THE SURROGATE MOTHER — A GROWING PROBLEM

BY
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In recent years, the beneficial and negative aspects of in vitro fertilisation and surrogate motherhood in general have been the subject of considerable discussion. Whilst such techniques provide obvious benefits to childless couples, they have important legal, social and medical ramifications. In this article, Ms Sappideen analyses the legal status of a child conceived by these methods using the law's approach to the A.I.D. child and the adopted child as a guide to possible judicial reactions and legislative reform. The legal relationships between the surrogate mother and the childless couple are examined in the light of the implications of separating the social and biological aspects of parenthood.

I. INTRODUCTION

The world-wide acclaim accorded researchers Steptoe and Edwards on the birth of Louise Brown, the world's first test tube baby, was an assurance of public acceptance; the benefits to childless couples overall were seen as overwhelming any negative aspects of the in vitro fertilisation technique.[1] A grotesque failure would likely as not

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1 Harris and Gallup polls conducted in the United States after the birth of Louise Brown showed that the majority of Americans favoured in vitro fertilisation, although most women in the Harris Survey wanted I.V.F. prohibited until further testing had established its safety; they also opposed federal funding of research on I.V.F.: *Ethics Advisory Board (H.E.W.) Report and Conclusions — H.E.W. Support of Research Involving Human In Vitro Fertilisation and Embryo Transfer* (1979), June 18, 1979 44 Federal Register, 35055.

have resulted in universal condemnation.[2] The willingness of childless couples to consent to the procedure despite the continuing debate on the risks involved[3] provides further evidence of the extent to which couples will risk public and moral condemnation[4] and adverse legal consequences. Surrogate motherhood, whereby a woman is asked to bear a child for another, is in some sense only another expression of the constant distress caused by sterility and the desperate desire to have a child. In the early 1970's this manifested itself in child bartering; it was reported that couples were paying up to U.S.$25,000 for a baby on the black market.[5] It is reflected in the proscriptions relating to adoption that no financial inducements be offered.[6] The natural mother is to be allowed sufficient time to make a considered decision whether to place the child for adoption,[7] and in some jurisdictions private placements for adoption are outlawed.[8] These measures largely prevented the buying and selling of babies[9] leaving adoption as the only real option for the infertile couple. The dramatic drop of babies available for adoption[10] renewed interest in a technique which had been known for centuries — the technique of artificial insemination.[11] Artificial insemination using sperm from an anonymous donor (A.I.D.) is a very simple procedure available in cases of male infertility or genetic disability. Many couples

2 J. D. Watson, "Moving Toward the Clonal Man" (May 1979) *Atlantic* 50, 52-53.

3 See J. J. Schlesselman, "How does one assess the risks of abnormalities from human in vitro fertilisation?" (1979) 135 *Am. J. Obstet. Gynecol.* 135.

4 For an excellent general survey of the literature, see L. Waters, "Human In Vitro Fertilization: A Review of the Ethical Literature" (1979) 9(4) *Hastings Center Report* 23.

5 *Adoption and Foster Care: Hearings on Baby Selling before the Subcommittee on Children and Youth of the Senate Committee on Labour and Public Welfare* 94 Cong., 1st Sess., 6 (April 28-29, 1975). Evidence was given before the committee that there was a flourishing baby selling business in New York, Pennsylvania, Florida and Ohio.

6 Adoption of Children Act 1965 (N.S.W.) s. 50.

7 *Id.*, s. 31(3). See also s. 57.

8 In New South Wales applications for adoption can only be made through The Director of Youth and Community Services and approved agencies; Adoption of Children Act 1965 (N.S.W.) s. 18(2). Exceptions apply to relatives.

9 But in the United States apparently, the practice is still continuing, see L. McTaggart, *The Baby Brokers: The Marketing of White Babies in America* (1981).

10 Ready availability of contraception, increased use of abortion, and single mothers keeping their babies are the major reasons for reduction in numbers. In Australia, in 1974, there were 23,000 exnuptial births; only about 5,000 were surrendered for adoption: *Royal Commission on Human Relationships, Final Report* (1977) Vol. iv, Part V, 66 para. 86.

11 The first reported instance of human artificial insemination was by John Hunter towards the end of 18th century. For an historical account of artificial insemination, see A. F. Guttmacher, "The Role of Artificial Insemination in The Treatment of Sterility" (1960) 15 *Obstet. Gynecol. Surv.* 767. Artificial insemination may take two basic forms: (1) A.I.H. — artificial insemination of a married woman using her husband's sperm. This could be used, for example, when the husband, although fertile, was impotent. (2) A.I.D. — artificial insemination using sperm of an anonymous donor. Combined artificial insemination (C.A.I.) using both husband and donor's sperm, although used by some practitioners, may be counterproductive.

embarked upon this procedure in what was a hostile moral[12] and legal climate.[13] Legal opinion regarded the child as illegitimate and the husband consenting to the procedure as having no rights or duties in respect of the child. Over the period of several decades the tide has turned and artificial insemination by donor is growing in acceptance.[14] This has been reflected in a changed judicial attitude in the United States. It has been held in a series of cases that where a husband consents to A.I.D., he becomes the legal father and the child becomes the legitimate child of the marriage.[15] In some jurisdictions statutory provisions have declared that where a husband consents to the artificial insemination of his wife, he is to be treated as though he were the natural father of the child.[16] Similar provisions are under consideration in New South Wales.[17]

Inability to have children due to the wife's incapacity will usually be the reason for seeking out another to have a child for the couple,[18] but this may not be the only reason. Single men wanting to have a child, or women, who for reasons of vanity, convenience, or a career, may seek a surrogate mother.[19] The news media report increasing numbers of women seeking surrogate mothers.[20] The usual procedure adopted in the United States is for the couple seeking to have a child (for convenience referred to as husband and wife) to enter into a contract with the surrogate whereby she agrees to be artificially inseminated with the husband's sperm, to carry the child to term, and to give custody of the child to the couple after birth. The child is then

12 Artificial insemination was condemned as contrary to Christian beliefs by the Anglican Church *(Report of a Committee appointed by the Archbishop of Canterbury on Artificial Human Insemination* (1948) and by the Catholic Church (see A. F. Guttmacher, note 11 *supra,* 781). In England in 1960 the Fevershem Report *(Report of the Departmental Committee on Human Artificial Insemination* Cmnd 1105 [1960]) regarded the practice as unfavourable being akin to such things as fornication and adultery.

13 *Roberts* v. *Roberts* [1971] V.R. 160, 166. See also the general survey of the law by D. F. J. J. De Stoop, "Human Artificial Insemination and the Law in Australia" (1976) 50 *A.L.J.* 298. Early authority regarded artificial insemination by donor (A.I.D.) as adultery: *Orford* v. *Orford* (1921) 58 D.L.R. 251. *Cf. MacLennan* v. *MacLennan* [1958] Sess. Cas. 105 where Lord Wheatley thought that A.I.D. without the husband's consent could not amount to adultery for the purposes of both Scottish and English law; see also *Dennis* v. *Dennis* [1955] 2 All E.R. 51.

14 See *e.g.* approval by the Anglican Church of Canada, Task Force on Human Life in P. Creighton, *Artificial Insemination by Donor* (1977). In the United States estimates of the number of children born as a result of A.I.D. vary enormously. One writer put the figure at ½ million in 1960: M. Golin, "Paternity by Proxy" (1960) 1 *Medico Legal Digest* 4.

15 The cases are reviewed *infra.* See notes 28-32 *infra.*

16 See the provisions of the American Uniform Parentage Act which provides a model code extracted *infra.*

17 The Attorneys-General of the various States have agreed that uniform legislation should be introduced to regularise the position of the A.I.D. child. This legislation has yet to be implemented.

18 The incapacity may result, for example, from a hysterectomy.

19 P. Reilly, *Genetics, Law and Social Policy* (1977) 218, argues that non-medical reasons should not be a ground for restriction of surrogate motherhood. Reilly argues that it is easy to criticise a woman who, for a career or for other reasons, asks another to bear her child and yet be uncriticial of the mother who leaves her baby with a nanny all the time: "To distinguish physical from non-physical reasons for using surrogate motherhood is an unacceptable form of value imposition." P. Reilly, "In Vitro Fertilization — A Legal Perspective" in A. Milunsky and G. J. Annas (eds), *Genetics and the Law* (1976) 370-371. *Cf.* M. Revillard, "Legal aspects of artificial insemination and embryo transfer in French domestic law and private international law" in C.I.B.A. Foundation, *Law and Ethics of A.I.D.* (1973) 77, 87.

20 By the end of 1981 there will be about one hundred children born to surrogate mothers, N. P. Keane and D. L. Breo, *The Surrogate Mother* (1981) 12.

formally adopted by the wife.[21] The benefit of this procedure is that the child is at least genetically the child of the husband. The increased success rate of in vitro fertilisation adds a further dimension to the problem. An ovum taken from the wife could be fertilised with the husband's sperm and the embryo transplanted [22] into the surrogate.[23] Husband and wife are undoubtedly genetic parents of the child, but the most critical issue is who is "mother" of the child at law — the surrogate who carried the child to term and gave birth or the wife as genetic parent? What is the status of contracts entered into by the surrogate and the couple? Are they enforceable? Should they be enforced? It is proposed to first consider the legal position independently of contract. There are two basic situations which must be examined. First, where the surrogate is artificially inseminated with husband's sperm. Secondly, employing in vitro fertilisation where an ovum taken from the wife, is fertilised with husband's sperm and the embryo is transplanted in the surrogate.

