

THE FUTURE OF SURROGACY IN VIRGINIA

Elizabeth Cheshire I'Anson

INTRODUCTION

Almost six hundred babies have been born under agreements known as surrogate parenting contracts by the end of 1987.¹ "Surrogate motherhood is a novel application of the technique of artificial insemination that also results in the birth of a child with a unilateral biological link to the infertile couple."² The debate over surrogacy is heated with the process being described by proponents as

... the "wave of new technology, an alternative whose time has come, an alternative which is here to stay, an alternative for childless couples, the 'outer crest of reproductive technology,'" a "gift of life" to childless couples, one that alleviates the needs of childless couples, implementation of the principal's right to obtain a baby, and one that is sensitive to the needs of infertile couples.³

Opponents of the process, on the other hand, have said surrogacy is

the illegal and unconstitutional purchase and sale of human beings, babies for profit, "rent a womb", industrialized reproduction, illegal black market babies, surrogate mother mills, commercial baby brokerage, and a threat to human dignity.⁴

The growing number of such arrangements has raised legal and ethical questions about the validity of such contractual arrangements. Several states have already chosen to legislate that the contracts are void and unenforceable.⁵ Virginia has no specific statute addressing surrogate parenting agreements and no Virginia court has directly confronted the issue.

The Virginia General Assembly has recognized that the matter of surrogate parenting agreements must be addressed by the legislature in the near future. The 1988 General Assembly

¹ Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96 (Spring-Sum. 1988).

² Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 *TENN. L. REV.* 71, 75 (1982).

³ Flaherty, *Enforcement of Surrogate Mother Contracts: Case Law, The Uniform Acts, and State and Federal Legislation*, 36 *CLEV. ST. L. REV.* 223, 224 (1988).

⁴ *Id.* at 225.

⁵ *KAN. STAT. ANN.* § 199.590 (Supp. 1988); *LA. REV. STAT. ANN.* § 2713 (West 1965 & Supp. 1989); *NEB. REV. STAT.* § 25-21, 200 (Supp. 1988). The Nebraska statute outlaws surrogacy contracts in which a woman is "compensated for bearing a child of a man who is not her husband." *NEB. REV. STAT.* § 25-21, 200 (Supp. 1988)(emphasis added).

established a joint subcommittee to study surrogate motherhood.⁶ The joint subcommittee was instructed to

determine the number of surrogacy contracts made in the Commonwealth and the potential for an increase in such arrangements; determine whether surrogacy contracts and surrogate brokerage shall be legal in Virginia and, if so, how such practices shall be governed; examine the various new reproductive technologies and assess the potential effect of such technologies on health and social policy planning in the Commonwealth; analyze the constitutional issues of privacy, protection of children born of new reproductive technologies, the surrogate, [and] the health and social effects of such arrangements on the Commonwealth and any other related issues deemed appropriate . . .⁷

Senate Joint Resolution No. 178 continued the joint subcommittee examining surrogate motherhood and asked that the committee submit its findings to the 1990 General Assembly.⁸

This article will not evaluate all the issues facing the joint subcommittee studying surrogate motherhood. The article will examine cases on the subject from other jurisdictions, the potential legality of the contracts under current Virginia law, and issues that the legislature must face in deciding whether to and how to regulate the surrogate parenting business.

CURRENT CASE LAW FROM OTHER JURISDICTIONS

Courts in Michigan, Kentucky, New York, and New Jersey have all addressed surrogate parenting contracts under the adoption laws of each state.⁹ Some courts found the contracts violated state laws while others determined that surrogacy contracts were not in the purview of the legislature at the time the laws were passed and thus the contracts were enforceable.¹⁰

One of the first cases to address surrogate parenting contracts was *Doe v. Kelley*.¹¹ In *Doe*, the plaintiffs wanted to have the Michigan statutes prohibiting the exchange of money in connection with an adoption declared unconstitutional.¹² Under the surrogacy agreement which

⁶ VA. GEN. ASSEMBLY S.J. RES. 178 (1988).

