Any change in custom or practice in this emotionally charged area has always elicited a response from established custom and law of horrified negation at first; then negation without horror; then slow and gradual curiosity, study, evaluation, and finally a very slow but steady acceptance.1

This statement, focusing on artificial insemination by donor (AID), was a valid assessment of how public policy was developing around that technology. In the 1950s and early 1960s, donor insemination was viewed with such horror that bills were introduced in state legislatures to ban the procedure. A proposed Ohio law would have criminalized AID and subjected all of the participants—the doctor, the donor, and the couple—to a fine and imprisonment.2 No such prohibitory laws were passed, however, and in the intervening years over half the states have adopted laws that facilitate AID by declaring the consenting husband of the sperm recipient to be the legal father (even though he has not adopted the child). Nonetheless, the AID debate continues in state legislatures. In 1984, Alabama passed its first AID law. In 1986, New Mexico joined the ranks, and Ohio finally adopted a law describing the medical requirements and parenthood implications of donor insemination, bringing the total number of AID laws to thirty.3

The 1980s have brought another vexing reproductive issue to lawmakers: surrogate motherhood. The Baby M case has provided an impetus for many legislative proposals about surrogacy. Bills in Delaware and Louisiana, for example, are prefaced by statements about how the Baby M case has raised complex legal and ethical issues. At the federal level, Ohio Congressman Tom Luken has proposed a bill that would prohibit the receipt of payment for making, engaging in, or brokering a surrogacy arrangement.4 The bill would also prohibit advertising for a paid surrogacy arrangement.5 The personal heartbreak and media circus of the Stern-Whitehead case led the public and legislators to call for laws to preclude similar future cases. However, less than one-third of the proposed laws have clear provisions establishing the legal parents after the birth of a baby conceived pursuant to a surrogacy agreement. Under the remaining proposals, recourse to the courts is still the only way for the biological father or biological mother to gain legal custody of the child when there is conflict.

To date, only Arkansas, Nevada, and Louisiana have actually enacted laws that touch on surrogacy. In Arkansas, the statute provides simply that if a couple contracts with an unmarried surrogate, the couple are the legal parents of the child, not the surrogate.6 The Nevada legislature passed a law that exempts surrogacy from the ban on payment

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**The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood**

by Lori B. Andrews

New Jersey’s Baby M case has thrust the issue of surrogate motherhood on state legislatures throughout the country. Like artificial insemination in the 1950s and 1960s, this new reproductive technology is evoking legislative responses ranging from horrified prohibition to cautious facilitation.

Two decades ago, Sophia J. Kleegman and Sherwin A. Kaufman, in *Infertility in Women*, observed that new reproductive technologies are greeted initially with shock and must pass through several stages before they are accepted:

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in connection with an adoption. Under the Louisiana law contracts for paid surrogacy are unenforceable.7 Another bill passed by the Arkansas legislature but vetoed by the governor would have provided for enforcement of all surrogacy contracts.

The majority of state legislatures are still considering the issue of surrogacy and their bills run the gamut of Kleegman's and Kaufman's typology. Will surrogate motherhood legislation, like donor insemination, evolve through the stages of horror, negation, evaluation, and acceptance ultimately toward facilitating laws? Or will the greater duration and intensity of the surrogate's involvement in collaborative reproduction lead to an alternative regulatory model? The answers to these questions will develop in state capitols as a result of legislative compromises and special interest group proddings by right-to-life groups, medical societies, adoption agencies, infertility support groups, feminists, religious organizations, and reproductive rights advocates.

**Horror**

Many state legislatures have reacted with horror to the issue of surrogate motherhood, often taking the issue of payment to the surrogate as their focus. Of the pending state laws, five (in Alabama, Illinois, Iowa, Maryland, and Wisconsin) would ban surrogate motherhood altogether,8 while seven others (in Florida, Kentucky, Michigan, New Jersey, New York, Oregon, and Pennsylvania) would specifically ban only paid surrogacy.9 Three additional bills—in the District of Columbia and alternative bills in Florida and New York—would ban paid surrogacy but allow unpaid surrogacy under an extensive regulatory scheme.10

The Michigan bill, an example of the prohibitory approach, states that a person entering into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than a year. The proposal further states that a person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a maximum fine of $50,000 or imprisonment for not more than five years. This bill also contains special provisions punishing those who enter, induce, or arrange a contract with an unemancipated minor female or a mentally retarded female. This sort of arrangement would be a felony punishable by five years imprisonment or a $50,000 fine, or both.

With the exception of the Michigan law, which provides that the legal parents are the surrogate and her husband, proposed prohibitory laws generally make no provision for legal parenthood in instances when surrogacy is undertaken in violation of the law. Since the proposals in the other states do not suggest that mere participation in a surrogacy arrangement is an indication of parental unfitness (which would give the state power to take over the care and custody of the child), disputes between the biological parents over custody would require judicial intervention. In ten of the thirteen states where prohibitory bills are pending, there are also alternative bills or additional provisions that would facilitate some form of surrogacy.

