A Comparative Analysis of Surrogacy Law in the United States and Great Britain - A Proposed Model Statute for Louisiana

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I. INTRODUCTION

Surrogacy has become an increasingly popular alternative for infertile couples in the United States and Great Britain. With increased use, surrogacy arrangements are also becoming more socially accepted. But many controversial issues surround surrogate motherhood. The surrogate mother's desire to keep the child is only one of the many ethical and social issues involved in surrogacy arrangements. Other issues include: moral beliefs regarding the right to have one woman bear a child for another, the enforceability of a surrogacy contract, proper payments to the surrogate mother, and how to decide custody of the child if a dispute arises.

There are two types of surrogacy: traditional surrogacy and gestational surrogacy. A traditional surrogacy arrangement occurs when a couple contracts with a surrogate mother to have the intentional father's sperm artificially inseminated into the surrogate. The surrogate will use her own egg, thus she will be genetically related to the child. The spouse of the intentional father is considered the intentional mother of the child born to the surrogate. An example of traditional surrogacy can be found as far back in time as the Book of Genesis. The birth of Ishmael resulted from Sara asking her servant, Hagar, to bear a child for her and Abraham because of Sara’s infertility.

The second type of surrogacy, called gestational surrogacy, can take place several ways. The intentional mother can use her own egg and the intentional

1. The term “surrogate” refers to a woman who gives birth to a child for another. Although “surrogate” may also be used to describe a woman who raises a child for someone else, this article will refer to a surrogate who bears a child for another.
2. The term “intentional” refers to the parents who are contracting with the surrogate mother to become parents of the child, that is, the couple who intend to become the parents of the child.
3. A traditional surrogacy arrangement occurs through artificial insemination. Through the advances of modern technology, it is not necessary for the surrogate mother to have intercourse with the intentional father. The surrogate mother will be artificially inseminated with the sperm of the intentional father.
5. Genesis 16:1-2 (King James).
6. Dolgin, supra note 4, at 64; Julia J. Tate, Surrogacy: What Progress Since Hagar, Bilhah, and Zilpah!, 1994 A.B.A. Sec. Fam. L. Rep.; Genesis 16:1-2 (King James): “Now Sara Abraham’s wife bore him no children; and she had a handmaid, an Egyptian, whose name was Hagar. Sara said unto Abraham, behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid, it may be that I may obtain children by her.”
father will use his own sperm, and the embryo, which is fertilized outside of the womb, will then be transplanted into the uterus of the surrogate mother. In this case, the surrogate is not genetically related to the child and will be used when the intentional mother is physically unable to carry the child on her own.7 Other options include using the intentional father’s sperm and the egg of an anonymous donor or using both sperm and egg donors to create the embryo that will be implanted in the surrogate. Several states regulate gestational surrogacy only, while other states’ laws apply to both gestational and traditional surrogacy.8

For purposes of this article, any proposed legislation will apply to both traditional and gestational surrogacy. In order to enforce surrogate contracts in the same manner as any other valid contract, a distinction need not be made between types of surrogacy. In both cases, a couple (or individual) contracts with a surrogate who will carry a child to term and subsequently relinquish parental rights to the child. The same rules will be applied to the contract regardless of the genetic relation the child has to the contracting parties.

Surrogacy can be further broken down into commercial and noncommercial surrogacy. Commercial surrogacy generally involves payments to the surrogate above and beyond reasonable expenses.9 The surrogate is paid a fee to conceive, gestate, bear a child and relinquish all parental rights to that child after birth.10 In many jurisdictions of the United States, commercial surrogacy is prohibited or even criminalized. Likewise, Great Britain does not allow commercial surrogacy.11 However, many argue that payment of a fee to a surrogate beyond reasonable expenses should be allowed because commercial surrogacy is not equivalent to baby selling. Advocates of commercial surrogacy claim that the fee is for gestational services that the surrogate provides and not for the actual surrender of parental rights toward the child.12 On the other hand, those who argue against commercial surrogate contracts say that the surrogate contract is centered around the product (the child) and not the process or the services provided by the surrogate mother. Opponents of commercial surrogacy argue that it is difficult to see how

7. See Jenn Z., supra note 4. In gestational surrogacy, the surrogate mother will be implanted with an embryo through in vitro or in vivo fertilization. It is also possible for the intentional parent(s) to use an egg donor, sperm donor, or both.


9. See Dolgin, supra note 4, at 64. Reasonable expenses are considered to be any out of pocket cost incurred by the surrogate, such as medical and health care costs, maternity clothes, housing, transportation, etc.


11. Surrogacy Arrangements Act, 1985 (Eng.); Human Fertilization and Embryology Act, 1990 (Eng.).

12. See Rae, supra note 10, at 29-31. William Laufer argues that the contracting couple is not paying for an adoption or for the surrender of parental rights to the child, but for the woman’s egg and the renting of her womb.
the fee paid to a surrogate mother can be for gestational services only when the service itself is not the ultimate cause of the contract. Payment is made to the surrogate when she fulfills her responsibilities by ensuring the transfer of parental rights to the contracting couple, but these opponents of payment must remember that the contracting parents are also paying for the gestational services because the surrogate must be sure to eat properly, seek regular medical attention, and participate in prenatal care in order to ensure that there are no health risks or defects in the end product (the child).

Noncommercial surrogacy occurs when the surrogate mother is compensated for the reasonable expenses associated with bearing a child but is not paid a fee for her services or for transferring her parental rights to the child. This type of surrogate arrangement is accepted more frequently by society and is usually the type of agreement that will be allowed by law in any instance where a law has been enacted to govern surrogacy. Because noncommercial surrogate agreements are more widely accepted and carry fewer risks, such as exploitation of the surrogate, or treatment of children and women's reproductive organs as commodities, this analysis will focus on noncommercial surrogate agreements.

Critics of surrogacy charge that many risks are involved with the surrogate process; such as: the risks to women, the risks to children, harm to other children of surrogates, and psychological or emotional damage to all parties involved in the surrogate arrangement. By enacting a thorough legislative scheme, many of these concerns can be eliminated or at least significantly minimized to protect the parties. The Louisiana Legislature has organized a task force to "study the impact of artificial means, including surrogacy, of reproduction relative to state law." The task force was organized, according to Senator Hines, because "the state of medical science, technology, and research in human reproduction has progressed so rapidly that state policy has not sufficiently evolved so as to address the advances in the area of artificial insemination and artificial means of reproduction." By looking to other jurisdictions in the United States and to Great Britain, Louisiana can evaluate the law and create a statute that will protect all parties to a surrogate arrangement.

