Uniform Status of Children of Assisted Conception Act: A View from the Drafting Committee

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Abstract

Nuclear energy was at once a breakthrough into untold wonders yet its use and development has been resisted by some as an uncontrollable force which threatens incomprehensible destruction.

KEYWORDS: children, assisted conception
man's willingness to become a surrogate results from a variety of personal motivations, money alone is not a sufficient or overriding cause for their actions. Monetary compensation to surrogates I have dealt with typically comes only after termination of the pregnancy, by miscarriage or birth, many months after forming the surrogacy agreement.

Personal Choices

This writer has discovered that it is not a difficult task to draft a written surrogacy parenting agreement, to secure an informed decision by securing independent legal and psychological counseling for the surrogate or couple or to adapt and respond to the ever-changing semantics of the debate on surrogacy.

While written agreements reduce the potential for conflict and misunderstanding and force a more introspective search of the participant’s motivations and expectations, entering into such an arrangement relying solely on contractual terms is not enough. The fundamental nature of these arrangements are intensely personal endeavors for both the surrogate and couple, and whatever legal trappings are employed, the relationship between the surrogate and the couple is at its core a matter of trust and understanding.

To the extent that legislative enactments permit all parties to freely exercise informed choices and respect the individual’s fundamental right of choice, these are welcome intrusions. When they prohibit or create uncertainty in the relationship, they unduly impinge upon that right.

It is my sincere hope that as the debate continues, the legal scholars, jurists and legislators faced with the issues of surrogacy will not be so short sighted as to deny its willing participants the right to share in the joy of a child.

4. Many women are willing to provide infertile couples with the means of having a child, because of their sympathy and compassion for the infertile couple.

I. Preface

Nuclear energy was at once a breakthrough into untold wonders, yet its use and development has been resisted by some as an uncontrollable force which threatens incomprehensible destruction. Nuclear energy, a force like many others, can be used for good and for evil, but once created, it remains for the prudence or folly of mankind to direct its course. It is not likely ever to be eradicated.

Medical technology has produced many miracles that have been feared and rejected at first: genetic engineers contemplate the perfect human, modern respirators sustain life, babies are produced in test tubes. Nuclear energy, genetic engineering, respirators, petri dishes and other advances developed by human ingenuity are here to stay. Once out, the genie never returns to the bottle. Our responsibility is to acknowledge the reality of these forces, and with wisdom and prudence, order and design their use for the good of humanity.

We are faced with the birth of many beautiful, innocent children brought into the world through extra-ordinary procedures which ultimately require regulation. The legal status of these children demands

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1. This article, as well as the Act itself, targets the children resulting from traditional artificial insemination, in vitro fertilization, and surrogacy arrangements. For definitions of these terms, see infra section 1 of the Act and its commentary. Legal status of children produced through other means is outside the scope of this article.

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our attention. Without traditional parentage, these children are buffeted by forces beyond their comprehension and control. Because of an accident of birth, these children of the new biology are deprived of certain basic rights.

Children are the first priority in an agenda which seeks to find solutions for these complex problems. One must then acknowledge the reality of these medical innovations created and developed to overcome the burden of infertility that bedevils our society. An estimated one billion dollars was spent by Americans in 1987 on medical care to combat infertility. The amount spent on office visits for infertility services rose from $600,000 in 1968 to about $1.6 million in 1984 according to the report of the Office of Technology Assessment.

Stringent regulatory legislation will become necessary in time to provide a social solution to deal with the utilization of recent advances in medical technology. At present, some 600 surrogate mother arrangements have been concluded. The “Status of Children of Assisted Conception” Act (hereinafter “the Act”) is not the complete answer to our complex social problem. It is not a surrogacy regulatory act, nor is it intended to be. The Act has made only limited tangential use of surrogacy components and then only to augment and clarify the rights of children born under the new technology, as well as the rights of the parties to these arrangements.

The Drafting Committee was given the responsibility to draft an Act, a child oriented act, to provide order and design that would inure to the benefit of those children who have been born as a result of these medical miracles. The Conference of Commissioners on Uniform State Laws directed the Drafting Committee, by almost unanimous vote, to proceed by making use of such limited and monitored surrogacy procedures as might be necessary to accomplish its mandate.

The Act was designed primarily to effect the security and well-being of children born and living in our midst as a result of assisted conception. The Conference’s Executive Committee and the general Conference, considering the plight of these children, some with five biological parents, some with no readily identifiable biological parents, and some with other deprivations, determined that the greatest priority and first call on the energy and talent of the Drafting Committee was to provide an act which addressed these and other deficiencies.


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The Drafting Committee has therefore addressed itself to the precise issue of the status of children, their rights, security and well-being. It is drawn with a narrow focus, and in many instances, is limited by design to accommodate its mandate. Some provisions may appear arbitrary and seemingly inequitable at first, but not one word in this Act was casually drafted.

The narrowness of the Act is designed to limit its applicability to what is best for children. The limitation was also intended to strengthen the focus of the Act in the eyes of legislators. Prospective legislation is needed immediately to provide order, direction and design to the unsettled lives of our target children. Because the Act is sensitive to the treatment of all parties, especially children, it is likely to be more readily accepted by legislators and the public than a full surrogacy regulatory act that is still meeting with intractable opposition.

Note the brevity of the Act. It is intended to state essential principles without inordinate elaboration or detailed regulatory procedures.

For example, a woman who gives birth to a child is the child’s mother.

A caveat is provided if a surrogacy arrangement is involved. An alternative is available for those who will not accept even limited, supervised, judicially-guided surrogacy, providing that any surrogacy agreement is void.

There was great urgency on the part of the Drafting Committee to provide a child with two legal parents. This principle led to a presumption of paternity of the husband of a married woman who bears a child through assisted conception, placing the burden on the husband to show lack of consent. A sperm donor, however, is not considered the parent of a child conceived through assisted conception unless there has been some prior agreement. We have given any child conceived under assisted conception virtually the same rights in property and inheritance as children conceived by natural means.

The bracketed Alternative A, including sections 5 through 9 relating to limited surrogacy is optional for each jurisdiction. The Act remains neutral as to the appropriateness of surrogacy and therefore includes an Alternative B, which rejects the enforcement of all surrogacy arrangements. The non-surrogacy sections of the Act stand alone and


7. See id. § 7 (1988).
our attention. Without traditional parentage, these children are buffeted by forces beyond their comprehension and control. Because of an accident of birth, these children of the new biology are deprived of certain basic rights.

Children are the first priority in an agenda which seeks to find solutions for these complex problems. One must then acknowledge the reality of these medical innovations created and developed to overcome the burden of infertility that bedevils our society. An estimated one billion dollars was spent by Americans in 1987 on medical care to combat infertility. The amount spent on office visits for infertility services rose from $600,000 in 1968 to about $1.6 million in 1984 according to the report of the Office of Technology Assessment.