**Negation**

Some legislators who oppose surrogacy nonetheless do not feel comfortable imposing prison sentences on parties trying to become parents in this manner. Yet they do want to discourage people from entering into surrogacy arrangements, and attempt to do so by negating the surrogate contract. Lawmakers in four states (Connecticut, Illinois, North Carolina, and Rhode Island) have proposed statutes that would make any contracts for surrogacy void and unenforceable.11 Proposals in Alabama, Minnesota, Nebraska, and New York would void only contracts for paid surrogacy.12 The most unusual of these statutes is that of Nebraska, which makes the contract unenforceable, but gives the biological father parental rights and obligations. The apparent intent of such a statute is to acknowledge that the man providing the sperm is the legal father but to avoid upholding other aspects of the contract, such as provisions requiring the surrogate to abort or to terminate her parental rights.

Under these proposed laws, couples and surrogates would not go to jail for participating in contractual reproduction, but if the surrogate changed her mind, the contract would not be upheld. In practical effect, such laws are similar to those that allow the surrogate to change her mind after the birth. Although they have a different symbolic weight, since laws declaring the contract void would evince societal disapproval of the arrangement while those allowing surrogacy with a mind-change option would not, such symbolism is unlikely to deter most couples who badly want a baby. As in the case of outright bans, these laws generally lack provisions for how parenthood would be decided in the instance when the surrogate changed her mind. Only the Connecticut bill specifies who the legal parents are in a surrogacy arrangement: the surrogate and her husband.13
Prohibiting Surrogacy

"It shall be unlawful for any person or persons, organizations, hospitals or associations to engage in surrogate parenthood or in activity in furtherance of such."

Alabama H. 2 sec. 1 (by Rains) (1987)

"Any contract whereby an individual agrees to act as a surrogate mother shall be void and unenforceable in this state whether entered into with or without consideration and whether entered into within or outside of the state of Rhode Island."


Evaluation

Some legislatures have not ruled out surrogacy, but instead have proposed or authorized study commissions to assess the potential benefits and risks of surrogacy arrangements. Study commissions have been adopted by the legislatures of Delaware, Indiana, Louisiana, Rhode Island, and Texas, and at least eight other states have proposed them. The bills calling for evaluation of surrogacy focus mainly on the composition of the commissions and on the issues to be considered.

The composition is likely to influence the type of proposals a commission develops. A commission of infertility specialists may conceptualize surrogacy according to a medical model, analogizing it to medical treatments for infertility such as drugs and surgery. A commission of adoption officials, however, might place surrogacy within its previous experience of adoption. These alternative interpretations may lead to different sets of policy recommendations. If surrogacy is analogized to a medical treatment, the commission might recommend that couples not undergo psychological screening to gain access to surrogacy, that surrogates be paid, and that the infertile couple be considered the legal parents. If surrogacy is analogized to adoption, it might be recommended that the couples be screened, that payment be prohibited, and that the surrogate have a certain time period after the birth of the child to assert her parental rights.

The Delaware commission is a Citizens Task Force of twelve members: a senator, a representative, three medical professionals, two clergymen, a representative of the city of Wilmington, and four public members. Members were not charged to address 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.

In Louisiana, the commission is composed of six legislators and one representative each from the state medical association, bar association, Catholic conference, and Interchurch Conference. The preamble of the bill establishing the commission notes that “surrogate mothering has potentially devastating problems for all the parties involved.” Yet when setting forth the issues troubling the legislature that the commission is apparently to address, it makes no reference to the key problems for the parties, the potential psychological risks. (Moreover, the commission itself contains no members who are experts in such matters.) Rather, the questions revolve around the validity of the surrogacy contract, the question of renunciation of the contract, and other problems such as custody and visitation rights, adoption, inheritance, and other property rights.

Even though the bill is premised on the statement that the “ethics of surrogate parenting needs to be examined in this state,” the actual task of the Commission is stated in terms of assessing what the law is rather than what it should be.

Under the proposed Connecticut law, the commission would be made up of people appointed by ranking legislators. The inquiry of the Connecticut commission would focus mainly on legal issues: whether contracts should be enforced, for example, and whether intermediaries should be allowed to broker and advertise.

The proposed Maine commission would consist of two senators, two representatives, a judge, the Attorney General (or a designee), the Commissioner of Human Services (or a designee), an attorney, a physician, a hospital administrator, and two members of the public. The issues identified for the commission to address are more wide-ranging than in other states, including issues involving the contract, genetic screening of the surrogate, the protocol for transfer of the infant, custody concerns, the duties of physicians to disclose risks, and authorizing a state agency to deal with surrogacy.

