threat of prosecution, it is conceivable that he could simply raise the price he is willing to pay for the child to compensate the surrogate for the risk of incurring a criminal penalty for selling the child.

only one of the parties to the transaction has criminal liability has the effect of drastically limiting the transaction, which is arguably the purpose of the statute anyway. Therefore, it appears that this statute legally and practically prevents commercial surrogacy from taking place in Utah.¹⁰⁶ However, it probably does not prevent gratuitous surrogacy, especially if the surrogate pays her own medical expenses.¹⁰⁷

B. Surrogacy as an Independent Adoption

Arguably, surrogacy is merely a form of independent adoption because the ultimate goal of the arrangement is to make the adopting couple the legal parents of the child created under the contract.¹⁰⁸ Many states discourage independent adoptions¹⁰⁹ in favor of requiring persons wishing to adopt to work through a state licensed agency. Utah law, however, permits independent adoptions by permitting unlicensed individuals to assist in bringing the parties together.¹¹⁰ But, independent adoption is permitted only as long as "no payment, charge, fee, reimbursement or expense, or exchange of value of any kind, or promise or agreement to make the same [is] made for that assistance."¹¹¹

This statute seriously restricts surrogacy arrangements by precluding the use of the surrogate broker; indeed, to the extent the broker is

106. The lack of a law defining the rights of individuals who avail themselves of artificial insemination is yet another legal impediment to surrogacy in Utah. Under Utah law there is a presumption "that a child born to the wife during marriage is the legitimate offspring of herself and her husband." *Lopes v. Lopes*, 30 Utah 2d 393, 395, 518 P.2d 687, 689 (Utah 1974). The child born to a surrogate, however, is not the child of the surrogate's husband, and it may be difficult for the surrogate's husband to establish that the child is not his because of Utah's adherence to the Lord Mansfield Rule which, in effect, prevents either spouse from giving testimony that would bastardize the child. *Id.* Other states have eliminated this problem by enacting laws governing artificial insemination. These laws provide that if the husband consents to his wife being artificially inseminated that any child born after the artificial insemination is treated as if it were the child of the husband. See generally Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935. Surrogacy contracts typically state that the surrogate's husband does not consent to the artificial insemination in order to rebut the implications of such laws.

107. But few women would be willing to do this. See Black, *supra* note 30.

108. Atwell, *supra* note 62, at 16.

109. Several commentators have criticized independent adoptions because more abuses tend to occur through independent adoptions than through agency adoptions. For example, a child placed for adoption through an independent procedure is more likely to become a victim of the black market. Moreover, some studies conclude that there is a greater risk that the biological parents will not receive proper counseling regarding the decision to place the child for adoption. There also appears to be a greater risk that the placement will not be permanent due to some intervening problem.

Atwell, *supra* note 62, at 20-21.

110. UTAH CODE ANN. § 62A-4-202(2)(a)(1988).

111. *Id.* The statute does not, however, preclude "payment of fees for medical, legal, or other lawful services rendered in connection with the care of a mother, delivery and care of a child, or lawful adoption proceedings . . ." UTAH CODE ANN. § 62A-4-202(3)(1988).

used, the statute may totally prohibit the practice.¹¹² Under the typical surrogacy contract, the individual or organization that matches the surrogate mother with the infertile couple receives a substantial fee for its services.¹¹³ Because the surrogate contract itself is ultimately consummated for the sole purpose of creating an adoptable child, it is inescapable that the surrogate broker's fee includes a healthy profit to the broker for bringing the two parties to the contract together.¹¹⁴ This, however, is expressly forbidden under Utah's Child Placement Law¹¹⁵ and results in both criminal and civil penalties.¹¹⁶ Commercial surrogacy, therefore, is impermissible because the intermediary receives an illegal fee.

C. Termination of Parental Rights

The laws governing the termination of parental rights are also fatal to surrogacy in Utah. Surrogate contracts purport to terminate the parental rights of the surrogate mother in order to facilitate the adoption of the child by the father's wife. Such an agreement is unenforceable under Utah law.¹¹⁷ Only a court may decree a termination of parental rights.¹¹⁸ A termination decree may be ordered only after a

112. It is doubtful whether surrogacy would occur but for the services provided by the surrogate broker. See Black, *supra* note 30.

