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# TOURO LAW REVIEW

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## **SURROGATE PARENTING AFTER *BABY M*: THE BALL MOVES TO THE LEGISLATURE'S COURT**

**John R. Dunne\***  
**Gregory V. Serio\*\***

### **INTRODUCTION**

The recent decision by the New Jersey Supreme Court in the now infamous case of *Baby M*<sup>1</sup> marks a crossroads for the emerging practice of surrogate parenting. Since mid-1986, extensive debates on surrogacy have taken place in legislatures, courts, and the media.

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1. *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

Deliberations thus far, however, have not resulted in any firm understanding of the concept, nor in the articulation of a comprehensive public policy framework guiding surrogates, intended parents, third party brokers, and the courts as they engage in or enforce surrogacy agreements. Instead, despite a flurry of legislative proposals, there has been relatively little progress in producing a statement of the public policy on surrogacy.<sup>2</sup> This state of affairs, however, may soon change.

The time for a committed legislative effort to develop surrogate parenting laws may now be at hand, given the limited jurisdiction of the courts in this "void" in the law. Courts have clearly indicated that the issue of surrogacy is at a crossroads, and that it is now the legislature's duty to devise a definitive policy resolution to this perplexing controversy. The ensuing debates will focus upon the *Baby M* decision and the public policy and constitutional underpinnings of surrogacy. This discussion will be placed within an examination of legislative activity to date and venture a prediction of what may be done in the various state legislatures now that the issue has become one of legislative, as well as judicial, concern.

Legislative consideration of surrogacy arose in New York even before the advent of *Baby M* as a judicial dilemma and media event.<sup>3</sup> The New York State Senate responded to the call by Surrogate Court Judge C. Raymond Radigan that the legislature address the issue of surrogacy, and produced an exhaustive study which provides a framework for this review.<sup>4</sup>

### I. *In re* BABY M

The most significant event in the evolution of the surrogate parenting issue is without doubt the decision of the New Jersey Supreme

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2. *Id.* at 469, 537 A.2d at 1264.

3. *In re Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. Nassau County 1986) (*Baby Girl L.J.* involved a private placement adoption between the surrogate mother and the natural father. The child was conceived by artificial insemination. The attorney representing the adoptive parents prepared a "Surrogate Parenting Agreement" which provided for the surrogate mother to receive \$10,000 for bearing the child.). See generally Comment, *Surrogate Motherhood Agreements and the Law in Pennsylvania*, 91 DICK. L. REV. 1085, 1090 (1987) (noting that neither party in *Baby Girl L.J.* was seeking to avoid a surrogate mother contract, rather, the court was ruling on the validity of a proposed private adoption); Comment, *Who's Minding the Nursery: An Analysis of Surrogate Parenting Contracts in Hawaii*, 9 U. HAW. L. REV. 567, 571 (1987) (courts which earlier held surrogate parenting contracts unenforceable analyzed the legality of surrogate contracts in a fashion similar to the approach adopted in *Baby Girl L.J.*).

4. NEW YORK STATE SENATE JUDICIARY COMMITTEE, *Surrogate Parenting in New York: A Proposal for Legislative Reform* (Jan. 1987) [hereinafter *Proposal for Reform*].

Court in *Baby M*. Whether it was the stinging condemnation of the practice under the current statutory or regulatory frameworks, or whether it was the equally scorching criticism of the trial court's handling of the case, and of the parties for that matter, the court's holdings constitute the strongest critiques to date that any body—legislative, judicial, or other—has made of the practice. The opinion does not, however, in any way toll an end to surrogacy, as some may have first thought.<sup>5</sup> Rather, the opinion identifies two basic principles which extend beyond New Jersey, and underlie any attempt to define a state's public policy: first, surrogacy will not be tolerated by the courts without a definitive policy—be it a policy of prohibition, a policy of voiding contracts, or a policy of allowance—that clearly states the rights and liabilities of the parties, and protects the interests of the child; second, the legislatures must work to fashion that policy, no matter how difficult, because it is the unique province of the legislative branch to institute the “values and objectives” of the society that lawmakers represent.<sup>6</sup>

Curiously, the *Baby M* decision was not so much an indictment of the practice of surrogate parenting as it was a call for action because of the glaring conflicts and contradictions that exist between current state statutes and the characteristics of surrogacy arrangements. In many ways, the message delivered by the New Jersey court was simply a restatement of the concerns first expressed by Surrogate Radigan in his *In re Baby L.J.* opinion, and repeated in the legislative debates that have continued since that decision. Surrogate Radigan was able to resolve the issues presented in *Baby Girl L.J.*, an uncontested adoption of a child born of a surrogacy arrangement, but nevertheless encouraged the legislature to explore the important issues in surrogate parenting. The *Baby M* decision, in its discussion of the sharply contested claims of parental rights, provided a still more urgent call for legislative resolution of the legal inconsistencies arising from surrogacy.

While the New Jersey Supreme Court's opinion is binding only on the courts of that state, it reads like a blueprint for legislative action on surrogate parenting in any state. The court's objection to the practice in general and to the specific agreement entered into by the parties was founded primarily on statutory or public policy argu-

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5. See, e.g., *The Baby M Decision Leaves Surrogacy's Future in Doubt*, N.J.L.J., Feb. 11, 1988, at 1, col. 2; *Surrogate Parenting Found Illegal in New Jersey*, N.Y.L.J., Feb. 4, 1988, at 1, col. 3. But see *Surrogacy Issues and Public Policy*, Christ. Sci. Mon., Feb. 4, 1988, at 19, col. 2.

6. *Baby M*, 109 N.J. 396, 469, 537 A.2d 1227, 1264.

ments, the development of which is exclusively the responsibility of the legislature. The court cited several substantial conflicts between the agreement's provisions and existing law: the payment of fees, the relinquishment of parental rights and the consent to the transfer of custody, the fitness of the parties, and the involvement of third parties.<sup>7</sup> Resisting the temptation to go beyond the identification of the contradictions, the court exercised significant judicial restraint by avoiding any expression of its own moral judgments on the issue which would only have served to further complicate an already delicate matter.