Massachusetts's proposed commission would be composed of two members of the senate, three
members of the house of representatives, and six persons to be appointed by the governor. Those six persons must include an attorney practicing in the commonwealth and one who is a member of a bar association organized in Massachusetts, a licensed psychiatrist or psychologist, a social service worker, and a member of the general public. The purpose of the commission is to investigate the possibility of and need for regulating surrogacy.

North Carolina has two proposals for study commissions pending. One would create a Surrogate Parenting Study consisting of nine members: a senator, representative, clergyman, child psychiatrist, social service representative, doctor, lawyer, child advocate, and a chairman from the field of education. The bill specifically provides for public hearings and asks the commission to seek public opinion on such issues as the rights of potential parents to use surrogacy, whether the contract may be binding, whether screening is advisable, what the established psychological evidence is on mother-child bonding, whether it is in the child's best interest to favor either the mother or father in the surrogacy contract, and how existing laws affect surrogacy. The preamble of the North Carolina bill may, in fact, presage the future findings of the commission when it says that "no matter how the surrogacy issue is resolved, babies cannot be traded like commodities."

The second North Carolina proposal would create a twenty-five-member Adoption and Surrogate Parenthood Study Commission comprised of four senators and four representatives, two county social services directors, two private adoption agency directors, a private adoption agency worker and a county adoption worker, an adoption agency attorney, an attorney specializing in adoption, and an Attorney General's office attorney knowledgeable about adoption, a physician, two superior court clerks, a member of the clergy, an adoptive parent, a birth parent of an adopted child, an adopted person, and the Director (or a designee) of the North Carolina Division of Social Services. This commission would have a broader mandate that includes not only addressing surrogacy as such, but determining how to amend the laws to meet more adequately the needs of adopted children, adoptive parents, and birth parents. Notably lacking from the proposed study commission, however, are people with any experience in the medical, legal, psychological, or personal aspects of surrogate motherhood, who might be able to provide insight about how the process is similar to—or different from—adoption.

New Jersey's proposed commission would include two senators and two representatives, both from different political parties, the Chief Justice of the Supreme Court or a designee, two members of the Family Law Section and two from the Women's Rights Section of the New Jersey State Bar Association, as well as two members qualified by their experience in the area of domestic relations, one appointed by the President of the Senate, and one appointed by the speaker of the General Assembly. The bill charges the commission 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.

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**Payment for Surrogacy**

"It shall be unlawful to offer or provide a fee of money or other consideration to a surrogate or her husband if she is married other than for reimbursement of the expenses described in [sec.] 6(d)."

D.C. Bill 7-176 sec. 6(e) (by Ray) (1987).

"Payments made to a surrogate pursuant to [sec.] 6(5) shall be for the purpose of compensating her for her services and the making to the acceptance of such a payment shall not constitute a violation of the laws of this state."


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**Acceptance**

The majority of the pending surrogacy bills incorporate the perspective that surrogacy, in some form, should be allowed. In adopting a regulatory rather than a prohibitory approach, lawmakers must grapple with such issues as whether surrogates should be paid, what type of screening participants should undergo, what safeguards are necessary to assure that participants have given voluntary, informed consent, whether the couples who are the intended parents should be recognized as the legal parents, whether the surrogate should have a certain time period after the birth in which to assert her parental rights, and whether the resulting child should, later in life, be able to obtain medical information about the surrogate or learn her identity.

In Oregon, one proposed statute takes a simplistic
approach to surrogacy in that it merely exempts surrogate arrangements from the ban on babyselling. Another legalizes both paid and unpaid surrogacy and provides for the enforcement of the contract by either specific performance or damages. A proposed Connecticut law would merely allow the Commissioner of Health Services to establish minimum standards for surrogates. Other statutes accepting surrogacy provide more elaborate regulations for the procedure. The District of Columbia bill, for example, not only sets standards for screening, recordkeeping, and other aspects of the procedure, it also requires that surrogate centers be licensed. Some of the proposed statutes also list provisions that must be included in the contract, such as that the couple agree to accept the child at birth, or that the parties be medically screened. The Illinois and Missouri laws further require the contract to state whether the parties have a right to meet and know each other's identity, to meet and not be identified, or to not meet and not to be identified.

### Paid or Unpaid Surrogacy?

Four jurisdictions (the District of Columbia, Florida, New York, and Wisconsin) would specifically allow only unpaid surrogacy, while statutes proposed in at least twelve states would allow either paid or unpaid surrogacy (California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, and South Carolina). Some of the latter bills, such as those of California and Illinois, specify that the compensation must be "reasonable," seemingly indicating that a court would have authority to decrease compensation that it considered excessive. Under proposed Massachusetts, New York, and Pennsylvania bills, however, there is also a requirement that the fee be "just," which seems to give a court the power to increase a fee it finds too small. One of the two proposed New Jersey bills allowing surrogacy would limit payment to the surrogate to $10,000.