13. See Rae, supra note 10, at 32-33.
14. Id. at 31. Margaret J. Radin suggests that the claim that the fee is for gestational services alone is merely a disguise that serves to hide the true intent of the contract.
15. These risks occur when the surrogate can be paid large sums of money to give birth to a child. If this were to be allowed, it would encourage women to use their reproductive organs to make large sums of money and could also constitute baby selling because the surrogate would be paid to give birth to a child and transfer her parental rights to the child.
17. 1999 Louisiana Senate Concurrent Resolution No. 141.
18. Id.
I. Surrogacy Law in the United States

The United States has a longstanding tradition of procreative liberty and each state is responsible for protecting this constitutional liberty granted to its citizens. The United States has a vast array of surrogacy laws. Some states have designed surrogacy statutes to eliminate all forms of surrogacy, while others have enacted statutes to severely limit the terms and enforcement of surrogacy contracts.

19. *See Rae, supra note 10, at 9.* The following cases demonstrate the growth and development of procreative liberty in the United States. In *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110 (1932), the court struck down a mandatory sterilization law for habitual criminals, particularly those guilty of "felonies involving moral turpitude." The court stated, "We are dealing here with legislation which involves the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. [When sterilized he is forever deprived of this basic liberty.]" *Id.* at 541, 62 S. Ct. at 1117. The court struck down a law forbidding the use of contraceptives in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965). The court stated, "This case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. We deal with a right of privacy older than the Bill of Rights." *Id.* at 484, 85 S. Ct. at 1683. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972), the court extended the ruling in *Griswold* and said that the right to use contraception also extended to unmarried individuals as well as married couples. In *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010 (1977), the court struck down a New York law and ruled that minors have procreative rights as well as adults. The court stated, "the decision to bear or beget a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the right to privacy. Decisions whether to accomplish or prevent conception are among the most private and sensitive." *Id.* at 683, 97 S. Ct. at 2018.

21. *Id.* at 1234.
22. *Id.*
23. *Id.* at 1234-35.
24. *Id.* To date, the New Jersey Legislature has taken no further action to amend its laws to provide for enforceable surrogacy contracts.
Many states have yet to enact any legislation addressing surrogacy. This disparate treatment of surrogacy across the United States has led to differing treatment of surrogate agreements in every state.

Arizona, Indiana, and North Dakota treat all surrogacy contracts as void and contrary to public policy, while New York and Utah have declared any type of surrogacy contract accompanied by payment (commercial surrogacy) void and unenforceable. Kentucky, Louisiana, Nebraska, and Washington also all declare surrogacy contracts for compensation void and unenforceable. Alabama, Arkansas, the District of Columbia, Iowa, and West Virginia also have enacted statutes addressing surrogate motherhood.

Michigan has gone a step further and actually criminalized surrogacy contracts that involve compensation to the surrogate, but has limited this statute to


26. N.Y. Dom. Rel. Law § 123 (Mckinney Supp. 1995) states: “No person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration.” The Utah statute, Utah Code Ann. § 76-7-204 (1995) provides that: “No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result... (c) a contract or agreement entered into in violation of this section are null and void, and unenforceable as contrary to public policy.”

27. Tate, supra note 6, at 85-132; The Kentucky statute, Ky. Rev. Stat. Ann. § 199.590 (Michie/Bobbs-Merrill 1991 & Supp. 1994), states in §§ 199.590 (2) and (3) that no one can be a party to a contract or agreement that would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. All such contracts shall be null and void and unenforceable. The Nebraska statute, Neb. Rev. Stat. § 25-21.200 (1989), states that: “(1) a surrogate parenthood contract entered into shall be void and unenforceable... (2) for purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.” Washington’s statute, Wash. Rev. Code §§ 26.26.210-260 (West Supp. 1995), says that, “a surrogate parenthood contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction shall be void and unenforceable in the state of Washington as contrary to public policy.”

gestational surrogacy. In Doe v. Attorney General, the Michigan appellate court held that a surrogate parentage contract involving the voluntary relinquishment after conception of a female’s parental rights to a child is void and unenforceable.

In Surrogate Parenting Associates, Inc. v. Armstrong, the Supreme Court of Kentucky held that a corporation’s involvement in a surrogate parenting procedure did not contravene statutory prohibition (KRS 199.590 (2)) against purchasing a child for the purposes of adoption, where the agreement to bear the child was entered into before conception. Subsequently, the Kentucky Legislature passed a statute declaring surrogate contracts valid as long as the surrogate mother is not paid.

There are only three states that have enacted extensive statutory schemes to regulate surrogacy by making certain noncommercial surrogacy arrangements legal and enforceable: Florida, New Hampshire and Virginia. These states ban payments to surrogates, but the laws contain a wide range of exceptions to allow the surrogate’s reasonable expenses to be paid because the surrogate should not be expected to pay out of pocket expenses. Virginia and New Hampshire provide a comprehensive regulatory structure, which includes medical and psychological screening and allows surrogacy contracts to be enforced if the contracts are approved by the court and meet the requirements enumerated in each state statute.

   A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation. (2) A participating party other than an unemancipated minor female or a female diagnosed as being mentally retarded or having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor... . . .
   [T]he Legislature had compelling government interests in preventing children from becoming mere commodities, protecting the best interests of children, and preventing the exploitation of women. These reasons were sufficient to justify intrusion into procreation rights of infertile couples and prospective surrogate mothers in the surrogacy context through the Surrogate Parenting Act without violation of due process.
Id. at 484.
31. 704 S.W.2d 209 (1986). The court stated that a surrogate mother who changes her mind before going through with her contractual obligation stands in the same legal position as a woman who conceives without the benefit of contractual obligations. She has forfeited her rights to whatever fees the contract provided, but both the mother, child and biological father have statutory rights and obligations that would exist in the absence of a contract.
35. Va. Code Ann. § 20-159 (1994). The provisions authorize the appointment of a guardian ad litem to represent the interests of any resulting child and also appoint counsel to represent the surrogate. The parties must have entered into the agreement voluntarily. All terms of the contract must
California is considered to be the most favorable forum for surrogacy arrangements in the United States. More than half of the country's 35-40 surrogate agencies are located in California and a majority of the estimated 1000 surrogate births each year occur in this state. The California Legislature has failed to adopt a law governing surrogacy, but the courts have created a strong line of jurisprudence favorable to enforcement of surrogacy contracts. Johnson v. Calvert was the first decision by a state supreme court to uphold a surrogate contract. The California Supreme Court held that the gestational surrogate had no parental rights to the child, affirming a lower court ruling that a gestational surrogacy contract was legal and enforceable. The court reasoned that the one who intended to "bring about the birth of a child that she intended to raise as her own—is the natural mother under California law." The court stated that invalidating the surrogacy contract would "foreclose a personal and economic choice on the part of the surrogate mother, and deny intending parents what may be their only means of procreating a child of their own genetic stock.