⁷ *Id.*

⁸ *Id.*

⁹ *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988); *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986); *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986); *Syrkowski v. Appleyard*, 420 Mich. 367, 326 N.W.2d 211 (1985); *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1982).

¹⁰ *Armstrong*, 704 S.W.2d at 214.

¹¹ 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1982).

¹² *Id.* at ___, 307 N.W.2d at 439.

the Does had entered into, they were to pay the surrogate mother five thousand dollars¹³ plus medical expenses.¹⁴ The Does claimed that the "baby-buying" statutes¹⁵ prohibited them from exercising their right to procreate.¹⁶ The Michigan Court of Appeals did not view the alleged right to procreate as a valid prohibition to state interference with surrogacy agreements.¹⁷ The court found that the statutes were not preventing the Does from procreating, but merely preventing them from "paying consideration in conjunction with their use of the state's adoption procedures."¹⁸

Four years later in *Syrkowski v. Appleyard*,¹⁹ the Michigan Supreme Court addressed the question of whether the trial court had jurisdiction to hear a case in which a father wanted to have an order of filiation entered by the court declaring his paternity after he and the biological mother had entered into a surrogate parenting contract. The court found jurisdiction because the Michigan Paternity Act was designed to determine the paternity of the father and the plaintiff in *Syrkowski* was merely seeking just that, a paternity determination.²⁰ Although the "Michigan Paternity Act was designed only for 'the purpose of providing support for children born out of wedlock,'" the Michigan court found that a child born as a result of a surrogate parenting contract was a child born "out of wedlock" for the purposes of the statute.²¹

In *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*,²² the Attorney General of Kentucky brought suit against Surrogate Parenting Associates, Inc. in an attempt to have the court revoke its charter for violations of public policy--namely, arranging for surrogate

¹³ The most common fee paid to surrogate mothers is ten thousand dollars plus expenses such as medical tests, maternity clothes, and actual delivery costs. Adding the fees paid to the commercial broker, the doctors, psychiatrists, and attorneys, the contract price can total between thirty thousand and fifty thousand dollars. Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96, 97 (Spring-Sum. 1988).

¹⁴ Kelley, 106 Mich. App. at ___, 307 N.W.2d at 440.

¹⁵ Statutes that prohibit the exchange of valuable consideration during adoption procedures are commonly referred to as baby-buying statutes.

¹⁶ Kelley, 106 Mich. App. at ___, 307 N.W.2d at 441.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 420 Mich. 367, 326 N.W.2d 211 (1985).

²⁰ *Id.* at ___, 326 N.W.2d at 214.

²¹ *Id.*

²² 704 S.W.2d 209 (Ky. 1986).

contracts in violation of the state's baby-buying statutes.²³ Surrogate Parenting Associates (SPA) ran a clinic which helped couples seeking surrogate mothers arrange for surrogacy contracts.²⁴ The arrangement was a typical surrogate parenting agreement because the biological father contracted with the surrogate mother to have his genetically-related child. Upon the birth of the child, the mother would terminate her parental rights and receive a fee for her services.²⁵ The wife of the biological father would then be in a position to adopt the child.²⁶

The Kentucky Supreme Court found that SPA did not violate the baby-buying statutes.²⁷ The court looked at the purpose behind the statutes and determined that there were fundamental differences between the surrogacy contracts and the buying and selling of babies as prohibited by the statutes.²⁸ The determining factor for the court was that in surrogate contracts the mother gives her consent to terminate her parental rights *before* she signs the contract, not *after*, as in the case of a pregnant woman or one who has recently delivered and is arranging for adoption of her child.²⁹

Justices Vance and Wintersheimer, in separate opinions, strongly dissented. Justice Vance stated that

the fact remains that [SPA's] primary purpose is to locate women who will readily, for a price, allow themselves to be used as human incubators and who are willing to sell, for a price, all of their parental rights in a child thus born. . . . [A] portion of the fee is paid in advance for the use of her body as an incubator, but a portion of the payment is withheld and is not paid until her living child is delivered unto the purchaser, along with the equivalent of a bill of sale, or quit-claim deed, to wit-the judgment terminating her parental rights.³⁰

Vance viewed the delivery of the child along with the termination of parental rights in exchange for money as selling children.³¹ Justice Wintersheimer also viewed the agreements as commercial contracts in which a surrogate mother accepts money in return for giving up her parental rights.³²

²³ Armstrong, 704 S.W.2d at 210.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 211.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 209, 214 (Vance, J., dissenting).

