SFA BILL ANALYSIS

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Senate Bill 228 (as passed by the Senate)
Sponsor: Senator Connie Binsfeld
Committee: Health Policy
Date Completed: 6-23-87

RATIONALE

For today's infertile couples — an estimated 3.5 million in the United States — a number of scientific breakthroughs, including surrogate parenting, offer hope to these couples in their 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 numerous 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 large sums of money — sometimes as much as $25,000, including a fee for the surrogate mother, and legal and medical costs — into the childbearing process. The issue of custody of a child resulting from a surrogate arrangement gained attention earlier this year in the New Jersey case involving a child, called Baby M, in which the surrogate mother fought for custody, despite having agreed in a contract to relinquish the baby to the biological father and his wife. While sympathizing with infertile couples, some people contend that regulation of surrogate parenting arrangements is needed to protect all parties involved.

CONTENT

The bill would create the "Surrogate Parenting Act" that would:

- **State that a "surrogate parentage contract" was void and unenforceable as contrary to public policy.**
- **Make it a crime to enter into or assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or a developmental disability was the surrogate mother or surrogate carrier.**
- **Make it a crime to enter into or assist in the formation of a surrogate parentage contract for compensation.**
- **State that the surrogate mother and the spouse of the surrogate mother, if any, would be the legal parents of the child and would be entitled to custody of the child.**
- **State that the biological mother and father, who were infertile and married, would be the legal parents of the child born to a surrogate carrier and would be entitled to custody of the child.**
- **Establish penalties for entering into a prohibited surrogate parentage contract.**
- **Define "compensation", "surrogate carrier", "surrogate mother", "surrogate parentage contract", and other terms.**

The bill would take effect October 1, 1987.

Surrogate Parentage Contract

A surrogate parentage contract would be void and unenforceable as contrary to public policy.

A person would be prohibited from entering into, inducing, arranging, procuring, or otherwise assisting in the formation of a surrogate parentage contract under either of the following conditions:

- For compensation.
- When an unemancipated minor female or a female disgnosed as being mentally retarded or as having a mental illness or developmental disability would be the surrogate mother or carrier.

Penalties

It would be a felony punishable by a fine of up to $50,000, imprisonment for up to five years, or both, for a person, other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability, to enter into, induce, arrange, procure, or otherwise assist in the formation of a contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or having a mental illness or developmental disability would be the surrogate mother or surrogate carrier.

A "participating party", other than an unemancipated minor female or female diagnosed as being mentally retarded or as having a mental illness or developmental disability, who entered into a surrogate parentage contract for compensation would be guilty of a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

A person other than a participating party who induced, arranged, procured, or otherwise assisted in the formation of a surrogate parentage contract for compensation would be guilty of a felony punishable by a maximum fine of $50,000 or imprisonment for up to five years, or both.

Custody

If a child were born to a surrogate mother as a consequence of a surrogate parentage contract, the surrogate mother and the spouse of the surrogate mother, if any, would be the legal parents of the child and would be entitled to custody of the child.

If a child were born to a surrogate carrier as a consequence of a surrogate parentage contract, the biological father and the biological mother, who were infertile and married,

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would be the legal parents of the child and would be entitled to custody of the child.

Definitions

"Compensation" would mean a payment of money, objects, services, or anything else having monetary value except payment of the actual medical expenses, including prenatal care and postnatal counseling, of a surrogate mother or surrogate carrier.

"Developmental disability", "mental illness", and "mentally retarded" would mean those terms as defined in the Mental Health Code.

"Participating party" would mean a biological mother, biological father, or surrogate carrier or the spouse of a biological mother, biological father, or surrogate carrier, if any.

"Surrogate carrier" would mean the female in whom an embryo was implanted in a surrogate gestation procedure.

"Surrogate gestation" would mean the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.

"Surrogate mother" would mean a female who was naturally or artificially inseminated and who subsequently gestated a child conceived through the insemination pursuant to a surrogate parentage contract.

"Surrogate parentage contract" would mean a contract, agreement, or arrangement in which a female agreed to conceive a child through natural or artificial insemination, or in which a female agreed to surrogate gestation, and to relinquish voluntarily her parental rights to the child.

FISCAL IMPACT

Senate Bill 228 would produce an indeterminate increase in local revenues, and an indeterminate increase in State costs.

Local public libraries would receive increased revenue from persons fined under the provisions of this bill. The Michigan Constitution (Article VIII, Section 9) provides that all fines assessed and collected for any breach of the penal laws shall be used to support pubic libraries and county law libraries. Given the lack of information available on surrogate parenting contracts, however, it is not possible to estimate the amount of revenue increase.

