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# Are You My Mother? A Judge's Decision in *In Vitro* Fertilization Surrogacy

by Suzanne F. Seavello\*

*H. Joseph Gitlin, an Illinois lawyer chairing the American Bar Assn. committee on surrogate parenting, noted that an old joke had become reality: A young woman tells her mom, "I'm pregnant," and the older woman asks, "Are you sure you're the mother?"*<sup>1</sup>

The dream of starting one's own family is an integral part of American culture that is strongly reinforced by social norms.<sup>2</sup> The reality is, however, that one out of every six couples is infertile.<sup>3</sup> Many of these infertile couples choose alternative means of becoming parents, for example, adoption, artificial insemination, and surrogacy. As these alternatives have developed, state legislatures and judges have generated bodies of law surrounding the practice of most of them.

Of these alternatives, surrogacy does not yet have standard rules to guide the parties involved.<sup>4</sup> Furthermore, since there are several types of

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1. Martin Kasindorf, *And Baby Makes Four, Johnson vs. Calvert Illustrates Just About Everything That Can Go Wrong in Surrogate Births*, L.A. TIMES, Jan. 20, 1991, Magazine, at 10, 12.

2. See JUDITH N. LASKER AND SUSAN BORG, IN SEARCH OF PARENTHOOD, 11-14 (1987); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 141-42 (1989).

3. Philip C. Kissam, *A Lawmaker's Guide to Reproductive-Freedoms — A Review of Reproductive Laws for the 1990's*, 58 GEO. WA. L.R. 599, 612 (1990) (Kissam defines "infertility" as the inability to conceive after one year of regular, unprotected intercourse).

4. See, e.g., *In the Matter of Baby M*, 537 A.2d 1227 (1988) and *Adoption of Matthew B.*, 232 Cal. App. 3d 1239 (1991). Both courts applied adoption laws because there were no surrogacy laws.

surrogacy, different rules may apply to different methods.

The most common form of surrogacy is "traditional" or "partial" surrogacy, which usually involves the artificial insemination of a woman with the sperm of an infertile woman's husband.<sup>5</sup> This situation is similar to adoption in that the "surrogate" mother is both the genetic mother (because she supplies the egg) and the gestational mother (because she gestates the fetus). Before conception, however, the mother voluntarily agrees to relinquish her parental rights, give the child to the father, and allow another woman to adopt it. Although this differs from adoption in the sense that the arrangement is made before conception, some adoption purposes, procedures, and laws may overlap with the purposes and needs of traditional surrogacy. Overlapping purposes, for example, are to provide the child with a stable home and parents who desperately want it and to consider the rights of the birth mother.

Nineteen eighty-five marked the success of a new form of surrogacy: *in vitro* fertilization (IVF) surrogacy.<sup>6</sup> In this method, a ripe egg from a woman is mixed with semen for fertilization.<sup>7</sup> Once the fertilized egg begins to divide, it is then transferred to the uterus<sup>8</sup> of a second woman for implantation and gestation.

This article argues that IVF surrogacy splits the traditional role of the woman in reproduction and hence splits the definition of the word "mother." Now there is a "genetic" mother and a separate "gestational" — or "birth" — mother. Reproduction of a child cannot be complete without both women's contributions. Stated simply, fertilizing the egg is the first step in reproduction, and gestation is the second step.

IVF surrogacy thus is similar to adoption and traditional surrogacy in that the surrogate mother is the gestational mother. It is similar to traditional surrogacy in that the agreement to relinquish parental rights is given before conception. IVF surrogacy differs from adoption and traditional surrogacy, however, because it allows both women to claim a role in the reproductive process. Thus, although IVF surrogacy, like traditional surrogacy, shares some purposes, laws and procedures with adoption, IVF surrogacy also overlaps in some ways with artificial insemination. For example, the parental rights of genetic donors should be considered in both artificial insemination and IVF surrogacy. Even with these overlapping areas of adoption and artificial insemination, neither body of law is adequate to cover all of the new rights and responsibilities created in the

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5. *Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1546 [hereinafter *Developments*]; see also Kasindorf, *supra* note 1, at 13.

6. Linda Rapattoni, *Surrogate Mother Carrying Another Woman's Baby*, UPI, Nov. 28, 1986, available in LEXIS, Nexis Library, UPI file.

7. MARY WARNOCK, *A QUESTION OF LIFE* 29 (1985).

8. *Id.*

three adults and the child involved in IVF surrogacy.

In 1989, four years after the first successful pregnancy from *in vitro* fertilization surrogacy, the first custody battle for a child conceived by this method was litigated in California with the case of *Anna J. v. Mark C. et al.*<sup>9</sup> [hereinafter *Johnson*]. In this case, the gestational mother, Anna Johnson, claimed to have bonded with the baby in her uterus.<sup>10</sup> Johnson filed an "action to be declared the mother of the child,"<sup>11</sup> and the parties were forced to litigate. The trial court held that Johnson "had no 'parental' rights."<sup>12</sup> The appellate court applied the California rules on genetic paternity determination<sup>13</sup> to this woman's non-genetic claim to the child and upheld the lower court's decision.

This article argues that the appellate court improperly applied a set of genetic determination rules to a non-genetic determination situation. The court did not have a surrogacy statute to define the proper issues and course of action. *In vitro* fertilization surrogacy is a means of becoming a parent independent of and alternative to adoption, artificial insemination, and traditional surrogacy. It should create different sets of rights and responsibilities in the participants because the method splits the mother's reproductive role into two separate roles. Also, the parental determination tests commonly relied on today are inadequate for IVF surrogacy situations because they were not designed to detect the pure gestational role in reproduction. Application of paternity laws, or other means of creating families, to *in vitro* fertilization surrogacy is improper, and a uniform statute regulating *in vitro* fertilization surrogacy is necessary to define the rights of all parties involved.

To fully explain why these laws are inadequate when applied to *in vitro* fertilization surrogacy and to propose a uniform solution, Part I of this article discusses the purposes, procedures, and laws behind several alternatives presently available to infertile couples. Part II examines how the laws of alternative means of creating a family were applied in the *Johnson* IVF surrogacy case and analyzes two reasons why this application was inappropriate. First, the court applied a genetic test to see if Anna Johnson was the mother after she had stipulated that she did not donate the egg. Second, the court did not agree that there are two aspects

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9. 6 Cal. App. 4th 521 (1991). The original cite for this case, 234 Cal. App. 3d 1557, has been omitted. It is reprinted without change in 6 Cal. App. 4th 521 to permit tracking pending review by the California Supreme Court.

10. Kasindorf, *supra* note 1, at 12.

11. 6 Cal. App. 4th at 528.

12. *Id.*

13. "Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply." CAL. CIV. CODE § 7015 (West Supp. 1991)(emphasis added). See also 6 Cal. App. 4th at 530.

to reproduction — supplying the genetic material and then gestating the embryo into the fetus — both of which merit parental status to the contributor.

Three types of arguments are given to support this dual view of reproduction: first, this section repeats arguments given by physicians in support of the gestational mother's parental status. Second, this section argues against the trial court's determination that the gestational mother is a foster mother, baby sitter, or incubator, by discussing aspects of gestation that show she is an active participant in reproduction, as opposed to a caretaker of another independent human being. Third, this section examines commentators' theories on why the court chose to discount the importance of the role gestation plays in child reproduction.

Part III describes the approaches taken by a few states that have legislation directed toward *in vitro* fertilization surrogacy. Finally, this article sets forth proposals for a uniform *in vitro* fertilization surrogacy code that recognizes the importance of gestation in the reproductive process.

## I. BACKGROUND: ALTERNATIVES FOR INFERTILE COUPLES

There are several alternatives for infertile couples. To establish a foundation for a proposal for an IVF surrogacy statute, this article begins with a broad look at adoption, artificial insemination, traditional surrogacy, and *in vitro* fertilization surrogacy and the laws that govern them.

### A. ADOPTION

Legal adoption is the practice of a couple accepting a child as their own, with each member having all the rights and responsibilities of natural family members.<sup>14</sup> The primary purpose of adoption can be viewed as "providing stable family relationships for the children who need them."<sup>15</sup>

Adoption procedures vary from state to state, although some states model their procedures after the Uniform Adoption Act.<sup>16</sup> Generally,

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Adoption is the legal process by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child. As a result of the adoption decree the legal rights and obligations which formerly existed between the child and his natural parents come to an end, and are replaced by similar rights and obligations with respect to his new adoptive parents.

HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 850 (2d ed. 1988).

15. *Id.* at 854.

16. *See, e.g.*, UNIF. ADOPTION ACT, 9 Part I U.L.A. 11 (1988). *See also* comments

states require: a petition by prospective parents,<sup>17</sup> an agency investigation of the child's and the adoptive parents' backgrounds,<sup>18</sup> and a hearing before a court.<sup>19</sup> These procedures produce one of three results: (1) issuance of a final decree of adoption;<sup>20</sup> (2) issuance of an interlocutory decree of adoption, "which by its own terms automatically becomes a final decree of adoption on a day therein specified, which day shall not be less than 6 months nor more than one year from the date of issuance of the decree";<sup>21</sup> or (3) "dismiss[al of] the petition and determin[ation of] the person to have custody of the minor, including the petitioner if in the best interest of the minor."<sup>22</sup>

Many adoption statutes recognize the strong bond between the mother and the newborn by providing "that the [mother's] consent [to adopt] may not be given earlier than a specific period after the child is born."<sup>23</sup> If the mother consents to the adoption before the child is born, there is "serious risk that the natural parent, once the child is born, will have second thoughts about giving him up and will attempt to revoke the consent."<sup>24</sup>

Some state statutes allow the natural parent to revoke consent after the child has been adopted only by approval of the court on the showing of something more than a change of mind, for example, fraud or duress.<sup>25</sup> In determining revocation of consent, some courts emphasize the child's interest "in a stable, continuing relationship with his psychological parents."<sup>26</sup> Courts also consider the stability of the environment for the child and the avoidance of hardship to the prospective adoptive parents when considering whether to grant a revocation of consent.<sup>27</sup>

Adoption, alone, is not the answer for all couples. Impediments to

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to each section of the act describing variations among the adopting jurisdictions.