³¹ *Id.*

³² *Id.* at 209, 214-5 (Wintersheimer, J., dissenting).

He expressed concern that offers of money could persuade financially needy women to sell their reproductive organs to those who could afford them.³³

A New York court, in the same year that *Armstrong* was decided, was faced with a private adoption of a child born to a surrogate mother.³⁴ The court refused to deny the adoption on public policy grounds and found that the best interests of the child lay in being adopted by the biological father and his wife.³⁵ The court then addressed whether the surrogate mother should be allowed to receive payment.³⁶ The New York court chose to follow the *Armstrong* decision and found that despite the court's "strong reservations about these arrangements both on moral and ethical grounds," it would not hold that payment to the surrogate mother was in violation of New York law.³⁷ The court then petitioned the legislature to review the problem of surrogate parenting agreements to determine if legislation was needed.³⁸

The most recent and most famous decision involving surrogate parenting agreements is *In re Baby M*.³⁹ In *In re Baby M*, the biological father (Mr. Stern) and the surrogate mother (Mrs. Whitehead) had entered into a contract under which the surrogate would bear Mr. Stern's child and after the birth, would terminate her parental rights.⁴⁰ Mr. Stern agreed to pay Mrs. Whitehead the sum of \$10,000 after the child's birth.⁴¹ After the birth of the baby, Mrs. Whitehead realized that she wanted to keep the baby and therefore, found herself in court when Mr. Stern sought enforcement of the surrogacy agreement.⁴²

The New Jersey Supreme Court found that surrogacy contracts violated the state's baby-buying statutes and conflicted with state public policy.⁴³ The court, however, awarded custody (but did not grant the adoption) to the biological father and his wife after determining that such

³³ *Id.* at 216 (Wintersheimer, J., dissenting).

³⁴ *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (1986).

³⁵ *Id.* at 974, 505 N.Y.S.2d at ____.

³⁶ *Id.*

³⁷ *Id.* at 978, 505 N.Y.S.2d at ____.

³⁸ *Id.*

³⁹ 109 N.J. 396, 537 A.2d 1227 (1988).

⁴⁰ *Id.* at ____, 537 A.2d at 1235.

⁴¹ *Id.*

⁴² *Id.* at ____, 537 A.2d at 1236-37.

⁴³ *Id.* at ____, 537 A.2d at 1246-50.

a placement was in the best interests of the child.⁴⁴ The court also allowed the biological mother visitation rights.⁴⁵ The *In re Baby M* case is comprehensive because the New Jersey Supreme Court addressed most of the issues facing courts in determining the legality of surrogacy contracts. Those issues include the invalidity and unenforceability of surrogacy contracts based on conflicts with baby-buying statutes and public policy, the termination of parental rights, the constitutional issues facing the courts, and finally, custody and visitation.⁴⁶

The court first addressed the question of whether the surrogacy contract violated the state's baby-buying statutes.⁴⁷ Finding that despite the fact that the surrogacy contract was carefully drafted so as to avoid the appearance of violating the statutes, the effect of the contract was to pay Mrs. Whitehead to allow Mrs. Stern (the wife of the biological father) to adopt the baby, thereby violating the statute.⁴⁸ The contract also violated the state statute which said that parental rights cannot be terminated unless the child is voluntarily surrendered to an approved agency or when "there has been a showing of parental abandonment or unfitness."⁴⁹ Neither one of the statutory criteria had been met in *In re Baby M*.⁵⁰

The next issue that the court discussed was whether the contract violated New Jersey public policy.⁵¹ The court found that the contract, by giving the father exclusive rights to the child and forcing the mother to terminate her parental rights, violated the policy of the state that a natural father's rights to custody of a child are no greater than the mother's rights.⁵²

⁴⁴ *Id.* at ___, 537 A.2d at 1255-61.