Previously, an appellate court upheld a traditional surrogacy agreement in In re Matthew. The court ruled that it would be in the best interests of the child to remain with the contracting parents. The surrogate released her parental rights to the child with a full understanding of what she was doing, thus the consent to adoption of the child could not be withdrawn. Following Matthew, the California law now favors the intended mother over (the genetic mother) the woman who carried and gave birth to the baby (the birth mother).

37. See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); In re Matthew, 284 Cal. Rptr. 18 (Ct. App. 1991); In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994); In re Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).
38. 851 P.2d 776 (Cal. 1993).
39. Id. at 782. The California law now favors the intended mother over (the genetic mother) the woman who carried and gave birth to the baby (the birth mother).
40. Id. at 783.
42. Id. at 24.
appellate court decided another case involving a traditional surrogacy agreement with In re Moschetta.\textsuperscript{43} Giving the holding in Johnson a narrow interpretation, the court refused to enforce the surrogate contract because the surrogate was both the biological and birth mother of the child. The court justified its position by stating that “[i]n Johnson the function of the surrogacy contract was to serve as a vessel in which the parties could manifest or express their intention... [t]he gestational surrogacy contract was never held to be enforceable per se.”\textsuperscript{44} In In re Buzzanca, the court extended its ruling in Johnson to situations in which the intentional parents are not genetically related to the child.\textsuperscript{45} The lower court used the “intended parent” standard from the Johnson case and stated, “but for their acted-on intention, the child would not exist.”\textsuperscript{46} The appellate court deemed the contracting parents as the legal parents because the child would never have been born if the contracting parents had not “agreed to have a fertilized egg implanted in a surrogate.”\textsuperscript{47} The broad range of law regarding surrogacy in the United States shows that there is no clear standard for surrogacy agreements. Great Britain, on the other hand, has enacted extensive legislation regarding surrogacy. By looking to Great Britain, as well as to various state laws, Louisiana could adopt concepts similar to those used in Great Britain and favorable American jurisdictions.

III. SURROGACY LAW IN GREAT BRITAIN

Great Britain has an extensive collection of both case law and statutory law in the area of surrogacy. Great Britain experienced its first surrogate birth when Kim Cotton was paid £6,500 ($11,610)\textsuperscript{48} in 1985 to have a baby for an infertile couple.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{43} 30 Cal. Rptr. 2d 893 (Ct. App. 1994).
\item \textsuperscript{44} Id. at 900.
\item \textsuperscript{45} 72 Cal. Rptr. 2d 280 (Ct. App. 1998). The court stated that Luanne and John, the international parents, caused the child’s conception and birth by initiating the surrogacy arrangement whereby an embryo was implanted into a woman who agreed to carry the baby to term on Luanne’s behalf. In applying the artificial insemination statute to a gestational surrogacy case where the genetic donors are unknown, there is no reason to distinguish between husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being. The California jurisprudence focuses on the intent of the parties. It should also be noted that the Buzzanca case did not involve a custody dispute as did all of the other California cases.
\item \textsuperscript{46} Jaycee B. v. Superior Court., 49 Cal. Rptr. 694, 702 (Cal. App. 1996).
\item \textsuperscript{47} Buzzanca, 72 Cal. Rptr. at 282.
\item \textsuperscript{48} The exchange rate between the British pound and the American dollar was .56 pounds per dollar in 1985.
\item \textsuperscript{49} Following the “Baby Cotton” case, Kim Cotton founded COTS—Childlessness Overcome Through Surrogacy—in 1988. COTS is a voluntary organization for couples seeking to have a child using surrogacy and for women prepared to become surrogate mothers. A subsidiary group of COTS, known as TRIANGLE, introduces infertile couples to women prepared to become surrogate mothers. The organization claims they have been involved in 250 surrogate births in the past decade. Membership in the organization has grown from 70 members to over 800.
\end{itemize}
This child became known as “Baby Cotton.”50 In this case, a surrogacy agency in the United States made a commercial surrogacy arrangement with Mrs. Cotton (the surrogate) for a couple (intentional parents) in the U.S. The local British authority intervened and made Baby Cotton a ward of court. The judge determined that the couple would be suitable parents and the child was awarded to the contracting couple. “The judge declared that his duty was to determine what was best for the child.”51 Since no application was made to adopt the child, the judge did not have to consider whether payments made to the surrogate mother would violate the adoption laws of Great Britain.

The court was forced to address this issue later in Re an Adoption Application, in which a couple agreed to pay a surrogate £10,000 ($17,860) in exchange for the mother’s bearing a child.52 The surrogate was paid only £5000 ($8,780) and the judge determined that this payment did not contravene the Adoption Act.53 The judge reasoned that the payments were to compensate the surrogate for the inconvenience and expenses of pregnancy.54

In 1982, following a series of controversial surrogacy cases, the Committee of Inquiry into Human Fertilization and Embryology was established by the British Parliament and asked to examine the ethical implications of developments in human reproduction, including surrogacy.55 The committee released the “Warnock Report”56 in 1984 with recommendations that would prohibit any third party from negotiating or otherwise assisting in the process of establishing a surrogacy arrangement. The majority of the committee members recommended that legislation make it clear beyond any possible doubt that surrogacy agreements are illegal contracts and therefore unenforceable in the courts.57 The government accepted the recommendations of the Warnock Committee and implemented part

52. (Surrogacy) [1987] Fam. 81; see Report of the Review Team, supra note 50, at 18.
53. For exchange rate, see supra note 48.
55. See Report of the Review Team, supra note 50, at 3. The terms of reference for the Warnock Committee were:
   To consider recent and potential developments in medicine and science related to human fertilization and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations.

Id. (emphasis added).
56. The report was named after Baroness Warnock who chaired the committee.
57. The Review Team interprets the Warnock majority recommendations as follows: that the clear objective of the Warnock proposals was to implement a legislative framework which strongly discouraged surrogacy arrangements, make transparent society’s disapproval of surrogacy as a practice and limited resort to surrogacy arrangements, at most, to a handful of instances where a relative or a close friend would agree to act as a surrogate on an altruistic basis. See Report of the Review Team, supra note 50, at 13.
of the recommendations in the Surrogacy Arrangements Act of 1985. This outlawed only commercial surrogacy agencies and prohibited the recruitment of women as surrogates.