113. The fee usually averages between \$5,000 and \$10,000. See *supra* notes 21-23 and accompanying text.

114. The surrogate broker's fee also includes the costs of artificially inseminating the surrogate and drawing up the surrogate contract. See contract between William Stern and Infertility Center of New York in Appendix B of the *Baby M* case. *In re Baby M*, 109 N.J. 396, 475-78, 537 A.2d 1227, 1271-73 (1988).

115. See *supra* note 110 and accompanying text.

116. UTAH CODE ANN. § 62A-4-203 (1988). This section provides:

(1) The division or any interested person may commence an action in district court to enjoin any person, agency, firm, corporation, or association violating Section 62A-4-202.

(2) A county attorney or the attorney general shall institute legal action as necessary to enforce the provisions of Section 62A-4-202. . . .

(3) In addition to the remedies provided in Subsections (1) and (2), any person, agency, firm, corporation, or association found to be in violation of Section 62A-4-202 shall forfeit all proceeds identified as resulting from the transaction, and may also be assessed a civil penalty of not more than \$10,000 for each violation. Every act in violation of Section 62A-4-202, including each placement or attempted placement of a child, is a separate violation.

Id.

117. Utah law indicates that there is a strong, but rebuttable, presumption that the interests of the child are best served by remaining in the custody of his natural parents. Therefore, termination is not appropriate unless clear and convincing evidence indicates otherwise. See *In re Castillo*, 632 P.2d 855 (Utah 1981); State *ex rel. Winger*, 558 P.2d 1311 (Utah 1976).

118. "A termination of parental rights may be ordered only after a hearing is held specifically on the question of terminating the rights of the parent or parents." UTAH CODE ANN. § 78-

hearing where parental unfitness, abandonment or failure to show the normal interest of a natural parent¹¹⁹ is shown by clear and convincing evidence.¹²⁰ The law does provide for termination upon voluntary petition of one or both of the parties, however, this does not eliminate the hearing requirement.

D. *The Utah Adoption Law*

Finally, surrogacy is clearly prohibited under the Utah Adoption Law.¹²¹ A critical feature of the surrogate contract is the surrogate's consent, long before conception, to relinquish her parental rights in the child and to permit it to be placed for adoption following its birth. This agreement violates the Utah Adoption Law in several respects.

The statute provides that "[a] child cannot be adopted without the consent of each living parent having rights in relation to said child"¹²² Consent must be given in the presence of a district court judge.¹²³ The purpose of this requirement is to assure the court that consent is both informed and voluntary.¹²⁴ Surrogate contracts violate this requirement. The contract purports to obtain the surrogate's consent to the adoption long before the child is conceived. Such advance consent is neither informed, voluntary nor possible under the statute.

Before conception, indeed, before birth, the surrogate lacks sufficient information to make an informed choice.¹²⁵ Only after the surrogate has given birth can she truly make an informed choice to place her child for adoption. Until the child is born the mother is unaware of the bond that has developed between her and her child.¹²⁶ Only after she

3a-48 (1985).

119. UTAH CODE ANN. § 78-3a-48(1)(1985).

120. Before a state may irrevocably terminate the rights parents have in their children, due process requires that the state must support its allegations by at least a clear and convincing evidence standard. *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re Castillo*, 632 P.2d 855 (Utah 1981).

121. UTAH CODE ANN. §§ 78-30-1 to 78-30-18 (1953).

122. UTAH CODE ANN. § 78-30-4(1)(1981).

123. UTAH CODE ANN. § 78-30-8 (1953). The statute also provides that if the person whose consent is necessary is not in the county, the court may appoint a commissioner to take her written consent and "[t]he commissioner shall explain to such person the legal significance of such consent, and shall certify to the court his findings as to whether the consent is freely given."

124. *See Taylor v. Waddoups*, 121 Utah 279, 241 P.2d 157 (Utah 1952).

125. "How well can a surrogate mother applicant understand and comprehend, prior to the artificial insemination how she will feel when she relinquishes the child?" Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. AM. ACAD. PSYCHIATRY LAW 21, 27 (1984).