⁴⁵ *Id.* at ___, 537 A.2d at 1261-64.

⁴⁶ *Id.* at ___, 537 A.2d at 1234.

⁴⁷ a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith (1) pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or (2) take, receive, accept or agree to accept any money or any valuable consideration.

N.J. STAT. ANN. § 9:3-54 (West 1988) (in relevant part).

⁴⁸ *In re Baby M*, 109 N.J. at ___, 537 A.2d at 1241.

⁴⁹ N.J. STAT. ANN. §§ 9:2-16, -17, 9:3-41, 30:4C-23, 9:2-14 (West 1988).

⁵⁰ *In re Baby M*, 109 N.J. at ___, 537 A.2d at 1243.

⁵¹ *Id.* at ___, 537 A.2d at 1246.

⁵² *Id.* at ___, 537 A.2d at 1247.

The primary constitutional issue facing the New Jersey court was the right to procreate.⁵³ The Sterns claimed that if the court found surrogacy contracts illegal, it would violate the Sterns' right to have a biologically-related child.⁵⁴ The court found that Mr. Stern had not been deprived of the right to procreate.⁵⁵

The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation. To assert that Mr. Stern's right of procreation gives him the right to custody of Baby M would be to assert that Mrs. Whitehead's right of procreation does *not* give her the right to the custody of Baby M; it would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation.⁵⁶

The court summarily dealt with the Stern's equal protection claim.⁵⁷ The Sterns asserted that their constitutional right had been violated because the New Jersey statute provided "full parental rights to a husband in relation to the child produced, with his consent, by the union of his wife with a sperm donor."⁵⁸ The court did not accept this argument reasoning that because a sperm donor and a surrogate mother were not similarly situated, the state could properly distinguish between the sperm donor and surrogate mother.⁵⁹

These five cases demonstrate the difficulties that courts face when dealing with surrogacy contracts. Courts are presented not only with contractual issues, but also with a live human being, a child. The judge must weigh the public policy issues against the best interests of the child and determine an equitable solution to a difficult dilemma.

LEGALITY OF SURROGACY CONTRACTS UNDER VIRGINIA LAW

Although Virginia has no statute directly addressing the legality of surrogate contracts, there are several statutes which a court could use in determining whether such a contract would be enforceable under Virginia law. Virginia Code section 63.1-220.1 defines who may place a child

⁵³ *Id.* at ___, 537 A.2d at 1253.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at ___, 537 A.2d at 1253-54 (emphasis in original).

⁵⁷ *Id.* at ___, 537 A.2d at 1254.

⁵⁸ N.J. *STAT. ANN.* § 9:17-44 (West 1988).

⁵⁹ *In re Baby M*, 109 N.J. at ___, 537 A.2d at 1254. The court looked at the difference in time it takes to produce sperm or to bear a child for nine months.

for adoption.⁶⁰ The only entities that may place a child for adoption are a licensed child-placing agency, a local board of public welfare or social services, the child's parent or any agency outside the Commonwealth which is licensed to place children for adoption by the laws of the state in which it operates.⁶¹ Therefore, if the child is being placed for adoption by its biological mother (with the consent of the biological father), this particular statute would not be violated.