17. See, e.g., UNIF. ADOPTION ACT § 8, 9 Part I U.L.A. 43 (1988).

18. See, e.g., *id.* § 11(b).

19. See, e.g., *id.* § 13.

20. See, e.g., *id.* § 13(c).

21. See, e.g., *id.* § 13(c). "In an interlocutory decree of adoption the Court may provide for observation, investigation, and further report on the adoptive home during the interlocutory period." *Id.* § 13(d).

22. See, e.g., *id.* § 13(d).

23. CLARK, *supra* note 14, at 879; see also UNIF. ADOPTION ACT § 7 (a), 9 Part I U.L.A. 39 (1988) ("The required consent to adoption shall be executed at any time after the birth of the child").

24. CLARK, *supra* note 14, at 879.

25. See, e.g., ILL. ANN. STAT. ch. 40, para. 1513 (Smith-Hurd Supp. 1992) (even if the action is based on fraud or duress, it may not be commenced after twelve months from the date the consent or surrender was executed).

26. CLARK, *supra* note 14, at 885. The text implies that "psychological" refers to the parents with whom the child has been living and to whom the child is emotionally attached. This can be either the natural or adoptive parents.

27. *Id.*

adoption are increasing: fewer babies are available for adoption, while there were between 500,000 and 1 million number of infertile couples as of December 1982.<sup>28</sup> The level of scrutiny that couples must endure under adoption procedures can also prevent many couples from starting their families. For example, parents of different religions who are also an older couple may find adoption of a newborn infant extremely difficult.<sup>29</sup> Furthermore, research has shown that some adopted children manifest learning difficulties, behavioral and psychological problems, and confusion about their identities and genetic backgrounds.<sup>30</sup>

#### B. ARTIFICIAL INSEMINATION AND SPERM DONATION

Artificial insemination (AI) is "the placing of semen inside a woman's vagina or uterus by means other than sexual intercourse."<sup>31</sup> This technique is used for couples in which the man is partially infertile or is unable to achieve intercourse<sup>32</sup> or where there is no male partner. These possibilities have led to two basic types of artificial insemination: artificial insemination by husband (AIH)<sup>33</sup> or artificial insemination by donor (AID, also known as sperm donation).<sup>34</sup>

Artificial insemination involves a relatively simple procedure. First, semen is collected from the husband or donor through masturbation.<sup>35</sup> The semen can then be used fresh, or it can immediately be frozen for future use.<sup>36</sup> At the proper time in the ovulation cycle the sperm is then placed or injected into the woman's uterus.<sup>37</sup> It is not necessary for the woman to know the sperm donor. She may go to a sperm bank to select a donor who has already had his sperm frozen for this purpose.

Consent of the natural father is usually not an issue in AI. Whether the arrangement is made informally between friends or formally through a sperm bank, the donor consents to have his sperm used for reproduction when he provides it.

Extinguishing the donor's parental rights is more complicated, however. In informal situations, the parties decide the issue among themselves. In some sperm banks, the donors sign a consent and release of parental

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28. In re Baby M, 525 A.2d 1128, 1136 (1987).

29. *Id.* at 1139.

30. Robert Hanley, *Bonding is Described at Baby M Hearing*, N.Y. TIMES, Feb. 28, 1987, § 1, 34.

31. WARNOCK, *supra* note 7, at 17.

32. *Id.*

33. If the man is not completely infertile, his semen may be concentrated in the lab and then inseminated into the woman. *Id.*

34. *Id.* at 18.

35. *Id.* at 17.

36. *Id.*

37. *Id.*

rights form. In Sweden, "[t]he law equates AID with adoption, so the donor has a socially recognized position, though one without rights."<sup>38</sup>

Should the sperm donor change his mind and wish to revoke his consent to give up his parental rights, courts appear to decide the issue based on the mother's marital status. When the woman receiving the sperm is married, courts are inclined to terminate the sperm donor's parental rights because the state has "a long-recognized social policy of preserving the integrity of the marriage."<sup>39</sup> Case law indicates that "legislation . . . extinguishes the legal paternal rights of the donor and establishes the legal paternity of the husband of the recipient" if the recipient's mate has the intention, formed "prior to conception, of functioning as the child's father."<sup>40</sup> With the use of AID by single women who know the donors, however, the courts have given parental rights to the sperm donors.<sup>41</sup>

Some ethical concerns of AID have been addressed by the Ethics Committee of the American Fertility Society. After evaluating AID, the organization established specific guidelines and recommendations emphasizing: "(1) informed consent; (2) psychiatric counselling [for the recipient]; (3) maintenance of a permanent record designed to preserve anonymity and confidentiality; (4) limitation of the same donor to a maximum of ten offspring; and (5) scrupulous attention to genetic and health screening of sperm donors."<sup>42</sup>

Artificial insemination is a controversial subject. Many people believe that even AIH is an "unwarranted deviation from the natural processes of intercourse";<sup>43</sup> others believe masturbation is wrong.<sup>44</sup> In 1948, the Archbishop of Canterbury recommended that AID be made a criminal offense.<sup>45</sup>

### C. SURROGACY

Surrogacy is used when there is no female partner or when she is infertile. Two forms are discussed below: traditional surrogacy and in

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38. JONATHAN GLOVER, *ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES* 35 (1989).

39. *Jhordn C. v. Mary K.*, 179 Cal. App. 3d 386, 395 (1986).

40. Book Review, 90 COLUM. L. REV. 1177, 1178 (1990)(reviewing CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989)) [hereinafter SHALEV].

41. See, e.g., *C.M. v. C.C.*, 377 A.2d 821, 824 (1977)(courts prefer children to have two parents) and *Jhordn C. v. Mary K.*, 179 Cal. App. 3d 386, 387 (1986)(even though paternity statutes protect married women from parental claims of sperm donors, it is not a denial of equal protection to deny the same protection to unmarried women).

42. Elizabeth Rose Stanton, *The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood*, 12 VT. L. REV. 87, 98 n.86 (1987).

43. WARNOCK, *supra* note 7, at 18.

44. *Id.*

45. *Id.* at 19.



*vitro* fertilization.

1. *Traditional surrogacy*

The most common form of surrogacy is "traditional" or "partial" surrogacy, which usually involves the artificial insemination of a second woman with the sperm of an infertile woman's husband.<sup>46</sup> The infertile woman may be unable to carry a child for physical or health reasons, or she may be unable to produce eggs. The second woman voluntarily signs a *pre-conception* contract relinquishing her parental rights<sup>47</sup> and promising to surrender the child to the genetic father after the birth. She is paid<sup>48</sup> for the nine months of physical and emotional work in developing and giving birth to the child.

Just as in adoption, the second woman is both the genetic mother, because she supplies the egg, and the gestational mother. However, this traditional surrogacy arrangement is unlike adoption in that pre-birth contracts are valid; in adoption they are void.<sup>49</sup> An additional difference between adoption and traditional surrogacy is that traditional surrogacy is intended to aid infertile families in reproducing a genetic child of their own, whereas one purpose of adoption is to find stable homes for children who are already in existence.<sup>50</sup>

Surrogacy arrangements may be formal or informal. Informally, a couple may ask a friend, relative, or acquaintance to be their surrogate. Before conception the surrogate may be asked to sign a contract relinquishing her parental rights to the child after it is born and/or to sign an adoption release. Alternatively, formal procedures may be followed, as in the cases of *Baby M*<sup>51</sup> and *Adoption of Matthew B.*<sup>52</sup> In both cases, the married couples went to a professional organization incorporated for the purpose of matching infertile couples with surrogate mothers. These organizations "screen" potential surrogate mothers.<sup>53</sup>

In *Baby M* the mother signed a contract before insemination, agreeing to relinquish the child to the father and thereafter to do whatever was

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46. *Developments*, *supra* note 5, at 1546.

47. *Id.*

48. *Id.* at 1546 n.135 (gestational mothers are paid approximately \$10,000 plus medical and legal expenses).

49. *See supra* text accompanying notes 23-24.

50. *See supra* text accompanying notes 14-15.

51. 537 A.2d 1227, 1235 (1988).

52. 232 Cal. App. 3d 1239, 1251 (1991).

53. Kasindorf, *supra* note 1, at 14. Some clients have filed complaints accusing brokers of negligence in their screening process. *Id.* *See also* Stiver v. Parker, 61 U.S.L.W. 1041 (6th Cir. 1992) (in holding that contracting parents may sue a surrogacy "broker" for negligence, the court said that those who arrange surrogate parent contracts must exercise a higher degree of care to protect the contracting parties because of the risky nature of surrogacy contracts).

necessary to terminate her maternal rights.<sup>54</sup> Three days after the birth, the mother gave the child to the father and his wife.<sup>55</sup> On that evening, however, the mother realized that she could not live without her child,<sup>56</sup> and a complicated battle for custody began.

