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SURROGATE GESTATOR: A NEW AND HONORABLE PROFESSION

JOHN DWIGHT INGRAM

I. INTRODUCTION

In recent decades, sex without reproduction has become common and widely accepted, and more recently medical science has made it increasingly possible to have reproduction without sex. The former is much more enjoyable than the latter for most of us and, while it does entail some moral and legal issues, is a great deal less complex than the latter.\(^1\) A major cause of the complexity of the issues associated with noncoital reproduction is that, while "science [tends to] look . . . forward to anticipate new and unforeseen possibilities, the law looks backward, drawing its support from precedent."\(^2\) Our society seems to first develop and perfect medical and scientific techniques, and only later consult experts in ethics and law to determine if we should be doing that which in fact we already are doing. Meanwhile, we try to resolve disputes arising from new reproductive technologies by using "old legal codes of paternity, maternity, baby-selling, adoption, and contracts."\(^3\)

This Article proposes a new approach to an aspect of noncoital reproduction—"gestational surrogacy"—that is gaining rapidly in popularity and seems to hold great promise for the future. Gestational surrogacy is an

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arrangement whereby the sperm and ovum of a couple, who wish to raise a genetically related child, is used to create an embryo through *in vitro* fertilization.\(^4\) The embryo is then implanted in the uterus of another woman who subsequently gives birth to the child. The child is then given to the genetic parents to raise.\(^5\) Gestational surrogacy has the potential to benefit both the creating genetic parents who will raise the child and the surrogate who will bear and give birth to the child. To achieve the full potential of this unique opportunity we must develop new ways of viewing and resolving the issues and problems involved.

**II. Why Surrogacy?**

The idea of "surrogate\(^6\) motherhood" dates back to at least the Old Testament stories of the apparently infertile Sarah\(^7\) and Rachel,\(^8\) who instructed their husbands to impregnate their maid-servants so that they might have children. In more recent years, the pregnancy of the surrogate mother has been accomplished by artificial insemination, or *in vitro* fertilization, rather than by physical intercourse. In any case, the objective is for the surrogate to take the place of a woman who cannot conceive a child or cannot carry it to a live birth.

Although many people are aware of surrogate motherhood, many of them, unfortunately, know about it only because of a few highly publicized contests between the surrogate mother and the parents who intended to raise the child. In recent years, less than one percent of surrogate births have created contests over custody of the child.\(^9\) However, it is these few battles that produce headlines and come to public attention.\(^10\)

Approximately two to three million couples in the United States, constituting eight to ten percent of married couples with a wife of child-bearing age, are infertile.\(^11\) Although some people think that infertility has greatly

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\(^4\) "In vitro" means "outside the living body and in an artificial environment." *Webster's New Collegiate Dictionary* 617 (10th ed. 1983).

\(^5\) See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). In this case, however, the gestator, Anna Johnson, attempted to keep and raise the child as her own.

\(^6\) A surrogate is "one appointed to act in place of another;... one that serves as a substitute." *Webster's New Collegiate Dictionary* 1187 (10th ed. 1983).

\(^7\) Genesis 16:2.

\(^8\) Id. 30:3.


increased in recent decades, it has actually remained fairly constant. However, due to sociological and environmental factors, such as postponement of parenthood for financial and career reasons, pollution in the atmosphere, and disease, individuals are less fertile when they try to have children after reaching thirty or forty. Thus, the incidence of infertility among couples who are trying to have children today is higher than in the past.

Through the years, adoption has been viewed as an acceptable alternative for many infertile couples. However, because of the widespread use of contraceptives, availability of abortion, and growing willingness of single mothers to keep their babies, the supply of desirable children available for adoption has dwindled greatly. For most couples, adoption is "a long and arduous process." The judge in the Baby M case "found that in 1984, two million couples contended for the 58,000 children placed for adoption" and that the waiting period was three to seven years. Many couples seek a better solution.

That better solution has sometimes involved the use of a surrogate mother, and use of surrogacy seems likely to increase in the years ahead. It is quite possible for a child born through a surrogacy arrangement to be in the welcoming arms of his parents within a year of the beginning of the process. Although surrogacy involves substantial expense, it may be less costly than adoption, especially when the latter is expedited by the use of the gray or black market.

Even more important, many couples are quite willing to invest more time and money than that required for adoption in order to have a child who is genetically related to one or both of them. This is clearly evidenced by the great increase in infertility treatment, the widespread use of artificial insemination and in vitro fertilization, and the growing interest in surrogate

15. For most potential adoptive parents, "desirable" means a healthy Caucasian baby.
19. Id.
20. Id.
In our society there is a powerful and pervasive "desire to reproduce [and] . . . connect to future generations through one's genes." 22

III. WHAT IS SURROGATE MOTHERHOOD?

Generally, most people use the phrase "surrogate mother" "to designate a woman who gives up a child she has borne to be raised by another woman and her husband, [the latter being] the child's biological father." 23 This arrangement is often called "partial surrogacy," because the "surrogate" is the genetic mother of the child, while the woman who will raise the child as its mother has no genetic relationship to it. In its purest form, however, surrogacy involves the creation of an embryo from the sperm and ovum of the couple who intend to raise the child. This embryo is then implanted in the womb of the surrogate, where it develops until birth. This arrangement is often called "full surrogacy," since the surrogate has no genetic relationship to the child, but simply provides a womb for the development of the child. 24

The remainder of this Article discusses only full surrogacy and the issues and opportunities pertaining thereto. Although there are problems and objections with any form of surrogacy, many do not apply to full surrogacy at all, and others apply to a much lesser degree. Moreover, full surrogacy has the potential to provide great opportunities and rewards to both the rearing parents and the gestator.