The inquiry, however, does not end with that statute. Virginia Code section 63.1-220.3 outlines the procedures that must be followed when a child is being placed for adoption by his parent or guardian.⁶² Before the adoption may be processed, the parent/guardian must execute a valid consent before a juvenile and domestic relations district court subject to the following findings: 1) that the birth parents are aware of alternatives to adoption and their consent is informed and uncoerced, 2) that a licensed child-placing agency has advised the adopting parents on alternatives to adoption, 3) that both sets of parents have exchanged identifying information, 4) that "any financial agreement or exchange of property among the parties and any fees charged or paid for services related to the placement or adoption of the child have been disclosed to the court," 4) that there has been no violation of the Virginia version of a baby-buying statute (to be discussed further below), and 6) that a licensed child-placing agency has conducted a study of the home of the adoptive parents.⁶³ Furthermore, consent cannot be given until the adoptive child is at least ten days old and that consent shall be revocable for up to fifteen days after execution.⁶⁴ Finally, the court must determine if the adoption is in the best interests of the child.⁶⁵

A typical surrogacy contract would violate several provisions of § 63.1-220.3. First, there normally is no counseling of the birth parent and adoptive parent on the alternatives to adoption.⁶⁶ Second, as will be discussed below, the contract itself arguably violates the Virginia baby-buying statute. Third, there is no investigation into the home-life of the adopting parent. Under a surrogacy contract there is no inquiry into the suitability of the adoptive parents. If the prospective parents have enough money to pay the bills, the inquiry stops there. "The mere fact

⁶⁰ V.A. CODE ANN. § 63.1-220.1 (Supp. 1989).

⁶¹ *Id.*

⁶² V.A. CODE ANN. § 63.1-220.3 (Supp. 1989).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ If there were such counseling, this portion of the statute would not be violated.

that a couple is willing to pay a good deal of money to obtain a child does not vouchsafe that they will be suitable parents"⁶⁷ The General Assembly believed strongly enough in the best interests of the child to include a suitability criteria in its statutory scheme for adoption. Because most surrogacy contracts do not address the best interests of the child, they would violate that criteria.⁶⁸ Finally, consent in Virginia cannot be given before the infant is at least ten days old and is revocable for up to fifteen days thereafter.⁶⁹ Under surrogacy contracts, the surrogate mother gives her consent nine months before the baby is born and normally that consent is not revocable. This clearly violates § 63.1-220.3, which was probably designed, like laws in other states, to give a woman time to think about her decision and time to change her mind after she has made her decision.⁷⁰

The final statutory provision that could be used to challenge a surrogacy contract in Virginia is § 63.1-220.4: "No person or child-placing agency shall charge, pay, give, or agree to give or accept any money, property, service or other thing of value in connection with a placement or adoption"⁷¹ The exceptions to the statute include 1) reasonable services and fees provided by a licensed agency, 2) payment for medical expenses, 3) payment for transportation costs incurred in gaining consent, 4) customary legal fees, and 5) expenses for transportation for intercountry adoptions.⁷² The statute also states that "[n]o person shall advertise or solicit to perform any activity prohibited by this section."⁷³

Although care can be taken to fashion a contract that appears not to violate the statute, the underlying purpose of the contract remains the same--payment of money in return for the termination of parental rights. In *In re Baby M*, the contract was structured so that the adopting mother was not a party to the contract, the stated purpose of the contract was to give a child to Mr. Stern (the biological father), and the payment to Mrs. Whitehead (the surrogate mother) was

⁶⁷ Capron, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 34, 37 (Spring-Sum. 1988).

⁶⁸ See *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1242 (1988)(adoption statutes seek to further the goal of determining the best interests of the child).

⁶⁹ Because Virginia has no published legislative history, there is no indication that surrogacy contracts were considered when the General Assembly adopted this statute effective July 1989.

⁷⁰ *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 214-15 (Ky. 1986) (Wintersheimer, J., dissenting).

⁷¹ VA. CODE ANN. § 63.1-220.4 (Supp. 1989).