126. Gaffney, *Maternal-Fetal Attachment in Relation to Self-Concept and Anxiety*, 1982 MATERNAL-CHILD NURSING J. 91. "Attachment begins with the . . . sensations created by fetal movement which validate the mother's awareness of another—an awareness that continues throughout pregnancy." *Id.* at 92.

has held her baby can she even partially comprehend the consequences of permanently severing her parental relationship with that baby.¹²⁷ Hence, any consent given before the child is born is necessarily uninformed.¹²⁸

Generally, the expectations of competent parties who have entered into a contract will be enforced.¹²⁹ However, freedom of contract is a qualified right.¹³⁰ Agreements may be unenforceable if one of the parties was unduly influenced to enter into the agreement.¹³¹

In the surrogacy context, the fee paid to the surrogate and her unequal bargaining position may be sufficient to render her consent involuntary. Preliminary research indicates that surrogacy candidates are typically poorly educated, unemployed or receiving public assistance.¹³² The high fee associated with surrogacy may unduly influence a financially needy woman's decision to become a surrogate because the money appears to be so easy to earn.¹³³ The promise of receiving an easy \$10,000 may cloud the potential surrogate's judgment to the extent that she is unable to fully appreciate the consequences of her contract—that she is expected to forever relinquish her child once it is born.¹³⁴

Utah law suggests that the policy of the state is to protect volun-

One commentator notes even a woman who has previously given birth "may not be able to predict her emotional state when the child she has agreed to surrender is born pursuant to the surrogate parenting agreement." Atwell, *supra* note 62, at 51-52.

127. "A parent can be unexpectedly smitten with profound connection to the newborn child at birth, and a parent who tries (for whatever reason) to give a child away, can find it impossible to go through with the parting." Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble With Specific Performance*, IV N.Y.L. SCH. HUM. RTS. 375, 400 (1987).

128. *In re Baby M*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988) ("any decision prior to the baby's birth is, in the most important sense, uninformed").

129. E. FARNSWORTH, *CONTRACTS*, § 5.1 (1982) [hereinafter 'FARNSWORTH, *CONTRACTS*'].

130. "No legal system devised by man has even been reckless enough to make all promises enforceable." Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969).

131. RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979) [hereinafter 'RESTATEMENT, *CONTRACTS*']. Undue influence is an equitable doctrine that "give[s] relief to victims of unfair transactions that were induced by improper persuasion." FARNSWORTH, *CONTRACTS*, *supra* note 130, at § 4.9.

A contract may also be unenforceable when entered into pursuant to duress, RESTATEMENT, *CONTRACTS* §§ 174-76, or mistake, *id.* at §§ 151-58.

132. *See supra* note 67 and accompanying text.

133. "[T]he monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary." *In re Baby M*, 109 N.J. 396, 425, 537 A.2d 1227, 1241 (1988).

134. To the extent that the possibility of earning such a high fee does cloud the surrogate's judgment, it may also prevent her from making an informed decision to become a surrogate. *See supra* notes 125-28 and accompanying text.

tary consent by prohibiting fees being paid to a parent in order to induce her to relinquish her child for adoption.¹³⁵ Some courts have held that the payment of very small sums in connection with an adoption were sufficient to render consent involuntary.¹³⁶ Therefore, any fee promised a prospective surrogate should be found to unduly influence her decision to become a surrogate and sufficient to render her consent to the agreement involuntary.¹³⁷

Advance consent in the form of the surrogacy contract is not possible under the statute for two reasons. First, the statute is plain in requiring that all parties involved in the adoption must appear before the court to sign the necessary consent forms. Second, pre-birth consent is not contemplated by the statute. Indeed, the statute contemplates that the child must be born before consent to adoption may be given. The statute requires that "[t]he person adopting a child *and the child adopted*, and the other persons whose consent is necessary, must appear before the district court" before consent may be given¹³⁸ and that adoption may not take place without the consent of each parent "having rights in relation to said child . . ." ¹³⁹ Advance consent is not possible under these statutes because parental rights cannot completely vest until the child is born.¹⁴⁰

The requirement that all parties to the adoption give their consent to the adoption before a judge is not served by the surrogacy contract. The purpose of this requirement is for the judge to satisfy himself that

135. See the discussion of Utah's baby-selling statute, *supra* notes 100-07 and accompanying text, and the discussion of independent adoptions, *supra* notes 108-16 and accompanying text.

136. *Downs v. Wortman*, 228 Ga. 315, 185 S.E.2d (1971)(an offer to pay the mother's airfare from Georgia to visit her parents in Illinois was sufficient to render consent involuntary); *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957)(consent was rendered involuntary by the adoptive parents paying \$400 in exchange for the biological parent's consent allowing them to adopt two children).

137. "[A]ny decision . . . compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary." *In re Baby M*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988).

