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## Gestational Surrogacy: Legal Implications of Reproductive Technology

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## NOTE

### Gestational Surrogacy: Legal Implications of Reproductive Technology

#### I. INTRODUCTION

Modern medical technology is significantly impacting the legal field by creating new emerging ethical issues. The spectrum of issues ranges from Dr. Kevorkian and his suicide machine,<sup>1</sup> to the purposeful and deliberate conception of a child to serve as a bone marrow cell donor to an older sibling,<sup>2</sup> to parental rights of gestational surrogates. This note will focus on *Johnson v. Calvert*, a case of first impression out of the Supreme Court of California, which examines the issue of gestational surrogacy and the parental rights of the non-genetically related surrogate mother to a baby.<sup>3</sup> The court in *Johnson v. Calvert*<sup>4</sup> provides the first legal interpretation of gestational surrogacy contracts, examines the related public policy considerations, and interprets the definition of "natural mother" found in the Uniform Parentage Act.<sup>5</sup>

A surrogate is defined as a person who takes the place of another.<sup>6</sup> The surrogate mother takes the place of an infertile woman by bearing a child who will be raised by the contracting couple. Gestational surrogacy differs greatly from the more widely known practice of surrogate motherhood. In the more traditional surrogate motherhood situations, the surrogate mother is typically inseminated with the sperm of the donor husband of a childless couple. The surrogate mother's egg provides the other half of the genetic material to produce the zygote. She then carries the fetus to term, delivers, and relinquishes possession of the baby to the married couple.<sup>7</sup> By contrast, in gestational surrogacy, the surrogate gestator has the zygote of the

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1. Kathleen Byland, *Judge Temporarily Restrains Suicide "Angel of Death,"* REUTERS, June 8, 1990, at 72.

2. Lance Morrow, *When One Body Can Save Another*, TIME, June 17, 1991, at 54.

3. 851 P.2d 776 (Cal. 1993).

4. *Id.*

5. Uniform Parentage Act, CAL. CIV. CODE §§ 7000-7021 (West 1993). The purpose of the Uniform Parentage Act was to eliminate the legal distinction between legitimate and illegitimate children.

6. WEBSTER'S NEW COLLEGIATE DICTIONARY 1165 (2D ED. 1979).

7. Alice Hofheimer, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 572 (1993).

couple implanted in her womb, gestates, and delivers a child to whom she is genetically unrelated.

*Johnson v. Calvert* is the first case which addresses the legal implications which arise when a gestational surrogacy contract goes awry.<sup>8</sup> The question of how to determine maternal rights arises when one woman supplies the ovum, when another woman gestates and gives birth to the child, and when both "mothers" claim right to the child.<sup>9</sup>

While gestational surrogacy is a product of modern technology, with reminiscent *Brave New World* overtones<sup>10</sup>, surrogacy has historically been in existence since biblical times. *The Bible* notes two occasions where surrogate mothers provided infertile women with children. In the Old Testament, Abraham's barren wife, Sarah, sets into motion the first documented surrogacy relationship when she coaxes Abraham to "go in to my maid" Hagar and states "[y]ou see that the Lord has not allowed me to bear a child. Take my slave-girl; perhaps I shall found a family through her."<sup>11</sup> A second illustration focuses on Rachel, the infertile wife of Jacob, tells him, "[h]ere is my slave-girl Bilhah. Lie with her, so that she may bear sons to be laid upon my knees, and through her I too may build up a family."<sup>12</sup> Although there were no doctors and lawyers involved in these early surrogacy arrangements, the basic objective for the procedure and exploitation of the surrogate mother has not changed since biblical times. One commentator has suggested that the role of the Egyptian slave girl is now, in the present, still primarily performed by women of color.<sup>13</sup>

This note will examine the legal implications regarding gestational surrogacy from constitutional and contractual theories, will briefly discuss holdings on the issue from various jurisdictions, and will focus on public policy concerns. Some part of the policy discussion will center on the exploitation of lower socio-economic and typically minority women from an economic, physical, and psychological perspective.<sup>14</sup>

## II. SUMMARY OF THE CASE

### A. *Facts Behind the Suit*

Mark and Crispina Calvert, a married couple, were unable to have a child. In 1984, Crispina had a hysterectomy to combat cancer. Her

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8. *Johnson*, 851 P.2d at 796.