To further address issues surrounding contracts for surrogate motherhood, the House of Lords approved the Human Fertilization and Embryology Act of 1990. Under Section 30 of the Human Fertilization and Embryology Act, a court may declare the intentional parents to be the legal parents of the surrogate child through a parental order. The intentional parents must apply for a parental order from the court and satisfy several requirements: 1) Each international parent must be at least eighteen years old, the couple must be married and at least one of them must live in Great Britain; 2) One of the couple must be genetically related to the child and the surrogate pregnancy cannot be established by natural intercourse; 3) The child must already be living with the intentional couple; and 4) There can be no money or other benefits paid to or received by the surrogate other than reasonable compensation for expenses incurred. The Act also provides that a Guardian ad litem will be appointed to each case and this guardian will determine if all requirements have been fulfilled.

In June 1997, the United Kingdom Health Ministers organized a committee to examine particular aspects of surrogacy arrangements that were of public concern.
There have been growing concerns in Britain that the country will become a haven for surrogacy in Europe because other European countries have much more stringent laws regarding surrogacy, and it is feared that infertile couples will come to Britain to seek out surrogate mothers. The committee was to determine if changes were needed in existing law in Great Britain. The team was asked to specifically address whether payments, including expenses, should continue to be made to surrogate mothers; whether a recognized body or bodies should regulate such arrangements; and if changes are required in existing law or current law is adequate.

The review team made several recommendations regarding the status of the law:

- First, that payments to surrogate mothers should be expressly limited to actual expenses occasioned by the pregnancy.
- Second, agencies involved in surrogacy arrangements should, as now, operate only on a non-profit making basis, and in addition should have to be registered by the Department of Health.
- Third, the UK Health Departments should develop a Code of Practice to set out minimum standards for surrogacy arrangements.
- Last, the welfare of the child should be the paramount concern of all those involved in a surrogacy arrangement.

The underlying policy in Great Britain announced by the Minister of Health is that there should not be commercialized surrogacy and any woman who has a child as a surrogate should not be forced to give up the child if she changes her mind.

After reviewing several possible forms of surrogacy law in both the United States and Great Britain, this comment suggests that a combination of several state statutes as well as jurisprudential rules established in California and Great Britain would serve as the best models for surrogacy law in Louisiana. New Hampshire
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and Virginia both have strong regulatory schemes that provide strict requirements for a surrogacy contract to be enforceable. The provisions for screening and counseling will insure that only qualified parties will be allowed to enter into surrogacy contracts and a judge will determine the validity of the contract before any procedures take place. By following the procedures laid out in the provisions of these statutes, the interests of all parties will be protected because the parties will be making informed decisions and the court will be approving the contract prior to any pregnancy.

The jurisprudential standard established in California also involves a contract theory for enforcing surrogacy arrangements. The "intended parent" standard established in Johnson v. Calvert ensures that the parties contracting to become parents of the resulting child will be responsible for that child because it is their intention to bring the child into the world. The agreement made between the parties will be enforced as a contract based on the intention of the parties.

The law of Great Britain also adds several positive aspects to the proposed statute. The proposed statute contains a rule that any person or agency acting as an intermediary and intending to bring together surrogate mothers with couples or individuals who desire a child through surrogacy may operate only on a non-profit basis. This will help eliminate the possibility of any parties to the surrogate contract being taken advantage of by another, thus eliminating commercial surrogacy. These intermediaries will have nothing to gain by coercing parties to enter into surrogate agreements because there will be no fee received. This will facilitate the giving of honest, straightforward information to make sure that all parties are informed of both the positive and negative aspects of the surrogate arrangement and that all parties are entering into the contract with full consent.

Another British rule incorporated into the proposed statute is that the surrogate mother be compensated only for reasonable expenses incurred during the pregnancy. The surrogate may not be paid for surrendering her parental rights to the child. This makes the statute one governing non-commercial surrogacy because the surrogate is only being paid for her services and not for the surrender of the child. This type of surrogate arrangement is in the best interest of all parties involved. While the elimination of a fee does discourage surrogacy, it does not make a surrogate contract impossible and in many cases, a feasible arrangement can be established.

The ideal surrogate is one who has no problems with pregnancy. Therefore, she should be able to continue any employment until a reasonable time before birth and may resume employment as soon as recovery is complete, making a loss of income minimal. The fact that the surrogate will incur no living expenses,
because the contracting individuals will reimburse the surrogate for these expenses during the term of the pregnancy, will also save the surrogate a good deal of money and could be equal to payment because these are expenses she would normally incur. She will have no expenses for medical care, clothing and many other expenses that may be paid for or reimbursed by the contracting party. Overall, the surrogate can save a great deal of money throughout the pregnancy if she is employed and/or has another source of income.

Through a proper regulatory scheme, contracts for surrogate birth should be enforceable and the most effective way to regulate surrogacy. Many argue that surrogate contracts exploit and dehumanize women. This argument suggests that women are not capable of making informed choices. The surrogate has the right to enter into a contract to gestate a child for a contracting party. This is her personal choice, and to argue that this choice exploits women classifies women as individuals who are not capable of making informed choices and are in essence incompetent. A woman is well-qualified and quite capable of making informed decisions and exercising her right to enter into a contract. She will be well informed of all risks associated with pregnancy and the surrogate contract itself. In fact, the enforcement of a surrogate contract actually protects the parties involved by giving them a legal avenue to deal with any problems that arise. If surrogate contracts are declared to be illegal, many parties may be inclined to take the law into their own hands. This type of action cannot benefit any party to the contract. The safest and most effective way to enforce surrogate contracts is through legislation. Because of the increasing number of infertile women who desire a child of their own, declaring surrogate contracts illegal will force women to form surrogate arrangements underground. Making surrogate contracts illegal cannot stop surrogacy; it only forces women to resort to unregulated means to obtain a child.

There are many reasons to have surrogacy laws, but the main concern should be for the enforcement of regulations protecting all parties involved in a surrogacy agreement. The variety of laws governing surrogacy mentioned above provide valuable guidance for the following statute. As mentioned previously, Louisiana has formed a task force to study and make proposals regarding possible new laws on assisted conception. The task force plans to include surrogacy in its review. The following proposed statutory scheme could serve as a model for any future Louisiana legislation.

reasonable living expenses are being paid because she will be allowed to save all of this money when the contracting individual(s) are paying her living expenses.

72. The COTS organization welcomes regulation and would like to become "licensed" to assist in surrogacy arrangements. They are concerned about underground surrogacy and are worried that many arrangements are made without any advice or support or with advice from individuals or organizations of questionable integrity.

