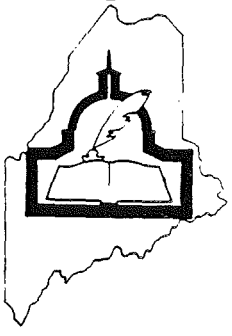
MAINE LEGISLATURE

THE SUBCOMMITTEE TO STUDY
SURROGATE PARENTING

JANUARY 1988



STATE OF MAINE
113TH LEGISLATURE
FIRST REGULAR SESSION
JUDICIARY COMMITTEE

THE SUBCOMMITTEE TO STUDY SURROGATE PARENTING

JANUARY 1988

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PREFACE BY THE JUDICIARY COMMITTEE

The use of surrogate parenting by infertile couples leaped to national attention in 1987. Some conspicuous disputes over custody of children born as a result of surrogate parenting arrangements confronted society with many difficult issues.

Many voices have joined the newly-prominent debate over the appropriateness of surrogate parenting. Concerns are raised for children's rights, for women's rights, for the right's of infertile couples to reproduce. Religious concerns are expressed. The roles of courts, lawyers, and legislators are debated.

The Judiciary Committee's Subcommittee to Study Surrogate Parenting has begun Maine's inquiry into the many public policy questions surrounding surrogacy arrangements. The full Judiciary Committee endorses the Subcommittee's recommendation that Maine avoid the hasty adoption of surrogate parenting legislation. Time for further study and consideration is needed. Upcoming actions by courts, other state legislatures, the Congress, and professional groups can only add needed information before Maine takes a final position on surrogate parenting.

In the following report, the Subcommittee provides a helpful summary of currently available information on surrogate parenting. The Judiciary Committee recommends consideration of this information by all concerned with the issues raised by surrogate parenting.

The Judiciary Committee does wish to note that not all members of the Committee are ready to adopt the two legislative approaches outlined in the Subcommittee's report as the only possibilities for surrogate parenting regulation in Maine. As the subject comes under further consideration, some Committee members may wish to explore other regulatory approaches.

Finally, the Judiciary Committee wishes to thank the members of the Surrogate Parenting Study Subcommittee for their fine work on a delicate and complex issue.

PREFACE

TO THE SUBCOMMITTEE

REPORT

The Subcommittee to Study Surrogate Parenting of the Joint Standing Committee on Judiciary of the 113th Maine Legislature conducted this study from September to December of 1987. Sen. Paul Gauvreau served as chair of the Subcommittee. Sen. Joseph Brannigan, Rep. Patrick Paradis, Rep. Constance Cote, Rep. Dana Hanley, Rep. Mary MacBride, and Rep. Dale Thistle also served as Subcommittee members. Martha Freeman, Principal Attorney, and Carolyn Chick, Legal Assistant, served as the Subcommittee's staff.

SUMMARY CONCLUSIONS

After careful consideration of the information on surrogate parenting presented to the Subcommittee, the Subcommittee decided not to propose legislation at this time. This report offers two possible legislative approaches to surrogate parenting for analysis and comment by members of the Judiciary Committee.

All members of the Subcommitee oppose commercial surrogacy in any fashion. The members also agree that the best interests of the child should be the governing standard in every circumstance of noncommercial surrogacy.

Possible Approaches:

1. A ban of surrogate parenting.

2. A ban of commercial surrogate parenting contracts. A two-step judicial process in which a noncommerical surrogacy agreement is recognized and reviewed by the court at the time the agreement is developed. The court reviews the situation again when the child is born.

INTRODUCTION

During the First Regular Session of the 113th Legislature, LD 658, Resolve, to Establish the Commission on Surrogate Parenting, was brought to the attention of the Judiciary Committee by sponsors Sen. Gauvreau, Sen. Brannigan, Rep. Pines, and Rep. Marge Clark. When informed of the Judiciary Committee's interest in undertaking a surrogate parenting study, the sponsors agreed to withdraw the bill. Toward that end, the Judiciary Committee recommended, and the Legislative Council approved, the establishment of the Surrogate Parenting Subcommittee.