9. Hofheimer, *supra* note 7, at 571.

10. A. HUXLEY, *BRAVE NEW WORLD* (1932).

11. *Genesis* 16:2.

12. *Genesis* 30:3-5.

13. Sherri Lynne Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 542 (1992).

14. Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205 (1992).

ovaries remained capable of producing eggs, however, so the couple decided to pursue a surrogacy arrangement.<sup>15</sup> In 1990, Mark and Crispina Calvert entered into a gestational surrogacy contract with Anna Johnson.<sup>16</sup> The contract provided that Crispina's egg which had been inseminated with Mark's sperm would be implanted in Anna; and after birth, the child would be taken into the Calvert's home as their own child.<sup>17</sup> Anna agreed to relinquish all parental rights to the child, and in return, she would be paid ten thousand dollars in a series of installments.<sup>18</sup> Mark was Caucasian of European ancestry, Crispina was Asian of Philippine ancestry, and Anna was black of African-American ancestry.<sup>19</sup>

After the implantation of the zygote on January 19, 1990, relations between the Calverts and Anna deteriorated.<sup>20</sup> In July of 1990, Anna sent the Calverts a letter demanding the balance of the money due under the contract and further stating that she would not give up the baby unless the Calverts sent the money.<sup>21</sup> In August of 1990, the Calverts sought a declaration that they were the legal parents of the unborn child.<sup>22</sup> A healthy baby boy named Christopher was born on September 19, 1990.<sup>23</sup> Blood samples excluded Anna as the genetic mother, and the parties agreed to a court order which provided that the baby would remain with the Calverts on a temporary basis with visitation permitted by Anna prior to trial.<sup>24</sup>

## B. *Prior Proceedings*

### 1. The Trial

The action was filed in Orange County, California Superior Court in 1990. The trial court ruled that the Calverts were the child's genetic, biological, and natural parents and that Anna had no parental rights to the child.<sup>25</sup> The court also held that the surrogacy contract was legal and enforceable. The court then terminated the order which permitted Anna visitation with the baby.<sup>26</sup> Anna appealed.

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15. *Johnson*, 851 P.2d at 778.

16. *Id.*

17. *Id.*

18. *Id.*

19. Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 18 (1991). The significance of the ethnic and racial characteristics of the parties will be analyzed in text accompanying notes 56-58.

20. *Johnson*, 851 P.2d at 496.

21. *Id.*

22. *Id.*

23. Allen, *supra* note 19, at 18.

24. *Johnson*, 851 P.2d at 778.

25. *Id.*

26. *Id.*

## 2. Appellate Court

On appeal, the California Court of Appeals unanimously affirmed the trial court's decision. The court held that a woman who agreed to have a couple's fertilized egg implanted in her womb and who carried the child to term was not the "natural" or "legal" mother of the child.<sup>27</sup> The wife who supplied the egg and the husband who supplied the sperm were deemed the "natural parents" of the child.<sup>28</sup> Moreover, the court held that the gestational surrogate was not deprived of any constitutional interests.<sup>29</sup>

### C. Supreme Court of California: Decision and Rationale

The California Supreme Court, in affirming the prior decisions, held that the Uniform Parentage Act (hereinafter the Act) facially applies to any parentage determination, including rare instances in which the child's maternity is at issue.<sup>30</sup>

The court found that the Act's legislative purpose was to eliminate the legal distinction between legitimate and illegitimate children and was not motivated by the need to resolve surrogacy disputes.<sup>31</sup> Although the court had the opportunity to disregard the Act, because of the lack of legislative direction on the maternity issue, it held that the Act applied on its face to any parentage determination.<sup>32</sup> The court reasoned that while the Act may not have been specifically designed for the issue of maternity, it provided a mechanism to resolve the dispute.

Under California law, the Act looks to the intention of the parties to parent the child in determining who is the natural mother when genetic consanguinity and the act of giving birth do not coincide.<sup>33</sup> The court found support from many legal scholars in adopting the intent standard and reasoned that "the child would not have been born but for the efforts of the intended parents."<sup>34</sup>

The court held that gestational surrogacy does not run afoul of prohibitions on involuntary servitude and found no potential for coercion or duress in the contract issue. The court reasoned that all the parties understood that a pregnant woman has the absolute right to

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27. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. App. 4th 1991).

28. *Id.* at 369.

29. *Id.* at 377.

30. Uniform Parentage Act, CAL. CIV. CODE §§ 7000-7021 (West 1993).

31. *Johnson*, 851 P.2d at 778-79.