73. 1999 Louisiana Senate Concurrent Resolution No. 141.
IV. PROPOSED MODEL STATUTE ON SURROGACY

Purpose:

(a) An act to declare noncommercial surrogacy contracts permissible if all parties to the contract comply with the following provisions and to establish consistent standards to regulate surrogacy in order to protect all parties involved in a surrogacy arrangement, placing a priority on benefiting the best interests of the intended child. 74

(b) The legislature acknowledges that surrogacy arrangements take place and there are many moral, ethical, social and practical issues involved in such arrangements. This is a sensitive area of public policy. The legislature also recognizes that surrogacy cannot be ignored or prohibited despite these sensitive issues. Otherwise, these types of arrangements will be formed secretly and/or become completely unregulated and all parties involved will suffer. 75 Regulation can ensure that surrogacy agreements will meet a certain minimum standard.

COMMENTS

Treating a surrogate contract as null and void and contrary to public policy 76 will not end the practice of surrogate motherhood. Infertile couples are increasingly turning to surrogate arrangements to enable the couple to have a child. Unenforceable surrogacy contracts will not deter a desperate couple from entering into such an agreement. Creating a statutory scheme will regulate the practice of surrogacy and ensure that the process will be carried out properly so the parties will be able to make informed decisions to enter into a binding agreement.

TITLE I

GENERAL PROVISIONS

Article 1000. Definitions:

The following terms shall have the listed meaning when used in this Article.

(1) "Artificial Insemination" means the introduction of semen, an embryo or zygote into a woman's vagina, cervical canal or uterus through extracorporeal means. 77 This can be achieved by two methods:

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75. COTS believes that underground surrogacy frequently occurs and that the parties to these agreements do not have proper guidance and cannot make informed choices.

76. This is the current language used in Louisiana Revised Statutes 9:2713 (1991), which governs surrogacy contracts.

77. See N.H. Rev. Stat. Ann. § 168-B:1 (1994). The source of the semen, embryo, or zygote can be from the surrogate mother, the intentional father, the intentional mother or a donor. Levitt, supra
a. "In vivo fertilization," when the egg of the surrogate is fertilized by sperm that is inseminated into the surrogate’s uterus.

b. "In vitro fertilization," the process by which an egg is fertilized with sperm outside of the body through medical or laboratory procedures and the resulting embryo is implanted in the surrogate’s uterus for gestation.78

(2) “Birth Mother” means a woman who gestates an embryo conceived through insemination, in vivo or in vitro fertilization or as a result of a surrogacy contract.79

(3) “Informed Consent” occurs when a competent person makes a voluntary decision about whether or not to participate in a proposed medical procedure or contractual arrangement that is based on a full awareness of the relevant facts. The relevant facts include:
   a. The medical and psychological risks;
   b. The legal, financial and contractual rights and obligations;
   c. The available alternatives, including the alternative of not participating in any procedure or arrangement and the risks and obligations associated with each alternative.80

(4) “Intentional Parent(s),” including “intentional mother” and/or “intentional father,” means person(s) who enters into a surrogacy contract with a surrogate mother by which he (they) are to become the parent(s) of the resulting child, regardless of the genetic relationships between the intentional parent(s), the surrogate and the child.81

(5) “Compensation” means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs.82

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note 74, at 473-75. These procedures replace sexual intercourse as a means of conception.

78. In accordance with Louisiana Revised Statutes 9:128 (1991), artificial insemination will only be permitted under medical supervision. Procedures that can be done in one’s home will not be permitted under this article.


80. Va. Code Ann. § 20-156 (Michie Supp. 1996). Levitt, supra note 74, at 475-76. Informed consent is a key area of criticism for many opponents of surrogacy. When comparing surrogacy with adoption, surrogacy contracts do not pose the same risks as do adoption contracts. In adoption, a woman who is already pregnant must choose to give up a baby that she conceived. Adoption laws were developed to prevent such a woman from being coerced to give up her child without full knowledge of her options. Contrary to adoption, surrogacy contracts are prearranged and the surrogate mother can negotiate any terms she feels are necessary. The surrogate voluntarily agrees to relinquish her rights to the child prior to conception where an adoptive mother is already with child and is attempting to find a home for that child.

81. Va. Code Ann. § 20-156 (Michie Supp. 1996). Model Act, supra note 79, at 952. Although surrogate contracts are most often utilized by infertile couples, there is no provision limiting such arrangements from being used by other individuals. It is unclear from both Louisiana and United States jurisprudence, but limiting surrogate arrangements to only infertile couples could infringe on an individual’s right to privacy or could violate the equal protection clause of both the Louisiana and United States Constitutions. Furthermore, Louisiana Children’s Code article 1198 allows unmarried persons to adopt.

“Reasonable medical and ancillary costs” includes the costs of the performance of artificial insemination, and also includes expenses such as: expenses to travel to and from the hospital, legal and counseling fees, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable postpartum period, the reasonable costs for medication and vitamins, maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy.83

“Surrogacy Contract” means an agreement between the intentional parent(s), a surrogate, and her husband, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intentional parent(s) the custody of and parental rights to any resulting child.84

“Surrogate” means any adult woman who agrees to bear a child carried for the intentional parent(s).85

“Intended Child” refers to the child that is intended to result from the surrogacy contract.

“Person” means any individual or surrogate agency.

“Licenced Person” refers to any person who has obtained a license from the Department of Health and Hospitals to perform surrogate procedures.86

83. Va. Code Ann. § 20-156 (Michie Supp. 1996); N.H. Rev. Stat. Ann. § 168-B:23 (1994). This is an illustrative list. The above costs are not limited to only those enumerated. The COTS organization suggests that a surrogate mother be reimbursed for the loss of actual earnings, payment of insemination costs, maternity clothes, food, travel, child daycare, medical and psychological expenses, as well as the solicitor’s costs together with life insurance payments. See also, Louisiana Children’s Code article 1223 which defines the permissible reimbursement of expenses made to the biological parent during an adoption proceeding. What expenses are beyond reasonable shall be determined by the court.


85. Va. Code Ann. § 20-156 (Michie Supp. 1996). Id. Louisiana Revised Statutes 9:130 (1991) currently states that if the in vitro patients renounce, by notarial act, their parental rights for the utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation and the in vitro fertilization patients may renounce their parental rights in favor of another married couple. This statute will not limit such options only to married couples. Any individual may be considered for a surrogate arrangement.