#### A. *Payment of Fees*

The New Jersey Supreme Court rejected the surrogate parenting arrangement on the grounds that it violated state law and was in conflict with state public policy. The court's basic objection was, without doubt, related to the passing of money to the surrogate mother.<sup>8</sup> New Jersey, like other states, prohibits the passage of money in association with an adoption.<sup>9</sup> In fact, the state's law makes the acceptance of money a criminal violation in all but a few situations.<sup>10</sup> The court said, "[W]e have no doubt whatsoever that the money [\$10,000] is being paid to obtain an adoption and not, as

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7. *Id.* at 434, 537 A.2d at 1246 (the premise of the contract provides for a determination of custody prior to the birth of the child which "bears no relationship to the settled law that the child's best interests shall determine custody."); see *Fantony v. Fantony*, 21 N.J. 525, 536-37, 122 A.2d 593, 598-99 (1956); see also *Sheehan v. Sheehan*, 38 N.J. Super. 120, 125, 118 A.2d 89, 92 (App. Div. 1955) (which held that "the ultimate determination of custody lies with the court . . .").

8. *Baby M*, 109 N.J. 396, 422, 537 A.2d 1227, 1240.

9. N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1987).

a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith

(1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or

(2) Take, receive, accept or agree to accept any money or any valuable consideration.

*Id.*; accord MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1987); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983).

10. N.J. STAT. ANN. § 9:3-54(b) (West Supp. 1987).

The prohibition of subsection a. shall not apply to the fees or services of any approved agency in connection with a placement for adoption, nor shall such prohibition apply to the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child, or to the acceptance of such reimbursement by a parent of the child.

*Id.* See generally *Surrogate Parenting Law: The Applicability Of LA-R.S. 14 § 286 Towards Providing A Constitutionally Reasonable And Legitimate Means By Which The State May Address Surrogate Contracts*, 13 SO. UNIV. L. REV. 125 (1986) (discussion of any payment to

the Sterns argue, for the personal services of Mary Beth Whitehead . . . ."<sup>11</sup> This reasoning, the court noted, was based on the fact that the agreement discharged the Sterns from the payment of any fees were the child to die prior to the fourth month of pregnancy, and obligated them to pay only \$1,000 if the child were stillborn, although services had been fully rendered.<sup>12</sup>

The court concluded that the payment of fees constituted purchasing an adoption, and thus was in conflict with state laws on baby-selling. It also found the use of a monetary arrangement to be contradictory to public policy.

The evils inherent in baby bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. . . . The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime.<sup>13</sup>

The court continued: "Baby-selling potentially results in the exploitation of all parties involved. . . . The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother."<sup>14</sup>

#### *B. Relinquishment of Rights and Transfer of Custody*

New Jersey law specifically provides the circumstances under which natural parents may surrender their rights with respect to a child.<sup>15</sup> Relinquishment must be to a state agency.<sup>16</sup> Otherwise, parental rights may be terminated only after a finding of parental abandonment or unfitness.<sup>17</sup> In private placement adoptions, in order to terminate parental rights, "there must be a finding of 'intentional abandonment or a very substantial neglect of parental duties without

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surrogate mother as either baby-selling or compensation which is representative of the risks undertaken by the surrogate mother during pregnancy and delivery).

11. *Baby M*, 109 N.J. 396, 422, 537 A.2d 1227, 1240.

12. *Id.* at 424, 537 A.2d at 1241.

13. *Id.* at 425, 537 A.2d at 1241. See generally N. BAKER, *BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTION* (1978).

14. *Baby M*, 109 N.J. 396, 425, 537 A.2d 1227, 1242.

15. N.J. STAT. ANN. § 9:17-40 (West Supp. 1987) (providing that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

16. *Baby M*, 109 N.J. 396, 426, 537 A.2d 1227, 1242 (citing N.J. STAT. ANN. § 9:2-16 (West 1976) (voluntary surrender to approved agency)).

17. *Id.* (citing N.J. STAT. ANN. § 9:2-19 (West 1976) (court may terminate parental rights when parent has forsaken parental obligation)).

a reasonable expectation of a reversal of that conduct in the future.'"<sup>18</sup> In the absence of proof establishing forsaken parental obligations, parental rights may not be terminated in a private placement setting.<sup>19</sup>

A particularly difficult aspect of a surrogacy agreement's provision for the surrendering of parental rights is the irrevocability of the consent. Mary Beth Whitehead agreed to "surrender custody of the child to [Stern] immediately upon birth, acknowledging that it is . . . in the best interest of the child to do so; as well as institute and cooperate in proceedings to terminate . . . parental rights to said child . . . ."<sup>20</sup> The court found this irrevocable surrender to be unenforceable and in conflict with applicable state statutes related to voluntary surrender.

Not only do the form and substance of the consent in the surrogacy contract fail to meet statutory requirements, but the surrender of custody is made to a private party. It is not made, as the statute requires, either to an approved agency or to DYFS [Division for Youth and Family Services].<sup>21</sup>

In fact, that is the only way an irrevocable surrender could be effectuated. In no other case, not even a private placement adoption, is consent to surrender irrevocable until it has been through an agency or is ordered by the court.<sup>22</sup>

A completely voluntary and informed consent, particularly prior to the birth of the child, is difficult if not impossible to achieve.

[T]he natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.<sup>23</sup>

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18. *Id.* at 427, 537 A.2d at 1242 (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West Supp. 1987)).

19. *Id.* at 428, 537 A.2d at 1243 (citing *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977) (although the mother consented to a private placement adoption, this did not result in abandonment of the child or forsaking parental obligations, and the mother was entitled to revoke consent and regain immediate custody of her child without further proceedings)).

20. *Id.* at 471, 537 A.2d at 1266 (Appendix A, Surrogate Parenting Agreement).

