FAMILY LAW

International & Comparative Law
Supplement on Reproductive Rights

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FAMILY LAW MODULE

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Introduction

Family law is a dynamic area of law that is rapidly changing in the face of new reproductive technologies and family structures. As social values shift and evolve, novel issues reach the courts. Though new family law topics are emerging, these situations center on familiar conflicts of interest and raise foundational legal principles of substantive due process, equal protection, and the right to privacy, among others. Disputes within couples over ownership of frozen embryos, disputes between parties involved in surrogate relationships, and the regulation of women's behavior during pregnancy are just a few examples of emerging issue areas.

The first section of this module highlights tensions between individual rights and states' interests. While reading these cases, consider how a court might weigh any state interest in potential fetal life with a pregnant woman's right to privacy. Or, consider the rights of parents against those of an intellectually disabled child in the context of sterilization. Whose rights are implicated when a state refuses, for example, to extend welfare benefits to a family's additional children?

The second section of this module focuses on individual rights in conflict. While lawmakers often recognize that women have a basic human and Constitutional right to reproductive self-determination, this right does not exist in a vacuum. That is, sometimes a woman's right to make decisions concerning her reproductive present and future conflicts with the rights and interests of others. When this happens, courts must undertake the difficult task of weighing women's reproductive and sexual rights against other's extant rights. The outcomes of these cases often depend on the extent to which the court appreciates the fundamentality of the reproductive rights that women claim.

Finally, this module will touch upon international and regional law, which is increasingly addressing reproductive rights and novel family law questions. For example, in *Maria Mamerita Mestanza Chavez v. Peru*, the Inter-American Commission on Human Rights ruled in favor of Maria Chavez's surviving husband and children after Maria died from complications of a forced sterilization. In a more recent case, *Artavia Murillo et al. v. Costa Rica,* the Inter-American Court of Human Rights ruled that Costa Rica's ban on in vitro fertilization (IVF) violated fundamental human rights.

PARADIGMATIC CHANGES IN GENDER JUSTICE: THE ADVANCEMENT OF REPRODUCTIVE RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

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I. Introduction

Reproductive rights are an emergent topic in international human rights law. This essay will explore how reproductive justice has been addressed by the Inter-American Human Rights System (IAS) through case law, hearings and thematic reports. Its objective is to analyze trends within the Inter-American doctrine and case law regarding reproductive health and freedom and present strategies to improve strategic litigation and increase access to justice for women and girls who suffer violations in these spheres.

The article will begin by describing the historical context in which reproductive rights have been framed as human rights in the international sphere and the importance of the democratic consolidation in Latin America in this process. The next section will present a series of landmark cases admitted and resolved in the Inter-American System, both in the Inter-American Commission and the Inter-American Court, relating to violations in the field of reproductive choices and gender-based violence illustrating common arguments and international human rights standards advanced in the case law. Here, I will argue that the new developments of the IAS jurisprudence on the elimination of gender-based violence in human rights law are relevant and can inform strategic litigation undertaken as an advocacy tool for the recognition and justiciability of reproductive rights.

Finally, in the concluding section, current opportunities and challenges will be indentified, taking into account the human rights framework and paradigms of international litigation outlined in the quest for reproductive justice and transformative equality faced by advocates.

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II. A Brief History of Reproductive Rights' Recognition in the International Sphere

With the rising of democratic governments in Latin America has come an increased attention to sexual and reproductive health services as human rights and social justice issue.[2] The struggle for democracy in the continent and the recognition of women's rights (including reproductive rights) as human rights was catalyzed by the United Nations (UN) Decade for Women (1975-85) and the development of specific international human rights instruments to recognize women's equality and eliminate all forms of gender-based violence. [3]

Although international human rights law was not initially developed to address violations of women's human rights and women were generally excluded from participating in the creation of international human rights law, the UN General Assembly's adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and of the Declaration on the Elimination of Violence against Women in 1993, marked the placement of women's rights on the human rights agenda and international legal discourse.[4] At the regional level, the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") in 1994. These international human rights instruments have been key in the recognition of women's rights as human rights, being broad-based, comprehensive documents that highlight the obligations of the States to promote gender equality and guarantee a life free of violence for women both in the public and private spheres.

However, these instruments only vaguely address sexual and reproductive rights. Only the CEDAW Convention commands States to "take all approapriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis for equality of men and women, access to health care services, including those related to family planning." [5] Nevertheless, the CEDAW Committee, an international body created to supervise the proper implementation of the Convention, has understood this obligation broadly, considering that States have a duty to ensure access to reproductive health services free from discrimination.[6]

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[2] REBECCA J. COOK ET AL., REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW 155 (2003).

[3] JANE S. JAQUETTE ED., FEMINSIT AGENDAS AND DEMOCRACY IN LATIN AMERICA 5 (2009).

[4] Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in WOMEN'S RIGHTS, HUMAN RIGHTS 36 (Julie Peters & Andrea Wolper, eds. 1995).

[5] *See* Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 12, U.N. General Assembly Resolution 34/180, Dec. 18th, 1979.

[6] *See* Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 24 "Women and

Historically, the human right to health described in other general human rights instruments, such as the International Covenant on Social and Economic Rights (1966), has excluded women's reproductive health and their needs in obtaining health- related services.[7] As L. Cabal notes: "In this context, reproductive health was relegated to the fields of population and development, and notions of reproductive rights as human rights were non-existent. The blatant exclusion of the pillars of reproductive rights – the rights to reproductive health care and to reproductive self-determination – from the human rights framework was revealing in that it exposed the biased lens with which human rights have traditionally been interpreted."[8] As a result, violations of women's human rights in the reproductive sphere, such as obstructions to accessing legal abortion, contraception, HIV and uterine cancer treatments, forced sterilizations and female genital mutilation were not considered as human rights violations.

The 90's brought a new shift to this vision with the UN International Conference on Population and Development (El Cairo, 1994) and the Fifth World Conference on Women (Beijing, 1995). Thanks to women's rights groups' timely advocacy, sexual and reproductive health was recognized from a human rights-based perspective at both Cairo and Beijing. Cairo's Program of Action described the international consensus that emerged from the Conferences: reproductive rights embrace certain human rights that are already recognized in national laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the

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Health", (1999), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d8025678500559 9ff.

[7] Luisa Cabal and Jaime M. Todd-Gher, *Reframing the Right to Health: Legal Advocacy to Advance Women's Reproductive Rights*, in REALIZING THE RIGHT TO HEALTH 120 (Andrew Clapham & Mary Robinson eds., 2009).

[8] *Id.*

right to attain the highest standard of sexual and reproductive health.[9]

Since then, women's rights movements have strongly advocated to enforce Cairo and hold States accountable for their international committments towards the improvement of reproductive health services within their countries, as well as for the enforcement of human rights law to protect women's reproductive choices.

Conceptualizing reproductive rights as human rights – related to equality, freedom and autonomy— rather than framing them as social or "second generation rights" is relevant to understanding the scope of the States' obligations regarding the achievement of reproductive self-determination. Women's rights groups have promoted the international interpretation of human rights instruments to underscore not only the importance of States' legal duty to respect reproductive rights by eliminating obstacles women face in exercising those rights, but also their positive obligations to guarantee their fulfillment through appropiate legislative, judicial, administrative and budgetary measures.[10]

In addition, feminist scholars have insisted on framing the issues of sexual and reproductive rights within the umbrella of citizenship.[11] The claim is that the sexual division of labor within the private sphere (family) restrains women's development as citizens in the public sphere (work and government), since the majority of their time is invested in family and domestic tasks. Thus, the exercise of reprodutive rights cannot be separated from the democratization of the family and the State.[12]

III. From Treaties to Practice: International Litigation of Reproductive Rights

Positive advances in the recognition of reproductive rights within the human rights framework have not been sufficient to effectively redress the inequalities and disadvatages to which women are subjected in their daily lives. As noted by R. Cook, this "failure" of human rights law to fulfill its promise of universality in the case of women is complex and is due to several factors, including a "lack of understanding of the systemic nature of the subordination of women,

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[9] Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, U.N. Doc. A/CONF.171/13/Rev.1, at para. 7.3.

[10] Rebecca Cook et. al, *supra* note 2, at 156.

[11] SILVIA LEVÍN, DERECHOS AL REVÉS ¿SALUD SEXUAL Y REPRODUCTIVA SIN LIBERTAD? 78 (2010).

[12] *See generally* MALA HTUN, SEX AND THE STATE: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies (2003).

failure to recognize the need to characterize the subordination of women as a human rights violation, and lack of state practice to condemn discrimination against women." [13] Consequently, a new paradigm emerged in the last decade of the 20th century: strategic litigation of reproductive cases before international human rights bodies.

Struggling for the international recognition of reproductive rights, women's groups became aware of the potential of international human rights law to defend women's rights. Thus, in addition to the capacity building, legislative and public policy advocacy strategies, efforts have been made to litigate cases both nationally and before international human rights bodies. [14] There has also been an increasing interest within human rights organizations with regard to reproductive rights topics.[15]

Although feminist advocates and scholars recognize the limitations of a rights-based strategy and are aware that its effectiveness varies depending on the cultural context, the importance of integrating women's experiences of injustice and subordination when developing international human rights law has also been a major concern.[16] The international litigation of cases continues to be a paradigmatic strategy for women's rights organizations in the 21st Century.

Consequently, several landmark cases regarding reproductive rights have been presented before international human rights bodies, both within the UN System and at the regional level, for example, the Inter-American System (composed of the Inter-American Commission and Court). The following analysis will concentrate on the Inter-American System.

Historically, the majority of cases resolved in the IAS have focused on gross-violations of human rights, such as arbitrary executions, massacres and forced disappearances due to the prevalence of authoritarian regimes and dictatorships in Latin America in the first half of the 20th Century. The rising of democratic

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[13] REBECCA J. COOK ED., HUMAN RIGHTS OF WOMEN 3 (1994).

[14] *See, e.g.*, the Center for Reproductive Rights (CRR), a women's rights NGO integrated by human rights lawyers whose mission is to use "the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect and fulfill." http://reproductiverights.org/en/about-us/mission; The Information Group on Reproductive Choice (GIRE), a Mexican NGO whose aim is "to promote and defend women's reproductive rights, within the context of human rights." http://www.gire.org.mx/index.php?option=com_content&view=article&id=392&Itemid=1115&lang=en.

[15] *See, e.g.*, Human Rights Watch, "Sexual and Reproductive Health" in their website: http://www.hrw.org/topic/health/sexual-and-reproductive-health; Amnesty International, "Women's Lives, Women's Rights" addressing maternal mortality as a global reproductive health issue: http://www.amnesty.org/en/campaigns/demand-dignity/issues/maternal-mortality

[16] *See* Rebecca J. Cook, *supra* note 13, at 4-5.

governments and relative political stability in the region has promoted analysis by the Inter-American Commission and Court of discriminatory practices suffered mainly by disadvantaged groups due to their race, ethnicity or gender.[17]

In this context, the Inter-American Human Rights Commission ("IAHRC or the Commission") has recently issued two thematic reports on reproducitve rights issues: *Access to Maternal Health Services from a Human Rights Perspective* (2010) and *Access to Information on Reproductive Health from a Human Rights Perspective* (2011).[18]

Also, the IAHRC has analyzed several petitions regarding reproductive rights in the last two decades. Three landmark cases regarding access to legal abortion, forced sterilization of women and adolescent pregnancy in schools are: Paulina Ramírez Jacinto (Mexico), María Mamérita Mestanza (Peru) and Mónica Carabantes Galleguillos (Chile). [19] It is worth noting that all three cases were resolved as *friendly settlements*, meaning the Commission didn't issue a merits report on the case but served as a mediator between the victims and the State to reach an agreement.[20]

In the case of Mónica Carabantes, a petition was filed against the State of Chile arguing the decision of that country's courts not to punish abusive interference in the private life of Mónica Carabantes Galleguillos. Carabantes Galleguillos had filed a suit against the private school that expelled her for becoming pregnant, arguing that this violated her honor and dignity as recognized in Article 11 of the American Convention on Human Rights (hereinafter "the American Convention"), and the right to equal protection of the law (Article 24). A friendly agreement was signed in 2001, where the State committed to cover higher education costs for Mrs. Carabantes, secondary and higher education costs for her daughter and carry out a public act of redress.[21]

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[17] Victor Abramovich, *From massive violations to structural patterns: new approaches and classic tensions in the inter-american human rights system*, SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS, 11 (2009), http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo_01.htm

[18] Inter-Am.C.H.R., *Access to Maternal Health Services from a Human Rights Perspective,* OEA/Ser.L/V/II. Doc. 69 (2010); Inter-Am.C.H.R., *Access to Information on Reproductive Health from a Human Rights Perspective* OEA/Ser.L/V/II. Doc. 61 (2011).

[19] *Paulina Ramírez v. Mexico*, Inter-Am.C.H.R, Friendly Settlement, Report 21/07, (2007); *María Mamérita Mestanza Chávez v. Peru*, Inter-Am.C.H.R, Friendly Settlement, Report 71/03, (2003); *Mónica Carabantes Galleguillos v. Chile*, Inter-Am.C.H.R, Friendly Settlement, Report 33/02, (2002).

[20] After a petition is admitted by IACHR and observations are made by the State presumed responsable of the human rights violations, the Commission issues a merits report on the case or requests the State and the petitioners to sign a friendly settlement. See Inter-American Convention on Human Rights, Article 48(1) (f).

[21] *See* IACHR, *Monica Carabantes v. Chile*, *supra* note 19.

In the case of María Mamérita Mestanza, a Peruvian 33 year old woman who suffered forced sterilization by public health authorities under Fujimori's regime, the petitioners alleged that the Peruvian State had violated Mrs. Mestanza's rights to life, personal integrity, and equality based on Articles 4, 5, 1, and 24 of the American Convention, as well as violations of Articles 3, 4, 7, 8, and 9 of the Convention of Belém do Pará"), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador") and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[22]

The Peruvian State recognized its international responsibiliy in a friendly agreement and offered economic compensation to Mrs. Mestanza's family as reparation. It also promised to make a thorough investigation of the facts and apply legal sanctions to any person determined to have participated, and modify national legislation and public policies on reproductive health and family planning to eliminate discrimination and respect women's autonomy.[23]

In the case of Paulina Ramírez, a petition was filed against the State of Mexico for violating the human rights of Paulina, a young girl from Baja California who became pregnant as a result of a rape and was prevented, by the state authorities, from exercising her right to terminate that pregnancy as provided for in Mexican law. According to the complaint, the Mexican State was internationally responsible for violating rights protected in Articles 1, 5, 7, 8, 11, 12, 19, and 25 of the American Convention, Articles 1, 2, 4, 7, and 9 of the Convention of Belém do Pará, as well as Article 10 of the Protocol Protocol of San Salvador,the right to health protected in Article 12 of the CEDAW, and the rights protected in Articles 19, 37, and 39 of the Convention on the Rights of the Child.[24]

The parties signed a friendly agreement where the State of Mexico committed to publicly recognize its international responsibility for the violation of Paulina's human rights and carry out reparation of damages. These included payment of judicial expenses, economic compensation, psychological and health care services for Paulina and her son, as well as an education scholarship, clarification of local laws to promote access to legal abortion services and enforcement of national public policies to provide medical assistance for women victims of sexual abuse.[25]

The only reproductive rights cases in which the Commission has issued merits reports are the *Baby Boy case (US)* and the *X and Y case v. Argentina*. In the first case, the Commission analyzed the rulings of the United States Supreme Court and the Court of Massachussets (upholding women's right to abortion) that

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22 *See* IACHR, *María Mamérita v. Peru, supra* note 19.

23 *Id.*

24 *See* IACHR, *Paulina Ramírez v. Mexico, supra* note 19.

25 *Id.*

presumably violated article 4 of the American Convention which protects right to life, in general, from the moment of conception. The Commission considered the U.S. had not breached its international obligations since the *traveaux preparatoirs* reflected the intention of the States parties to respect abortion laws in the region, as finally established in the provision to protect life *in general* from the moment of conception in Article 4 of the Convention.[26] In the second case, regarding vaginal inspections conducted by prision authorities on the women visitors of the Federal Penitentiary Service in Argentina, the Commission found the Argentinian State responsible for imposing an unlawful condition to female visitors for prison visits lacking appropriate legal and medical guarantees. [27] The Commission concluded the State of Argentina had thus violated the rights to personal integrity, privacy and familiy life of Ms. X and her daughter Y, as guaranteed in Articles 5, 11, 17 of the American Convention, in relation to the general obligation established in Article 1.1 which requires the Argentinian State to respect and guarantee the full and free exercise of all provisions recognized in the Convention, as well as the rights of children protected in article 19 of the same instrument. [28]

The Commission has also admitted cases regarding illegal conditions in the detention of pregnant women in Ecuador, discrimination of adoptive mothers in their right of maternity leave in Brazil and sterilization without informed consent in Bolivia. [29] The common alleged violations in these cases have been the rights to personal integrity and humane treatment (Article 5.1), judicial protection and effective resources (Articles 8.1 and 25) protected in the American Convention, and the obligation of the State to act with due diligence to prevent, investigate and sanction violence, asestablished in Article 7 of the Convention of Belem do Pará.