86. According to Louisiana Revised Statutes 40:1062.1 (1992), the Department of Health and Human Services shall promulgate laws regarding artificial insemination services. Louisiana Revised Statutes 9:128 (1991) states that only medical facilities meeting the standards of the American Fertility Society and the American College of Obstetricians and Gynecologists and directed by a medical doctor licensed to practice medicine in the State of Louisiana and possessing specialized training and skill in in vitro fertilization also in conformity with the standards established by the American Fertility Society and the American College of Obstetricians and Gynecologists shall cause the in vitro fertilization of a human ovum to occur. No person shall engage in in vitro fertilization procedures unless qualified as provided in this section.
Article 1001. Surrogacy Contracts Permissible:

A surrogate, her husband, if any, and the prospective intentional parent(s) may enter into a written agreement whereby the surrogate agrees to relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intentional parent(s) may become the parent(s) of the child as long as the provisions of this statute are upheld.\textsuperscript{77}

Article 1002. Eligibility:

A. A woman may become a surrogate mother only if she meets the following requirements:

1. She must be at least 18 years old;\textsuperscript{88}
2. She must be medically examined and have documentation of at least one pregnancy and viable delivery in her history;
3. The surrogate must undergo medical and psychological examination and seek regular counseling; and
4. The surrogate’s husband, if any, must also receive appropriate counseling.\textsuperscript{89}

B. The intentional parent(s) may enter into a surrogacy agreement only if he (they) meets the following criteria:

1. The intentional parent(s) must be over the age of 18;\textsuperscript{90}
2. The intentional mother must be medically diagnosed as infertile or physically unable to bear a child without serious risk to her health or that of the child;
3. The intentional father or a donor must provide sperm to be used to impregnate the surrogate;
4. The intentional mother, the surrogate or a donor must provide the ovum;

\textsuperscript{77} Va. Code Ann. § 20-159 (Michie Supp. 1995). For a surrogate contract to be enforceable, all of the requirements laid out in this statute must be complied with. If any party fails to comply with any term of the contract, it will then become invalid and unenforceable.

\textsuperscript{88} This is the age of majority in Louisiana when a person has capacity to enter into a legally binding contract. The age requirement of eighteen will not infringe on a minor’s constitutional right to procreate because this statute is not prohibiting a minor from becoming a surrogate mother. This statute is simply stating that a woman must be eighteen to enforce a surrogate contract. To allow a tutor to contract for a minor would constitute an immoral cause in Louisiana and thus make the contract unenforceable. Allowing a tutor to contract for a minor could allow the tutor to force the minor to keep the child or give it up because the tutor would be responsible for the enforcement of the contract and this type of act is contrary to public policy in Louisiana.

\textsuperscript{89} Levitt, \textit{supra} note 74, at 481-82; N.H. Rev. Stat § 168-B:13 (1994). The counseling provided will inform the surrogate and her husband of all risks involved with the surrogate arrangement and help the surrogate and her husband to cope with all of the emotional aspects of the surrogate contract. The counseling will be both for mental health and legal aspects of the surrogacy agreement. See La. Ch. C. arts. 1120-21.

\textsuperscript{90} Again, this is the age of majority in Louisiana at which legal capacity to contract is given. This provision is not limited to married couples.
5. The intentional parent(s) must meet the qualifications for parenthood under Louisiana Adoption Law; and
6. Both the intentional mother and/or intentional father must undergo counseling regarding the surrogacy arrangement.\textsuperscript{91}

**COMMENTS**

(a) The surrogate must have had at least one viable birth prior to entering into the surrogate contract. This will help reduce the chance of complications with the pregnancy and to insure the contracting individual(s) have a viable chance that the surrogate can carry the child to term.

The surrogate must comply with the examinations required to make sure that the surrogate has the physical and emotional capacity to carry out the surrogacy agreement. These examinations can identify any potential problems that may arise before there is a breakdown between the surrogate and the contracting individual(s).

(b) The requirement that the intentional mother be medically diagnosed as infertile will protect the surrogate from exploitation.\textsuperscript{92} This requirement prevents surrogate motherhood contracts from becoming a form of convenience for women who do not want to give birth to a child themselves. This provision does not limit surrogacy to only infertile couples.\textsuperscript{93}

There is no requirement that any party to the contract must also provide the sperm or the ovum for the fertilization and implantation of the surrogate. Either component or both may be furnished by a donor. This will apply for both traditional and gestational surrogacy because there will be no distinction made regarding the genetic contribution made by the parties.\textsuperscript{94}

The contracting individuals will be judged by the same criteria that is used for private placement adoptions in Louisiana. Determination of eligibility for becoming an intentional parent(s) of a surrogate child will be determined by the same standards used in the adoption process to decide if the parents will provide a suitable home for the child.\textsuperscript{95}

\textsuperscript{91} Model Act, supra note 79, at 975; Levitt, supra note 74, at 475-76. The counseling will help the contracting person(s) to interact with the surrogate and will also help the intentional parent(s) to cope with their loss if the surrogate mother chooses to keep the child after birth. The contracting person(s) will also learn of all legal and social aspects of the surrogate contract through counseling.

\textsuperscript{92} This is an issue that opponents of surrogate motherhood identify as a risk that is too great to justify the practice of surrogacy. If any person can pay someone else to bear a child and then turn the child over and relinquish parental rights then the practice of surrogacy could be exploited. Rae, supra note 10, at 56-58.

\textsuperscript{93} There is no statement in the article limiting surrogacy options solely to women. Men are physically incapable of bearing children, therefore, it is not impossible for a homosexual couple to enter into a surrogacy contract.

\textsuperscript{94} The two types of surrogacy are distinguished based on the genetic makeup of the resulting child. This statute will not base contract enforcement or determination of child custody on the genetic makeup of the child but will use the intent of the parties as the major factor for enforcement.

Article 1003. Regulatory Procedures:

A. A surrogate arrangement is lawful only if the following requirements are fulfilled prior to the procedure to impregnate the surrogate:
   1. The licenced person performing the procedure receives written certification that the parties successfully completed the medical and non-medical evaluation and counseling pursuant to Article 1002;96
   2. The surrogate arrangement has been preauthorized by the court pursuant to Article 1004;97
   3. All parties to the surrogacy contract provide the licenced person performing the procedure with written indication of their informed consent to the arrangement.98
   4. The procedure to impregnate a surrogate shall be performed only in accordance with the regulations issued by the Department of Health and Human Services.99

No person shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, any party or parties to enter into a surrogacy agreement.

COMMENTS

(a) The written certification will be used as a screening process. The surrogate as well as the intentional parent(s) must pass both the medical and non-medical exams and the counselor must determine that each party to the contract has the psychological ability to fulfill his obligation.