21. *Id.* at 432, 537 A.2d at 1245.

22. *Id.* at 433-34, 537 A.2d at 1246 (citing *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977)).

23. *Id.* at 437, 537 A.2d at 1248.

*C. Fitness of the Parties*

Serious reservations were also expressed by the court over the failure of the agreement to consider, either in its drafting or execution, the fitness of the parties, and the impact of such failure upon the "best interest" standard. The court noted that the Sterns did not examine the findings of the psychological examinations of Mary Beth Whitehead, and that there was little, if any, information available on the genetic make-up or medical history of the surrogate.<sup>24</sup> Also, the court found that "[t]here is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother."<sup>25</sup> Indeed, most objectionable, in the court's view, was that the agreement totally disregarded the best interests of the child.<sup>26</sup>

*D. Third Party Profits*

The court attributed the lack of background fitness investigations to the conflicting interest of the Infertility Center of New York which coordinated the Whitehead-Stern agreement. The court declared:

It is apparent that the profit motive got the better of the Infertility Center. Although the [psychological] evaluation was made, it was not put to any use, and understandably so, for the psychologist warned that Mrs. Whitehead demonstrated certain traits that might make surrender of the child difficult and that there should be further inquiry into this issue in connection with her surrogacy. To inquire further, however, might have jeopardized the Infertility Center's fee.<sup>27</sup>

The court acknowledged a certain logic for the use of middlemen or brokers in the surrogacy process, but nonetheless objected to their motivation.

The demand for children is great and the supply small. The availability of contraception, abortion and the greater willingness of single mothers to bring up their children has led to a shortage of babies offered for adoption . . . . The situation is ripe for the entry of the

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24. *Id.* at 436-37, 537 A.2d at 1247-48.

25. *Id.* at 437, 537 A.2d at 1248.

26. *Id.*

27. *Id.* at 437, 537 A.2d at 1247-48.



middleman who will bring some equilibrium into the market by increasing the supply through the use of money.<sup>28</sup>

While the ends appear justified to infertile couples who have found adoption to be difficult,<sup>29</sup> the court found that the means to achieve this, namely the use of brokers, are nevertheless beyond reason. As the court found to its dismay, "the profit motive predominates, permeates, and ultimately governs the transaction."<sup>30</sup>

The court, throughout its analysis, was most concerned about the embodiment of surrogacy agreements within contractual relationships, and the mistaken belief by the parties that the relationship insulated them from the letter or spirit of the law. As the court noted, the root of all evils arising in the instant case was "the inducement of money [and] the coercion of contract,"<sup>31</sup> which, they found, apparently went far beyond the parameters of existing law or established public policy. The contract, the court said, was flawed for several reasons.

First, the foundation upon which the contract was based violated established law. The agreement entitled the natural parents to determine prior to birth which party was to have custody of the child. Since established law mandates that the child's best interests shall determine custody, the contract, which awarded custody in the absence of a best interests analysis, contravened existing law. The court retains the power to make ultimate determinations of custody through the exercise of its supervisory jurisdiction as *parens patriae*, notwithstanding an agreement of the parents.<sup>32</sup> Second, the contract encouraged the separation of natural parent and child, conflicting with the public policy that "to the extent possible, children should remain with and be brought up by both of their natural parents."<sup>33</sup> Third, the contract violated the policy against presumptions in favor of one parent against the other parent. "The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother."<sup>34</sup> Fourth,

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28. *Id.* at 439, 537 A.2d at 1249; see N. BAKER, *supra* note 13; *Adoption and Foster Care, 1975: Hearings on Baby Selling Before Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 6 (1975) (statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc.).

29. *Baby M*, 109 N.J. 396, 411, 468, 537 A.2d 1227, 1234, 1264.

30. *Id.* at 439, 537 A.2d at 1249.

31. *Id.* at 422, 537 A.2d at 1240.

32. *Id.* at 434-35, 537 A.2d at 1246 (citing *Fantony v. Fantony*, 21 N.J. 525, 122 A.2d 593 (1956); *Sheehan v. Sheehan*, 38 N.J. Super. 120, 125, 118 A.2d 89, 92 (App. Div. 1955)).

33. *Id.* at 435, 537 A.2d at 1246-47.

34. *Id.* at 436, 537 A.2d at 1247.

surrogacy contracts in general place an inordinate focus upon money, as the motivation for the pregnancy, while in adoptions the pregnancy precedes any discussion of monetary compensation.<sup>35</sup>

The court concludes its opinion, not by castigating those who would seek to utilize surrogates in order to have children, but rather by focusing attention on the true problem: creating a public policy, or at the very least, clarifying public policy. A clear public policy would alleviate the startling contradictions found between existing law and surrogacy agreements, and would discourage agreement participants from using the surrogacy contract as a method for bypassing the law's current restrictions.

The court focused upon the unregulated practice of surrogate parenting and the problems arising therefrom. The court's opinion, therefore, necessarily militates in favor of legislative involvement, recognizing that "the Legislature remains free to deal with this most sensitive issue as it sees fit . . . . The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area."<sup>36</sup> This is tantamount to a mandate to the legislature to devise a policy statement, and to avoid the destructive forces of future *Baby M* cases.

## II. NEW YORK SURROGATE PARENTING BILL S. 1429-A

### A. Report to the Legislature

The New York State Legislature became involved in the issue of surrogate parenting before the publicity of *Baby M* in response to Surrogate C. Raymond Radigan, who addressed a surrogate parenting contract in *In re Baby Girl L.J.*<sup>37</sup>

Surrogate Radigan brought to light the inadequacies of current adoption laws in addressing the special circumstances arising from surrogate parenting contracts. Finding that the advancements of biomedical science were not contemplated by state legislatures in enacting adoption laws years ago, Surrogate Radigan recognized the necessity for the New York Legislature to reexamine existing laws in light of these developments:

35. *Id.* at 438, 537 A.2d at 1248.