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The Act was designed primarily to effect the security and well-being of children born and living in our midst as a result of assisted conception. The Conference’s Executive Committee and the general Conference, considering the plight of these children, some with five biological parents, some with no readily identifiable biological parents, and some with other deprivations, determined that the greatest priority and first call on the energy and talent of the Drafting Committee was to provide an act which addressed these and other deficiencies.

3. Id.
may be adopted without either Alternative A or B.

Those states that choose Alternative A can be edified by the serious attention to matters that preserve the best interests of the child. At the same time, this Alternative provides order and balance to the rights and duties of all of the parties concerned.

In drafting Alternative A, the Committee considered carefully the respective rights and duties of all parties in interest, the planning and review of all terms and components in the arrangements, the guidance of the court, and the concern for those issues necessary to provide the greatest protection for the child. These factors provide solutions for the possible problems of the children, and also make a difference even among those who object to general surrogacy legislation. Because of the limited focus of the Act, we believe it will eliminate the need for protracted litigation.

The process contemplated in Alternative A may in some instances burden the court and the intended parents must enter these arrangements fully prepared for certain exigencies and risk. To assure the desired result, some burden, inconvenience and risk must be undertaken.

In drafting Alternative A, the Committee made clear, positive choices in each instance to produce a child-oriented act. There was no boiler plate readily available to accomplish the task. The litany of restrictions, examinations, investigations, qualifications and limitations as set out in Alternative A complies with the mandate given to the Committee, although, in the eyes of some, constitutes a burden that may have a chilling effect on the success of the process.

The narrow scope and focus of the Act, through these specific measures, develops a valid order that provides for the best interests of the child. It establishes with clarity and dignity the rights of all parties in this extended family under Alternative A of this Act.

The Act gives equal opportunity for those who are not prepared to adopt the new technology. They may opt to elect Alternative B, which voids any arrangement which contemplates surrogacy, or an arrangement whereby a woman relinquishes her rights and duties as a parent of a child. The Act establishes certain basic rights for children under either alternative arrangement.

SECTION 1. DEFINITIONS

In this [Act]:

(1) "Assisted conception" means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.

(2) "Donor" means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

(3) "Intended parents" means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.

(4) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

COMMENT

Section 1. The definition of "assisted conception" establishes the scope of coverage of this Act. It is intended to be a broad definition. Section 1(1)(i) includes both "traditional" artificial insemination with fertilization occurring inside the woman's body and in vitro fertilization in which the joinder of sperm and egg takes place outside the body. Section 1(1)(ii) is designed to include the situation in which fertilization takes place through sexual intercourse and the resulting embryo is transplanted to the womb of a different woman.

The final clause of section 1(1) purposefully excludes husband-wife procreation from the definition of assisted conception. There are two reasons for this exclusion. First, as a policy matter, the rules pertaining to husband-wife procreation are the same regardless of the means utilized for procreation. Thus, if a husband and wife procreate through in vitro fertilization or more traditional artificial insemination, the status of the resulting child is determined by existing laws, such as the Uniform Parentage Act [hereinafter UPA2], which governs the status of children produced by sexual intercourse. Second, the rules of this
may be adopted without either Alternative A or B.

Those states that choose Alternative A can be edified by the serious attention to matters that preserve the best interests of the child. At the same time, this Alternative provides order and balance to the rights and duties of all of the parties concerned.

In drafting Alternative A, the Committee considered carefully the respective rights and duties of all parties in interest, the planning and review of all terms and components in the arrangements, the guidance of the court, and the concern for those issues necessary to provide the greatest protection for the child. These factors provide solutions for the possible problems of the children, and also make a difference even among those who object to general surrogacy legislation. Because of the limited focus of the Act, we believe it will eliminate the need for protracted litigation.

The process contemplated in Alternative A may in some instances burden the court and the intended parents must enter these arrangements fully prepared for certain exigencies and risk. To assure the desired result, some burden, inconvenience and risk must be undertaken.

In drafting Alternative A, the Committee made clear, positive choices in each instance to produce a child-oriented act. There was no boiler plate readily available to accomplish the task. The litany of restrictions, examinations, investigations, qualifications and limitations as set out in Alternative A complies with the mandate given to the Committee, although, in the eyes of some, constitutes a burden that may have a chilling effect on the success of the process.

The narrow scope and focus of the Act, through these specific measures, develops a valid order that provides for the best interests of the child. It establishes with clarity and dignity the rights of all parties in this extended family under Alternative A of this Act.

The Act gives equal opportunity for those who are not prepared to adopt the new technology. They may opt to elect Alternative B, which voids any arrangement which contemplates surrogacy, or an agreement whereby a woman relinquishes her rights and duties as a parent of a child. The Act establishes certain basic rights for children under either alternative arrangement.

II. The Act with Commentary

SECTION 1. DEFINITIONS

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(2) "Donor" means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

(3) "Intended parents" means a man and woman, married to each other, who enter into an agreement under this Act providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.

(4) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

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Act designating parentage and status of children are not always appropriate to husband-wife procreation. For example, a consenting husband ought not be permitted, through the use of artificial insemination, to claim the status of a non-parent donor under section 4(a) of this Act. As a result of the exclusion in section 1(1), he is not permitted to claim that status.

This Act is intended to govern the status of children of assisted conception, not to establish a regulatory scheme establishing the appropriate methods for the performance of such assisted conception. A jurisdiction may, for example, choose to enact separate regulations requiring genetic screening when assisted conception is undertaken or requiring that assisted conception be conducted only under certain conditions.

While it may be suggested that the word “donor” is properly limited to those who merely offer genetic material without compensation, section 1(2) defines the term to include those who receive compensation for their genetic material. The term donor is regularly used to describe those who sell sperm to sperm banks. Also, those who sell their blood to blood banks are usually referred to as blood donors.

The bracketed language in section 1(2) should be enacted only if the adopting jurisdiction selects Alternative A, concerning surrogacy. The exception clause at the end of section 1(2) makes it clear that a woman whose egg is fertilized through assisted conception and who bears the resulting child is not considered a donor. Under section 2 of the Act she is the mother of that child, unless a surrogacy arrangement has been approved under Alternative A. The bracketed language which appears as section 1(3) should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

Regardless of which alternative treatment of surrogacy agreements is chosen by a particular jurisdiction, section 1(4) should be enacted. This subsection defines a surrogate, which definition is necessary whether or not an enacting jurisdiction enforces surrogacy agreements.

SECTION 2. MATERNITY

[Except as provided in Sections 5 through 9,] a woman who gives

birth to a child is the child’s mother.

COMMENT

Section 2: The unbracketed language in this section codifies existing law concerning maternity, necessary because of the existence and growing use of technology enabling a woman to give birth to a child to whom she is not genetically related. This provision makes it clear that unless the enacting jurisdiction has adopted Alternative A, which in some circumstances designates someone other than the woman who gives birth as the mother, the woman who bears a child is the mother of that child. The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

SECTION 3. ASSISTED CONCEPTION BY MARRIED WOMAN

[Except as provided in Sections 5 through 9,] the husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child’s birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.