For purposes of this Article, I will avoid using the word "mother" for either of the women involved. Instead, I will refer to the couple who are the genetic creators of the child as the "parents" and the woman who bears and gives birth to the child as the "gestator." In so doing, I hope to avoid the confusion that often surrounds the word "surrogate," and the emotional and traditional connotations of the word "mother." I will refer to the entire process as "gestational surrogacy."

23. Capron, supra note 1, at 679 n.1.
IV. POTENTIAL PARTICIPANTS IN GESTATIONAL SURROGACY

A. Parents

Many couples who are involuntarily childless are not infertile. They are, in fact, capable of producing healthy ova and sperm. For some women, pregnancy is difficult or dangerous because of some physical condition, such as diabetes or high blood pressure. In other cases, a woman with ovaries may have undergone a hysterectomy. A woman also may elect to use a surrogate gestator rather than bear her own child simply for convenience, for reasons relating to her career, leisure, or lifestyle.

B. Gestators

Women choose to be gestators for many reasons. Some women enjoy being pregnant and like the feeling that comes from creating a new life. Others get great satisfaction from being able to help another couple have a much-wanted child. Most women, however, including many of those influenced by the above reasons, are motivated by the desire for financial reward. For some, this means being able to buy things, such as a second car, a better house, or an education that they could not otherwise afford. For those less economically privileged, it means an opportunity to be self-supporting or to contribute to the basic budget of one's family. For women who find it difficult to obtain employment that pays well, being a gestator may be the ideal job, since it can be done in their “spare time at home with little training.”

A gestator can bear children for others in between and after the births of her own children, “allowing [her] to stay at home to raise [her own] children while still making money to support the family.”

26. Robertson, supra note 25, at 1012.
27. Katz, supra note 17, at 3.
30. Levitt, supra note 29, at 461.
32. Woliver, supra note 3, at 189.
C. The Host Uterus Program

Gestational surrogacy is not revolutionary. The Division of Reproductive Endocrinology and Fertility at George Washington University Medical Center started its "host uterus" program in the late 1980s, and eighty or more such births have been reported in recent years.\footnote{Levitt, supra note 29, at 459.} The next logical step is to have the sponsors of host uterus programs assume responsibility for \textit{all} aspects of gestational surrogacy: matching parents and gestators, collecting and paying all fees and compensation, providing medical facilities and benefits to the gestators, and enforcing all provisions of the agreement among the parties.\footnote{See infra part VII.} Each gestator would become, at least during her pregnancy, an employee of the host uterus program, subject to its rules and regulations, and assured of full payment for performance of her duties. The parents, on the other hand, would be clients of the host uterus program. Thus, they would be able to rely on its past performance and its interest in future good will and reputation. In this way, they are less likely to encounter a dispute than if they dealt directly with the gestator.

There is every reason to believe that, over a period of time, the position of gestator will be viewed as an honorable and desirable profession, which gives many women the opportunity to earn money by providing a service that society values. But before this will materialize, we must recognize the objections that have been raised to surrogate motherhood, including gestational surrogacy. We must then demonstrate that these objections are ill-founded and far outweighed by the benefits of a well-conceived host uterus program.

V. Objections and Their Rebuttal

\hspace{1cm} A. Commercialization

The following article describes New York's ban on surrogate-parenting for profit:

\textit{Albany, N.Y.—[July 23, 1992]} Gov. Mario Cuomo signed a bill Wednesday making New York—where an estimated 40 percent of the nation's surrogate-parenting deals are arranged—the 18th state to ban surrogate parenting for profit. The Legislature, pushed by an unusual coalition that included the National Organization for Women and the New York State Catholic Conference, approved the ban last month. It takes effect in one year. New Yorkers will still be
allowed to act as surrogates for friends or relatives, but no contracts or broker fees will be allowed.\textsuperscript{35}

"[S]urrogate parenting contracts of a commercial nature are void and against public policy, and you cannot use the courts to enforce them," said Helen Weinstein, a chief sponsor of the new legislation.\textsuperscript{36} Moreover, Weinstein believes that "[s]urrogate parenting denigrates human life and turns reproductive rights into something that you can buy and sell, and turns children into commodities."\textsuperscript{37}

In response, Betsy Aigen, a clinical psychologist who became interested in the issue after she discovered that she was infertile, said "the proposed legislation would do more harm than good."\textsuperscript{38} According to Aigen, "Anti-surrogacy bills don't prevent surrogacy, [but rather] leave [the] participants without any protection."\textsuperscript{39} Aigen warns that "eliminating trained, accountable professionals would lead to a proliferation of Baby M stories."\textsuperscript{40}

Although most people apparently do not object, in principle, to surrogate motherhood, considerable opposition to paid surrogacy exists. It is, however, difficult to find any logic in such a distinction. Perhaps the opposition to commercial surrogacy is derived from our "historical failure to value [the] domestic work of mothers and housewives [, which contributes] to the sense that gestation has no value[,] as a form of productive labor."\textsuperscript{41} But this overlooks the value of the services that the gestator provides to the parents. She should be paid for her time, energy, physical discomfort, and risk. If society is comfortable with allowing payment to doctors who aid in the creation of children through in vitro fertilization, and with compensating those who contribute their sperm or ova, it certainly should be acceptable to pay a gestator who contributes the temporary use of her womb.\textsuperscript{42}

Why is using a body to produce a baby for someone else any different from using a body to produce blood, sperm, ova, or any other regenerative substance for someone else's use?

