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Senate Bill 228 (as enrolled) (Public Act 199 of 1988)

Sponsor: Senator Connie Binsfeld

Senate Committee: Health Policy

House Committee: Judiciary

Date Completed: 7-1-88

**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 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 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 nationwide attention last 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. In Michigan, a case arose recently (*Yates v Keane*) in which a surrogate mother of twins sought to keep her children in violation of a surrogacy contract; when the judge found the contract unenforceable, the case became a custody dispute and custody was awarded to the biological father. In another Michigan case, the surrogate mother gave birth to twins—one boy and one girl, but the contracting couple (who already had three sons) took only the girl. The surrogate mother (who also had three young children) first decided to put the boy in foster care, then decided to raise him herself, and finally decided that the twins should be raised together. This case did not go to court because the father relinquished the girl voluntarily. While sympathizing with infertile couples, many people contend that these cases demonstrate the need to regulate surrogate parenting arrangements in order 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 the surrogate mother or surrogate carrier was an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or a developmental disability.
- Make it a crime to enter into or assist in the formation of a surrogate parentage contract for compensation.
- State that if a dispute arose between parties concerning the custody of a child born to a surrogate mother or surrogate carrier, the party having physical custody of the child could retain physical custody until the circuit court ordered otherwise.
- Require the circuit court to award legal custody of the child based on a determination of the "best interests of the child" as defined in the Child Custody Act.
- 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 September 1, 1988.

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 diagnosed 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, or 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

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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 knowingly 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 or surrogate carrier pursuant to a surrogate contract and there were a dispute between the parties concerning the custody of the child, the party having physical custody of the child could retain physical custody until the circuit court ordered otherwise. The circuit court would be required to award legal custody of the child based on a determination of the "best interests of the child", as defined in the Child Custody Act.

("Best interests of the child" is defined in the Child Custody Act as the sum total of the following factors to be considered, evaluated, and determined by the court:

- The love, affection, and other emotional ties existing between the parties involved and the child.
- The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of the State in place of medical care, and other material needs.
- The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- The permanence, as a family unit, of the existing or proposed custodial home or homes.
- The moral fitness of the parties involved.
- The mental and physical health of the parties involved.
- The home, school, and community record of the child.
- The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and other parent.
- Any other factor considered by the court to be relevant to a particular child custody dispute.)

### Definitions

"Compensation" would mean a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses 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, 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 public 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 someday. 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 payment of expenses incurred as a result of the pregnancy and the surrogate's actual medical 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***

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 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 Constitution, 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 arrangements, 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 arrangement. 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 against paying compensation either directly to the surrogate or to a third party in the arrangement would, in effect, curtail the majority of surrogate arrangements.

### ***Opposing Argument***

Although the proposed criminal penalties would apply only to surrogate contracts that were made for compensation or that involved a mentally handicapped surrogate mother, all surrogate contracts would be void and unenforceable. Thus, for all practical purposes, the bill would have the effect of outlawing any surrogacy arrangement. Few, if any, childless couples would be willing to enter into a surrogacy agreement that would automatically be void. Few, if any, women would be willing to carry a child for another couple for nothing more than reimbursement of expenses. Rather than banning the practice in this way, the Legislature should establish regulations of surrogate parenting that protected the child and all parties involved.

**Response:** While it may not be appropriate to penalize individuals who voluntarily entered into surrogacy arrangements that did not involve compensation, it is certainly within the purview of the State to discourage those arrangements and set a strong public policy against them. Furthermore, the bill would still allow the circuit court to determine custody based on the best interests of the child.

### ***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 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 New Jersey Superior Court 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**

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. A ban on surrogate parenting for a fee could 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 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 would fail to protect sufficiently 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 preferable to have the law, rather than the court, determine custody, as the Senate-passed version of the bill would have done, so that the child would not be harmed by lengthy court battles. The bill specifies that the person who had physical custody of the child would retain custody until a court ordered otherwise, but there are no provisions either to ensure that a court did not order temporary foster placement, or to accommodate situations where an institution or person other than a parent had custody at the time the dispute arose. Furthermore, 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 were taken into consideration when the circuit court awarded legal custody.

### **Opposing Argument**

Besides unfairly penalizing infertile couples, the bill is not legally sound and contains a number of ambiguities. Among the questions the bill would not fully address are: Would Michigan be obliged, under the full faith and credit clause of the United States Constitution, to enforce a contract that had been drawn up in another state? And, what specifically would be covered under "expenses incurred as a result of pregnancy" and, therefore, be subject to reimbursement? Given these ambiguities, some people believe that the bill would not survive any kind of court test. Others believe that 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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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.