As for pending cases in the Inter-American Court of Human Rights (Inter-American Court or "the Court"), a paradigmatic resolution is expected this year on *in vitro* fertilization in Costa Rica. The Court is currently analyzing whether the probibition on the assisted reproductive technique known as *in vitro* fertilization, in place since 2000 following a ruling by the Constitutional Chamber of the Costa Rican Supreme Court, respects International human rights standards.

In its merits report of the case, the Commission found that this absolute prohibition violated the human rights of infertile couples protected in articles 11(2), 17(2) and 24 of the American

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[26] *Baby Boy Case*, Resolution 23/81(United States), Case 2141, Inter-Am. Com. H.R. , OEA/Ser.L/V/II.54, Doc. 9 rev. 1 (1981).

[27] *Ms. X v. Argentina*, Case10.506, Inter-Am. C.H.R., Report 38/96, (1996) at para. 116.

[28] *Id.*

[29] *Karina Montenegro and Others v. Ecuador*, Inter-Am.Com.H.R., Report No. 48/07 (2007); *Fátima Regina Nascimento de Olveira and Maura Tatiana Ferreira Alves v. Brasil*, Inter-Am.Com.H.R., Report No. 7/10, (2010); *I.V. v. Bolivia*, Inter-Am.Com.H.R., Report No. 40/08, (2008).

Convention, considering it constituted an arbitrary interference in the right to private and family life and the right to found a family.[30] The Commission also found that the prohibition violated the victims' right to equality since the State had denied them access to a treatment that would have enabled them to overcome their disadvantage with respect to fertile couples in their ability to have biological children, and that it had a disproportionate impact on women.[31]

Without diminishing the relevance of reproductive rights violations being discussed in the IAS, it is worth noting that the majority of these cases lack a broad analysis of the claims of structural and gender-based discrimination embedded in the lack of reproductive health services and obstructions to women's autonomy. Since three of the landmark cases have been resolved through friendly settlements (*María Mamérita, Paulina Ramirez and Monica Carabantes*), the opportunity has been lost to address the context and patterns of gender-based discrimination represented by these three cases (victims of sexual violence denied abortion services, marginalized women sterilized against their will and adolescent girls expelled from schools for becoming pregnant). For example, in the case of Mrs. Mestanza, the petitoners argued that it was "one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women."[32] Similarly, Paulina's case was claimed to be "indicative of those of a countless number of girls and women forced into motherhood after being raped and after being prevented by state authorities from exercising a legitimate right enshrined in Mexican law."[33]

Even in the merits report of the *X and Y case*, the Commission dedicated the report to analzying whether the vaginal inspections were preventive measures adopted by the State authorities for an objetive purpose (the maintainance of public order and security), and concluded that they were not acceptable restrictions to the Convention's provisions and not reasonable under the circumstances of the case.[34] The petitioners´ argument that these searches constituted a discriminatory practice against women was not discussed.

Nevertheless, the Commission has argued before the Inter-American Court in the *in vitro fertilization* case that the absolute ban of this assisted reproductive technique is discriminatory and disproportionaly affects women. [35] It is now up to the Court to

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[30] *Gretel Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Case No. 12.361, Inter-Am. C. H.R.; Inter-American Commission on Human Rights, July 29, 2011. http://www.cidh.oas.org/demandas/12.361Eng.pdf.

[31] *Id.*

[32] *See María Mamérita v. Peru, supra* note 19, at para. 9.

[33] *See Paulina Ramírez v. México, supra* note 19, at para. 14.

[34] *See Ms. X v. Argentina, supra* note 27, at paras. 72, 116.

[35] *See* "*In Vitro Fertilization*", *supra* note 30.

determine wether or not the prohibition of in vitro fertilization constitutes gender-based discrimination.

Also, in recent cases, the Commission seems to be identifying a close nexus between violence and reproductive rights violations, or at least considering this aspect of the petitioners' claims when further analyzing the merits of the case. For example, in the case of *I.V. v. Bolivia*, the Commission considered that forced sterilization committed by public officers, the consequences of the intervention (both physical and psychological), as well as the delay in due process against the perpetrators can be considered violations of Art. 7 of Convention Belem do Pará.[36] And in its admissibiliy report of the *Karina Montenegro and Others* case, the Commission considered that the illegal detention of pregnant women and elders and the conditions in which the pregnancy occurred, can be considered violence against women (articles 7 and 4 of Belem do Pará).[37]

In contrast to the emergent doctrine on discrimination and violence in reproductive rights cases, the Inter-American Commission and Court's decisions on ground-breaking cases regarding pervasive manifestations of violence against women, such as feminicides, domestic and sexual violence, have underscored the close nexus between discrimination and gender-based violence. In this respect, the Inter-American Court has issued noteworthy resolutions addressing structural discrimination caused by cultural stereotypes and social inequalities that prevent women from full realization of their human rights.[38]

For example, in the *Cotton Field Case*, regarding the murders and disappearances in Ciudad Juárez, Mexico, the Court analyzed the particular context of the city in which the violence occurred and expressed concerns regarding the culture of discrimination ("machismo") affecting women.[39] One significant finding of the Court in this case was the prevalence of discriminatory stereotypes, particularly in the justice system, relating to the context of widespread violence against women. In this landmark decision, the Court delivered a comprehensive interpretation of the Belem do Pará Convention, examining its applicability and conducting a thorough review of the due diligence obligation of States to prevent, investigate and punish violence against women.[40]

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[36] *See I.V. v. Bolivia* , *supra* note 29.

[37] *Karina Montenegro and Others v. Ecuador*, *supra* note 29.

[38] *The "Las Dos Erres" Massacre v Guatemala,* Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. ("Cotton Field") v Mexico,* Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and Others v México,* Inter-Am.Ct.H.R. Judgment Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

[39] The Court concluded that violence against women in Ciudad Juarez follows a systemic pattern of discrimination and in this situation "an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days." *See Cotton Field, supra* note 38, at para. 283.

[40] *See generally Cotton Field.*

In light of the discriminatory context in which feminicides occurred, the Court went beyond the concept of integral reparations and ordered the Mexican State to implement *transformative reparations* to modify discriminatory practices and pervasive cultural stereotypes against women in Ciudad Juárez. Reparations should be crafted aspiring not only for restitution and redress of damages, but for the transformation of the situation of violence, designed to identify and eliminate the factors that cause discrimination; and adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women.[41]

In the *Rosendo Cantú* and *Fernandez Ortega* cases, the Inter-American Court also expressed its concern about the "institutional violence" that women face when there is a large military presence.[42] In both rulings, the Court considered that sexual violence is a paradigmatic form of violence against women with consequences that transcend the victim,[43] characterizing it as a form of torture when committed by State agents and aggravated in cases of indigenous women. [44] Sexual violence and violations of women's personal integrity had been analysed by the Court in the context of systemic patterns of violence in previous rulings.[45]

The Inter-American Commission has considered domestic violence to be a form of gender-based discrimination, finding States responsible for violating women's rights to personal integrity and effective judicial protection due to discriminatory judicial passivity (overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors) and insufficient commitment to take appropriate action to address domestic violence.[46]

IV. What Can We Learn From these Cases?

Considering the positive developments made in the Inter-American System to advance women's rights, there have been significant advances in framing violence as gender-based discrimination and international human rights standards regarding access to justice for victims of violence that are useful in defending reproductive rights cases.

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41 *Cotton Field, supra* note 38, para. 451.

42 *Fernandez Ortega and Others v.* Mexico, at para. 109.

43 Id. at para. 118. Judge Cecilia Medina dissented on this argument in *Cotton Field,* arguing that also private actors can commit torture. *See Cotton Field supra* note 38, at para.132, Dissenting Vote of Judge Medina Quiroga at para. 2-3.

44 *Rosendo Cantú and Others v México* Inter-Am. Ct. H.R. Series C. No. 216 (2010) at para. 71. *Fernandez Ortega and Others v. Mexico,* Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

45 *See The "Las Dos Erres" Massacre v Guatemala,* Inter-Am.Ct.H.R. Series C. No. 211 (2009), at para. 141.

46 *See Maria Da Penha Fernandes v Brazil,* Inter-Am. Com. H.R., Report No. 54/01 (2001); *Jessica Lenahan (Gonzáles) and Others v United States,* Inter-Am. Com. H.R., Report No. 80/11, Case 12.626 (2011).

In cases involving gender-based killings, including feminicides, crimes of sexual violence and intimate partner violence,[47] the Inter-American jurisprudence as well as the Special Rapporteur on Violence Against Women, its Causes and Consequences have outlined the following standards regarding access to justice and due diligence obligations of States: [48]

a) Conduct effective investigations of the crime, prosecute and sanction acts of violence perpetrated by the State or private actors, especially when these acts are tolerated by the State and demonstrate a pattern of systemic violence towards women;

b) There is an obligation of judicial impartiality which includes the requirement to treat women victims and their relatives with respect and dignity throughout the legal process;

c) Guarantee *de jure* and *de facto* access to adequate and effective judicial remedies;

d) Ensure comprehensive and integral reparations for women victims of violence and their relatives, including measures designed to address institutional and social violence;

e) Adopt public measures to modify cultural patterns based on discriminatory stereotypes that promote unequal treatment of women in societies; and

f) Identify certain groups of women as being at particular risk for acts of violence, including women belonging to ethnic, racial and minority groups.

As noted by R. Celorio, the international human rights standards elucidated upon in recent case law addressing gender-based violence were "geared toward shedding light on the content of the States' obligation to organize their structure - including the work of all sectors such as justice, health, and education - to prevent, investigate,

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[47] *See Raquel Martín de Mejía v. Peru*, Case. 10.970, Inter-Am. Com. H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 rev. (1996); *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Com.H.R., Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001); *The "Las Dos Erres" Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. ("Cotton Field") v Mexico*, Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and other v México*, Inter-Am.Ct.H.R. Judgment Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

[48] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Human Rights Council, 23th Sess., at 116.U.N. Doc. A/HRC/20/16, (May 23, 2002).

sanction, and offer reparations for acts of violence and discrimination against women in different settings and sociopolitical contexts."[49]

V. The Way Forward: Opportunities and Challenges in Advancing Reproductive Rights

Taking into account that some reproductive rights violations are perpretated in the context of structural discrimination and/or gender-based violence, women's rights advocates should take advantage of the developments of the Inter-American System to address gender-based violence when framing reproductive rights cases. Although the jurisprudence on reproductive rights is still emerging from the shadows of international human rights law, reproductive health and self-determination are rights protected in human rights instruments.

States have positive obligations to protect, respect and guarantee reproductive rights and are obligated to carry out comprehensive reparation if public officials deny access to reproductive health services, treatments and scientific advances. Moreover, according to international human rights law, States have the duty to ensure informed choices in this field by: acting with due diligence to eliminate discriminatory practices and gender-based violence that undermines reproductive freedom; guarantee access to justice to victims denied of these rights; adopt appropiate legislative, judicial and administrative measures to *transform* discriminatory practices and cultural stereotypes restricting women's reproductive choices.

In this sense, the concept of *transformative equality* is embodied in international human rights law. As scholars have noted, the formulation of this concept "sees full and genuine equality as likely to be achieved only when the social structures of hierarchy and dominance based on sex and gender are transformed."[50] When litigating cases for women's rights advocacy, it is crucial to take into account the context of structural discrimination and violence in order to identify patterns in the human rights violations analyzed and seek transformative justice.

Aside from increasing national and international litigation of reproductive rights cases, women's rights groups should use other international human rights mechanisms to make visible the common patterns and contexts of subordination in which reproductive rights violations take place. Therefore, the constant monitoring of the situation of discrimination and violence against women in the Americas, including sexual and reproductive health issues, conducted by the Inter-American Commission's Rapporteurship on the Rights of

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[49] Rosa Celorio, "The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting", 65 U. MIAMI L. REV. 819, 821 (2011).

[50] Marsha A. Freeman et al eds., COMMENTARY, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*, 55 (2012).

Women is an open window to request regional hearings, country visits, and colaborate with thematic reports on these issues.

The justiciability of reproductive rights at the international level is necessary for the determination of international human rights standards in this sphere and the enforcement of States's obligations to ensure reproductive rights. Nevertheless, access to the international "theater" of justice is very expensive and a long journey to vindicate rights violations. Considering the limited economic and human resources that women's rights organizations generally have in Latin America, international litigation represents a costly and technical endeavour that not everyone can undertake.

On the other hand, a significant current challenge in combating reproductive injusice, as well as gender-based violence, is the implementation of existing human rights standards to ensure that the root causes and consequences of violence and discrimination against women are tackled at all levels, from the home to the transnational arena.[51] Thus, the implementation of human rights rulings and recommendations of International bodies continues to be the "elephant" in the room.

The Inter-American System has mechanisms to monitor the compliance of reports and rulings issued in human rights cases such as: requesting information and submission of reports by the State, as well as expert opinions and observations to those reports by the victims or their legal representatives; holding hearings and adopting other measures that deems appropriate.[52] Nevertheless, the IAS has not been effective in ensuring States' fulfilment of their obligations as outlined in human rights instruments and promises of integral reparations to victims of gender-based violence and reproductive violations. Impunity to investigate crimes and sanction perpretators continues to be rampant in the region. Despite the signficance of international jurisprudence addressing violence against women and reproductive rights issues for their recognition in the human rights framework and discourse, the language issued in international rulings has become very sophisticated (structural discrimination, institutional violence, gender stereotypes) and is difficult for local judges to understand and integrate domestically.

VI. Conclusion

Reproductive rights have been significantly integrated, at least in a formal sense, in the human rights framework and in the interpretation of international human rights bodies. The cases regarding abortion, forced sterilization, intimate searches in prison,

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51 *See* Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Conclusions and Recommendations, *supra* note 48, at paras. 103-104.

52 *See* Article 48.1 of the Rules of Procedure of the Inter-American Commision establishing follow-up measures and Article 69 of the Rules of Procedure of the Inter-American Court establishing the Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court.

and reproductive techniques reviewed and pending in the IAS are proof of this. The emergent case-law on reproductive rights needs to be informed by recent international human rights standards on gender-based violence, particularly in the resolution of pending cases and the framing of new petitions before the IAS. A broad interpretation of the Inter-American human rights instruments to include controversial issues, such as access to legal abortion, emergency contraception and reproductive techniques will be a key factor in the realization of gender equality.

REPRODUCTIVE RIGHTS AT HOME AND ABROAD

Nancy Northup†

I. INTRODUCTION

The Center for Reproductive Rights ("the Center") is a global human rights organization that uses constitutional and international law to advance reproductive freedom as a fundamental human right that all governments are obligated to respect, protect, and fulfill. Nearly twenty years ago, in 1994, the International Conference on Population and Development was held in Cairo. At this conference, 179 countries worldwide adopted a Programme of Action, which was the first international consensus document to recognize that reproductive rights are human rights.[1] The Center works to ensure that governments throughout the world are held legally accountable for the political commitments they made by adopting the Cairo Programme of Action, applying international human rights treaties to the circumstances of women's reproductive health and decision-making. In this effort, the Center has partnered with women's rights advocates around the world, working in over fifty countries, to use a range of legal and advocacy strategies—including strategic litigation, fact-finding reports, legal publications, and law reform—to advance this goal.

Strategic litigation, a core component of the Center's legal and advocacy strategies, can serve the dual goals of shaping and defining international standards and holding governments accountable when they fail to comply with these norms. On the one hand, civil society can use this norm-building tool to transform broad human rights principles into concrete protections for sexual and reprodnctive health. On the other hand, by presenting individual complaints before national, regional, and international adjudicatory bodies, advocates can enforce international standards by seeking redress for individual rights violations.

It is worth emphasizing that strategic litigation cannot be an isolated tactic, but rather takes place in the context of a broader

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[1] International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the ICPD*, U.N. Doc A/CONF.171/13/Rev.1 ch. 7 (1995).

advocacy strategy aimed at fostering a political, social, and cultural environment conducive to the advancement and protection of women's reproductive rights, laying the groundwork for both successful decisions and implementation of positive rulings.

The Center has litigated or supported the litigation of a number of reproductive rights cases internationally—covering such issues as access to maternal healthcare, abortion, reproductive health information, and emergency contraception, as well as the right to be free from abuse and violence in healthcare facilities—which have led to groundbreaking decisions by national, regional, and international courts. I will discuss here three of the landmark decisions that the Center has won as a way to illustrate how strategic litigation can be used to advance and protect sexual and reproductive rights. I will also discuss some of the challenges for transforming these victories into tangible protections for women's sexual and reproductive health needs.

