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Are You My Mother: The Legal Obstacles of Assisted Reproductive Technology

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ARE YOU MY MOTHER?1: THE LEGAL OBSTACLES OF ASSISTED REPRODUCTIVE TECHNOLOGY

I. INTRODUCTION

Modern medicine, specifically assisted reproductive technology, has surpassed legislative action in many jurisdictions around the country.2 These new medical practices present many significant legal problems with which the courts and legislators struggle.3 Lawmakers are forced to examine the existing substantive law to determine if the legal system can adequately handle the ramifications of advanced technological discoveries.4 This comment will begin with an analysis of the legal history of assisted reproductive technology in three different states, each with a substantial number of court decisions on the issue of parental rights. Further, this comment will explore the case of first impression recently decided by the highest court in Massachusetts, concluding with an analysis of what can be expected of reproductive law in the future.

The different practices grouped under the umbrella of assisted reproductive technology afford individuals the opportunity to procreate when biology and nature cannot perform on their own.5 Heterologous artificial insemination ("AID") is the method whereby a woman is impregnated with semen from a man who is not her husband.6 This procedure carries the most significant legal problem with

1 P.D. EASTMAN, ARE YOU MY MOTHER? (Beginner Books Division of Random House, Inc.) (1960).
2 See John Ellement, Mass. Pushed into Birth-Rights Arena, Boston Globe, Sept. 10, 1997 at B1 (recognizing the court will decide an issue where science has moved ahead of law).
3 See id. (outlining problems as to definition of rights of birth mother, couple who hired her, and child).
4 See id. (requiring court to look at any current laws related to the issue).
the determination of who should bear the paternity obligation—the donor or the woman’s husband. Homologous artificial insemination ("AIH") poses fewer legal ramifications because the woman is impregnated with the semen of her husband and the child conceived is the biological child of both the woman and her husband. Combined artificial insemination ("CAI") is a method in which the woman is inseminated with a combination of her husband’s semen and that of a donor. CAI does not pose the same legal problems as AID because the mix of donor sperm allows a court to presume that the husband is the biological father.

Different from artificial insemination, in vitro fertilization and surrogate motherhood introduce the problems of establishing both maternity and paternity. In vitro fertilization can be performed by merging the egg and sperm of one couple to be carried to term by a second female or it can be performed by taking the sperm of the husband and fertilizing the egg of a second woman to then be carried by the wife. Similarly, there are two techniques under the umbrella of surrogate motherhood, both of which pose parentage issues. The legal problem with traditional surrogacy is that the baby is genetically

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7 See id. (outlining problems associated with AID).
8 See id. (describing procedure and problems associated with AIH).
9 See Wadlington, supra note 5 at 469 (1983) (describing procedure of CAI).
10 See id. (explaining why CAI does not present as many problems as AID).
11 See Sherwyn, 173 Cal. App. 3d at 56-57, 218 Cal. Rptr. at 781 (identifying problems of in vitro fertilization and surrogacy). Parentage problems result because at least one of the intended parents is not biologically related to the child. Id.
12 See Wadlington, supra note 5 at 473 (1983) (describing the two forms of in vitro fertilization).
13 See id. at 475 (detailing the problems traditional surrogacy and gestational surrogacy pose). In a traditional surrogacy situation, a woman conceives a child by AID, carries it to term and relinquishes the baby to the sperm donor after birth. Id. Gestational surrogacy differs because the surrogate is impregnated through in vitro fertilization with the merged egg and sperm of a married couple. Id. at 474.
related to the surrogate mother, not the wife of the sperm donor.\textsuperscript{14} Traditionally, with both forms of surrogacy, a contract is signed by the surrogate whereby she agrees to carry the baby to term with the intention of turning the baby over to the couple after its birth.\textsuperscript{15} Because of the varying legal problems which arise from the different methods of assisted reproductive technology, lawmakers need to draft legislation to resolve the controversies.

II. HISTORY

A. New Jersey

In 1988, the Supreme Court of New Jersey decided one of the most important and controversial cases involving assisted reproductive technology.\textsuperscript{16} \textit{In the Matter of Baby M}\textsuperscript{17} forced the court to confront the issue of surrogate motherhood and the legality of the surrogate contract used by the parties.\textsuperscript{18} The facts of the case involved the artificial insemination of a woman, Mary Beth Whitehead, with the semen of William Stern, a man who was not her husband.\textsuperscript{19} Mrs. Whitehead entered into a surrogacy contract with Mr. Stern whereby she agreed to conceive the child, carry it to term and after its birth surrender the child to its natural father and his wife for adoption.\textsuperscript{20} The contract provided for a payment to Mrs. Whitehead of $10,000 for her services.\textsuperscript{21} At the time the contract was created, the Parentage Act in existence in New Jersey provided for a presumption

\textsuperscript{14} See \textit{id}. at 475 (resulting in biological mother possibly wishing to maintain maternal rights).

\textsuperscript{15} See \textit{Sherwyn}, 173 Cal. App. 3d at 57, 218 Cal. Rptr. at 781 (posing problems when surrogate refuses to turn baby over to couple).

\textsuperscript{16} See \textit{In re Baby M}, 109 N.J. 396, 537 A.2d 1227 (forcing the court to decide the fate of a contract that would provide a new way of bringing children into a family).

\textsuperscript{17} 109 N.J. 396, 537 A.2d 1227 (1988).

\textsuperscript{18} See \textit{id}. (identifying the problems surrounding surrogacy and surrogacy contracts).

\textsuperscript{19} \textit{id}. at 411-12, 537 A.2d at 1235.

\textsuperscript{20} \textit{id}. at 412, 537 A.2d at 1235.

\textsuperscript{21} \textit{id}.
of paternity on the part of the mother’s husband. To prevent any problems, Mr. Whitehead became a party to the contract and promised to do all the necessary acts to rebut the presumption. After the birth of the child, initially named Sara Elizabeth Whitehead, Mrs. Whitehead realized that she could not part with the child. After time, however, she did reluctantly turn the child over to the Sterns as stipulated in the contract. Later, the Sterns, fearful of the continuing unstable mental condition of Mrs. Whitehead, agreed to Mrs. Whitehead’s request to turn the child, who they named Melissa, over to the surrogate for one week. When Mrs. Whitehead refused to return Melissa to the Sterns, Mr. Stern filed a complaint to enforce the surrogacy contract and the courts became involved in the situation.