New Jersey appellate court Judge Sorkow held that the contract was valid and enforceable<sup>57</sup> and that the child's best interests were served by placing her in her father's sole custody.<sup>58</sup> The New Jersey Supreme Court decided to follow the rules of adoption, however, and held that the contract conflicted with laws prohibiting the use of money in connection with adoptions, laws requiring proof of parental unfitness or abandonment before parental rights are terminated or adoption is granted, and laws making surrender of custody and consent to adoption revocable in private-placement adoptions.<sup>59</sup> It held that the contract conflicted with state public policy.<sup>60</sup> The court also held that the natural (genetic and gestational) mother was "inappropriately called the 'surrogate mother,'" found no legal adoption, and restored her visitation rights.<sup>61</sup> The court then urged the state legislature to create a statute to govern surrogacy.

In *Adoption of Matthew B.* the "surrogate" mother signed the surrogate contract on June 17, 1985, and the child was born on September 1, 1986.<sup>62</sup> Three days later the mother signed an adoption release, and the father received sole custody of the child.<sup>63</sup> Almost ten months later, the mother petitioned to revoke her consent to the step-parent adoption by the father's wife.<sup>64</sup>

Like the New Jersey Supreme Court in *Baby M*,<sup>65</sup> this California court based its decision on adoption law. The California court, however, held the adoption consent to be valid and denied the natural mother any further visitation with the child.<sup>66</sup>

Aside from these legal uncertainties and problems that the contracting parties face, the difficulties that the child might face must also be taken into consideration. Since studies of the effects of surrogate arrangements on children's lives have not been conducted, we can only speculate on possible types of harm. There is a "strong fear" among child welfare

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54. 537 A.2d 1227, 1235 (1988).

55. *Id.* at 1236.

56. *Id.* at 1236-37.

57. 525 A.2d 1128, 1166 (1987).

58. *Id.* at 1170.

59. 537 A.2d 1227 (1988).

60. *Id.*

61. *Id.* at 1234-35.

62. 232 Cal. App. 3d 1239, 1252 (1991).

63. *Id.*

64. *Id.* at 1253.

65. 537 A.2d 1227 (1988).

66. 232 Cal. App. 3d 1239, 1239-40 (1991).

experts that children from surrogacy arrangements may experience problems similar to those that some adopted children have: confusion about their identities and genetic backgrounds, learning difficulties, and behavioral and psychological problems.<sup>67</sup>

## 2. *In vitro* fertilization (IVF) surrogacy

*In vitro* fertilization can be used by couples who have trouble conceiving naturally.<sup>68</sup> In IVF surrogacy, ripe eggs taken from the woman are mixed with semen for fertilization.<sup>69</sup> Once the fertilized egg has started to divide, it is then transferred back to the uterus of the same woman for implantation and gestation.<sup>70</sup> The first successful "test-tube baby," Louise Brown, was born in England in 1978.<sup>71</sup>

In IVF surrogacy, the woman supplying the egg cannot carry the child. She may have fallopian tube problems<sup>72</sup> or possibly have had a partial hysterectomy.<sup>73</sup> Her egg is fertilized with her husband's sperm and then transferred to the uterus of a second woman for implantation and gestation. Couples choose IVF surrogacy over traditional surrogacy because it provides a genetic link between both parents and the child.<sup>74</sup>

The first successful birth using *in vitro* fertilization surrogacy was in 1985.<sup>75</sup> "Since [1981], more than 10,000 babies have been conceived using *in vitro* fertilization."<sup>76</sup> Although this new method may give hope to many infertile couples, only ten to fourteen percent of attempts result in successful live births.<sup>77</sup> Furthermore, IVF surrogacy presents several difficulties beyond those arising in traditional surrogacy. It is a complicated, time-consuming, and physically taxing procedure.<sup>78</sup> Some of the drugs given to genetic mothers to induce ovulation may cause side effects, such as swelling, nausea, diarrhea, stomachaches, weight gain, burst

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67. Hanley, *supra* note 30.

68. WARNOCK, *supra* note 7, at 29 (discussing IVF as a recent development for women with fallopian tube problems who may bear their own children with this technology) and at 42 (discussing IVF as a form of surrogacy).

69. *Id.* at 29.

70. *Id.*

71. Roy Carleton Howell, *Kenyan Jurisprudence: The Answer to Western Regulation of "In-Vitro-Fertilization,"* 17 S.U. L. REV. 69, 79 (1990).

72. WARNOCK, *supra* note 7, at 29.

73. Kasindorf, *supra* note 1, at 14.

74. See, e.g., *id.* at 14 (in *Johnson*, the genetic father gave his reason for choosing IVF surrogacy: "With Chris' [the genetic mother] personality . . . we really wanted a child that had her innocence, her sweetness, her demeanor").

75. Rapattoni, *supra* note 6.

76. *Id.*

77. *Id.* (fourteen percent); see also *Developments*, *supra* note 5, at 1539-40 n.93 (ten to twelve percent).

78. *Developments*, *supra* note 5, at 1540.

ovaries, and risk of death.<sup>79</sup>

Just as in traditional surrogacy, there are professional organizations incorporated to match potential parents with gestational mothers.<sup>80</sup> In the *Johnson* case,<sup>81</sup> however, the genetic parents, the Calverts, chose to bypass the professionals and make the *in vitro* fertilization arrangement with one of the wife's co-workers.<sup>82</sup>

At that time, California did not have a statute on surrogacy — either traditional or IVF — to distinguish the rights of the parties. Johnson did not agree to file an adoption consent. She signed a surrogacy contract in which she agreed “neither to form or attempt to form a parent-child relationship”<sup>83</sup> and to give the child to the genetic parents after birth. The contract cautioned that, because surrogate parenting is “a new and unsettled area of the law,” its provisions “may be declared void as against public policy by the California courts.”<sup>84</sup>

When Johnson decided to keep the child, she filed an action asking for maternal rights.<sup>85</sup> In the two traditional surrogacy cases discussed earlier,<sup>86</sup> the mothers signed surrogacy contracts, and one signed an adoption release form. The two courts then decided the cases using adoption law. But in *Johnson*, the trial court bypassed adoption law and decided the surrogacy contract Johnson had signed was valid.

Even so, this court still had a decision to make: Is a gestational mother (Johnson) entitled to maternal rights for her contribution to the reproductive process? Johnson's California trial court decided that the gestational mother was not to be considered a parent, but an “environment,”<sup>87</sup> a “home,”<sup>88</sup> and more like a foster mother<sup>89</sup> than a true mother. The appellate court did not consider her a parent because she did not pass California's genetic paternity test.<sup>90</sup> Consequently, a gestational mother never has a right to revoke her consent to giving up the child she carries because the child she carries does not belong to her in any manner.

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79. *Id.* at 1540 n.99.

80. *See generally* Kasindorf, *supra* note 1 (discussing brokers throughout the text).

81. *See supra* text accompanying notes 9-13.

82. Kasindorf, *supra* note 1, at 16.

83. *Id.* at 30.

84. *Id.*

85. 6 Cal. App. 4th 521, 528 (1991).

86. *See supra* text accompanying notes 51-66.

87. Katha Pollitt, *When is a Mother Not a Mother; Surrogate Mother Case of Anna Johnson*, THE NATION, Dec. 31, 1990, at 825.

88. *Id.*

89. *Id.* “Foster . . . [A]ffording, receiving, or sharing nurture or parental care though not related by blood or legal ties.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 487 (1983).

90. 6 Cal. App. 4th 521, 530-33 (1991).

This was a brief discussion of several alternative ways for infertile couples to create a family and the laws, or lack of laws, governing them. Next, this article examines how these laws and their application affected the *Johnson* case.

## II. APPLICATION OF LAW AND THE REASONING IN *JOHNSON*

Having no laws governing IVF surrogacy, both the trial and appellate courts deciding *Johnson* applied the current California civil and evidence codes to determine which woman was the "true" mother.

The trial court found the contract valid and likened the gestational mother to an "environment."<sup>91</sup> The appellate court applied California Civil Code § 7015: "Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. *Insofar as practicable*, the provisions of this part applicable to the father and child relationship apply."<sup>92</sup> The provisions the appellate court applied included California Evidence Code § 621, a paternity test that defines the natural father as the man whose blood matches the child's genetic markers.<sup>93</sup> The appellate court concluded that Johnson could not be a "natural" mother because the genetic markers in her blood did not match the child's.<sup>94</sup>

This article argues that it is not practical to apply laws applicable to the father and child relationship in IVF surrogacy situations for two reasons: first, blood testing of the gestational mother to determine genetic relationship provides no new evidence since it is already stipulated that she has not contributed the egg. Second, even though a gestational mother is not genetically related to the child, her contribution during the reproductive process refutes the theory that she merely provides an environment and in fact qualifies her as a natural parent.

It is not helpful to search for genetic markers in the gestational mother's blood. A man fathers a child by contributing his sperm; therefore, genetic testing is a reliable means of ascertaining paternity. If the issue litigated here was who donated the egg, then by analogy this law would apply. But this issue was not disputed: Johnson stipulated that the woman who donated the egg had the genetic relationship to the child.<sup>95</sup>

By applying rules that relate only to paternal bonds, the court ignored

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91. Pollitt, *supra* note 87.

92. CAL. CIV. CODE § 7015 (West Supp. 1991)(emphasis added).

93. CAL. EVID. CODE § 621 (West Supp. 1991).

94. 6 Cal. App. 4th 521, 533 (1991).

95. *Id.*

the contributions to reproduction that only women perform.<sup>96</sup> Since IVF surrogacy splits the woman's role in reproduction into separate stages executed independently by two women — a genetic participant and a gestational participant — the issue becomes: Is each of the women participating to be considered a "mother"? In the *Johnson* case, only one of the women's roles was litigated — what maternal rights a woman may receive from her gestational contributions. Yet the court did not adequately analyze this contribution; it merely applied law pertaining only to the undisputed genetic contribution.