Even when paid surrogacy has been accepted, there has been much debate about whether payment to the surrogate is equivalent to payment for a child rather than payment for a service since in many programs the bulk of the payment is made after birth and in some the woman does not receive full payment if she miscarries. The proposed South Carolina law would codify this latter approach by providing that the surrogate will receive no compensation other than medical expenses if she miscarries before the fifth month of pregnancy and will receive only 10 percent of the agreed upon fee plus medical expenses if she miscarry during or after the fifth month. A Maryland bill specifically authorizes that "a portion of the total compensation may be withheld until the child's birth," but does not indicate whether payment is contingent on live birth. In contrast, a Michigan bill states that the surrogate agreement may not contain a payment reduction provision if the child is stillborn or born alive but impaired.

### Access to Surrogacy

The proposed regulatory bills often limit who may contract with a surrogate. According to laws proposed in Florida, Illinois, New Jersey, and South Carolina, for example, the intended parents must be married. In some states surrogacy may only be used for medical reasons, as under bills in California, the District of Columbia, Illinois, Massachusetts, Michigan, New York, Pennsylvania, and New Jersey. Generally those reasons are defined as infertility or threat to the health or life of the intended mother or her child were she to conceive. In most states, these medical reasons encompass the desire not to pass on a serious genetic defect to the child. As their lack of attention to the issue suggests, other bills would apparently not limit the use of surrogacy to medical indications.

The proposed Missouri and South Carolina laws seem to exclude people who are disabled or in poor health from contracting with a surrogate. They require examination of the intended parents to determine if they have any medical conditions that would interfere with their capabilities as parents. The South Carolina bill and one of the New Jersey bills require investigation of the intended parents similar to the home study done in an adoption situation. Under the South Carolina bill, the investigation must consider such factors as the intended parents' moral fitness, the stability of their family unit, and the capacity and disposition of the intended parents to give the child love, affection, guidance, permanence, education, and medical care, as well as food, clothing, and other material needs.

The surrogate's qualifications are described in detail under many of the bills, which generally focus on psychological and medical measures. Some bills, however, provide additional categories for exclusion of potential surrogates to eliminate surrogate applicants who haven't had children before and to avoid incest. The proposed District of Columbia law seems particularly concerned about eugenics. It prohibits any representation that a child born through surrogacy (or for that matter, embryo transfer) will possess superior genetic or physical traits.

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Screening Issues

Few of the proposed laws address the issue of screening the participants. Some require a detailed medical history of the surrogate, and in most instances, medical information is collected about the intended father as well. In the District of Columbia this includes information about known genetically transmitted diseases (including those of blood relatives), sexually transmitted diseases, habitual use of drugs or alcohol, and exposure to radiation and toxic substances. It is unlawful for the surrogate to knowingly conceal such information. The proposed Missouri law requires certification that the providers of genetic materials and the intended parents were medically and genetically examined by a physician knowledgeable in genetics. The proposed laws usually specify that there be full disclosure of the results of medical exams and tests to the other parties to the contract.

Proposed laws in at least seven states would require the surrogate and the intended father who provides the sperm to be screened for sexually transmitted diseases. An Illinois bill allows the parties to contract for genetic screening, while bills in at least six states would require genetic screening of the surrogate and intended father. The Michigan regulatory bill states that the surrogate mother must also, upon the request of the societal father, submit to genetic screening and authorize the release of the results to the societal father. One of the New York bills similarly provides for medical screening at the request of the intended father.

Some bills would require psychological screening or counseling of the participants in surrogacy arrangements. Under the District of Columbia bill, the surrogate (and her husband if she is married) must undergo counseling by a mental health professional about the psychological consequences of the termination of parental rights. The professional must certify that all parties are capable of consenting and that the surrogate (and spouse) received counseling. In addition, under this and one of the New York bills, the intended father may require the surrogate to undergo a psychological evaluation prior to execution of the contract. Under the Michigan bill, a mental health professional must certify that the surrogate is capable of consenting.

A proposed Illinois bill requires both the surrogate and her husband to undergo psychological screening by either a board-certified psychologist or a psychiatrist to determine that they are fit persons capable of surrendering the child upon birth. Under one of the New Jersey bills, the surrogate must undergo psychological screening, but the purpose of that screening is not identified. In contrast, bills in Massachusetts, New York, and Pennsylvania would require assessments by mental health professionals at the discretion of the judge.

The Maryland bill requires that the contract contain a provision saying that the surrogate, upon reasonable request of the biological father and his spouse, must submit to a pre-insemination psychiatric or psychological evaluation, and psychological counseling prior to and after the birth of the child if recommended as a result of the evaluation.

Bills in the District of Columbia and Michigan require that, prior to signing the contract, the intended rearing parents undergo counseling by a mental health professional on the consequences and responsibilities of parenthood under a surrogacy arrangement. The proposed California statute requires psychological counseling for all involved parties beginning thirty days prior to entering the contract and ending no earlier than two months after the birth of the child. In particular, the surrogate must be counseled about the consequences of acting as a surrogate and giving her child up for adoption.