The Subcommittee conducted its study in three meetings. At these meetings, the Subcommittee heard from, among others, Robert Robinson, Esq., chairman of the drafting committee of the National Conference of Commissioners on Uniform State Laws; Ellen Kandoian, professor from the University of Maine Law School; Judith Swazey, ethicist from the Acadia Institute; Jasper Wyman of the Christian Civic League; Father J. Joseph Ford and Gerald R. Dube representing the Roman Catholic Diocese of Portland; and Peter Walsh, a representative from the Department of Human Services. Rep. Marge Clark also offered testimony from the National Organization for Women.

The following report of the Subcommittee first presents a brief history of the surrogate parenting issue and discusses legislation in other states. It next describes testimony received by the Subcommittee, uniform surrogate parenting legislation, and legal issues involved in surrogate parenting. The final section of the report presents the Subcommittee's conclusions.

I. THE SURROGATE PARENTING ISSUE

History

Approximately 2.5 million couples in the United States are involuntarily infertile[1]. For many couples who are infertile and still desire a child, adoption is not always the answer. Due to the increase in abortions and the decision of many unwed mothers to keep their children, the number of babies available for adoption has declined. As a result, many childless couples are now turning to new reproductive techniques developed to aid infertile persons.

These new techniques have been referred to by some as the "new biology,"[2] and include in vitro fertilization,[3] artificial insemination,[4] and surrogate parenthood. The National Conference of Commissioners on Uniform State Laws considers these techniques as a group; its report[5] on the status of children born as a result of these techniques includes surrogate parenthood as part of this "new biology."

Some testifying before the Subcommittee argued that the issue of surrogate parenthood should not be considered in isolation,[6] but should be considered as one part of the new biological technology. Others urged the Subcommittee to consider surrogate parenthood separately from in vitro fertilization or artificial insemination.[7] This report addresses only the issue of surrogate parenting.

A "surrogate mother," typically, is a woman who agrees to be artificially inseminated with the sperm of a man whose own wife is incapable of conceiving or carrying a child to term. The surrogate mother is artificially inseminated, conceives and carries the child for nine months, gives birth, and then releases her parental rights, giving up the child to the father and to his wife for adoption. A written contract sets forth the agreement between the surrogate mother and the natural father or couple. In addition to a fee, this contract usually provides for the surrogate mother to receive all medical and living expenses associated with the bearing of the child. Although there are no standard monetary provisions in these contracts, the average amount paid by a couple, including the attorney's fee, medical expenses, and fee paid to a surrogate, is $20,000 to $25,000.[8]

An impetus to this study in Maine, as in other states, was the "Baby M" case. See In Re Baby M, 525 A.2d 1128 (N.J. Super. Ch. 1987). In this case, the biological father of Baby M and his wife brought suit seeking to enforce the surrogate parenting agreement, to compel the surrender of the infant born to the surrogate mother, to restrain any interference with their custody of the infant, and to terminate the surrogate mother's parental rights to allow adoption of the child by the wife of the father. The Court found in favor of enforcing the surrogate parenting agreement. The case is currently on appeal in New Jersey.

Legislation

Surrogate parenting has been practiced for many years. Until recently, however, there were no laws that expressly regulated surrogacy arrangements. The Baby M litigation has encouraged states to consider the ethical questions surrounding surrogate parenting, and the regulation of surrogacy arrangements. Many states have introduced bills addressing surrogate parenting. Surrogacy legislation has been introduced around the country in three basic forms: those bills that would ban surrogacy itself or any aspect of it; those bills that would regulate surrogacy arrangements; and those bills establishing committees or commissions to study the issue.

The state of Louisiana is the first, and, at this time, only state to have passed legislation dealing with surrogate motherhood that requires more than a study of the issue. Act 583 provides that a contract for surrogate motherhood shall be absolutely null, void, and unenforceable as contrary to public policy. It defines "contract for surrogate motherhood" as any agreement whereby a person not married to the contributor of the sperm agrees, for valuable consideration, to have her ovum be artificially inseminated, to carry any resulting fetus to birth, and to relinquish to the contributor of the sperm the custody and all rights and obligations to the child. The Louisiana law does not affect an informed agreement under which a woman agrees, without payment, to bear a child for someone else.