138. UTAH CODE ANN. § 78-30-4 (1953)(emphasis added).

139. UTAH CODE ANN. § 78-30-4(1)(1981).

140. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr v. Robertson*, 463 U.S. 248, 260 (1983)(quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)). At issue in *Lehr* was the time in which the parental rights of an unwed father may be terminated. The Court determined that an unwed father's parental rights do not vest until he "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' . . ." *Id.* at 361. While it is true that the mother's role in procreation and birth establishes some sort of parental relationship between mother and child, *id.* at n.16, it seems that the biological link between mother and child is insufficient to create the full blown parental rights of which the Court was speaking. Arguably the mother must also accept "some measure of responsibility for the child's future" in order to enjoy full blown parental rights." *Id.* at 262.

the person placing the child for adoption is giving informed and voluntary consent to the adoption. If the judge has any doubt that any element of consent is not satisfied, he may prevent the parent from forever losing her parental rights. The surrogate's parental rights are clearly not protected by the surrogate contract because it attempts to get the surrogate to consent to an adoption before the surrogate has the opportunity to make an informed and voluntary decision.

The Adoption Law also requires that if written consent of a licensed child-placement agency is not obtained upon the filing of the adoption petition, that the Division of Family Services shall investigate the matter and report its findings to the court.¹⁴¹ The statute requires the Division of Family Services to determine "whether the proposed foster parent is financially able and morally fit to have the care, supervision, and training of the child"¹⁴² and "any other facts and circumstances pertaining to the child and his welfare."¹⁴³ This "indicate[s] a legislative intention to assure that a minor child, in an independent adoption, will be placed with fit and proper parents."¹⁴⁴ Surrogacy contracts violate this policy because little, if any, effort is expended to determine the parental fitness of the adopting parent.¹⁴⁵ Indeed, the contract's sole purpose is to provide an infertile couple with a baby; not to seek the best interests of the child.

V. THE UTAH SURROGATE PARENTHOOD ACT

The preceding section suggested that surrogacy contracts may already have been prohibited under Utah's baby-selling, child placement, termination, and adoption laws before the legislature voted to enact the Surrogate Parenthood Act. These laws, however, did not prohibit surrogacy because the legislature made a conscious policy decision to preclude the practice, rather surrogacy was forbidden indirectly—indeed, accidentally—by laws that were promulgated to deal with entirely dif-

141. UTAH CODE ANN. § 78-30-14 (1985). See *Matter of S.*, 572 P.2d 1370 (Utah 1977).

142. UTAH CODE ANN. § 78-30-14(4)(c)(1985).

143. UTAH CODE ANN. § 78-30-14(4)(e)(1985).

144. *Matter of S.*, 572 P.2d 1370, 1372 (Utah 1977).

145. The New Jersey Supreme Court said of the Baby M contract,

Although the interest of the natural father and adoptive mother is certainly the predominant interest, realistically the *only* interest served . . . not even a superficial attempt is made to determine their awareness of their responsibilities as parents.

Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.

In re Baby M, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988)(emphasis in original).

ferent problems. The previous prohibition against surrogacy was not specific, therefore, it lacked authoritativeness because surrogacy *itself* was not directly prohibited. The prohibition also failed to define the rights of parties involved in surrogate contracts, leaving courts without legislative guidance as to how custody disputes should be resolved.

The Surrogate Parenthood Act, however, changed this. The Act explicitly renders both commercial and gratuitous surrogacy unenforceable as violative of public policy, provides criminal liability for all persons and organizations involved in commercial surrogacy,¹⁴⁶ and defines the status of children born as a result of surrogacy agreements.¹⁴⁷

In light of the potential problems involved in any surrogacy arrangement the Act was long overdue. The Act is justified, if for no other reason, on the ground that it sends a message to all persons contemplating a surrogate contract that neither commercial nor gratuitous

146. Violation of the Act is considered a class A misdemeanor. UTAH CODE ANN. § 76-7-204(1)(d)(1989). A class A misdemeanor is punishable by imprisonment for a term of a year or less. *Id.* at § 76-3-204(1)(1973).

147. The Act provides:

(1)(a) No person, agency, institution, or intermediary may be a party to a contract for which consideration is given, and in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.

(b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1). This section does not apply to medical care provided after conception.

(c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.

(2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable.

(3)(a) In any case arising under Subsection (1) or (2), the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes.

(b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.

(4) Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state.

(5) This section applies to contracts or agreements that are entered into after April 24, 1989, the effective date of this act.

(6)(a) This section is repealed on July 1, 1991.

