



**House
Legislative
Analysis
Section**

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SURROGATE PARENTING

Senate Bill 228 (Substitute H-6)
First Analysis (6-8-88)

RECEIVED

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Sponsor: Senator Connie Binsfeld
Senate Committee: Health Policy
House Committee: Judiciary

Mich. State Law Library

THE APPARENT PROBLEM:

For today's infertile couples—an estimated 3.5 million in the United States—a number of scientific breakthroughs, including surrogate parenting, offer hope in the quest to start a family. A surrogate parenting agreement, commonly referred to as "surrogacy," typically is a contract in which a woman agrees to be artificially inseminated with the semen of a man who wants a child, to bear and give birth to the child, and to surrender her parental rights to and responsibilities for the child to the baby's biological father and his wife. From its beginnings, surrogate parenting, especially when done for a fee, has raised ethical questions. Controversy surrounding this practice was heightened several years ago when a Michigan surrogate mother's baby was born with potentially severe handicaps, repudiated by the man who had contracted with the mother, and subsequently determined to be fathered by the surrogate mother's husband. Opponents of the practice point to this case as the exemplification of a number of their concerns. These concerns include the fear that undue emphasis will be placed on producing a "perfect" child by surrogate parenting arrangements that interject money—sometimes as much as \$25,000, including a fee for the surrogate mother, and legal and medical costs—into the childbearing process.

Surrogate parenting issues received fresh attention with a number of recent cases reviewed in court and the media. In February 1988, the New Jersey Supreme Court decided In the Matter of Baby M (No. A-39-87), the well-known case where a surrogate mother fought for custody, despite having agreed in a contract to relinquish the baby to the biological father and his wife. The court held that a surrogacy contract that provided money for the surrogate mother and included her irrevocable agreement to surrender her child was invalid and unenforceable. The surrogacy contract violated New Jersey statutes and public policy, including statutes prohibiting the use of money in connection with adoptions and limiting termination of parental rights, and policies that custody be awarded in the best interests of the child and that the rights of a natural father and a natural mother are equal.

A case that arose more recently and closer to home was Yates v. Keane, in which the surrogate mother of twins sought to keep her children in violation of a surrogacy contract. The Gratiot County circuit court ruled in January 1988 that surrogate parenting contracts are against public policy and thus are invalid and unenforceable. Concerns for the rights of the child and human dignity were emphasized in the decision.

Finally, a situation that did not go to court demonstrates another aspect of surrogate parenting issues. In that case, a surrogate mother gave birth to twins, one a boy and the other a girl, but the contracting couple only wanted the girl. The young surrogate mother, who had not planned to enlarge her family, was left to decide whether to keep the other child, which she eventually did.

While sympathizing with infertile couples, to many it appears that the complications of surrogacy agreements, including the risks of emotional harm to children and families, warrant strong statutory measures.

THE CONTENT OF THE BILL:

The bill would create the Surrogate Parenting Act, establishing criminal penalties for involvement in a for-pay surrogate parenting contract and making surrogate parentage contracts void and unenforceable as contrary to public policy. The bill would take effect September 1, 1988, providing House Bill 4395 and Senate Bill 171 were enacted into law. (House Bill 4395 and Senate Bill 171 would require the divestiture of various public pension fund assets in companies doing business in South Africa.)

Ban on contracts for compensation. It would be against the law for a person to enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation. Such contracts would include both "surrogate mother" contracts where the woman conceived a child through insemination and "surrogate carrier" contracts where the woman gestated a child following the transplant of an embryo not genetically related to her. "Compensation" would be anything having monetary value other than payment for expenses incurred as a result of the pregnancy and the actual medical expenses of the surrogate mother or carrier.

Penalties. The bill would establish penalties that varied according to circumstances, with stiffer penalties applying to third-party arrangers of contracts and to persons involved in a contract that made a surrogate of an unemancipated minor or a mentally ill or developmentally disabled woman.

It would be a misdemeanor punishable by a fine of up to \$10,000 and imprisonment for up to one year for a participating party to knowingly enter into a surrogate parentage contract for compensation. (A "participating party" would be a biological mother or father, a surrogate carrier, or the spouse of any of them.)

Someone other than a participating party who assisted in the formation of a surrogate parentage contract for compensation would be guilty of a felony punishable by a fine of up to \$50,000 and imprisonment for up to five years. The same penalty would apply to anyone who entered into or assisted in the formation of a surrogacy contract under which an unemancipated minor or a mentally ill or developmentally disabled woman was a surrogate mother or carrier.

Custody. If a custody dispute arose over a child born under a surrogate parentage contract, the party having physical custody could retain custody until the court ordered otherwise. The court would award legal custody based on a determination of the best interests of the child, as that

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term is defined in the Child Custody Act. (NOTE: the bill does not specify which court is to have jurisdiction over the matter.)