According to information from the National Conference of State Legislatures, as of September 1987, 14 states have introduced legislation that would regulate surrogacy contracts; 17 states have proposed legislation that would prohibit surrogacy arrangements; and 14 states are studying or considering studying the issue. More detailed information on these proposals is available in the Subcommittee files.

On the federal level, Congressman Thomas Luken has introduced a bill (H.R. 2443) that would prohibit commercial surrogate motherhood arrangements. In this bill, the term "surrogacy arrangement" means any arrangement in which a woman agrees to carry to term a pregnancy that has not been initiated at the time the arrangement is made, with the expectation that parental rights to that child will be exercised by another person. Hearings began on this bill in October.

II. TESTIMONY, MODEL LEGISLATION, AND LEGAL ISSUES

Proponents and Opponents

The Subcommittee received testimony on several aspects of the surrogacy issue. Opponents of surrogacy arrangements encouraged the Subcommittee to consider a ban of any surrogacy agreements. Opposition to surrogacy arose from concern for family rights, marriage as an institution, and the right of a child to be raised by his or her parents. Some of these opponents argued that marriage does not confer a right to have a child. The right to have children was also questioned by some who supported regulated surrogacy arrangements. The right to procreate is addressed below.

While all who spoke to the Subcommittee recognized surrogate parenting as part of a new technology that is here to stay, some suggested dealing with the surrogacy issue through legislation. In contrast to a ban, these suggestions involved the regulation of surrogate parenting contracts.

New reproductive techniques raise questions about social values and reproductive rights and responsibilities. The Subcommittee was urged to take into account moral views as well as social issues when considering legislation and recommendations.

National Conference of Commissioners on Uniform State Laws

The Subcommittee also heard from Robert Robinson, Esq., chairman of the drafting committee of the National Conference of Commissioners on Uniform State Laws. This committee is drafting a model uniform parentage act under the title, "Status of Children of the New Biology." The draft focuses on protecting the interests of children, and deals with status issues regarding children conceived or carried to birth through procedures falling within the definition of "the new biology." The draft is aimed at jurisdictions contemplating adoption of provisions permitting surrogate motherhood.

Mr. Robinson urged the Subcommittee to postpone introducing surrogate parenting legislation in Maine until his committee completes work on its model legislation in August of 1988. Several others supported this suggestion. A moratorium on surrogate parenting contracts was suggested as a possible step in the interim.

Constitutional Concerns and Related Maine Laws

In the Baby M case, Judge Sorkow accepted the argument that a fundamental right to procreate, secured by the United States Constitution, protected the right of the infertile married couple to enter into a surrogate parenting contract. He also stated that a prohibition of money payments in exchange for surrogate mothering might interfere with this right to procreate. He found that the compelling state interest in the child's rights supported narrowly drawn restrictions on surrogate parenting.[9]

Judge Sorkow also found that a woman's right to decide about abortion under the terms of Roe v. Wade, 410 U.S. 113 (1973), cannot be abrogated by a surrogate parenting agreement.[10] Finally, he further suggested that a surrogate has a constitutionally protected right to enter into a contract to provide surrogate services.[11]

Judge Sorkow reviewed various United States Supreme Court decisions concerning privacy in his constitutional analysis of surrogate parenting contracts. Other commentators have reviewed these and related decisions, too.[12] Differing opinions exist on the extent of the constitutional right of privacy. Does it extend to a right in all individuals to procreate? To a right to procreate inside marriage only? Does a right to procreate extend to noncoital procreation? Set forth below are the holdings of many of the United States

Supreme Court decisions that enter into a consideration of the constitutional rights implicated by surrogate parenting arrangements:

Skinner v. Oklahoma, 316 U.S. 535 (1942): A state statute provided that a person convicted two or more times for certain crimes could be sterilized. The court found the statute to be in violation of the Equal Protection Clause of the Fourteenth Amendment for treating criminals convicted of like crimes differently. In the course of its opinion, the Court stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the human race." Id. at 541.