Throughout American history, we have readily accepted the use of surrogates to perform various roles of parenthood, such as wet nurse, govern-

\begin{itemize}
  \item \textsuperscript{35} Helen Weinstein, \textit{N.Y. Outlaws Surrogate-Parenting Profits}, CHI. TRIB., July 23, 1992, § 1, at 11.
  \item \textsuperscript{36} George E. Curry, \textit{New York State May Bar Mothers for Hire}, CHI. TRIB., May 31, 1992, § 1, at 17.
  \item \textsuperscript{37} \textit{Id}.
  \item \textsuperscript{38} \textit{Id}.
  \item \textsuperscript{39} \textit{Id}.
  \item \textsuperscript{40} \textit{Id}.
  \item \textsuperscript{41} Andrea E. Stumpf, \textit{Redefining Mother: A Legal Matrix for New Reproductive Technologies}, 96 YALE L.J. 187, 200 n.51 (1986).
  \item \textsuperscript{42} Hollinger, \textit{supra} note 12, at 893.
\end{itemize}
ess, day-care worker, and boarding school teacher. Prebirth surrogacy is merely a modern extension of postbirth surrogacy, made possible by advances in science and medicine. No one has ever questioned that postbirth surrogates should be paid for their services. Ours is a commercial society, and most of our needs are satisfied by the use of commercial transactions. Only a fair financial return will induce most potential gestators to allow others to use their reproductive capacity. Allowing surrogate motherhood but prohibiting payment for the gestator's services would be comparable to allowing doctors to perform abortions but prohibiting payment for the doctors' services. Such a prohibition would "erect a major barrier to access to the procedure." Bearing and giving birth to a child is perhaps the finest and most valuable service a woman may provide. We should allow women to place an economic value on this service so that they may be properly compensated if they wish to provide this service to others.

B. Baby-Selling

All states prohibit the selling of children and most have statutes aimed at eliminating black market adoptions. Some people feel that these statutes should apply to surrogacy arrangements. However, surrogate motherhood did not exist when the baby-selling statutes were enacted. Such legislation was established to protect a mother and child in an adoption situation from falling prey to unscrupulous people operating in the adoption black market. In most cases, the child involved was unplanned, unwanted, and illegitimate, and the mother could not find an alternative to giving up her baby to the highest bidder. Generally, the adopting parents were not biologically related to the child, their suitability as parents was not usually investigated, and the child's best interests were rarely considered.

In a gestational surrogate parenting arrangement, however, the agreement to bear a child and give the child to its genetic parents is entered into

44. Noel P. Keane, Legal Problems of Surrogate Motherhood, 1980 S. Ill. U. L.J. 147, 156.
46. See Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (holding that women are competent to enter into binding contracts).
47. Merrick, supra note 13, at 163.
48. Katz, supra note 17, at 8-9 n.34.
before conception. The gestator is "not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing." Rather than being unwanted, the pregnancy is actively sought by a gestator who knowingly and voluntarily relinquishes any claim she may have to the child before she becomes pregnant. Since the child will be reared by his genetic parents, his best interests will be as well protected as if his birth had resulted from normal coital conception and his genetic mother's pregnancy.

If the child is deemed to be, from conception, the child of his genetic parents, there is no sale of the child. The gestator is not a parent, and thus has no parental rights to relinquish. Payments to the gestator are for her services in bearing and giving birth to the child and delivering the parents' child to them. Moreover, the payments compensate her for her foregone opportunities (employment, travel, birth of own child) and limitations on activities (recreation, diet, sexual relations).

The most that can be reasonably argued is that part of the gestator's compensation is for her preconception relinquishment of any possible claim to parental rights she might have under existing state law. For many years, we have allowed the preconception sale of a man's possible parental rights when he provides sperm for artificial insemination. If that is permissible, it should not be objectionable to allow a gestator, who will have no genetic tie to the child, to do the same. In divorce cases, for example, we routinely allow a party to relinquish or limit his right to custody of a child in exchange for some other benefit in the overall divorce agreement.

C. Exploiting Poor Women

Some are concerned that most surrogates will be poor women who will offer the use of their bodies to the well-to-do as an addition to their present services of housekeeping and childrearing. First, there is no reason to think that only poor women will want to become gestators. Despite the long-standing view that women work only because of either stark economic necessity or to earn some "pin money," many middle-class women work, and would become gestators, to improve their standard of living. These

51. Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986) (emphasis omitted).
52. Levitt, supra note 29, at 475 & n.141.
54. Robertson, supra note 25, at 1022.
55. For example, a woman may wish to buy or remodel a house, buy a car, pay for her own or her children's education, or travel.
women are certainly not being exploited any more than a man would be if he took a second job for the same purpose.\textsuperscript{56}

The exploitation argument is most often raised in connection with gestational surrogacy because the racial, genetic, and educational background are no longer of much concern to the child’s genetic parents. Some argue that African-American and Hispanic women, who have fewer economic choices than Caucasian women, will be hired as gestators because they will accept lesser fees than Caucasian women.\textsuperscript{57} But the well-to-do are presently employing these same women at very low wages for childcare and housework that takes them away from their own families. Why is it “exploitation” to give these women the free choice of opting to earn money while remaining at home, or perhaps earning more money while performing their previous jobs and, at the same time, also serving as a gestator? Rather than exploiting women, commercial surrogacy will liberate many women by allowing them to engage in employment that is less distasteful and more remunerative than their present choices.\textsuperscript{58}

The other exploitation argument is that “[t]he lure of a very large sum of money, perhaps larger than the woman could get any other way, may lead her to commit herself to a decision that she may very deeply regret.”\textsuperscript{59} This problem is certainly not limited to surrogate motherhood. Many people who commit themselves to long-term activities later wish they had not. In many cases, they must complete their obligations because they have no alternatives. Examples that readily come to mind are undertaking polar or space expeditions, military combat, or an ocean voyage; performing a long and delicate operation; or caring for children in the parents’ absence. In such instances, as with a surrogate gestator, the appeal of the offered rewards may fade as the task becomes more onerous and seemingly never-ending. However, the task must be completed. Generally, we do not consider it exploitive to expect people to perform difficult and dangerous assignments that they have willingly and knowingly undertaken.