36. *Id.* at 469, 537 A.2d at 1264.

Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under [surrogate] parenting agreements. Accordingly, the court finds that this is a matter for the Legislature to address rather than for the judiciary to attempt to determine by the impermissible means of "judicial" legislation. . . . [T]he court requests the Legislature to review this serious problem in order to determine whether statutory provisions should be made to allow or disallow the payments requested herein . . . .<sup>38</sup>

Heeding this call, the Senate Judiciary Committee held public hearings in October, 1986 to foster debate on this issue. Following these hearings, the Committee issued a report, *Surrogate Parenting in New York: A Proposal for Legislative Reform*.<sup>39</sup>

This report was the first comprehensive examination of surrogate parenting by the New York State Legislature and evaluated the three options which the Legislature could select: prohibition, laissez faire, or regulation.<sup>40</sup> The report yielded the conclusion that strict regulation of the practice would be the most viable public policy route to pursue.<sup>41</sup>

A laissez faire approach, which in essence would continue the practice in an unregulated manner, was rejected because it ignored the fact that, without a declaration of public policy, the child's rights are at a substantial risk, similar to that seen in the *Baby M* litigation.<sup>42</sup> Such a "hands-off" approach also would not give the courts direction as to how to resolve surrogate parenting disputes, thus leaving public policy to be developed in a piecemeal fashion.<sup>43</sup>

Interestingly, the report also dismissed the prohibition of the practice as a viable public policy option.<sup>44</sup> Prohibition would entail either the criminalization of the practice, or at the very least the declaration that the practice is against public policy, which would result in a nullification of any contractual arrangement. The staff of the Senate Judiciary Committee rejected the option of prohibition on the grounds that it could potentially violate the parties' right to privacy.<sup>45</sup> This conclusion was based on an analysis of the landmark United States Supreme Court cases that articulated the right of pri-

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38. *Id.* at 978, 505 N.Y.S.2d at 818.

39. *Proposal for Reform*, *supra* note 4.

40. *Id.* at 42-50.

41. *Id.* at 4, 49-50.

42. *Id.* at 42.

43. *See id.* at 42-43.

44. *Id.* at 46.

45. *Id.* at 45-46.

vacy as found within the penumbra of rights surrounding the first, third, fourth, fifth, and ninth amendments.<sup>46</sup>

The committee report endorsed the regulation of surrogate parenting agreements.<sup>47</sup> The regulatory scheme envisioned would not be based strictly upon contract and adoption concepts, but rather upon what the report described as an informed consent model.<sup>48</sup> Contract principles, while adding predictability to the process and adapting familiar legal concepts to a new area of law, treat the child more as a product and, in large measure, fail to protect the interests of the parties.<sup>49</sup> Adoption concepts are also not entirely appropriate, since adoption generally focuses on the relinquishment of custodial rights after the birth of the child.<sup>50</sup>

The informed consent model approach is based on the principle that an individual has the right to accept risks, provided that he or she fully understands the nature of those risks. The informed consent model provides for court review of the surrogate parenting process to promote the best interests of the child and to ensure that all parties have full knowledge of the risks and responsibilities involved, as well as the sacrifices to be made as a result of their entry into a surrogate parenting arrangement.<sup>51</sup>

### B. *The Senate Bill*

Senate Bill 1429-A, embracing the informed consent model approach to surrogate parenting, amends the Domestic Relations Law by adding a new article on surrogate parenting.<sup>52</sup> The preamble of Senate Bill 1429-A reflects the legislation's purpose and its rooting in the informed consent paradigm:

[T]o ensure that the child born in fulfillment of a surrogate parenting agreement has a permanent home and settled rights to inheritance; to define and delineate the rights and responsibilities of the intended par-

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46. *Id.* at 43-46; see *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (several fundamental constitutional guarantees create zones of privacy which, in turn, give life and substance to the express protections provided by the Bill of Rights). See generally Note, *Surrogate Motherhood Legislation: A Sensible Starting Point*, 20 IND. L. REV. 879 (1987) (discussing state's power to regulate surrogate parenting).

47. *Proposal for Reform*, *supra* note 4, at 49-50.

48. *Id.* at 52-54. See generally Andrews, *Surrogate Motherhood: Should the Adoption Model Apply?*, 7 CHILDREN'S LEGAL RTS. J. 13 (No. 4 1986).

49. *Proposal for Reform*, *supra* note 4, at 29-32.

50. *Id.* at 35 (whereas the surrogate motherhood agreement is made prior to insemination and, therefore, no coercive effect results from the payment of money to the mother).

51. *Id.* at 52-54.

52. N.Y. S. 1429-A, 200th Leg., Reg. Sess. §§ 119-130 (1987-1988).

ents, the surrogate mother, and her husband, if any; to facilitate private reproductive choices by effectuating the parties['] intentions; to minimize the risk to the parties; to prevent the use of surrogate parenting for other than medically necessary reasons; to reduce the risk of exploitation and coercion which may arise from the commercialization of surrogate parenting; and to ensure informed and voluntary decision-making.

The legislature declares that a court approved surrogate parenting contract . . . shall not be against public policy.<sup>53</sup>

The key element in this proposal is the role of the court in surrogate parenting agreements. Senate Bill 1429-A establishes a mechanism for judicial review of the surrogate parenting process which will protect the child's rights as the highest priority, and ensure that the parties have freely entered into the agreement and are fully informed as to its consequences. In addition, provisions are made for nullification and modification of the agreement based upon a compelling change of circumstances. The bill, through sections 129 and 130, also places restrictions on the commercialization of surrogate parenting by removing the profit motive of third parties associated with the process.