II. STATUS OF THE SURROGATE MOTHER AT LAW

1. Artificial Insemination Using Husband's Sperm[24]

Most reported cases of surrogate motherhood have involved insemination of the surrogate with sperm from the husband of the childless couple. On the face of it there should be little difficulty in finding that the husband is the natural father of the child with corresponding rights and duties.[25] But here the issue may be complicated by statutory provisions aimed at protecting the marital relationship and preventing unnecessary disputes concerning the legitimacy of children born during the marriage. If the surrogate mother is married, then the child is presumed to be the legitimate child of the marriage. In New South Wales this is a rebuttable presumption.[26] A further complication may arise out of statutory provisions enacted to regularise the position of children born as a result of artificial insemination by donor (A.I.D.). The American Uniform Parentage Act paragraph 5 provides:

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21 The Adoption of Children Act 1965 (N.S.W.) provides that except in special circumstances adoption orders are to be made in favour of a husband and wife jointly: s. 19(1). Under s. 19(4) the court can make an adoption order in favour of a husband and wife notwithstanding that one of them is a natural parent.

22 For a general summary of the technique involved in in vitro fertilisation, see R. G. Edwards and P. C. Steptoe, "Biological aspects of embryo transfer" in C.I.B.A. Foundation, *Law and Ethics of A.I.D. and Embryo Transfer* (1973) 11.

23 There is no reported case of surrogate motherhood using in vitro fertilisation which up until this stage has required special research facilities and extensive preparation for the procedure.

24 Other variations are possible, for example, the surrogate could be inseminated with the sperm of an anonymous donor. In this case the couple, or a single woman or single man would have no genetic link with the child. Both husband and wife might be infertile: in a sample survey of 121 adoptive parents 90% were both infertile, M. Bohman, *Adopted Children and Their Families* (1970) 97.

25 Comyn J. so found in the English case *A.* v. *C.* (1978) 8 Fam. Law 170, the first reported case on surrogate motherhood. Note that at common law the natural father of an illegitimate child is not entitled to custody, nor is his consent required for adoption, but as natural father he may apply for access. Under recent amendments to the Adoption of Children Act 1965 (N.S.W.) notice of consents given for adoption must be given to putative fathers who may apply for custody and guardianship of the child, ss 31A-31E.

26 Children (Equality of Status) Act 1976 (N.S.W.) s. 10. Blood tests may be ordered, s. 19. The presumption is rebuttable, in any proceedings, on a balance of probabilities, s. 18.

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child thereby conceived . . .
(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child so conceived.

If this provision is read literally the surrogate's husband will be the legal father of the child where he consented to the insemination[27] and the sperm donor will no longer be treated as the natural father of the child. In the United States a result similar to that contained in paragraph 5 of the Uniform Parentage Act has been reached through case law. It has been held that where, with the consent of her husband, a married woman was artificially inseminated with the sperm of an anonymous donor (A.I.D.), the husband became the legal father of the child with corresponding rights and duties. In *People* v. *Sorenson*[28] the court stated that a child conceived through A.I.D. does not have a natural father as the term is commonly used. The anonymous donor of the sperm cannot be considered the natural father as he is no more responsible for the use made of his sperm than the donor of blood or a kidney. Subsequently in the case *In re Adoption of Anonymous,*[29] a case concerning consent to adoption, the court found that the husband consenting to A.I.D. for his wife was legal father and the child the legitimate child of the marriage.[30] It was acknowledged that policy considerations required that as far as possible a child should have two parents and no purpose was served by declaring the child illegitimate.[31] Both the *Sorenson* case and *In re Adoption of Anonymous* concerned artificial insemination of married women using sperm of an anonymous donor. In contrast, in the rather curious case of *C.M.* v. *C.C.*[32] a young unmarried couple decide to have a child but rather than resort to usual measures the young woman inseminated herself with sperm provided by her boyfriend. The court held, as indeed it could do little else, that the young man was the natural father of the child and as such was entitled to access to the child.

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27 E. A. Erickson, "Contracts to Bear a Child" (1978) 66 *Cal. L. R.* 611. In many of the reported instances of surrogate motherhood artificial insemination was not administered by a physician but by the surrogate herself. This would render the provisions of the American Uniform Parentage Act para. 5 inapplicable.

28 *People* v. *Sorenson* 68 Cal. 2d 280, 437 P. 2d 495, 66 Cal. Rptr 7 (Sup. Ct 1968).

29 *In re Adoption of Anonymous* 74 Misc. 2d 99, 345 N.Y.S. 2d 430 (Sup. Ct 1973).

30 Lord Kilbrandon, a judge of the House of Lords, observed that "the [A.I.D.] child is legitimate in that it was borne by the wife, in fulfilment of the wishes of the husband, and, in that sense, to call it illegitimate is a misuse of language". "Discussion: Legal Aspects" in C.I.B.A. Foundation, *Law and Ethics of A.I.D. and Embryo Transfer* (1973) 92.

31 *Cf.* the statistics on lone parent families. In Australia in 1977, 10% of Australian families were lone parent families: *Royal Commission on Human Relationships, Final Report* (1977) Vol. iv, Part V, 77 paras 14, 15. In the United States one in five children out of a total of 12.2 million lived with one parent; more than 90% of those children lived with their mother who was either divorced or separated: U.S. Census Bureau reported in *New York Times,* 19 October 1981. The view that children need two parents is supported by recent studies. In an ongoing study of 18,000 children in single parent homes conducted by The National Association of Elementary School Principals and The Kettering Foundation, it was reported that as a group, children from one-parent homes achieve less, are absent more, and have more disciplinary problems. At the secondary school level, they also have more health problems, *Time,* 4 January 1982, 81.

32 *C.M.* v. *C.C.* 152 N.J. Super. 160, 377 A. 2d 821 (Cumberland County Ct 1977).

Applying these authorities to the case of a married surrogate mother whose spouse consents to A.I.D., it may be argued that the surrogate's spouse becomes legal father of the child. This result is unlikely for two reasons. First, unlike the *Sorenson* case,[33] the sperm donor may not be an anonymous donor and, unlike a blood donor or an anonymous sperm donor, is responsible for the use of his semen.[34] Secondly, if the surrogate's spouse consents, this consent is given for very different purposes to those envisaged in the cases: the surrogate's spouse consents to the use of A.I.D. so that the surrogate can bear a child for someone else. The result is that the husband, being the sperm donor, would be regarded as the natural father of the child as in *C.M.* v. *C.C.*[35]

All this reveals that even the simple exercise of determining who is the father can be extraordinarily complicated. If provisions similar to those set out in the American Uniform Parentage Act are adopted in New South Wales, the surrogate's spouse might be regarded as legal father, and the sperm donor (the husband of the childless couple) may no longer be treated in law as the natural parent. If the surrogate mother is not married there are no difficulties; the sperm donor would be regarded as natural father of the child. The issue whether the child should be regarded as the legitimate child of the marriage is discussed below.

Where the surrogate is artificially inseminated with the husband's semen, she is both genetic and gestational mother and, independently of any contractual provisions, there seems little doubt that the courts would find that, as natural mother of the child, she has corresponding rights and duties in respect of the child.[36] This view reaffirms the traditional approach in determining parental rights despite a movement away from genetic identity as the basis of the family unit and as the basis for imposition of obligations and vesting of parental rights in A.I.D. cases.[37] This trend away from natural rights of parents is also reflected in child custody cases which, over the last few decades, have looked increasingly to social or psychological parents in determining disputes.[38] But in the case of child placement decisions these changes in emphasis have not displaced biological parents as primary caretakers of the child; intervention by courts and the state is warranted only for cause. In the case of A.I.D., the finding that a spouse who consents to artificial insemination of his wife is the legal father of the child, was dictated as a matter of policy — the natural father of the child was not readily identifiable,[39] a child should have two parents wherever possible and the conduct of the spouse in participating in the decision concerning A.I.D. was sufficient to impose duties upon him and vest him with rights with regard to the child.[40] In the absence of

33 Note 28 *supra.*

34 The donor is only anonymous in the sense that his identity is not revealed to the parent who is artificially inseminated or her spouse.

35 Note 32 *supra.*

36 Note 25 *supra.*

37 See notes 28, 29 *supra.*

38 For a classic statement of this approach, see J. Goldstein, A. Freud and A. Solnit, *Before The Best Interests of The Child* (1979). See also Family Law Act 1975 (Cth) s. 64(1).

39 Some physicians do not maintain permanent records of A.I.D. donors making it impossible to determine his identity: M. Curie-Cohen, L. Luttrell and S. Shapiro, "Current Practice of Artificial Insemination by Donor in the United States" (1979) 300 *N. Engl. J. Med.* 585.