\textbf{D. Surrogacy Degrades Women}

Some people, especially some feminists, believe that surrogate arrangements “demean[ ] motherhood by reducing it to a type of farming; it rele-

\begin{itemize}
\item \textsuperscript{56} Andrews, supra note 45, at 76.
\item \textsuperscript{58} David Orentlicher, \textit{Does Mother Know Best?}, 40 HASTINGS L.J. 1111, 1114-15 (1989) (reviewing MARTHA A. FIELD, \textit{SURROGATE MOTHERHOOD} (1988)).
\end{itemize}
gates [these] women . . . to their biological function as reproducers, thus degrading and objectifying them as 'mother machines.'” An additional concern is that, because gestators will be valued in the marketplace by their physical and psychological characteristics, some will have Saks Fifth Avenue price tags while others will have K-Mart price tags. Some consider it degrading that a woman's body can be rented for a price determined by her reproductive capabilities, rather than for her intrinsic worth and achievements.

However, most people readily accept the fact that, for many purposes, their worth is determined by their personal characteristics, including physical, psychological, and other attributes. While many of us wish our personal characteristics were of a higher quality, we do not consider it degrading to be judged on that basis. Perhaps the resistance to allowing women’s bodies to be treated as marketable objects is derived from the sexism associated with Playboy bunnies and Miss America. But to let that stand in the way of a woman’s right to engage in gestational surrogacy is paternalism at its worst. Women are not second-class citizens and do not need to be protected from themselves. They are fully capable of making their own decisions and accepting responsibility for them.

Far from being degrading, gestational surrogacy has the potential to open up new opportunities for women that might not otherwise be economically possible. It may provide temporary employment to fulfill the short-term needs of many women. For example, a young woman could finance a year of school, save for the down-payment on a house, travel, or study abroad. And for the mother-to-be who will raise the child, the potential for opportunity and liberation is equally promising. Freed from the need to take time out for bearing and giving birth to children, women will truly be free to compete equally with men in business and professional life. Because the role of gestator will be left to those who choose it, how can it be degrading for a woman to willingly bear and give birth to a child?

E. Surrogacy Will Reduce Demand for Adoption

A further objection to surrogate arrangements is that they will reduce the demand for adoption at a time when there are many handicapped, older, and non-Caucasian children in need of good adoptive homes.

61. Merrick, supra note 13, at 166.
62. Healy, supra note 53, at 115 n.112.
Martha Field argues that “[i]t would be a real social harm for surrogacy to substitute for adoption.” While it is indeed difficult “to adopt the healthy, white infants that many desire,” the shortage of the latter “has resulted in many children being adopted who once would have been hard to place.”

While I do not question the social desirability of placing these “less desirable” children in adoptive families, I do question whether the availability of gestational surrogacy will have much effect on the adoption of hard-to-place children. Relatively few couples will engage in gestational surrogacy, but those who do need to be fairly affluent to afford the substantial costs involved. If surrogacy is not available to these couples, they will most likely enter the black or gray market to adopt a Caucasian baby. Hard-to-place children will continue to be adopted primarily by couples who lack the means to pursue other alternatives.

Moreover, there is no reason to burden one small group of potential parents with a special duty to adopt hard-to-place children. If we are determined to find homes for these children, we should require that all couples who already have two genetically related children must adopt one hard-to-place child before they may have another child by natural birth. Failure to adopt before the arrival of a third child would subject the couple to a substantial fine. Perhaps my suggestion seems facetious, but it illustrates how unfair it is to limit the opportunities of a group of people who did not cause the social problem that we wish to cure.

It must also be noted that, to the extent that surrogate arrangements result in a small decrease in the demand for adoption, it will make it possible for some eager adoptive parents to raise a child who would not otherwise be available to them or whose availability would at least be long delayed.

F. Effect on Gestator’s Own Children

Most host-uterus programs will require that a gestator have at least one child of her own before entering into a gestational surrogacy arrangement. Because of this, some writers suggest that the gestator’s own children will experience feelings of abandonment, fear, and anxiety when they see their mother go through nine months of pregnancy, and they then observe that

65. Id.
67. See infra part VII.A.
the baby does not join their family.\textsuperscript{68} The rather obvious solution to such a problem is for the gestator to honestly and fully explain to her children exactly what she is doing and why. It should be no different from the situation in which a woman provides day care for other people's children, or serves as a temporary foster parent. Bearing and giving birth to another couple's child is her "job." Because this is an honorable and useful service, she should be quite comfortable explaining it to her children and expecting them to be proud of her "work." If her children know from the beginning that the baby-to-be is the child of the parents-to-be, and not a part of the gestator's family, they will have no reason to fear that they will be abandoned or given away.