HOUSE COMMITTEE ACTION:

The House Judiciary Committee adopted a substitute bill that differs from the Senate-passed version in its tie-bars to the divestiture legislation, in its proposed effective date, in its definition of "compensation," and in its provisions affecting custody. The Senate-passed bill would have declared the surrogate mother and her spouse to be the legal parents and entitled to custody of a child born under an insemination contract, while the legal parents of a child born to a carrier under an embryo transplant contract would have been the biological parents. Unlike the Senate-passed bill, the committee substitute would allow non-medical pregnancy expenses to be paid without being considered compensation prohibited by the bill.

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill would have no fiscal implications. (6-8-88)

ARGUMENTS:

For:

Surrogate parenting, especially for a fee, is an offense to basic human values and should not be condoned by the law. Surrogacy arrangements treat babies as commodities and surrogate mothers as mere rented wombs. The surrogate simply incubates the child under the contractual supervision of doctors, lawyers, and a couple whose sole interest is the acquisition of an acceptable baby. The practice of commercialized surrogate parenting should be prohibited—babies are not objects that should be bought and sold, and motherhood and a woman's reproductive ability should not be devalued by turning them into mere commodities. Indeed, the very term "surrogate mother" is a misnomer that devalues the woman's contribution and position. The "surrogate" mother is the child's natural, biological mother.

For:

There is reason to fear that surrogate parenting, and especially commercialized surrogate parenting, will lead to the use of abortion to reject unsatisfactory infants. The parties to the contract are, after all, engaged in producing a "made-to-order" baby, for financial compensation. The natural father and the surrogate mother could agree in the contract that the child be aborted, if pre-natal testing should show the child to be defective in some way, or to be the "wrong" sex. In fact, some surrogate mothers have reported that their contracts stipulated that their compensation from the contracting couple would have been reduced if a "defective" baby had been delivered. Also noteworthy is the Michigan case of a woman who delivered twins, only one of whom was wanted by the contracting couple. Even though the courts have ruled that women have a right to choose abortion, the state should not allow a practice that trivializes the decision by treating the child as a product and dilutes the mother's authority by involving other parties.

For:

Surrogate parenting arrangements, especially those completed for a fee, have the potential for causing serious trauma to a number of different people caught up in its effects. The surrogate mother's decision about whether to keep or give up the child she carries cannot be made freely when there is a binding legal contract and significant

compensation involved. As a result, she may grieve over the child she gives up or suffer from profound guilt. If she is married, her husband's resentment about her carrying and bearing another man's child, even if she is being paid for doing this, may irreparably harm their marriage. A surrogate mother's other children may become obsessed with their mother "giving away" the baby and worry that they, too, may be sold some day. Finally, children born under a surrogate parenting arrangement may be devastated by the knowledge that they were conceived and born for a fee, in effect sold by their natural mother.

For:

By inducing women, particularly poor women, to hire themselves out as mercenary baby-making factories, surrogate parenting is the most extreme form of sexual exploitation. In its attempt to force a woman to yield up her control over her body and her right to her children, surrogate parenting is analogous to indentured servitude or slavery.

Response: The argument that surrogate parenting exploits women is patronizing. In fact, the bill discriminates against women, implying that they do not have the intelligence or moral sophistication to make satisfactory choices about participating in such financial arrangements. No one has suggested that men who sell their sperm to sperm banks are being exploited.

For:

The bill would not prohibit all surrogate arrangements in the state, but would prohibit those performed for compensation beyond the expenses of pregnancy and related health care. By outlawing commercial gain and setting stiff penalties, the bill would eliminate the profit motive from these arrangements, and recognize that surrogate motherhood is not a business deal. Babies would not be for sale in Michigan, but a woman could, out of love for a family member or close friend, carry and deliver a baby for another.

For:

The bill would indirectly resolve an uncertainty in the Michigan Adoption Code. Under the code, a surrogate mother may give her consent to the wife of the child's father to adopt the baby. The code, however, is vague on the payment of a fee. While the code does not specifically prohibit payments to a surrogate mother, the code does specify that there can be no payment, except for charges and fees approved by the court (MCL 710.54). Theoretically, a judge could rule that a \$10,000 fee paid to the surrogate mother was allowed under the law. The bill would make it clear that no compensation would be allowed, except for certain expenses.

Against:

Making contracts unenforceable and prohibiting compensation would be tantamount to prohibiting surrogacy arrangements. Approximately 9 out of 10 surrogate parenting contracts reportedly are arranged with a fee paid to the surrogate mother. By also prohibiting payment to third parties, the bill would make it virtually impossible for a prospective surrogate mother or contracting couple to obtain legal advice in this complicated area of law. Further, by making surrogacy contracts void and unenforceable, childless couples would be hesitant to enter into such a contract, even when no compensation was involved. Surrogacy agreements can and often do work; the state should not bar this means by which infertility problems may be solved and loving families created.

Against:

Criminalizing participation in a for-pay surrogacy agreement is the wrong approach. The bill would make criminals of the adults who might in one sense or another be the parents of the child. Surrogacy arrangements are not necessarily bad or harmful, but experience has demonstrated a need to prevent complications and disputes of the sort exemplified by various well-publicized cases. Regulatory, rather than prohibitive, legislation could accomplish the aim of safeguarding the rights of parents, spouses, and children involved in surrogacy arrangements.