State costs for corrections would increase if persons were imprisoned for violating the provisions of this bill. Given the lack of information available on surrogate parenting contracts, however, it is not possible to estimate the amount of increased costs.

ARGUMENTS

Supporting Argument

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.

Supporting Argument

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. 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. 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.

Supporting Argument

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.

Supporting Argument

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.

Response: The argument that surrogate parenting exploits women is patronizing. In fact, the bill is discriminatory toward 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.

Supporting Argument

Senate Bill 228 would not prohibit all surrogate arrangements in the State, but would prohibit those performed for compensation beyond actual medical and counseling expenses. By outlawing commercial gain and setting stiff penalties, the bill would take away the profit motive in these arrangements, which is the strongest disincentive possible. The bill would recognize that surrogate motherhood is not a business deal and, consequently, babies would not be for sale in Michigan.

Supporting Argument

By making it clear that a surrogate mother and her spouse were the legal parents of the child, Senate Bill 228 would guarantee that a Baby M case did not occur in Michigan. In that case, Mary Beth Whitehead entered into a contract, for a fee, with William Stern to bear a child using his artificially inseminated sperm and, upon birth of the child, to surrender the baby and willingly end her parental rights. Mrs. Whitehead refused the money and fought for custody of the child. While New Jersey Superior Court Judge Harvey R. Sorkow upheld the surrogate mother agreement and awarded custody to Stern, questions still remain, including whether a natural mother's right to her child outweighs that of the natural father. Under the bill, a child born to

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a surrogate mother, as a consequence of a surrogate parentage contract, and the spouse of the surrogate mother would be the legal parents of the child and entitled to the custody of the child. Thus, regardless of the contract, custody fights — such as the Baby M case — could be avoided in the State under the bill.

Supporting Argument

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 probate 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.

Supporting Argument

The bill would affirm the premise that the surrogate mother is the mother of the child — the only real mother that child would have because she donated her genetic make-up, carried the child for nine months, and developed an emotional relationship and bond with that child. The wife of the biological father would not be considered the mother — only the prospective adopter.

Response: Many surrogate mothers say that they never felt the child was theirs in the first place. Rather, these surrogates experienced no sense of loss when they relinquished the child because they believed that they were merely serving as incubators and that they were helping a couple to start a family and to know the love and joy that comes with rearing a child. Since having a child is of the upmost importance in the lives of a childless couple, the child that results from a surrogate parenting contract is highly valued because of the effort the couple has put into getting that child. While the wife of the biological father may not have a genetic link to the child resulting from a surrogate arrangement, her desire and love for that child provide an emotional link that is no less than that of any adoptive mother.

Supporting Argument

The bill would make the distinction that in cases of a surrogate carrier arrangement, the contracting couple would be the parents of the child, which indeed they would be. In such a case, a procedure known as in vitro fertilization is performed in which the woman's egg is fertilized by her husband's sperm in a petri dish. The fertilized egg then is implanted in the uterus of another woman — the surrogate carrier. The surrogate carries the fetus and gives birth nine months later. The resulting child is genetically related only to the infertile couple who donated the egg and sperm.

Response: There is some ambiguity in the bill as to the relationship of the surrogate carrier to the child. The bill provides that in a case of in vitro fertilization of a surrogate carrier, the child would belong to the biological parents. Yet, the surrogate carrier theoretically could point to another provision in the bill under which any contract, including the contract that she be the carrier, would be void in the State. Thus, the surrogate carrier could argue that the child belonged to her. Perhaps the bill should clarify provisions on contracting with a surrogate carrier, especially in relation to the State's paternity and adoption laws.

Supporting Argument

The 13th Amendment to the United States Constitution, adopted in 1865, abolished slavery in the United States. Some legal experts argue that the framers of the Constitutiton, in the course of their debates, intended to abolish and prohibit all manner of involuntary servitude and trafficking in human persons. In the days of slavery, when a freeman could not afford to buy a slave, he would "rent" a slave. If the freeman fathered a child by that person, the child was considered to belong to the owner of the slave. Thus, the father would buy his own child from the slave owner. The 13th Amendment sought to end this practice. Surrogacy is equally abhorrent, if not more so, because the biological mother actually chooses to "sell" her child. Senate Bill 228 would declare the policy of the State — against buying and selling human beings — that would be in harmony with the 13th Amendment.