Upon learning of the court’s involvement, the Whiteheads fled to Florida with the child. A Florida court enforced the New Jersey court order requiring the Whiteheads to turn over the child. The New Jersey court reaffirmed the ex parte prior order, awarding custody of the child to the Sterns pendente lite, however, the court also awarded Mrs. Whitehead limited visitation with Baby M pending final judgment. The Sterns’ complaint sought possession and ultimate custody of the child, enforcement of the surrogacy contract, termination of Mrs. Whitehead’s parental rights, and permission for Mrs. Stern to adopt the child. The Superior Court, Chancery Division/Family Part, held that the surrogacy contract was valid and or-

22 See In re Baby M, 109 N.J. at 412, 537 A.2d at 1236 (requiring Mr. Whitehead to rebut the presumption of paternity under the statute). See also N.J. STAT. ANN. §§ 9:17-43a(1)-44a (West 1993) (listing the steps necessary to rebut presumption of paternity).
23 Id.
24 Id. at 414-15, 537 A.2d at 1236-37.
25 Id. at 415, 537 A.2d at 1237.
26 Id.
27 Id.
28 In re Baby M, 109 N.J. at 416, 537 A.2d at 1237.
29 Id.
30 Id. at 416, 537 A.2d at 1237.
31 Id. at 417, 537 A.2d at 1237.
dered that Mrs. Whitehead’s parental rights be terminated and that sole custody of the child be granted to Mr. Stern with an order allowing Mrs. Stern to adopt Melissa. In determining whether the surrogacy contract was valid, the superior court focused its opinion on the best interest of the child. Upon appeal, however, the Supreme Court of New Jersey looked to the best interest of the child solely to determine the issue of custody.

Upon analysis of the superior court’s decision, the supreme court determined that the superior court’s review of the issue involving the surrogacy contract differed from its own. The superior court concluded that the various statutes governing adoption, termination of parental rights, and payment of money in connection with adoptions, do not apply to surrogacy contracts because the legislature did not have surrogacy contracts in mind when enacting those laws. The supreme court, on the other hand, held that the surrogacy contract was in direct conflict with existing statutes and public policy of the state, and was therefore invalid. The supreme court also decided that the surrogacy contract conflicted with statutes prohibiting the use of money in connection with adoptions; statutes requiring proof of parental unfitness or abandonment before termination of parental rights; and statutes making the surrender of custody and consent to adoption revocable in private adoptions. The supreme court finally

32 See id. at 417, 537 A.2d at 1237 (citing lower court decision 217 N.J. Super. 313, 525 A.2d 1128 (1987)).
33 See In re Baby M, 109 N.J. at 418, 537 A.2d at 1238 (determining validity of contract based on what is best for the child).
34 Id. The supreme court believed that the analysis by the trial court was inconsistent and states that the trial court awarded custody to Mr. Stern based on evidence and analysis that would have taken place had there been no surrogacy contract. Id. The trial court ultimately thought the contract was irrelevant. Id.
35 See id. (reviewing contract for different reasons than lower court).
36 See id. at 418, 537 A.2d at 1238 (deciding that current statutes don’t apply).
37 See id. at 421-22, 537 A.2d at 1239-40 (disagreeing with lower court’s analysis).
38 See In re Baby M, 109 N.J. at 423, 537 A.2d at 1240 (deciding that contract conflicts with current statutes). See also N.J. STAT. ANN. § § 9:3-54a,
held that the surrogacy contract directly conflicted with New Jersey’s public policy which (1) aims to keep children with and to be reared by both of their natural parents, (2) affords equal rights concerning the child to both natural parents, (3) aims to keep the consent for the surrender of a child as an informed decision for the surrogate, and (4) looks to the best interest of the child in determining custody. Despite the invalidity of the surrogacy contract, the supreme court awarded custody to the child’s natural father and his wife based on an analysis of the child’s best interest. The natural mother retained her parental rights, entitling her to visitation with the child. The Supreme Court of New Jersey stated in dicta that the present laws of New Jersey do not pose any legal prohibition to surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. This comment leaves the door open to the legislature to deal with the issue as it sees fit, and in the way most advantageous to the people who would benefit from procedures such as surrogacy while minimizing the risk to the community at large.

The New Jersey courts have confronted the issues surrounding artificial insemination as well as those surrounding the surrogacy contract found in In the Matter of Baby M. In C.M. v. C.C., the Juvenile and Domestic Relations Court of Cumberland County, New Jersey heard a case involving a woman who underwent artificial insemination with the sperm of a known donor. The sperm bank denied the individuals the use of its facilities, so the individuals suc-


40 Id. at 459, 537 A.2d at 1259.

41 Id. at 466, 537 A.2d at 1263.

42 See id. at 469, 537 A.2d at 1264 (outlining one way surrogacy contract may be upheld).

43 See id. (encouraging action by legislators).


45 Id.
cessfully attempted the insemination at home. The donor, C.M., assumed that he would undertake the paternal role in the child's life, however, C.C. did not want that. This conflict led to the application by C.M. for visitation rights to the baby. In this case of first impression, the court looked to other jurisdictions confronted with the issue of the paternity of a child conceived through artificial insemination. The court reviewed decisions by both the Supreme Court of New York and the Supreme Court of California and decided that "[i]f an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered to be less a father because he is not married to the woman." Finally, the court held that the voluntary decision by C.M. to participate in the procedure which led to the conception of a child, should place on him the responsibilities of fatherhood, including the right to visitation as well as support and maintenance of the child.

The ramifications of artificial insemination reach to areas beyond visitation, as illustrated in *C.M. v. C.C.* Issues of support, upon divorce, for children born during the course of a marriage who were conceived by artificial insemination are found in *K.S. v. G.S.*, de-

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46 *Id.* at 161, 377 A.2d at 821.

47 *Id.*

48 *Id.*

49 See *C.M. v. C.C.*, 152 N.J. Super. at 162, 377 A.2d at 822 (using case law from other states for assistance).

50 *Id.* at 167, 377 A.2d at 824. This decision upholds the policy favored by the courts which requires that a child be provided with a father as well as a mother and provides the court with the necessary leeway in determining what is in the best interest of the child in granting visitation without making distinctions between those children conceived naturally or artificially. *Id.* See generally *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (Sup. Ct. 1968); *Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973); *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948); *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

51 See *C.M. v. C.C.*, 152 N.J. Super. 160, 168, 377 A.2d 821, 825 (holding that paternity imposes requirements on father, even if by artificial insemination).