Beyond collecting medical or psychological information, some laws attempt to foster informed decisionmaking by actually requiring the participants to review that information. Under the California, District of Columbia, Illinois, Michigan, and Missouri bills, prior to entering a contract, the potential rearing couple must review the results of the medical, genetic, and psychiatric or psychological examinations of the surrogate to decide if the surrogate is acceptable. The Illinois and Missouri bills also provide that each side review the other's criminal arrest and conviction records (other than those for minor traffic offenses).

Facilitating Voluntary Informed Consent

Some proposed statutes include mechanisms intended to assure that the decision to enter a surrogacy arrangement is well-thought-out, well-informed, and uncoerced. Bills in the District of Columbia and Michigan, for example, provide a cooling-off period prior to insemination by requiring that at least thirty days pass between the execution of the contract and the artificial insemination of the surrogate. Other proposals stipulate provisions regarding legal counsel for the surrogate. Bills in at least eleven states specify that the same lawyer must not represent both the surrogate and the intended parents. In at least five states, the surrogate's attorney would be paid for by the intended parents, with California limiting reimbursement to $300.

Some proposals provide for court approval of the
contract prior to insemination (in Illinois, Massachusetts, Missouri, New Jersey, New York, Pennsylvania, and South Carolina, for example). In Illinois and Missouri, the judge scrutinizes whether the parties “have executed the agreement knowingly and voluntarily.” Similarly, bills in Massachusetts, New York, and Pennsylvania require a judicial determination regarding whether each party is freely informed and has freely and knowingly entered into the agreement. The Massachusetts judge may also determine whether the contract “protects the health and welfare of the potential child.”

**Decisionmaking during Pregnancy**

Most of the proposed laws that touch on the surrogate’s behavior during pregnancy give her the right to make health care decisions during pregnancy, including aborting or not aborting according to her own determination. Such is the case, for example, under bills in Illinois, Massachusetts, Missouri, New York, and Pennsylvania. In contrast, the District of Columbia bill limits the surrogate’s control by requiring that the contract contain an agreement by the surrogate “to follow the medical instructions given to her by the physician attending her during pregnancy to protect her health and the health of the unborn child.” A proposed Maryland bill includes a similar provision and additionally requires that the surrogate submit to reasonable requests by the father and his wife for prenatal medical care. A proposed New Jersey bill states that the surrogate must follow a medical examination schedule. An alternative New York bill provides that the surrogate must adhere to reasonable medical instructions and submit to “any reasonable pregnancy related medical care or treatment as provided in the contract.” If she does not, the father can declare the contract null and void.

The South Carolina bill imposes the most stringent restrictions on the surrogate’s behavior during pregnancy. It requires that the surrogate adhere to all medical instructions, follow a specified schedule of prenatal visits, and not abort the child unless informed by the inseminating physician that such an abortion is necessary for her physical health.

Under proposals in Illinois and Missouri, if the surrogate undergoes an abortion that is not medically necessary, the intended parents can recover the fees and expenses paid to the surrogate and reasonable attorneys’ fees. If the abortion is involuntary, medically necessary, or agreed to by the parties, the surrogate is entitled to a pro rata portion of the fee, plus her medical expenses, plus attorneys’ fees for enforcement of her rights. Under one of the proposed New York bills, if the surrogate refuses to comply with the father’s request to abort, the father nonetheless maintains parental rights and responsibilities for the child.

**Surrogates’ Decisionmaking**

“A surrogate mother agreement shall contain a provision requiring the surrogate to adhere to all medical instructions given to her by the inseminating physician or any other physician attending her during pregnancy.”


“[Contract shall] state that the surrogate shall be the sole source of consent with respect to the clinical management of the pregnancy, including but not limited to amniocentesis and termination of the pregnancy.”


**Parental Rights**

Under most proposals (for example, in California, the District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, and South Carolina), the intended rearing parents have an explicit duty to assume all parental rights and responsibilities for the child upon birth, no matter what the child’s condition. Under the California law, however, the couple does not have to take custody of a child who suffers from a disease or defect caused by the surrogate in violation of the contract. One pending Massachusetts bill does not give custody automatically to the intended parents, although it specifically states that the contract can be enforced. If a petition is filed concerning custody, the court shall determine what custody arrangement is in the best interest of the child. Among the factors to be considered when determining custody are the existence of fraud, duress, undue influence, or overreaching by either party to the contract or by any intermediary, the maturity and mental capacity of both parties, the home environment of the parties, the biological makeup of the child, and the consideration given by the parties to the contract.

Under both proposed New Jersey bills, in the event of a dispute over custody, the provisions of the
contract shall prevail unless the court under extraordinary circumstances finds otherwise. Similarly, under the California bill and one of the Illinois bills, the agreement prevails unless that would be to the detriment of the interests of the child.