### 1. *Judicial Review*

Under the proposed legislation, judicial review of a surrogate parenting agreement is commenced by the filing of a petition in either the state's Family Court or Surrogate's Court, each possessing concurrent jurisdiction.<sup>54</sup> The petition presented to the courts would include: (1) a copy of the surrogate parenting agreement; (2) a physician's affidavit stating that the intended mother is infertile; (3) a physician's affidavit stating that the surrogate mother is fertile and not pregnant; (4) a physician's affidavit stating that both the surrogate mother and the intended father have been tested for sexually transmitted and genetically detectable diseases, and the results of those tests; and (5) an affidavit from third parties who received or will receive compensation for services rendered in connection with the surrogate parenting agreement.<sup>55</sup>

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53. *Id.* § 1.

54. *Id.* § 120.1. The statute provides that transitory residents would not be permitted to enter a surrogate parenting agreement. Petitions for approval of the agreement "may be maintained when either the surrogate mother or the intended father is a resident of this state and has been a resident thereof for two years immediately preceding the commencement of the proceeding." *Id.* § 120.2.

55. *Id.* § 123.2.

The parties must have independent counsel while negotiating the agreement. Under no circumstances may the same attorney represent the surrogate mother and the intended parents.<sup>56</sup> Within thirty days of the filing of the petition, the court will schedule a hearing to examine the parties,<sup>57</sup> fix the surrogate's compensation,<sup>58</sup> determine eligibility of the intended mother,<sup>59</sup> and review all terms of the agreement including any compensation to be paid to a third party.<sup>60</sup>

The court will examine each of the parties under oath to determine whether the parties freely and knowingly entered into the agreement,<sup>61</sup> whether they are fully informed, and whether the rights and obligations under the agreement are fully understood.<sup>62</sup> The intended parents must understand that they will have full parental responsibilities as of the time of the child's birth.<sup>63</sup> Also, the surrogate mother must understand that upon the birth of the child, she will have no parental rights.<sup>64</sup>

In determining whether the compensation to be paid to the surrogate is "just" and "reasonable,"<sup>65</sup> the proposed statute establishes the following factors:

- (1) calculation of [the surrogate's] anticipated lost wages;
- (2) actual or anticipated expenses incurred [by the surrogate];
- (3) value of time expended;
- (4) value of health risks incurred or likely to be incurred incident to or on account of the surrogate parenting agreement; and

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56. *Id.* § 122.3; *cf. In re Baby M*, 109 N.J. 396, 425, 537 A.2d 1227, 1241-42 ("Baby-selling potentially results in the exploitation of all parties involved." The court also expressed particular concern about "baby bartering" especially when the natural mother does not receive proper "counseling and guidance.").

57. *Id.* § 124.1.

58. *Id.* §§ 124.1(e)(1)-124.2(b).

59. *Id.* § 124.2(a).

60. *Id.* § 124.3(a).

61. *Id.* § 124.1(a); Annotation, *What Constitutes "Duress" in Obtaining Parent's Consent to Adoption of Child or Surrender of Child to Adoption Agency*, 74 A.L.R. 3d 527, 530-33 (1976).

62. N.Y.S. 1429-A, § 124.1(b); Annotation, *supra* note 61, at 536 (citing *Huebert v. Marshall*, 132 Ill. App. 2d 793, 270 N.E.2d 464 (1971) (wherein the court invalidated an adoption because the natural mother had been advised that she did not need legal representation)).

63. N.Y.S. 1429-A, § 124.1(c); *cf. In re Adoption of Sturgeon*, 300 Pa. Super. 92, 445 A.2d 1314 (1982) (preadoptive parents not entitled to the protections afforded natural parents and cannot acquire such protection before the final adoption).

64. N.Y.S. 1429-A, § 124.1(d); *see also In re Adoption of Child*, 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971) (where the natural parent voluntarily, freely, and understandingly gives her consent, such consent is irrevocable).

65. N.Y.S. 1429-A, § 124.2(b).

- (5) such other factors the court deems necessary to consider in the interests of justice.<sup>66</sup>

Since a surrogate parenting agreement is one "whereby the surrogate mother agrees to be inseminated by the sperm of the husband of an *infertile woman* . . . ." an affidavit must be presented attesting to the intended mother's infertile condition.<sup>67</sup> An infertile woman is defined as one who:

- (a) has not conceived after twelve months of treatment for infertility by a physician licensed to practice in this state or, (b) is diagnosed by a physician licensed to practice in this state as unable or unlikely to conceive a child, or to carry a child to term without significant risks to her life or health, or to her child's life or health or (c) is sterile.<sup>68</sup>

Based on the physician's affidavits, the court must determine whether the infertility of the intended mother is established. If the court is not satisfied that the requirement is met, it shall order a diagnosis by a second physician.<sup>69</sup> If the intended mother is not infertile, as defined, this article would not apply and any agreement would therefore be void and unenforceable.

A review of the surrogate parenting agreement by the court is then required by section 124.3(a) to determine whether its terms are in compliance with the statute.<sup>70</sup> The agreement must contain the following provisions:<sup>71</sup> (a) that the agreement is not binding and enforceable until approved by the court;<sup>72</sup> (b) that the surrogate mother agrees to be inseminated by the sperm of the intended father and to carry the child to term and then surrender all parental rights to the intended parents; (c) that the intended parents agree to accept parental responsibilities for the child at birth, regardless of the physical condition of such child; (d) that the surrogate mother has control of all medical decisions relating to her pregnancy; (e) that the

66. *Id.* § 124.1(e).

67. *Id.* § 119.5 (emphasis added); *see also* N.Y. SOC. SERV. LAW § 374-b (McKinney 1983) (Section 374-b prohibits any person from accepting any compensation for placing out a child for the purpose of adoption. Section 130 of Senate Bill 1429-A would modify the Social Services Law to the extent that prior court approval would exempt participants in a surrogate parenting agreement from criminal liability.).

68. N.Y.S. 1429-A, § 119.1.

69. *Id.* § 124.2(a).

70. *Id.* § 124.3(a).

71. *Id.* § 122(a)-(l).