There is concern that the gestator's children will suffer embarrassment when their peers learn of their mother's arrangement.\textsuperscript{69} Perhaps they will, as is sometimes the case with children whose parents are members of religious sects or children whose parents advocate unpopular causes. We surely do not want to let social intolerance and bigotry determine what activities are permissible. It is the gestator's right to determine if her surrogacy arrangement is good for her family. Moreover, it is her responsibility to help her children understand the importance of doing what they think is right, even when that does not coincide with the views of others.\textsuperscript{70}

\textbf{G. Maternal Bonding}

There is evidence that "a deep attachment or bond develops in the course of the prenatal and postnatal relationship between mother and child."\textsuperscript{71} Because of this, some people feel that a gestator will experience mental anguish and depression when she "gives up" the baby. However, although this is a common experience for women who give up their children for adoption, there is little danger that this will occur with a gestational surrogate. The latter knows before conception that the child is not hers, and that her role in the child's life will end shortly after birth. The relationship of gestator to fetus is analogous to that of many nannies and housekeepers to their charges. They provide loving care for a time and often develop close ties, but they always know that the child's tie to his parents is paramount. The very low risk of unyielding "maternal bonding" on the part of a gestator is evidenced by the fact that, while seventy-five percent of biological mothers who give up a child for adoption later change their

\textsuperscript{68} Merrick, \textit{supra} note 13, at 167.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} Andrews, \textit{supra} note 45, at 78.
\textsuperscript{71} Hill, \textit{supra} note 21, at 394-96 \& nn.219-25.
minds, only about one percent of surrogates have similar changes of heart.\(^\text{72}\) Furthermore, most surrogates who have a change of heart are the genetic mother of the child, not just a genetically unrelated gestator.

VI. THE ROLE OF THE STATE IN SURROGATE ARRANGEMENTS

The force of law over surrogacy, in the form of statutory regulation, should be employed only to: (1) provide a back-up for situations when the parties directly involved have not made their own contractual arrangements; (2) expressly authorize arrangements that may have been considered illegal in the past;\(^\text{73}\) (3) relieve involved parties from parental or other responsibilities, when appropriate; and (4) provide for problems of inheritance, custody, and financial support.

A statute should expressly require that the parties directly involved in gestational surrogacy—the parents, the gestator, and the clinic or other medical facility (host uterus program)—must enter into a complete and binding agreement covering every foreseeable issue.\(^\text{74}\) The parties should be free to make any provisions they wish unless those provisions are clearly contrary to public policy. No provision should be deemed contrary to public policy merely because it offends some people’s beliefs. The agreement should specifically state that advance provisions concerning surrogacy will be legally binding and enforceable. As a result, all concerned will "know with reasonable certainty" what will happen "if certain contingencies occur."\(^\text{75}\) Those who are involved in gestational surrogacy must be able to rely on the agreements they made.\(^\text{76}\) And, the certainty that provisions

\(^{72}\) Andrews, supra note 45, at 74.


\(^{74}\) See infra part VII.


\(^{76}\) Without enforceability, surrogacy contracts could easily become tools for blackmail. A gestator might seek to extort additional payments from the parents by either threatening to abort or keep the child. Krause, supra note 43, at 203. In connection with the widely publicized case of Anna J. v. Mark C., 286 Cal. Rptr. 369 (Ct. App. 1991), the intended father, Mark Calvert, stated on ABC-TV's The Home Show, on February 11, 1993, that the gestator (Anna Johnson) had offered to give up her claim to custody of the child for $50,000. Also, as Judge Posner points out, surrogacy becomes less valuable to the gestator because she loses part of her bargaining power. If surrogacy contracts are enforced, the gestator can command a higher fee because the outcome is more certain. Richard A. Posner, The Ethics and Economics of Enforcing Surrogate Motherhood, 5 J. Contemp. Health L. & Pol'y 21, 22 (1989).
made in advance will be binding and enforceable will "minimize the frequency and expense of dispute resolution."77

Undoubtedly, one of the worst ways to start a child's life is with a custody contest.78 To avoid this undesirable possibility, statutory law should make clear that the couple who genetically create the child and intend to rear the child are the child's legal parents and are entitled to custody of the child from the moment of birth. The statute should also clearly state that the gestator is not the mother of the child and has no parental rights or obligations in relation to the child.79 We have traditionally defined fatherhood by the genetic link. There is every reason to define motherhood in the same way. If the right to custody of the child is clearly established and legally enforceable, even the very small percentage of disputes that have occurred will be largely eliminated.80

VII. PROVISIONS FOR THE AGREEMENT OF THE PARTIES

The agreement among the parents (the couple who will genetically create the child), the gestator, and the host uterus program should anticipate and provide for as many future contingencies as possible. The agreement must be binding on all involved parties and subject to modification only if all parties agree. By now, we have had enough experience in this field to foresee most of the issues and problems that may arise.

As stated in Part IV.C, the host uterus program will find and employ gestators. Because each program will expect to provide services for many years to come, it will have a strong incentive to set high standards and build an excellent reputation. It is quite possible that, as the popularity of such programs increases, some programs will have their own medical facilities to assure quality and to achieve economies of scale.