⁷² *Id.*

⁷³ *Id.*

for compensation of services.⁷⁴ The court still found that the contract violated New Jersey law because money was paid to Mrs. Whitehead in connection with the adoption of Baby M.⁷⁵ Under the Virginia statute, not only could a court find the parties to the contract to be in violation of the statute, but the agency as well for advertising for or soliciting such arrangements.⁷⁶

A Virginia court could, however, take the approach of the court in *Surrogate Parenthood Assoc., Inc. v. Commonwealth ex rel Armstrong*.⁷⁷ That court concluded that because consent by a mother is given before entering into the surrogate agreement, there were fundamental differences between surrogacy contracts and baby-buying, and therefore the baby-buying statute was not violated.⁷⁸ The Kentucky Supreme Court focused on the fact that in surrogacy contracts the biological mother gives her consent to termination of her parental rights before she conceives, not after, as in the case of a woman who is already pregnant and is approached by a baby-broker.⁷⁹

It is not clear under current Virginia law whether surrogacy contracts are legal. The General Assembly has recognized that surrogacy is an area that must be addressed by the legislature. The next section of this article will outline issues which the General Assembly should consider in drafting legislation concerning surrogate parenting agreements.

ISSUES TO BE ADDRESSED BY GENERAL ASSEMBLY

Exploitation of Women

Some critics of surrogacy agreements have argued that the agreements promote the exploitation of women. Although a surrogate parenting contract is signed before a woman conceives and the woman is not laboring under an unwanted pregnancy at the time she signs the contract, that woman may still be exploited. Financial inducements to enter into the contract are still present whether the woman is pregnant or not. A single mother who is unable to meet her

⁷⁴ *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1241 (1988).

⁷⁵ *Id.* at ___, 537 A.2d at 1241.

⁷⁶ Violation of this statute is considered a class 5 felony. VA. CODE ANN. § 63.1-220.4 (Supp. 1989). A class 5 felony subjects a person to a prison term of between one and 10 years or confinement in jail for up to 12 months and a fine of not more than \$1000, either or both.

⁷⁷ 704 S.W.2d 209 (Ky. 1986).

⁷⁸ *Id.* at 211.

⁷⁹ *Id.*

debts to support her other children, faced with the prospect of earning \$10,000 for bearing a child, may be induced to enter into a surrogacy contract.

Couples who wish to employ the use of a surrogate mother are generally well educated and well off financially.⁸⁰ Almost sixty-four percent of the couples have an income of over fifty thousand dollars per year, while another twenty-eight percent earn between thirty thousand and fifty thousand dollars per year.⁸¹ At least thirty-seven percent of the couples are college-educated and fifty-four percent have attended graduate school.⁸²

The surrogate mothers, on the other hand, are generally non-Hispanic Protestant whites between the ages of twenty-six and twenty-eight, sixty percent of whom are married.⁸³ Less than thirty-five percent of surrogate mothers have gone to college and only four percent ever attended graduate school.⁸⁴ Only thirty percent of surrogate mothers earn between thirty thousand and fifty thousand dollars per year and sixty-six percent earn less than thirty thousand dollars.⁸⁵

These figures show that most of the couples seeking surrogate mothers are in a position to financially induce a surrogate mother to bear their child. "Although an offer of money almost always serves as an inducement to act in certain ways, it is difficult to determine when an incentive becomes an 'undue' inducement."⁸⁶ It is difficult to ascertain how much money will induce someone because people place different values on sums of money and have varied amounts of willingness to undergo the substantial discomforts of pregnancy.⁸⁷ One cannot separate, in a surrogacy context, what sum would be "undue" influence versus merely "due" influence.⁸⁸

Because of the cost involved, up to fifty thousand dollars,⁸⁹ only the wealthy will be able to afford to enter into surrogacy contracts. A woman in a destitute situation with the prospect of

⁸⁰ Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96 (Spring-Sum. 1988).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 97.

⁸⁵ *Id.*

⁸⁶ Macklin, *Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis*, 16 *LAW, MEDICINE & HEALTH CARE* 57, 62 (Spring-Sum. 1988).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See note 13, *supra*.

earning up to ten thousand dollars may sign the contract merely to get the money.⁹⁰ "It is always going to be poor women who have babies and rich women who get them."⁹¹