COMMENT

Section 3. The presumptive paternity of the husband of a married woman who bears a child through assisted conception reflects a concern for the best interests of the children. Any uncertainty concerning the identity of the father of such a child is shouldered by the married woman’s husband rather than the child. Thus, the husband (not someone acting on his behalf such as a guardian, administrator or executor) has the obligation to file an action aimed at denying paternity through lack of consent to the assisted conception. Neither the child nor the mother has an obligation to prove the husband’s paternity.

If, however, the non-paternity action is timely filed and the husband’s lack of consent is demonstrated, the child is without a legally recognized father since the sperm donor is not the father under section 4(a) of the Act. The filing of such a non-paternity action is also permitted within two years of the husband’s learning of the child’s birth.
Act designating parentage and status of children are not always appropriate to husband-wife procreation. For example, a consenting husband ought not be permitted, through the use of artificial insemination, to claim the status of a non-parent donor under section 4(a) of this Act. As a result of the exclusion in section 1(1), he is not permitted to claim that status.

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If, however, the non-paternity action is timely filed and the husband's lack of consent is demonstrated, the child is without a legally-recognized father since the sperm donor is not the father under section 4(a) of the Act. The filing of such a non-paternity action is also permitted within two years of the husband's learning of the child's birth.
Therefore, the period of uncertainty concerning the identity of the child's father would be longer than two years in the relatively rare case where the husband is not immediately aware of the child's birth.

By designating the husband of a woman who bears a child through assisted conception as the father, it is intended that he be considered the father for purposes of any cause of action that arises before the birth of the child. For example, he would be the father under any state law authorizing a wrongful death action for the death of an unborn child during pregnancy.

The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy. Under that Alternative, under certain circumstances the husband of the woman bearing the child will not be the father of the child. Instead, the man whose sperm is used in the conception of the child is the father.

SECTION 4. PARENTAL STATUS OF DONORS AND DECEASED INDIVIDUALS

[Except as otherwise provided in Sections 5 through 9]

(a) A donor is not a parent of a child conceived through assisted conception.

(b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child.

COMMENT

Section 4. Present statutory law is split concerning the parental status of sperm donors. Fifteen states have statutes patterned after section 5(b) of the Uniform Parentage Act, specifying that a donor is not considered the father of the child born of artificial insemination if the semen was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. Fifteen other statutes do not explicitly limit non-parenthood to situations where the semen is provided to a physician. Instead, they shield donors from parenthood in all situations where a married woman is artificially inseminated with her husband's consent.

Subsection 4(a), when read together with section 3, opts for the broader protection of donors provided by the latter group of statutes. If a married woman bears a child of assisted conception through the use of a donor's sperm, the donor is not the father. Her husband is the father unless and until his lack of consent to the assisted conception is proven within two years of his learning of the birth. This provides certainty for prospective donors. Note, however, that under section 4(a), non-parenthood is also provided for those donors who provide sperm for assisted conception by unmarried women. In that situation, the child would have no legally recognized father. Also, section 4(a) does not adopt the UPA's requirement that the donor provide the semen to a licensed physician. This is not realistic in light of present practices in the field of artificial insemination.

In providing non-parenthood for "donors," section 4(a) includes by reference the definition of donor in section 1(2), which covers those who provide sperm or eggs for assisted conception. Therefore, if a woman provides an egg for assisted conception which results in another woman bearing the child, the egg donor is not the child's mother. This places no burden on the child in light of section 2's general rule declaring that the woman who gives birth to a child is the child's mother.

Subsection 4(b) is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential parenthood of the deceased. The latter situation, in which cryopreservation is used to "freeze" an embryo created in vitro, already exists and gave rise to much controversy in Australia in the early 1980's.

A married couple died after having created an embryo through in vitro fertilization. Among the questions raised after their simultaneous death in a plane crash was whether posthumous implantation of the embryo would result in children who would be those of the deceased couple. Under section 4(b), implantation after the death of any genetic parent does not result in that genetic parent being the legally recognized parent. Clearly, under section 2 of the Act, the woman who bears the child is the mother. The parenthood of such child would presumptively be that of the mother's husband, if she is married, under section 3 of the Act. 10

10. For a discussion of recent Australian legislation in the area, see Corns, Legal Regulation of In Vitro Fertilization in Victoria, 58 LAW INSTR. J. 838 (1984); Note, Genetic Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos, 36 SYRACUSE L. REV. 1021, 1029 n.49 (1985).
Therefore, the period of uncertainty concerning the identity of the child’s father would be longer than two years in the relatively rare case where the husband is not immediately aware of the child’s birth.

By designating the husband of a woman who bears a child through assisted conception as the father, it is intended that he be considered the father for purposes of any cause of action that arises before the birth of the child. For example, he would be the father under any state law authorizing a wrongful death action for the death of an unborn child during pregnancy.

The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy. Under that Alternative, under certain circumstances the husband of the woman bearing the child will not be the father of the child. Instead, the man whose sperm is used in the conception of the child is the father.

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Subsection 4(a), when read together with section 3, opts for the broader protection of donors provided by the latter group of statutes. If a married woman bears a child of assisted conception through the use of a donor’s sperm, the donor is not the father. Her husband is the father unless and until his lack of consent to the assisted conception is proven within two years of his learning of the birth. This provides certainty for prospective donors. Note, however, that under section 4(a), non-parenthood is also provided for those donors who provide sperm for assisted conception by unmarried women. In that situation, the child would have no legally recognized father. Also, section 4(a) does not adopt the UPA’s requirement that the donor provide the semen to a licensed physician. This is not realistic in light of present practices in the field of artificial insemination.

In providing non-parenthood for “donors,” section 4(a) includes by reference the definition of donor in section 1(2), which covers those who provide sperm or eggs for assisted conception. Therefore, if a woman provides an egg for assisted conception which results in another woman bearing the child, the egg donor is not the child’s mother. This places no burden on the child in light of section 2’s general rule declaring that the woman who gives birth to a child is the child’s mother.

Subsection 4(b) is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential parenthood of the deceased. The latter situation, in which cryopreservation is used to “freeze” an embryo created in vitro, already exists and gives rise to much controversy in Australia in the early 1980’s.

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Section 4(b) is the only provision of the Act that deals with procreation by those who are married to each other. It is designed primarily to avoid the problems of intestate succession, which could arise if the posthumous use of a person’s genetic material leads to the deceased being termed a parent. Of course, those who want to provide explicitly for such children in their wills may do so.

The bracketed language at the beginning of this Section should be adopted only by those jurisdictions enacting Alternative A concerning surrogacy. Under that provision, certain persons who would otherwise be considered donors are parents.

ALTERNATIVE A

Comment: A state that chooses Alternative A should also consider Section 1(3) and the bracketed language in Sections 1(2), 2, 3, and 4.