A. Compensation of Gestators and Fees Charged Parents

In gestational surrogacy, the race and ethnicity of the gestator will be irrelevant. The primary qualifications will be her present health and medical history, her willingness to conform her activities and lifestyle to the optimum conditions for pregnancy, and her willingness to relinquish custody

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77. Ahnen, supra note 75, at 1345.
78. Field, supra note 64, at 5.
79. This should eliminate any possible argument about "baby-buying or selling." Hill, supra note 21, at 356-57.
80. Only one percent of surrogate birth mothers, most of whom have a genetic link to the child, have attempted to rescind their agreement to relinquish the child. See supra note 72 and accompanying text.
of the child immediately after birth. A well-run program will subject potential gestators to psychological and physical tests to determine their health and emotional stability. It also seems wise to require that a gestator must be living with at least one natural child of her own. This will assure that she is physically capable of bearing and giving birth to a child. Moreover, it will establish that she can accurately predict her own feelings about relinquishing the parents' child at birth and that she understands the medical and emotional consequences of pregnancy and birth.\(^\text{81}\)

The gestator's compensation will be determined by market forces—the law of supply and demand. Over time, some gestators may be able to command a premium price because of their successful record in prior surrogate births. First-timers will necessarily be judged largely by the results of the program's testing. However, the rules of economics also dictate that the opportunity costs of gestators will play a major role. Although a woman is pregnant twenty-four hours a day for nine months, she may do many other things during pregnancy. Women commonly work right up to the day of delivery. In any case, many gestators will probably be women who have low opportunity costs because their other earning opportunities are limited.\(^\text{82}\)

In addition to receiving compensation for opportunity costs, a gestator should also be compensated for (1) any medical expenses not covered by the program's own facilities or her own insurance; (2) her discomfort, pain, and risk during pregnancy and birth; and (3) interruption of her sexual activity.\(^\text{83}\) The program should also compensate the gestator, her family, or both in the event of her death or disability during the period of employment.\(^\text{84}\)

The host uterus program would recoup the gestator's compensation and its other costs by charging fees to the parents who contract for its services. Among these costs would be: (1) the expenses of any medical facilities and personnel it maintains or contracts; (2) the expenses of locating and screening qualified gestators; (3) the fees of attorneys and other consultants; and (4) the cost of any guarantees the program may give to provide institutional or other care for children born with impairments.\(^\text{85}\)

\(^{81}\) Levitt, supra note 29, at 476-77.


\(^{83}\) If the gestator is married, which will usually be the case, her husband should be a party to the agreement with the program and should be compensated for interference with his normal consortium with his wife.

\(^{84}\) This likely could be provided by insurance, perhaps on a group basis.

\(^{85}\) This may also be covered by insurance. See infra part VII.B for further discussion of this topic.
Obviously, the fees charged to parents will be quite substantial, often ranging from $30,000 to $50,000.\textsuperscript{86} While this will limit the potential demand for gestational surrogacy, it will be partially offset by the parents’ opportunity cost savings. The genetic mother-to-be will be relieved of undergoing pregnancy and childbirth herself. Thus, she can avoid taking time out from her career and can avoid all the discomfort, inconvenience, and risk of giving birth to her own child. For many, the net cost will be very attractive, especially when compared to the present high cost and delay in adopting a child who would not be genetically related.\textsuperscript{87}

\textbf{B. The Agreement}

A number of articles list and discuss the specific provisions that should be included in the agreement among the parents, the gestator, and the host uterus program.\textsuperscript{88} Because it would serve no purpose to repeat all of that in this Article, the instant discussion will be limited to the key issues where controversial questions will arise and where breaches of the agreement are most likely to occur.

1. Activities of the Gestator

The agreement will usually provide that the gestator agrees to: (1) visit the treating physician, chosen by the program, according to a specified schedule; (2) follow the medical instructions of that physician, including tests and screening; (3) not smoke tobacco products, drink alcohol, use illegal drugs, or take any medication without the physician’s consent; and (4) submit to medical care or treatment prescribed by the physician.\textsuperscript{89} The agreement should affirmatively list the tests and procedures permitted\textsuperscript{90} or list those to which the gestator need not submit. There must be a clear understanding of this before conception because thereafter the interests of the parents and the gestator will often conflict. The parents’ interest will be

\begin{footnotesize}
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\item\textsuperscript{86} Merrick, \textit{supra} note 13, at 163.
\item\textsuperscript{87} Elisabeth M. Landes & Richard A. Posner, \textit{The Economics of the Baby Shortage}, 7 J. LEGAL STUD. 323, 340 (1978).
\item\textsuperscript{89} Thomas W. Mayo, \textit{Medical Decision Making During a Surrogacy Pregnancy}, 25 HOUS. L. REV. 599, 620 (1988).
\item\textsuperscript{90} Such procedures might include amniocentesis, ultrasonography, drug therapy, blood transfusions, fetal surgery, and Cesarean delivery. \textit{Id.} at 627.
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almost exclusively in the child's well-being; they will be interested in the gestator's health only to the extent that her health will affect the delivery of a healthy child. While the gestator will want to deliver a healthy baby and successfully complete her contract, she will not be eager to risk her own life and health to reduce the chances of the child's death or disability.\textsuperscript{91} Once there is a voluntary and knowing agreement on the part of the gestator, any deviation from or refusal to submit to the prescribed regimen will be properly treated as a breach of contract.

In most cases, gestators will be willing to follow the requirements of the agreement, especially if they hope for future employment as a gestator. When a breach is threatened, or occurs, a court is unlikely to affirmatively order the gestator to undergo a test or procedure that involves more than a minimal invasion of her body.\textsuperscript{92} However, courts are usually much more willing to issue prohibitory injunctions\textsuperscript{93} and might well order the gestator to stop smoking, drinking, or engaging in other activity that is potentially harmful to the fetus. In addition to any monetary consequences provided for in the contract or awarded as damages by a court, any subsequent violation of the injunction would subject the gestator to sanctions for contempt of court.

2. Confidentiality

Because the gestator will be an employee of the program, and the parents will be clients of the program, the gestator and parents need not know each other's identity or ever meet. Parties may be matched by the program according to their wishes on this subject. Some will be eager to share the experience of pregnancy and birth and perhaps will have a continuing relationship thereafter. Others will want total or partial confidentiality and privacy. There is no right or wrong. The critical thing is to have a clear and binding agreement, which cannot be modified later without the consent of all parties.