II. Recognition of Reproductive Rights as Human Rights: Case Studies

A. *K.L. v. Perú* (Human Rights Committee)

Over the last fifteen years or so, the Center for Reproductive Rights has led strategies to ensure that human rights mechanisms, including United Nations (U.N.) treaty bodies and regional and national courts increasingly recognize that restrictions on access to safe and legal abortion interfere with women's enjoyment of their human rights. The groundbreaking decision by the Human Rights Committee in *K.L. v. Perú* marked the first time an international human rights body held a government accountable for failure to ensure access to abortion where it is legal.[2]

This case focused on K.L., a seventeen-year-old girl from Perú, who learned that she was pregnant with an anencephalic fetus.[3] Doctors confirmed that K.L.'s fetus would likely be born without major portions of the brain, leading to stillbirth or death and posing risks to K.L.'s life if the pregnancy continued. Thus, they advised her to terminate the pregnancy.[4] A social worker also advised K.L. to have an abortion to protect her and her family's mental health, noting that the continuation of the pregnancy "would only

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[2] Human Rights Comm., Karen Noelia Llatoy v. Perú, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), *available at* http://www.umn.edu/humanrts/undocs/1153-2003.html [hereinafter K.L. v. Perú].

[3] *Id.* ¶ 2.1.

[4] *Id.* ¶ 2.2.

prolong the distress and emotional instability of [K.L.] and her family."[5]

Although abortion in Perú is illegal in most circumstances, the law recognizes a limited exception to the abortion ban in order to preserve a woman's life or health.[6] The director of one of Perú's state hospitals, however, denied K.L.'s request for an abortion, claiming it fell outside the health and life exceptions, because there is no explicit right to abortion in cases of severe fetal impairment.[7] Thus, K.L. was forced to carry her pregnancy to term and give birth. The baby died four days later and K.L. became severely depressed, requiring psychiatric treatment.[8] A psychiatrist who examined K.L. at this time concluded that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient's future mental health."[9]

Unable to receive justice at the national level, K.L., with the assistance of the Center and local partners, filed a petition before the United Nations Human Rights Committee claiming that by denying access to therapeutic abortion, Perú violated its international obligations.

The Center chose to file this case at the U.N. Human Rights Committee because of its expansive jurisprudence in considering individual complaints. At the time, many of the other international human rights bodies had issued few decisions. Moreover, by filing the case with the U.N. Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights, the Center was able to invoke the articles on the rights to life,[10] privacy,[11] special protection of minors,[12] and freedom from cruel, inhuman and degrading treatment,[13] in an effort to develop

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5 *Id.* ¶ 2.4.

6 CODIGO PENAL [Criminal Code], art. 119 (Perú), *available at* http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-codpenal.htm&vid=Ciclope:CLPdemo.

7 *K.L. v. Perú* ¶ 2.3.

8 *Id.* ¶ 2.6.

9 *Id.* ¶ 2.5.

10 International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

11 *Id.* art. 17.

12 *Id.* art. 24.

13 *Id.* art. 7.

human rights standards around denial of access to legal abortion services as violations of these rights.

In November 2005, the Human Rights Committee held that, by denying K.L. access to a legal therapeutic abortion, the State violated her rights to be free from cruel, inhuman and degrading treatment, privacy, and special protection as a minor.[14] In particular, with respect to the Article 7 right to be free from cruel, inhuman and degrading treatment, the Committee noted that Article 7 "relates not only to physical pain but also to mental suffering."[15] The Committee determined that the depression and mental anguish that K.L. suffered as a result of having to carry the pregnancy to term was a foreseeable consequence and direct result of the State's denial of the abortion.[16] Specifically, it indicated that:

> owing to the refusal of the medical authorities to carry out the therapeutic abortion, [K.L.] had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon . . . which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy . . . . The Committee notes that this situation could have been foreseen . . . . The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced.[17]

With respect to the right to privacy, the Committee noted that K.L. was informed by her gynecologist that she could either choose to continue with the pregnancy or terminate it, and that the State's refusal to act in accordance with her decision amounted to a violation of her Article 17 right to privacy.[18] Finally, the Committee noted that, because she was a minor, K.L. was entitled to special care under Article 24, which she did not receive during and after her pregnancy.[19]

The Committee required Perú to provide K.L. with an effective remedy, including compensation. Additionally, it recognized Perú's obligation to take steps to ensure that similar violations would not occur in the future.[20]

The Center is still negotiating with the Peruvian government

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14 *K.L. v. Perú* ¶ 7.
15 *Id.* ¶ 6.3.
16 *Id.*
17 *Id.*
18 *Id.* ¶ 6.4.
19 *K.L. v. Perú* ¶ 6.5.
20 *Id.* ¶ 8.

to determine the appropriate monetary damages that should be paid to K.L. Additionally, Perú has not complied with its obligation to adopt clear legal guidelines for the provision of legal abortions. Cases like K.L.'s continue to occur. However, the Center has been consistently working for the implementation of this decision through a comprehensive strategy, including submitting memos to the Human Rights Committee on Perú's reluctance to comply with the decision, meeting with the Secretariat of the Committee to discuss this issue, and lobbying Committee members to pressure Perú to implement this decision.

Currently, K.L. is living with a relative in Spain and is studying at a university. She left Perú after her traumatic experience and has not returned since.

B. R.R. v. Poland (European Court of Human Rights)

Another piece of the Center's ongoing strategy to ensure access to safe and legal abortions has been to challenge the lack of clear legal and regulatory frameworks to implement laws permitting abortion for certain indications. In the landmark decision *R.R. v. Poland*, the European Court of Human Rights for the first time found a violation of the right to be free from inhuman or degrading treatment in an abortion-related case.[21] This was also the first time the Court recognized that states have an obligation to regulate the exercise of conscientious objection in order to guarantee patients access to lawful reproductive healthcare services.

This case focuses on R.R. who, during her eighteenth week of pregnancy, was informed that her fetus had a potentially severe malformation, and that genetic testing was required to confirm the diagnosis—information that would be crucial in her decision as to whether to carry the pregnancy to term.[22]

Abortion is legal in Poland when prenatal tests reveal a high risk that the fetus would be severely and irreversibly damaged.[23] Although R.R. was legally entitled to the genetic testing and her doctors confirmed the need for the tests, a series of doctors refused to provide her with the testing or referrals she needed. During the eight-week period that R.R. tried to access these tests, she saw six-

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[21] R.R. v. Poland, App. No. 27617/04, Eur. Ct. H.R. (2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911.

[22] *Id.* ¶ 9.

[23] *Id.* ¶ 67; *see also* Law on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion of January 7, 1993, as amended as of December 23, 1997, art. 4a(1)–(2), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act—English%20translation.pdf.

teen doctors, underwent five sonograms, and was hospitalized twice. Recognizing her need for genetic screening, all of the physicians she saw refused a referral.[24]

Unable to secure the necessary referral, she was only able to access the genetic testing she needed by going to a hospital and stating that she was in need of emergency care. This was during her twenty-third week of pregnancy.[25] Once she received confirmation that the fetus was suffering from genetic abnormalities, her requests for an abortion were denied because at that point, during her twenty-fifth week of pregnancy, the hospital determined that the fetus was already viable.[26]

A few months later, R.R. gave birth to her third child, a baby girl suffering from Turner Syndrome,[27] a genetic condition in which a female does not have the usual pair of two X chromosomes.[28] Girls with this condition are normally shorter than average, infertile and can experience health problems such as kidney and heart abnormalities.[29]

Unable to obtain sufficient redress through the Polish legal system, the Center for Reproductive Rights and local partners assisted R.R. in bringing her claim to the European Court of Human Rights, alleging that the government had violated its human rights obligations under the European Convention for the Protection of Human Rights.

In May 2011, the European Court of Human Rights found Poland to be in violation of R.R.'s right to be free from inhuman and degrading treatment and her right to privacy.[30] In its first abortion-related decision finding a violation of the Article 3 right to be free from inhuman or degrading treatment, the European Court held that the denial of health information and genetic testing services, which should have been part of normal health services, was a source of great suffering to R.R. and met the threshold of severity to find an Article 3 violation.[31] The court recognized that the fact R.R. was pregnant and deeply distressed at the potential malformation of her fetus was an aggravating factor of her suffering. R.R.'s

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24 *R.R. v. Poland* ¶¶ 12–23.

25 *Id.* ¶¶ 27-28.

26 *Id.* ¶ 33.

27 *Id.* ¶ 37.

28 *Turner Syndrome*, NAT'L INST. HEALTH, GENETICS HOME RESEARCH, http://ghr.nlm.nih.gov/condition/turner-syndrome (last visited Sept. 18, 2012).

29 *Id.*

30 *R.R. v. Poland* ¶¶ 161–62, 214.

31 *Id.* ¶¶ 159, 161.

painful uncertainty was prolonged by the physicians' repeated refusals to grant her the necessary tests.[32] Additionally, the court explicitly stated that R.R. "had been humiliated" and condemned the conduct of the health professionals involved, noting that R.R. was "shabbily treated by the doctors dealing with her case."[33] The court also explicitly noted that R.R.'s access to genetic testing "was marred by procrastination, confusion and lack of proper counseling and information,"[34] and that ultimately she received this service by "means of subterfuge."[35]

Furthermore, the court found that Poland's lack of a clear legal and procedural framework to implement access to legal abortion, denial of access to information about the fetus' health, and inadequate regulation of conscientious objection all violated R.R.'s right to respect for her private life under Article 8.[36] It held that in order to comply with its obligations under the Convention, Poland must:

> (1) provide pregnant women the practical means to establish their right of access to a lawful abortion by putting in place effective and accessible procedures to implement Poland's abortion law;[37]
>
> (2) ensure an adequate legal and procedural framework to guarantee pregnant women access to diagnostic services and relevant, full, and reliable information on their pregnancy;[38]
>
> (3) organize its health system in a way so that conscientious objection of health professionals does not impede access to legal health services;[39] and
>
> (4) formulate provisions regulating the availability of lawful abortion in a way as to alleviate the chilling effect on doctors that current legal restrictions may have.[40]

Additionally, the court awarded 45,000 Euros to R.R. in non-pecuniary damages, as well as 15,000 Euros for legal fees.[41]

The judgment in this case was recently finalized and the Polish Ministry of Health is in the process of preparing an action plan to present to the Committee of Ministers, which oversees compliance

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[32] *Id.* ¶ 159.
[33] *Id.* ¶ 160.
[34] *Id.* ¶ 153.
[35] *R.R. v. Poland* ¶ 153.
[36] *Id.* ¶¶ 197, 200, 206, 213–14.
[37] *Id.* ¶ 213.
[38] *Id.* ¶¶ 197, 200.
[39] *Id.* ¶ 206.
[40] *R.R. v. Poland* ¶ 193.
[41] *Id.* ¶ 5.

with judgments from the European Court of Human Rights. The Center and its partners are continuing to monitor developments in this decision and are devising a strategy for its implementation.

Since giving birth, R.R. has been struggling to provide her daughter with the life-long medical care that she requires on a daily basis. Such care is costly and relatively difficult to obtain in Poland. Moreover, after the birth of the baby, R.R.'s husband left her.[42]

C. *Alyne da Silva Pimentel v. Brazil* (Committee on the Elimination of Discrimination against Women)

The Center has also been working for almost two decades on the recognition that maternal mortality is a human rights imperative. We advocate that U.N. treaty bodies call upon governments to ensure women's access to maternal healthcare; abolish practices that are prejudicial to women's health; and enable women to plan their pregnancies by promoting access to family planning. Just last year, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") Committee issued a decision in the case of *Alyne da Silva Pimentel v. Brazil*, the first U.N. decision holding a government accountable for failing to meet its human rights obligations to combat preventable maternal mortality.[43]

Alyne, an Afro-Brazilian woman and a resident of one of Rio de Janeiro's poorest districts, was repeatedly delayed in receiving access to emergency obstetric care when she was six months pregnant with her second child. This ultimately led to her preventable death.[44]

Brazil's maternal mortality rates are considerably higher than less economically developed countries.[45] Indigenous, low-income, and Afro-descendant women are disproportionately affected by maternal mortality.[46]

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[42] *Id.* ¶ 178.

[43] Comm. on the Elimination of Discrimination Against Women, Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women Concerning Communication No. 17/2008, CEDAW/C/49/D/17/2008 (July 25, 2011), *available at* http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf [hereinafter Alyne v. Brazil].

[44] *Id.* ¶¶2.1-2.12.

[45] Braz. U.N. Country Team, A U.N. Reading of Brazil's Challenges and Potential: Common Country Assessment, ¶ 40 (Aug. 2005), *available at* http://www.undg.org/archive_docs/7631-Brazil_CCA.doc.

[46] *See generally* COMITÉ LATINOAMERICANO Y DEL CARIBE PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER (CLADEM), MONITOREANDO EL REPORTE ALTERNATIVO SOBRE LA

Alyne first sought medical attention at her local health center when she experienced vomiting and severe abdominal pain. Although these signs indicated a high-risk pregnancy, doctors performed no tests and Alyne was sent home.[47] When she returned to the health center two days later, doctors discovered that there was no fetal heartbeat.[48] A few hours later, she delivered the stillborn fetus.[49] Despite medical standards dictating that Alyne should have undergone an immediate curettage surgery to remove placental parts and to prevent hemorrhage and infection, she did not undergo surgery until approximately fourteen hours later.[50]

Following surgery, Alyne experienced severe hemorrhaging, low blood pressure, and disorientation.[51] As her condition worsened, doctors determined that she needed to be transferred from the health center to a hospital with adequate equipment to treat her condition.[52] The staff at the hospital to which she was transferred was only given a brief oral account of her medical condition and treated Alyne without knowledge that she had just delivered a stillborn fetus.[53] Although she was temporarily resuscitated, her blood pressure suddenly plummeted to zero and she was left on a makeshift bed in an emergency room hallway.[54] She died on November 16, 2002, twenty-one hours after her arrival at the hospital,[55] of an entirely preventable condition.

Alyne's mother sought redress for her daughter's death by filing a petition for civil indemnification for material and moral damages against the state-sponsored healthcare system. To date, the Brazilian judiciary has failed to provide any effective or timely remedy.[56]

The Center and its local partner filed a petition before the Committee on the Elimination of Discrimination against Women

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SITUACIÓN DE LA MORTANDAD MATERNA EN BRASIL PARA LA CONVENCIÓN INTERNACIONAL SOBRE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES [Monitoring Alternative Report on the Situation of Maternal Mortality in Brazil to the International Covenant on Economic, Social, and Cultural Rights], *available at* http://www.cladem.org/monitoreo/informes-alternativos/Brasil/Comite_DESC/2003-Mortandad-materna-Esp.pdf.

47 *Alyne v. Brazil* ¶ 2.2.
48 *Id.* ¶ 2.4.
49 *Id.* ¶ 2.5.
50 *Id.* ¶ 2.6.
51 *Id.*
52 *Alyne v. Brazil* ¶ 2.8.
53 *Id.* ¶ 2.10.
54 *Id.* ¶ 2.9.
55 *Id.* ¶ 2.12.
56 *Id.* ¶ 3.14.

(CEDAW Committee), alleging that the Brazilian government had failed to identify and address the barriers to maternal healthcare, particularly for marginalized women. The Center chose to file this case before the CEDAW Committee, which oversees compliance with CEDAW, because of its focus on discrimination. This Committee was uniquely positioned to recognize the multiple forms of discrimination that Alyne experienced when she was denied access to maternal health services—services that only women need.

In August 2011, the CEDAW Committee held that, by failing to provide appropriate maternal health services, the Brazilian government had violated its obligations to ensure the right to health and take all appropriate measures to eliminate discrimination against women, including by private actors.[57] In particular, the CEDAW Committee found that the State had neglected its due diligence obligation to regulate and monitor the provision of healthcare services by private healthcare institutions under Article 2(e),[58] as well as its obligation to ensure appropriate services in connection with pregnancy under Article 12.[59] The Committee noted in particular that Alyne's lack of access to quality and appropriate maternal healthcare systems stemmed from multiple forms of discrimination, which the State had failed to address.[60] The Committee also held that the State had failed to ensure effective judicial protection and to provide adequate remedies to Alyne's family, in violation of the Convention.[61]

The Committee ordered that the government provide appropriate reparations to Alyne's mother and daughter, including adequate compensation.[62] The Center is in the process of negotiating with the government to determine the amount of such compensation. Additionally, the Committee ordered the government to ensure women's right to safe motherhood and affordable access to adequate emergency obstetric care, provide professional training for health workers, ensure that private healthcare facilities comply with national and international standards on reproductive healthcare, and ensure sanctions are imposed on health professionals violating women's reproductive rights.[63]

The Center, in consultation with Brazilian experts and non-

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57 *Alyne v. Brazil* ¶¶ 7.5–7.6.
58 *Id.* ¶ 7.5.
59 *Id.* ¶ 7.6.
60 *Id.* ¶ 7.7.
61 *Id.* ¶ 7.8.
62 *Alyne v. Brazil* ¶ 8(1).
63 *Id.* ¶ 8(2).

governmental organizations, has developed a 150-page document for the Brazilian government, which specifies the measures it can take to comply with this decision and is working with the Brazilian government to urge it to implement such measures. The Center, along with Alyne's family, is currently negotiating the terms of individual and symbolic reparations. The Center continues to work with the Brazilian government on how to effectively implement the remaining recommendations for general measures set forth by the CEDAW Committee.