40 Notes 28, 29 *supra.*

these factors, the donor as natural father is vested with rights and obligations towards the child.[41]

2. Embryo Transfer to Surrogate

Successes with in vitro fertilisation enable an embryo to be implanted in a woman who is not genetic mother. Taking again the childless couple as an illustration — the wife's ovum could be fertilised with her husband's semen and the embryo implanted in a surrogate.[42] Here the surrogate is the gestational mother and the couple are genetic parents. As the procedure does not involve artificial insemination the complications previously encountered do not arise in the same way. But on one level of abstraction the A.I.D. cases give rise to the following argument: if the surrogate is married, consent by the surrogate's spouse to use of the partner's reproductive powers[43] in a non-sexual manner is sufficient to make the consenting spouse legal parent. The situation suggested, however, differs from the A.I.D. cases[44] in that the donor is responsible for the use of his sperm, and it is not a case where it can be said that there is no identifiable person who could reasonably be regarded as natural father of the child. It can therefore be concluded that a broad application of the principles in the A.I.D. cases would not result in the surrogate's husband being regarded as legal father.

If provisions similar to those contained in the American Uniform Parentage Act were enacted in New South Wales, they would not apply to in vitro fertilisation; the section applies only to artificial insemination. This could lead to some illogical results. If a married surrogate, with the consent of her spouse, is inseminated with sperm from the husband of the childless couple, then the surrogate's husband might be considered to be the legal father of the child, and the sperm donor treated in law as if he were not the natural father. If instead in vitro fertilisation is employed using ova from the surrogate fertilised with sperm from the husband of childless couple, the sperm donor will be regarded as the natural father of the child.[45] Unless there are special risks associated with the in vitro fertilisation procedure[46] it seems illogical that different results should arise from different procedures. If legislation similar to that contained in the American Uniform Parentage Act were introduced in New South Wales it could be extended to cover the use of an anonymous donor's sperm used in the in vitro fertilisation technique. This could be done independently of any question relating to surrogate motherhood.[47]

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41 Note 32 *supra.*

42 Human Leucocyte Antigen (H.L.A.) blood tissue test, can determine with a very high degree of probability (around 98%) genetic parentage obviating any difficulties in this regard. On H.L.A. testing generally, see M. W. Shaw and M. Kass, "Illegitimacy, child support and paternity testing" (1975) 13 *Houston L.R.* 41; C. L. Lee, "Current Status of Paternity Testing" (1975) 9 *Fam L.Q.* 615.

43 Albeit in a very restricted sense of gestation and bearing the child.

44 See notes 28 and 29 *supra.*

45 This is the likely common law position in New South Wales for both artificial insemination and in vitro fertilisation. The sperm donor would not be regarded as the legal father of the child as he is not married to the "mother" of the child, see discussion *infra.*

46 Note 3 *supra.*

47 The legislation would have to be carefully circumscribed to ensure that it is not wider than necessary — if broadly cast, it could extend to a child "conceived" and brought to term in a test tube: ectogenesis.

If the surrogate is not married the position is less complicated. Where sperm and ova from the childless couple are used in the procedure, it is clear that the sperm donor husband will be the natural father. If the sperm of an anonymous donor is used for the procedure, there are three possibilities: the child born as a result of the procedure may be (i) fatherless, or (ii) the natural child of the sperm donor, or (iii) the legal child of the husband. The last view would rest on the argument that as the husband was married to the "mother" of the child, on analogy with the A.I.D. cases, his consent to the in vitro fertilisation procedure utilising the wife's ova and the sperm of an anonymous donor is sufficient to invest him with rights and duties as legal father. The objection to this argument is that even if the A.I.D. cases could be so extended, there is a further stumbling block. The wife, *semble,* could not be regarded as mother of the child at law. This is discussed below. In the absence of legislation in New South Wales relating to artificial insemination the common law position would seem to be that the sperm donor would be regarded as the natural father of the child.

Who then is the mother — the genetic mother who supplied ova used in the in vitro fertilisation procedure or the surrogate as gestational mother? The legislative and judicial response to the question will depend on an evaluation of the significance of genetic identity as part of the process of motherhood. A trend reducing the significance of genetic identity has been discerned in A.I.D. decisions in the United States and in child placement cases.[48] It has also been pointed out that genetic identity does not guarantee that parents will act responsibly,[49] nor has genetic identity been regarded as critical in all societies.[50] This is also reflected in a movement towards genetic responsibility where there is a substantial risk of severe genetic defect; advocates argue that there is no inviolate right for all to reproduce when the resulting child has serious genetic defects with high cost to the community.[51] In an era when the "nature-nurture" debate (whether intelligence is genetically ordained or nurtured by environment) continues to rage,[52] the importance of the uterine environment to the subsequent development of the child is largely unknown. If, for example, it were found that personality or temperament were largely conditioned by uterine environment would these attributes be considered more important than physical characteristics? On this issue one researcher in the field concluded:

> The evidence suggests that the foetus is particularly sensitive to its environment within the maternal host and to stresses which affect the mother. At least the possibility has been established that the major determinants of viability, physical growth and health, mental ability and personality, may be those which operate during gestation. It has now become mandatory to take cognizance of prenatal

48 See *supra.*

49 Instance increasing numbers of abortions, child bashings and incest.

50 Participants at the C.I.B.A. Conference on A.I.D. and embryo transfer (see note 19 *supra*) reported that when patients in a small area in England were blood tested it was found that 30% of the husbands could not have been fathers of the children — this represented a minimum figure as at that time blood tests could only exclude paternity in cases of blood group incompatibility: E. E. Philipp, 66. J. E. Edwards at the same conference also reported that blood tests in the 1950's in the West Ilseworth area showed that about 50% of the children had not been fathered by the apparent father, 66, 68.

51 J. Fletcher, *The Ethics of Genetic Control* (1974) 125-26 arguing that no one has a moral right to bring a known defective into the world; P. Ramsdey, *Fabricated Man* (1970) 58-59.

52 See for example, N. J. Block and G. Dworkin (eds), *The I.Q. Controversy* (1976); A. Montagu (ed.), *Race and I.Q.* (1975).

factors in any study of the etiology of differences in personality, intelligence and health.[53]

A number of studies lend support to the view that stresses which affect the mother may adversely affect the unborn child.[54] In addition, it has been shown that negative maternal attitude has given rise to a significant increase in perinatal death and congenital anomalies.[55] These studies underline the importance of the uterine environment to the developing child and lend force to the argument that the gestational mother ought to be regarded as the natural mother of the child at law.

It is thought that the courts will find that the surrogate mother is the natural mother of the child as this most closely conforms to the societal conception of motherhood[56] and that an impersonal genetic contribution does not endow the status of natural mother of the child.[57]

In New South Wales the position is affected by statutory provisions relating to proof of maternity and paternity under the Children (Equality of Status) Act 1976, Part IV. Under Part IV the results of blood tests may be admitted in evidence to show that a person may be or is not the mother (or father) of the child; section 20. The thrust of the provisions is clearly that if it could be shown that there was a 98% probability that X was genetically the mother of the child[58] then the court would be persuaded on the balance of probabilities that X was the mother. But this testing determines only genetic parenthood. There is provision in section 19(10) for a third party to dispute paternity or maternity. These provisions do not necessarily exclude a finding that a surrogate who carries a child to term (but who is not genetic parent) is mother of the child.

An alternative approach to the discussion rests on the argument that the embryo can be regarded as the property of the childless couple. Where the embryo is a fusion of the husband's sperm and the wife's ovum, it may be argued that the embryo was their property and remained so throughout the period it was carried and nurtured by the surrogate. The argument is not without precedent. In *Del Zio* v. *The Presbyterian Hospital*[59] an action was brought for the destruction of the contents of a test tube thought to contain a fertilised ovum.[60] The plaintiffs, husband and wife, regarded in vitro fertilisation as their last opportunity to have a child. The plaintiffs alleged that the defendant had intentionally inflicted emotional harm. A second ground was that of conversion. The plaintiffs succeeded on the first ground but failed on the second. It is not at all clear why the claim in conversion failed. One report of the case stated that the claim in conversion failed because the defendant came by the test tube and its

53 D. H. Stott, "The Child's Hazards *In Utero*" in *Modern Perspectives in Child Psychiatry* (1st U.S. ed. 1971).

54 Note 99 *infra.*

55 V. H. Laukaran & B. J. Van den Berg, "The relationship of maternal attitude to pregnancy outcomes and obstetric complications, a cohort study of unwanted pregnancy" (1980) 126 *Am. J. Obstetc. Gynecol.* 374.

56 Note 153 *infra.*

57 The distinction between natural mother and genetic mother may require clarification in incest laws.

58 This could be determined by H.L.A. testing, see note 42 *supra.*

59 *Del Zio* v. *The Presbyterian Hospital* United States District Court, Southern District of New York, 1978 74 Civ. 3588 (memorandum decision).