(b) Prior to January 1, 1991, the Legislative Interim Social Services Committee shall analyze and assess the current status of surrogacy arrangements and related issues, including adoption, paternity, custody, support, visitation, and the termination of parental rights, and make its recommendations to the Legislature regarding the policy of this state and any proposed legislation regulating surrogate parenthood arrangements.

(b) Any incident or arrangement of surrogate parenthood, as described in Subsection (1) or (2) that occurs prior to July 1, 1991 is governed by this section.

surrogacy will be enforced in the Beehive State. Those contemplating surrogacy have advance notice as to the consequences of a surrogate relationship and are not left wondering whether the policy of the state permits or forbids the practice. Infertile Utahns wishing to employ a surrogate must either find a woman willing to bear the child for free, and take the risk that she will breach her agreement, or go out of state and take their chances with the laws and policies of other jurisdictions.

Perhaps one of the most important provisions of the Act, besides rendering surrogacy unenforceable, is the presumption that a child born to a surrogate is legally the child of the surrogate and her husband.¹⁴⁸ This provision legitimizes¹⁴⁹ a child born as a result of an illegal commercial contract or legal gratuitous contract, and provides further protection to the child by determining ultimate parental responsibility in the event that either party breaches the agreement after the child is born.¹⁵⁰ The section does not provide a similar presumption as to the child's paternity when the surrogate is unmarried, even though it does provide that the child is legally the surrogate's.¹⁵¹ This may not be a significant problem, however, because people seem to prefer that the surrogate be married anyway.¹⁵² But to the extent that single surrogates are used, this section has the effect of bastardizing the child of a single surrogate who decides to keep the child for herself.¹⁵³ Whether

148. UTAH CODE ANN. § 76-7-204(3)(a)(1989). It is interesting to note that Utah has not adopted the Uniform Parentage Act. Section 5 of that Act provides that a husband will be treated as the natural father of a child born to his wife when he has consented to her being artificially inseminated with donor sperm. Because surrogates normally conceive by means of artificial insemination, the above cited section of the Utah Surrogate Parenthood Act seems to suggest that a married woman, who is artificially inseminated with donor sperm, gives birth to a legitimate child whether or not her husband consented to the insemination, and both her and her husband are legally the parents of that child. It is questionable whether this is the Utah Legislature's intended result.

149. At common law an illegitimate child had few rights. An illegitimate was not entitled to support from her parents nor was she entitled to an inheritance. In addition, she was considered to be without heirs, except for those of her own body. Today, however, the status of illegitimate children has significantly improved, although an illegitimate child is still not entitled to support or an inheritance from her father unless he takes action to legitimize her, or she brings a paternity action against him. See generally B.Y.U. J. LEGAL STUD., SUMMARY OF UTAH FAMILY LAW §§ 20.2-20.5 (1980).

150. UTAH CODE ANN. § 76-7-204(3)(a)(1989).

151. *Id.*

152. See *supra* note 24.

153. This is arguably no different than the status of a child born to an unwed mother. Both are illegitimate. However, in the latter case, the putative father can legitimize the child by marrying the child's mother, UTAH CODE ANN. § 77-60-14 (1978), or by publicly acknowledging the child as his own. UTAH CODE ANN. § 78-30-12 (1977). If the single surrogate reneges on her agreement and keeps her child it is likely that the child will remain illegitimate unless the father is willing to publicly acknowledge it as his own. It seems highly unlikely that the father would ever be willing to do this, especially in light of the agreement's breach. However, Utah law does permit

or not this problem is one that can be resolved is something the legislature will have the chance to deal with when the Act expires.¹⁵⁴

It is significant that the Act provides that courts are to ignore the terms of the contract and look only to the best interests of the child in resolving custody disputes.¹⁵⁵ This should be self-evident, given the fact that the court is making a decision that will affect an innocent child's future. However, the trial court's decision in the *Baby M* case illustrates too well that the judge may place more importance on the surrogate contract than on the best interests of a child created under the contract.¹⁵⁶ This provision reflects a policy decision that the best interests of a child should not be determined by self-interested participants to a contract, but rather on the basis of an impartial judicial decision made after the child's birth and after reviewing all of the relevant facts that could affect that child.