52 See *id.* (indicating that support is an issue as well as visitation).

lected by the Superior Court of New Jersey, Chancery Division. The parties involved were married, but unable to conceive because of the husband's prior voluntary vasectomy. The parties decided to attempt artificial insemination and met with a specialist in the field of fertility who explained the procedure. This specialist was then given oral consent by the defendant/husband to the procedure. After a miscarriage, the husband initially urged his wife to continue the procedure, but alleges he later changed his mind due to the cost of the procedures, and told his wife to stop the treatments. The wife continued with her treatments and after a pregnancy was confirmed, her husband left her, stating that he objected to her pregnancy. Soon after the birth of the child, the wife filed for divorce and sought support for the child. The court was faced with the issue of whether support obligations may be imposed on the husband who has never seen the child or contributed previously to its support. Statutes enacted in other states address the problem of paternal obligations created by artificial insemination and uniformly impose marital obligations when the husband consented to the procedure. The court compared the aspect of consent for artificial insemination for determining paternity with nonaccess of the putative father at the time of conception prior to, or during a marriage. Based on this compari-

54 Id.
55 Id. at 104, 440 A.2d at 65.
56 Id.
57 Id. Neither in 1981, nor presently, does New Jersey require written consent be obtained by a physician prior to the beginning of artificial insemination procedures. Id.
59 Id. at 105, 440 A.2d at 66.
60 Id.
61 See id. (deciding issue of support obligations of man who was involved in artificial insemination procedure).
62 See id. at 106, 440 A.2d at 66 (citing statutes from other states imposing support obligations). See also CAL. CIV. CODE § 7005 (West 1975) and N.Y. DOM. REL. LAW § 73 (McKinney 1988) (requiring support payments of husband who consents to artificial insemination procedure).
63 See K.S. v. G.S., 182 N.J. Super. at 107, 440 A.2d at 67 (determining importance of consent of husband).
son, the court decided that it is practical, because of the difficulty in proving consent, to apply a rebuttable presumption criterion to determine the existence of consent at a certain time. Therefore, the court held that consent, once given, is presumed to be effective at the time of conception unless the husband establishes by clear and convincing evidence that he revoked or rescinded his consent. Without clear evidence, the defendant was declared the lawful father of the child conceived through artificial insemination and therefore held some responsibility for the support of the child. In deciding cases involving the use of artificial insemination, the court attempts, whenever possible, to provide the child with both a mother and a father, and will prevent individuals from shirking the responsibility that comes with parenthood.

B. New York

New York courts decided cases involving artificial reproductive technology long before the courts in New Jersey. As was mentioned in the C.M. v. C.C. case, the court looked to the cases from New York for assistance in making its decision. The first case from New York is Strnad v. Strnad which deals with the issue of the artificial insemination of a woman with the sperm of a donor not her husband, but with her husband’s consent. Julie Strnad brought the court action against her husband, Antoine, involving the custody of

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64 See id. at 109, 440 A.2d at 68 (applying rebuttable presumption criteria to determine consent).
65 See id. at 109-10, 440 A.2d at 68-69 (requiring definite revocation of consent to avoid obligations).
66 See id. at 110, 440 A.2d at 69 (holding husband responsible for support of child).
67 See id. (attempting to provide two parents and support for all children).
68 See Strnad v. Strnad, 78 N.Y.S.2d 390, 190 Misc. 786 (1948) (indicating the date of the decision as forty years prior to the Baby M decision).
69 See C.M. v. C.C., 152 N.J. Super. at 167, 377 A.2d at 824 (using case law from New York as guidance).
70 190 Misc. 786, 78 N.Y.S.2d 390 (1948).
71 Id. at 786, 78 N.Y.S.2d 390.
her child, Antoinette.\textsuperscript{72} The court decided that Mr. Strnad was entitled to the same child visitation rights as those acquired by foster parents who formally adopt a child, if not the same rights as those given to natural parents.\textsuperscript{73} This decision came from the court’s holding that when a wife undergoes artificial insemination with the consent of her husband, the child is semi-adopted by the husband.\textsuperscript{74} Under the same analysis, the child is therefore not considered illegitimate.\textsuperscript{75} The court looks at the child conceived through artificial insemination as no different from a child born out of wedlock who is then made legitimate by law upon the marriage of the interested parties.\textsuperscript{76} This was the first case where the legitimacy of a child conceived through a method of assisted reproductive technology was discussed, however, the court did not make any determination on the legal consequences of the legitimacy of the child with regard to property rights.\textsuperscript{77}

In 1963, the Supreme Court of New York again faced the issue of artificial insemination of a woman, by a donor not her husband, with the written consent of her husband.\textsuperscript{78} In this action for annulment brought by Stanley Gursky, the issue surrounded the support of Minday, a child conceived through artificial insemination.\textsuperscript{79} The court analyzed the concept of legitimacy in both statutory law and common law.\textsuperscript{80} Statutorily, a child whose natural father is not married to her

\textsuperscript{72} Id. 
\textsuperscript{73} See id. at 787, 78 N.Y.S.2d at 391-92 (deciding that husband involved in artificial insemination given visitation rights).
\textsuperscript{74} See id. at 787, 78 N.Y.S.2d at 391 (entitling husband to same rights of visitation as those who adopt children).
\textsuperscript{75} See Strnad, 190 Misc. at 787, 78 N.Y.S.2d at 391 (using comparison to adoption to make children legitimate).
\textsuperscript{76} See id. at 787, 78 N.Y.S.2d at 392 (determining status of child born by artificial insemination).
\textsuperscript{77} See id. (deciding property rights and moral questions connected with this issue not appropriate here).
\textsuperscript{79} Id. at 1085, 242 N.Y.S.2d at 408.
\textsuperscript{80} See id. at 1085, 242 N.Y.S.2d at 408-09 (using all legal means in existence for guidance).
mother is illegitimate regardless of the marital status of the mother.\textsuperscript{81} The court also commented on the only other New York case dealing with the subject, \textit{Strnad v. Strnad}, stating that there was no legal precedent supporting that decision, which was actually in contradiction with the statute dealing with adoption.\textsuperscript{82} For additional assistance, the court looked to a Cook County Superior Court decision which held that heterologous artificial insemination by a third party donor, with or without the consent of the husband, constitutes adultery on the part of the mother.\textsuperscript{83} As a result, a child so conceived is not a child born in wedlock and is therefore illegitimate.\textsuperscript{84} The Gursky court held that the child, Minday, was not the legitimate issue of the husband, but concluded that based on the implied contract for support formed by his written consent to the artificial insemination procedure, he was liable for the support of the child.\textsuperscript{85} Again, the New York court was unwilling to make any decision upon the personal rights, including property rights, that the child may have from the relation with the husband.\textsuperscript{86}

In addition to decisions concerning artificial insemination, New York courts have faced issues regarding surrogacy agreements.\textsuperscript{87} In 1986, the Surrogate’s Court of Nassau County, New York, decided

\textsuperscript{81} See \textit{id.} at 1086, 242 N.Y.S.2d at 409 (stating that use of artificial insemination may lead to illegitimate status for child). See also N.Y. DOM. REL. LAW § 119(a) (McKinney 1988) (indicating that statute was repealed in 1962).

\textsuperscript{82} See \textit{id.} at 1088, 242 N.Y.S.2d at 411 (providing no legal manner for child to be legitimate in \textit{Strnad}). New York Domestic Relations Law § 110 specifically states that no person shall be adopted except in pursuance thereof. \textit{Id.}

\textsuperscript{83} See \textit{Gursky}, 39 Misc. 2d at 1088, 242 N.Y.S.2d at 411 (citing Doombos v. Doombos, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956)).

\textsuperscript{84} See \textit{id.} (reiterating illegitimacy of child born by artificial insemination).