60 It was never certain whether fertilisation had occurred: T. M. Powledge, "A Report from the Del Zio Trial" (1978) 8(5) *Hastings Centre Report* 15.

contents unintentionally.[61] This does not make any sense; intentional destruction constitutes conversion however the defendant came into possession.[62] The more difficult issue of whether an unimplanted embryo can be the subject of proprietary rights was not addressed. But it must be assumed that the court was of the view that proprietary rights could subsist in an embryo.

The common law has, however, traditionally found that there are no proprietary rights in a corpse.[63] The High Court in *Doodeward* v. *Spence*[64] held that this principle was not all-embracing. The rather unusual case concerned seizure by the police of a bottle containing the preserved body of a two headed baby which had been used as part of a side show exhibit. The side show proprietor sued the police for recovery of the exhibit. The High Court allowed recovery on the ground that the body was not an ordinary corpse but had been the subject of skilful work that had changed its nature.[65] The unimplanted test tube embryo does not neatly fit either characterisation. *Doodeward* v. *Spence* might suggest that proprietary rights exist in the research facility, as the embryo is a result of their special skills in collecting the ova and in providing suitable laboratory conditions for fertilisation and growth. Even if it were held that the couple had proprietary rights in the unimplanted embryo, it is unlikely that the courts would hold that these proprietary rights were sufficient to maintain an action on birth of the child against the surrogate. Proprietary rights do not annex to children; they are not the subject of ownership nor can they be considered a commercial commodity.[66] It is for this reason also that any attempt to contractually determine "rights" to children are likely to be rebuffed by the courts. The contractual aspect of the issue is the next point of focus.

III. SURROGATE MOTHER CONTRACTS

1. Contracting Parties

The practice followed in the United States is to require the surrogate to enter into a contract which regulates the rights and duties of the parties. Where the identities of the surrogate and the couple are not revealed the surrogate enters into a contract with the

61 *Id.*, 16.
62 See generally, J. G. Fleming, *Law of Torts* (5th ed. 1977) ch. 4.
63 See *Doodeward* v. *Spence* (1908) 6 C.L.R. 406.
64 *Ibid.*
65 The majority did not express an opinion on whether a still-born foetus was in the same category as a dead body. Griffith, C.J. *Id.* 420. For further discussion on the issue whether an unimplanted embryo can constitute property, see L. O. Schroeder, "New Life Person or Property" (1974) 131 *Am. J. of Psychiatry* 541.
66 Actions in trover and detinue are available with respect to living children, note 63 *supra*, 418.

attorney or physician who acts as an intermediary.[67] In other cases there may be a direct contractual relationship between the surrogate and the couple wanting to have the child. If the surrogate is married, her spouse's consent is not legally required[68] and therefore he would not be a necessary party to the contract.[69]

2. Terms of the Contract

Current contracts in the United States provide that the couple are legal parents of the child and that the surrogate will give custody of the child to them at birth. As most cases of surrogate motherhood involve artificial insemination using the husband's sperm, there is provision for adoption by the wife. The husband as natural father does not have to adopt.[70] The contract requires the surrogate to consent to the adoption. It is usual also to require the couple to provide health insurance for the surrogate during pregnancy and the birth of the child, and to allow recovery of necessary expenditure from the couple.[71] In most cases the surrogate also agrees not to contact the child until the child is at least eighteen.[72] In addition to reimbursement of expenses, the surrogate is usually paid a fee of around $10,000, although it can vary from $7,000-$35,000.[73] Numerous other matters can be included in the contract. Where attorneys or physicians have acted as intermediaries in bringing together the parties, they have generally required surrogate applicants to undergo preliminary health screening.[74] The contract may in any event contain specific provisions relating to the health of the surrogate. The following might be included. A warranty by the surrogate that there are no known health reasons which could affect her bearing a healthy child.[75] The

67 Where the contract is directly with the attorney or physician acting as intermediary, this poses difficulties, as the couple are not parties to the contract, and of course nor would any child born as a result be. One attorney seeks to avoid the problem by drawing up contracts between the natural father and the surrogate and requiring the natural father and surrogate to declare that although there is a signature line on a page attached to the contract for the signatures by the surrogate and her husband, if married, that in order to maintain confidentiality, they will never see any of the signatures of the surrogate and her husband or that of the natural father. N. P. Keane and D. L. Breo, note 20 *supra,* 295, 296. The cumbersome nature of this procedure could be avoided if the attorney signed the contract as agent for a principal whose existence (but not name) has been disclosed.

68 *Paton* v. *British Pregnancy and Advisory Service* [1979] Q.B. 276 (consent to legal abortion not required): *Fitzgerald* v. *Rueckl* 1979 *Report on Human Reproduction and Law* 11-A-2 (Jan. 1979) (husband's consent to artificial insemination (A.I.D.) on wife not required).

69 Although if his consent was not obtained, this may lead to breakdown of the marriage. It is unlikely that it would be characterised as adultery, see *MacLennan* v. *MacLennan* note 13 *supra, Dennis* v. *Dennis* note 13 *supra, cf. Roberts* v. *Roberts* note 13 *supra, Orford* v. *Orford* note 13 *supra.* The current U.S. practice is to require the husband to sign the contract so that he may waive any "parental rights" to the child, see N. P. Keane and D. L. Breo, note 20 *supra,* 291.

70 In New South Wales adoption orders are normally made in favour of married couples only, see note 21 *supra.*

71 In one form of contract the couple agree to pay all court approved medical expenses during the pregnancy and six weeks after birth, N. P. Keane and D. L. Breo, note 20 *supra,* 291.

72 The Adoption of Children Act 1965 (N.S.W.) s. 49A makes it an offence for a natural parent to communicate with an adopted child under eighteen without the consent of the adoptive parents.

73 C.B.S. (New York) 18/10/1981, 60 Minutes. In Michigan it is illegal to offer to pay anything in respect of the adoption of a child. Surrogates, therefore, cannot be paid anything further than expenses. See note 89 *infra.*

74 Research into the practice of A.I.D. shows that genetic screening may be inadequate or made without proper knowledge, see note 39 *supra.*

75 This could be extended to cover the surrogate's genetic history.

surrogate may be required not to smoke, drink or take drugs. She may undertake to maintain a healthy diet, avoid emotional distress and the risk of infection; in short anything medical science tended to indicate might adversely affect the foetus.[76] The surrogate may be required to undergo certain medical procedures, for example, amniocentesis, or required to undergo a certain method of delivery. Abortion might be required in certain circumstances.[77] There may be medical reasons such as the risk of gross deformity or where, due to the surrogate's ill health, she may be unable to continue the pregnancy. Non-medical reasons for abortion may also be included, for example, the couple may become bankrupt, the marriage may breakdown, the wife may conceive after entering into contract, there may be death or incapacity of either the husband or the wife prior to birth. The parties may also wish to make provision where the child is born defective. The contract could, for example, provide that if the couple or surrogate do not wish to accept the child, that the child be given up for adoption and until adoption all expenses be paid by the couple.[78]

3. Breach of Contract

Although surrogate contracts are likely to be held void as being contrary to public policy (see below *4.*) if those contracts were enforceable, difficult problems would arise on breach of contract. Independently of the issue of public policy, a court of equity will not specifically enforce contracts for personal services.[79] Two reasons may be given for this rule; the first is that contracts which require constant supervision will not be enforced and secondly, that a court will not order performance of contracts requiring special confidence and trust. A court of law can, however, enforce the contract by awarding damages for breach of contract. Examples will be given to illustrate inherent difficulties.

(a) Breach by the Surrogate

The surrogate may breach the contract (depending on its terms) in a variety of ways, for example smoking, drinking during pregnancy, terminating the pregnancy by abortion, or refusal to hand over custody of the baby.[80] Taking the first examples, smoking and drinking during pregnancy — would this breach allow the couple to treat the contract as at an end? Should the contract provide that the breach of any of its terms renders the contract voidable by the innocent party? Would a fraudulent

76 It might even require the surrogate to refrain from intercourse in the last trimester of pregnancy. Studies have shown that intercourse in the last trimester of pregnancy is more likely to produce premature births, foetal distress, amniotic fluid infection. The studies are summarised and evaluated by J. W. Selby, L. G. Calhoun, A. V. Vogel, H. E. King in *Psychology and Human Reproduction* (1980), 15-16; see also a report of an extensive study involving 26,886 single born infants between 1959-1966 placental inflammation and perinatal mortality were more frequently observed if coitus was reported to have occurred at least weekly during the last month before delivery, (1979) 301 *N.Engl.J.Med.* 1235-1236.

77 Provisions of this kind would most likely be void as contrary to public policy, see *infra.*

78 P. Vieth, "Surrogate Mothering: Medical Reality in a Legal Vacuum" (1981) 8 *J. of Legislation* 140.

79 *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; *Page One Records Ltd.* v. *Britton (trading as the Troggs)* [1967] 3 All E.R. 822.