Another Illinois bill and one in Missouri provide for a court to order specific performance of the contract by either side. An action for specific performance must be sought no later than fourteen days after the intended parents learn of the birth of the child and the court hearing on the matter must be within seven days of notice to the party or parties. However, if the court finds that giving the intended parents custody is contrary to the child's best interest, or that the intended parent is not fit, or if, after the insemination, the surrogate learns that an intended parent has been convicted of a crime that the court finds indicative of the intended parent's lack of fitness as a parent, the court may award custody to the surrogate.

When the Surrogate Changes Her Mind

In a few states, the surrogate would have a certain time period during which she could change her mind after the birth of the child. One proposed regulatory law in Pennsylvania would give the surrogate twenty days after the child's birth to change her mind. The biological father's remedies in such a situation would apparently be limited to damages under the contract. Similarly, under the Michigan regulatory bill and one of the New York bills, the surrogate may revoke her consent within twenty days of the birth and bring an action for custody. A proposed Florida bill would allow the surrogate to relinquish her parental rights only after the birth and permit her to rescind her consent at any time prior to the completion of the adoption (which may be as late as six months after the birth of the child). If consent is revoked, the surrogate and her husband would be the legal parents of the child.

Under a proposed Minnesota law, the surrogate has a right to legal and physical custody of the child for two weeks after the child's birth and apparently cannot let the biological father and his wife have the child during that time period. During the fourteen-day period, she may revoke her consent. If she does so, the father must be reimbursed for the fees and expenses he spent. He will have no support obligations to the child, but may seek custody or visitation rights.

Under the proposed Florida law, if the surrogate is awarded custody of the child the intended father does not have support obligations. In contrast, in California if the surrogate is given custody of the child, the father continues to have parental responsibility. The California statute does indicate a preference for awarding joint custody or giving custody to the parent most likely to allow contact with the noncustodial parent.

Insurance and Guardian Requirements

Regulatory bills in at least eight states require that the surrogate arrangements provide for insurance on the life of the surrogate with the beneficiary of her choice and on the life of the intended parents, generally with the resulting child as the beneficiary. Most require that the minimum death benefits be around $100,000.

In addition to the financial protections for the resulting child in the case of the death of the intended parents, a number of states require that a guardian be selected for the child. Under proposed laws in California, Maryland, Michigan, Minnesota, and South Carolina, if the biological father dies before the child's birth, his wife shall assume custody of the child, unless the surrogate contract provides otherwise. Under a proposed Minnesota law, if the biological father dies, his wife has the option, within fourteen days after the birth, to claim the child, although the surrogate can renounce the agreement during that same time period.

Under bills in the District of Columbia, Illinois, and Missouri, each surrogate parenthood agreement must name a guardian for the child in case both intended rearing parents die. The California bill states that if both the intended mother and father die before the birth of the child, the surrogate may opt for custody of the child within twenty days after birth. If the surrogate mother declines, the child apparently is placed with the guardian named by the infertile couple. The Michigan and South Carolina bills award custody to the surrogate mother if both the intended mother and father die; under the South Carolina statute, the surrogate is entitled to her full compensation if the intended parents die.

Recordkeeping

Few proposals address the issue of recordkeeping. Certain bills require information about the surrogacy arrangement to be filed with a state official, such as the Secretary of the Department of Human Resources (Maryland), the Commissioner of Human Services (Minnesota), the Registrar (District of Columbia), the Office of Vital Records and Public Health Statistics (South Carolina), or the Department of Health (New York).

A proposed New Jersey bill mandates that the
Department of Health must maintain records of all surrogate mothers. The records held by the department shall be kept confidential to be disclosed only to a physician and only if the information is necessary to care for a child produced by a surrogate motherhood procedure. Also, the practitioner supervising the insemination of the surrogate is required to give a copy of all medical records and the contract for surrogacy to the Department of Health. The Michigan bill requires that upon the birth of the child, the couple file the agreement with the local probate court; the probate court in turn reports to the state registrar. The District of Columbia bill requires the Registrar to report annually to the health department and the City Council the number of surrogate agreements filed.

**Informational Rights of the Resulting Children**

Under a proposed Maryland bill, the biological father and his spouse must make available to the child the genetic screening information acquired about the surrogate. As part of a continuing obligation to have information available to the resulting child, a New Jersey bill provides that the surrogate has a duty to disclose any genetically-related health changes to the practitioner after the birth of the child. Failure to do so renders the surrogate liable for damages.

Few bills address whether the children of surrogacy arrangements will have access to information about, or the identity of, their surrogates. Under bills in California, Illinois, Massachusetts, New Jersey, New York, and South Carolina, it appears that such records will be treated like sealed adoption records, opened only for good cause. However, one of the Illinois bills and the Missouri bill would allow an emancipated person born from a surrogate contract to learn whether or not his or her prospective spouse is related to him or her.