72. *Id.* § 122(a); *In re Baby M*, 109 N.J. 396, 422, 429-31, 537 A.2d 1227, 1240, 1244 (1988) (One of the primary reasons the court invalidated the surrogacy agreement was because the natural mother has irrevocably consented to give up all rights to the child prior to conception. Conditioning a surrogacy agreement on court approval would help remedy this public policy violation.).

intended parents assume responsibility for payment of all reasonable and necessary medical expenses incurred by the surrogate mother; (f) that term life and health insurance be provided for the surrogate mother with the beneficiary of her choice; (g) that the surrogate mother's compensation be deposited in an escrow or attorney trust account prior to the first insemination;<sup>73</sup> (h) that the surrogate mother agree to undergo medical examinations for pregnancy, fertility, and sexually transmitted and genetically detectable diseases; (i) that the intended father agree to undergo medical examinations for sexually transmitted and genetically detectable diseases prior to the donation of semen; (j) that the results of such testing be exchanged between the parties; (k) that any provision whereby compensation is conditioned upon the health, viability, or survival of the child shall be void as against public policy;<sup>74</sup> and (l) that any cause of action arising from a surrogate parenting agreement be limited to an action for breach of contract or an action for enforcement of the terms of the agreement and that remedies for breach of contract be limited to money damages in the amounts described in the agreement.<sup>75</sup>

Once the court is satisfied that the agreement complies with the statute it shall order each of the parties to undergo an evaluation by a licensed mental health professional.<sup>76</sup> The tragic experiences in the *Baby M* case demonstrate the purpose of the evaluation, which is to determine whether the parties are aware of the emotional and psychological consequences of surrogate parenting and whether they are entering into the agreement fully informed.<sup>77</sup>

When the foregoing is completed, and if upon a second appearance the court concludes that the parties are fully informed, the court may grant its approval to the agreement. The effect of court approval is that "the agreement shall be deemed enforceable for all purposes; and the child shall be deemed at birth the legitimate, natu-

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73. N.Y.S. 1429-A, § 122(g). *But see Baby M*, 109 N.J. 396, 412, 537 A.2d 1227, 1235 (contractual provision in the Stern-Whitehead surrogacy agreement whereby \$10,000 was to be paid to Mrs. Whitehead only after the birth and surrender of the child held invalid).

74. N.Y.S. 1429-A, § 122(j); *cf. Baby M*, 109 N.J. 396, 424, 537 A.2d 1227, 1241 (This section in the bill would prohibit the provision in the surrogacy agreement between Mr. Stern and Mrs. Whitehead wherein Mrs. Whitehead would not receive any compensation if the child died before the fourth month of pregnancy, and only \$1,000 if the child was stillborn.).

75. N.Y.S. 1429-A, § 122(l).

76. *Id.* (the intended parents pay the costs for this counseling).

77. *Id.* § 125; *cf. Baby M*, 109 N.J. 396, 436-37, 537 A.2d 1227, 1247 (The court observed that the counseling Mrs. Whitehead had received to determine if she was likely to "change her mind" was insufficient because neither of the contracting parties had seen the results of Mrs. Whitehead's evaluation, and Mrs. Whitehead had only been informed that "'she had passed'").



ral child of the intended parents for all purposes."<sup>78</sup> The court's approval allows the parties to then proceed with the insemination process.

## 2. *Nullification or Modification: Compelling Change in Circumstances*

The bill allows the surrogate mother, within forty-five days after the birth of the child, to apply to the court to annul or modify the surrogate parenting agreement.<sup>79</sup> The surrogate mother must show, by clear and convincing evidence, such a compelling change in circumstances that enforcement of the contract is not in the child's best interest. In this proceeding, a court-approved contract will be presumed to be valid and in the best interests of the child. It is against the weight of such validity that the surrogate mother must establish the compelling change in conditions. If the court subsequently determines that the contract is unenforceable, the court shall decide all issues of custody and support of the child in accordance with the law and the best interests of the child.<sup>80</sup>

## 3. *Limiting Commercialization*

Sections 129 and 130 are designed to limit the commercialization of surrogate parenting by removing the profit motive from the process. Section 129 requires that any third party who "solicits, promotes, induces or receives surrogate mothers or intended parents for the purpose of entering into a surrogate parenting agreement" must be a not-for-profit corporation.<sup>81</sup> Section 130 makes it a misdemeanor for any person, agency, or corporation to enter into a surrogate parenting agreement and pay fees without court authorization.<sup>82</sup>

# III. LEGISLATIVE ACTIVITIES IN THE STATES

The *Baby M* case created a heightened public awareness of surrogate parenting and generated, in part, the response in as many as

78. N.Y.S. 1429-A, § 126.

79. *Id.* § 127.

80. *Id.*; cf. *Baby M*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 ("Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents . . . or the effect on the child of not living with her natural mother.").

81. N.Y.S. 1429-A, § 129.

82. *Id.* § 130; see also N.Y. SOC. SERV. LAW § 374-b (McKinney 1983) (providing that no "agency, association, corporation . . . and no person" can accept payment for the "placing out of a child").

twenty-six state legislatures where sixty-four separate bills were introduced during the first half of 1987.<sup>83</sup> Despite this activity, only three states have enacted legislation dealing with the surrogate parenting issue.<sup>84</sup>

An Arkansas law provides that the intended parents of a child born of an unmarried surrogate mother are the legal parents of the child.<sup>85</sup> A 1987 Louisiana law makes contracts for paid surrogacy unenforceable.<sup>86</sup> A Nevada statute exempts surrogate parenting from the prohibition against payment in connection with adoption.<sup>87</sup> In addition to the state activity, there is a bill in Congress which would prohibit making, engaging in, or brokering a surrogacy agreement on a "commercial basis" and prohibit the advertising of the availability of such a commercial surrogacy agreement.<sup>88</sup>

The state proposals which address the surrogate parenting issue can be divided into four categories: prohibition, disapproval, further study, and regulation.<sup>89</sup> Although the various approaches fall into general categories, there are vast differences among the specific proposals in each bill, even though the measures fit within the same grouping.