Currently, Alyne's daughter is a high school student and resides with her maternal grandmother. They continue to live in abject poverty in Brazil. The grandmother, who is unable to work consistently because of health problems, is the sole source of support for the family.

III. Conclusion—Taking Stock of Victories and Challenges for the Future

Despite the recognition that existing human rights protections apply in the context of reproductive health and rights, transforming this promise into concrete legal protections has met with resistance, even within the mainstream human rights movement. For example, when the Center first started working on the *Alyne* case, a number of human rights experts said, "This is a medical malpractice case—why are you seeking government accountability from a human rights body for maternal mortality?"

During the past twenty years, the Center has been using its legal and advocacy strategies to give teeth to this promise, by ensuring that human rights treaties are interpreted to protect women's fundamental reproductive rights. These groundbreaking victories are a testament to the role that strategic litigation can play in promoting and protecting reproductive rights as human rights.

At the same time, these decisions demonstrate that it is a long-term struggle to ensure that women's reproductive rights are fully realized, and securing these victories does not mean that the struggle is over.

On the one hand, it is important for activists to know about groundbreaking decisions so that they can use these developments to push for changes on the ground. For example, the Peruvian government has yet to implement the *K.L.* decision, but the Human Rights Committee's ruling has had far-reaching effects, being cited, for instance, by the Colombian Constitutional Court in

its decision to liberalize Colombia's abortion law[64] and by the Slovakian Constitutional Court in its decision to uphold a law legalizing abortion in the first trimester.[65]

On the other hand, a central challenge for reproductive rights litigation, as with human rights litigation in general, is making sure that these decisions are fully implemented at the national level. This is one key area where we as advocates must remain vigilant. The Center, together with its local partners, uses sustained advocacy strategies at the national, regional, and international levels to push for implementation.

In the case of *K.L.*, for instance, the recalcitrance of the government to implement the decision led the Center to bring a similar case to the CEDAW Committee, with the aim of increasing the international pressure on the Peruvian government to ensure access to legal abortions and consolidating human rights standards across treaty bodies. This strategy led to a recent landmark decision by the CEDAW Committee in the case of *L.C. v. Perú*, handed down in November 2011—the CEDAW Committee held that Perú had violated L.C.'s right to health and to be free from discrimination.[66] The Committee also recommended that Perú decriminalize abortion where pregnancy results from rape,[67] marking the first international decision where a human rights body has recommended that a government change its abortion laws.

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64 Corte Constitucional [Constitutional Court], May 10, 2006, Sentencia C-355/06, at subsec. 8.4 (Colom.).

65 Ústavného súdu Slovenskej republiky [Constitutional Court of the Slovak Republic], Dec. 4, 2007, PL. ÚS 12/01-297 at subsec. 3.2.

66 Comm. on the Elimination of Discrimination Against Women, Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women Concerning Communication No. 22/2009, CEDAW/C/50/D/22/2009 (Nov. 4, 2011), *available at* http://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-22-2009_en.pdf.

67 *Id.* ¶ 9(b)(iii).

Government in Conflict with Individual Rights

It is important to recognize that an individual's reproductive and sexual rights are violated not only when a state directly interferes with her decision or capacity to reproduce, but also when the state indirectly burdens a decision or capacity to reproduce. States can indirectly encumber individuals' reproductive rights – achieving in a roundabout way what is an obvious rights infraction when accomplished directly. Accordingly, laws that have the effect of infringing on a person's reproductive rights – as when a state refuses to increase the welfare benefits paid to a beneficiary on the birth of an additional child, or when a state denies certain privileges to persons who have more than a certain number of children – ought to be subjected to the same scrutiny as laws that are more direct in their goals.

The following cases provide a snapshot of different approaches that courts and other legal bodies have taken to laws that impact private choices regarding reproduction and the creation of family. Consider whether the decision in any given case evidences an expansive or restricted understanding of reproductive and sexual rights. Compare the rationales given for the recognition (or non-recognition) of these rights.

Re Eve
(1986) 31 D.L.R. (4th) 1 (S.C.C.)

¶1 LA FOREST J.:— These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid J. of the Supreme Court of Prince Edward Island – Family Division. In the interests of privacy, he called the daughter "Eve," and her mother "Mrs. E".

¶2 When Eve was a child, she lived with her mother and attended various local schools. When she became twenty-one, her mother sent her to a school for retarded adults in another community. There she stayed with relatives during the week, returning to her mother's home on weekends. At this school, Eve struck up a close friendship with a male student; in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

¶3 The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E. This would understandably cause her great difficulty; she is a widow and was then approaching sixty. That is why she decided Eve should be sterilized.

¶4 Eve's condition is more fully described by McQuaid J. as follows:

> The evidence established that Eve is 24 years of age, and suffers what is described as extreme expressive aphasia. She is unquestionably at least mildly to moderately retarded. She has some learning skills, but only to a limited level. She is described as being a pleasant and affectionate person who, physically, is an adult person, quite capable of being attracted to, as well as attractive to, the opposite sex. While she might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, as consisting of a father, a mother, and children residing in the same home, she would have no concept of the idea of marriage, or indeed, the consequential relationship between, intercourse, pregnancy and birth.
>
> Expressive aphasia was described as a condition in which the patient is unable to communicate outwardly thoughts or concepts which she might have perceived. Particularly in the case of a person suffering from any degree of retardation, the result is that even an expert such as a psychiatrist is unable to determine with any degree of certainty if, in fact, those thoughts or concepts have actually been perceived, or whether understanding of them does exist. Little appears to be known of the cause of this condition, and even less of its remedy. In the case of Eve, this condition has been diagnosed as extreme.

From the evidence, he further concluded:

> [t]hat Eve is not capable of informed consent, that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

...

General Considerations

¶21 ... The Court is asked to consent, on behalf of Eve, to sterilization since she, though an adult, is unable to do so herself. Sterilization by means of a tubal ligation is usually irreversible. And hysterectomy, the operation authorized by the Appeal Division, is not only irreversible; it is major surgery. Eve's sterilization is not being sought to treat any medical condition. Its purposes are admittedly non-therapeutic. One such purpose is to deprive Eve of the capacity to become pregnant so as to save her from the possible trauma of giving birth and from the resultant obligations of a parent, a task the evidence indicates she is not capable of fulfilling. As to this, it should be noted that there is no evidence that giving birth would be more difficult for Eve than for any other woman. A second purpose of the sterilization is to relieve Mrs. E. of anxiety about the possibility of Eve's becoming pregnant and of having to care for any child Eve might bear.

...

***Parens patriae* Jurisdiction**

¶ 72 ... From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in Wellesley v. Duke of Beaufort, *supra* at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

¶ 73 The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

¶ 74 The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in J. v. C., [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

¶ 75 What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

Re Eve
(1986) 31 D.L.R. (4th) 1 (S.C.C.)

¶ 76 I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the *parens patriae* jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the same. Many of these instances are related in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far or as in Quinlan permit the removal of life-sustaining equipment, I leave to later disposition.

¶ 77 Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in Re X, at pp. 706-07, and Heilbron J. in Re D, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

¶ 78 There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; The Sexual Sterilization Act, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

¶ 79 Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by

means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, *supra*, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

¶ 80 Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in Sterilization, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

> Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the physical health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see Sterilization, *supra*, at pp. 49-52. The Commission has this to say at p. 50:

> It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.
>
> In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. Their attempts to pass for normal were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ....

> The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

¶ 81 In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

¶ 82 I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

¶ 83 The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see Sterilization, passim). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

> For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

¶ 84 The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, *supra*, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent;

it is a social problem, and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes as between men and women, the poor and the rich, and people of different ethnic backgrounds; see Sterilization, *supra*, at p. 44.

¶ 85 As far as the hygienic problems are concerned, the following view of the Law Reform Commission (at p. 34) is obviously sound:

> ... if a person requires a great deal of assistance in managing their own menstruation, they are also likely to require assistance with urinary and fecal control, problems which are much more troublesome in terms of personal hygiene.

Apart from this, the drastic measure of subjecting a person to a hysterectomy for this purpose is clearly excessive.

¶ 86 The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

¶ 87 To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest. And how are we to weigh the best interests of a person in this troublesome area, keeping in mind that an error is irreversible? Unlike other cases involving the use of the *parens patriae* jurisdiction, an error cannot be corrected by the subsequent exercise of judicial discretion. That being so, one need only recall Lord Eldon's remark, *supra*, that "it has always been the principle of this Court, not to risk damage to children which it cannot repair" to conclude that non-therapeutic sterilization may not be authorized in the exercise of the *parens patriae* jurisdiction. McQuaid J. was, therefore,

right in concluding that he had no authority or jurisdiction to grant the application.

¶ 88 Nature or the advances of science may, at least in a measure, free Eve of the incapacity from which she suffers. Such a possibility should give the courts pause in extending their power to care for individuals to such irreversible action as we are called upon to take here. The irreversible and serious intrusion on the basic rights of the individual is simply too great to allow a court to act on the basis of possible advantages which, from the standpoint of the individual, are highly debatable. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the Canadian Charter of Rights and Freedoms and otherwise.

¶ 89 Many of the factors I have referred to as showing that the best interests test is simply not a sufficiently precise or workable tool to permit the *parens patriae* power to be used in situations like the present are referred to in Matter of Guardianship of Eberhardy, *supra*. Speaking for the court in that case, Heffernan J. had this to say, at p. 894:

> Under the present state of the law, the only guideline available to circuit courts faced with this problem appears to be the "best interests" of the person to be sterilized. This is a test that has been used for a number of years in this jurisdiction and elsewhere in the determination of the custody of children and their placement – in some circumstances placement in a controlled environment ... No one who has dealt with this standard has expressed complete satisfaction with it. It is not an objective test, and it is not intended to be. The substantial workability of the test rests upon the informed fact-finding and the wise exercise of discretion by trial courts engendered by long experience with the standard. Importantly, however, most determinations made in the best interests of a child or of an incompetent person are not irreversible; and although a wrong decision may be damaging

> indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. And, of course, alleged errors of discretion in exercising the "best interest" standard are subject to appellate review. Sterilization as it is now understood by medical science is, however, substantially irreversible.

¶ 90 Hefferman J. also alluded to the limited capacity of judges to deal adequately with a problem that has such general social overtones in the following passage, at p. 895:

> What these facts demonstrate is that courts, even by taking judicial notice of medical treatises, know very little of the techniques or efficacy of contraceptive methods or of thwarting the ability to procreate by methods short of sterilization. While courts are always dependent upon the opinions of expert witnesses, it would appear that the exercise of judicial discretion unguided by well thought-out policy determinations reflecting the interest of society, as well as of the person to be sterilized, are hazardous indeed. Moreover, all seriously mentally retarded persons may not ipso facto be incapable of giving birth wit out serious trauma, and some may be good parents. Also, there has been a discernible and laudable tendency to "main-stream" the developmentally disabled and retarded. A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of fact-finding and the opinions of experts.

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¶ 91 The foregoing, of course, leaves out of consideration therapeutic sterilization and where the line is to be drawn between therapeutic and non-therapeutic sterilization. On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.

¶ 92 It will be apparent that my views closely conform to those expressed by Heilbron J. in Re D, *supra*. She was speaking of an infant, but her remarks are equally applicable to an adult. The importance of maintaining the physical integrity of a human being ranks high in our

scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

¶ 93 I should perhaps add, as Heilbron J. does, that sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem. Heilbron J. was referring, as I am, to cases where such treatment is necessary in dealing with a serious condition. The recent British Columbia case of Re K, *supra*, is at best dangerously close to the limits of the permissible.

¶ 94 The foregoing remarks dispose of the arguments based on the traditional view of the *parens patriae* jurisdiction as exercised in this country. Counsel for the respondent strongly contended, however, that the Court should adopt the substituted judgment test recently developed by a number of state courts in the United States. That test, he submitted, is to be preferred to the best interests test because it places a higher value on the individuality of the mentally incompetent person. It affords that person the same right, he contended, as a competent person to choose whether to procreate or not.

¶ 95 There is an obvious logical lapse in this argument. I do not doubt that a person has a right to decide to be sterilized. That is his or her free choice. But choice presupposes that a person has the mental competence to make it. It may be a matter of debate whether a court should have the power to make the decision if that person lacks the mental capacity to do so. But it is obviously fiction to suggest that a decision so made is that of the mental incompetent, however much the court may try to put itself in her place. What the incompetent would do if she or he could make the choice is simply a matter of speculation. The sophistry embodied in the argument favouring substituted judgment has been fully revealed in Eberhardy, *supra*, at p. 893 where in discussing Grady, *supra*, the court stated:

> The fault we find in the New Jersey case is the ratio decidendi of first concluding, correctly we believe, that the right to sterilization

> is a personal choice, but then equating a decision made by others with the choice of the person to be sterilized. It clearly is not a personal choice, and no amount of legal legerdemain can make it so.

...

> We conclude that the question is not choice because it is sophistry to refer to it as such, but rather the question is whether there is a method by which others, acting in behalf of the person's best interests and in the interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

¶ 96 Counsel for the respondent's argument in favour of a substituted judgment test was made essentially on a common law basis. However, he also argued that there is what he called a fundamental right to free procreative choice. Not only, he asserted, is there a fundamental right to bear children; there is as well a fundamental right to choose not to have children and to implement that choice by means of contraception. Starting from the American courts' approach to the due process clause in the United States Constitution, he appears to base this argument on s. 7 of the Charter. But assuming for the moment that liberty as used in s. 7 protects rights of this kind (a matter I refrain from entering into), counsel's contention seems to me to go beyond the kind of protection s. 7 was intended to afford. All s. 7 does is to give a remedy to protect individuals against laws or other state action that deprive them of liberty. It has no application here.

¶ 97 Another Charter related argument must be considered. In response to the appellant's argument that a court-ordered sterilization of a mentally incompetent person, by depriving that person of the right to procreate, would constitute an infringement of that person's rights to liberty and security of the person under s. 7 of the Canadian Charter of Rights and Freedoms, counsel for the respondent countered by relying on that person's right to equality under s. 15(1) of the Charter, saying "that the most appropriate method of ensuring the mentally incompetent their right to equal protection under s. 15(1) is to provide the mentally incompetent with a means to obtain non-therapeutic sterilizations,

which adequately protects their interests through appropriate judicial safeguards." A somewhat more explicit argument along the same lines was made by counsel for the Public Trustee of Manitoba. His position was stated as follows:

> It is submitted that in the case of a mentally incompetent adult, denial of the right to have his or her case presented by a guardian ad litem to a Court possessing jurisdiction to give or refuse substituted consent to a non-therapeutic procedure such as sterilization, would be tantamount to a denial to that person of equal protection and equal benefit of the law. Such a denial would constitute discrimination on the basis of mental disability, which discrimination is prohibited by Section 15 of The Canadian Charter of Rights and Freedoms.

¶ 98 Section 15 of the Charter was not in force when these proceedings commenced but, this aside, these arguments appear flawed. They raise in different form an issue already dealt with, i.e. that the decision made by a court on an application to consent to the sterilization of an incompetent is somehow that of the incompetent. More troubling is that the issue is, of course, not raised by the incompetent, but by a third party.

¶ 99 The court undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best interests. But this function must not, in my view, be transformed so as to create a duty obliging the court, at the behest of a third party, to make a choice between the two alleged constitutional rights – the right to procreate or not to procreate – simply because the individual is unable to make that choice. All the more so since, in the case of non-therapeutic sterilization as we saw, the choice is one the courts cannot safely exercise.

...

Conclusion

¶ 101 I would allow the appeal and restore the decision of the judge who heard the application.

Edited - footnotes may vary from original

SOJOURNER A., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT Y.A.; ANGELA B., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT W.B., PLAINTIFFS-APPELLANTS, AND ROSA C., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT Y.C.; AND CRYSTAL D., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR HER INFANT S.D., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES AND WILLIAM WALDMAN, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW JERSEY

828 A.2d 306 (2003)

OPINION:

The opinion of the Court was delivered by

PORITZ, C.J. [**308]

In this appeal, plaintiffs challenge the constitutionality of a provision in the Work First New Jersey Act (WFNJ) that "caps" the amount of cash assistance for families at the level set when the family enters into the State welfare system. *N.J.S.A. 44:10-61(a)*. Although families in the assistance program are eligible to receive additional Medicaid and food stamp benefits on the birth of another child, the statute prohibits an increase in cash assistance benefits for any child born more than ten months after the family initially applies for and obtains such benefits. *N.J.S.A. 44:10-61(a), (b), and (e)*. Plaintiffs claim that the "family cap" violates the right to privacy and equal protection guarantees of the New Jersey Constitution. More specifically, plaintiffs allege that Section 61(a) impinges on a welfare recipient's right to bear a child and, if she chooses to have that child, denies her and her unsupported child equal treatment under the law.