\textsuperscript{85} See \textit{id.} at 1089, 242 N.Y.S.2d at 412 (holding husband to written consent and requiring support thereby).

\textsuperscript{86} See \textit{id.} (stating personal rights of child not properly decided here).

Adoption of Baby Girl L.J.\textsuperscript{88} and held that a private placement adoption in which the adoptive child was born to a surrogate mother artificially inseminated by the adoptive father was valid.\textsuperscript{89} The court was concerned with two issues: (1) the validity of the adoption proceeding, since the parties agreed to the terms prior to the conception and birth of the child and (2) the possible violation of existing statutes by the payment of a fee to the surrogate mother.\textsuperscript{90} Based on the facts, the court granted the adoption because it was in the best interest of the child to live in the home of the petitioners.\textsuperscript{91} In deciding the issue surrounding the payment of a fee to the surrogate mother, the court found that such arrangements are not void, but voidable because of the state's adoption statutes which take precedence over any agreement between the parties.\textsuperscript{92} If violations of these statutes are found in the agreements, the contract may be illegal and the petition for adoption may be denied.\textsuperscript{93} However, in this case, the court held that the payment provided for in the agreement between the parties was legitimate under the statute.\textsuperscript{94}

In 1990, the Family Court of Kings County, New York, refused to follow the decision a few years earlier in Adoption of Baby Girl
L.J. In *Adoption of Paul*, Elizabeth A. and Greg T. entered into a surrogate parenting agreement whereby Elizabeth agreed to be artificially inseminated with Greg’s sperm in order to conceive a child who would be placed into the custody of Greg. The agreement provided for a payment to Elizabeth of $10,000 upon her surrender of custody of the child. Elizabeth was before the court for the purpose of executing a “Judicial Consent” to the adoption of her son by Greg and his wife. The adoptive parents did not initially disclose the fee of $10,000 to be paid to Elizabeth. The court, through analysis of the agreements submitted as part of the documents in support of the surrender and subsequent adoption, determined that Elizabeth did anticipate receiving a payment in exchange for the execution of the Judicial Consent. It was this payment that was at issue before the court.

Despite the prior New York case which was squarely on point on the issue allowing a surrogate contract with a payment provision, this court was unable to approve a fee paid to the surrogate mother. The court looked to the law of other jurisdictions as guidance, as there was no statutory guidance in New York, and concluded that “the contract at Bar provides for ‘the sale of a child, or, at the very least, the sale of a mother’s right to her child’, in contravention of the law of this state.” After this decision, surrogate contracts, which provide for payments to the surrogate mother, are void under the law of the State of New York.

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95 See Adoption of Paul, 146 Misc. 2d 379, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990) (determining that surrogacy contract at hand is void under state law).
97 Id. at 379, 550 N.Y.S.2d at 815.
98 Id.
99 Id. at 380, 550 N.Y.S.2d at 816.
100 Id. at 380, 550 N.Y.S.2d at 816.
101 Adoption of Paul, 146 Misc. 2d at 381, 550 N.Y.S.2d at 816.
102 Id. at 381, 550 N.Y.S.2d at 817.
103 See id. (citing *Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S.2d 813 (N.Y. Sur. Ct. 1986)).
104 Id. at 385, 550 N.Y.S.2d at 818.
105 See id. at 385, 550 N.Y.S.2d at 818 (voiding all surrogacy contracts which provide payments).
The Supreme Court, Appellate Division, of New York, made a finding on a gestational surrogacy issue in 1994. In the case of *McDonald v. McDonald*, the defendant wife, Olga, was the gestational mother of twins born during her marriage to the plaintiff husband, Robert. Olga was unable to conceive naturally, so the couple agreed to conceive a child through in vitro fertilization. This procedure mixed the sperm of Robert with the eggs of a female donor, which were then implanted into Olga’s uterus. Sometime after the twins were born, Robert sought a divorce from Olga and in that action for divorce sought to declare that the children were genetically and legally his and that he should be granted custody of them. Robert’s argument was based on the fact that he is the “only genetic and natural parent available” to the children and therefore his claim for custody should override Olga’s who is not the genetic mother.

In deciding the issue of whether Olga is the natural mother of the children, for the purposes of resolving the issue of custody, the court looked to prior case law from California and New Jersey. The court distinguished the present case from *In re Baby M* because in this case, the two functions of the female in reproduction were shared between two women. This “egg donation” scenario is similar to that of *Johnson v. Calvert*, because in that case there was a gestational surrogate who carried the fertilized eggs of the married cou-

108 Id.
109 Id.
110 Id.
111 Id.
112 See *McDonald*, 196 A.D.2d at 9, 608 N.Y.S.2d at 478 (arguing that Olga had insignificant claim for custody since only gestational mother).
113 See id. (referring to *Johnson v. Calvert* and *In re Baby M*).
114 See id. at 10, 608 N.Y.S.2d at 479 (distinguishing case where surrogate was genetic mother from case where anonymous egg donor was involved).
However, the present case is different because Olga, unlike the surrogate in Johnson, is not genetically related to the children to which she gave birth. Despite the differences between the present case and Johnson, the Supreme Court of New York found the reasoning used by the California court to be persuasive. As a result, the court held that in the present case, Olga, who is the gestational mother, is the natural mother, and is therefore entitled to temporary custody of the children with visitation rights given to Robert.

C. California

Similar to New Jersey, the Supreme Court of California decided a case involving a surrogacy contract, but it differed in that it was one of gestational surrogacy, not traditional surrogacy as was seen in the Baby M case. The suit was brought by a husband and wife seeking declaration that they were the legal parents of a child born to a woman in whom the couple’s fertilized egg had been implanted. There was a contract signed by the parties which stipulated that Ms. Johnson would relinquish all parental rights to the child in favor of Mr. and Mrs. Calvert upon the birth of the child in return for a payment of $10,000 and a $200,000 life insurance policy. The primary issue in the case was: Who is the child’s natural mother under California law? The trial court ruled that the Calverts were the child’s

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116 See id. (citing Johnson, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993)).
117 See id. (indicating differences between gestational surrogate role in two cases).
118 See Johnson, 5 Cal. 4th at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500 (holding woman intending to procreate the child and raise the child as own is natural mother).
119 See McDonald, 196 A.D.2d at 12, 608 N.Y.S.2d at 480 (following analysis of Johnson court).
121 Id. at 84, 851 P.2d at 776, 19 Cal. Rptr. 2d at 494.
122 Id. at 87, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496.
123 Id. Blood samples obtained from both Ms. Johnson and the baby excluded Ms. Johnson as the genetic mother. Id.
"genetic, biological and natural" parents and that Ms. Johnson had no "parental" rights to the child. In addition, the trial court held that the surrogacy contract was legal and enforceable against the claims made by Ms. Johnson. The Court of Appeals for the Fourth District, Division Three affirmed the decision of the trial court and the Supreme Court granted review.

