

Prohibiting Commercial Surrogacy: Revising New York's DRL, by Norah Hart.

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This article examines surrogate birth contracts and argues that New York should permit, enforce, and regulate commercial surrogacy. New York's prohibition on commercial surrogacy, set forth in Domestic Relations Law §§121-124, ignores the knowledge acquired over twenty years of commercial surrogacy in the United States and is gravely out of step with the demand for assisted reproduction. This article focuses chiefly on traditional surrogacy—where the surrogate carrier is also the genetic mother of the child. Gestational surrogacy, where the carrier is not genetically related to the child, is far less controversial and is not expressly prohibited in any state. Section I discusses New York's early surrogacy cases and the policy concerns that led to the enactment of a statutory ban against commercial surrogacy in 1992. Section II asks what we have learned about commercial surrogacy by examining the surrogate birth litigation in the national reporter system and news media over the past twenty years. Section III looks at recommendations the American Bar Association has proposed in its Model Surrogacy Act and argues that additional protections are needed to bring New York's surrogacy laws into the 21st Century. Lastly, Section IV considers constitutional challenges to New York's statutory ban.

I. New York's First Surrogacy Cases

Surrogacy became the focus of national attention in 1986 when New Jersey decided *In re Baby M*.^[i] *Baby M* involved a surrogate mother who repudiated a contract she had entered into by refusing to surrender her biological child to its genetic father and his wife. The New Jersey trial court upheld the validity of the contract, ordering “specific performance,” and requiring that the child be placed in the custody of the genetic father and his wife.^[ii] The court based its ruling on the child's best interest and on the parents' constitutional right to procreate.^[iii] The New Jersey Supreme Court reversed the trial court.^[iv] Finding that an agreement to terminate the mother's rights in exchange for payment was a violation of the state's adoption laws, the court held that consent to adoption should, as a matter of law, be revocable.^[v] Subsequent courts that addressed the enforceability of surrogate contracts also found them void as contrary to adoption laws.^[vi]

In July 1986, New York's first case concerning a surrogate parenting agreement, *Matter of Adoption of Baby Girl L.J.*, was decided in the Nassau County Surrogate's Court.^[vii] Despite Surrogate Radigan's “strong reservations about these arrangements both on moral and ethical grounds,” the court enforced this surrogacy contract as being in the best interests of the child. The intended parents were granted custody and the court ordered the payment of \$10,000 to the surrogate mother, set off by \$3,500 in legal costs awarded to the father and his wife. Surrogate Radigan expressed his reluctance to rule such contracts void as a matter of public policy: “For the reasons developed hereafter, the court finds it is for the legislature to determine if such payments should be disallowed so as to prevent such practices in the future.”^[viii] The Surrogate's plea for legislative guidance would become a familiar refrain in courtrooms across the country facing surrogacy disputes.

At the time of *Baby Girl L.J.*, a 1981 Michigan case similar to *Baby Girl L.J.* had been denied certiorari by the Supreme Court.^[ix] That case, *Doe v. Kelley*, challenged the constitutionality of

the Michigan Adoption Code that prohibited any monetary exchange or consideration in an adoption. The plaintiff parents argued that the statute amounted to a governmental intrusion into their rights of privacy in violation of the Fourteenth Amendment. Although the Supreme Court had announced previously—in *Griswold v. Connecticut* and *Carey v. Population Services International*—that the decision “whether or not to bear or beget a child” was encompassed within the constitutionally protected right to privacy,[x] the Michigan Court of Appeals held that a couple’s right to bear a child with the aid of a third party was not included in that concept.[xi] Surrogate Radigan observed in his *Baby Girl L.J.* opinion that Michigan’s ruling effectively prohibited the use of surrogate mothers altogether since few women other than perhaps a close family member would bear someone else’s child without compensation.[xii]

The next New York surrogacy case arose in the Kings County Family Court in 1989. In the *Matter of the Adoption of Paul* involved no custody dispute.[xiii] Here, a surrogate birth mother petitioned the court to execute a “Judicial Consent” to the adoption of her child by the his father and the father’s wife. The surrogate agency negotiating the arrangement drafted an inventive contract that was intended to avert the problems earlier couples had had. The 49-page contract provided that the surrogate biological mother, Elizabeth A., would receive \$10,000 upon her surrender of the child but stipulated that the payment was “in no way to be construed as a fee for termination of parental rights by Elizabeth A. or a payment or exchange for a consent to surrender the child for adoption or to assist in the adoption of the child or as payment of any expenses for living or maternity care between the birth of the child and the adoption of the child.”[xiv] The Agreement included a declaration that the sole purpose of the conception was to provide a child for the intended parents and was “without any consideration other than concern for the best interests and welfare of the child.”[xv] The court not only denied the request but as a condition of its consent to the adoption it required the parties to pledge that no money would be exchanged for any purpose related to the surrender or adoption of the child, undermining the contract completely.[xvi]