80 Contracts may provide that the surrogate must return all monies and expenses paid if she does not surrender the child, see N. P. Keane and D. L. Breo, note 20 *supra,* 269. *Cf.* Adoption of Children Act (1965) (NSW) s. 57.

misrepresentation that the surrogate did not smoke or drink allow the innocent party to rescind? If the innocent party reaffirmed the contract and sued for damages, what would be the damages? For example, how could damage be measured and proved if all that could be shown was that the surrogate had had one cigarette, or one drink?[81] If the surrogate terminated the pregnancy what damages could be recovered by the couple? Presumably all that could be obtained here would be damages for emotional distress suffered as flowing naturally from the breach.[82]

(b) Breach by the Couple

Depending on the terms of the contract, breaches could include failure to pay, failure to take custody of the child, or failure to provide health insurance or to adopt the child. If the couple refused to take custody of the child, would the surrogate be able to recover the cost of upkeep for the child until aged eighteen, or would the surrogate be obliged to mitigate her loss by placing the child for adoption?[83]

It is submitted that arguments of this kind should have no place in determining the custody of a child; a child should not be placed on the level of a commercial commodity to be bartered and traded. Contractual arguments of the kind suggested above amount to a denial of humanity, a denial of the unique and loving relationship that should be accorded the child.

4. Legal Effect of the Contract

Surrogate motherhood contracts will not be enforced by the courts. Several different reasons can be advanced for this result. First, at common law, rights and duties of a parent are inalienable.[84] There is no common law adoption. Where the surrogate is artificially inseminated with the husband's sperm, the surrogate is the genetic and gestational mother, she cannot assign rights as natural mother of the child to a third party.[85] Where embryo transfer is employed using husband's sperm and wife's ova, again it can be argued that for legal purposes the surrogate as gestational mother is vested with legal rights and duties in respect of the child; consequently the contract is ineffective to assign those rights to a third party. The contract would be unenforceable as being against the public policy of protecting the family.[86]

Secondly, the contract may breach the provisions of the Adoption of Children Act 1965 (N.S.W.). Section 50(1) provides that it is a criminal offence, to make, give or receive a payment or reward in consideration of the adoption of a child or transfer of possession or control of a child with a view to adoption, or to conduct negotiations to

81 There could be difficulty in deciding the cause of many congenital defects; a handicap arising genetically could be mistakenly attributed to exposure to drugs or trauma during pregnancy, R. G. Edwards, "The Problem of Compensation for Antenatal Injuries" (1973) 246 *Nature* 54-55.

82 In a suit based on contract the general rule has been that there can be no recovery for non-economic loss. For a good summary of the general rule and exceptions, see G. H. Treitel, *The Law of Contract* (5th ed. 1979) 687-97.

83 The duty arises to act reasonably in mitigation — but what is reasonable where a woman agrees to hand over a child, *cf. Sherlock* v. *Stillwater Clinic* (1978) 260 N.W. 2d 169.

84 *Poole* v. *Stokes* (1914) 110 L.T. 1020; *Brooks* v. *Blount* [1923] 1 K.B. 257.

85 *Humphreys* v. *Polak* [1901] 2 K.B. 385.

86 See generally, *Halsbury's Laws of England* (4th ed.) ix, 281.

make arrangements with a view to the adoption of a child.[87] Under section 31(2) consent given by the natural mother before the birth of the child is ineffective. Any consent given by the mother on, or within three days after, the day on which the child was born is also ineffective unless it is proved that at the time the instrument was signed the mother was in a fit condition to give consent.[88] A contract by which a surrogate mother agreed in advance to give up the child for adoption would be in breach of these provisions. The aim of the sections is to protect the natural mother against coercion and allow sufficient time for a considered decision.

In Michigan it has been held that payments to another to act as surrogate mother would not be enforceable as they would be in breach of statutory provisions making it criminal to offer, give or receive anything of value for placing a child for adoption. The court has said that "[m]ercenary considerations used to create a parent-child relationship and its impact upon the family unit strike at the very foundation of human society and is patently and unnecessarily injurious to the community."[89] A similar result might be expected within this jurisdiction although the American courts approach the issue from a different perspective, that is, whether the statute was an interference with the constitutional right to reproductive privacy. It was held that the statute was not in breach of constitutional rights. In Michigan, however, the view is held by surrogate agencies that, if the surrogate is paid expenses only, the contract would be enforceable. This is debateable; the contract may still be void as in breach of public policy for protection of the child and the family unit.[90]

In Kentucky, surrogate motherhood contracts have been declared illegal and unenforceable by the Attorney-General.[91] A contract by which a surrogate mother agrees in advance either to give up the child for adoption by the natural father's wife or to voluntarily terminate her parental rights would violate statutory provisions which required a parent to wait a prescribed time after the birth of the child to give consent.

Thirdly, even if surrogate mother contracts were enforceable, specific provisions of the contract may not be; for example, provisions relating to abortion. Any contractual provision requiring the surrogate to terminate the pregnancy would be unenforceable as an agreement to procure an unlawful abortion.[92] Even if there were grounds upon which the surrogate might lawfully seek an abortion, the courts are likely to hold that it is against public policy to allow any interference with the personal decision of a pregnant woman whether to terminate the pregnancy.

87 Note, however, that it would not apply to a natural father who did not formally adopt the child. Failure to do so would leave him open to custody disputes.

88 Adoption of Children Act 1965 (N.S.W.) s. 31(3).

89 *Doe* v. *Kelly* (1980) 6 F.L.R. 3011.

90 It is not the payment of expenses that is objectionable, for the natural father may be ordered to pay them under the Maintenance Act 1964 (N.S.W.), but rather the agreement to transfer possession and waive rights in respect of the child. See also Adoption of Children Act 1965 (N.S.W.) s. 50(2).

91 (1980) 7 F.L.R. 1058.

92 See ss 82-84 Crimes Act 1900 (N.S.W.) and interpretation of these provisions in *R.* v. *Wald* (1972) 3 D.C.R. 25.

IV. SHOULD SURROGATE CONTRACTS BE ENFORCEABLE?

Commentators have suggested a combination of approaches that would sanction surrogate motherhood. (i) The contractual approach — the rights and liabilities of the parties should be determined by private law and the terms of the contract between the parties; these contracts should be enforced. (ii) The public law approach — the practice of surrogate motherhood should be sanctioned and regulated by statute. (iii) An adoption model statute should be appropriately modified to deal with surrogate motherhood.[93] It is proposed to look generally at the issues raised by surrogate mothers rather than the various proposals made which would sanction surrogate contracts. The role of the surrogate mother is first scrutinised.

1. The Surrogate

(a) Profit Motive

One aspect of surrogate motherhood which deserves examination is the effect of monetary reward on the surrogate. A recent report on the motivation of women offering to be surrogate mothers states that financial reward is a major factor in at least 80% of the women applying to be surrogates.[94] The risks of commercialisation in the area of blood donation have been pointed out in the classic work by Titmuss, *The Gift Relationship.* In many cases paid donors deliberately concealed personal information which would have prevented them from giving blood. Paid donors badly in need of money are less likely than voluntary donors to reveal a full medical history and to provide information about contact with infectious disease, recent innoculations and about their diets, drinking and drug habits that would disqualify them as donors.[95] The paid blood donor sells his blood for the highest market price; it is an alternative way of getting money. The transaction is mechanical, impersonal and conducted on a private market basis, the price varying according to what is thought to be demand and supply.[96]

If surrogate motherhood is seen simply as an alternative way to make money, it increases the danger that the surrogate will be less than truthful about her medical history. Although careful medical screening may assist in overcoming some problems it is unlikely to show up all potential medical difficulties.[97] Again, if surrogate motherhood is seen merely as a money making enterprise the surrogate may be less than careful in her diet and personal habits.[98] Responsible motherhood would require

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93 See M.A.B. Oakley, "Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development" (1974) 8 *Family L.Q.* 385; E. A. Erikson, note 27 *supra;* P. J. Vieth, note 78 *supra;* P. Reilly, note 19 *supra,* ch. 7; N. P. Keane and D. L. Breo, note 20 *supra.* See also R. Posner, *Economic Analysis of Law* (1977) 111-16, the case for legalising baby sales argued from the market viewpoint.

94 *New York Times,* 7 September 1981. Applications to become a surrogate were few and far between when applicants were told that in Michigan only expenses could be paid as it was against the law in that jurisdiction to offer money in consideration for an adoption, N. P. Keane and D. Breo, note 20 *supra,* 49.

95 R. M. Titmus, *The Gift Relationship — From Human Blood to Social Policy* (1971) 76-77, 151.

96 *Id.* 75-76.

97 See note 74 *supra.*

98 Attorney Keane provides a good illustration in his book of a surrogate often high on drugs and alcohol, N. P. Keane and D. Breo, note 20 *supra* 104.

that the pregnant woman abstain from smoking, drinking, and drug taking of any kind during pregnancy. The difficulty is in ensuring this level of dedication and responsibility on the part of the surrogate. The experience with paid blood donors suggests that this type of commitment cannot generally be expected.