The biggest problem with the Act is that it is temporary.¹⁵⁷ Because of this it provides no guidance as to the long term policy of the state regarding the practice of surrogacy. This may cause some problems for people contemplating surrogate motherhood after the Act's repeal and, once again, place the courts in the awkward and difficult position of trying to decide what laws apply to this unique arrangement. Before the Act was adopted, a good argument could be made that surrogacy was already prohibited by the baby-selling statute as well as a combination of the adoption, child placement and termination statutes.¹⁵⁸ The current Act plainly supercedes the above combination of statutes, because it is specifically designed to prohibit the practice as one that is against public policy; therefore, the official attitude of the state towards surrogacy is no longer left to inference. However, once the Act is repealed, infertile couples will once again be left to infer what the policy of the state actually is.

Because the Act is ambiguous, two inferences are possible. First, one could infer that the above mentioned combination of statutes will continue to prohibit the practice in the absence of a specific act. This may not be a plausible inference, however, because the legislature failed to state in the current Act whether it considered surrogacy to be baby-selling or something that could otherwise be prohibited by other statutes. Second, because the legislature prohibited surrogacy and then

an illegitimate to bring a paternity action against its putative father and to sue for support. UTAH CODE ANN. §§ 78-45a-2 and 78-45a-5 (1977).

154. See UTAH CODE ANN. § 76-7-204(6)(1989).

155. UTAH CODE ANN. § 76-7-204(3)(b)(1989).

156. See *In re Baby M*, 217 N.J. Super. Ct. Ch. Div. 313, 525 A.2d 1128 (1987).

157. UTAH CODE ANN. § 76-7-204(6)(1989). For the text see *supra* note 147.

158. See *supra* notes 100-45 and accompanying text.

repealed the prohibition, it is also possible to infer that the practice after repeal is legal and not subject to regulation by the previously mentioned statutes. The second inference seems to be more sound.

That the legislature chose to prohibit surrogacy for only two years is disappointing. Presumably this will give the Legislative Interim Social Services Committee two additional years¹⁵⁹ to analyze the effect of this new Act on surrogacy to determine whether the Act accomplishes its objectives and should be retained, whether it should be more strict, or whether it should be totally repealed in favor of an act merely regulating surrogacy instead of proscribing it. Arguably, there may be some benefits to be gained in having the legislature readdress this issue again in 1991. Perhaps by then surrogacy will be a more accepted means of helping infertile couples cope with childlessness. However, until such time, for the sake of predictability, the law should be on the books indefinitely and the burden placed on the proponents of surrogacy to prove that the practice is in line with sound public policy.

VI. CONCLUSION

Although this Act is a step in the right direction, it is unfortunate that an attempt to give clear definition to the state's existing policy is given such a limited duration. Hopefully, the legislature will rectify this problem by realizing that the repeal of the Act in 1991 will revert the surrogacy laws to a point less certain than they were in 1988 and enact long term legislation to prohibit the practice.¹⁶⁰ Such a broad pro-

159. Why the legislature would feel that they need an additional two years to study surrogacy is a mystery. In 1988 the House of Representatives established a Surrogate Parenthood Study Committee for the purpose of studying the issues surrounding surrogacy for eight months. The Committee was composed of qualified representatives from the Department of Health, the Department of Social Services, the Utah Hospital Association, the Utah Medical Association, the Attorney General's Office, in addition to senators, representatives, and a medical ethics expert. The purpose of the Committee was to (1) consider whether public policy would permit surrogate contracts, (2) seek input from medical and ethics experts, as well as religious organizations, (3) consider the competency of the courts to adjudicate surrogacy controversies, and (4) consider whether legislative action is necessary to regulate the practice, and if so, to recommend surrogacy legislation. UTAH LEGIS. REP. §§ 63-70-1 and 63-70-2 (1988).

160. Under the present Act, toleration of gratuitous surrogacy may be justified because fewer risks are involved.

The potential for commodification is avoided, and the potential for exploitation is minimized. Because gratuitous surrogacy arrangements usually occur among friends or relatives, the likelihood of breaches is greatly reduced. Accordingly, enforcement problems rarely occur. In fact, an understanding between sisters or intimate friends probably is not cast in the matrix of a contract at all. 'Philanthropic' surrogacy, then, is virtually benign and its suppression advances no weighty state interest.

Commercial Conceptions, *supra* note 18, at 152-53. Nevertheless, this fails to take into account the risks to the mental health of the surrogate, her family, the adopting couple, and the child. See *supra* notes 94-97. However, since the legislature has expressed an interest in studying surrogacy

hibition may be painful for childless couples, however, the risks that are attendant in surrogacy place a greater potential for pain on the child thus conceived. There should be no question as to which party is better able to cope with this sort of psychological pain.

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