A look back at New York’s first surrogacy cases is instructive in order to show that the court’s initial view of surrogacy was not unfavorable. The New Jersey and New York courts expressed concern over the potential for exploitation in surrogacy arrangements but in fact the first impulse of both courts was to enforce these contracts. It can be argued that the New York court’s plea for legislative guidance remains unanswered because it was met with a law that merely prohibits commercial surrogacy without providing recommendations or insight into the types of issues that can arise or how they may be resolved. The law in fact deters efforts to protect against the harmful potential of surrogacy by obstructing efforts to monitor the practice.

New York’s Ban on Surrogacy

Following the *Baby M* case, public debate ensued as to the dangers and benefits of surrogacy. A flurry of research and legislative proposals were formulated as a result of the total absence of legislative guidance on the subject.[xvii] The New York House and Senate regulatory session debates led to numerous bills including Senator John R. Dunne’s proposal that recommended viewing surrogacy agreements within the rubric of the constitutional right to privacy.[xviii] Senator Dunne’s proposal, which was never passed, contained many of the same elements that would later be recommended by the American Bar Association’s Model Surrogacy Act, which

has likewise never been adopted by any state. Senator Dunne recommended STD-testing, mandatory counseling of the couple, and prior judicial approval “to insure that all consents are informed and voluntary.” His proposal also suggested deciding in advance who would make decisions regarding the pregnancy and remedies for breach of contract. Other bills were proposed that sought to regulate surrogacy contracts or to completely ban them. None of these proposals passed until 1992 with the amendment of New York’s Domestic Relations Law.

In July 1992, New York amended its Domestic Relations Law with Article 8, Sections 121 through 124, making surrogate parenting contracts void and unenforceable.[xix] Section 122 reads, “Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.” Section 123.1 reads, “No person 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.” Sections 123.1 (a) and (b) provide exceptions for adoption pursuant to social services law and medical and hospital expenses incurred by “the mother in connection with the birth of the child.” Section 123.2 (a) states that \$500 civil penalties can be assessed against “a birth mother or her husband,” or “a genetic father and his wife,” along with the genetic mother and her husband “if the genetic mother is not the birth mother.” Section 123.2 (b) warns that a civil penalty up to \$10,000 can be assessed against any person or entity which “induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee.” A second offense following a civil penalty shall result in a felony violation. Section 124.2 permits the court to award actual legal expenses but not surrogacy fees.

II. Twenty Years After Baby M: What We Now Know About Surrogacy

Only eleven surrogacy cases went to litigation out of 5,500 estimated babies born as of 1993 through surrogate parenting in the U.S.[xx] To date, only fourteen cases can be found in the national reporter system where surrogate mothers asserted their right to custody.[xxi] Lori Andrews, a prominent surrogacy scholar, asserts that less than one percent of surrogates change their mind and try to assert their parental rights.[xxii]

Although the exact number of surrogate births is unknown, disputes in surrogate birth arrangements are rare. Surrogacy disputes have generated only a handful of published opinions. As of May 13, 2005, only 44 cases mentioning commercial surrogacy agreements had been reported in the national reporter system. Thirty of these cases did not involve any dispute between the parties but sought other results such as declaratory rulings of parentage or to invalidate a law or provision that interfered with their parental authority.[xxiii] Only fourteen of these cases stemmed from the surrogate’s claim to custody and in three of these cases the surrogate’s change of heart was precipitated by an unforeseen event such as the failure of the marriage of the intended parents,[xxiv] incarceration of the intended mother,[xxv] or signs of unsuitability of the intended parents.[xxvi]

Early opponents of surrogacy argued that a surrogate’s consent to relinquish a child prior to the birth of that child can never be “true consent.” This section looks at these concerns in light of what we have learned after twenty years of steady growth in the number of surrogate births.