One author has suggested that "[s]urrogate [p]arenting can be viewed as a new and possibly lucrative field for women. Rather than being demeaning to bear a child for another woman, it could be viewed as a noble and honorable profession, and pretty well-paying, too."⁹² However, "[t]he role of paid breeder is incompatible with a society in which individuals are valued for themselves and are aided in achieving a full sense of human well-being and potentiality."⁹³ Indeed, as one author put it: "[w]hile commercialized surrogacy finally acknowledges the economic value of women's reproductive capabilities- i.e., that 'labor' is labor- it also makes biological mothers into workers on a baby assembly line, as they try to convert their one economic asset- fertility- into cash for their other children."⁹⁴

Violations of the Policies Behind Baby-Buying Statutes

Many states, including Virginia, prohibit the exchange of money in connection with an adoption except for the payment of medical expenses and customary agency and legal fees.⁹⁵ "[P]rohibitions on paying for adoptable babies are based on a collective judgment that certain things simply should not be bought and sold."⁹⁶ At least one court has found that surrogacy contracts violated the baby-buying statutes of that state.⁹⁷

Proponents of surrogacy contracts argue that the contracts do not violate baby-buying statutes. "Concerns that an unwed mother will part with her child because of societal pressure and the attendant emotional strain of the situation or that she will yield to unscrupulous baby brokers

⁹⁰ *In re Baby M*, 109 N.J. at ___, 537 A.2d at 1249; Macklin, *supra*, note 86 at 61.

⁹¹ Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 *LAW, MEDICINE & HEALTH CARE* 57, 60 (Spring-Sum. 1988) (citation omitted).

⁹² Keech, *Surrogate Parenting Agreements in Virginia*, 16 *COLONIAL LAWYER* 28, 31 (1987).

⁹³ Capron, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 34, 36 (Spring-Sum. 1988).

⁹⁴ Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96, 108 (Spring-Sum. 1988) (citation omitted).

⁹⁵ Capron, *supra*, note 94 at 109.

⁹⁶ Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96, 109 (Spring-Sum. 1988).

⁹⁷ *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1240-41 (1988).

involved in the black market are not warranted in the surrogate context.⁹⁸ In the situation which most baby-buying statutes were designed to prevent, an unwed pregnant mother is accosted by a baby-broker and induced into selling her unborn child.⁹⁹ In a surrogacy situation, the potential mother makes an informed, rational decision before she is faced with an unwanted pregnancy and the financial burden that will follow.¹⁰⁰

The fact remains, nevertheless, that under surrogate contracts, money is given to the surrogate mother in exchange for an adoption. "[T]he procedure . . . is nothing more than a commercial transaction in which a surrogate mother receives money in exchange for terminating her natural and biological rights in the child."¹⁰¹ The child is conceived for the purpose of abandoning him to someone else in spite of what might be in the best interests of the child after he is born.¹⁰²

There is certainly a valid argument that in special circumstances surrogate arrangements serve a legitimate and useful purpose—for example, the woman who wishes to produce a baby (without compensation) for her infertile daughter or sister. The Nebraska legislature recognized those special circumstances when it enacted legislation that only prohibited surrogacy contracts in which the woman received compensation.¹⁰³ A law such as Nebraska's would greatly reduce the number of surrogacy agreements because it would be hard to find women who would serve as surrogates for no compensation, but it would still allow for the truly dedicated women to produce a biologically-related child without violating a baby-buying statute.

The Right to Procreate and Equal Protection

Surrogacy litigants have argued that constitutional issues such as the right to procreate and equal protection under the law mandate a court to approve such contracts.¹⁰⁴

⁹⁸ Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 108 (1982).

⁹⁹ *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986).

¹⁰⁰ *Id.* But even if a woman makes an informed consent before conception, the woman cannot know (unless she has previously done so) what it is like to give up one's child after birth. Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 LAW, MEDICINE & HEALTH CARE 57, 60 (Spring-Sum. 1988).

¹⁰¹ *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 214-15 (Ky. 1986) (Wintersheimer, J., dissenting).

¹⁰² Macklin, *supra*, note 100 at 59.

¹⁰³ NEB. REV. STAT. § 25-21, 200 (Supp. 1988).