This article argues that if it takes three people to make a baby, then there are three parents. When the child was born, "William Steiner, the baby's guardian for legal purposes," ordered the hospital to "treat the baby as if he has three parents" and allowed frequent visits by the genetic parents.<sup>97</sup> But the court reasoned differently. Trial court Judge Parslow acknowledged Johnson's "substantial contribution" and that "[i]t took the three of them to get the child here."<sup>98</sup> However, he stated his belief that Anna was not a natural parent, saying "right up front" that he had no "intention to split this baby into two emotional situations [to] be raised by two mothers."<sup>99</sup> He said that he has heard a lot from experts about genetics, that the gestational environment is still not clear, and that three natural parents is not in the best interests of the child and "is ripe for crazy making."<sup>100</sup> It is unclear whether Judge Parslow found Johnson had no parental rights because her contribution was not substantial enough, because he believes that three people creating a child makes two parents, or because it was not in the child's best interests.

The appellate court's conclusion that the gestational contributor could not be considered the child's mother is also inconsistent with some of the evidence it acknowledged. The court acknowledged, for example, the argument by the American Civil Liberties Union that the gestational contribution was "profound,"<sup>101</sup> yet the court did not comment further on this point. In addition, when the court was making its determination of maternity it relied on the statement that "[g]enes determine the way physiological components of the human body, such as the heart, liver, or

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96. Pollitt, *supra* note 87.

97. Catherine Gewertz, *Surrogate Gives Birth to Boy, Custody Fight*, L.A. TIMES, Sept. 20, 1990, at A3.

98. *Calif. Judge Speaks on Issue of Surrogacy*, NAT'L L.J., Nov. 5, 1990, at 36.

99. *Id.* (emphasis added).

100. *Id.* He also found that if Johnson did have parental rights, "in this case they were relinquished." *Id.* He went as far as to say that the contract "is enforceable by either specific performance, arguably even by habeas corpus if necessary." *Id.* (compare to § B9 of the proposed statute at the end of this article).

101. 6 Cal. App. 4th 521, 573 (1991).

blood vessels operate."<sup>102</sup> Earlier in the opinion, however, the court stated that the woman "for good or ill, can permanently affect the child by what she ingests,"<sup>103</sup> thereby acknowledging that events during gestation can determine the way physiologic components operate.

The court also considered "irrelevant" the opinion of the Committee on Ethics of the American College of Obstetricians and Gynecologists which viewed "the genetic link between the commissioning parents and the resulting infant, while important, [to be] less weighty than the link between surrogate mother and fetus."<sup>104</sup>

Both *Johnson* courts acknowledged the importance of the gestational mother's contribution, yet neither found she had parental status. This article argues that the reasoning of these California courts is wrong and that there is a need for an IVF surrogacy statute that reflects the following two positions. First, the gestational mother should be afforded maternal rights. This position is supported in the following section. Second, some of the parental rights and duties in IVF surrogacy are different from those in adoption and sperm donation. When these differences are not considered, the gestational mother's rights are not adequately protected because she is not recognized as providing a parental contribution under current case law.

### III. THE DILEMMA OF IN VITRO FERTILIZATION SURROGACY: CREATION OF A THIRD NATURAL PARENT

One of the questions raised by *in vitro* fertilization is: "Who is within the 'mother and child relationship?'"<sup>105</sup> In traditional surrogacy, a woman is usually artificially inseminated with the sperm of the infertile woman's husband. In this situation, there are two natural parents: the man who supplied the sperm and the woman who supplied the egg, was inseminated, and carried the child to term. After this genetic and gestational mother relinquishes her legal maternal rights and turns the child over to the father, the infertile woman adopts the child. In California, case law (*Adoption of Matthew B.*<sup>106</sup>) shows that following a statutory period, this procedure irrevocably creates only two legal parents.

IVF surrogacy, however, creates a different situation because a second woman is involved to gestate the fertilized egg. The couple has one of their eggs fertilized with their sperm and then transferred to a second

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102. *Id.* at 540.

103. *Id.* at 537.

104. *Id.* at 540.

105. *Id.* at 530.

106. See *supra* text accompanying note 62-66.

woman. It is already agreed that the fertilized egg makes both of the genetic contributors parents. But the following physicians' testimony, description of the gestational mother's participation in the reproductive process, and authors' comments all make the further point: gestation is also a parental contribution that is just as vital to producing a healthy child as the genetic contribution and thereby creates a third natural parent. IVF surrogacy statutes must, therefore, address the fact that the gestational mother is contracting to renounce her parental rights in favor of the other parents, just as in traditional surrogacy and adoption. Statutes should not treat her like an environment or an incubator, neither of which has legal rights or responsibilities, because this would cast the gestational mother in the role of an object.

#### A. PHYSICIANS' TESTIMONY

The *Johnson* trial court's comparison of a woman gestating a fetus to an "environment"<sup>107</sup> (or as commentators have said, an "incubator")<sup>108</sup> is too simplistic to describe the dynamic physical relationship between a woman and the child she is gestating, whether or not the original egg carries her genetic material. This section attempts to answer the question: Does a pregnant woman actively participate in the creation of a baby, or does she just incubate the fertilized egg "until it finally 'hatches'?"<sup>109</sup>

A definition will be helpful here. An incubator is "an apparatus providing suitable conditions (e.g. warmth and moisture) for incubating something."<sup>110</sup> To incubate means "to sit upon eggs to hatch them; also: to keep (as eggs) under conditions favorable for development."<sup>111</sup> An incubator does not dynamically interact with a chicken egg as a woman dynamically interacts with and contributes to the child developing inside her.

Dr. Michelle Harrison, a physician, psychiatrist, and expert witness in the *Johnson* case, explained the difference between gestation by a woman and the use of chicken incubators that are kept in zoos:

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107. Pollitt, *supra* note 87.

108. See, e.g., Michelle Harrison, *Anna Johnson is a Mother, Not Just an Incubator*, CHI. TRIB., Oct. 8, 1990, at C13. See also Sonni Efron and Kevin Johnson, *Decision Hailed as Proper, Criticized as Outrageous*, L.A. TIMES, Oct. 23, 1990, at A1:

Alexander M. Capron, a renowned medical ethicist who teaches law and medicine at USC, acknowledged that infertile couples need options but said that forcing a woman to comply with a contract to give up a child she bore "turns a child into a commodity and a woman into a machine."

109. Harrison, *supra* note 108, at C13.

110. MERRIAM-WEBSTER DICTIONARY 360 (3d ed. 1974).

111. *Id.*



The fertilized bird egg that one watches in these incubators comes with enough nutrient to carry it through its entire gestation. The human fertilized egg comes with only enough nutrition to last the growing embryo about ten days, and then it must attach itself to the uterus or it will cease to exist. Unlike the hard shell of the bird's egg, however, the fertilized human egg is surrounded only by a thin membrane. Therefore, it must establish a dynamic relationship in which the woman's body meets its need for fluids, oxygen and nutrients, clears natural wastes from its system, and protects it from potentially harmful toxic and physical conditions . . . *While one can trace Matthew's genes to the Calverts, it is his umbilical cord to his mother upon which his life depended. However much the donors of a fertilized egg may want a baby that the egg and sperm began, they did not undergo the biological process by which that child was formed.* . . . It demeans the biologic mother to say she is not the mother. Genetic parenthood and biologic motherhood are not synonymous. One simply cannot pretend that a pregnant woman's nurturing of a fetus can be reduced to incubation.<sup>112</sup>

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112. Harrison, *supra* note 108 (emphasis added). Dr. Harrison further states:

Anna Johnson believes she is the mother of the baby boy she delivered September 19. While she probably wishes she could give the Calverts back their embryo, that embryo does not exist anymore.

Anna's 3-year-old daughter never got attached to the embryo. But then her mother's body began to swell and the new baby competed for room on mommy's lap. The 3-year-old felt the kicking of the baby and said, "My brother's name is Matthew."

. . . .  
[To the woman, the embryo starts as a stranger and] becomes a part of her self . . . For the slowly evolving fetus, home is the place filled with mother's warmth and cushioned by her fluids. It is the place where her appetite feeds both of them, her liver filters toxins for both of them, her lungs breathe for both of them. In the last months, the fetus hears her singing, her talking, her crying. At birth the newborn shows preference for her voice above all others.

Dr. Harrison also discussed the role of genes verses the role of gestation:

From fertilized egg to delivery of the baby, a human embryo grows 4,500 times in length and more than a billion times in weight.

. . . .  
What is the role of DNA in this process? A baby at birth is not just an enlarged embryo. DNA represents blueprints for a baby, subject to modification in the womb. As with plans for a house, the coding tells how the essential structure is to be built, which beams go where, and so on. DNA describes the intended structure, while the pregnant woman builds it. The embryo becomes a fetus with a heart that beats, a mouth that sucks, eyes that blink and legs that kick, all parts out of what the woman gives to make it grow. Without the

Another physician, Dr. Marshall Klaus, testified that the "physiological" contributions to the infant are just as important as the sperm and egg because "[t]he baby can't exist without all three being combined."<sup>113</sup>

B. DESCRIPTION OF THE GESTATIONAL MOTHER'S  
ROLE IN REPRODUCTION

After the egg is fertilized, gestation is a vital factor in continuing the reproduction process. A pregnant woman actively participates in the development and birth of the fetus. Without this biological exchange between the mother and child, the fertilized egg would perish. No controlled environment or incubator can duplicate the physiological contribution to reproduction provided by the gestational mother.