#### A. Prohibition

Lawmakers in Alabama, Illinois, Iowa, Maryland, and Wisconsin have introduced legislation which would ban surrogate parenting outright.<sup>90</sup> Bills in seven other states (Florida, Kentucky, Michigan, New Jersey, New York, Oregon, and Pennsylvania) prohibit paid

83. *Surrogate Parenthood: A Legislative Update*, 13 FAM. L. REP. (BNA) 1442 (July 14, 1987).

84. Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REPORT 31 (Oct.-Nov. 1987).

85. *Id.* (citing ARK. CODE ANN. § 9-10-201(c)(1) (1987) ("A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of the woman intended to be the mother.")).

86. Andrews, *supra* note 84, at 2 (citing LA. REV. STAT. ANN. § 9:2713(A) (West Supp. 1988) ("A contract for surrogate motherhood . . . shall be absolutely null and shall be void and unenforceable as contrary to public policy.")).

87. *Id.* at 31-32. The Nevada statute prohibiting payment in return for cooperation or consent to adoption does "not apply if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man who is not her husband." NEV. REV. STAT. ANN. § 127.303(5) (Michie Supp. 1987).

88. H.R. 2433, 100th Cong., 1st Sess. (1987).

89. See Andrews, *supra* note 84, at 32 (Andrews uses the categories Horror, Negation, Evaluation, and Acceptance).

90. *Id.* at 32, 40 n.8.

surrogacy.<sup>91</sup> At least six of these bills criminalize some aspect of surrogate parenting (Iowa, S. 358; Maryland, S. 613; Michigan, S. 228; New Jersey, A. 4138; Oregon, S. 456; Pennsylvania, H. 570).<sup>92</sup>

The Michigan bill, for example, makes entering into a paid surrogate parenting agreement a misdemeanor punishable by a fine of not more than \$10,000 or imprisonment for not more than one year.<sup>93</sup> The bill further declares it a felony for a person other than the participating parties to induce, arrange, procure, or otherwise assist in the formation of a surrogate parenting contract for compensation. The penalty for these brokers is a fine up to \$50,000 or prison for up to five years.<sup>94</sup>

### B. Disapproval

Lawmakers in several states have expressed their displeasure with the surrogate parenting concept through proposals which would negate the agreement. Connecticut, Illinois, North Carolina, and Rhode Island have bills which would make surrogate parenting agreements void and unenforceable.<sup>95</sup> Legislation in Alabama, Minnesota, Nebraska, and New York would void paid surrogate parenting agreements.<sup>96</sup>

By prohibiting or negating surrogate parenting agreements, legislators specifically indicate to the courts a public policy intended to discourage such agreements. Such a response allows lawmakers not only to by-pass a complex legal and highly emotional issue, but also to avoid the task of drafting an intricate framework of regulation.<sup>97</sup>

With the exception of proposals in Connecticut and Michigan, which state that the surrogate and her husband are the legal parents,<sup>98</sup> the prohibitory and negating proposals lack provisions which

91. *Id.* at 32, 40 n.9.

92. *Surrogate Parenthood: A Legislative Update*, *supra* note 83, at 1442-44.

93. MICH. COMP. LAWS ANN. §§ 710.54, 710.69 (West Supp. 1987); *cf.* N.Y. SOC. SERV. LAW § 389 (McKinney 1983) (making it a misdemeanor to violate § 374 of the Social Services Law, which prohibits anyone, excluding authorized state agencies, from paying or accepting payment for the adoption or placing out of a child, other than actual medical and legal expenses); N.Y.S. 1429-A, § 130 (equating a violation of this bill with a violation of § 374 of the Social Services Law, criminalizing some aspect of surrogate parenting).

94. Andrews, *supra* note 84, at 32.

95. *Id.* at 32, 40 n.11.

96. *Id.* at 32, 40 n.12 (The New York Proposals also void arrangements for *in vitro* fertilization. It can also be argued that the North Carolina bill only addresses paid surrogacy, because it voids contracts involving women "employed" as surrogates.).

97. Memorandum from Gregory Serio to Senator John Dunne (Dec. 10, 1987) (public policy of surrogate parenting).

98. Andrews, *supra* note 84, at 32.

determine legal parentage.<sup>99</sup> These proposals leave a legal void and any dispute between the surrogate mother and the biological father over custody would have to be resolved in the courts.<sup>100</sup>

There are also questions as to the constitutionality of a ban on surrogate parenting.<sup>101</sup> There is a theory that the rights to privacy and to bear a child extend to surrogate parenting agreements since these arrangements are usually between the biological mother and the biological father of the child.<sup>102</sup>

In the judgment of some, legislative condemnation of surrogate parenting, either by prohibition or by voiding the agreements, is unlikely to deter infertile couples who desperately want to have a child. Such legislative action is more likely to move surrogate parenting underground where it cannot be regulated by the states.

### C. Further Study

Some states have opted to study the surrogate parenting issue before taking any further action. Delaware, Indiana, Louisiana, Rhode Island, and Texas have established commissions for this purpose.<sup>103</sup> Eight other states have similar proposals.<sup>104</sup>

99. *Id.*

100. *Id.*

101. The New York State Legislature decided that, prior to a prohibition of surrogate parenting, there must be a determination as to whether or not such prohibition would result in a denial of a fundamental constitutional right. Several recent Supreme Court decisions have related to the right to have a child: *Carey v. Population Serv., Inc.*, 431 U.S. 678 (1977) (decision to have a child is a choice protected by the constitution); *Roe v. Wade*, 410 U.S. 113 (1973) (declaring unconstitutional state statute forbidding abortions throughout entire pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (decision to have a child is fundamental and should be free from unwarranted government intrusion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring unconstitutional state statute making use of contraceptives by married persons a crime); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (declaring unconstitutional state statute providing for mandatory sterilization of criminals convicted of more than one crime involving moral turpitude). After reviewing these decisions, the legislature determined that the right to have a child is a fundamental constitutional right. *Proposal for Reform*, *supra* note 4, at 45-46. It further found that, although that right to privacy had not yet been extended to surrogate parenting, to prohibit a viable alternative to infertile couples would effectively deny them of their fundamental constitutional right to have a child. Therefore, on February 3, 1987, the Senate of the State of New York proposed legislation to reflect the position that the state may not, either directly or indirectly, enact legislation prohibiting the practice of surrogate parenting. N.Y.S. 1429-A, 210th Leg., Reg. Sess. § 120.1 (1987-1988).