I

A brief description of the two families before the Court provides context for our review of the constitutional claims raised herein.

In 1987, shortly after giving birth to her first child, plaintiff Angela B. began receiving family Medicaid benefits in addition to a monthly allowance in the form of food stamps and cash assistance. Subsequently, in 1988, 1989, and 1995 Angela B. gave birth to three more children. She received an increase in combined welfare benefits for the two children born in 1988 and 1989, but due to the enactment of New Jersey's first family cap provision in the interim, was unable to obtain additional cash assistance when her fourth child was born.

In 1994, also after bearing her first child, plaintiff Sojourner A. began receiving Medicaid family coverage as well as monthly assistance in food stamps and cash payments. When Sojourner A. became pregnant with her second child in 1996, however, the State notified her that she was not eligible for an increase in cash assistance as her child would be born more than ten months after she had started receiving welfare benefits. According to Sojourner A., she again became pregnant in 1997 and 1998, but terminated those pregnancies because of financial difficulties and because "she was not ready . . . for more children." By 1998, Sojourner A. was working five days a week and was therefore ineligible for cash assistance under WFNJ, although her family remained entitled to Medicaid and an increase in food stamps.

Both Angela B. and Sojourner A. have stated in depositions that the lack of additional cash assistance has imposed an extreme financial hardship on their families and left them without adequate food, shelter and other necessities. At the time of filing, Sojourner A. was receiving $ 322 in cash assistance, $ 163 in food stamps, and Medicaid benefits for her two children. Angela B. was receiving $ 424 in cash assistance, $ 396 in food stamps, and Medicaid benefits for the three children then residing with her.

[**309] II

On September 5, 1997, plaintiffs filed a class action lawsuit against the New Jersey Department of Human Services and its Commissioner (collectively Department or DHS), claiming that *N.J.S.A. 44:10-61(a)* and *N.J.A.C. 10:90-2.18* violate New Jersey's Constitution. The gravamen of plaintiffs' complaint is that the family cap provision has been designed impermissibly to coerce the procreative and child-bearing decisions of plaintiffs

and other women similarly situated by penalizing them for "exercis[ing] their fundamental right to bear children." Plaintiffs further contend that the "family cap" violates the equal protection rights of certain classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

> all purposes including, but not limited to, the existing cash assistance benefit, child support, medical assistance and food stamp benefits provided to the assistance unit.

Plaintiffs sought preliminary injunctive and declaratory relief, which relief was denied on October 28, 1997. On July 17, 2000, however, the trial court granted class certification to:

> all women who have conceived or will conceive a child while they or someone in their family received welfare benefits (or within a year of such receipts) under the former AFDC program or under the Work First program any time after October 1, 1992, and all children born to such women after August 1, 1993 who have been or will be subject to *N.J.S.A. 44:10-61* and *N.J.A.C. 10:90-2.18* or their predecessor statute and regulations, *N.J.S.A.* 44:10-3.5 and *N.J.A.C.* 10:81-3.8 and 10.81-1.11.

Subsequently, plaintiffs and the DHS filed a motion and cross-motion for summary judgment.

On December 18, 2000, the court entered an order granting the Department's cross-motion and dismissing plaintiffs' complaint with prejudice. In an oral opinion upholding the family cap under the New Jersey Constitution, the court applied the balancing test established by this Court in *Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985)*, and *Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982)*. In respect of plaintiffs' right to privacy claim, the court stated that the right "may be restricted only when necessary to promote a compelling governmental interest." Distinguishing our decision in *Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000)*, wherein the data indicated that a significant burden was created when a minor's right to obtain an abortion was conditioned on parental notification, the court found that in this case the plaintiffs had failed to submit any evidence that the family cap materially affected a woman's right to make procreative choices. The court concluded:

> [T]he State has demonstrated a legitimate and a substantial relationship between the statutory classification and the ends asserted. The interest here of the Legislature, [which] represents all of us, in promoting self-sufficient citizens, diminishing the dependency upon welfare and creating [parity] between welfare recipients and working people . . . greatly outweighs an[y] slight imposition [**310] or mere burden on . . . the plaintiffs' right to privacy.

The Appellate Division affirmed the trial court in a published opinion issued on April 2, 2002. Judge Winkelstein, writing for the panel, first observed that the Third Circuit Court of Appeals previously had affirmed a federal district court determination that the family cap does "not violate the procreative privacy and equal protection guarantees of the United States Constitution." *Sojourner A. v. New Jersey Dep't of Human Servs., 350 N.J. Super. 152, 163 2002). See C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996)* (hereinafter *C.K. II), affirming, sub nom., C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995)* (hereinafter *C.K. I*). Nonetheless, because "'there may be circumstances in which the [New Jersey] Constitution provides greater protections'", *id. at 166, 794 A.2d 822* (quoting *Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987))*, than does the Federal Constitution, and because state restrictions on a woman's right to privacy and equal protection guarantees under our Constitution have been read expansively by our courts, the panel deemed those federal cases "not dispositive," *id. at 163, 794 A.2d 822*.

As had the trial court, the Appellate Division applied the balancing test set forth in *Right to Choose, supra* and *Greenberg, supra* acknowledged the fundamental nature of a woman's right to make procreative decisions under *Article I, paragraph 1 of the New Jersey Constitution*, and found that the family cap "at best, indirect[ly] and insignificant[ly]" intrudes on that right. *Id. at 169, 794 A.2d 822*. The panel concluded that the cap "does not present a direct obstacle to bearing children. It merely introduces one of many factors that a woman considers when deciding whether to become pregnant and carry the child to term[,] a choice that remains hers and hers alone." *Id. at 171, 794 A.2d 822*. Similarly, the panel found that the cap does not

> completely deprive either the family unit of the benefits it is already receiving, or eliminate all benefits to the newborn child. Although the welfare recipient will not receive an additional cash stipend for the child, she continues to receive benefits designed to assist her to obtain and retain employment, and

> significantly, Medicaid coverage and food stamps are provided for the additional child. [*Ibid.*]

Agreeing with the trial court that the purposes of the statute--reducing the welfare rolls and putting welfare families on the same footing as working families--are "'laudable state objectives,'" the Appellate Division held that the family cap provision bears a substantial relationship to those legitimate and reasonable goals. *Id. at 172, 794 A.2D 822* (quoting *Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11, 17 (App. Div. 1998)).*

III

A

New Jersey has, since 1959, engaged in a cooperative effort with the federal government to provide aid to families in need of assistance. *42 U.S.C.A. § 601 et seq.* [**311]; *see In re Petitions for Rulemaking N.J.A.C. 10:82-1.2 and 10:85-4.1, 223 N.J. Super. 453, 456-58, 538 A.2d 1302 (App. Div. 1988)* (outlining history of State's participation in federal welfare programs), *aff'd, 117 N.J. 311, 566 A.2d 1154 (1989).* In a shift in approach related to that effort, the State Legislature enacted the FDA in 1992 to "offer[] intensified and coordinated services that . . . address the educational, vocational and other needs of the public assistance recipient's family. . . ." *N.J.S.A.* 44:10-20. That legislation included a provision that denied an incremental increase in benefits for children who were born when the family was eligible for AFDC benefits. *N.J.S.A.* 44:10-3.5 (repealed by *L.* 1997, c. 38, § 17). Implementation of Section 3.5 required a waiver from the United States Department of Health and Human Services that was obtained by DHS on July 20, 1992.

In 1996, Congress replaced AFDC with the Temporary Assistance to Needy Families (TANF) block grant program, *42 U.S.C.A. § § 601-608.* Under TANF, Congress provided the states with the flexibility to implement welfare reform in their jurisdictions, subject to a mandatory national welfare-to-work feature similarly designed to motivate welfare recipients to become [*327] self-sufficient. *See, e.g., 42 U.S.C.A. § 607(a)* (requiring percentage of recipients to work) and *§ 608(a)(7)* (imposing time limits on cash assistance). In March of 1997, the New Jersey Legislature responded to the federal initiative by replacing the FDA with WFNJ, *N.J.S.A. 44:10-55 to -70.*

Under WFNJ, the level of cash benefits is determined pursuant to a schedule administered by the DHS. That schedule, with certain important limitations, provides incremental increases based on the size and need of the family. *N.J.A.C. 10:69-10.2(a) and 90-3.3.* One such limitation is the family cap found at *N.J.S.A. 44:10-61(a)*, which states:

> The level of cash assistance benefits payable to an assistance unit with dependent children shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits. . . .

The Act defines an "Assistance unit" as

> a single person without dependent children; . . . dependent children only; or a person or couple with one or more dependent children who are legally or blood-related, or who is their legal guardian, and who live together as a household unit.[*N.J.S.A. 44:10-57.*]

As noted earlier, the family cap does not apply "to an individual . . . who gives birth to a child fewer than 10 months after applying for and receiving cash assistance benefits." *N.J.S.A. 44:10-61(e).* The family cap also does not apply when the new child is the product of rape or incest. *N.J.S.A. 44:10-61(f).*

Like its predecessor New Jersey statute, and consonant with the TANF approach, the primary purpose of WFNJ is to encourage employment, self-sufficiency and family stability. *See generally N.J.S.A. 44:10-56.* Toward that end, WFNJ contains mechanisms designed to promote independence and decrease long-term reliance on welfare payments. One such mechanism reallocates the savings achieved by application of the family cap to a variety of programs aimed at developing adult welfare recipients' educational and vocational skills to enable them to get and keep stable employment.

Prior to receiving benefits, eligible welfare recipients are assessed as to their educational level, prior work experience and other indicators of their "potential . . . readiness for work." *N.J.S.A. 44:10-62f.* [**312] After the assessment is completed, "individual responsibility plan[s]" are developed to set specific goals in respect of employment, education obligations, medical care and schooling for the recipient's dependent children. *Ibid.* Once recipients agree to follow the plan, they must "continuously and actively seek employment" or accept placement in an approved "work activity" to continue in the program. *N.J.S.A. 44:10-62a.* Recipients are not on their own in this endeavor; WFNJ provides or subsidizes a panoply of such activities, including actual "employment; on-the-job training; job search and job readiness assistance; vocational educational training; job skills training related directly to employment; community

work experience; alternative work experience; supportive work; community service programs . . . [and] education that is necessary for employment. . . ." *N.J.S.A. 44:10-57.* The statute encourages education by reducing the hourly work requirements for adult recipients who are "full time post-secondary student[s]," *N.J.S.A. 44:10-62b*, and permitting young parents under the age of nineteen to fulfill the "work activity" requirement by completing high school or a high school equivalency program, *N.J.S.A. 44:10-57.*

WFNJ also aims to remove barriers so that persons receiving welfare can maintain employment or stay in school. Under *N.J.S.A. 44:10-38*, recipients receive "supportive services" such as child care, transportation to and from work, and stipends for necessary "work-related expenses, . . . as determined by the commissioner." Moreover, to enable those who have gained steady employment to remain in the workforce, the State continues to subsidize medical and child care expenses for two years after recipients have become ineligible for cash benefits. *Ibid.*

B

The DHS has contracted with Mathematica Policy Research, Inc. (Mathematica), to examine the effectiveness of the WFNJ program. *See N.J.S.A. 44:10-41* (calling for periodic public reports and evaluations of WFNJ). The Department's agreement with Mathematica requires a series of six reports that evaluate how families are faring under the program. Mathematica's first report, released in 1999, found that during the initial eighteen months of WFNJ implementation, approximately one in three WFNJ participants exited the welfare system and entered the workforce. A survey of those who remained on welfare revealed that they faced a variety of more substantial impediments to employment, including low skills levels and less prior work experience.[1]

We note, as did the researchers themselves, that the first Mathematica report covered a period of strong economic growth and may not reflect real gains due to WFNJ. Further, information obtained after the first eighteen months of any new program may not be indicative of long term improvements, whereas subsequent evaluations are likely to provide more reliable data. In any event, the evaluations provided in the record before the Court do [**313] not indicate whether WFNJ has achieved (or will achieve) its goals.

IV

A

Plaintiffs bring this action under the New Jersey Constitution. Nonetheless, when cognate provisions of the Federal Constitution are implicated, we have turned to case law relating to those provisions for guidance. *See, e.g., State v. Schmid, 84 N.J. 535, 549 (1980)* (discussing free speech protections in [*330] New Jersey within federal *First Amendment* framework), *appeal dismissed sub nom. Princeton Univ. v. Schmid, 455 U.S. 100, 102 (1982)*; *State v. Johnson, 68 N.J. 349, 352-53 (1975)* (analyzing defendant's search and seizure rights in light of federal *Fourth Amendment* jurisprudence).

The *Fourteenth Amendment of the United States Constitution* provides that the state governments shall not "deny to any person within [their] jurisdiction the equal protection of the law," and shall not "deprive any person of life, liberty, or property[] without due process of law." *U.S. Const.* amend. XIV, § 1. Under the latter provision, citizens enjoy the right to be free from governmental intrusion in making procreative decisions. *Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).* The extent to which statutory provisions are scrutinized under federal equal protection and right to privacy claims depends on the class of persons affected, the nature of the right implicated, and the level of interference. When a state statute directly impinges on a fundamental right or a suspect class, then the provision is strictly scrutinized, *City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)*; *Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977)*; when a statute impairs a lesser interest, the federal courts ask only whether it is "rationally related to legitimate government interests." *Washington v. Glucksberg, 521 U.S. 702, 728 (1997).* It follows, then, that the rational basis test is applied when economic legislation, including statutes that establish benefit programs, is challenged. *See Dandridge v. Williams, 397 U.S. 471, 485-87 (1970)* (upholding limits on welfare benefits as rationally related to legitimate government interest "in encouraging employment and . . . avoiding discrimination between welfare families and the families of the working poor").

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[1] The record also contains a Rutgers School of Social Work study of the FDP and a 1999 study conducted by Legal Services of New Jersey and the New Jersey Poverty Research Institute. Legal Services and the Poverty Research Institute surveyed Work First New Jersey participants and found that most knew about the goals of the Work First program and wanted to enter the workforce. Those surveyed also expressed concern about the adequacy of such necessary components of the program as transportation, child care and rent subsidies. The Rutgers study was not directed specifically toward the effects of the family cap combined with the provision of back-to-work services.

As noted earlier, the Third Circuit Court of Appeals and the federal District Court for New Jersey have considered the same claims that are now before this Court. In *C.K. I, supra* plaintiffs brought a class action challenging a decision of the Secretary of the United States Department of Health and Human Services to waive certain federal welfare requirements and [**314] thereby to permit implementation of the family cap provision under FDA. *883 F. Supp. at 996-97.* In addition to contesting the Secretary's authority to grant the waiver, plaintiffs claimed that the family cap violated their equal protection and fundamental privacy rights. *Id. at 1012.*[2] The court held that the family cap provision was "rationally related to the legitimate state interests of altering the cycle of welfare dependency . . . [and] promoting individual responsibility and family stability." *Id. at 1015.* It reasoned that "by maintaining the level of . . . benefits despite the arrival of an additional child, [the family cap] puts the welfare household in the same situation as that of a working family, which does not automatically receive a wage increase" when a new child is born. *Id. at 1013-14.*

C.K. I also rejected plaintiffs' privacy claims. The court observed that the birth of an additional child in a family on welfare does not result in a decrease in benefits under the cap. Rather, it "remove[s] the automatic benefit increase associated with an additional child under the federal program." *Id. at 1015.* The court held that although women have a fundamental right to make procreative decisions, there is no constitutional right to government subsidies in furtherance of that right. *Ibid.* (citing *Harris v. McRae, 448 U.S. 297, 316 (1980)).*

The Third Circuit "ha[d] nothing to add to the district court's opinion [that plaintiffs' procreative rights are not burdened by the family cap] except to observe that it would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice." *C.K. II, supra, 92 F. 3d at 195.*

B

In the New Jersey Constitution, both equal protection and the right to privacy derive from the same broad constitutional language, which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." *N.J. Const. art. I, P 1.* Although Article 1 does not contain the terms "equal protection" or "right to privacy," it is well settled law that the expansive language of that provision is the source for both of those fundamental constitutional guarantees. *See Planned Parenthood, supra, 165 N.J. at 629 Right to Choose, supra, 91 N.J. at 303.*

Thirty years ago, Chief Justice Weintraub rejected "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or due process clauses" of the New Jersey Constitution. *Robinson v. Cahill, 62 N.J. 473, 491 (1973).* He described the balancing process by which a court "[u]ltimately" decides equal protection and due process challenges:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [*Id. at 492, 303 A.2d 273* (citation omitted).]

