

The Legal Status of a Mother of Children Born Through Surrogacy in the United States (summary)

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1 There has been a heated discussion about the legal status of parentage in the case of assisted reproduction in the United States. Surrogacy, in particular, gives rise to many difficult issues. Is the very notion of surrogacy permissible? Related to this, is a contract for surrogacy valid? Can a surrogate mother be compensated, and if so, to what extent? If surrogacy is permissible, then who is the father or mother of the child born through this procedure? In the United States no uniform rules have been established so far, and we see very few clear rulings. Many states have no statutes and little caselaw. Legal responses to this new technology are lagging far behind, and opinions on public policy and ethical concerns differ from person to person, and state to state.

2 This paper focuses on the issue of who will be the mother of a child born through assisted reproduction, in cases of surrogacy in particular. The answer may be among the following three choices: 1) the gestational mother, 2) the biological mother, and 3) the woman who wants a baby and intends to raise him or her own. The first answer is the traditional solution, which is supported by the alleged fact that the gestational mother and fetus have a special relationship during pregnancy. Supporters of the second choice emphasizes the importance of the genetic relation which can be established very easily and precisely due to current advances in science. Also they claim that those who want babies through surrogacy care much about the blood relation. The third choice is the newest and gaining in popularity. In the famous case of *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), the court stated that the woman who intended to bring about the birth of a child that she intended to raise as her own is the natural mother. Also, in the later case, *In re Marriage of Buzzanca*, 72 Cal. Rptr.2d 280 (Cal. Ct. App., 1998), which involved three women, an intending mother, a gestational mother, and a genetic mother, the court applied the language of the Johnson court that "in cases of 'genetic consanguinity' and 'giving birth' the intended mother is to be held the lawful mother." In sum, deciding who is responsible for the maintenance

and support of children is most important and that is in essence the best interest of the child.

This third and last choice was adopted in Article 8 of the Uniform Parentage Act 2000 (UPA), amended in 2002. Uniform acts often fail to achieve uniformity between all of the states where they are adopted. Regrettably, this Article 8 of the UPA may not contribute to enhancing any further uniformity either.

3 The UPA barely refers to the issue of conflict of laws. In its section 103, the applicable law regarding parentage is specified as the law of the forum state. Beyond that, it merely, adds a comment that the relationship between the full faith and credit clause of the U.S. Constitution and surrogacy matters is quite difficult to ascertain. We see few cases, statutes, or even law review articles on this point. A contrasting situation appears in determining the applicable law for same sex marriage issues. We should wonder why this contrast appears. At any rate, the surrogacy debate continues, and more legal developments will be seen.