3. Miscarriage or Stillbirth

In order to receive the full contractual compensation for her services, the gestator will presumably have to bear and give birth to the child and deliver the child to the parents. It is sometimes argued that the gestator

\textsuperscript{91} Id. at 627-28.

\textsuperscript{92} For example, ordering a cesarean delivery would arguably involve more than a minimal invasion of the gestator's body.

\textsuperscript{93} E.g., Lumley v. Wagner, 42 ENG. REP. 687 (Ch. 1852) (enjoining opera singer who refused to perform pursuant to her contract from singing elsewhere; court acknowledged that it could not compel her to sing).
should receive a partial or pro-rata payment in the event of miscarriage or stillbirth. The rationale for this is that she has performed a service by carrying the fetus for that period of time. It is further argued that if no payment is made unless a live baby is delivered to the parents, the transaction is tantamount to illegal baby-selling. However, as stated earlier, baby-selling cannot occur in gestational surrogacy because the baby is at all times the child of the parents. The gestator is being paid to bear and give birth to the child, deliver the child to the parents, and waive any possible claim to custody. Under this reasoning, the gestator might logically be denied any compensation in the event of miscarriage or stillbirth, and the parents may have no liability. The marketplace often compensates people only for producing a desired result, regardless of the time and labor spent. Examples of this include the farmer whose crop is destroyed by hail just before the harvest, the artist whose watercolor is washed out by a flood, and the Ph.D. candidate whose almost-finished thesis is thrown out by a janitor. All have expended labor over a long period of time, but will receive no reward. The potential buyer will not have to pay anything for the fruits of their labor.

Of course, the program may contract to compensate a gestator in case of miscarriage or stillbirth, especially if it wants to build good will and enhance its reputation as a quality operation. The program may either incorporate such costs into its overall fee structure or require the parents whose baby is miscarried or stillborn to pay all or part of the normal fee.

4. Abortion: Permitted? Required?

In most agreements, the gestator will agree not to have an abortion unless her treating physician determines that it is necessary for her physical well-being or that the child is impaired. She will also agree to have an abortion in the event of either of these two contingencies. Of course, the agreement may provide that the gestator is not required to abort, if that is what the parties wish. It also seems wise to give the parents the right to require an abortion if one of them dies or they become divorced.

While Roe v. Wade protects a woman's right to have an abortion, that right may be voluntarily and knowingly waived, just as other constitutional rights may be waived. Having an abortion when prohibited, or refusing to

have one when required, will constitute a breach of contract. The gestator may not change the rules any more than an astronaut may quit during a mission or a surgeon may walk away during an operation. It is not uncommon for a party to a contract to regret having entered into the agreement, but the law still provides that contracts voluntarily entered into will be enforced.  

If the gestator decides to have an unauthorized abortion, the agreement will probably provide that she will forfeit some or all of her compensation. It would also seem proper for the parents to be relieved of their financial obligation and perhaps to also receive some compensation from the program for the delay and mental suffering that may ensue. Conversely, if the parents and program want the gestator to have an abortion and she refuses, the parents should be relieved of any financial and legal obligation to the child. Custody of the child at birth should vest in either the gestator or the program, as provided in the agreement. The agreement may also provide for the child’s placement for adoption, or for institutional care, if necessary. The expenses involved, both present and future, will become part of the program’s overall budget. The expenses will be reflected in compensation and penalties to the gestator and fees charged to satisfied parents.

If the parents, the program, or both determine that an abortion is desirable, and the gestator aborts as requested, she should certainly be entitled to substantial compensation to cover her services for her time involved, her lost opportunity costs, and her risk and discomfort. The fees charged to the parents should logically cover this because the parents are exercising a right to abort in the same way as if the female parent was herself pregnant and carrying the fetus.

5. Death or Divorce of the Parents

If one parent dies before the child is born, the surviving parent will still have full custody of the child, just as with the child of a coital conception and normal birth. If both parents die before the child is born, the parents should provide for the child’s custody and care just as they would for any of their other children. Of course, if the parents wish, the agreement could provide for custody of the child to pass to the gestator, or to the program, which would make the child available for adoption.

98. A court is unlikely to award damages for breach of contract, since in purely monetary terms “not having to raise a child is a financial benefit, not a loss, and intangible values of parenthood are very difficult to ‘price.’” Natalie Loder Clark, *New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood*, 25 J. Fam. L. 483, 494 (1986-87).
The parents should also make a provision in the agreement in case they are separated or divorced during the pregnancy. They may prefer an abortion in the early months of pregnancy. Further along, the likely options are that one parent will take custody of the child and relieve the other parent of all responsibility or that custody will pass to the gestator or the program, as in the case of death of the parents.

6. After Birth of the Child

The agreement should provide that the gestator and her husband, if any, agree that they have no parental or custodial rights or obligations to the child and that the parents will be entitled to immediate physical custody of the child upon birth.99 The agreement should provide that either the parents or the gestator will be entitled to specific performance, "that is, the right to have the court order and enforce the delivery of the child [by the gestator] to the . . . [p]arents."100 The situation is analogous to commissioning a work of art. While the artist cannot be forced to create the work, "once it is completed" it belongs to the commissioning party, and the artist "cannot refuse to deliver it . . . merely because he wants to keep it."101

7. If Parents Refuse to Accept the Child

If a healthy child is born, but for some reason the parents refuse to accept custody, they should certainly be required to pay all fees provided for in the agreement and other expenses that are incurred until someone else assumes custody of the child. As in the case of death or divorce of the parents, the agreement could provide for custody to pass to the gestator or to the program so that the child may be placed for adoption. There is no reason to force a healthy child on unwilling parents when others would be very happy to raise the child.