The bill would be difficult to enforce and could simply force surrogate parenting arrangements underground. Fears about the suitability of the contracting parents, the risks of harm to the surrogate, or of neglect of the baby's welfare could be realized and perhaps aggravated. All the participants would be burdened further with the fear of exposure, disgrace, and severe mandatory criminal penalties. Natural fathers and surrogate mothers would be induced to execute their agreements without proper legal counsel or medical supervision. If disputes arose between the surrogate and the couple who contracted with her, the parties would not be able to go to court nor would they have the protection of the law in trying to resolve the dispute. All of these unhappy effects could be reduced or eliminated by merely regulating the practice instead of banning surrogate parenting when done for a fee.

Against:

For many childless couples, adoption is almost out of the question since some couples have been told that due to a shortage of healthy Caucasian infants there can be a seven-year wait before a couple could adopt a child. Thus, surrogate parenting offers several attractions over the more traditional route of adoption in order to start a family. For example, a baby born as the result of a surrogate arrangement is a blood relative of the inseminating father. In addition, couples can exercise considerable discretion in selecting the genetic qualities that they would want from among the many women who have offered to be surrogates.

Response: Justifying the need to permit surrogate parenting because of the shortage of healthy Caucasian infants overlooks the fact that many children who are available for adoption in Michigan never find adoptive homes. These children, who need loving parents, either are older, come from other racial backgrounds, are part of sibling groups, or are handicapped. Our society would be well served if the desperate desire of the childless couple now turning to surrogate parenting were satisfied by their adopting one of these children. In addition, many surrogate agreements are prompted by a male's urge to continue his bloodline, which is a form of ego gratification that many find insulting to women and insensitive to the potential emotional harm to others.

Against:

The state has no business telling couples how to run their reproductive lives by outlawing nontraditional avenues of procreation. In fact, surrogacy may be considered an extension of the right to procreate. Refusing to enforce surrogacy contracts and prohibiting the payment of money could represent an unconstitutional interference with procreative liberty, by preventing childless couples from obtaining a means with which to have a family. No decision is more private than the decision to bear a child, and no area needs to be protected more from unwarranted governmental interference.

Response: The state does have an interest in the establishment of families, and the protection of the relatively powerless, such as children. The ban on surrogate parenting for a fee would be an extension of the well-established public policy against baby-selling.

Against:

Opponents of surrogate parenting for a fee liken the practice to baby-selling. However, the biological father of the child pays the surrogate a fee for her willingness to be impregnated and to carry his child. The father cannot buy what already is his. The fee actually is a payment for a service performed by the surrogate.

Against:

To declare surrogacy contracts to be unenforceable may do little. For one thing, it seems likely that rather than curb the practice, it would simply divert it to outside the state's borders. Further, would Michigan be obliged, under the full faith and credit clause in the United States Constitution, to enforce a contract that had been drawn up in another state where it was legal? The question of regulating, or for that matter banning, surrogate parenting should be left up to the federal government, which is better suited to handle questions that may affect interstate responsibilities and enforcement.

Against:

The bill fails to sufficiently protect the most vulnerable and innocent party in a surrogate arrangement: the child. Although the bill offers guidance in the event of custody disputes, it would be better to have the statute, rather than the court, determine custody so that the child was not harmed by lengthy court battles. The bill would specify that whomever had physical custody of the child would retain it until a court ordered otherwise, but there are no provisions to ensure that a court did not order temporary foster placement or to accommodate situations where some institution or person other than a parent had custody at the time the dispute arose. Further, the bill would not provide for legal representation for the child in a court dispute. Without stronger safeguards, it would be all too likely for a child to end up in foster care.

Response: The bill would ensure that the best interests of the child would rule, and that there would be sufficient flexibility to accommodate individual circumstances.

Against:

Tying the bill to the divestiture bills is inappropriate and makes a mockery of the legislative process. Surrogate parenting and South African divestiture have nothing to do with each other and each legislative proposal should rise or fall on its own merits. It is hard to see how any court could rule that the tie-bars meet the constitutional requirement that a bill not embrace more than one object.

POSITIONS:

The Department of Social Services supports the bill. (6-8-88)

Right to Life of Michigan supports the bill. (6-2-88)

The Michigan Federation of Private Child and Family Agencies opposes surrogate parenting and feels the entire practice should be outlawed in Michigan. (6-6-88)

The Michigan Probate Judges Association opposes surrogacy arrangements, but has no formal position on the substitute at this time. (6-2-88)

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The Michigan Chapter of the National Organization for Women opposes the bill. (6-3-88)

The American Civil Liberties Union of Michigan opposes prohibiting, banning, or criminalizing paid or unpaid surrogacy agreements between informed, consenting adults, based on a strong civil libertarian interest and the right to reproductive choice. However, the union believes a surrogacy agreement conditioned on the pre-birth termination of the gestational mother's parental rights is void. (6-3-88)

The Family Law Section of the State Bar of Michigan favors a regulatory approach like that contained in Senate Bill 483 and opposes efforts to criminalize surrogate parenting arrangements. (6-6-88)