The joint participation between the mother and fetus begins as early as the second week of development, when the embryo is completely imbedded in the uterus.<sup>114</sup> "[M]aternal blood vessels penetrate the . . . shell [of the embryo] to enter the intervillous space."<sup>115</sup> By the end of the third week, the embryo develops small blood vessels.<sup>116</sup> "These vessels in turn . . . connect[] the placenta<sup>117</sup> and the embryo . . . . Hence, when the heart begins to beat in the fourth week of development, the villous system is ready to supply the embryo proper with the necessary nutrients and oxygen"<sup>118</sup> from the mother's body.

The placenta is another example of the joint participation between the mother and fetus. It is an active "structure in the uterus . . . through which the fetus derives its nourishment."<sup>119</sup> It consists of two portions:

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healthy pregnant state she maintains, there is no healthy infant.

Under normal circumstances, the human body rejects anything that is foreign to it. All embryos are foreign bodies because the combination of egg and sperm results in a pattern of DNA different from the pregnant woman's own DNA. In order for a woman's body not to reject the embryo, substances are secreted which make her body less vigilant against foreign intrusions, and which mark the fetus as hers. In a process as old as mammalian life itself, she is directed to accept the embryo as it implants in her uterus.

One simply cannot ignore the nine months that transpire between implantation of an embryo and birth of a baby, nor can one pretend that a pregnant woman's nurturing of a fetus can be reduced to incubation.

*Id.*

113. Martin Kasindorf, *Surrogate Mother's Rights Backed; Expert: Baby Needs All 3 Parents*, NEWSDAY, Oct. 11, 1990, at 15.

114. THOMAS W. SADLER, *LANGMAN'S MEDICAL EMBRYOLOGY* 41 (5th ed. 1985).

115. *Id.* at 54.

116. *Id.* at 55.

117. See text below describing the role of the placenta.

118. SADLER, *supra* note 114, at 55.

119. TABER'S CYCLOPEDIA DICTIONARY 1408 (16th ed. 1989).

fetal and maternal.<sup>120</sup> "[T]he full-grown placenta contains approximately 150 ml of blood, which is replenished about three or four times per minute" directly from the mother's circulatory system.<sup>121</sup> "At term, the fetus 'extracts' 20-30 cc of oxygen per minute from the maternal circulation."<sup>122</sup> Even a short-term interruption from the maternal oxygen supply would be fatal to the fetus.<sup>123</sup>

Unlike an incubator, the purpose of which is to maintain favorable heat and moisture conditions, the placenta exchanges nutrients and electrolytes (amino acids, free fatty acids, carbohydrates, and vitamins) with the maternal circulation.<sup>124</sup> The fetus also acquires from the maternal circulation maternal antibodies against various infectious diseases and passive immunity against others.<sup>125</sup> Whereas a hatched chick can simply be removed from an incubator, "[a]t birth [the placenta] is torn from the uterine wall and, approximately 30 minutes after birth of the child, expelled from the uterine cavity . . . . Much of the [placenta] remain[s] temporarily in the uterus and is expelled with subsequent uterine bleedings."<sup>126</sup>

The genes of the genetic parents are not the sole determiners of organ development. The gestating woman's actions can also have an important impact on organ development. Most congenital<sup>127</sup> malformations originate during the fourth to eighth weeks after conception, when the organs are developing.<sup>128</sup> The embryo is the most susceptible to factors interfering with individual organ development during this critical time.<sup>129</sup> The mother has control over some environmental factors that play an important role in determining the length and weight of the fetus.<sup>130</sup> Severe malnutrition and heavy smoking, for example, may lead to reduced fetal growth.<sup>131</sup>

### C. COMMENTATORS' ARGUMENTS

Commentators also agree that the act of gestation qualifies as a parental contribution. One commentator, Katha Pollitt, defines "nurturing"

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120. SADLER, *supra* note 114, at 92.

121. *Id.* at 96.

122. *Id.* at 97-98.

123. *Id.* at 98.

124. *Id.*

125. *Id.*

126. *Id.* at 94-95.

127. "Congenital . . . Present at birth." TABER'S CYCLOPEDIA DICTIONARY 402 (16th ed. 1989).

128. SADLER, *supra* note 114, at 76.

129. *Id.*

130. *Id.* at 86.

131. *Id.*

differently than Dr. Harrison,<sup>132</sup> although her views on the importance of the contributions of pregnancy and childbirth are similar: "In a debate over nature verses nurture, the winner is nature," read the New York Times pull-quote. Why define 'nature' as DNA rather than as the physiological events of pregnancy and birth?"<sup>133</sup>

Pollitt argues that "there's nothing 'natural' about egg donation, which involves the hormonal priming of an infertile woman, the extraction of an egg by delicate technology, fertilization in a dish with masturbated sperm and implantation of the zygote in another [woman]."<sup>134</sup>

Pollitt describes pregnancy and childbirth as "the sharing of the body and the risking of health, well-being and even life itself that is required to bring another life into existence."<sup>135</sup> She believes "'nurture' is a bland social-sciency word that belittles a profound relationship and masks the role of women in gender-neutral language."<sup>136</sup>

Pollitt also argues that the *Johnson*<sup>137</sup> trial court Judge Parslow thoroughly degraded women by equating motherhood with fatherhood — that is, by redefining it solely as the contribution of genetic material.<sup>138</sup> She says he downgraded a mother's other contributions (carrying the fetus to term and giving birth) to services rather than integral components of parenthood.<sup>139</sup>

Under this legal definition, a normally pregnant woman is now baby-sitting a fetus that happens to be her own . . . The picture of pregnancy as biological baby-sitting has many sources. It's as old as Aeschylus, who had Athena acquit Orestes of matricide in *The Eumenides* on the ground that mothers are merely "nurses" of men's seed, and as new as those ubiquitous photos of fetuses seeming to float in empty space.<sup>140</sup>

Katha Pollitt further states and sympathizes with sociologist Barbara Katz Rothman's view that

Judge Parslow's decision follows the general pattern of our society, in which women's experiences are recognized to the extent that they are identical with men's, and devalued or ignored to the extent that they are different . . . . Thus [*in Baby M*<sup>141</sup>], Mary

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132. See *supra* text accompanying note 112.

133. Pollitt, *supra* note 87, at 825.

134. *Id.*

135. *Id.*

136. *Id.*

137. See *supra* text accompanying notes 9-13.

138. Pollitt, *supra* note 87, at 825.

139. *Id.*

140. *Id.*

141. 537 A.2d 1227 (1988).

Beth Whitehead won back her parental rights because the New Jersey Supreme Court acknowledged her genetic contribution: Baby M was half hers.<sup>142</sup>

Pollitt further argues that it is wrong to say that "postmenopausally pregnant, egg-donated women achieve parental rights solely by being married to the babies' fathers, not through their own contributions."<sup>143</sup> She believes judges should re-evaluate gestational mothers' claims to parentage in light of the information about the value these "women place on pregnancy and childbirth and the persistent (if apparently erroneous) belief that the resultant babies belong to them."<sup>144</sup>

Alexander M. Capron, a medical ethicist who teaches law and medicine, also commented on the *Johnson*<sup>145</sup> IVF surrogacy case. He states that gestational mothers should have a guaranteed right to change their minds, just as women who surrender children for adoption do.<sup>146</sup> "We as a society must recognize the fact that (the [surrogate] mother) is a flesh-and-blood person and not an incubator."<sup>147</sup>

Lori B. Andrews, an American Bar Foundation research fellow specializing in reproductive technology, agrees that genetics should not be the primary determiner of parenthood. She believes more emphasis should be placed on the intent of the parties signing the contract.

It's an extremely masculine way to view parenthood, to base it all on genetics . . . . The only way to give men parental rights, since they don't physically bear children, is through a genetic tie. That's how that body of paternity law evolved. But it's not necessarily a good thing to apply the same standard to a birth mother.<sup>148</sup>

In summary, the testimony of the physicians, the description of gestation as a necessary part of reproduction as opposed to baby-sitting, and the authors' comments all make the same point: Gestation deserves to be recognized as a parental contribution that is as important as the genetic contribution. Just as the donation of sperm or an egg qualifies the donor as a natural (genetic) parent, so should the donation of a womb for IVF surrogacy gestation earn parental status for the supplier. In sperm donation, the law extinguishes the legal paternal rights of the donor and establishes the legal paternity in the husband of the recipient.<sup>149</sup> In adoption,

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142. Pollitt, *supra* note 87, at 825.

143. *Id.*

144. *Id.*

145. See *supra* text accompanying notes 9-13.

146. Efron and Johnson, *supra* note 108.

147. *Id.*

148. *Id.*

149. See *supra* text accompanying notes 31-45 (artificial insemination/sperm dona-

the natural mother is given a period of time to revoke her consent before her legal rights are permanently extinguished. Likewise, the rights and responsibilities of gestational mothers should be recognized. Consequently, after giving the gestational mother a period of time to revoke her consent to adoption, an IVF surrogacy law should permanently extinguish the legal maternal rights of the gestational mother and establish legal maternity solely in the genetic mother.

#### IV. CURRENT STATUS OF LAWS GOVERNING IVF SURROGACY

Family issues generally are governed by the individual states,<sup>150</sup> although legislatures must bear in mind constitutional issues of the parents' right to privacy, their right to procreate,<sup>151</sup> and equal protection between couples who practice artificial insemination and those who practice surrogacy.<sup>152</sup>

The current laws on adoption,<sup>153</sup> artificial insemination,<sup>154</sup> sperm donation,<sup>155</sup> and traditional surrogacy<sup>156</sup> do not address the questions raised by *in vitro* fertilization surrogacy. Furthermore, not every state has legislation on surrogacy, and those that do often disagree about its virtues. Some states, for example, hold that surrogacy contracts are unenforceable;<sup>157</sup> Washington and Utah have gone so far as to say that surrogacy arrangements (for compensation) are criminal.<sup>158</sup> New York and Kentucky, on the other hand, have held that surrogacy is not governed by state statutes prohibiting payment in connection with adoption.<sup>159</sup> Ar-

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tion).