Proposed bills in the District of Columbia and Michigan take an entirely different approach. They provide that, upon reaching age eighteen, a child born as a result of a surrogate contract may obtain copies of any documents filed. In the District of Columbia, however, the identifying information is deleted. In Minnesota, the surrogate may at any point file (or revoke) with the Commissioner of Human Services an affidavit allowing her identity to be disclosed. Unless she specifically declines disclosure, the child will be told of her identity. If the surrogate has died or has failed to file an affidavit declining disclosure and cannot be found, the child will be told of her identity. If the surrogate has kept and raised the child, the child would likewise have a right to seek the identity of the biological father.

**The Future Regulation of Alternative Reproduction**

Once legislators overcame their initial horror of artificial insemination by donor, the regulatory laws they passed beginning in the 1960s were unusually simple. They merely provided that the legal parents of the child were the sperm recipient and her consenting husband and that the donor had no legal bond to the child. In contrast, the majority of the proposed laws allowing surrogacy are more complex. The differences between the existing donor insemination laws and the proposed surrogacy laws may be rooted in a stereotypical perception that women are more likely than men to need the state’s protection and that women are more likely to make faulty decisions if multiple safeguards are not built into the process.

Another reason may be the legitimate recognition that a pregnant woman who contracts to be a surrogate has a much greater involvement in the procreative process than does the anonymous sperm donor in traditional artificial insemination by donor. But the difference in approaches is also attributable to historical context. In the two decades since the first donor insemination laws were passed, medical practice has changed, as well as society’s expectations about health care. The law of informed consent has evolved in the intervening period, so it is understandable that the circumstances surrounding the obtaining of consent are given more attention in the surrogacy bills. Genetic screening, in its infancy in the 1960s, has become an increasingly important aspect of reproductive medicine, a development likewise reflected in proposed legislation.

As legislators address the social, legal, and medical context in which surrogate motherhood is to be regulated, some are reconsidering the donor insemination laws as well. The most recent AID laws are more complex than their precursors. The 1986 Ohio law, for example, includes provisions for medical and genetic screening of the donor, recordkeeping, confidentiality, and informed consent, as well as a requirement that the sperm recipient and her husband be given access to extensive nonidentifying information about the donor’s characteristics, health status, and educational background. In addition, a number of lawmakers who have introduced surrogacy bills, such as John Ray of Washington, DC and Walter Kern of New Jersey, have introduced companion bills with detailed regulatory guidelines for traditional artificial insemination by donor. Thus, the legacy of the Baby M case may not be just the passage of laws to govern surrogacy, but the reconstruction of traditional donor insemination laws as well.
References