According to Louisiana law, only qualified medical facilities may engage in artificial insemination procedures. Therefore, surrogate procedures must be carried out by a qualified professional in a medical facility. Any attempt to complete the procedure in any other manner will eliminate the ability of any party to the contract

96. The Department of Health and Hospitals will furnish a list of psychologists and counselors that may be used by the parties but they are not limited to using only the physicians and counselors on this list. The only stipulation is the examinations be performed by a licensed person according to this article.

97. If the parties fail to comply with this provision, in the event of a breach by any party, the court will not award damages to any party to the surrogate contract.

98. This will be evidenced by an affidavit signed by the licensed person performing the counseling that the individuals are informed and have voluntarily consented to the agreement.

99. Model Act, supra note 79, at 973. Levitt, supra note 74, at 475-76. According to Louisiana Revised Statutes 40:1062.1 (1992), the Department of Health and Human Services shall promulgate laws regarding artificial insemination services. Louisiana Revised Statutes 9:128 (1991) states that only medical facilities meeting the standards of the American Fertility Society and the American College of Obstetricians and Gynecologists and directed by a medical doctor licensed to practice medicine in the state of Louisiana and possessing specialized training and skill in in vitro fertilization, also in conformity with the standards established by the American Fertility Society and the American College of Obstetricians and Gynecologists, shall cause the in vitro fertilization of a human ovum to occur. No person shall engage in in vitro fertilization procedures unless qualified as provided in this section.
to have the contract enforced or bring an action for damages against the breaching party.

(b) This provision is meant to ensure that any agency responsible for surrogate arrangements acts only on a non-profit basis. This article only permits noncommercial surrogacy and operation by surrogate agencies only on a nonprofit basis.

**Article 1004. Hearing and Validity of the Surrogacy Arrangement:**

A. Prior to the performance of assisted conception, the intentional parent(s), the surrogate and her husband, if any, shall join\(^ {100} \) in a petition to the circuit court of the parish or city in which at least one of the parties resides. The petition should contain the following:

1. The full names, ages and residences of all petitioners;
2. A copy of the contract signed by all parties;
3. All required written consents;
4. All evaluations and reports required in this statute; and
5. The name and address of the person who will perform the procedure.\(^ {101} \)

B. The court shall appoint a guardian ad litem to represent the interests of any resulting child and shall appoint counsel to represent the surrogate, if the surrogate cannot obtain counsel on her own. The contracting parents shall be responsible for the fees regarding the appointment of the guardian ad litem and counsel for the surrogate.\(^ {102} \)

C. The court shall hold a hearing within 30 days of the filing of the petition and will validate the surrogacy agreement only if the following findings are made by the court:

1. All parties have given their full informed consent;
2. The surrogacy contract conforms to all of the requirements of this statute and contains no prohibited or unconscionable terms;
3. The required evaluations and counseling have been completed and all parties involved have been determined to be competent to continue with the surrogacy agreement;
4. The surrogacy contract is in the best interest of the intended child.

D. The effect of the judicial order shall be the automatic termination of the parental rights of the surrogate and her husband, if any, after the birth of a child born as a result of the arrangement and a vesting of those rights solely in the intentional parent(s), unless the surrogate exercises her right under Article 1005 to

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\(^ {100} \) Having all parties to the contract jointly petition the court is evidence of the informed consent of all parties to the surrogacy agreement.


\(^ {102} \) See *Report of the Review Team,* supra note 50, at Annex B. The guardian ad litem is a specialist in social work who will act as an officer of the court to safeguard the best interests of the child. The guardian is to evaluate all parties to the contract and determine if consent to the agreement was given freely and all parties to the contract fully understand what is involved with the contract; *Va. Code* § 20-160 (Michie 1995). The surrogate may also have the intentional parent(s) pay her legal fees if she so stipulates in the contractual agreement.
keep the child, in which case any parental rights of the intentional parent(s) are terminated and shall be vested solely in the surrogate and her husband, if any. 103

COMMENTS

(a) The purpose of the hearing and validation article is to describe the procedures that must be followed in order to have an enforceable contract for surrogate motherhood. This process must be done prior to the impregnation of the surrogate. The goal of this hearing and validation process is an attempt to avoid long, drawn out court proceedings 104 when the surrogate agreement fails. This process is designed to establish the rights and duties of each party prior to the insemination of the surrogate mother. By establishing each party’s duties in advance, the court can easily rule regarding a breach of the contract.

(b) By showing that all requirements for a surrogacy agreement have been complied with, the parties to a surrogacy agreement have created a valid and enforceable contract and, in the event of a breach, the parties are entitled to recover damages.

Article 1005. Mandatory Terms of a Surrogacy Contract:

A. In order to be valid, a surrogacy contract must be signed by the intentional parent(s), the surrogate, and, if she is married, the surrogate’s husband. The contract shall contain the following provisions:

1. The consent of the surrogate that she and her husband, if any, will surrender custody of the child or accept the obligation of parenthood, if the surrogate gives notice of her intent to keep the child as provided in paragraph 5 of this Section;
2. Once impregnated the surrogate may not choose to have an abortion or be forced to undergo such a procedure; 105

103. In the event the surrogate mother chooses to keep the child, the intentional parent(s) will be entitled to recover any expenses paid to the surrogate mother regarding the implantation and pregnancy of the surrogate and any other damages provided for in the contract between the parties.
104. This statute is attempting to avoid cases such as Baby M, 537 A.2d 1227 (1988).
105. The sole exceptions where the surrogate mother will be permitted to undergo abortion procedures will be if a medical professional determines that the life of the surrogate mother is in danger. This process will be acceptable to prevent harm to the surrogate mother. The intention of the parties is to bring a child into the world; therefore, there is no reason other than danger to the life of the surrogate mother for an abortion to take place. Although this provision may violate a woman’s right to privacy, the surrogate mother is contracting to bear a child. Therefore, any abortion procedure for reasons other than to save the life of the mother will constitute a breach of the contract. See generally, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739 (1973) (requiring that abortions be performed only in accredited hospitals); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976) (requiring spousal consent prior to an abortion); Webster v. Reproductive Health Servs., 492 U.S. 490, 109 S. Ct. 3040 (1989) (the state can prevent state facilities and resources from being used for abortions); Planned Parenthood v. Casey, 510 U.S. 1309, 114 S. Ct. 909 (1994) (a Pennsylvania law that requires a woman to wait 24 hours before having an abortion, notify her husband if married, notify her parents if a minor and receive counseling about alternatives is constitutional).
3. The consent of the intentional parent(s) that he (they) shall accept the obligations of parenthood, unless the surrogate gives notice to keep the child. 106