The potential for the economic exploitation of surrogate carriers was a major concern for New York policymakers. Do surrogates who consent to relinquish their newborns do so freely, without coercion or duress? A comparison of the number of disputed surrogacy cases in relation to the number that go undisputed would shed light on this question. Such comparisons are difficult because the exact number of surrogate births is unknown. One 1992 estimate calculated that as many as 4000 babies have been born to surrogate mothers in the United States.[xxvii] As of 1987, an estimated 500 births had resulted from surrogate arrangements.[xxviii] A 1989 Detroit News article estimated that, during the 1980s, would-be parents spent more than \$33 million dollars in connection with more than 1200 commercial surrogacy births.[xxix] In 1990 it was estimated that 750 to 1,000 live births occurred in the U.S. through the use of surrogate mothers.[xxx] Another source put the figure at more than 2,000 surrogate births from 1987 to 1990 alone.[xxxii] One 2003 estimate is that 20,000 births have occurred internationally since 1975, according to Shirley Zager, Director of a Chicago based surrogacy agency.[xxxii]

Most states have no formal law regarding surrogacy and hence no administrative regulations tracking the number of births. The U.S. Centers for Disease Control does not collect data on surrogate births. A 2003 CDC report of licensed ART clinics shows that there are 391 clinics licensed in the U.S. and 72% provide gestational carrier services.[xxxiii] Among these clinics responding, anywhere from less than 1 % to 5% of their births involve surrogates. Notably, larger clinics, i.e. clinics with the largest number of “cycles” (not to say the largest number of clients[xxxiv]) tended to involve surrogates in a higher percentage of treatments. The largest clinic in California reports that 5% of its cases involve surrogates.

No surrogate has ever claimed fraudulent inducement or duress in a surrogacy arrangement. Only two fraud cases involving surrogacy appear in the reporter system: In 2004 a woman sued a physician in New York who failed to perform the embryo transplantation that he had promised. As his defense he argued that the contract was void and unenforceable because the Domestic Relations Law prohibited his facilitating surrogacy contracts.[xxxv] In fact, Section 123.1 provides exceptions for medical and hospital expenses incurred by “the mother in connection with the birth of the child.” One other case of fraud arose in 2004 when a woman was found guilty of theft and forgery in an Illinois surrogate pregnancy scam.[xxxvi] Debra Hemauer posed as a surrogate and lied to a couple about being pregnant with their child after accepting more than \$17,000 in payment. She forged medical bills, insurance documents, and positive pregnancy test results. She pled guilty to felony theft and forgery and was sentenced to six months in jail.

New York policymakers compared surrogate mothers to poor pregnant women who in some cases had succumbed, it had been found in a statewide study, to offers to sell their children.[xxxvii] Improper analogies between adoptions and surrogate births underlay several of New York’s early policy considerations. Not only is a surrogate unlike the pregnant woman who needs to put a child up for adoption, in desperate need of a solution to a problem that is growing every day, surrogates are typically financially secure. In their surrogate selection guidelines, surrogate agencies recommend not using women who are in need.[xxxviii] Richard Posner, United States Appeals Court Judge with a self-described “long-standing interest in the law and economics of the family and adoption,”[xxxix] observed in his controversial essay advocating a free-market in surrogacy: “[T]here is no evidence that surrogate mothers are drawn from the ranks of the desperately poor, and it seems unlikely they would be....A couple would be unlikely

to want the baby of a desperately poor woman; they would be concerned about her health, and therefore the baby's.[xl]

Twenty years of surrogacy has shown us that the initial concerns of policymakers are unfounded but the realities remain ignored.

[i] See *In re Baby M*, 217 N.J. Super. 313, 525 (N.J.Super.Ch., 1987).

[ii] See *id.* at 525.

[iii] See *id.* at 525.

[iv] See *In Re Baby M*, 109 N.J. 396 (N.J., 1988).

[v] See *id.* at 423.

[vi] See Note, *Developments in the Law- Medical Technology and the Law, II. Reproductive Technologies*. 103 Harv. L. Rev. 1525, 1546, 1547 (1990).

[vii] See *Matter of Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 973 (N.Y.Sur., 1986).

[viii] See *id.* at 986.

[ix] See *Doe v. Kelley*, 106 Mich. App. 169 (Mich. App., 1981), cert. denied 459 U.S. 1183.

[x] See *Griswold v. Connecticut*, 381 U.S. 479; *Carey v. Population Services International*, 431 U.S. 678.

[xi] See *Doe v. Kelly*, 106 Mich. App. at 188.

[xii] See *Baby Girl L. J.*, 132 Misc.2d 972, at 988.

[xiii] See *In the Matter of the Adoption of Paul*, 550 N.Y.S.2d, 815 (N.Y. Fam. Ct., 1990).

[xiv] See *id.* at 821.

[xv] See *id.* at 821.

[xvi] See *id.* at 825.

[xvii] Nancy Zeldis, *New York Seen Facing Delays on Surrogate Mother Measure*, N.Y.L.J., Apr. 27, 1987

[xviii] Paula Barbaruolo, *Albany Law Journal of Science and Technology*, 1993, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*. P. 51.