SECTION 5. SURROGACY AGREEMENT

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate’s husband, if a party to the agreement, is the father of the child. If the surrogate’s husband is not a party to the agreement or the surrogate is unmarried, patriernity of the child is governed by [the Uniform Parentage Act].

COMMENT

Alternative A, Section 5. Because of the significant controversy concerning the appropriateness of arrangements under which a woman agrees to bear a child on behalf of another woman, this Act proposes two alternatives. Under Alternative A, in sections 5 through 9, the adopting state is offered a framework under which such agreements are given effect under limited and prescribed circumstances. This alternative also outlines the parent-child relationships established when such agreements are approved by a court.

Alternative B, consisting of alternative Section 5, declares such agreements to be void and describes the parent-child relationships between any child born pursuant to such agreements and the other parties. The desire of some childless couples for a biologically-related child together with the technological capacity to use the sperm of a husband in impregnating a woman not his wife and the willingness of others to aid such couples makes it likely that such agreements will continue to be written. Therefore, it is important that a state enacting the Act adopt either Alternative A or Alternative B.

Under section 5(a) of Alternative A, together with the definition of “intended parents” under section 1(3), a valid surrogacy agreement requires the participation of two intended parents who are married to each other and a surrogate, who is defined by section 1(4) as an adult woman who agrees to bear a child through assisted conception for the intended parents. If the surrogate is married, her husband must also be a party to the surrogacy agreement. Additional requirements for a surrogate and the intended parents are imposed by section 6 of Alternative A. Note that section 5(a) simply authorizes such agreements. It does not give them effect in terms of designating parenthood. In order to become effective in such matters, the agreement must be approved by the appropriate court under section 6.

Section 5(b) makes clear that agreements not approved under section 6 are void. Non-approved agreements in a jurisdiction that has adopted Alternative A of the Act have the same effect as all surrogacy agreements under Alternative B. That is, the surrogate is the mother of any child of assisted conception born pursuant to such an agreement. Her husband, if he is a party to the agreement, is the father. If the surrogate’s husband is not a party to such agreement or if the mother is unmarried, paternity of the child is left to existing law.

SECTION 6. PETITION AND HEARING FOR APPROVAL OF SURROGACY AGREEMENT

(a) The intended parents and the surrogate may file a petition in the [appropriate court] to approve a surrogacy agreement if one of them is a resident of this State. The surrogate’s husband, if she is married, must join in the petition. A copy of the agreement must be attached to the petition. The court shall name a [guardian ad litem] to represent the interests of a child to be conceived by the surrogate through assisted conception and [shall] [may] appoint counsel to represent the surrogate.

(b) The court shall hold a hearing on the petition and shall enter an order approving the surrogacy agreement, authorizing assisted concep-
Section 4(b) is the only provision of the Act that deals with procreation by those who are married to each other. It is designed primarily to avoid the problems of intestate succession, which could arise if the posthumous use of a person's genetic material leads to the deceased being termed a parent. Of course, those who want to provide explicitly for such children in their wills may do so.

The bracketed language at the beginning of this Section should be adopted only by those jurisdictions enacting Alternative A concerning surrogacy. Under that provision, certain persons who would otherwise be considered donors are parents.

**ALTERNATIVE A**

Comment: A state that chooses Alternative A should also consider Section 1(3) and the bracketed language in Sections 1(2), 2, 3, and 4.

**SECTION 5. SURROGACY AGREEMENT**

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by the Uniform Parentage Act.

**COMMENT**

Alternative A, Section 5. Because of the significant controversy concerning the appropriateness of arrangements under which a woman agrees to bear a child on behalf of another woman, this Act proposes two alternatives. Under Alternative A, in sections 5 through 9, the adopting state is offered a framework under which such agreements are given effect under limited and prescribed circumstances. This alternative also outlines the parent-child relationships established when such agreements are approved by a court.

Alternative B, consisting of alternative Section 5, declares such agreements to be void and describes the parent-child relationships between any child born pursuant to such agreements and the other parties. The desire of some childless couples for a biologically-related child together with the technological capacity to use the sperm of a husband in impregnating a woman not his wife and the willingness of others to aid such couples makes it likely that such agreements will continue to be written. Therefore, it is important that a state enacting the Act adopt either Alternative A or Alternative B.

Under section 5(a) of Alternative A, together with the definition of "intended parents" under section 1(3), a valid surrogacy agreement requires the participation of two intended parents who are married to each other and a surrogate, who is defined by section 1(4) as an adult woman who agrees to bear a child through assisted conception for the intended parents. If the surrogate is married, her husband must also be a party to the surrogacy agreement. Additional requirements for a surrogate and the intended parents are imposed by section 6 of Alternative A. Note that section 5(a) simply authorizes such agreements. It does not give them effect in terms of designating parenthood. In order to become effective in such matters, the agreement must be approved by the appropriate court under section 6.

Section 5(b) makes clear that agreements not approved under section 6 are void. Non-approved agreements in a jurisdiction that has adopted Alternative A of the Act have the same effect as all surrogacy agreements under Alternative B. That is, the surrogate is the mother of any child of assisted conception born pursuant to such an agreement. Her husband, if he is a party to the agreement, is the father. If the surrogate's husband is not a party to such agreement or if the mother is unmarried, paternity of the child is left to existing law.

**SECTION 6. PETITION AND HEARING FOR APPROVAL OF SURROGACY AGREEMENT**

(a) The intended parents and the surrogate may file a petition in the [appropriate court] to approve a surrogacy agreement if one of them is a resident of this State. The surrogate's husband, if she is married, must join in the petition. A copy of the agreement must be attached to the petition. The court shall name a guardian ad litem to represent the interests of a child to be conceived by the surrogate through assisted conception and [shall] [may] appoint counsel to represent the surrogate.

(b) The court shall hold a hearing on the petition and shall enter an order approving the surrogacy agreement, authorizing assisted concep-
tion for a period of 12 months after the date of the order, declaring the
intended parents to be the parents of a child to be conceived through
assisted conception pursuant to the agreement and discharging the
guardian ad litem and attorney for the surrogate, upon finding that:
(1) the court has jurisdiction and all parties have submitted to its
jurisdiction under subsection (e) and have agreed that the law of this
State governs all matters arising under this Act and the agreement;
(2) the intended mother is unable to bear a child or is unable to do
so without unreasonable risk to an unborn child or to the physical or
mental health of the intended mother or child, and the finding is sup-
ported by medical evidence;
(3) the [relevant child-welfare agency] has made a home study of the
intended parents and the surrogate and a copy of the report of the home
study has been filed with the court;
(4) the intended parents, the surrogate, and the surrogate's husband,
if she is married, meet the standards of fitness applicable to adoptive
parents in this State;
(5) all parties have voluntarily entered into the agreement and un-
derstood its terms, nature, and meaning, and the effect of the pro-
ceeding;
(6) the surrogate has had at least one pregnancy and delivery and
bearing another child will not pose an unreasonable risk to the unborn
child or to the physical or mental health of the surrogate or the child,
and this finding is supported by medical evidence;
(7) all parties have received counseling concerning the effect of the
surrogacy by [a qualified health-care professional or social worker] and
a report containing conclusions about the capacity of the parties to
enter into and fulfill the agreement has been filed with the court;
(8) a report of the results of any medical or psychological examina-
tion or genetic screening agreed to by the parties or required by law has
been filed with the court and made available to the parties;
(9) adequate provision has been made for all reasonable health-care
costs associated with the surrogacy until the child's birth including re-
sponsibility for those costs if the agreement is terminated pursuant to
Section 7; and
(10) the agreement will not be substantially detrimental to the inter-
est of any of the affected individuals.
(c) Unless otherwise provided in the surrogacy agreement, all court
costs, attorney's fees, and other costs and expenses associated with
the proceeding must be assessed against the intended parents.