32. *Id.* at 779.

33. *Id.* at 782.

34. *Id.* The standard the Court adopted in deciding the case was the "intent" of the efforts of the parents by which the child could not have been born but for the efforts of the intended parents. *Id.*

abort or not abort any fetus she is carrying and that any promise to the contrary is unenforceable.<sup>35</sup>

The court strongly stated that it was unpersuaded that gestational surrogacy contracts would exploit or dehumanize women of lower economic status. It acknowledged that women of lesser means typically serve as surrogates but stated that there was no proof that surrogacy contracts exploited these women to any greater degree than the general exploits of poorly paying and undesirable employment.<sup>36</sup> In a single sentence, the court dismissed any claim that children will be seen as mere commodities.<sup>37</sup> While the court took a strong stand on the issue, it lacked firm statistics, empirical data, and legal reasoning.

#### D. *Concurrence and Dissent*

##### a. Concurrence

Justice Arabian concurred in the holding of the majority opinion rendered by Justice Panelli for the court but declined to subscribe to the dictum which found surrogacy contracts not inconsistent with public policy. He acknowledged that surrogacy contracts touch upon one of the most sensitive subjects of human endeavor, and stated that the area of surrogacy should be addressed in the nonadversarial legislative forum.<sup>38</sup>

##### b. Dissent

Justice Kennard contended that the legal standard applicable to this type of case should be the one which is most protective to the child's welfare. He posited that the *Johnson* decision should have been one based on the "best interest of the child" rather than on "intent".<sup>39</sup> Kennard addressed the majority's four major arguments and determined that the rigid reliance on the intent of the genetic mother will not serve the best interests of the child in all circumstances.<sup>40</sup> He concluded by stating that his proposed "best interest" standard examines who can best assume the social and legal responsibilities of motherhood for a child born out of a gestational surrogacy arrangement.<sup>41</sup>

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35. *Id.* at 784.

36. *Id.* at 785.

37. *Id.* at 784.

38. *Id.* at 788.

39. *Id.*

40. *Id.* at 794-98.

41. *Id.* at 800.

### III. PRIOR LAW AND PRACTICE

Modern medical technology has vastly broadened and greatly benefitted the society in which we live. Today we are provided with medical and health choices and a quality of life unimaginable a generation or two ago. However, modern medical technology may have opened a Pandora's box. While surrogate motherhood can serve as a highly feasible alternative to infertile couples, there is the potential that gestational surrogacy can open the door to the exploitation of those who lack bargaining power. Further, while there are four thousand children living in this country who are positive products of surrogacy arrangements,<sup>42</sup> there are also losers in the surrogacy game.

The best known surrogate motherhood situation was widely publicized and legally debated in the well known case of *In re Baby M*.<sup>43</sup> The surrogate mother, Mary Beth Whitehead Gould, failed in her attempt to get custody of her genetically related child. The contracting parents, the Sterns, left the courthouse with the prized possession.<sup>44</sup> The *Johnson* case differs from *Baby M*. in that there was no genetic link between the baby and the surrogate mother<sup>45</sup> as in *Baby M*.<sup>46</sup>

### IV. ANALYSIS

#### A. Constitutional Theory

While the California Supreme Court clearly stated that constitutional rights are not implicated in gestational surrogacy because the surrogate can terminate the pregnancy at her will, the court's decision is lacking in substance and patronizing to women.

The constitutional implications of gestational surrogacy are broad in scope. The Supreme Court has recognized the right to privacy as a fundamental right protected by the United States Constitution. The recognition of this fundamental right was carved out in *Griswold v. Connecticut*,<sup>47</sup> where the Court found unconstitutional a state statute forbidding the use of contraceptives. The Supreme Court further expanded the notion of procreative freedom in *Eisenstadt v. Baird*,<sup>48</sup> in which it overruled a statute which prohibited the sale of contraceptives to unmarried couples.

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42. Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 396 (1991).

43. 537 A.2d 1227 (N.J. 1988).

44. Brent Parker Smith, *Anna J. v. Mark C.: Proof of the Imminent Need for Surrogate Motherhood Regulation*, 30 J. FAM. L. 493, 493 (1992).

45. *Johnson*, 851 P.2d at 778.

46. 537 A.2d at 1235.

47. 381 U.S. 479 (1965).

48. 405 U.S. 438 (1972).