[xix] N. Y. Dom. Rel. Law Section 121 through 124.

[xx] Steve Johnson & V. Dion Hayes, *Surrogacy Debated, but Still the Answer for Some*, Chi. Trib., Jan. 17, 1993, Section 2 (Northwest) at 1.

[xxi] A search on Westlaw on May 14, 2005, in the ALLCASES database using the search terms “surroga! /3 mother carrier birth agreement” resulted in 209 cases. One hundred and sixty-five cases used the terms surrogate with agreement in a sense different than meant here. Thirty cases sought declaratory judgments on issues including constitutionality, adoption petitions, child support liability, and custody disputes between the intended parents after their relationship ended. Only fourteen cases turn up that involve a surrogate carrier seeking to establish her parental rights to the child.

[xxii] See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VALR 2343, 2351 n.36 (1995).

[xxiii] See *Hodas v. Morin*, 442 Mass. 544 (Mass. 2004) (seeking a declaratory pre-birth ruling as to parentage); *Cullington v. Beth Israel*, 435 Mass. 285 (Mass. 2001) (seeking declaratory birth certificate); *Falk v. Sadler*, 341 S.C. 281, (S.C.App. 2000) (seeking damage award from attorney appointed guardian ad litem of child born of a surrogacy arrangement); *A.H.W. v. G.B.H.*, 339 N.J. Super. 495 (N.J. Super. Ch., 2000) (seeking declaratory ruling on parentage); *Huddleton v. Infertility Center of America, Inc.* 700 A.D.2d 453 (Pa.Super., 1997) (seeking damages in negligence where surrogate mother sued surrogacy clinic after sperm-donor father shook surrogate child to death).

[xxiv] See *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (Cal.App. 4 Dist., 1994) (awarding joint custody to intended father and surrogate mother after breakup of intended parents’ marriage precipitated surrogate’s motion for custody).

[xxv] See *Seymour v. Stotski*, 82 Ohio App. 3d 87 (Ohio App. 10 Dist., 1992) (seeking to vacate custody determination upon dissolution of intended parents’ marriage and incarceration of mother).

[xxvi] See *J.F. v. D. B.*, 2004 WL 1570142 (Pa. Com. Pl. 2004) (granting gestational surrogate standing to pursue custody as legal mother where biological father’s and his wife’s fitness as parents was questioned when they failed to visit newborn triplets for six days following the birth).

[xxvii] Jay Mathews, *California Surrogate Stirs Dispute*, Washington Post, Sept. 21, 1990, at A8.

[xxviii] ef1 Harvard Law Review, May 1990, *Developments in the Law- Medical Technology and the Law, II. Reproductive Technologies*. 103 Harv. L. Rev. 1525, 1546.

[xxix] Rebecca Powers & Sheila G. Belloli, *The Baby Business: A Detroit News Special Report*, Detroit News, Sept. 17, 1989, at ef1S.

[xxx] Robert H. Blank, *Regulating Reproduction* 75 (1990).

[xxxii] Andrea Sachs, *And Baby Makes Four*, *Time*, August 27, 1990, at 53.

[xxxiii] Bill Lohmann, *Gift of Life*, (December 7, 2003)

[xxxiiii] CDC 2002 Assisted Reproductive Technology Report: [2002 Fertility Clinic Report by State: Accessible National Summary](#), at 4. (April 13, 2005) .

[xxxv] CDC tabulates the volume of a clinic's business according to ovum-implantation cycles rather than number of clients because one client typically receives more than one cycle, sometimes up to four or five. The number of cycles compared with the number of resultant births provides a more accurate way to gauge success rates.

[xxxvi] See *Itskov v. N.Y. Fertility Center*, 4 Misc.3d 874, (N.Y. City Civ. CT. 2004) (seeking damages for breach of contract against infertility doctor).

[xxxvii] Chris Dettro, *Woman Sentenced in Baby Scam Gets 180 Days in Jail, \$17,818 Fine*, *Springfield State Journal-Register*, October 26, 2004, at 1.

[xxxviii] See William L. Pierce, *Survey of State Activity Regarding Surrogate Motherhood*. 11 *Fam.L.Rep.* 3001(1985).

[xxxix] Merrit Morrison Turner, [What You Should Expect an Agency to Provide](#), *The American Surrogacy Center website* (1996).

[xl] Richard A. Posner *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*. 5 *J. Contemp. Health L. & Pol'y*, 21, 21 (1989).

[xl] *Id.* at 25.