or vital statistics, the court shall conduct all hearings and proceedings
under this section in camera. The court shall keep all records of the
proceedings confidential and subject to inspection under the same stan-
dards applicable to adoptions. At the request of any party, the court
shall take steps necessary to ensure that the identities of the parties are
not disclosed.

(e) The court conducting the proceedings has exclusive and continu-
ating jurisdiction of all matters arising out of the surrogacy until a child
born after entry of an order under this section is 180 days old.

COMMENT

Alternative A, Section 6. Section 6, along with section 8 dealing
with parentage under an approved surrogacy, is the core of Alternative
A. It provides for state involvement, through supervision by a court, in
the surrogacy process before the assisted conception. The purpose of
this early involvement is to insure that the parties are appropriate for a
surrogacy arrangement, that they understand the consequences of what
they are about to do and that the best interests of any child(ren) born
of the surrogacy arrangement are considered before the arrangement
is authorized.
The forum for state involvement is a petition brought by all the
parties to the arrangement (including the surrogate's husband if she is
married). The parties must seek a judicial order authorizing the as-
sisted conception contemplated by their agreement. The agreement it-
self must be submitted to the court. The court must hold a hearing on
the petition and, under section 6(b), must make ten separate findings
before the surrogacy arrangement is allowed to proceed. Section
6(b)(10) requires a finding that the arrangement is not "substantially
detrimental to the interest of any of the affected individuals." This in-
sures that the court retains a measure of discretion to consider and use
all relevant information.
This pre-conception authorization process is roughly analogous to
adoption procedures currently in place in most jurisdictions. Just as
adoption contemplates the transfer of parentage of a child from the
natural to the adoptive parents, surrogacy involves the transfer from
the surrogate to the intended parents. Section 6 is designed to protect
the interests of the child(ren) to be born under the surrogacy arrange-
ment as well as the surrogate and the intended parents. It should be
noted that under section 1(3), at least one of the intended parents is
genetically related to the child(ren) born of the arrangement.

https://nsuworks.nova.edu/nlr/vol13/iss2/13
tion for a period of 12 months after the date of the order, declaring the intended parents to be the parents of a child to be conceived through assisted conception pursuant to the agreement and discharging the guardian ad litem and attorney for the surrogate, upon finding that:

1. The court has jurisdiction and all parties have submitted to its jurisdiction under subsection (e) and have agreed that the law of this State governs all matters arising under this Act and the agreement;

2. The intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;

3. The [relevant child-welfare agency] has made a home study of the intended parents and the surrogate and a copy of the report of the home study has been filed with the court;

4. The intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State;

5. All parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding;

6. The surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence;

7. All parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court;

8. A report of the results of any medical or psychological examination or genetic screening agreed to by the parties or required by law has been filed with the court and made available to the parties;

9. Adequate provision has been made for all reasonable health-care costs associated with the surrogacy until the child's birth including responsibility for those costs if the agreement is terminated pursuant to Section 7; and

10. The agreement will not be substantially detrimental to the interest of any of the affected individuals.

(c) Unless otherwise provided in the surrogacy agreement, all court costs, attorney's fees, and other costs and expenses associated with the proceeding must be assessed against the intended parents.

(d) Notwithstanding any other law concerning judicial proceedings or vital statistics, the court shall conduct all hearings and proceedings under this section in camera. The court shall keep all records of the proceedings confidential and subject to inspection under the same standards applicable to adoptions. At the request of any party, the court shall take steps necessary to ensure that the identities of the parties are not disclosed.

(e) The court conducting the proceedings has exclusive and continuing jurisdiction of all matters arising out of the surrogacy until a child born after entry of an order under this section is 180 days old.

COMMENT

Alternative A, Section 6. Section 6, along with section 8 dealing with parentage under an approved surrogacy, is the core of Alternative A. It provides for state involvement, through supervision by a court, in the surrogacy process before the assisted conception. The purpose of this early involvement is to ensure that the parties are appropriate for a surrogacy arrangement, that they understand the consequences of what they are about to do and that the best interests of any child(ren) born of the surrogacy arrangement are considered before the arrangement is authorized.

The forum for state involvement is a petition brought by all the parties to the arrangement (including the surrogate's husband if she is married). The parties must seek a judicial order authorizing the assisted conception contemplated by their agreement. The agreement itself must be submitted to the court. The court must hold a hearing on the petition and, under section 6(b), must make ten separate findings before the surrogacy arrangement is allowed to proceed. Section 6(b)(10) requires a finding that the arrangement is not "substantially detrimental to the interest of any of the affected individuals." This insures that the court retains a measure of discretion to consider and use all relevant information.

This pre-conception authorization process is roughly analogous to adoption procedures currently in place in most jurisdictions. Just as adoption contemplates the transfer of parentage of a child from the natural to the adoptive parents, surrogacy involves the transfer from the surrogate to the intended parents. Section 6 is designed to protect the interests of the child(ren) to be born under the surrogacy arrangement as well as the surrogate and the intended parents. It should be noted that under section 1(3), at least one of the intended parents is genetically related to the child(ren) born of the arrangement.
Section 6 seeks to protect the interests of the child(ren) in several ways. The major protection of the interests of the child provided by the Act is the authorization procedure itself. By providing for the court order authorizing the assisted conception and the surrogacy arrangement, the Act establishes closely supervised surrogacy as one of the methods to guarantee the security and well being of the child. Under section 6(a), a guardian ad litem must be appointed to represent the interests of any child conceived through the surrogacy arrangement. As enacting jurisdiction may choose either mandatory or optional independent representation for the surrogate. Under section 6(b)(3), the court is informed of the results of a home study of both the intended parents and the surrogate. A study of the surrogate is required because of the possibility of termination of the agreement under section 7 in which case the surrogate is the legally recognized mother.