Griswold v. Connecticut, 381 U.S. 479 (1965): A state statute made it a crime for any person to use any contraception. Another statute made it a similar crime to assist another to use contraception. The Court held both statutes to be in violation of the right of marital privacy found within the penumbra of the specific guarantees of the Bill of Rights: "We deal with a right of privacy older than the Bill of Rights - older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." Id. at 486.

Eisenstadt v. Baird, 405 U.S. 438 (1972): A state statute made it a crime for anyone to provide contraception to another, except for doctors or pharmacists providing contraception to married persons. The Court found the statute to violate the Equal Protection Clause of the Fourteenth Amendment for providing dissimilar treatment of married and unmarried persons. The Court commented: "It is true that in Griswold the right of privacy in question inhered in the marital relationship... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

Roe v. Wade, 410 U.S. 113 (1973): A statute made it a crime to procure or attempt an abortion except upon medical advice for the purpose of saving the mother's life. The Court found the statute to violate the right of privacy in the Fourteenth Amendment Due Process Clause concept of personal liberty: "(T)he right of personal privacy includes the abortion decision, but ... this right is not unqualified and must be considered against important state interests in regulation." Id. at 154.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976): Among other things, a state statute required the written consent of a spouse of a woman seeking an abortion, unless a physician certified that the abortion was necessary to preserve the mother's life. The Court held that this restriction was unconstitutional under the terms of Roe v. Wade: "(S)ince the State cannot regulate or prescribe abortion during the first stage, when the physician and his patient make the decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." Id. at 69.

Carey v. Population Services International, 431 U.S. 678 (1977): A state statute made it a crime for anyone to sell or distribute contraceptives to persons under age 16, and for anyone other than a pharmacist to distribute contraceptives to persons 16 years of age or older. A majority of the Justices found the statute either to violate the right of privacy, protected by the Due Process Clause of the Fourteenth Amendment, or not to be supported by a compelling state interest justifying its prohibitions. The majority also stated: "Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." Id. at 687 (emphasis added).

None of the above cases finally answers the question of whether married and unmarried persons have a right to procreate by noncoital means that involve a surrogate. If any version of that right exists, the next question is whether, consistent with the Equal Protection Clause, the state may limit the exercise of that right to noncommercial means.[13]

Judge Sorkow's understanding of the right to procreate, as set forth in the Baby M case, led him to conclude that the surrogate parenting contract was valid and that the surrogate mother had breached it. In determining whether to require the mother to perform the remainder of the contract, that is to relinquish the child to the father, the judge turned to an assessment of the child's best interests. The judge determined that existing New Jersey laws of adoption, custody, and termination of parental rights did not apply.[14] Instead, the judge was guided by the parens patriae (or guardianship of legally disabled persons) jurisdiction of the court.

How existing Maine statutes apply to surrogacy situations cannot be stated with certainty. The following statutes and the standards they contain should be examined as any surrogacy legislation is developed:

19 MRSA §214 - Parenting and support decreed when parents live apart

19 MRSA §271 et seq. - Paternity

19 MRSA §531 et seq. - Adoption

22 MRSA §2761 - Registration of live births

22 MRSA §4031 et seq. - Child protection orders

22 MRSA §4050 - Termination of parental rights

III. CONCLUSION

All members of the Subcommittee oppose commercial surrogacy and agree that the child's best interests should be the governing standard in all situations. However, the Subcommittee was divided on how to achieve this result, with some members supporting a ban and some members supporting recognition of noncommercial surrogacy agreements.

The Subcommittee decided not to propose any legislation at this time. Decisions to be rendered in the near future by courts, other states, and professional groups will better inform those who will create surrogate parenting policy in Maine. In the interim, the Subcommittee does offer the following alternative legislative approaches for all Judiciary Committee members to consider:

A. Surrogacy Arrangements Prohibited - This suggestion would ban surrogacy arrangements in any form and prohibit any advertisement connected with surrogacy arrangements. Violation of either prohibition would be a crime. A bill proposing this ban would contain these elements:

"Surrogate mother arrangement" is defined as an arrangement in which a female agrees to be artificially inseminated with the semen of a donor, bear a child, and relinquish all rights regarding that child to the donor or donor couple.