4. A mandatory damage clause in accordance with Article 1006; and

5. The surrogate has the right to keep the child if at any time prior to 5 days after the birth of the child the surrogate:
   a. Executes a signed writing of her intention to keep the child; and
   b. Delivers the writing to the intentional parent(s), the attending physician, or the hospital medical director. 107

B. The right contained in paragraph 5 of Section A of this article may only be exercised by the surrogate. 108

C. If the surrogate will receive a fee, the fee shall be limited to reasonable medical and ancillary costs. The costs to be covered must be stated in the contract. 109

COMMENTS

(a) The surrogate will have 5 days to determine if she will transfer her parental rights to the intentional parent(s). Louisiana adoption law provides the birth mother 5 days to determine if she will give up the child for adoption. 110 Although the surrogate arrangement is different from adoption because the surrogate has prearranged the contract to surrender parental rights before pregnancy, while the mother surrendering her child for adoption is faced with pregnancy before deciding to surrender parental rights, the time limits should remain consistent. This time limit is designed to make sure a mother who has pregnancy complications or must undergo a cesarian section and will not fully recover for several days has the

106. In the event that the child is born with birth defects or other mental disorders and the intentional parent(s) refuse to accept the parental rights transferred by the surrogate, the child shall become a ward of the state. Although the child shall become a ward of the state, the intentional parent(s) shall bear sole responsibility for the child and shall be charged with the financial obligations regarding the child. A breach by the intentional parent(s) will not release him (them) from his (their) contractual obligations. Model Act, supra note 79, at 980.

107. These requirements insure that it is truly the surrogate's choice to keep the child and there are no outside pressures placed on the surrogate mother.

108. Although the surrogate's husband, if any, must also consent to relinquish any parental rights to the child, the contract is made with the surrogate for her services, therefore she is the only party to the contract entitled to choose to retain parental rights to the child.

109. Note that reasonable medical and ancillary costs are defined in Article 1000. This is an illustrative list. The above costs are not limited to only those enumerated. The COTS organization suggests that a surrogate mother be reimbursed for the loss of actual earnings, payment of insemination costs, maternity clothes, food, travel, child daycare, medical and psychological expenses as well as the solicitor's costs together with life insurance payments. The Review Team chose to recommend the following expenses be paid by the commissioning couple: maternity clothes, health food, domestic help, counseling and legal fees, life and disability insurance, travel to and from the hospital, medical expenses, telephone and postal expenses, overnight accommodation, ovulation and pregnancy tests, insemination and in vitro fertilization costs and medicine and vitamins. See Report of the Review Team supra note 50, at 25, 48.

110. La. Ch. C. art. 1130 states in pertinent part: "No act of surrender by a mother shall be executed earlier than five days following the birth of the child."
opportunity to make a clear, informed decision to surrender parental rights to the child. Childbirth is an extremely emotional event and this time limit will allow the surrogate mother to recover physically and mentally and make a decision based on clear reflection. This is done to protect both the child and the surrogate.111

Article 1006. Damages:

A. The remedy of specific performance will not be available for a breach by the surrogate of the contract.112
B. The intentional parent(s) may recover all health care expenses and any other expenses paid pursuant to and specifically listed in the surrogate contract if:
   1. The surrogate mother refuses to become impregnated.
   2. The surrogate elects to keep the child as provided in Article 1005(A)(5).
   3. The surrogate undergoes abortion procedures for reasons other than to save the life of the surrogate.
C. If the intentional parent(s) breach any term of the contract, the surrogate may:
   1. Recover any expenses the intentional parent(s) is required to pay according to the contract. The surrogate may not recover any fees not provided for in the surrogacy contract.113
   2. If the intentional parent(s) refuse(s) to accept the child after the surrogate mother has chosen to relinquish parental rights to the child, the surrogate mother may choose to keep the child or turn the child over to the Department of Social Services. In either case, the intentional parent(s) will be responsible for the financial care of the child.114

COMMENTS

(a) Requiring the surrogate mother to refrain from behavior that could be harmful to the health of the child is not the same as a requirement for specific performance.
(b) The return of any fees and expenses other than health care expenses must be specifically provided for in the surrogacy contract. This will enable the court system to rectify the injured party's position as soon as possible following a breach of the contract.
(c) Regardless of the reason the intentional parent(s) has for refusing to accept the child once the surrogate agrees to relinquish all parental rights, the intentional parent(s) will remain financially responsible for the child because the prenatal

111. Model Act, supra note 79, at 983; See La. Ch. C. art. 1122 B(1).
112. Model Act, supra note 79, at 985; Levitt, supra note 74, at 502.
113. The intentional parent(s) will remain financially responsible for all obligations to the surrogate mother regardless of the breach. These fees include all medical and ancillary costs enumerated in the surrogate contract.
114. Whether the intentional parent(s) decide to raise the child or make the child a ward of the state, the intentional parent(s) will be responsible for the expenses of the child such as, but not limited to: living, education, medical or other ancillary costs.
intent of the intentional parent(s) was to bring a child into the world and once the contract begins, this intent is irrevocable. The intent to produce a child carries with it the intent to accept the responsibility to care for the child. The intentional parent(s) will not be relieved of this responsibility.  

V. CONCLUSION

Surrogacy contracts are made in Louisiana each year. There are an increasing number of infertile couples and individuals who desperately desire a child who they can raise from birth as their own. It is the duty of the legislature to pass laws to protect the citizens of Louisiana and ensure that all of the benefits of reproductive technology are available to every member of our society. By ignoring surrogacy and the issues surrounding the contractual arrangement, the legislature is not ensuring that the best interests of the Louisiana citizens are served and most importantly, that our children are protected.

Through regulation, all parties to a surrogacy contract can be protected. Precautions can be established to help ensure lasting arrangements because informed parties agreed to the contract and the best interests of the intended child are protected. Declaring surrogate contracts illegal or contrary to public policy is not effective and leaves the door open to illegal arrangements with no opportunity for valid enforcement through our legal system. The Louisiana task force should focus on this model statute when deciding how to approach the increasingly technical world of reproduction and implement the above provisions to regulate surrogacy agreements.

Amy Garrity

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115. The use of reproductive technology is an unambiguous indicator of intent. Users of such technology intend to produce a child and intend to care for that child. Use of the surrogate method, manifesting procreative intent, should give rise to the legal presumption that the child belongs to those intending to bring the child into existence. Prenatal intent should govern the ultimate outcome of the surrogacy contract. Levitt, supra note 74, at 502.