The *Johnson* trial court decision<sup>49</sup> included surrogacy among constitutionally protected procreative rights by extending such rights to the infertile.<sup>50</sup> Yet, the court failed to recognize the procreative right of the gestator.<sup>51</sup> The court's brief consideration of the constitutional rights of the gestator is a dodged issue. The court's one sentence which states that surrogacy contracts do not run afoul of the constitutional prohibitions on involuntary servitude<sup>52</sup> is insulting lip service to women.

*Johnson* sparked a new wave of concern that gestational surrogate motherhood turns women into commercial slaves twenty-four hours a day for 270 days.<sup>53</sup> The trial judge analogized the unique role of the gestational surrogate first to that of a foster parent who provides care, protection, and nurture during the period that the natural mother was unable to, and second to that of a wet nurse who merely provides essential nutrition.<sup>54</sup> Both arrangements, fostering parenthood and wet-nursing, leave the "service" provider without legal recourse in the form of custodial or visitation rights. The court must address whether satisfaction of the strong desire to have one's own genetically related children is worth the social price of surrogacy arrangements.<sup>55</sup>

## B. Contractual Theory

Because the right to contract is generally afforded broad protection by the law, it would seem that the courts may enforce a contract, supported by consideration, into which all parties enter willingly.<sup>56</sup> However, jurisdictions differ on the legality of surrogacy contracts. If the court declares that the practice of surrogacy is unprotected by the Constitution and is illegal, then any surrogacy contract becomes unenforceable. Courts will not enforce a contract which provides for the performance of an illegal act. This highlights the underlying contractual doctrine of unconscionability.<sup>57</sup> Unconscionability has a twofold purpose, to prevent oppression and to prevent unfair surprise.<sup>58</sup> The

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49. *Johnson v. Calvert*, No. X633190 consolidated with AD5738 (Cal. Super. Ct. Oct. 22, 1990) (transcript).

50. *Id.*

51. Smith, *supra* note 44, at 506-07.

52. *Johnson*, No. X633190 at \*15. The trial judge was sure that the "genetic" mother and not the "carrying person" has whatever procreative rights the Supreme Court established as fundamental. *Id.* "I think, probably, as I see it, there are some constitutional problems with trying to outlaw [surrogacy agreements] all together." *Id.*

53. Allen, *supra* note 19, at 17.

54. Hofheimer, *supra* note 7, at 582.

55. Allen, *supra* note 19, at 21.

56. Smith, *supra* note 44, at 503.

57. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 9-40, at 403 (3d 1987).

58. *Id.*

surrogate mother is typically found in a lower socio-economic status and is a prime candidate to fall victim to unconscionable oppression.

In the commercial surrogacy context, the surrogate mother usually creates a child not because she wants to be magnanimous, but because she wants to earn a specified fee.<sup>59</sup> This clearly exemplifies the exploitation of the poor. Typically, the surrogate mother is paid a total of ten thousand dollars in installments, for her services.<sup>60</sup> A wage of ten thousand dollars for nine months is equivalent to a wage of one dollar and fifty-four cents per hour if one considers surrogate motherhood a twenty-four-hour-a-day job.<sup>61</sup>

A further harm in upholding the constitutional validity of gestational surrogacy contracts is the devaluation of human life by "baby selling." Baby selling is a demeaning practice which treats children like commodities that can be bought or sold on an open market.<sup>62</sup> A stance must be taken, and it should be acknowledged that childbearing is too sacred and too personal to commercialize.<sup>63</sup> By turning the womb into a commodity, many feminists fear that society will once again value women primarily for their reproductive capacities.<sup>64</sup>

### C. *Where the States Lie in Gestational Surrogacy Legislation*

A survey of the jurisdictions shows varying approaches to the legal issue of surrogacy. Arizona, Indiana, and North Dakota have responded by making any type of surrogacy contract void and unenforceable. Kentucky, Louisiana, Nebraska, Utah, and Washington have taken the position that surrogacy contracts are voidable, not illegal and void.<sup>65</sup> Michigan takes the strongest stance by criminalizing surrogacy.<sup>66</sup> The Virginia and New Hampshire legislatures have enacted statutes which permit surrogacy contracts and establish extensive schemes governing their terms and enforcement.<sup>67</sup> The California trial court in *Johnson* held that surrogacy contracts are not void or against public policy and urged that such contracts should be enforced, even by means of habeas corpus.<sup>68</sup> Approximately sixteen states have adopted or adapted the Uniform Parentage Act.<sup>69</sup> If other

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59. Lieber, *supra* note 14, at 209.