150. See, e.g., text accompanying notes 16-27 (adoption statutes).

151. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 496-97 (1965)(Goldberg, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

152. See *infra* comment accompanying notes 221-222 (equal protection concerns for parental fitness screening and whether marital status may govern who receives parental rights).

153. See *supra* text accompanying notes 16-27.

154. See *supra* text accompanying notes 31-41.

155. *Id.*

156. See *supra* text accompanying notes 46-67.

157. See, e.g., LA. REV. STAT. ANN. § 9: 2713 (West 1991): "A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy."

158. "A surrogate parentage contract entered into for compensation . . . shall be void and unenforceable in the state of Washington as contrary to public policy." WASH. REV. CODE ANN. § 26.26.240 (West 1991). "Any person, organization, or agency who intentionally violates any provision of RCW 26.26.210 through 26.26.260 shall be guilty of a gross misdemeanor." WASH. REV. CODE ANN. § 26.26.250 (West 1991); see also UTAH CODE ANN. §76-7-204 (1992).

159. Stanton, *supra* note 42, at 105.

kansas permits surrogacy.<sup>160</sup> Most of these statutes, whether they are for or against surrogacy, were written with partial surrogacy in mind and afford little security to couples wishing to use *in vitro* fertilization surrogacy.<sup>161</sup>

In *Baby M*, when appellate court Judge Harvey R. Sorkow decided to give Baby M to Mr. Stern,<sup>162</sup> he addressed the problem of not having uniform laws for traditional surrogacy and the future impact of not solving the problem. His statements apply equally well to IVF surrogacy:

The issues and dimensions of surrogacy are still evolving, but it is necessary that laws be adopted to give our society a sense of definition and direction if the concept is to be allowed to further develop. With an increasing number of surrogate births, legislation can avoid harm to society, the family and the child . . . . If there is no law then society will suffer the negative aspects of this alternative reproduction vehicle that appears to hold out so much hope to the childless who make up a substantial segment of our society.<sup>163</sup>

The California legislature addressed the question of surrogacy contracts for the first time in Senate Bill 937, the Alternative Reproduction Act of 1992, which passed both houses and was vetoed by the governor.<sup>164</sup> The proposed general statute encompassed all methods of surrogacy as well as egg donors. The statute included a requirement that the gestational mother be at least 21 years of age and have had at least one

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160. Rorie Sherman, *Surrogacy Again Rears Its Head; Are Contracts Enforceable?*, NAT'L L.J., Oct. 8, 1990, at 3 ("Marilyn Adams of the Denver-based National Conference of State Legislatures . . . notes [that] 11 other states have either declared commercial surrogacy illegal or simply made the practice difficult or impossible to carry out: Arizona, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, Nevada, North Dakota, Utah and Washington").

161. See, e.g., LA. REV. STAT. ANN. § 9: 2713 (West 1988)(narrowly specific language — i.e., "insemination" — might be construed as inapplicable to *in vitro* fertilization surrogacy):

B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

162. 525 A.2d 1128, 1175 (1987). See also *supra* text accompanying notes 54-58.

163. 525 A.2d 1128, 1138 (1987).

164. S Bill 937, Cal. Reg. Sess. (1991). The Senate passed the bill on August 25, 1992, and the Assembly passed it two days later. Governor Wilson vetoed SB 937 on September 26, 1992. Telephone conversation with California Legislative Bill Room in Sacramento, Cal. (Oct. 23, 1992).

child.<sup>165</sup> The surrogate and her husband would receive psychological counseling<sup>166</sup> and be represented by counsel separate from the intended parents.<sup>167</sup> The surrogate would select her physicians and surgeons.<sup>168</sup> The contract would have had to include specified provisions, including inheritance<sup>169</sup> and adoption consent<sup>170</sup> of the gestational mother. Custodial disagreements would be determined in the best interests of the child, and the court would not approve the withdrawal of consent to adoption.<sup>171</sup> The statute accounted for the death of the intended parents in terms of custody<sup>172</sup> and life insurance.<sup>173</sup> The intended parents would have been required to place funds sufficient to cover all known and estimated expenses in an escrow account.<sup>174</sup> It further required the intended parents to provide medical and life insurance policies for the surrogate.<sup>175</sup>

This bill fulfilled most *in vitro* fertilization surrogacy purposes, but there are two points the statute failed to address. First, under an early version of the bill, all remedies of contract or tort law applied to surrogate contracts,<sup>176</sup> including specific performance. Under certain circumstances these remedies may attempt to force a woman, against current constitutional mandates, either to have an abortion or to carry a child to term. Secondly, this bill would not have defined both mothers to be "natural" mothers. Such an omission may lead to arguments similar to those found in the *Johnson* case<sup>177</sup> and deprive the gestational mother of rights normally afforded to other natural parents. For example, under certain circumstances, both women in adoption cases and sperm donors may revoke consent to terminate their parental rights.<sup>178</sup>

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165. S Bill 937, Cal. Reg. Sess., § 7305 (1991).

166. *Id.* § 7317.

167. *Id.* § 7303.

168. *Id.* § 7318(k).

169. *Id.* § 7311.

170. *Id.* § 7318(a).

171. *Id.* § 7308.

172. *Id.* § 7310(c).

173. *Id.* § 7318(d)(3).

174. *Id.* § 7318(f).

175. *Id.* § 7318(d)(1),(2).

176. *Id.* § 7309.

177. See *supra* text accompanying notes 9-13.

178. See *supra* text accompanying notes 23-24 and 41.



## V. PROPOSAL FOR A UNIFORM STATUTE FOR IN VITRO FERTILIZATION SURROGACY

As one commentator noted about the *Baby M* case,<sup>179</sup> "in order for more persons 'to enjoy the benefits of the new technology . . . while minimizing the risk of abuse' we need some societal consensus."<sup>180</sup>

This article compiles ideas from current statutes and commentators to create a uniform statute. Washington state legislators, for example, have enacted a statute criminalizing surrogacy. In doing so, the legislature defined surrogacy,<sup>181</sup> prohibited some women from entering into surrogacy agreements,<sup>182</sup> declared such agreements for compensation void and unenforceable as contrary to public policy,<sup>183</sup> and stated that anyone who intentionally violates these provisions shall be guilty of a misdemeanor.<sup>184</sup> This article uses the Washington definitions to create the following proposal for a uniform statute on *in vitro* fertilization surrogacy. Quotation marks appear around phrases drawn verbatim from the Washington statute.

The purpose of the following proposal is to outline rules pertaining to IVF surrogacy and clarify that all three people with a direct biological contribution to the creation of the child are considered "natural parents." Furthermore, in order to avoid protracted custody battles and minimize litigation, this law states a clear preference, in the form of a rebuttable presumption, that the initiating couple retain all the legal rights and duties of parents. The gestational mother, however, will be granted three days to revoke adoption consent. Therefore, three days after the birth of the child, if the gestational mother has not revoked her consent to give up her parental rights, her legal parental rights are to be explicitly extinguished, as in adoption and sperm donation for artificial insemination. In certain cases, her rights may be renewed, if, for example, during pregnancy, the gestational mother feels there are substantial changes in the initiating couples' home environment that may harm the child, such as the death of one of the genetic parents or the divorce of the couple. The following proposal attempts to balance the rights of the gestational mother, the rights of the initiating parents, the best interest of the child, and considerations of public policy. Because IVF surrogacy is such a new area, constant reassessment will be needed as new evidence becomes available.

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179. See *supra* text accompanying notes 54-61.

180. Walter Wadlington, *United States: the Continuing Debate about Surrogate Parenthood*, 27 J. FAM. L. 321, 323 (1988-89)(quoting "the [*Baby M*] court").

181. WASH. REV. CODE ANN. § 26.26.210 (West 1991).

182. *Id.* § 26.26.220.

183. *Id.* § 26.26.240.

184. *Id.* § 26.26.250.

Accordingly, this proposal encompasses the following five areas: (A) definitions of terms; (B) the rights and duties of the gestational mother; (C) the rights and duties of parents initiating the gestational contract; (D) the best interests of the child; and (E) the rules that will govern if the issue reaches litigation. Footnotes in the statute refer to the source of the ideas included in the statute.

#### A. DEFINITIONS

1. "Compensation" means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a [gestational] mother, and the payment of reasonable attorney fees for the drafting of a [gestational] parentage contract.<sup>185</sup>

2. "Surrogate gestation" means the medical procedure of implanting in a woman's uterus a fertilized egg that is not genetically related to her and the subsequent gestation of the child by that woman.<sup>186</sup>

3. "Gestational mother" means a woman who has undergone the medical procedure of being artificially inseminated with a fertilized egg not genetically related to her and who subsequently gestates the child pursuant to an *in vitro* fertilization surrogate parentage contract.<sup>187</sup>

4. "*In vitro* fertilization surrogate parentage contract" means a contract, agreement, or arrangement in which a woman agrees to surrogate gestation and voluntarily to relinquish her parental rights to the child.<sup>188</sup>

5. "Initiating parents" means the couple that has contracted to have the man's semen fertilize the woman's egg(s), to have the resulting fertilized egg(s) transplanted into the uterus of a second woman who has agreed in this contract to surrogate gestation, and to receive custody of the child at the end of gestation.

6. "Genetic parents" means the initiating parents, if the resulting child has been tested to be genetically related to this couple.

7. "Natural parents" means the woman who donated the egg, the man who donated the sperm, and the woman who carried out the gestation.