If the child is impaired in some way, however, the situation is more difficult. If the impairment is genetic or otherwise not attributable to the gestator, custody should remain in the parents, just as it would with a child born naturally to the female parent. As with a natural child, they would have full legal and financial responsibility for the child. If appropriate, they would also have to arrange for institutional care.

On the other hand, if the child’s impairment results from actions of the gestator, such as smoking, drinking, or failing to conform to the medical

100. Id. at 133.
regimen, an instinctive reaction might be that she should be legally and financially responsible for the child. However, this is not a wise solution. The gestator has made it clear from the beginning that she does not want or intend to raise the child even if the child is healthy. Furthermore, she is unlikely to be in an economic position to provide for an impaired child. The agreement could certainly provide that the parents assume the risk of gestator-caused impairments and will accept custody and responsibility in any case. However, that might create a very resentful atmosphere in which the child would be raised. It might be best in this situation to provide for custody to pass to the program, to seek adoption of the child, or to provide institutional care. Any costs involved would be borne by the program as part of its overall cost of doing business.

The parents should be allowed to renounce custody of the child only if the gestator-caused impairment is "serious." The agreement should attempt to define "serious." If either the seriousness of the impairment or its cause is disputed, the agreement should provide for the issue to be decided by a medical arbitration panel.

VIII. STATUTORY PROVISIONS

A. If There Is No Surrogacy Agreement

Even though a statute may require that no surrogacy arrangements may be undertaken without a written agreement among the parents, gestator, and host uterus program, people will violate the law. Thus, it will be necessary to determine the custody of the child and financial responsibility for the child when the parties themselves cannot agree. As suggested in Part VI, a statute should provide that the parents are the legal parents of the child and are entitled to custody from the moment of his birth. The statute should also state that the gestator is not the mother of the child and has no parental rights or obligations relating to the child. These simple statutory provisions will eliminate almost all of the disputes that might otherwise occur. Because the parents will be indisputably entitled to custody of the child, a court should not hesitate to order the gestator to deliver

102. See supra part VI.
104. The presumption that the mother of a child "was the one from whose womb the child came" has been so strong that the law has never felt it necessary to define the word "mother." Stumpf, supra note 41, at 187 & n.1.
the child to the parents, just as would be the case in a divorce or other child custody proceeding in which a court orders someone to deliver a child to the person(s) having a right of custody.

B. Statutory Provisions Needed to Support a Surrogacy Agreement

1. Inheritance

Probate law generally permits a person conceived before but born after a parent's death to inherit by will or intestacy. Inheritance by a posthumous child born as a result of gestational surrogacy should provoke no more societal objection than inheritance by a child conceived coitally and given birth by his genetic mother.

2. Relief from Parental Responsibility

Just as the law imposes no obligation of financial support on a sperm or egg donor, a gestator who makes her womb available to produce a child for others to raise should be relieved of any financial obligation to the child. This may be accomplished by so providing in the surrogacy agreement and by enacting statutes that make such agreements legally binding and enforceable. While this will leave a gestator who does not have a formal agreement exposed to possible financial liability, it is consistent with the strong public policy requiring formal surrogacy agreements to reduce or eliminate disputes.

3. Confidentiality

Just as in cases of adoption, the parties will usually want confidentiality in the surrogacy arrangements to protect the child from learning about his origin from someone other than his parents. The parents should be able to control "the time and manner in which their child learns of the circumstances of [his] birth," when the child is deemed "ready to understand and benefit from this information." By the same token, while most gestators will not try or be able to hide their pregnancy and the fact that they are serving as gestators, many will want to be sure that they cannot be linked in

105. See, e.g., CAL. PROB. CODE § 6150(c) (West 1991).
107. See supra part VI.
any way to the parents and the child after the birth. Statutory law should recognize the general acceptance of a right to privacy in reproductive matters. The law should provide that all records and documents relating to a surrogacy arrangement shall be confidential and that only the parents shall be listed on the birth certificate.

**IX. CONCLUSION**

The fact that an occasional gestator may regret having to surrender the child to the parents is not a valid reason to ban the practice or to make such agreements unenforceable. People often make agreements that they later regret—marriage, divorce, relinquishment of children for adoption—but society continues to permit such practices and enforce such agreements. The law should recognize as legal parents the couple who really want to have and raise a child because they are as likely to perform well the task of parenting as any other couple whose child was born in the usual way.

Banning surrogacy will not end the practice; it will simply force it underground, as was the case with abortion in many states prior to *Roe v. Wade.* Gestational surrogacy may be beneficial to all parties involved and to society. Some states will almost surely allow surrogacy arrangements. Thus, banning the practice in other states will be largely futile because potential surrogate parents will usually have the means to travel to and make arrangements in another state.

Society not only allows women to bear and give birth to children without compensation, it lauds and honors them for doing so. Why should we deny women the opportunity to earn fair compensation for voluntarily producing children for others? Is cleaning houses and offices, providing child day care, clerking, and waitressing more honorable than bearing and giving birth to children? Do we prefer to keep women economically dependent when they could be earning substantial sums doing something that they want and prefer to do over the other choices available to them? How can it logically be argued that using one's body to clean bathrooms for pay is morally permissible, but using one's body to produce a child for others for pay is not?
The benefit of gestational surrogacy to the parents is clear and largely undisputed. The benefit to the gestator should be just as clear. We should allow gestational surrogacy to become an accepted and honored profession.