The surrogate's profit motive raises another issue; the psychological relationship between mother and the unborn child. Although in the last few years medical science has vastly increased its understanding of the development of the foetus, it is only very recently that the psychological relationship between the mother and the unborn child has begun to be examined. The importance of this relationship must be investigated in the evaluation of benefits and detriments resulting from surrogate motherhood. It may not be enough to simply ensure that the surrogate is physically healthy; the surrogate's emotional stability and feelings about the child throughout the pregnancy may be equally important. Existing studies leave open the question whether surrogate motherhood can result in physical and emotional harm to the child. A number of studies lend support to the view that stresses which affect the mother may adversely affect the unborn child. High levels of anxiety in pregnancy are more likely to produce complications in delivery and the child is more likely to have physical problems.[99] Surrogate motherhood may itself generate anxiety; for example, fear that the child will not be accepted at birth, worry about the outcome if the child is deformed,[100] stress created by lack of social acceptance of surrogate motherhood. Another aspect of the problem is that the surrogate who carries the child for profit may lack the necessary psychological identification with the child and this in turn may have adverse effects on the child. In a prospective study of 8,000 pregnant women, negative maternal attitude was found to give rise to a significant increase in perinatal death, congenital anomalies and postpartum infection or haemorrhage. Negative maternal attitude was also shown in increased accidental injuries during pregnancy as well as need for analgesics during labour.[101] The point at issue is how far these studies can be related to the position of the surrogate mother. The surrogate who carries the child for profit may lack the necessary psychological identification with the child. The extent to which this is so and how far it may adversely affect the child has to be fully investigated before any decision is made to sanction surrogate motherhood. Some of the potential difficulties involved where the surrogate bears a child for profit might be avoided if surrogates were paid expenses only.[102]

(b) Altruism

Altruism as a motive for surrogate motherhood is now brought into focus. Although money has been reported as the major factor for surrogate mothers, other motivations

99 R. W. Newton et al, "Psychological Stress in Pregnancy and its Relation to the Onset of Premature Labour" (1979) 2*Br.M.J.* 411-13; R. P. Lederman et al, "Relationship of Psychological Factors in Pregnancy to Progress in Labour" (1979) 8 *Nurs. Res.* 94; J. W. Selby et al, note 76 *supra*, 20-23. *Cf.* V. H. Laukaran and B. J. Van den Berg, "The Relationship of Maternal Attitude to Pregnancy Outcomes and Obstetric Complications" (1980) 136 *Am.J. Obstet. Gynecol.* 374.

100 This is apparently a common fear of intending surrogates, *New York Times* 7 September 1981.

101 V. H. Laukaran and B. J. Van den Berg, note 99 *supra*, 374.

102 In any event, the Maintenance Act 1964 (N.S.W.) would allow recovery of confinement expenses from the natural father.

included enjoyment of pregnancy, a protest against abortion, having a perfect birth,[103] and a wish to give a baby to a couple who could not have one. About 30% of women offering to become surrogates through one agency had lost a child through abortion or adoption and surrogate motherhood allowed them to assuage the guilt they may have felt.[104] It seems not a little curious to a layman that the guilt of an earlier abortion or adoption should be assuaged by bearing a child for another. For behavioural scientists, however, this is a well known aspect of some gift relationships. The sacrificial gift strengthens the social bond between the parties.[105] It provides a means of

> redressing equilibriums that have been upset: by expiation they redeem themselves from social obloquy, the consequence, and re-enter the community ... The social norm is thus maintained without danger to themselves, without diminution for the group.[106]

It is open to question whether surrogate motherhood will have this redemptive effect especially as it may not be socially sanctioned by the community. Even in respect of socially sanctioned conduct, the making of a sacrificial gift may not result in re-acceptance within the social group. Researchers in the field of organ donation found that organ donation by the "black sheep" of the family did not always have the desired effect of acceptance within the family and increased feelings of self worth.[107] If at every level of the inquiry it is found that there are serious adverse consequences for all participants in surrogate motherhood, this strengthens the case for banning the practise.

Altruism has been seen as involving a gift relationship between the parties. Gift relationships have traditionally given rise to reciprocal obligations. Three sets of norms operate; these are the obligations to give, to receive, and to repay in equivalent value.[108] In the area of kidney donations, these norms have sometimes operated with adverse consequences. First, in respect of the obligation to give, researchers have pointed out that subtle pressures might be brought to bear on a family member to offer his kidney[109] and have suggested that as organ donation becomes more institutionalised there would be increased social pressures to make this kind of gift.[110] Secondly, the gift relationship imposes an obligation to receive; again in the context of kidney donation it was found that a dying donor was not absolutely free to reject the gift, as refusal implied rejection of the donor.[111] Finally, the gift creates an obligation to repay which sometimes left the donee with a sense of continuing obligation to the donor.[112] They

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103 See N. P. Keane and D. Breo, note 20 *supra.*

104 Reported by Dr Philip Parker, Detroit psychiatrist to the *New York Times* 7 September 1981.

105 B. Schwartz, "The Social Psychology of the Gift" (July 1967) *Am. J. Soc.* 1.

106 H. Robert and M. Mauss, *Sacrifice: Its Nature and Function* (1964) 102-103.

107 R. G. Simmons, S. D. Klein and R. L. Simmons, *Gift of Life: The Social and Psychological Impact of Organ Transplantation* (1977) 191, 445. See also R. C. Fox and J. P. Swazey, *The Courage to Fail: A Social View of Organ Transplants and Dialysis* (1974) 24-25. *Cf.* the increased feelings of self worth reported by unrelated kidney donors, H. H. Sadler et al, "The Living, Genetically Unrelated Kidney Donor" in P. Castelnuovo-Tedesco (ed.), *Psychiatric Aspects of Organ Transplantation* (1971) 158-159, 431-432.

108 M. Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (1967).

109 R. C. Fox and J. P. Swazey, note 107 *supra* 7, 20; R. G. Simmons et al, note 107 *supra,* 258-59, 431-32.

110 R. C. Fox and J. P. Swazey, note 107 *supra,* 8.

111 *Id.* 8, 235.

112 *Id.* 333-34; see also R. G. Simmons et al, note 107 *supra* 82, 172-74, 325-26, 452-57.

noted a tendency for the donor to exhibit a proprietary interest in the conduct and life of the recipient.[113] Because of this sense of obligation engendered in recipients, in respect of cadaver transplants, transplant centres generally do not reveal the name of the deceased; the donor, the recipient and their families remain anonymous in an attempt to minimise the extent to which the recipient and his family feel obligated to the deceased's family. It also reduces the tendency of the deceased's family to identify with the recipient and to think of the donee as a substitute relative or to make claims on him.[114]

In contrast, voluntary blood donations were found not to follow the traditional gift relationship pattern.[115] The critical differences centre around the fact that the gift does not involve a personal relationship between the donor and the recipient; each is anonymous to the other. There is no obligation to give, no expectation of repayment, nor any obligation to repay. To the donor there was no permanent loss and yet to the receiver it may be the gift of life itself.[116] Blood donors' answers to why they donated indicated a high sense of social responsibility towards the needs of the members of society.[117]

If the experience of researchers in the kidney donor field can be applied to surrogate mothers, it would suggest that if surrogate motherhood is to be sanctioned, there should be no direct dealing between the surrogate and the couple wanting the child and that their identities should not be revealed.[118] It would also indicate the risks involved with "moral blackmail" of a member of the family to act as surrogate. In respect of unrelated donors, the medical profession in the field of organ transplantation has generally been reluctant to accept unrelated donors whose motives have been regarded with suspicion;[119] some commentators thought this was unwarranted.[120] In contrast, it was found that unpaid blood donors generally act out of a true sense of altruism for the general benefit of society.[121] This has yet to be shown in the case of surrogate mothers. The surrogate's motives may vitally affect her sense of responsibility towards the developing child and therefore the child's well being. It is in this area that research is required before any complete assessment of surrogate motherhood can be made.

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113 R. C. Cox and J. P. Swazey note 107 *supra,* 27, give the following example: the kidney donor said, "He's being unfair to himself and to me (by going back to work too soon) . . . After all, it's my kidney . . . That's me in there".

114 R. C. Fox and J. P. Swazey, note 107 *supra,* 32. An illustration of what can happen — a father of a boy heart donor to the father of a young girl who received it: "We've always wanted a little girl, so now we're going to have her and share her with you."

115 Note 95 *supra,* 74.

116 *Ibid.*

117 *Id.,* 235-236.

118 The child might, however, feel compelled to seek out the surrogate mother on learning the facts of his birth, see *infra.*

119 R. C. Fox and J. P. Swazey note 107 *supra,* 7-8.

120 C. H. Fellner and S. M. Schwartz, "Altruism in Disrepute: Medical Versus Public Attitudes Towards the Living Organ Donor" (1971) 284 *N. Eng. J. Med.* 582-85; R. G. Simmons et al, note 107 *supra* 444-45; R. Steinbrook, "Unrelated Volunteers as Bone Marrow Donors" (1980) 10 (1) *Hastings Center Report* 11; H. H. Sadler et al, note 107 *supra* 86.