[**315] Later, in *Right to Choose, supra* and in *Greenberg, supra* the Court reaffirmed that approach, finding that it provided a more flexible analytical framework for the evaluation of equal protection and due process claims. In keeping with Chief Justice Weintraub's direction, we "'consider[] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" *Planned Parenthood, supra, 165 N.J. at 630* (quoting *Greenberg, supra, 99 N.J. at 567* (citing *Right to Choose, supra, 91 N.J. at 308-09 (1982))).* By deviating from the federal tiered model, we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction. *See Planned Parenthood, supra, 165 N.J. at 630* (noting "that in cases involving a classification that 'indirectly infringes on a fundamental right,' the inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests") (internal citations omitted). We point out, however, that although our mode of analysis differs in form from the federal tiered approach, the tests weigh the same factors and often produce the same result. *See Barone, supra, 107 N.J. at 368,*

Greenberg, supra, 99 N.J. at 567.

C

[2] As in this case, the *C.K. I* plaintiffs asserted that the cap impermissibly infringed on their decision to bear children and denied equal protection to children born when the family was receiving welfare benefits. *Id. at 1012-13.*

We turn now to plaintiffs' claims that the family cap provision of WFNJ unconstitutionally infringes on a woman's right to make procreative decisions by penalizing her for choosing to bear a child and, further, that the cap improperly singles out classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

Our discussion begins with an inquiry into the nature of the affected right. In *Right to Choose, supra* we adverted to the "body of law . . . in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion." *91 N.J. at 303-304* (citing *Gleitman v. Cosgrove, 49 N.J. 22, 62-63 (1967)* (Weintraub, C.J., dissenting in part) (suggesting that woman with rubella had right to choose abortion); *Berman v. Allan, 80 N.J. 421, 432 (1979)* (establishing cause of action for deprivation of right to decide whether to bear child with Down's Syndrome); *Schroeder v. Perkel, 87 N.J. 53, 66 (1981)* (declaring right to abort second child when first child was born with cystic fibrosis)). Later, in *Planned Parenthood, supra* we emphasized "the importance of a woman's right to control her body and her future, a right we as a society consider fundamental to individual liberty." *165 N.J. at 631-32.* The Court was "keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution." *Id. at 632.* That most basic right, plaintiffs allege, has been burdened impermissibly by the family cap provision of WFNJ.

It is, then, the nature of that burden or the extent of the governmental intrusion that we must consider. Plaintiffs claim that the family cap functions as a coercive tool designed to encourage poor women to avoid having children or to abort their pregnancies when the family unit is receiving welfare. By withholding an incremental increase in cash assistance, plaintiffs argue, the State unduly influences their procreative choices. But even if we assume that procreative choices are influenced by a cap on cash assistance to the family unit, we do not find that influence to be "undue," or that a new burden is thereby [**316] created. We expect that the income of a family unit, whatever the source, is likely to influence a woman's decision to conceive or bear a child. That is true for most families in New Jersey. As noted by the federal courts, working families do not receive automatic wage increases when additional children are born. Indeed, the family cap appears to do no more than place welfare families "on a par with working families."[3] *C.K. I, supra, 883 F. Supp. at 1013.*

We also find that the DHS has presented ample justification for the family cap. The record informs us that resources available as a result of the cap have been diverted to job training, child care, and other programs established and expanded under WFNJ. The goals of promoting self-sufficiency and decreased dependency on welfare are laudable; the focus on education, job training and child care should advance those goals and, ultimately, result in improving the lives of children born into welfare families.

In *Right to Choose, supra* the Court was presented with a challenge to legislation that denied Medicaid funding for abortions except when an abortion was medically necessary to save the life of the mother. *91 N.J. at 292.* On considering plaintiffs' equal protection challenge, we stated:

> [T]here [is no] fundamental right to funding for an abortion. The right to choose whether to have an abortion, however, is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. *As to that group of women,* the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary. Under [the statute] those needing abortions receive funds only when their lives are at stake. By granting funds when life is at risk, but withholding them when health is endangered, the statute denies equal protection to those women entitled to necessary medical services under Medicaid.
>
> [*91 N.J. at 305-06* (citations omitted; emphasis added).]

The *Right to Choose* dichotomy is directly relevant to this case. There we held that the state could not distinguish between "those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary." *Id. at 305. See also Planned Parenthood, supra, 165 N.J. at 634* (expressing concern that delay in obtaining abortion increases risk to health of mother). Most important, we also held that "[e]lective, nontherapeutic abortions . . . do not involve the life or health of the mother, and the State may pursue its interest in potential life by excluding those abortions from the Medicaid program." *Right to Choose, supra, 91 N.J. at 310.* Here, the life or health of the mother is not at issue.

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[3] We point out that medical benefits and food stamp assistance are provided for children born after the family receives welfare and regardless of the family cap. Unlike working families, those benefits establish an "assistance floor" for welfare recipients.

Whatever the impact of the family cap on the family unit, that impact is no different from the impact of another child on any family with a fixed income. Like most women in New Jersey, a woman receiving welfare assistance will likely weigh the extent of the economic strain caused by the addition of a child to the family unit. Ultimately, however, the decision to bring a child to term or to have an abortion remains wholly with the woman.

Plaintiffs also rely on the distinction created in WFNJ between children [**317] born before the family begins receiving welfare benefits, and similarly situated children born ten months after the receipt of such benefits. The family cap treats these classes disparately, plaintiffs argue, based on when mothers choose to exercise their fundamental right to conceive and bear children. In fact, the *family* does not receive additional cash assistance when a new child is born, although the family does receive additional food stamps and Medicaid benefits. All of the children in the family unit share presumably in the total amount of cash assistance available, as is the case in other similarly situated family units.

V

This case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice. In *Right to Choose, supra* we held that the State may decline to fund a woman's choice to obtain an abortion when the abortion is not medically necessary. We hold today that the State is not required to provide additional cash assistance when a woman chooses to bear a child more than ten months after her family has received welfare benefits. In so holding, we reject plaintiffs' claim that the family cap provision of WFNJ violates the equal protection and due process guarantees of our State Constitution.

The judgment of the Appellate Division is affirmed.

CASE NO.:
Writ Petition (civil) 302 of 2001

Javed & Others v. State of Haryana & Others

DATE OF JUDGMENT: 30/07/2003

BENCH:
R.C. LAHOTI, ASHOK BHAN & ARUN KUMAR.

J U D G M E N T

R.C. LAHOTI, J.

Leave granted in all the Special Leave Petitions. In this batch of writ petitions and appeals the core issue is the vires of the provisions of Section 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act No.11 of 1994) (hereinafter referred to as the Act, for short). The relevant provisions are extracted and reproduced hereunder:-
175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -

(q) has more than two living children :

Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified;

"177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -

(a) who is elected, as such, was subject to any of the disqualifications mentioned in section 175 at time of his election;

(b) during the term for which he has been elected, incurs any of the disqualifications mentioned in section 175, shall be disqualified from continuing to be a member and his office shall become vacant.

(2) In every case, the question whether a vacancy has arisen shall be decided by the Director. The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy, has arisen, the members shall not be disqualified under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final:

Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard."

Act No.11 of 1994 was enacted with various objectives based on past experience and in view of the shortcomings noticed in the implementation of preceding laws and also to bring the legislation in conformity with Part IX of the Constitution of India relating to 'The Panchayats' added by the Seventy-third Amendment. One of the objectives set out in the Statement of Objects and Reasons is to disqualify persons for election of Panchayats at each level, having more than 2 children after one year of the date of commencement of this Act, to popularize Family Welfare/Family Planning Programme (Vide Clause (m) of Para 4 of SOR).

Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. A person having more than two children up to the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two. If the factum is disputed the Director is entrusted with the duty of holding an enquiry and declaring the office vacant. The decision of the Director is subject to appeal to the Government. The Director has to afford a reasonable opportunity of being heard to the holder of office sought to be disqualified. These safeguards satisfy the requirements of natural justice.

Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in, the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1)(q) of the Act. The grounds for challenging the constitutional validity of the above said provision are very many, couched differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five :- (i) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.

The State of Haryana has defended its legislation on all counts. We have also heard the learned Standing Counsel for the State. On notice, Sh. Soli J. Sorabji, the learned Attorney General for India, has appeared to assist the Court and he too has addressed the Court. We would deal with each of the submissions made.

Submissions (i),(ii) & (iii)

The first three submissions are based on Article 14 of the Constitution and, therefore, are taken up together for consideration.

Is the classification arbitrary?

It is well-settled that Article 14 forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. To satisfy the constitutional test of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia has a rational relation to the object sought to be achieved by the Statute in question. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. [See : Constitution Bench decision in Budhan Choudhry and Ors. Vs. The State of Bihar, (1955) 1 SCR 1045]. The classification is well-defined and well-perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.

The legislation does not serve its object?

It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme. This is consistent with the National Population Policy.

Under Article 243G of the Constitution the Legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayat to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such

conditions as may be specified therein. Clause (b) of Article 243G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

24. Family Welfare.

25. Women and child development.

In pursuance to the powers given to the State Legislature to enact laws the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act No.11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat.
Clause XIX (1) of Section 21 reads:

"XIX. Public Health and Family Welfare -

(1) Implementation of family welfare programme."

The family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the Legislature has made a provision for making a person ineligible to either contest for the post of Panch or Sarpanch having more than two living children. Such a provision would necessarily be identical. So is the case with the laws governing legislators and parliamentarians.

It is not permissible to compare a piece of legislation enacted by a State in exercise of its own legislative power with the provisions of another law, though pari materia it may be, but enacted by Parliament or by another State legislature within its own power to legislate. The sources of power are different and so do differ those who exercise the power. The Constitution Bench in The State of Madhya Pradesh Vs. G.C. Mandawar, (1955) 2 SCR 225, held that the power of the Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. Two laws enacted by two different Governments and by two different legislatures can be read neither in conjunction nor by comparison for the purpose of finding out if they are discriminatory. Article 14 does not authorize the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject, its provisions are discriminatory. When the sources of authority for the two statutes are different, Article 14 can have no application. So is the view taken in The Bar Council of Uttar Pradesh Vs. The State of U.P. and Anr. (1973) 1 SCC 261, State of Tamil Nadu and Ors. Vs. Ananthi Ammal and Ors. (1995) 1 SCC 519 and Prabhakaran Nair and Ors. Vs. State of Tamil Nadu and Ors. (1987) 4 SCC 238.

Incidentally it may be noted that so far as the State of Haryana is concerned, in the Haryana Municipal Act, 1973 (Act No. 24 of 1973) Section 13A has been inserted to make a provision for similar disqualification for a person from being chosen or holding the office of a member of municipality.

A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance.

The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination. In Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna etc., Vs. State of Bihar and Ors., (1988) 2 SCC 433, the policy of nationalizing educational institutes was sought to be implemented in a phased manner. This Court held that all the institutions cannot be taken over at a time and merely because the beginning was made with one institute, it could not complain that it was singled out and, therefore, Article 14 was violated. Observations of this Court in Pannalal Bansilal Pitti and Ors. Vs. State of A.P. and Anr. (1996) 2 SCC 498, are apposite. In a pluralist society like India, people having faiths in different religions, different beliefs and tenets, have peculiar problems of their own. "A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."

To make a beginning, the reforms may be introduced at the grass-root level so as to spiral up or may be introduced at the top so as to percolate down. Panchayats are grass-root level institutions of local self-governance. They have a wider base. There is nothing wrong in the State of Haryana having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of rural population, and thereby contribute to the development of the nation which in its turn would benefit the entire citizenry. We may quote from the National Population Policy 2000 (Government of India Publication, page 35):-

"Demonstration of support by elected leaders, opinion makers, and religious leaders with close involvement in the reproductive and child health programme greatly influences the behaviour and response patterns of individuals and communities. This serves to enthuse communities to be attentive towards the quality and coverage of maternal and child health services, including referral care."....."The involvement and enthusiastic participation of elected leaders will ensure dedicated involvement of administrators at district and sub-district levels. Demonstration of strong support to the small family norm, as well as personal example, by political, community, business, professional, and religious leaders, media and film stars, sports personalities and opinion makers, will enhance its acceptance throughout society."

No fault can be found with the State of Haryana having enacted the legislation. It is for others to emulate.

We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(q) of Haryana Act No.11 of 1994 seeks to achieve a laudable purpose - socio-economic welfare and health care of the masses and is consistent with the national population policy. It is not violative of Article 14 of the Constitution.

Submission (iv) & (v) : the provision if it violates Article 21 or 25?

Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue - Whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights?

Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right __ a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is nothing wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

* * *

In our view, disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

With this general statement of law which has application to Articles 21 and 25 both, we now proceed to test the sustainability of attack on constitutional validity of impugned legislation separately by reference to Articles 21 and 25.

The disqualification if violates Article 21 ?

Placing strong reliance on Mrs.Maneka Gandhi Vs. Union of India & Anr. - (1978) 1 SCC 248, and M/s. Kasturu Lal Lakshmi Reddy and Ors. Vs. State of Jammu and Kashmir and Anr. - (1980) 4 SCC 1, it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious

term of the Article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

It is necessary to have a look at the population scenario, of the world and of our own country.India has the (dis)credit of being second only to China at the top in the list of the 10 most-populous countries of the world. As on 1.2.2000 the population of China was 1,277.6 million while the population of India as on 1.3.2001 was 1,027.0 million (Census of India, 2001, Series I, India - Paper I of 2001, page 29).

The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University, - Research Paper on Population Stabilization, Delhi Law Review, Vol. XXIII 2001, pp.125-131).

In the words of Bertand Russell, "Population explosion is more dangerous than Hydrogen Bomb." This explosive population over-growth is not confined to a particular country but it is a global phenomenon. India being the largest secular democracy has the population problem going side by side and directly impacting on its per capita income, and resulting in shortfall of food grains in spite of the green revolution, and has hampered improvement on the educational front and has caused swelling of unemployment numbers, creating a new class of pavement and slum-dwellers and leading to congestion in urban areas due to the migration of rural poor. (Paper by B.K. Raina in Population Policy and the Law, 1992, edited by B.P. Singh

Sehgal, page 52).

In the beginning of this century, the world population crossed six billions, of which India alone accounts for one billion (17 per cent) in a land area of 2.5 per cent of the world area. The global annual increase of population is 80 millions. Out of this, India's growth share is over 18 millions (23 per cent), equivalent to the total population of Australia, which has two and a half times the land space of India. In other words, India is growing at the alarming rate of one Australia every year and will be the most densely populous country in the world, outbeating China, which ranks first, with a land area thrice this country's. China can withstand the growth for a few years more, but not India, with a constricted land space. Here, the per capita crop land is the lowest in the world, which is also shrinking fast. If this falls below the minimum sustainable level, people can no longer feed themselves and shall become dependent on imported food, provided there are nations with exportable surpluses. Perhaps, this may lead to famine and abnormal conditions in some parts of the country. (Source - Population Challenge, Arcot Easwaran, The Hindu, dated 8.7.2003). It is emphasized that as the population grows rapidly there is a corresponding decrease in per capita water and food. Women in many places trek long distances in search of water which distances would increase every next year on account of excessive ground water withdrawals catering to the need of the increasing population, resulting in lowering the levels of water tables.

Arcot Easwaran has quoted the China example. China, the most populous country in the world, has been able to control its growth rate by adopting the 'carrot and stick' rule. Attractive incentives in the field of education and employment were provided to the couples following the 'one-child norm'. At the same time drastic disincentives were cast on the couples breaching 'one-child norm' which even included penal action. India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit. However, it has to be remembered that complacence in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.

The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered 'family planning and a limitation of children' essential for the interests of social economy, family happiness and national planning. The committee recommended the establishment of birth control clinics and other necessary measures such as raising the age at marriage and a eugenic sterilization programme. A committee on population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source - Seminar, March 2002, page 25)

Every successive Five Year Plan has given prominence to a population policy. In the first draft of the First Five Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a

step forward for improvement in health, particularly that of mothers and children. The Second Five Year Plan (1956-61) emphasized the method of sterilization. A central Family Planning Board was also constituted in 1956 for the purpose. The Fourth Five Year Plan (1969-74) placed the family planning programme, "as one amongst items of the highest national priority". The Seventh Five Year Plan (1985-86 to 1990-91) has underlined "the importance of population control for the success of the plan programme...." But, despite all such exhortations, "the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised. (Population Policy and the Law, ibid, pages 44-46).

The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations wherever needed.

None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that Seventh Schedule, List II - State List, Entry 5 speaks of 'Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration'. Entry 6 speaks of 'Public health and sanitation' inter alia. In List III - Concurrent List, Entry 20A was added which reads 'Population control and family planning'. The legislation is within the permitted field of State subjects. Article 243C makes provision for the Legislature of a State enacting laws with respect to Constitution of Panchayats. Article 243F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of Panchayat if he is so disqualified by or under any law made by the Legislature of the State. Article 243G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243G read with Eleventh Schedule is - Scheme for economic development and social justice in relation to health and sanitation, family welfare and women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include 'Public Health and Family Welfare', 'Women and Child Development' and 'Social Welfare'.

Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example.

Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the

people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.

The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in Air India Vs. Nergesh Meerza and Ors. (1981) 4 SCC 335. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, ... when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

The provision if it violates Article 25 ?