California is one of the few states to enact legislation with the Uniform Parentage Act as its foundation. Under Part 7 of Division 4 of the California Civil Code, §§ 7000-7021, pertinent portions of the Uniform Parentage Act were encompassed. These sections deal with the legal distinction between legitimate and illegitimate children. The Supreme Court of California determined that these statutes apply to any parentage determination, especially those involving the issue of a child's maternity, and analyzed the facts of this case under the framework of the Act. There are specific provisions of the Act which address the issue of maternity and recognize both genetic consanguinity and giving birth as means of establishing the mother and child relationship. However, California law recognizes that a

124 Id. at 88, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496.
125 Johnson, 5 Cal. 4th at 88, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496.
126 Id.
127 See UNIF. PARENTAGE ACT §§ 1-2, 9B U.L.A. 287 (1987) (listing the states which have adopted the Act).
129 See Johnson, 5 Cal. 4th at 89, 851 P.2d at 779, 19 Cal. Rptr. 2d at 497 (providing that parent/child relationship extends equally to all children and to parents regardless of marital status).
130 See id. (using interpretation of statute to decide issue of maternity in gestational surrogacy case).
child has only one natural mother which poses some problems in cases of reproductive technology where a different outcome may be biologically possible. The court determined that the terms of the Act are not sufficient to render a fair decision about the maternity of a child born from reproductive technology. The many ambiguities resulting from the procedures are not directly resolved in the Act and an analysis into the intention of the parties is necessary for the decision making process. After thorough analysis, the court concluded that when the biological functions necessary to bring a child into the world have been allocated between two women, it is the woman who intended to procreate the child and raise that child as her own, who is the natural mother under California law.

In addition to the maternity issue in the Johnson v. Calvert case, the court was faced with determining the validity of the surrogacy contract. Ms. Johnson argued that the surrogacy contract violated the policies underlying the adoption laws of the state because it constituted a prebirth waiver of parental rights. However, the court disagreed with her and ruled that gestational surrogacy differs from adoption and is not subject to the adoption statutes. The court looked to the purpose of the payments stipulated under the contract when making their decision. Based on the purpose of the payments

132 See Johnson, 5 Cal. 4th at 92, 851 P.2d at 781, 19 Cal. Rptr. 2d at 499 (refusing to recognize more than one natural mother, despite mother/child relationship).
133 See id. at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500 (acknowledging ambiguity caused by the statute).
134 See id. (concluding intention of parties is deciding factor).
135 See id. (attempting to avoid confusion caused by combining custody and parentage).
136 See id. at 95, 851 P.2d at 783, 19 Cal. Rptr. 2d at 501 (deciding issues such as maternity and validity of surrogacy contract).
137 Johnson, 5 Cal. 4th at 96, 851 P.2d at 784, 19 Cal. Rptr. 2d at 502 (arguing contract unenforceable).
138 See id. (acknowledging difference between surrogacy contract and adoption).
139 See id. (holding payments were compensation for services, not for giving up parental rights).
and the intent of the parties, the contract used in the Johnson case did not violate public policy governing adoption or termination of parental rights.\textsuperscript{140}

In 1994, the California Court of Appeals was faced with deciding the issue of the enforceability of a traditional surrogacy contract.\textsuperscript{141} In re Marriage of Moschetta\textsuperscript{142} introduced the issue to the court which defined traditional surrogacy to "mean an arrangement where a woman is impregnated with the sperm of a married man with the prior understanding that the resulting child is to be legally the child of the married man and his infertile wife."\textsuperscript{143} This type of surrogacy presents problems because the surrogate is the woman who gave birth to the child and also is the "natural" parent of the child, as is the father.\textsuperscript{144}

In the present case, Robert and Cynthia Moschetta wanted to start a family, but Cynthia was sterile.\textsuperscript{145} The couple met with a surrogacy broker who introduced them to Elvira Jordan, a woman who agreed to be the surrogate for the Moschettas.\textsuperscript{146} Elvira signed a surrogacy agreement which provided that she would be artificially inseminated with Robert's semen so as to give birth to his biological offspring, to which she would then give Robert sole custody and control.\textsuperscript{147} Elvira also agreed to take all of the necessary steps to assist Cynthia in adopting the child.\textsuperscript{148} The Moschettas began to have marital problems, of which Elvira learned while in labor and caused

\textsuperscript{140} See id. at 95, 851 P.2d at 784, 19 Cal. Rptr. 2d at 502 (viewing that the surrogacy agreement on its face is not inconsistent with public policy).


\textsuperscript{143} Id. at 1221-22, 30 Cal. Rptr. 2d at 894.

\textsuperscript{144} Id. at 1222, 30 Cal. Rptr. 2d at 894.

\textsuperscript{145} Id. at 1223, 30 Cal. Rptr. 2d at 895.

\textsuperscript{146} In re Marriage of Moschetta, 25 Cal. App. 4th at 1223, 30 Cal. Rptr. 2d at 895.

\textsuperscript{147} Id.

\textsuperscript{148} Id.
her to reconsider the surrogacy agreement.\textsuperscript{149} She finally relented, having been told by the Moschettas that they intended to stay married, however, that changed after seven months.\textsuperscript{150} Robert took the child, Marissa, with him and Cynthia proceeded to file a petition to establish a parental relationship, alleging that she was the "de facto mother" of the child.\textsuperscript{151} The trial court concluded that Robert Moschetta and Elvira Jordan were the legal parents of the child.\textsuperscript{152} Robert appealed the trial court's judgment challenging its decision that Elvira is the legal mother of the child.\textsuperscript{153}

The court looked to the California Supreme Court decision in \textit{Johnson} to determine whether the surrogacy contract with Elvira Jordan was enforceable.\textsuperscript{154} However, the \textit{Johnson} court never reached a decision of whether traditional surrogacy contracts, like the one in the present case, are enforceable.\textsuperscript{155} The \textit{Moschetta} court used the analysis of the \textit{Johnson} court with respect to a gestational surrogacy contract to decide the present issue regarding a traditional surrogacy agreement.\textsuperscript{156} The situation with the Moschettas and Elvira Jordan differs from the situation in \textit{Johnson} because there is no need for a tie-breaker between the genetic and birth mothers.\textsuperscript{157} In the present case, Elvira Jordan did not share the responsibilities with the intended mother, Olga, but instead, took on the role of both the genetic and

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} See In re Marriage of Moschetta, 25 Cal. App. 4th at 1223, 30 Cal. Rptr. 2d at 895 (asserting parentage due to intent to bear and care for the child).

\textsuperscript{152} See \textit{id}. at 1224, 30 Cal. Rptr. 2d at 895 (granting legal parents joint legal and physical custody of child).

\textsuperscript{153} See \textit{id}. (finding grounds for Cynthia's parentage in Uniform Parentage Act).

\textsuperscript{154} See \textit{id}. at 1228, 30 Cal. Rptr. 2d at 899 (ruling that surrogacy contract is incompatible with rationale and analysis of \textit{Johnson}).