¹⁰⁴ *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

The right to procreate has only been the subject of one Supreme Court case.¹⁰⁵ Under surrogacy agreements, the biological father is not denied his right to procreate.¹⁰⁶ The biological father asking for the "custody, care, companionship, and nurturing that follow birth" is not asking for his right to procreate.¹⁰⁷

Couples attempting to enforce surrogacy agreements have also argued that invalidating the contract would be a denial of equal protection under the law.¹⁰⁸ This argument arises in states which allow "granting full parental rights to a husband in relation to the child produced, with his consent, by the union of his wife with a sperm donor."¹⁰⁹ The infertile couples argue that if a sperm donor was allowed to help an infertile couple to conceive, it would be a denial of equal protection to couples with infertile wives if a surrogate mother were not also allowed to help infertile couples.¹¹⁰

There are, however, fundamental differences between sperm donors and surrogate mothers. The two parties are not similarly situated. A sperm donor is not the same as a surrogate mother. The difference between donating sperm and carrying a child to term is substantial enough for a state to distinguish between the two parties. The male sperm donor donates his sperm in a sterile doctor's office or sperm bank. The surrogate mother, on the other hand, meets with the future parents, and after deciding to go through the process, endures the physical and emotional changes associated with a nine-month pregnancy. On this basis, the state may distinguish between the two parties so as to justify automatically divesting a sperm donor's parental rights without doing the same for the surrogate mother.¹¹¹

¹⁰⁵ *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization of criminals violated the fourteenth amendment) noted in *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

¹⁰⁶ *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1253 (1988).

¹⁰⁷ *Id.* at ___, 537 A.2d at 1253-4. See, *supra*, note 53 and accompanying text. In the majority opinion, Chief Justice Wilentz makes a convincing argument that the right to procreate does not include the right to custody of a child.

¹⁰⁸ Charo, *Legislative Approaches to Surrogate Motherhood*, 16 *LAW, MEDICINE & HEALTH CARE* 96, 109 (Spring-Sum. 1988).

¹⁰⁹ *In re Baby M*, 109 N.J. 396, ___, 537 A.2d 1227, 1254 (1988). Virginia has a statute which states that "[a]ny child born to a married woman, which was conceived by means of artificial insemination performed by a licensed physician at the request of and with the consent in writing of such woman and her husband, shall be presumed, for all purposes, the legitimate natural child of such woman and such husband the same as a natural child not conceived by means of artificial insemination." *VA. CODE ANN.* § 64.1-7.1 (1988). (This statute is found in the Virginia Code section dealing with wills and trusts).

¹¹⁰ *Id.*

¹¹¹ *Id.* at ___, 537 A.2d at 1254.

The United States Supreme Court in *Reed v. Reed*,¹¹² stated that in order to avoid a violation of the Equal Protection Clause, distinctions between males and females had to be reasonable.¹¹³ The distinction between male sperm donors and female surrogate mothers, for reasons outlined above, is reasonable. In addition, no court that has considered such claims has acknowledged the validity of a constitutional challenge on equal protection grounds.

CONCLUSION

There are many ways which the legislature can choose to deal with the question of surrogacy in Virginia. It can pass a law declaring the contracts void and unenforceable. This would satisfy those members of the "constituency" that believe such contracts to be morally wrong. If the General Assembly believes that the contracts serve a useful purpose, but is troubled by the fact that such contracts promote the buying and selling of babies, it could pass a law against commercialized contracts, similar to that of Nebraska. A final approach could be to put into place a regulatory system that would review the contracts before they are signed and monitor the outcome of the contracts. A statutory scheme similar to that outlined in the adoption statutes could be established for surrogacy contracts. In this manner, issues such as the best interests of the child and the prevention of the exploitation of women could be addressed.

My recommendation to the General Assembly is to either outlaw surrogacy contracts altogether or to outlaw only those involving compensation paid to the surrogate mothers. Either of these two solutions would promote the general public policy against the buying and selling of babies while not requiring the state to become over-involved in the regulation of surrogacy contracts.

¹¹² 404 U.S. 71 (1976).

¹¹³ *Id.* at 76.