Further protection of the child is provided by the finding required by section 6(b)(4) that both intended parents and surrogate (and her husband, if any) satisfy the standards of fitness required of adopted parents. Under section 6(b)(6), the court must assure itself, on the basis of medical evidence, that the pregnancy will not be dangerous to the child. While section 6(b)(6) does not require any medical or genetic screening, if such testing is required by the agreement (or other law), the results will be available to the court and all parties. Section 6(b)(9) requires assurance that payment of health care costs during pregnancy shall be provided. The provisions in section 6(b)(1) and 6(c), dealing with exclusive jurisdiction, are designed to minimize the possibility of parallel litigation in different states and the consequent risk of childnappping for strategic purposes.

The interests of the surrogate are also protected by section 6. The bracketed version of section 6(a) requires appointed counsel to represent her interests. The findings required by section 6(b)(5) and 6(b)(7) protect the surrogate against the possibility of overreaching or fraud. Under section 6(b)(6), the court must find that the surrogate has had at least one previous pregnancy and delivery. Presumably, such a finding helps ensure that the surrogate fully understands the nature and experience of pregnancy. The court must also find the contemplated pregnancy and delivery does not pose unreasonable physical or mental health risks to the surrogate. The requirement of assurance of provision for health care costs until birth imposed by section 6(b)(9) also protects the surrogate. Section 6(c) requires that all costs associated with the hearing be borne by the intended parents, unless other...
Section 6 seeks to protect the interests of the child(ren) in several ways. The major protection of the interests of the child provided by the Act is the authorization procedure itself. By providing for the court order authorizing the assisted conception and the surrogacy arrangement, the Act establishes closely supervised surrogacy as one of the methods to guarantee the security and well being of the child. Under section 6(a), a guardian ad litem must be appointed to represent the interests of any child conceived through the surrogacy arrangement. An enacting jurisdiction may choose either mandatory or optional independent representation for the surrogate. Under section 6(b)(3), the court is informed of the results of a home study of both the intended parents and the surrogate. A study of the surrogate is required because of the possibility of termination of the agreement under section 7 in which case the surrogate is the legally recognized mother.

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Most surrogacy arrangements involve intended parents and surrogates who have met each other. If, however, this is not the case and the surrogate does not want her identity revealed to the intended parents, she may request (under section 6(d)) that the court take all steps to insure that anonymity. At any event, section 6(d) requires all proceedings to be held in camera with sealed records to insure confidentiality. In addition to the protections offered the surrogate by section 6 at the hearing, she is given the right under section 7 to terminate the agreement, even after it has been approved.

The interests of the intended parents are considered. As an opportunity for childbearing for those intended parents who are unable to procreate through traditional means, the Act provides some protection for their interests. The requirements of sections 6(b)(5), (6) and (7) help provide assurance to the intended parents that the surrogate is capable and knowingly enters the surrogacy arrangement. The interest of the intended parents in producing a healthy child is promoted through section 6(b), which requires a finding that a pregnancy by the surrogate will not be unreasonably risky to the child.

Section 6, while constructing a detailed set of requirements for the petition and the findings that must be made before an authorizing order can be issued, nowhere states the consequences of violations of the rules. Because of the variety of violations that could possibly occur, a bright-line rule concerning the effect of such violations is inappropriate. The question of the consequences of a failure to abide by the rules of section 6 is left to a case-by-case determination. A court is guided in making such a determination by the narrow purpose of Alternative A to permit surrogacy arrangements and the equities of a particular situation.

Note that section 7 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of section 6 provides the occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of section 6 is discovered by a party during a time when section 7 termination would have been permissible, failure to terminate might be an appropriate reason to estop the party from later seeking to overturn or ignore the section 6 order.

11. See Uniform Act § 6(b)(2).
SECTION 7. THE TERMINATION OF SURROGACY AGREEMENT

(a) After entry of an order under Section 6, but before the surrogate becomes pregnant through assisted conception, the court for cause, or the surrogate, her husband, or the intended parents may terminate the surrogacy agreement by giving written notice of termination to all parties and filing notice of the termination with the court. Thereupon, the court shall vacate the order entered under Section 6.

(b) A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement. Upon finding, after notice to the parties to the agreement and hearing, that the surrogate has voluntarily terminated the agreement and understands the nature, meaning, and effect of the termination, the court shall vacate the order entered under Section 4.

(c) The surrogate is not liable to the intended parents for terminating the agreement pursuant to this section.

COMMENT

Alternative A. Section 7. Subsections (a) and (b) provide for termination of the surrogacy arrangement after the authorization order in two situations. Under subsection (a), any party or the court for cause may cancel the arrangement before the pregnancy has been established. This provides for a period of cancellation during a time when the interests of the parties would not be unduly prejudiced by such termination. By definition, the procreation process has not begun and, therefore, there is no interest to be asserted on behalf of the child. The intended parents have an expectation of interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means.

Subsection (b) gives a surrogate who has provided the egg for the assisted conception 180 days after the last insemination to recant and decide to keep the child as her own. The subsection requires that all parties to the agreement be given notice and that a hearing be held.

[12] Under current surrogacy arrangements, the surrogate does provide the egg.

SECTION 7. THE TERMINATION OF SURROGACY AGREEMENT

(a) After entry of an order under Section 6, but before the surrogate becomes pregnant through assisted conception, the court for cause, or the surrogate, her husband, or the intended parents may terminate the surrogacy agreement by giving written notice of termination to all other parties and filing notice of the termination with the court. Thereupon, the court shall vacate the order entered under Section 6.

(b) A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement. Upon finding, after notice to the parties to the agreement and hearing, that the surrogate has voluntarily terminated the agreement and understands the nature, meaning, and effect of the termination, the court shall vacate the order entered under Section 4.

(c) The surrogate is not liable to the intended parents for terminating the agreement pursuant to this section.

COMMENT

Alternative A, Section 7. Subsections (a) and (b) provide for termination of the surrogacy arrangement after the authorization order in two situations. Under subsection (a), any party or the court for cause may cancel the arrangement before the pregnancy has been established. This provides for a period of cancellation during a time when the interests of the parties would not be unduly prejudiced by such termination. By definition, the procreation process has not begun and, therefore, there is no interest to be asserted on behalf of the child. The intended parents have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means. Subsection (b) gives a surrogate who has provided the egg for the assisted conception 180 days after the last insemination to recant and decide to keep the child as her own. The subsection requires that all parties to the agreement be given notice and that a hearing be held on

12. Under most current surrogacy arrangements, the surrogate does provide the

a filing of an intent to terminate by the surrogate. Such notice, of course, must be provided in a constitutionally acceptable manner. If the court determines that the surrogate’s termination is voluntary and she is aware of the consequences of such a termination, it must vacate the authorization order.

This 180-day recantation period is a compromise between two polar positions concerning recantation. Some argue that once the agreement has been presented to a court that has made the requisite findings under section 6(b), no recantation should be permitted. After all, the surrogate has entered into an agreement to bear a child for the intended parents. The court has found that she acted knowingly and voluntarily and that she was an appropriate person to fulfill the role of surrogate. It is argued that the expectation interests of the intended parents should not be frustrated by the surrogate’s unilateral action.