#### B. RIGHTS AND DUTIES OF THE GESTATIONAL MOTHER

In order to assure that the surrogate parentage contract clearly specifies the responsibilities and obligations of all parties and recognizes the gestational mother's wants and needs,<sup>189</sup> this model uniform statute con-

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185. *Id.* § 26.26.210 (1).

186. *Id.* § 26.26.210 (2).

187. *Id.* § 26.26.210 (3).

188. *Id.* § 26.26.210 (4).

189. Mindy Ann Baggish, *Surrogate Parenting: What We Can Learn from Our British Counterparts*, 39 CASE W. RES. L. REV. 217, 240 (1989).

siders her rights and duties, including all the factors discussed below.

1. Judicial supervision is required to ensure informed consent of the gestational mother.<sup>190</sup> In deciding this issue, factors the court should consider include whether the gestational mother: has had legal counseling on her rights and duties as a gestational mother; has had psychological counseling pertaining to the relinquishment of the child;<sup>191</sup> understands all the initiating parents' rights and duties; is at least 21 years of age and is not bearing her first child;<sup>192</sup> has had a "cooling off" period *after* signing the contract but *before* implantation takes place; has consented to termination of her parental rights, signed an adoption release,<sup>193</sup> and understands the length of the grace period during which she may revoke her consent to relinquish the child after birth<sup>194</sup> (this last factor must be both in the contract and verbally acknowledged to the judge). Informed consent includes knowledge of the risk that the child may have a genetic defect.

Comment. The gestational mother has a right to know this information because it may affect her decision whether or not to carry the child. Without this knowledge, there is a greater possibility of abortion or bringing a child into the world who may not be happy.

2. If the gestational mother is married, her husband must give written, informed consent and follow any procedures necessary to rebut the presumption that he is the father of the child.

3. The gestational mother may revoke her consent to give up her parental rights within three days after birth. If she elects this option, there are three legal parents. A hearing will be held to decide visitation and custody rights in the best interest of the child, and the court shall approve the withdrawal of consent to adoption.<sup>195</sup>

Comment. A model statute that recognizes the gestational mother as a natural parent would have to take into consideration adoption laws that grant the mother a grace period to change her mind about giving up the child after it is born.<sup>196</sup> In adoption, the mother is the only mother, and the adopting parents usually have no biological link — and hence no equal parental rights — to the child. Here, both women contribute to the reproductive process, and all three people with a biological link are considered natural parents. Even though the law recognizes a sperm donor as the natural father of the child, and "legislation . . . extinguishes the legal

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190. Stanton, *supra* note 42, at 117.

191. *Id.* at 117-18.

192. S Bill 937, Cal. Reg. Sess., § 7305 (1991).

193. *Id.* § 7318(a).

194. The grace period here is similar to the one given to birth mothers in adoption.

195. S Bill 937, Cal. Reg. Sess., § 7308 (1991).

196. See *supra* text accompanying notes 23-24.

paternal rights of the donor"<sup>197</sup> without a grace period, this should not be the case in IVF surrogacy because IVF surrogacy is more analogous to adoption. The gestational mother has undergone much physical trauma while supplying the safety and support for the child's future life outside the womb. She may have established physical or emotional bonds to the child. Therefore, contrary to egg and sperm donation agreements<sup>198</sup> and similar to adoption, there should be a time frame of temporary custody affording the surrogate mother the right to revoke her consent. Once this statutory period for revocation has passed, all legal rights shall vest in the genetic parents.

4. Blood and tissue testing of the child shall be required after its birth. If the child is genetically related to the gestational mother and not genetically related to the initiating parents, the gestational mother shall be awarded full custody.

Comment. This statute considers that the mother may not want to give away a child that belongs both genetically and gestationally to her, and the initiating parents may not want to take such a child. As a protection for both the genetic parents and the gestational parent, blood and genetic tissue testing should be required after the birth to ensure that the child is genetically related to the initiating parents.<sup>199</sup> If the child has no genetic link to the initiating parents, then the gestational mother will be declared the legal mother with all the accompanying rights, responsibilities, and duties. Furthermore, if the child does not belong to the initiating parents, the genetic and gestational mother should pay all the medical expenses incurred during her pregnancy and delivery, but she would not be liable for the fees incurred for the IVF procedures.<sup>200</sup>

5. The gestational mother and her husband must have legal representation independent from the initiating parents.<sup>201</sup>

Comment. This provision guards against exploitation of the gestational mother. The initiating parents may contract to pay for her lawyer, although the attorney must be sure to alleviate any conflict of interest, as is done in other situations where one party pays for another party's legal fees (for example, an insurance company defense attorney or a corporation's counsel defending one of its officers).

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197. SHALEV, *supra* note 40, at 1178.

198. See *supra* text accompanying notes 31-41 (no waiting period).

199. Stanton, *supra* note 42, at 112.

200. If the gestational mother was checked for pregnancy before implantation of the fertilized egg was attempted, and the child is also the gestational mother's genetic child, then the implantation did not work. Unless there is proof that it was her fault that the IVF attempt did not work, there is no reason for the gestational mother to pay back the initiating parents.

201. S Bill 937, Cal. Reg. Sess., § 7303 (1991).

6. The gestational mother is to be paid for her services.<sup>202</sup> Services will vary from case to case, depending on the success of the pregnancy and birth. Services may include: allowing the gestational mother's cycle to be synchronized with the genetic mother's; undergoing several attempted implantations; becoming pregnant; surviving a miscarriage, sickness, and other physical traumas of being pregnant; labor, childbirth, or Caesarean section; recovering from childbirth or surgery; and risks of diabetes, high blood pressure, and death. A contract is not to include terms that vary the compensation according to the survival or sex of the child because this would tend to equate surrogacy services with baby-selling.<sup>203</sup> "If the process ends early, she shall still recover for the services rendered up to that date."<sup>204</sup>

7. The gestational mother selects her physicians and surgeons.<sup>205</sup>

8. The intended parents must provide medical and life insurance policies for the gestational mother.<sup>206</sup>

9. The gestational mother's husband (or other partner in a significant relationship) must also go through psychiatric evaluation and counseling.

Comment. A husband may find it difficult to support his wife while she gestates and gives birth to a child unrelated to him. Marital discord between the surrogate mother and her husband may increase the potential for medical problems occurring in the pregnancy or problems in the gestational mother's decision to relinquish custody of the child. The initiating parents may contract to pay for reasonable fees incurred for counseling of the husband concerning the surrogate pregnancy.

10. The gestational mother must sign a release allowing the initiating parents access to any genetic, psychological, and medical records that may be of importance in their decision to hire a particular woman.

11. Specific performance may not be a remedy for the initiating parents to force the gestational mother to carry the child to term.<sup>207</sup> Her

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202. Baggish, *supra* note 189, at 236-37. See also Book Review, 102 HARV. L. REV. 1074, 1078 (1989)(reviewing MARTHA A. FIELD, *SELLING ONE'S BIRTH-RIGHTS* (1988)) [hereinafter FIELD] (little or low pay is oppressive and "fits into our tradition of noncompensation for women's work"; on the other hand, high pay and/or "economic necessity coerces people into accepting a wide range of dangerous or unpleasant jobs").

203. Ramona Ripston, *One Baby, Three Parents: Whose Rights Prevail?*, L.A. TIMES, Oct. 17, 1990, at B7 (although a woman may be compensated for her surrogacy services, the child born from this arrangement "has the right not to be sold as chattel").

204. Baggish, *supra* note 189, at 237 n.128.

205. S. Bill 937, Cal. Reg. Sess., § 7318(k)(1991).

206. *Id.* § 7318(d)(1),(2).

207. Also to be recognized are a woman's constitutional rights to control her body without outside interference. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Robert Casey v. Planned Parenthood of Southeastern Pa.*, 112 S. Ct. 2791 (1992)(unconstitutional to require a married woman seeking an abortion to sign a statement indicating that she has notified her husband).

rights would be limited, however, by current constitutional views of fetal rights and liability for breach of contract to the initiating parents. Liability is limited to the cost of the IVF treatment undertaken in reliance on her participation.

Comment. This subpart reflects that a woman's constitutional right to choose whether or not to continue a pregnancy cannot be contracted away.<sup>208</sup> Further, this subpart would prevent exploitation of gestational mothers by recognizing their complete control over their reproductive choices. A model statute, therefore, would allow the contract to be terminated by the gestational mother if she chose to have an abortion.

12. The intended parents must place funds sufficient to cover all known and estimated expenses in an escrow account.<sup>209</sup>

13. Initiating parents owe a duty to protect the safety of the gestational mother and the possible child. Initiating parents must be screened for diseases that may be transmittable to the gestational mother or the child.<sup>210</sup>

#### C. RIGHTS AND DUTIES OF INITIATING PARENTS

To provide the initiating parents security in the surrogate parentage contract, the contract should clearly specify the responsibilities and obligations of all parties, including all the factors discussed below.

1. Judicial supervision is required to ensure informed consent of the initiating parents.<sup>211</sup> In deciding the issue of informed consent, the court should consider whether the initiating parents have had legal counseling on their rights and duties as parents; have had psychological counseling to probe for unconscious hostile feelings about another woman gestating their fertilized egg that may later cause them to harm or resent the child; and understand the gestational mother's rights and duties.

2. This statute provides the initiating parents with a signed release allowing them access to genetic, psychological, and medical records that may be important in their decision to hire a particular woman.

Comment. Initiating parents have the right to know if the gestational mother has had previous physical trouble with pregnancies or is predisposed to any kind of drug use, depression, or ill-health.

3. To ensure that this child is genetically related to the initiating

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208. FIELD, *supra* note 202, at 1077.