121 Note 95 *supra,* 235-36.

(c) Positive Eugenics

Another aspect of surrogate motherhood is that it may be an exercise in positive eugenics.[122] One commentator recommends that surrogate mothers be licensed. Who should decide who can be licensed and on what criteria?[123] Surrogate motherhood may involve artificial insemination using the husband's sperm or embryo transfer utilising sperm and ova from husband and wife. In the former, the surrogate makes a genetic contribution to the child. We could assume at least that genetic and physical health would be critical. Would there be problems of class bias; for example, would there be a bias against women with several children badly in need of money [124] so that only those moderately in need or not in need at all could be selected? Studies show a middle class bias in selecting adoptive parents and recipients of organ transplants.[125] The decision process is likely to directly reflect the values of the selector with the resulting risk that surrogate motherhood would have an over-representation of higher occupational groups with higher educational levels.

What critera would be used to determine who would be a suitable surrogate? Would it involve an inquiry into the applicant's eating and sexual habits, and ability to stand stress? All these factors may be relevant to the health of any child,[126] and yet it may be surmised that such inquiry would involve a serious interference with the privacy of the surrogate.

A further issue which arises is whether surrogates should be selected for the positive attributes they offer; for example, natural beauty, high intelligence, artistic ability, athletic endowment. Should only those women be selected who could make a positive contribution to the genetic endowment of the child assuming that these qualities can be genetically transferred?[127] Positive eugenics is currently practised in artificial insemination. In 1980 it was reported that a sperm bank had been established with all donors being Nobel Prize winners.[128] More commonly, however, healthy university or medical students are used.[129] Practitioners usually try to match the husband's physical characteristics with those of the donor. It has already been pointed out that physicians in making these decisions have generally chosen medical and university students and in so doing show a tendency to reproduce their own kind.[130] These practices assume a scale of values in which mental skills are regarded as superior to physical skills. Is this warranted? Physical skills are equally vital to the community. Moreover it cannot be assumed that the life of a child is necessarily more fulfilling because he has a high I.Q.

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122 Genetic improvement as distinct from negative eugenics: prevention of genetic disease.

123 One advocate recommends that it be handled by adoption agencies. Adoptive parents and prospective surrogate mothers can register with the adoption agency who can determine who is competent and how best to go about it, N. P. Keane and D. L. Breo, note 20 *supra* 264.

124 Note one institute soliciting surrogates rejects poorly educated women and women on welfare or public assistance (1979) *Ob. Gyn. News,* May 1.

125 R. G. Simmons et al, note 107 *supra* 12-14: M. Bohman, note 24 *supra,* 74-84.

126 See studies cited in note 99 *supra.*

127 On this issue the debate continues to rage, for a general survey of the material on the I.Q. debate see N. J. Block and G. Dworkin (eds), *The I.Q. Controversy* (1976).

128 Recipients must be a member of the Mensa Club, a club for people in the top 2% of measured I.Q. — "In Brief" (1980) 10(7) *Hastings Center Report* 29.

129 M. Curie-Cohen et al, note 39 *supra,* 585-89.

130 G. J. Annas, "Artificial insemination: Beyond the Best Interests of the Donor" (1979) 9(4) *Hastings Center Report* 14.

but is physically clumsy. Assuming that intelligence is genetically ordained there is a further problem of misfit if the child is born into a family whose I.Q. levels are below average.

Further objections to a licensing system may be raised. A system of licensing may be seen by some as a step towards restricting certain classes of persons from procreating. That is, if you prevent certain persons from acting as surrogate mothers why not prevent the retarded, insane, or those with a genetic disease from procreating[131] or even further, permit only those who can contribute positively to the genetic pool. The anticipated response to this position is that to act responsibly in the best interests of a child in one situation does not open the floodgates to irresponsible conduct.[132] Although a licensing system for surrogates could be rationalised on the basis that where there is an interference with the natural process of procreation the state has a special interest in ensuring the well being of the child, a licensing system nevertheless will have extensive ramifications for society as a whole.

(d) Early Adoption

Surrogate motherhood might be regarded as analogous to an early adoption of the child. Relevant policy considerations are evidenced in adoption legislation. It is contrary to public policy that a woman's choice whether or not to keep the child she bears should be overborne by third parties.[133] Advocates of surrogate motherhood argue that the consent of the surrogate mother to the adoption given at the time of contract should be made lawful and irrevocable; it differs from the case of the mother handing over her child for adoption in that the surrogate mother made a deliberate, pre-pregnancy decision to bear a child for another.[134] This approach completely ignores the physical and psychological implications of pregnancy on the surrogate mother. In addition it poses special problems of its own. If adoption takes place when the surrogate becomes pregnant, as is proposed,[135] what will be the posiiton if the child is born with some deformity, for example, a cleft palate or an ugly facial birthmark, and the couple no longer want the child? Will they be forced to accept him or will the child be simply put on the market again for adoption? There are obvious risks in forcing the child on the unwilling couple. Another issue which may arise in this context would be where the foetus is diagnosed as having Down's syndrome, or if there is merely a risk that the child might be deformed (for example, where the surrogate contracted rubella[136] or was exposed to fumes from toxic chemicals). Would the adopting couple as parents be entitled to demand that the surrogate abort, or alternatively, would they be entitled to a court order restraining the surrogate from terminating the pregnancy?

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131 See also, L. R. Kass, "Making Babies — The New Biology and the 'Old' Morality" (1972) 26 *The Public Interest,* 18-56.

132 J. Fletcher, *The Ethics of Genetic Control — Ending Reproductive Roulette* (1974) 33.

133 See notes 88-91 *supra.*

134 N. P. Keane and D. L. Breo, note 20 *supra,* 237.

135 In Michigan a bill has been introduced to sanction surrogate contracts. After preliminary medical and genetic screening, the court could approve contracts and once the surrogate became pregnant, the judge would sign adoption papers for the child; *New York Times* 28 October 1981.

136 Rubella poses only a risk of deformity, the risk decreasing with the length of pregnancy. For a useful evaluative study, see D. Callahan, *Abortion: Law Choice and Morality* (1970) Ch. IV.

In summary, the relationship between surrogate mother and the unborn child appears crucial to the health and well being of the child; the surrogate's motivations in offering to carry the child are intimately related to the issue whether necessary commitment to the unborn child can be expected of the surrogate. At this stage no clear affirmative answer can be given.

2. The Childless Couple

The most likely scenario is of a couple where the wife is unable to bear children because of a hysterectomy or where the couple have been trying for years to have a child having undergone the usual battery of tests for infertility. What is the motivation of the couple which leads them to seek a surrogate rather than adopt or foster a child? Reduced numbers of children available for adoption is only part of the answer. In a recently published book on surrogate mothers[137] one feature which recurred was the husband's desire to have a child biologically his own and a refusal or reluctance to adopt. This reluctance to adopt has been documented in studies on adoption; researchers concluded that adoption is more commonly used as a solution to childlessness where it is the wife who is infertile and it is usually the wife who is the driving force towards adoption.[138] A further feature of interest arising out of the same studies was that if a couple decide to adopt they are more likely to request a girl than a boy contrary to the traditional desire of a couple to have a son as the first born or only child.[139] The male's hesitancy to adopt is though to be a survival of traditional values, most likely derived from a patrilineal kinship system in which male heirs are needed to carry on the family line.[140] Adoption would pose a threat to the male; it would confirm and perpetually remind him of his inability to provide the symbol of family continuity. The threat is abated if a girl is adopted.[141]

Psychological difficulties have also been reported in respect of A.I.D. (artificial insemination donor) which is indicated as a solution for male infertility.[142] The social attitudes to male sterility have been neatly expressed as follows: "Culturally, male sterility does not exist; there are only concepts of impotency or lack of virility."[143] This view may assist in explaining one important aspect of the A.I.D. cases. Although no large scale studies have been undertaken, the existing studies indicate an almost universal desire for secrecy among couples using A.I.D. In a recent study in the United Kingdom involving 147 couples, 143 couples said they would definitely not imform the child that it had been conceived by A.I.D.; of the four couples who were considering

137 N. P. Keane and D. L. Breo, note 20 *supra.*

138 H. D. Kirk, *Shared Fate — A Theory of Adoption and Mental Health* (1964) 129, 133.

139 *Id.,* 126-127.

140 *Id.,* 134. See also A. P. Ulanov, "The Search for Paternal Roots: Jungian Perspectives on Fathering" in E. V. Stein (ed.) *Fathering, Fact or Fable?*

141 H. D. Kirk, note 138 *supra,* 136-137.

142 See. G. Gerstel, "A Psychoanalytic View of Artificial Donor Insemination" (1963) 17 *Am. J. Psychother.* 64; W. W. Watters & J. Sousa-Poza, "Psychiatric Aspects of Artificial Insemination Donor" 95 (1966) *Can. Med. Assoc. J.* 106-112; J. C. Czyba & M. Chevret, "Psychologoical Reactions of Couples to Artificial Insemination with Sperm Donor" (1979) 24(4) *Int. J. Fertil.* 240.