On the other hand, some argue that the surrogate ought to be permitted to renounce her agreement at any time until after the birth of the child. This position assimilates the surrogate’s rights to those of a birth mother who gives consent to the adoption of her child. Most current adoption statutes provide that valid consent can be given only after birth.

The selection of the 180-day recantation period, however, can be viewed as more than a mere mechanical compromise between the two positions. Instead, this recantation period can be explained by pointing out that the surrogacy agreement is simply different from both the ordinary contract situation and the ordinary adoption situation and, therefore, ought to be treated differently. Surrogacy is not an ordinary contract because it contemplates the creation of a human being whose interests must be taken into account. The child’s interests in a parent-child relationship with his or her biological mother are protected by giving her an extra 180 days to decide if she really wants to give up the child to the intended mother.

Surrogacy is also different from an adoption and the post-birth consent requirement of adoption is not appropriate for the surrogacy situation. The requirement of post-birth consent in adoption is based on the reality that many birth mothers are young, unmarried women who arrange during pregnancy to give their child up for adoption. Decisions made under such circumstances are often the result of emotional stress created by young women in the midst of an often unwanted pregnancy.

13. See Uniform Act § 8(b).
Therefore, "pregnant women are irrebuttably presumed incapable of protecting their own interests."14

The surrogacy arrangement authorized under this Act is different. Most importantly, the original decision to give up the child is made before the pregnancy by an adult woman who has already experienced a previous pregnancy. It is an arrangement that has been examined and approved by a court under section 6, which provides many protections of the surrogate. Any undue pressure to become a surrogate will have been examined at the section 6 hearing.

Rejecting the contract and adoption analogies, the question of an appropriate time period for recantation remains. Section 7(b)'s 180-day recantation period roughly coincides with the time during which the surrogate has a constitutionally-protected right to terminate the pregnancy. Because the surrogate has this right to choose to abort, there is a certain logic in giving the same period in which to decide to bear the child and honor her pre-conception agreement. This recantation position recognizes the right of the surrogate to change her mind well into the pregnancy as well as the interests of the intended parents in the finality of the decision-making process before birth. Note that because the 180-day period begins on the date of the last insemination pursuant to the agreement (a point chosen because of its certainty), it is possible that the recantation period will extend longer than 180 days into pregnancy, if the pregnancy was actually created by an earlier insemination. A jurisdiction that finds the 180-day period too short can choose not to enact Alternative A and opt for Alternative B, which provides for no enforcement of surrogacy agreements.

Section 7(c) insures that a recanting surrogate is not liable for damages for her recantation, either under subsection (a) or (b). No such liability for the surrogate for her recantation can be imposed by the agreement. By creating this immunity for the surrogate, this provision is not intended to impose any liability for costs associated with the surrogacy on any other parties to the arrangement. Such obligations, however, may be imposed by the agreement itself.18

15. See UNIFORM ACT § 6(b)(9).

SECTION 8. PARENTAGE UNDER APPROVED SURROGACY AGREEMENT

(a) The following rules of parentage apply to surrogacy agreements approved under Section 6:

(1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).

(2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b), the surrogate is the mother of the resulting child, and her husband, if a party to the agreement, is the father.

If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

(b) Upon birth of the child, the intended parents shall file a written notice with the court that a child has been born to the surrogate within 300 days after assisted conception. Thereupon, the court shall enter an order directing the [Department of Vital Statistics] to issue a new birth certificate naming the intended parents as parents and to seal the original birth certificate in the records of the [Department of Vital Statistics].

COMMENT

Alternative A. Section 8. Under section 8(a), parentage of the child born pursuant to an approved surrogacy is vested in the intended parents where the order under section 6 is still in effect. Notice of the birth of the child must be filed by the intended parents and the court, upon receipt of the notice, shall direct the issuance of a birth certificate naming the intended parents as parents. A birth certificate issued under this subsection might later be replaced by a birth certificate naming other individuals as parents of the child if an action to dispute the parentage of the intended parents filed under section 9(d) is successful.

Section 8(b) deals with parentage where the surrogate has exercised her section 7(b) right of recantation. It makes clear that the surrogate and her husband, if a party to the agreement, are the parents of the child in such a situation. Where the surrogate is unmarried or her husband was not a party to the agreement, paternity is left to the otherwise relevant state law. If, however, the surrogate has married or re-
Therefore, "pregnant women are irrebuttably presumed incapable of protecting their own interests."14

The surrogacy arrangement authorized under this Act is different. Most importantly, the original decision to give up the child is made before the pregnancy by an adult woman who has already experienced a previous pregnancy. It is an arrangement that has been examined and approved by a court under section 6, which provides many protections of the surrogate. Any undue pressure to become a surrogate will have been examined at the section 6 hearing.

Rejecting the contract and adoption analogies, the question of an appropriate time period for recantation remains. Section 7(b)'s 180-day recantation period roughly coincides with the time during which the surrogate has a constitutionally-protected right to terminate the pregnancy. Because the surrogate has this right to choose to abort, there is a certain logic in giving the same period in which to decide to bear the child and honor her pre-conception agreement. This recantation provision recognizes the right of the surrogate to change her mind well into the pregnancy as well as the interests of the intended parents in the finality of the decision-making process before birth. Note that because the 180-day period begins on the date of the last insemination pursuant to the agreement (a point chosen because of its certainty), it is possible that the recantation period will extend longer than 180 days into pregnancy, if the pregnancy was actually created by an earlier insemination. A jurisdiction that finds the 180-day period too short can choose not to enact Alternative A and opt for Alternative B, which provides for no enforcement of surrogacy agreements.

Section 7(c) insures that a recanting surrogate is not liable in damages for her recantation, either under subsection (a) or (b). No such liability for the surrogate for her recantation can be imposed by the agreement. By creating this immunity for the surrogate, this provision is not intended to impose any liability for costs associated with the surrogacy or any other parties to the arrangement. Such obligations, however, may be imposed by the agreement itself.15

15. See UNIFORM ACT § 6(b)(9).

SECTION 8. PARENTAGE UNDER APPROVED SURROGACY AGREEMENT

(a) The following rules of parentage apply to surrogacy agreements approved under Section 6:

(1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).

(2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b), the surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father.

If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by the Uniform Parentage Act.

(b) Upon birth of the child, the intended parents shall file a written notice with the court that a child has been born to the surrogate within 300 days after assisted conception. Thereupon, the court shall enter an order directing the [Department of Vital Statistics] to issue a new birth certificate naming the intended parents as parents and to seal the original birth certificate in the records of the [Department of Vital Statistics].