102. *Proposal for Reform*, *supra* note 4, at 43-47.

103. *Andrews*, *supra* note 84, at 32.

104. *Id.* at 33, 40 n.14 (Connecticut, Illinois, Maine, Massachusetts, Nebraska, North Carolina, New Jersey, and Pennsylvania have proposed study commissions to assess the potential risks and benefits of surrogacy.).

The commissions generally are comprised of members of the legislature, judiciary, clergy, as well as medical and bar associations.<sup>105</sup> The focus of each commission is different. The Delaware Task Force was not actually charged to address any specific issues, "but the preamble of the bill alludes to a legal question regarding privacy, and ethical issues regarding whether women should be encouraged to conceive children they will never raise and whether surrogates are mothers or manufacturers of products."<sup>106</sup> The Louisiana Commission's responsibility was to assess the state of existing law on surrogacy, rather than determine what it should be.<sup>107</sup> In New Jersey, a proposed commission would be charged "to study the policy implications raised by surrogacy, and more specifically, to consider if surrogate contracts are in accord with public policy, whether the courts have sufficient guidance to make a determination in a surrogate parenthood controversy, and whether legislative action is necessary."<sup>108</sup>

#### *D. Regulation of Surrogate Parenting*

Many proposals have been advanced which allow surrogate parenting and provide for the regulation of its practice. Lawmakers have attempted to craft bills so as to provide for the protection of both the child and the parties, and also to determine issues such as compensation for the surrogate mother.

Most of the regulatory bills state that the intended parents are the child's legal parents and have full responsibility for the child regardless of his or her physical condition at birth. An exception to this is a California proposal providing that the intended parents do not have to assure custody of a child born with defects or disease which is found to result from a surrogate's conduct in breach of the surrogate parenting agreement.<sup>109</sup>

In order to ensure that the parties entered into the agreement voluntarily, proposals in Washington, D.C. and Michigan require a waiting period between the date of agreement and the date of insemination.<sup>110</sup> Other bills require that the surrogate mother and the in-

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105. *Id.* at 33.

106. *Id.*

107. *Id.*

108. *Id.* at 34.

109. *Id.* at 37.

110. *Id.* at 36.

tended parents be represented by separate counsel.<sup>111</sup> Some more comprehensive bills require judicial review and approval of the agreement prior to insemination (Illinois, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, and South Carolina).<sup>112</sup> Insurance provisions are required in eight state proposals and the appointment of a guardian for the child in the event of the intended parents' death is required in several others.<sup>113</sup>

Some state proposals give the surrogate mother a time period after birth during which she may change her mind.<sup>114</sup> Other bills preclude renegeing by the surrogate mother and enable the courts to order specific performance of the contract against all parties.<sup>115</sup>

Under certain statutes, "reasonable" payment to the surrogate mother is permitted (California, Illinois),<sup>116</sup> while in others the fee must be "just and reasonable" (Massachusetts, New York, Pennsylvania).<sup>117</sup> A New Jersey bill would limit the fee to \$10,000.<sup>118</sup> District of Columbia, Florida, New York, and Wyoming proposals would allow only unpaid surrogate parenting, while twelve other state proposals would allow paid or unpaid surrogacy (California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, and South Carolina).<sup>119</sup>

## CONCLUSION

The provisions embodied in Senate Bill 1429-A strike a familiar chord with the concerns raised by the New Jersey Supreme Court in its *Baby M* decision. Together they form a substantial foundation for evaluating the merits of surrogacy and how best to address the myriad of interests—the child's being of primary importance—in fashioning a policy construct. Both the legislation and case law instruct that public policy makers should not be hesitant to depart from familiar concepts of adoption and contract law. Surrogacy represents

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111. *Id.* at 36, 40 n.32 (states requiring separate counsel include California, Illinois (both bills), Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York (both bills), Pennsylvania, and South Carolina).

112. *Id.* at 36-37.

113. *Id.* at 38.

114. *Id.*

115. *Id.*

116. *Id.* at 35.

117. *Id.*

118. *Id.*

119. *Id.* at 35, 40 nn.21-22.

an opportunity for innovation in the law, regardless of whether the final policy favors regulation or prohibition.

The innovation in the drafting of a new law should, however, make proficient use of current laws that may indeed be applicable. While the New Jersey court clearly and comprehensively put forth the inconsistencies between the practice and the law of that state, Senate Bill 1429-A illustrates those provisions which are transferable from adoption and contract theories, such as pre-insemination/pre-adoption evaluations, and combines them with new concepts, such as pre-insemination consent.

The development of a regulatory policy, as opposed to one advocating prohibition of the practice or nullification of the enforceability of a surrogate parenting contract, has thus far been the minority perspective. This policy option, however, must not be summarily dismissed since it affords, within an environment of intense oversight by the courts, an otherwise unavailable opportunity to those who would derive the greatest benefit—infertile couples. In this way, Senate Bill 1429-A goes well beyond current adoption rules. In a sense, the debate on surrogacy, and its pilot application in New York, could well provide a model for future adoption law reform.

One of the unique aspects of public policy developments, as contrasted with other areas of the law, is the dynamic relationship between legal concepts and human emotion, and the balancing of these elements. As Congress and state legislatures continue to examine the issue of surrogate parenting, it will be imperative that they strike this balance in order to create public policy that is consistent with constitutional and statutory precepts, and also reflective of the common goal of assuring the best interests of the child.