"Donor" means a man whose semen is used to impregnate a woman who is not his wife in a surrogate mother arrangement.

"Donor couple" means the donor and another person, including but not limited to the donor's spouse.

"Materially assist in a surrogate mother arrangement" includes but is not limited to acting as an agent, finder, counselor, or intermediary for a surrogate mother arrangement.

Under this proposal, a person could not participate in, agree to participate in, offer to participate in, or materially assist in a surrogate mother arrangement in this State. A person could not be a party to an agreement in which a woman agrees to conceive a child through artificial insemination and to relinquish voluntarily her parental rights.

This proposal would also prohibit advertisement of the availability of a surrogacy arrangement which would be made, engaged in, or brokered on a commercial basis. Individuals would not be allowed to advertise willingness to participate in surrogacy arrangements.

B. Recognition of Surrogacy Agreements - This suggestion would prohibit the creation of commercial surrogacy arrangements. It permits noncommercial surrogacy arrangements and would provide for a two-step judicial review of those arrangements, such as the following:

At the time of the initial surrogacy arrangement, the arrangement would be judicially reviewed. At that time, responsibilities of all parties would be articulated and tentative rights to a child born as a result of the arrangement would be developed applying the standards of 19 MRSA §214. However, at this point, the arrangement would not be binding on any party and there would be no final commitment from the mother to give up the child.

Under this proposal, no female who enters into a surrogate parenting agreement could accept, directly or indirectly, any money or other consideration to act as a surrogate, other than for legitimate expenses incurred by her as a surrogate. Expenses would be limited to all medical and maternity expenses, reasonable attorney fees, and income actually lost.

After the birth of the child, the court would again review the situation and, at that time, require the parties to execute consents to the surrogate parenting agreement. The court would make a final order of custody and support under

section 214. In the event the court was not satisfied that the surrogate parenting arrangement would protect the child's best interests, the court could make such other orders or dispositions as it deemed just and proper.

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NOTES

1. Human Embryo Transfer: Hearings Before the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology, 98th Congress, 2d Sess. 34 (1984) (Testimony of Howard W. Jones, Jr., M.D.) as referenced in Litigation, Legislation and Limelight, 72 IOWA L. REV. 415 (1987).

2. "Status of Children of the New Biology," Draft, National Conference of Commissioners on Uniform State Laws, July 31 - August 7, 1987.

3. In vitro fertilization is a process in which a sperm is joined with an egg outside the womb in a laboratory procedure, then transplanted into the womb of the mother or another woman. The Law of Artifical Insemination and Surrogate Parenthood in Oklahoma, 22 TULSA L.J. 283 (1987).

4. Artifical insemination is a method by which a female is inpregnated through injection of semen from a donor other than her husband and other than through sexual intercourse. BLACKS LAW DICTIONARY, 5th Ed., 1979.

5. Supra note 2.

6. Testimony of Judith Swazey, Ph.D., the Acadia Institute, October 8, 1987.

7. Testimony of Rep. Margaret Pruitt Clark, Maine National Organization for Women, December 1, 1987.

8. "Baby M, Ethics and the Law," New York Times Metropolitan News, January 18, 1987, p. 1 as referenced in CSG Backgrounder, "Surrogate Mothering," March, 1987.

9. 525 A.2d 1163-65.

10. Id. at 1159.

11. Id. at 1165.

12. See, e.g., K.M. Sly, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee, 18 GONZAGA L. REV. 539 (Summer 1982); Note, Rumpelstiltskin Revisted: The Inalienable Rights of Surrogate Mothers, 99 HARV. L. REV. 1936 (June 1986); S.L. Tiller, Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements, 72 IOWA L. REV. 415 (1987); N.Y. State Senate Judiciary Committee, Surrogate Parenting in New York: A Proposal for Legislative Reform (January 1987).

13. Tiller, supra note 12, at 436

14. 525 A.2d at 1157-58.