It was then submitted that the personal law of muslims permits performance of marriages with 4 women, obviously for the purpose of procreating children and any restriction thereon would be violative of right to freedom of religion enshrined in Article 25 of the Constitution. The relevant part of Article 25 reads as under:-25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases.

The meaning of religion - the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in Dr. M. Ismail Faruqui and Ors. Vs. Union of India & Ors. (1994) 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.

In Sarla Mudgal (Smt.), President, Kalyani and Ors. Vs. Union of India and Ors. (1995) 3 SCC 635, this Court has judicially noticed it being acclaimed in the United States of America that the practice of polygamy is injurious to 'public morals', even though some religions may make it obligatory or desirable for its followers. The Court held that polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of Sati in the interest of public order. The Personal Law operates under the authority of the legislation and not under the religion and, therefore, the Personal Law can always be superseded or supplemented by legislation.

In Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors., (1985) 2 SCC 556, the Constitution Bench was confronted with a canvassed conflict between the provisions of Section 125 of Cr.P.C. and Muslim Personal Law. The question was: when the Personal Law makes a provision for maintenance to a divorced wife, the provision for maintenance under Section 125 of Cr.P.C. would run in conflict with the Personal Law. The Constitution Bench laid down two principles; firstly, the two provisions operate in different fields and, therefore, there is no conflict and; secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the Personal Law of the parties, in cases where they are in conflict.

In Mohd. Hanif Quareshi & Ors. Vs. The State of Bihar, (1959) SCR 629, the State Legislation placing a total ban on cow slaughter was under challenge. One of the submissions made was that such a ban offended Article 25 of the Constitution because

such ban came in the way of the sacrifice of a cow on a particular day where it was considered to be religious by Muslims. Having made a review of various religious books, the Court concluded that it did not appear to be obligatory that a person must sacrifice a cow. It was optional for a Muslim to do so. The fact of an option seems to run counter to the notion of an obligatory duty. Many Muslims do not sacrifice a cow on the Id day. As it was not proved that the sacrifice of a cow on a particular day was an obligatory overt act for a Mussalman for the performance of his religious beliefs and ideas, it could not be held that a total ban on the slaughter of cows ran counter to Article 25 of the Constitution.

In The State of Bombay Vs. Narasu Appa Mali, AIR 1952 Bombay 84, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (XXV (25) of 1946) was challenged on the ground of violation of Article 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held - "A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

Their Lordships quoted from American decisions that the laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religions recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is recognized institution according to Hindu religious practice, their Lordships stated in no uncertain terms - "The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

What constitutes social reform? Is it for the legislature to decide the same? Their Lordships held in Narasu Appa Mali's case (supra) that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of Law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.

We find ourselves in entire agreement, with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized

without any demur. Divorce unknown to ancient Hindu Law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim Personal Law.

The Division Bench of the Bombay High Court in Narasu Appa Mali (supra) also had an occasion to examine the validity of the legislation when it was sought to be implemented not in one go but gradually. Their Lordships held - "Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise."

Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.

In Badruddin Vs. Aisha Begam, 1957 ALJ 300, the Allahabad High Court ruled that though the personal law of muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

In Smt. R.A. Pathan Vs. Director of Technical Education & Ors. - 1981 (22) GLR 289, having analysed in depth the tenets of Muslim personal law and its base in religion, a Division Bench of Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

In Ram Prasad Seth Vs. State of Uttar Pradesh and Ors. (1957 L.L.J. (Vol.II) 172 = AIR 1961 Allahabad 334) a learned single Judge held that the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, the Rule 27

of the Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

The law has been correctly stated by the High Court of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India.

In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

Looked at from any angle, the challenge to the constitutional validity of Section 175 (1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practise or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

Some incidental questions. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

It was also submitted that the impugned disqualification would hit the women worst, in as much as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain

us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

Hypothetical examples were tried to be floated across the bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

Conclusion

The challenge to the constitutional validity of Section 175(1)(q) and 177(1) fails on all the counts. Both the provisions are held, intra vires the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the above said provisions are held liable to be dismissed.

Certain consequential orders would be needed. The matters in this batch of hundreds of petitions can broadly be divided into a few categories. There are writ petitions under Article 32 of the Constitution directly filed in this Court wherein the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were many a writ petitions filed in the High Court of Punjab & Haryana under Articles 226/227 of the Constitution which have been dismissed and appeals by special leave have been filed in this Court against the decisions of the High Court. The writ petitions, whether in this Court or in the High Court, were filed at different stages of the proceedings. In some of the matters the High Court had refused to stay by interim order the disqualification or the proceedings relating to disqualification pending before the Director under Section 177(2) of the Act. With the decision in these writ petitions and the appeals arising out of SLPs the proceedings shall stand revived at the stage at which they were, excepting in those matters where they stand already concluded. The proceedings under Section 177(2) of the Act before the Director or the hearing in the appeals as the case may be shall now be concluded. In such of the cases where the persons proceeded against have not filed their replies or have not appealed against the decision of the Director in view of the interim order of this Court or the High Court having been secured by them they would be entitled to file reply or appeal, as the case may be, within 15 days from the date of this judgment if the time had not already expired before their initiating proceedings in the High Court or this Court. Such of the cases where defence in the proceedings under Section 177(2) of the Act was raised on the ground that the disqualification was not attracted on account of a child or more having been given in adoption, need not be re-opened as we have held that such a defence is not available.

Subject to the abovesaid directions all the writ petitions and civil appeals arising out of SLPs are dismissed.

SLP (C) No.22312 of 2001Though this petition was heard with a batch of petitions on 17.07.2003, raising constitutional validity of certain provisions of Haryana Panchayati Raj Act, 1994, no such question is raised in this petition. List for hearing on 04.08.2003.

There are three sets of petitions. In petitions under Article 32 of the Constitution, directly filed in this Court, the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were some writ petitions filed in the High Court of Punjab and Haryana under Article 226/227 of the Constitution which have been dismissed, appeals by special leave have been filed there against. All the writ petitions and appeals shall also stand dismissed. In some of the matters the High Court had by interim order stayed the disqualification and in some cases proceedings before the Director under Section 177 (2) of the Act. With the decision in these writ petitions, the proceedings shall stand revived at the stage where they were. Within 15 days from the date of this judgment the person proceeded against, may file appeal against the decision of the Director, as the case may be. In such of the cases where defence to the proceedings under Section 177(2) of the Act was raised on the ground of disqualification, being not attracted on account of the child having been given in adoption, the defence shall not be available. The proceedings shall stand concluded and the disqualification shall apply. All the appeals and writ petitions be treated as disposed of in terms of the above said directions.

Edited - footnotes may differ from original

AID FOR WOMEN, et al., Plaintiffs, vs. NOLA FOULSTON, et al., Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

427 F. Supp. 2d 1093 (2006)

OPINIONBY: J. THOMAS MARTEN

OPINION:

[*1095] MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiffs' action for declaratory and injunctive relief. Plaintiffs seek to prevent enforcement of Kansas Attorney General Phill Kline's application of the state mandatory reporting statute, through an Attorney General's Opinion, to consensual underage sexual activity.[1] Specifically, as [*1096] filed, this case turns on whether *Kan. Stat. Ann. § 38-1522*, commonly referred to as the "Kansas reporting statute," requires reporting of all consensual underage sexual activity as sexual abuse.

The court heard approximately seven days of testimony in a bench trial commencing January 30, 2006. For clarity, the court notes that neither side objects to the reporting of: 1) incest; 2) sexual abuse of a child by an adult; and 3) sexual activities involving a child under the age of twelve. Therefore, the only issue presented is whether consensual underage sexual activity must be reported under the Kansas reporting statute. After extensive review of the record, this court holds that the Kansas reporting statute: 1) does not make all underage sexual activity inherently injurious; and 2) requires that the reporter have reason to suspect both injury and that the injury resulted from illegal sexual activity, as defined by Kansas law, before reporting is required. In addition, to require reporting in accordance with Attorney General Kline's opinion would violate a minor's limited right of informational privacy. Thus, this court permanently enjoins enforcement of *Kan. Stat. Ann. § 38-1522* in any manner inconsistent with this decision, which includes the Kline Opinion.

I. FINDINGS OF FACT

* * *

B. The Kansas Reporting Statute

Kansas law recognizes the state's interest in reporting abuse of children:

> It is the policy of this state to provide for the protection of children who have been subject to physical, mental or emotional abuse or neglect or sexual abuse by encouraging the reporting of suspected child abuse and neglect, insuring the thorough and prompt investigation of these reports and providing preventive and rehabilitative services when appropriate to abused or neglected children and their families so that, if possible, the families can remain together without further threat to the children.

Kan. Stat. Ann. § 38-1521. See also *Clevenger v. Catholic Social Serv. of the Archdiocese of Kansas City, 21 Kan.App.2d 521, 529 (1995)* ("It is apparent that the public policy of this state is to encourage persons with information concerning possible child abuse to report this information to the proper authorities."); *Kansas State Bank & Trust Co. v. Specialized Transp. Serv., Inc., 249 Kan. 348, 372 (1991)* (purpose of reporting statute is to provide protection for children by encouraging reporting of suspected child abuse and insuring thorough and prompt investigation of such reports); *Kennedy v. Kansas Dept. of Social and Rehabilitation Serv., 26 Kan.App.2d 98 (1999)* (public policy of state is to encourage reporting of possible child abuse).

As part and parcel of this obligation, Kansas requires reporting to the state government whenever certain persons have "reason to suspect that a child has been injured as a result of . . . sexual abuse." *Kan. Stat. Ann. § 38-1522* (emphasis added). The mandatory reporting

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[1] As the phrase "consensual underage sexual activity" appears in this opinion, "consensual" means: 1) no coercion was involved; 2) no appreciable power differential existed between partners; and 3) the age difference between partners is no more than three years. "Underage" means neither of the persons involved is younger than twelve years of age and that at least one of the persons is under the age of sixteen. "Sexual activity" includes: penile-vaginal intercourse, oral sex, anal sex, and touching of another's genitalia by either sex.

[*1098] requirement extends to various medical and health care providers, school officials, law enforcement, child care service providers, social workers, counselors, and emergency response personnel. See *Kan. Stat. Ann. § 38-1522(a)* (listing the persons who are considered mandatory reporters). Such persons are required to notify the designated state agency, or, in limited circumstances, law enforcement. *Kan. Stat. Ann. § 38-1522(c), (e)*. "Willful and knowing failure to make a report" is a misdemeanor criminal offense. *Kan. Stat. Ann. § 38-1522(f)*.

Kansas law defines "sexual abuse" as "any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated." *Kan. Stat. Ann. § 38-1502(c)*. The referenced chapter criminalizes a range of sexual activities involving a minor under the age of sixteen.[2] See, e.g., *Kan. Stat. Ann. § 21-3503(a)(1)* ("any lewd fondling or touching . . . done or submitted to with the intent to arouse or to satisfy . . . sexual desires"); *Kan. Stat. Ann. § 21-3501(2)* ("oral contact . . . of the female genitalia or . . . of the male genitalia"); *Kan. Stat. Ann. § 21-3501(1)* ("any penetration of the female sex organ by a finger, the male sex organ or any object"). Based on the very language of the relevant provisions, sexual activity of minors younger than sixteen is illegal, regardless of whether the activity is voluntary or the sexual activity involves an age-mate.[3] The only exception to this criminal ban is in the case of consensual sexual contact between a person under sixteen and that person's spouse. See, e.g., *Kan. Stat. Ann. § § 21-3503(b); 21-3504(b); 21-2502(b)*. Kansas has long allowed twelve-year-old females and fourteen-year-old males to marry with parental or judicial consent, although the Kansas legislature is now considering raising these ages. *State v. Sedlack, 246 Kan. 305, 307, 787 P.2d 709, 710 (Kan. 1990)* (citing *State v. Johnson, 216 Kan. 445, 448, 532 P.2d 1325 (1975)*). Kansas law requires both parties to be at least eighteen years of age before recognizing a common law marriage as valid. *Kan. Stat. Ann. § 23-101 (b)* (2004).

The reporting statute does not define "injury."

C. Reporting Policies and Investigation

The mandatory reporter notifies the Kansas Department of Social and Rehabilitation Services (hereafter "SRS") in most instances. *Kan. Stat. Ann. § 38-1522(c)*. After the mandatory reporter notifies SRS, an intake screener collects information from the mandatory reporter about the minor, including age and social security number, alleged perpetrator and the minor's caretaker. An SRS social worker then reviews the intake report and determines whether the report should be "screened in" or "screened out" as set forth in SRS's Policy and Procedure Manual (hereafter "SRS Manual"). If a report is "screened in," SRS conducts further investigation and assessment. If the report is "screened out," SRS does not investigate, provide information to law enforcement or provide any services to a person identified in the report, according to SRS Director Sandra Hazlett. Further, SRS Regional Director Jean Hogan testified that she was unaware of any case where a criminal investigation or prosecution was initiated for a "screened-out" report.

[*1099] The SRS policy is to screen out a report when the "report concerns lifestyle' issues that do not directly harm a child or place a child in likelihood of harm." SRS Manual § 1361. The Practice Note lists several situations where the "information indicates . . . lifestyle issues which do not directly harm children or place them in imminent danger of harm." One such situation of particular significance in this case is the "mutual sexual exploration of age-mates (no force, power differential, or incest issues)." In other words, SRS screens out intake reports of consensual, voluntary sexual activities of unrelated age-mates. Cathy Hubbard, SRS Program Administrator for the Protection Unit of Child and Family Services, testified that one reason such cases are not investigated further is because it is impossible to identify which child is the victim and which is the perpetrator.

SRS has a long-standing policy of screening out consensual underage sexual activity. The parties presented no evidence to indicate that either the legislature or the executive branch (until the Kline Opinion) have attempted to change this policy.

D. Advisory Opinions

In 1992, Kansas Attorney General Robert Stephan issued an opinion defining the reporting requirements in cases of unmarried pregnant minors. In pertinent part, the opinion states:

> Whether a particular minor in a particular case has been injured as a result of sexual intercourse and a resulting pregnancy must be determined on a case-by-case basis. The fact of pregnancy certainly puts one on notice that sexual abuse (as statutorily defined) has probably occurred, and requires persons listed in *K.S.A. 1991 Supp. 38-1522(a)* to investigate further whether the child has suf-

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[2] The term "minor" as used throughout this opinion means a person who is under the age of sixteen, i.e., a person who is under the age to legally consent to sexual intercourse.

[3] Kansas Department of Social and Rehabilitation Services officials testified that they consider "age-mates" to be persons within three years of age of each other.

> fered injury, physical or emotional, as a result of such activity. If there is reason to suspect that the child has been injured, that person is then required to report such suspicions and the reasons therefore.

Kansas Att'y Gen. Op. No. 92-48, 1992 WL 613410 (April 6, 1992) (hereafter "Stephan Opinion") (emphasis added). The Stephan Opinion did not equate underage pregnancy with "inherent injury," which would automatically trigger reporting. Instead, it placed reporters on notice that the statutory standard of sexual abuse probably had occurred and that the reporter should investigate further to determine if there was injury. Thus, the Stephan Opinion acknowledged the broad statutory scope of the term "sexual abuse," but it left the reporter to determine if there was reason to suspect the child had suffered an injury requiring reporting, which is consistent in every respect with the statutory language.

Attorney General Stephan's successor, Carla Stovall, reached a similar conclusion in a letter dated June 3, 1999. However, on June 18, 2003, Kansas Attorney General Phill Kline issued an opinion seeking to significantly change the standard for reporting. His opinion, in part, states:

> Kansas law clearly provides that those who fall under the scope of the reporting requirement must report any reasonable suspicion that a child has been injured as a result of sexual abuse, which would be any time a child under the age of 16 has become pregnant. As a matter of law such child has been the victim of rape or one of the other sexual abuse crimes and such crimes are inherently injurious.

[*1100] Kansas Att'y Gen. Op. No. 2003-17, 2003 WL 21492493 (June 18, 2003) (emphasis added). In reaching this conclusion, the Attorney General looked beyond the statute's language and beyond the law of the State of Kansas. His opinion that the minor's pregnancy is "inherently injurious" eliminated the reporter's discretion to determine whether the minor had been "injured." Further, as the Attorney General's opinion acknowledges, such "inherent injury" reaches beyond a minor's pregnancy:

> We are aware that although this opinion is limited to the question posed, the consequences of the conclusion reach further. Other situations that might trigger a mandated reporter's obligation, because sexual activity of a minor becomes known, include a teenage girl or boy who seeks medical attention for a sexually transmitted disease, a teenage girl who seeks medical attention for a pregnancy, or a teenage girl seeking birth control who discloses she has already been sexually active.

Kline Opinion, 2003 WL 21492493, at *6 (emphasis added). Thus, if all illegal sexual activity of a minor is considered sexual abuse and is per se injurious, then pursuant to the Kline Opinion, a mandatory reporter must automatically report any indication that a minor is sexually active.