209. S Bill 937, Cal. Reg. Sess., § 7318(f)(1991).

210. See, e.g., Stiver v. Parker, 61 U.S.L.W. 1041 (6th Cir. 1992)(surrogate mother sued broker when she was apparently infected with cytomegalovirus from genetic father's sperm; surrogate mother and her husband subsequently had child that had microencephaly).

211. Stanton, *supra* note 42, at 117.

parents, blood and genetic tissue testing is required after the birth.<sup>212</sup> If the child has no genetic link to the initiating parents, then the contract is void, and the surrogate mother owes the initiating parents reasonable compensation for payments made to any person or institution in connection with this pregnancy and birth, excluding the extra expenses of the *in vitro* fertilization attempt.

Comment. The gestational mother cannot be held liable for any failed implantation procedures, and, in light of the fact that IVF has a low success rate,<sup>213</sup> she cannot be held liable for the costs of the *in vitro* fertilization attempts.

4. To protect the initiating parents from a contest of the surrogate parentage contract by the gestational mother on the basis of lack of informed consent, there shall be a judicial decree of the gestational mother's informed consent (and of her husband's informed consent if she is married).

5. The genetic parents may not revoke their decision to take custody of the child after it is conceived.

Comment. Under this statute, both genetic parents are viewed like the sole father in a natural pregnancy. When a woman is pregnant, she has the constitutional right to control her body; the father may not demand an abortion for any reason (i.e. change of mind about being a parent, unsatisfied with the sex of the child, birth defects), and he has the legal obligation to support the child if it is born alive. This statute explicitly states its acknowledgment that the initiating parents are restricted by current constitutional laws from governing the gestational mother's conduct and will be under legal obligation to accept custody of the child from the gestational mother.

6. If the gestational mother chooses to have an abortion against the initiating parents' wishes, the abortion cannot be enjoined. There can be no specific performance to carry the child to term.<sup>214</sup> Initiating parents may, however, hold the gestational mother liable for breach of contract. Other contract remedies — monetary damages for lost expectation and emotional distress, restitution, and reliance — may be levied against whichever party breaches the contract.

7. Initiating couples must have medical proof that it would be dangerous or impossible for the initiating mother to gestate the child.

Comment. Since the purpose of this statute is to allow *infertile* couples to create a family, couples may not exploit IVF surrogacy to avoid the burdens of pregnancy. Some commentators state that allowing surro-

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212. *Id.* at 112.

213. See *supra* text accompanying note 77.

214. See *supra* text accompanying notes 207-08.

gate parentage contracts made by fertile couples will commercialize children and exploit women.<sup>215</sup> Others, like Katha Pollitt, however, believe this fear may be blown out of proportion.<sup>216</sup> This statute considers the possibility that the former commentators' fears may occasionally be justified. For public policy reasons, therefore, this statute requires women to show medical proof that it would be dangerous or impossible for them to bear children.<sup>217</sup> A surrogate parentage contract entered into by a couple, the wife of whom is able to bear children naturally, should be held void and unenforceable as contrary to public policy.

8. The intended parents must provide medical and life insurance policies for the gestational mother.<sup>218</sup>

9. The intended parents must place funds sufficient to cover all known and estimated expenses in an escrow account.<sup>219</sup>

10. Initiating parents owe a duty to protect the safety of the gestational mother and the possible child. Initiating parents must be screened for diseases that may be transmittable to the gestational mother or the child.<sup>220</sup>

#### D. INTEREST OF THE CHILD

This model uniform statute recognizes the importance of the child's right to a stable environment and takes the following precautions.

1. Judicial supervision is required to ensure that the initiating parents are emotionally stable enough to endure the unique stresses associated with IVF surrogacy and that they have been screened for parental fitness

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215. See, e.g., Kissam, *supra* note 3, at 615 ("paid surrogacy would help entrench stereotypes of women as 'vessels of the race' in the sense that women's wombs are being 'rented' for reproductive services to a patriarchal purpose").

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When ethicists fret that professional women may resort to gestational surrogacy to avoid "putting their careers on hold," they betray more than antiquated views about the capacities of pregnant women to get out of bed in the morning. They reveal their own assumption that pregnancy is a trivial, empty experience with nothing positive about it except the end product, the genetically connected baby. They then compound the insult by attributing this view to a demonized fantasy of working women — cold, materialistic, selfish, corrupted by "male values" — that is, those held by the ethicists themselves. Is there any evidence that working women — even MBAs, even lawyers — see pregnancy this way? Who do the pundits think are mobbing infertility clinics and signing on for donated eggs? A couple needs two incomes just to pay the doctors.

Pollitt, *supra* note 87.

217. *Id.*

218. S Bill 937, Cal. Reg. Sess., § 7318(d)(1),(2) (1991).

219. *Id.* § 7318(f).

220. See *supra* note 210.



using factors that are considered in adoption hearings.<sup>221</sup> Initiating parents shall be counseled about the psychological stresses children and parents may encounter from *in vitro* fertilization surrogacy.<sup>222</sup>

Comment. Using the same strict factors for IVF surrogacy parent screening that are considered in adoption hearings suggests an equal protection problem. In artificial insemination, when the man is infertile, no such screening is required; therefore, requiring strict screening of initiating couples when the woman is infertile may violate equal protection. Also, the screening shall not be as strict as in adoption because, unlike adoption, the IVF surrogacy initiating couple is related to the child. But this statute requires some screening because of the state interest in protecting the best interest of the child.

2. Initiating parents must be informed of their rights, responsibilities, and duties as parents as defined by the state in which the surrogacy is arranged.

3. The identity of the gestational mother shall be sealed because it may create confusion and mixed emotions for the child to know the gestational mother during childhood.<sup>223</sup>

4. This statute does not endorse a total disregard for the mother-infant bond. Separation of the IVF surrogacy child from one of its natural parents during its formative years is deemed the best method of providing a stable childhood environment. As some states allow adopted children to do, however, the IVF surrogacy child may later decide to seek out the gestational mother. Judicial records, therefore, shall be kept of the surrogacy arrangement and of the identities of the parties. When the child is of the age of majority and the record indicates the gestational mother's consent, the child may obtain her name and seek her out.

5. To account for the death of the natural parents, the contract must include specified provisions, including inheritance<sup>224</sup> from any natural parent, life insurance<sup>225</sup> of the intended parents, and custody<sup>226</sup> of the child.

6. Initiating parents owe a duty to protect the safety of the gestational

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221. These factors will depend on the individual state.

222. Child welfare experts fear that children from surrogacy arrangements may experience problems similar to those experienced by adopted children. See *supra* text accompanying note 30. These include: learning difficulties, behavioral and psychological problems, and confusion over their identities and backgrounds. *Id.*

223. Catherine Gewertz, *Psychiatry Professor Doubts Surrogate's Emotional Bond*, L.A. TIMES, Oct. 12, 1990, at B1 (Dr. Justin Call, child psychology expert, believes that a child should start out life peacefully, not in a tug-of-war that may be created if the surrogate mother has visitation rights. "Shared parenting" arrangements may upset a child's values).

224. S Bill 937, Cal. Reg. Sess., § 7311 (1991).

225. *Id.* § 7318(d)(3).

226. *Id.* § 7310(c).

mother and the possible child. Initiating parents must be screened for diseases that may be transmittable to the gestational mother or the child.<sup>227</sup>

#### E. LITIGATION

If a gestational mother believes she would be a more fit parent than the initiating parents and chooses to sue for custody of the child, there shall be a judicial hearing. The burden of proof is on the gestational mother to prove she is the more fit parent, since this statute grants the genetic parents the presumption of custody (not presumption of fitness). The court shall decide the fitness of each parent in accordance with the governing rules of its jurisdiction. It should, however, consider more than economic factors and shall not be swayed by the cultural and social affinities of any of the parties, including the judge.<sup>228</sup>

#### CONCLUSION

*In vitro* fertilization surrogacy is a new method of becoming a parent. It is independent from adoption, sperm donation, and traditional surrogacy. Because of the gestational mother's vital contribution to reproduction — that of developing the fertilized egg to the new born infant — equating her to an incubator demeans her role in the reproduction of the child and treats her as an object. IVF surrogacy creates a third natural parent.

As a parent, the gestational mother would normally have all the rights, responsibilities, and duties required by the laws of the state in which she resides. The purpose of *in vitro* fertilization surrogacy, however, is to help infertile couples create a family, just as adoption, egg donation, and artificial insemination help other couples create families. In the latter three instances, one or both of the natural parents must give up all parental rights. In adoption, however, some states recognize the bond between mother and child by allowing two exceptions: (1) during a specific period of time after the birth legal consent for adoption may be withheld and (2) when the child reaches the age of majority he or she may attempt to contact the natural parents.

This article suggests an IVF surrogacy statute that recognizes the gestational mother as a natural parent and allows her a statutory period to change her mind concerning the relinquishment of her parental rights. The proposed statute also extends the gestational mother the right to prove she would be a more qualified parent than the genetic parents. She is accorded parental status, but, as in adoption, with her voluntary consent and with a period of time to revoke after the child is born, her rights

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227. See *supra* note 210.

228. FIELD, *supra* note 202, at 1077-78.

may be terminated. The child is allowed to contact the gestational mother after reaching the age of majority if the gestational mother left written consent in the sealed documents of her identity. At that time, as in adoption cases where the child has chosen to seek the natural mother, the two parties may form a relationship. Any other rights, responsibilities, or duties will not be restored except by proper action of law.

Because IVF surrogacy is sufficiently different from other forms of creating a family, it should have its own body of law to govern its use in order to prevent confusion and unjust results from the misapplication of rules from adoption, artificial insemination, and sperm donation.