4. H.R. 2443, to amend 18 U.S. Sec. 1822 100th Congress, 1st Session.
5. Id., to amend 15 U.S.C. Sec. 52(1)(1).
8. Alabama H. 2 Sec. 1(r) (by Raids); Ill. H.B. 2101 Sec. 3 by (Granberg); Iowa S.F. 358 (by Hannon); Md. H.B. 613 Sec. A (by Mitchell); Wis. proposal by Rep. Merk.
9. Fla. S.B. 1081 Sec. 63.212(1)(i) (by Ros-Lehtinen); Ky. 88 R.S. BR 219 Sec. 3 (by Travis); Mich. S.B. 228 Sec. 9(1) (by Binsfeld et al.); N.J. A. 4138 Sec. 2 (by Kavanaugh et al.); N.Y. A.B. 5529 55-80(1) (by Schmid); Or. S.B. 456 Sec. 2 (by Hill and Kernesseloney); Pa. H.B. 570 Sec. 4305 (by Markosek). The following bills would also make the contract void and unenforceable: Fla. S.B. 1081 Sec. 63.212(1)(i); Ill. H.B. 2101 Sec 4; Ky. 88 R.S. BR 219 Sec. 3; Mich. S.B. 228 Sec. 5; N.Y. A.B. 5529 Sec. 5-80(1); and Or. S.B. 456 Sec. 3.
10. D.C. Consumer Protection and Regulation of Surrogate Parenting Centers Act of 1987, Bill 7-176 Sec. 6(e) (by Ray)(unlawful to pay a fee to surrogate or her husband); Fla. S.B. 1297 Sec. 1(3)(a) (by Frank); and N.Y.A. 2403 Sec. 65-a (by Halpin). These bills would allow payment for expenses: D.C. 7-176 Sec. 6(d); Fla. S.B. 1297 Sec. 1(3)(a) (this payment may not be conditioned on the termination of parental rights); and N.Y.A. 2403 Sec. 65-a.
11. Conn. H.B. 5398 Sec. 1(b) (by Tulasian); Ill. S.B. 499 (by Barkhausen); N.C. S.B. 305 (by Johnson); N.C. H. 1205 (by Miller); and R.I. 67-S-386 (by Carlin).
12. Ala. H. 1113 (by McKee et al.); Minn. S.F. 1167 (by Brandl et al.); Minn. H.F. 1584 (by Kelly et al.); Neb. L.B. 674 (by Chambers); N.Y.S. B. 1481 (by Marchi); H.B. 6277 (by Barnett et al.) (the New York proposals also void arrangements for I.V.F. pregnancies). An argument could be made that the New York bill only covers paid surrogacy since it voids contracts “in which a woman is employed as a surrogate.”
13. Conn. H.B. 5398 Sec. 2(a). The Connecticut bill provides that, if the surrogate and her wife wish to relinquish the child, the existing statutes on paternity and adoption would apply.
14. Conn. H.B. 5398 (passed through House Committee Judiciary); Ill. H.J.R. 80 (by Currie); Me. S. 239 (by Gauvreau); Mass. H.B. 5486 (by the Committee of the Judiciary); Mass. H.B. 5312 (by Clapprood); Neb. L.R. 177 (by Barrett et al.); N.C. S.B. 745 (by Hardison et al.) and N.C.S. B. 871 (by Rand); N.J. S.J.R. No. 49 (by DiFrancesco et al.); N.J. A.J.R. No. 76 (by Felice et al.); Pa. H.R. 93 (by Saloom et al.); Pa. H.R. 136 (by Hagarty et al.).
15. Or. S.B. 384 (by Hamby et al.).
16. Or. H.B. 3907 Sec. 2(1) (by Bunn et al.). The father must pay for all hospital and medical costs arising from performance of the contract. Id.
17. Id. at Sec. 2(3).
19. They include bills in California, the District of Columbia, Florida, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, and South Carolina.
20. Ill. S.B. 1510 Sec. 7(a); Mo. H.B. 480 Sec. 5(14).
21. D.C. Consumer Protection and Regulation of Surrogate Parenting Centers Act of 1987, Bill 7-176 Sec. 6(e) (by Ray); Fla. S.B. 1297 Sec. 1(3)(a) (by Frank); N.Y.A. 2403 Sec. 65-a (by Halpin); and Wis. Proposal by Magnuson. The District of Columbia bill would allow reimbursement of the surrogate’s expense for health care, legal representation, food, medicine, clothing, transportation, and lodging (at Sec. 6(d)). The Florida bill would also allow for payment of pregnancy-related medical or psychological care or treatment but the subsidy cannot be conditioned upon transferring parental rights (at Sec. 1(5-a)). The New York bill would allow medical and maternity expenses, lost wages, and reasonable attorney’s fees (at Sec. 65-a), as would the Wisconsin proposal.
22. Cal. A.B. 1707 (by Duffy et al.); Ill. S.B. 1510 (by D’Arco); Ill. S.B. 1111 (by Marovitz); Md. H.B. 759 (by Athey); Mass. H.B. 5314 (by Morin); Mich. H.B. 4753 (by Clack et al.); Minn. H.F. 1647 (by Bishop et al.); Mo. H.B. 480 (by Committee on Children, Youth and Families); N.J. Assembly No. 3038 (by Kern); N.J. S. 767 (by DiFrancesco); N.Y. S.B. 1429 (by Dunne et al.); Or. H.B. 3307 (by Bunn et al.); Or. S.B. 384 (by Hamby); Pa. H.B. 776 (by Reber) (see also Pa. S. 742 (by Lewis), which is identical to H.B. 776 except that it does not allow the surrogate to change her mind); S.C. S. 620 (by Thomas).
23. The Illinois and New Jersey bills do not include risk to the child.
24. The Illinois and New Jersey bills do not include genetic reasons.
25. Proposals in California, Illinois, and South Carolina require that surrogates have borne at least one child before.
26. Proposed bills in Illinois and Missouri evince concerns about the potentials for incest and provide an elaborate statutory scheme to prohibit the combination of egg and sperm of blood relatives closer than cousins of the second degree.
27. These include the proposals in California, the District of Columbia, Illinois, Missouri, and South Carolina. A New Jersey bill requires evaluation of the surrogate’s physical health.
28. See, for example, the bills in the District of Columbia, Missouri, New Jersey, and South Carolina.
29. See, for example, the proposals of the District of Columbia, Illinois, Maryland, Massachusetts, Missouri, New York, and Pennsylvania. The South Carolina bill requires only that the surrogate’s evaluation be released to the intended father.
30. These are the proposals of the District of Columbia, Illinois, Massachusetts, Missouri, New York, Pennsylvania, and South Carolina. A New Jersey bill would require sexually transmitted disease testing for surrogates only.
31. These are the District of Columbia, Maryland, Massachusetts, Missouri, New York, and Pennsylvania. A New Jersey bill would apply to surrogates only.
32. California, Illinois (both bills), Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York (both bills), Pennsylvania, and South Carolina.
34. The states are California, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, New York, and Pennsylvania.
35. The proposed South Carolina law does allow adoption agencies to release nonidentifying information about surrogates, however.

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