\textsuperscript{155} See \textit{id}. at 1230, 30 Cal. Rptr. 2d at 900 (looking to \textit{Johnson} court's analysis for assistance).

\textsuperscript{156} See In re Marriage of Moschetta, 25 Cal. App. 4th at 1231, 30 Cal. Rptr. 2d at 900 (using the contract to ascertain the intent of the parties).

\textsuperscript{157} See \textit{id}. (distinguishing traditional surrogacy from gestational surrogacy where two women have equal claims to maternity).
birth mother of the child.158 Despite these differences, the court determined that the Uniform Parentage Act still applies for ascertaining parentage and placed that responsibility in the hands of Elvira Jordan.159 The court also determined that the surrogacy contract could not serve as an adoption agreement since the parties did not adhere to the statute requiring the presence of a social worker at the time the "birth parents" give consent to adoption.160 Because parentage was placed in Elvira Jordan and there was no proper adoption, the Moschetta court declined to enforce the surrogacy agreement between the Moschettas and Elvira Jordan, resulting in a finding of no parental relationship for Olga.161 The court's decision that the traditional surrogacy contract was not enforceable results in couples having no assurance that their intentions to become parents with the aid of assisted reproductive technology will be honored.162

The most recent case involving the use of assisted reproductive technology decided by the California court is In re Marriage of Buzzanca.163 In this case, John and Luanne Buzzanca decided to start a family and to achieve that result, agreed to have an embryo genetically unrelated to either of them implanted in a surrogate who would carry and give birth to a child for them.164 Following all of the steps and procedures leading to the birth of Jaycee, John and Luanne divorced and a lawsuit began to determine who are Jaycee's lawful parents.165 The two individuals who donated the sperm and egg were anonymous, and like the surrogate mother, made no claim to the

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158 See id. (illustrating situation where two usual means of showing maternity coincide in one woman).
159 See id. (deciding application of statute relevant in traditional surrogacy situation).
160 See id. (applying CAL. FAM. CODE § 8814 (West 1994)).
162 See id. at 1235, 30 Cal. Rptr. 2d at 903 (causing unrest with couples desiring use of traditional surrogacy).
164 Id. at 1412, 72 Cal. Rptr. 2d at 282.
165 Id.
child.\textsuperscript{166} Despite the fact that John and Luanne were the intended parents, and that neither the surrogate nor genetic parents wanted the child, the trial court decided that "Jaycee had no lawful parents."\textsuperscript{167}

The California Court of Appeals, Fourth District, disagreed with the trial court stating that the trial judge erred by failing to consider the body of law establishing fatherhood in ways different from giving birth or genetics.\textsuperscript{168} The appellate court decided that the same reasoning should apply to the Buzzanca's situation as applies to the situation where a husband consents to the artificial insemination of his wife, which results in the husband being the lawful father of the child.\textsuperscript{169} Therefore, the Buzzanca's would be deemed the lawful parents of Jaycee, a child genetically unrelated to them born to a surrogate on their behalf.\textsuperscript{170} The analysis of the Buzzanca court promotes public policy which favors the establishment of legal parenthood and the responsibilities that come with it, whenever possible.\textsuperscript{171}

III. LEGISLATION ON THE ISSUE

Almost ten years after the New Jersey Supreme Court decided the Baby M case, Massachusetts was faced with a similar scenario.\textsuperscript{172} Massachusetts has no laws or legal precedent specifying the rights of the parties involved in surrogacy arrangements or whether those

\textsuperscript{166} Id.
\textsuperscript{167} See id. (citing lower court decision).
\textsuperscript{168} See In re Marriage of Buzzanca, 61 Cal. App. 4th at 1412, 72 Cal. Rptr. 2d at 282 (referring to situation where husband consents to wife's artificial insemination and is deemed child's father).
\textsuperscript{169} See id. at 1413, 72 Cal. App. 4th at 282 (following reasoning of Johnson court).
\textsuperscript{170} See id. (declaring John and Luanne the lawful parents of Jaycee).
\textsuperscript{171} See id. at 1423, 72 Cal. Rptr. 2d at 290 (promoting state interest in providing parents for all children).
\textsuperscript{172} See R.R. v. M.H. & Another, 426 Mass. 501, 689 N.E.2d 790 (1998) (indicating the date of the decision as ten years since the Baby M decision).
agreements are valid contracts. In 1994, two separate bills were proposed by the Commonwealth of Massachusetts House of Representatives which addressed the issue of surrogate parenting arrangements. The bills were never passed, so Massachusetts is still without any legislation on the issue. Some other states have legislation addressing surrogacy arrangements, however, there is no uniformity in how states have ruled on the issue. The Uniform Status of Children of Assisted Conception Act is an attempt by the federal government to outline and provide guidelines for states in handling surrogacy situations. This Act provides two alternatives—one that makes surrogacy contracts enforceable with court approval, and another that makes surrogacy contracts void as against public policy. As of 1997, only two states, North Dakota and Virginia, adopted any or all portions of the Act.

Even though Massachusetts legislation has not kept pace with the advances of all assisted reproductive technology, such as surrogacy, it has enacted some laws to regulate the new means for conception.

174 See H.R. 3787, 178th Leg., 2d Sess. (Mass. 1994) (voiding any contract regarding the transfer of parental rights of a child for valuable consideration as contrary to public policy); see also H.R. 4544, 178th Leg., 2d Sess. (Mass. 1994) (proposing that surrogacy contracts shall be void and unenforceable).
175 Id.
176 See generally R.R. v. M.H. & Another, 426 Mass. 501, 689 N.E.2d 790 (1998) (citing statutes in minority of states which have enacted legislation on the issue of surrogacy arrangements). Some states have chosen to deny enforcement of all surrogacy agreements entirely, while others have chosen to deny enforcement only if the surrogate is to receive compensation. Id.
178 See id. (outlining terms of Alternatives A and B).
179 See id. (indicating states where Act has been adopted).
180 See generally MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1996) (outlining maternity of child born as result of artificial insemination); MASS. GEN. LAWS ANN. ch. 209C, § 10(b) (West 1996) (giving custody of child born
In existence is a statute which states that "[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."\textsuperscript{181} In the case of a child born to a single woman with the assistance of artificial insemination, Massachusetts has enacted a law that gives the mother sole right of custody until there is an adjudication of paternity which would require both parents to provide support.\textsuperscript{182} However, under other statutes, there is a presumption of paternity in the husband of a woman who bears a child while married.\textsuperscript{183} There is no statute creating a presumption of maternity in the birth mother, however, there is a provision for a cause of action to establish such maternity.\textsuperscript{184} Contrary to Massachusetts laws, the Uniform Status of Children of Assisted Conception Act states that the birth mother is the legal mother.\textsuperscript{185} As illustrated above, Massachusetts has attempted to rise to the necessary level of legislation for deciding some issues of modern reproductive technology, however, there are still some gaps that need to be filled.