Opposing Argument

Although the bill ostensibly would prohibit the payment of compensation under surrogate parenting arrangments, Senate Bill 228 would serve to outlaw most if not all such arrangements: approximately nine out of 10 surrogate parenting contracts reportedly are arranged with a fee paid to the surrogate mother. The bill also could be interpreted as prohibiting any third party in a surrogate parenting arrangement from receiving compensation for participating in the arrangment. For example, a lawyer could not assist a surrogate in evaluating a contract, a doctor could not perform the insemination procedure, or a psychologist could not counsel the surrogate prior to entering into a surrogate arrangement unless it were done for free. It is unrealistic to expect that any of these persons would participate in surrogate parenting arrangements without being compensated. The surrogates, thus, would be left out in the cold, unable to seek any outside legal or medical assistance. The prohibition on paying compensation either directly to the surrogate or a third party in the arrangement would, in effect, curtail the majority of surrogate arrangements. Further, by stating that a surrogate parentage contract would be void and unenforceable, childless couples would be hesitant to enter into such a contract, even when no compensation was involved, and risk the contract being considered void in cases in which disputes arose. Rather than banning the practice, the Legislature should establish regulations of surrogate parenting in order to protect the child and all parties involved.

Opposing Argument

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.

Opposing Argument

The State has no business telling couples how to run their reproductive lives by outlawing nontraditional avenues of

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procreation. In fact, surrogacy may be considered an extension of the right to procreate assured by the 14th Amendment to the United States Constitution. The judge in the Baby M case ruled that the rights of parties to contract are constitutionally protected under the 14th Amendment. Thus, the judge held that refusing to enforce surrogacy contracts and prohibiting the payment of money could constitute 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. The State should be guided by the ruling in New Jersey's Baby M case and should protect a couple's right to procreate.

Response: The State does have an interest in the establishment of families, the basic social unit, which is why the State interposes itself in marriages and mediates through the law in adoptions. The ban on surrogate parenting for a fee would be an extension of the well-established public policy against baby-selling.

Opposing Argument

If the State's principal interest is to protect the child, the surrogate, and the contracting couple from adversarial custody claims by each other or third parties, the proposed legislation would fail to effectuate that interest. Under the bill, the surrogate and her husband would be the child's legal and custodial parents — whether or not they wanted the child. The surrogate's husband, whether or not he consented to his wife's involvement in surrogate parenting, would be the father of and financially responsible for an unwanted, unplanned, and unrelated child. In the case of a child born to an unmarried surrogate, the bill would deny the child a father by granting custody to the single mother. The potential abuse of the biological father's paternity rights in the bill is unparalleled.

Response: Even though the biological father would be without paternity rights like any other sperm donor, he would still have the recourse of bringing a circuit court action to establish paternity and show that the baby was a child born out of wedlock, that is, a child born during a marriage but not the "issue" of the marriage. Then, once paternity was established, the father could seek custody of the child. Furthermore, the parties could still enter into a voluntary arrangement under which the biological father and surrogate mother filed an acknowledgement of paternity and agreed that the father would have custody, the surrogate mother relinquished her parental rights, and the father's wife adopted the child; it is only the compensation for such an arrangement that the bill would prohibit and the courts currently won't enforce.

Opposing Argument

Opponents of surrogate parenting for a fee argue that a biological father purchases the child. Yet, as pointed out in the Baby M case, a biological father of the child pays the surrogate a fee for her willingness to be impregnated and to carry his child. The father does not purchase the child since he is biologically related to the child, and he cannot purchase what already is his. The fee actually is a payment for a service performed by the surrogate.

Opposing Argument

The Legislature should recognize the reality of surrogate parenting. Reportedly, there are more than 30 women in the State who are pregnant as the result of surrogate parenting arrangements. A ban on surrogate parenting for a fee would be impossible to enforce and could force the practice 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, even 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.

Opposing Argument

The bill's provisions on the custody of a child in a surrogate carrier arrangement need to be clarified. The bill would require that the biological mother and biological father be "infertile" and "married". Yet, there is no definition as to what is meant by "infertile" and "married", which could result in confusion and intervention by the courts. For example, as to the requirement of being "married", would that mean the couple had to be married to each other or would that mean married to other persons, as long as they are married?

Opposing Argument

Although New Jersey and New York are considering legislation to regulate surrogate parenting, Michigan could become the first state to outlaw the practice. Questions have been raised as to the applicablility of the bill's provision that a surrogate parentage contract would be void and unenforceable in the State. It is not certain whether Michigan would be obliged, under the full faith and credit clause in the United States Constitution, to enforce a contract that had been drawn up in Ohio, for example. 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.

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