COMMENT

Alternative A, Section 8. Under section 8(a), parentage of the child born pursuant to an approved surrogacy is vested in the intended parents where the order under section 6 is still in effect. Notice of the birth of the child must be filed by the intended parents and the court, upon receipt of the notice, shall direct the issuance of a birth certificate naming the intended parents as parents. A birth certificate issued under this subsection might later be replaced by a birth certificate naming other individuals as parents of the child if an action to dispute the parentage of the intended parents filed under section 9(d) is successful.

Section 8(b) deals with parentage where the surrogate has exercised her section 7(b) right of recantation. It makes clear that the surrogate and her husband, if a party to the agreement, are the parents of the child in such a situation. Where the surrogate is unmarried or her husband was not a party to the agreement, paternity is left to the otherwise relevant state law. If, however, the surrogate has married or re-

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married since the order authorizing the surrogacy, her husband is not the father of the child.18

Because under section 1(3) of the Act at least one intended parent must be genetically related to the child and section 7(b) recantation is limited to those surrogate who have provided the egg, in all cases arising under section 8(b), the intended father will be the genetic father. Thus, the interaction of section 8(b) and the law of paternity may result in the legally recognized father (the intended father) and the legally recognized mother (the surrogate) being in different households. This situation, while regrettable, is not unique in family law and may precipitate litigation over custody.19

SECTION 9. SURROGACY: MISCELLANEOUS PROVISIONS

(a) A surrogacy agreement that is the basis of an order under Section 6 may provide for the payment of consideration.

(b) A surrogacy agreement may not limit the right of the surrogate to make decisions regarding her health care or that of the embryo or fetus.

(c) After the entry of an order under Section 6, marriage of the surrogate does not affect the validity of the order, and her husband’s consent to the surrogacy agreement is not required, nor is he the father of a resulting child.

(d) A child born to a surrogate within 300 days after assisted conception pursuant to an order under Section 6 is presumed to result from the assisted conception. The presumption is conclusive as to all persons who have notice of the birth and who do not commence within 180 days after notice, an action to assert the contrary in which the child and the parties to the agreement are named as parties. The action must be commenced in the court that issued the order under Section 6.

(e) A health-care provider is not liable for recognizing the surrogate as the mother before receipt of a copy of the order entered under Section 6 or for recognizing the intended parents as parents after receipt of an order entered under Section 6.

[END OF ALTERNATIVE A]

16. See UNIFORM ACT § 9(c).


18. See UNIFORM ACT § 9(b).

19. See Robinson and Kurtz.
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the father of the child."

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[END OF ALTERNATIVE A]

16. See UNIFORM ACT § 9(2).
17. See In re Baby M, 537 A.2d 1227 (N.J. 1988) and the trial court order on

COMMENT

Alternative A. Section 9. Subsection 9(a) shields surrogacy agree-
ments that include payment of the surrogate from attack under “baby-
selling” statutes, which prohibit payment of money to the natural
mother in adoptions.

Section 9(b) acknowledges that the surrogate, as a pregnant wo-
man, has a constitutionally-recognized right to provide for her health
care and that of the unborn child. Section 9(c) makes it clear that a
man who marries the surrogate after the surrogacy authorization has
been issued is neither a party to the original action nor the father of a
resulting child, even if the surrogate exercises her recantation right
under section 7(b). Since he was not a party to the surrogacy agree-
ment, he is not burdened with the status of parent. In the case of a
recanting surrogate who has married since the original section 6 order,
she is the mother and the intended father may be the legally recognized
father under the jurisdiction's ordinary paternity laws.

Subsection 9(d) should be read in connection with the parentage
provision of section 8(a). The presumption created by section 9(d) is
intended to provide a starting point for the determination of whether a
child born to the surrogate was actually the product of the assisted con-
ception performed pursuant to the agreement. For example, a surro-
gate may assert that the child was created by the union of her egg and
her husband's sperm. She and all other persons who have notice of the
birth are given 180 days to commence an action to assert that the child
was not the product of the assisted conception. Such actions are gov-
erned by substantive and procedural law and otherwise relevant state
statutes concerning disputed parentage of a child.

Subsection 9(e) provides an incentive to the parties to the surro-
gacy to make hospital personnel aware of the existence of the arrange-
ment and to protect the health care providers in case such notification
has not been made.

ALTERNATIVE B

Comment: A state that chooses Alternative B shall consider Sections
10, 11, 12, 13, 14, 15, and 16, renumbered 6, 7, 8, 9, 10, 11, and 12,
respectively.

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SECTION 5. SURROGATE AGREEMENTS

An agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void. However, she is the mother of a resulting child, and her husband, if a party to the agreement, is the father of the child. If her husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

[END OF ALTERNATIVE B]

COMMENT

Alternative B, Section 5. This section should be adopted by a jurisdiction that chooses not to give any efficacy to surrogacy arrangements. It recognizes, however, that some such arrangements continue to be achieved even though they are not enforceable at law. Therefore, it makes provision for the maternity and paternity of children who are born pursuant to such agreements. Note that Alternative B, section 5, substitutes for Alternative A, sections 5-9.

SECTION 10. PARENT AND CHILD RELATIONSHIP; STATUS OF CHILD

(a) A child whose status as a child is declared or negated by this [Act] is the child only of his or her parents as determined under this [Act].

(b) Unless superseded by later events forming or terminating a parent and child relationship, the status of parent and child declared or negated by this [Act] as to a given individual and a child born alive controls for purposes of:
(1) intestate succession;
(2) probate law exemptions, allowances, or other protections for children in a parent's estate; and
(3) determining eligibility of the child or its descendants to share in a distributive transfer from any person as a member of a class determined by reference to the relationship.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 12. SHORT TITLE

This [Act] may be cited as the Uniform Status of Children of Assisted Conception Act.

SECTION 13. SEVERABILITY

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14. EFFECTIVE DATE

This [Act] shall take effect on ... . Its provisions are to be applied prospectively.
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(3) determining eligibility of the child or its descendants to share in a donative transfer from any person as a member of a class determined by reference to the relationship.

COMMENT

Section 10 (Section 6 if Alternative B is adopted): This provision parallels those provisions in adoption statutes which provide that once an adoption creates or negates a parent-child relationship, that relationship or negation of a relationship applies in all circumstances.

While strictly speaking subsection(b) may be redundant in light of subsection (a), it is included because of the importance of the situations listed herein. The introductory clause deals with situations where a parent-child relationship established under this Act is later severed through the placement of a child for adoption or, conversely, where a parent-child relationship is negated by the Act but is later established by an adoption.

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Weaving “Birth” Technology into the “Value and Policy Web” of Medicine, Ethics and Law: Should Policies on “Conception” Be Consistent?

Margaret A. Somerville*

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The author dedicates this article to her mother, Gertrude Honora Ganley, and her father, the late George Patrick Ganley, with gratitude for life.

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† Due to the interdisciplinary and international nature of this article, citations to legislation, cases outside of the United States, and medical journals, are in the citation form appropriate to the particular forum or discipline.