143 J. Czyba & M. Chevret, *id.,* 247. In a small study of 44 couples seeking A.I.D. (generally due to husband's infertility, one case of genetic disability) in psychological interviews with husbands, 80% said they had guilt feelings; they felt they could not give proof of their manhood, A. David & D. Avidnan, "Artificial Insemination Donor: Clinic and Psychologic Aspects" (1976) 27 *Fertility & Sterility* 528, 531.

whether to inform the child of its origins, two had used A.I.D. for genetic reasons.[144] In a French study, 98% of interviewed couples using A.I.D. spontaneously felt a need to discuss the secret of A.I.D. with the interviewer, 90% the painful experience of sterility, 70% artificial insemination by donor, and 50% the desire for pregnancy.[145] These studies might suggest to the casual lay observer that a critical element in the use of A.I.D. was the need for the male to be able to cloak his infertility. The importance of these studies in this context is that the couple, in seeking a surrogate mother, may be expressing not simply a desire to have a child that could not be satisfied by adoption, fostering, *etc.*, but rather an acknowledgement of the male's psychological need to be[146] the biological father of his children.

In addition to psychological problems connected with infertility and their possible impact upon the child and marriage,[147] there is a real risk of financial and emotional blackmail of the couple. Despite legal sanctions preventing payments in respect of adoption, the couple are vulnerable and easy targets for a surrogate anxious to get their last cent.[148]

If the interests of the childless couple were held to be dominant there would be a case for the enforcement of surrogate contracts; the legislature, judiciary and community however, recognise the child's interests as paramount.[149] It has yet to be demonstrated that surrogate motherhood is in the best interests of the child.

Where the couple decide for reasons of convenience, vanity, a career, *etc.*, to have a surrogate bear the child, it prompts the question whether a woman who is not prepared to bear a child herself will act responsibly towards the child after birth. If there is no

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144 R. S. Ledward, L. Crawford & E. M. Symonds, "Social Factors in Patients of A.I.D." (1979) 11 *J. Biosoc. Sci.* 473, 477. In this study only 20.4% of couples stated that they preferred the experience of childbirth and pregnancy to adopting a child as their specific reason for choosing A.I.D. 29% said they were put off adoption by the long waiting list. Only 6% gave their reason for choosing A.I.D. that they preferred the child to have some family resemblance. Similarly, only 6% gave their reason that the male sees the child as his own or has difficulty in accepting an adopted child. See also the report of an unpublished survey of 88 unmarried women aged 18-33 randomly selected. 90% indicated they they would use artificial insemination with their husband's sperm it if were the only way they could conceive when they married; 66% supported in vitro fertilisation using their ova and husband's sperm, but only 14% supported A.I.D. or in vitro fertilisation using anonymous donor sperm, and 11% in vitro fertilisation using another women's ova: Warren B. Miller, "Reproduction, Technology and the Behavioural Sciences" (1974) 183 *Science* 149. In the Harris survey following the birth of Louise Brown, women were asked if they could not have children would they prefer adoption or I.V.F.; more than twice as many chose adoption (57%) as I.V.F. (in vitro fertilisation) (21%): "Protection of Human Subjects", *Ethics Advisory Board (H.E.W.) Report and Conclusions — H.E.W. Support of Research Involving Human In Vitro Fertilisation and Embryo Transfer* (1979), June 18, 1979 44 Federal Register, 35033, 35055.

145 J. C. Czyba and M. Chevret, note 142, *supra*, 242.

146 Or as the A.I.D. studies suggest that the male must be seen to be the biological father, see studies in notes 144, 145 *supra*.

147 There are unfortunately no recent detailed studies of the effect of A.I.D. on the marital relationship although researchers generally reported that marriages were very stable and in many instances the fact of A.I.D. was forgotten on the birth of the child, see A. David and D. Avidnan, note 143 *supra* 531 and report of a 1955 study by Dr A. Guttmacher involving 300 A.I.D. families by P. Creighton, *Artificial Insemination by Donor* (1977) 42. See also K. Ostram, "Psychological Considerations in Evaluating A.I.D." (1970) 54 (3) *Soundings, An Interdisciplinary Journal* 290.

148 One of the surrogate mothers signed up by Noel Keane fell into this catergory, see N. Keane and D. L. Breo, note 20 *supra*, 103, 111.

149 See Family Law Act 1975 (Cth) s. 64(1).

willingness to make a personal commitment involved in the bearing of a child, can resposible parenthood be expected?

3. The Surrogate Child

The most critical issue requiring research is the effects of surrogate motherhood on the child. As already indicated, existing studies seem to suggest that the physical and emotional well being of the child depends upon a personal sense of responsibility on the part of the surrogate and a close identification with, and emotional commitment to, the growing child.[150] These cannot be bought with money, but even if the surrogate takes no fee there is still the issue as to whether the commitment necessary can be expected from a surrogate mother.

One aspect of surrogate motherhood paralleled in adoption and A.I.D. cases is the question whether the child should be told of his origins. Adopted children often suffer an identity crisis on learning that they are adopted;[151] the information might be found out accidentally or in the most adverse of circumstances, for example, during a quarrel or on divorce. The last decade has in this respect seen a reversal of opinion. Initially it was thought that an adopted child should not be told that he was adopted; matching parents' characteristics with the child assisted the deception. But nowadays it is almost universally agreed that a child should be told as early as possible that he is adopted in an attempt to avoid later psychological problems.[152] The experience of researchers in adoption, however, is that for many adoptive parents telling the child that he or she is adopted is a traumatic experience, for it requires them to acknowledge their incapacity to have children.[153] Their decisions of when and how to tell the child of his adoption are made in an environment which sees biological motherhood as superior to adoptive motherhood: "the sentiment environment surrounding the adoptive parents has at its core a mode of thought which identifies genuine parenthood as a chain of child-bearing-and-rearing. Of necessity it throws doubt on the full competence of adoptive parents";[154] the mother with the natural "know-how" is regarded as the better mother.[155]

As with adoptive parents, A.I.D. parents have experienced psychological problems in explaining to their child the facts of his conception.[156] But unlike adoptive parents, there has been no pressure on them to tell the child and from the few studies at hand it seems that most couples decide to never tell the child.[157] There remains the risk that the

150 See note 99 *supra* and related discussion.

151 J. Triseliotis, *In Search of Origins, The Experience of Adopted People* (1973); E. G. Kilbranoff, "Genealogical Information in Adoption. The Adoptee's Quest and the Law" (1977) 11 *Family L.Q.* 185.

152 *Ibid.*, and M. Bohman, note 24 *supra*, 33-34. In relation to adoption it has been said that ". . . at a subtle level, the young child's partial overhearing of mysterious allusions, and his sensing of parental lies, half truths and evasions may incur confusion, suspicion, and anxiety for which he needs his parents' help; instead he feels cut off from them by a conspiracy of silence". V. W. Barnard, *Adoption* (1964) 102.

153 H. D. Kirk, note 138 *supra*, 32-34.

154 *Id.*, 32.

155 Id., 32-34.

156 R. T. Francoeur, *Utopian Motherhood — New Trends in Human Reproduction* (2nd ed. 1974) 20.

157 See notes 144 and 145 *supra*, and surrounding text.

child may find out accidentally; how far this may give rise to a psychological need to seek out the biological father has yet to be explored.

In respect of the surrogate child, analogies may be drawn both with the adopted child and the A.I.D. child. The child may regard the surrogate mother as his true mother even if the surrogate is only gestational and not genetic mother.[158] Even if the child knows his genetic identity he might still have a sense of abandonment by the surrogate and this is in turn may cause psychological difficulties. The child might feel a need to seek out the surrogate in the same way adopted children seek out biological parents. If the identity of the surrogate is known additional problems may arise, for example, the surrogate may be unable to relinquish her ties with the child with the result that the child may be torn between two "mothers".[159]

IV. CONCLUSION

Surrogate motherhood poses risks for all parties involved, the surrogate, the child and the couple. Until a proper assessment of those risks can be made surrogate motherhood should not be sanctioned. The present position in New South Wales appears to be that the Adoption of Children Act 1965 effectively bars payments in respect of adoption;[160] this would not, however, prevent surrogates from acting without a fee and would not prevent payments where no adoption was contemplated.[161] Any consent to adoption given before the birth of the child would however, be ineffective.[162] The restrictions on advertisements concerning adoption[163] on a narrow construction may not extend to advertisements for surrogate mothers. An extension of this provision together with suitable amendments to provisions outlawing unauthorised arrangements for adoption[164] would effectively restrict agencies or individuals from soliciting surrogate mothers. It would not, however, prevent a close friend for instance, offering to bear a child for her friend without payment. The risks resulting from such arrangements have already been pointed out. Independently of the moral and philosophical issues raised, possible detriments might be regarded as outweighing the advantages of surrogate motherhood.

158 This would be the case where an ovum from a third party is fertilised and the resulting embryo transplanted in the surrogate.

159 In one case the surrogate moved in with the young couple for whom she bore the child, N. Keane and D. L. Breo, note 20, *supra* 149.

160 S. 50(1).

161 For example where a single man had a surrogate bear his child, as natural father he need not adopt but this may leave him open to custody disputes.

162 Adoption of Children Act 1965 (NSW) s. 31(2). See also s. 31(1). The court may refuse to make an adoption order where the consent was obtained by "fraud, duress or other improper means".

163 *Id.*, s. 52.

164 *Id.*, s. 28(2).