\textsuperscript{181} MASS. GEN. LAWS ANN. ch. 209C, § 5 (West 1996). In \textit{R.R. v. M.H. & Another}, this would make the husband of the surrogate, Mr. Hoaglund, the legal father of the child and would give him all the rights and responsibilities of a parent, not Mr. Rascoe, the biological father who donated the sperm. \textit{Id.}

\textsuperscript{182} See MASS. GEN. LAWS ANN. ch. 209C, § 10(b) (West 1996) (giving mother right of custody until adjudication).

\textsuperscript{183} See MASS. GEN. LAWS ANN. ch. 209C, § 6 (West 1996) (creating a presumption of paternity in the husband).

\textsuperscript{184} See MASS. GEN. LAWS ANN. ch. 209C, § 21 (West 1996) (providing for a right of action to establish maternity).

IV. CASE IN CHIEF

Since the Baby M case, there has been an increase in the use of surrogacy agreements and as a result, there has been more concern about the legality and enforcement of such agreements. Absent legislation denoting the rights of the biological father, the surrogate mother and the child, there is confusion and debate surrounding the contract and the ultimate issue of determining the legal parents of the child.186 Not until 1998, when the court decided R.R. v. M.H. & Another187 did Massachusetts voice an opinion on the issue of surrogacy.188 Massachusetts has no statute expressly relating to surrogacy agreements, therefore, the Supreme Judicial Court ("SJC") looked to other jurisdictions to see how they handled such situations.189

In R.R. v. M.H. & Another, a married woman, Michelle Hoaglund, a Massachusetts resident, contracted to be a traditional surrogate for a childless married couple, Robert and Margaret Rascoe, of Rhode Island.190 Under the contract, the surrogate would receive a $10,000 payment in installments for her services, but would also keep her parental right to the baby and her constitutional right to have an abortion.191 These terms were conditioned upon a return of all payments if she decided to exercise either of those rights.192 Ms. Hoaglund had already received $6,600 of the payment when she decided to keep the baby, but she was unable to return the entire amount of money to the Rascoes.193 It was upon this decision to keep the baby,

188 See id. at 502, 689 N.E.2d at 791 (determining specific surrogacy arrangement of case invalid).
189 See id. at 501, 689 N.E.2d at 790 (using other state's legislation and cases for guidance).
190 See Ellement, supra note 2 at B1.
191 Id.
192 Id.
193 Id.
and this inability to return the money owed, that the Rascoes demanded in court that the surrogate live up to the contract. The Worcester Probate and Family Court gave the Rascoes temporary custody of the baby and allowed Ms. Hoaglund visitation for twelve hours per week. After the motion for preliminary injunctive relief was heard in the family court, the questions of law were reported to the Appeals Court and upon consolidation of all matters, the ("SJC") transferred the matter on its own initiative because the court had not previously dealt with such an issue.

In this case of first impression, the SJC grappled with the question of the enforceability of the surrogacy agreement. The court was not asked to discuss the temporary custody order set out by the family court because the parties had since agreed on a custody arrangement that achieved approval of the family court judge. In deciding the issue surrounding the surrogacy agreement, the court entered into a lengthy discussion of the law in other jurisdictions regarding surrogacy arrangements. The court especially considered the legislation in place in New Hampshire and Virginia which make unpaid surrogacy agreements lawful. In concluding that the surrogacy agreement was unenforceable, the court stated that certain conditions must be met for a surrogacy agreement to rise to the level of enforceability, but those conditions are not likely to be agreed upon

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194 Id.
195 See Ellement, supra note 2 at B1 (holding that surrogate mother entitled to visitation rights).
197 See id. (facing decision of enforcing a surrogacy contract).
198 Id.
199 See id. at 506, 689 N.E.2d at 794 (citing statutes from other states which differ drastically in their opinion of the enforceability of surrogacy arrangements).
by the biological father.\footnote{See R.R. v. M.H & Another, 426 Mass. at 512, 689 N.E.2d at 797 (deciding that surrogacy contracts are not inherently unlawful).} It is for this reason that the court states, "[a] Massachusetts statute concerning surrogacy agreements, pro or con, would provide guidance to judges, lawyers, infertile couples interested in surrogate parenthood and prospective surrogate mothers."\footnote{Id. at 513, 689 N.E.2d at 797. The court states that a better procedure than the one described with many conditions imposed is that of judicially approved agreements prior to conception as in Virginia and New Hampshire. \textit{Id.}}

In reaching its conclusion, the SJC analyzed some of the legislation already in place in Massachusetts that is related to the issue of surrogacy arrangements.\footnote{\textit{See id.} at 509-11, 689 N.E.2d at 795-97 (discussing laws surrounding parentage in an artificial insemination situation and adoption).} One law in place recognizes and accepts artificial insemination as a procedure resulting in a form of surrogate fatherhood.\footnote{\textit{See id.} at 509, 689 N.E.2d at 795 (citing \textit{MASS. GEN. LAWS ANN. ch. 46, §} 4B (West 1996)). This statute states if a mother’s husband consents to the procedure, the resulting child is considered the legitimate child of the mother and her husband. \textit{Id.} While this section sets out the guidelines for the legitimacy of the child, it does not comment on the rights and obligations of the biological father. \textit{Id.}} The case at hand differs because it is the wife who is the infertile spouse, requiring the use of a surrogate mother, and there is no statute in place outlining the consequences in such a situation.\footnote{See R.R. v. M.H & Another, 426 Mass. at 509, 689 N.E.2d at 795 (stating the difference between surrogate motherhood and fatherhood and the issue of anonymity).} The court attempts to consider the application of \textit{Mass. Gen. Laws Ann. c. 46 § 4B} to this case and determines that if the statute applied, the biological father of the child would be the husband of the surrogate mother.\footnote{See id. at 510 (resulting from surrogate mother’s husband consenting to the procedure).} Because situations such as this one could arise, where the surrogate mother’s husband consents to the procedure, but has no intent on being the father of the child, the court determined that it is doubtful that the Legislature intended this statute to apply to the child.
of a married surrogate mother. For this reason, the court does not use the statute to assist in the decision concerning the enforceability of the surrogacy arrangement.

In addition to the parentage statute discussed above, the court looked to the policies underlying the adoption legislation of Massachusetts. Although the adoption legislation has no application in the matter of child custody, which is at issue here, it can provide guidance as far as the issue of consent. It is the normal expectation in the case of a surrogacy agreement that the father's wife will adopt the child with the consent of both the mother and father. The problem with surrogacy agreements is that the consent of the mother is often given before the birth of the child, however, under the statutes in place, this consent to adoption is not to be executed "sooner than the fourth calendar day after the date of birth of the child to be adopted." Even though the statute is in place for adoption cases, the standard should be expanded to state that no mother may agree to surrender the custody of her child earlier than the fourth day after its birth. In addition, private agreements concerning adoption and custody are inconclusive because a judge must look to the best interest of the child when making a decision about custody.