60. Russell-Brown, *supra* note 13, at 541.

61. *Id.*

62. Smith, *supra* note 44, at 505.

63. Lori A. DeMond, Note, *The Ongoing Uncertainty of Surrogacy*, 63 B.Y.U. L. REV. 686, 688 (1991).

64. Lieber, *supra* note 14, at 209.

65. *Id.*

66. *Id.*

67. *Id.*

68. Allen, *supra* note 19, at 22.

69. Hofheimer, *supra* note 7, at 573.

states interpret “natural mother” as the California court did, *Johnson* could stand as the forerunner of such decisions.<sup>70</sup>

#### D. Public Policy Concerns and Feminist Perspectives

In the gestational surrogacy realm, there is fertile ground for public policy concerns. The main tenet of feminism is that women should not have their destiny controlled by their biology.<sup>71</sup> In Western cultures, social roles have been defined by the fact that only women can become pregnant, and women are given the primary responsibility of rearing children.<sup>72</sup> The feminist community appears to be split on the issue of surrogacy. A small minority of feminist writers believe that surrogacy is one of the many reproductive choices from which women should be free to choose.<sup>73</sup> Most feminist scholars see surrogacy as a form of slavery or prostitution in which the surrogate is exploited through either one or both of the enticements of money or the social expectation of self-sacrifice.<sup>74</sup> Many feminists fear that surrogates will be turned into a class of breeders and that a reproductive brothel will emerge.<sup>75</sup>

Another major area of concern is the potential for actual psychological and physical harm to women.<sup>76</sup> While proponents of surrogacy argue that it is a woman’s choice to use her body in any way she sees fit, most believe that commercial surrogacy will lead to the exploitation of women through economic and societal pressures.<sup>77</sup> The psychological trauma of a baby being stripped from the arms of the surrogate mother after a change of heart is unimaginably heart-wrenching. Medical inquiry into the issue has found that hormonal changes during pregnancy make it impossible for the surrogate to determine how she will feel about relinquishing possession and parental rights of the child.<sup>78</sup>

The holding in *Johnson* clearly suggests the possibility that the courts will litigate difficult circumstances faced by gestational surrogacy participants when the scientific miracle of birth goes awry.<sup>79</sup> In cases of infertility, surrogacy arrangements have allowed infertile couples to experience the joys of parenthood. Children of such ar-

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70. *Johnson*, 851 P.2d at 776.

71. Leiber, *supra* note 14, at 209.

72. *Id.* at 210.

73. *Id.* at 209.

74. *Id.*

75. *Id.* at 210.

76. *Id.*

77. *Id.* at 209.

78. *Id.* at 211-212.

79. Benefits do exist in “individual cases” of surrogacy arrangements when the agreements are followed with no dispute.

rangements are born where life once was an impossibility, and some surrogates really do benefit from the gift of life, either psychologically or financially. Yet, the masses of women who are physically and psychologically harmed far outweigh the small number of women who feel fulfilled by such arrangements.<sup>80</sup> Unfortunately, it becomes a cost-benefit analysis with the costs greatly outweighing the benefits to women. The courts should take this opportunity to reflect on such harmful side effects and to act by deciding case law in an according manner. Legislatures should prohibit such contractual relationships which are detrimental to women and children.

#### IV. CONCLUSION

The court's holding in *Calvert v. Johnson* leaves many questions unanswered.<sup>81</sup> The greatest of these questions is whether satisfaction of the strong desire to have one's own genetically related child is worth the social price of a surrogacy arrangement. The legal relationship between a surrogate gestator mother and her child is complex. While no genetic linkage is present, there is a nine month gestation period and a birthing process that the surrogate and child share exclusively. While some view the surrogate relationship as a mere contractual service, in reality, the issue is a multifaceted and deep one. Justice Arabian is correct that the multiplicity of considerations at issue do require careful, nonadversarial analysis in a legislative forum.<sup>82</sup> The magnitude and severity of public policy considerations demand immediate legislative attention and action.

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80. York, *supra* note 42, at 399.

81. Leiber, *supra* note 14, at 209.

82. *Id.*

\* Für Meinen Vater, Walter Hesselthaler, 20 XI 28 - 13 XI 92.