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207 See id. (applying § 4B to this case would make unsupportive husband of surrogate the father of the child).
208 See id. at 509-10, 689 N.E.2d at 795 (deciding that § 4B is intended to apply to a fertile mother whose husband consented to her artificial insemination for their own familial purposes).
209 See id. at 510-11, 689 N.E.2d at 796 (suggesting surrogate agreement should have no effect).
210 See R.R. v. M.H. & Another, 426 Mass. at 510-11, 689 N.E.2d at 796 (requiring consent be given only after reasonable time passed following birth of child).
211 See id. at 510, 689 N.E.2d at 796 (questioning adoption statute which does not require consent of mother's husband in surrogacy situation).
212 See id. (citing MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1996)).
213 See id. (acknowledging importance of mother's bond with child and time it takes to develop).
214 See id. at 510-11, 689 N.E.2d at 795-96 (indicating that the best interest of the child is of major import).
Another issue in question surrounds the payment made to surrogate mothers as outlined in the agreement. Adoptive parents may pay the expenses of the birth mother, but may not make any direct payments to her. The court looked to the surrogacy arrangement and decided that Mr. Rascoe was promised more than the services of Ms. Hoaglund in carrying the child; he was promised the surrender of the custody of her child. The SJC stated in dicta that, "[t]he statutory prohibition of payment for receiving a child through adoption suggests that, as a matter of policy, a mother’s agreement to surrender custody in exchange for money (beyond pregnancy-related expenses) should be given no effect in deciding the custody of the child."

In deciding this case of first impression, the court recognized that "there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife." However, the court does have a problem with surrogacy arrangements, like the one involved in the case at hand. This is so because of the compensation paid beyond pregnancy related expenses and because the birth mother is bound by her consent to the father’s custody of the child which is made before a reasonable period of time has elapsed following the birth of the child. The court lists six other conditions, beyond those of payment and consent, that it found important in deciding whether a surrogacy arrangement is enforce-

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215 See R.R. v. M.H. & Another, 426 Mass. at 511-12, 689 N.E.2d at 796-97 (indicating that father was promised more than just services for the payment).
216 See id. at 511, 689 N.E.2d at 796 (citing MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1996); 102 MASS. REGS. CODE tit. 102, § 5.09 (1997)).
217 See id. at 511, 689 N.E.2d at 796 (permitting mother to assert custody rights only upon reimbursement of payment and expenses incurred).
218 Id.
219 Id. at 512, 689 N.E.2d at 797.
220 See R.R. v. M.H. & Another, 426 Mass. at 512, 689 N.E.2d at 797 (indicating that the court disapproves of some surrogacy arrangements).
221 See id. at 512, 689 N.E.2d at 797 (providing reasons why the court rejected the surrogacy arrangement at hand).
Although the court found the surrogacy arrangement, as set out by the parties involved in this case, unenforceable, the court did not state, per se, that surrogacy agreements are void in the Commonwealth of Massachusetts.  

V. FUTURE STATE OF REPRODUCTIVE LAW

The holding provided by the SJC in *R.R. v. M.H. & Another* did not directly address the question of what the future will hold for reproductive law in Massachusetts. However, the court did provide, in dicta, some very persuasive suggestions for the legislature indicating what they would like to see in the future with respect to surrogacy agreements. While the court held that the surrogacy agreement at issue was invalid, the court outlined ways interested parties could overcome the obstacles the Rascoes and Hoaglunds met. In addition, the SJC suggested judicially approved surrogacy agreements as a procedure which will allow individuals to conceive artificially without

222 *See id.* (listing important conditions in deciding enforceability of surrogacy arrangement). The other conditions the court will consider may include such a requirement that:

(a) the mother's husband give his informed consent to the agreement in advance; (b) the mother be an adult and have had at least one successful pregnancy; (c) the mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the father's wife be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel.  

*Id.*

223 See generally *id.* at 512-13, 689 N.E.2d at 797 (holding surrogacy contract at hand unenforceable).


225 *See id.* (stating the court's suggestions for overcoming legal obstacles of surrogacy agreements). The court stated that if no compensation beyond pregnancy related expenses are paid and if the mother is bound by her consent to the father's custody of the child only after a specified time has passed following the birth of the child, the consent of the mother would be enforceable.  

*Id.*

226 *See id.* (outlining conditions that would be important in determining the validity of a surrogacy contract).
the barriers that are currently present. In short, the SJC would like to see a statute in Massachusetts, concerning surrogacy agreements, which will provide guidance to judges, lawyers and all individuals interested in either surrogate parenthood or becoming a surrogate mother.

The future of reproductive law, and specifically surrogacy, is a question posed to all states, not only Massachusetts. Because of the widespread problem, the ABA Section of Family Law is drafting a model act in an attempt to resolve some of the controversial issues raised by assisted reproductive technology. The Committee on the Laws of Assisted Reproductive Technologies and Genetics is working to provide guidelines for legislators and judges to consider as they begin drafting the much needed laws on the issue and rendering decisions in current controversies. The action taken by these committee individuals is in response to the recurring theme in case decisions that there should be some legislation on the issue.

VI. CONCLUSION

The use of the different methods of assisted reproductive technology has become an increasingly popular resource for couples wishing to have a family despite biological obstacles of one of the parties. In fact, a popular television situation comedy has introduced the issue of surrogacy into the storyline of one of its characters.

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227 See id. (suggesting a similar procedure as is followed in other states). Both Virginia and New Hampshire allow surrogacy agreements that are judicially approved prior to conception. Id.

228 See id. at 513, 689 N.E.2d at 797 (desiring legislation to guide individuals interested in and involved with the issue).

229 See Debra Baker, Conceiving Solutions, ABA JOURNAL, Dec. 1998 at 78 (drafting of model act to aid all states with the issue).

230 See id. (responding to the questions raised by the technological advances).

231 See id. (hoping the guidelines will assist the individuals responsible for the future of assisted reproductive technology).

232 See id. at 79 (understanding that case law is not enough).

233 See Friends (NBC television broadcast, Jan. 8, 1998) (using one character as surrogate mother for brother and his wife).
The prevalence of these situations mean a difficult road ahead for the courts which have not yet faced the reality that existing legislation is in no way equipped to handle the issues that are certain to arise. In some ways, Massachusetts has prepared itself for some scenarios, such as those involving artificial insemination, but the main problem for this state is the lack of any law providing guidance for the court in deciding a case that involves the use of a surrogacy contract. Because of this void in the legislation, Massachusetts is forced to look to the decisions of other jurisdictions. However not all jurisdictions have ruled consistently. The SJC realized the importance of these arrangements and the opportunities they can provide and ruled accordingly. However, the most beneficial act for this new technology would be legislation which can guide individuals on the issues.

Rena Deutscher