* * *

II. CONCLUSIONS OF LAW

A. Statutory Interpretation

The interpretation of the Kansas reporting statute is of central importance to this case. That being so, the court considered certification to the Kansas Supreme Court. Because a federal court's determination of state law is not final, the state court's interpretation on this issue would be helpful. See *United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L. Ed. 2d 822 (1971)* (noting that federal courts "lack jurisdiction authoritatively to construe state legislation").

However, such certification should be utilized only if the construction of state law is subject to doubt. See *Stenberg v. Carhart, 530 U.S. 914, 945, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000)*; *Houston v. Hill, 482 U.S. 451, 468-471, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)* (certification should not be used where "there is no uncertain question of state law"); *Grant v. Meyer, 828 F.2d 1446, 1448 n. 5 (10th Cir. 1987)* (refusing certification "since the statute is unambiguous"). As more fully discussed below, the court finds that the reporting statute is clear and unambiguous; therefore, certification is unnecessary.

As a general rule, if the language of a statute is clear in its application, the court is bound by it. *Hubbard v. United States, 514 U.S. 695, 703, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995)*. "If the statutory language is clear, this will ordinarily end the analysis." See, e.g., *United States v. Morgan, 922 F.2d 1495, 1496 (10th Cir. 1991)*, cert. denied, *501 U.S. 1207, 111 S.Ct. 2803, 115 L.Ed.2d 976 (1991)*.

As noted above, the Kansas statute mandates reporting by certain persons who have "reason to suspect that a child has been injured as a result of . . . sexual abuse." *Kan. Stat. Ann. § 38-1522(a)* (emphasis added). This language has remained unchanged since its enactment in 1982. Senate Bill No. 520, ch. 182 § 19 (1982).

Examining its separate components, the clause recognizes that a mandatory reporter must identify two

things: 1) there is reason to suspect that the child has been injured; and 2) the injury resulted from sexual abuse. The meaning of the terms "injured" and "sexual abuse" are important to the court's analysis. As mentioned above, the legislature has defined "sexual abuse" in Article 35, Chapter 21 of the Kansas Statutes. *Kan. Stat. Ann. § 38-1502(c)*. However, it has not defined "injury."

[*1102] The Stephan Opinion noted that "injury" is not defined in the code for care of children, *Kan. Stat. Ann. § 38-1501 et seq.*, which includes the reporting statute. Although some statutory provisions recognize that "injury" includes physical, mental or emotional abuse or neglect, Kan. Stat. Ann. 1991 Supp. *§ 38-1502(b)*, past SRS programs did not list pregnancy as a per se injury. After reviewing the scant legislative history and case law approaches to pregnancy, the Stephan Opinion concluded that ". . . pregnant, unmarried minors may likely display signs of emotional, physical or mental injuries which should be reported. However, we do not believe that pregnancy of an unmarried minor necessarily constitutes injury even when that term is understood in its broadest sense." (Emphasis added). Ultimately, the Stephan Opinion held that pregnancy is not itself an injury but a natural condition, so reporting a pregnancy as sexual abuse must be determined on a case-by-case basis.

The Kline Opinion, on the other hand, shifted the focus away from the condition of pregnancy and toward the underlying sexual intercourse, which it claims constitutes an inherently injurious and harmful act. Since the legislative history of the reporting statute is limited, the Kline Opinion examined insurance case law where a federal district court in this district described sexual abuse as inherently harmful.[4] The Kline Opinion states that the consensus opinion of the courts is that sexual abuse of a minor is inherently harmful. Despite the focus on case law to understand statutory language, the Kline Opinion noted that it is not the function of the courts to write legislation but only to construe statutes. .

If "injury" is the equivalent of "sexual abuse," as the Attorney General contends, then the requirement of an "injury" in the reporting statute is rendered meaningless. The statutory language does not require reporting of all illegal sexual activity of minors; it requires reporting of such sexual activity if there is "reason to suspect injury." Therefore, the statute requires reporting of illegal sexual activity that causes injury, not all illegal sexual activity. See *United States v. American Trucking Ass'ns., 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L. Ed. 1345 (1940)* ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

The legislature included a very specific phrase in the statute: "reason to suspect that a child has been injured as a result of . . . sexual abuse. . . ." This phrase vests a degree of discretion in the reporter not only to determine suspected sexual abuse, but also resulting injury. *Cortez v. Pawnee Mental Health Serv., Inc., 77 P.3d 1288, 2003 WL 22283159, at *3 (Kan. App. 2003)* (noting that the *Kan. Stat. Ann. § 38-1522* requires a "reason to suspect" before mandating reporting); *Kansas State Bank & Trust Co. v. Specialized Transp. Serv., Inc., 249 Kan. 348, 372, 819 P.2d 587, 604 (1991)* ("The decision to report suspected abuse should be based on something more than suspicion."). The legislature acknowledged that not all illegal sexual activity involving a minor necessarily results in "injury;" thus, not all unlawful sexual activity warrants reporting. The language of the statute recognizes that some illegal sexual conduct, such as consensual, voluntary sexual activity with an age-mate, falls outside the scope of the [*1103] statute, as it may not cause injury. See *BedRoc Ltd., LLC v. U.S., 541 U.S. 176, 183, 124 S.Ct. 1587, 1593, 158 L. Ed. 2d 338 (2004)* citing *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)* ("The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.' ").

Therefore, the court finds that the legislature's inclusion of the phrase "reason to suspect that a child has been injured" requires reporters to determine if there is a reason to suspect injury resulting from sexual abuse. "Injury" and "sexual abuse" are distinct concepts under the statute. Any attempt to conflate the meaning of these terms is contrary to a plain reading of this statute.

This reading is consistent with the agency policies developed following enactment of the statute, as set out in an earlier part of this opinion See *American Trucking, 310 U.S. at 544, 60 S.Ct. at 1064* ("A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, excepting as a different purpose is plainly shown.' ") (citations omitted). SRS policy acknowledges sexual abuse to be coextensive with the statutory definitions,[5]

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[4] *Troy v. Allstate Ins. Co., 789 F. Supp. 1134, 1136 (D. Kan. 1992)* (citations omitted) (noting that "it is now a generally accepted conception that harm is inherent in the act of sexually abusing a child").

[5] SRS Manual § 160 defines "sexual abuse" as "any act committed with a child that is described in, [*Kan. Stat. Ann. §] 21-3501 et seq.* and amendments thereto and the acts described in [*Kan. Stat. Ann. §] 21-3602* and [*Kan. Stat. Ann. §] 21-3603* and amendments thereto."

but it does not consider investigation of all illegal sexual activity involving a minor to be necessary or appropriate. SRS Manual § 1361. Where a report does not indicate a child "has been harmed or is likely to be harmed" or where the report concerns" lifestyle' issues that do not directly harm a child or place a child in a likelihood of harm," SRS screens out the report. SRS Manual § 1361. SRS does not extend services in cases of consensual, age-mate sexual exploration with no evidence of force, coercion, or significant age disparities. SRS Manual § 1361, Practice Notes. SRS's policy interpretation creates a distinction between broad statutory definitions and working definitions on which investigations are actually conducted.

The 1992 Stephan Opinion and the Stovall letter of 1999 both were plain language readings of the reporting statute. Both Stephan and Stovall gave full meaning to the reporting statute, requiring that the reporter have not only reason to suspect abuse, but also reason to suspect injury resulting from it. From a reporter's standpoint, as supported by their trial testimony, the reporting statute was clear, and the reporters were not only authorized, but compelled, to make a case-by-case determination as to whether injury occurred.

The Attorney General is not only allowed to, but also is required to render an opinion on his interpretation of the law under certain circumstances. See *Kan. Stat. Ann. § 75-704* (the Attorney General, when required, provides written opinions ". . . upon all questions of law submitted to him or her by the legislature, or either branch thereof, or by the governor, secretary of state, state treasurer, state board of education, or commissioner of insurance.");*Kan. Stat. Ann. § 77-420* (directing Attorney General review of any state agency rule or regulation). However, true interpretation of law is a judicial function, not an executive or legislative function. *Board of Comm'rs v. General Sec. Corp., 157 Kan. 64, 138 P.2d 479, 479 (Kan. 1943)*. An executive branch official, such as the Attorney General, cannot effectively amend [*1104] legislation by reinterpreting its language through an "advisory" opinion. See *In re Allen, Gibbs & Houlik, L.C., 29 Kan.App.2d 537, 545, 29 P.3d 431, 439 (Kan. App. 2001)* ("A statute should not be so read as to add that which is not readily found therein or to read out what as a matter [of] ordinary English language is in it." (citations omitted)). The legislature has not chosen to delete the "reason to suspect that a child has been injured" language from the reporting statute; the Attorney General cannot amend the statute by an advisory opinion See *State ex rel. Stephan v. Finney, 251 Kan. 559, 578, 836 P.2d 1169, 1182 (Kan. 1992)* ("And in accordance with the general principles of the separation of powers, the executive department cannot generally usurp or exercise judicial or legislative power. . . ."). In view of both the statutory language and the long-standing interpretation of the reporting statute, the Kline Opinion effectively amends the reporting statute by eliminating the discretion the legislature gave mandatory reporters to determine if there had been an injury. Under the Kline Opinion, the mandatory reporter has no discretion with respect to reporting illegal sexual activity of a minor,[6] in contravention of the plain language of the statute and legislative intent as evidenced in the statute's clear and unambiguous language. *American Trucking, 310 U.S. at 543, 60 S.Ct. at 1063*. The court's interpretation neither reads phantom language into the statute, nor cuts from the statute language the legislature deliberately placed there.

Accordingly, the court holds that the Kline Opinion contradicts the plain meaning of the statute for two related reasons. First, the Kline Opinion inappropriately strikes the legislature's placement of discretion in the hands of licensed professionals by ignoring the phrase "reason to suspect that a child has been injured" as a result of sexual abuse. Second, the opinion wrongly redefines the common understanding of both state agencies and mandatory reporters by denoting all sexual activity to be "inherently injurious."

B. Injunctive Relief

Plaintiffs present four constitutional claims as a basis for declaratory and injunctive relief against the reporting statute's application to incidents of consensual sexual activity between persons under the age of sixteen and persons of similar age where mandatory reporters conclude in their professional judgment the sexual activity had not caused the minor any injury. Plaintiffs' claims include: 1) informational privacy; 2) decisional privacy; 3) equal protection; and 4) vagueness. The Tenth Circuit has already recognized that plaintiffs have standing, so the court will not revisit this issue. *Aid for Women, No. 04-3310, (10th Cir. Jan. 26, 2006)*. The statute is not vague, does not implicate equal protection concerns, and does not invade decisional privacy. Thus, the court will only address plaintiffs' informational privacy claim.

To grant a permanent injunction, a district court must find that four requirements have been satisfied: "1) actual success on the merits; 2) irreparable harm unless the injunction is issued; 3) the threatened injury out-

[6] What must be reported depends on who you ask. See infra pp. 21-22.

weighs the harm that the injunction may cause the opposing parties; and 4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1180 (10th Cir. 2003)*. Having heard and reviewed the trial testimony and exhibits, the court finds that plaintiffs have met the four requirements and are entitled to permanent injunctive [*1105] relief on the claim of violation of the right to informational privacy.

1. Actual Success on the Merits

The narrow constitutional issue before this court is whether minor patients have a right to informational privacy concerning consensual sexual activity with an agemate where there is no evidence of force, coercion, or power differential. Plaintiffs argue that, as Dr. Robert Blum[7] testified, confidentiality is a cornerstone of treating adolescents and that automatic reporting of all illegal, but non-injurious, sexual activity will deter their minor patients' access to health care. Defendants argue that the state interest in reporting of sexual abuse trumps a minor's privacy interests.

Although the United States Constitution does not explicitly recognize a right to privacy, the Supreme Court has found certain "zones of privacy" in the amendments to the Constitution. See *Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891)*; *Roe v. Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)*. Within the zone of privacy are two types of privacy interests: 1) the individual interest in avoiding disclosure of personal matters; and 2) the interest in independence in making certain kinds of important decisions. *Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)* (citations omitted)). The Tenth Circuit recognizes a right to informational privacy concerning personal sexual matters and confidential medical information. *Livsey v. Salt Lake County, 275 F.3d 952, 956 (10th Cir. 2001)* (if information is "highly personal or intimate," an individual's expectation of privacy is legitimate); *ALA v. West Valley City, 26 F.3d 989, 990 (10th Cir. 1994)* ("There is no dispute that confidential medical information is entitled to constitutional privacy protection.") (citations omitted).

An individual's right to informational privacy may be implicated when the government compels disclosure of that individual's personal sexual or health-related information to the government and/or to other third parties. *Eastwood v. Department of Corrections, 846 F.2d 627, 630-31 (10th Cir. 1988)*; *ALA, 26 F.3d at 990*. Compelled disclosure may violate an individual's right to informational privacy unless the disclosure serves a compelling state interest in the least intrusive manner. *Sheets v. Salt Lake County, 45 F.3d 1383, 1387 (10th Cir. 1995)*. To determine whether information is of such a personal nature that it demands constitutional protection, the court considers: "1) if the party asserting the right has a legitimate expectation of privacy; 2) if disclosure serves a compelling state interest; and 3) if disclosure can be made in the least intrusive manner." *Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981)*. A "legitimate expectation of privacy," is based "at least in part, upon the intimate or otherwise personal nature of the material." *Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986)* (emphasis added). See also *United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980)* (medical records protected). "It is obviously not easy to define the limits of an individual's right to privacy in the context of intimate personal matters." *Livsey, 275 F.3d at 956*. However, the court will uphold legislation enacted under the state's broad police powers, which takes into consideration privacy [*1106] concerns, and is the product of "orderly and rational legislative decision." *Whalen, 429 U.S. at 597*.

The Supreme Court and this Circuit have extended to minors the constitutional right to privacy, including the right of informational privacy. See *Application of Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)* ("neither the *Fourteenth Amendment* nor the *Bill of Rights* is for adults alone"); *Aid for Women v. Foulston, 441 F.3d 1101, No. 04-3310 (10th Cir. Jan 27, 2006)*. However, in a variety of contexts the powor of the state to control or regulate the conduct of children has been found to reach beyond the scope of its power over adults. *Carey v. Population Serv. Int'l, 431 U.S. 678, 692, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977)*.

For the narrow issue of whether mandatory reporting of consensual sexual activity of minors violates a minor's informational privacy rights, the court begins with a three-prong analysis: 1) is there is a legitimate expectation of privacy; 2) does disclosure serve a compelling state interest; and 3) can disclosure be made in the least intrusive manner? *Lichtenstein, 660 F.2d at 435*. The court finds the Kansas reporting statute encompasses these elements. First, the statute recognizes an expectation of privacy in conduct when there is no reason to suspect injury as a result of abuse. Second, the state clearly has a compelling interest in protecting children from abuse, but, as the statute indicates, this interest is limited to circumstances when there is a reason to suspect injury. Thus, a minor's privacy ends where the

[7] Dr. Blum is professor and chair of the Department of Population and Family Health Sciences at Johns Hopkins University, Bloomberg School of Public Health, and former consultant for the World Health Organization.

state's interest in protecting the minor begins. Finally, the statute recognizes that privacy should be breached only when injury to the child is reasonably suspected. By its very terms, the statute recognizes an element of privacy in mandatory reporting of unlawful sexual activity of a minor.

2. Irreparable Harm

Plaintiffs provided credible evidence of irreparable harm at trial. First, the Kline Opinion places plaintiffs on notice that they may be prosecuted for not reporting illegal sexual activity of minors. While everyone agrees that the Attorney General's Opinion does not bind any of the district or county attorneys in Kansas, it creates an untenable situation for reporters. Although not expressly given concurrent authority with county and district attorneys to commence prosecutions for failure to report under *Kan. Stat. Ann. § 38-1522*, the Kansas Supreme Court has long held that "the attorney general's powers are as broad as the common law unless restricted or modified by statute." *Memorial Hosp. Ass'n, Inc. v. Knutson, 239 Kan. 663, 667, 722 P.2d 1093 (1986)*, citing *State v. Finch, 128 Kan. 665, 280 P. 910 (1929)*. Thus, it appears that even if a county or district attorney chose to interpret the reporting statute in a manner consistent with the plain language of the statute, but inconsistent with the Kline Opinion, the Attorney General has the power to commence a prosecution for failure to report. Several plaintiffs testified that a conviction for failure to report could result in the loss of licensure.

Second, considering the Kline Opinion, plaintiffs do not have fair notice of what is reportable under the statute. For nearly three years, the acts which would give rise to reporting have been in dispute. Although the Kline Opinion was triggered by a limited question concerning pregnant minors, the Opinion equated all illegal sexual activity of a minor with per se injurious sexual abuse. Thus, according to the Kline Opinion, all illegal sexual activity is reportable when a mandatory reporter [*1107] suspects it has occurred. Attorney General Kline took this position in his deposition, testifying that all illegal sexual activity would be reportable.

At trial, Assistant Attorney General Camille Nohe, representing Attorney General Kline, claimed for the first time the Kline Opinion was narrower than previously suggested. This was particularly noteworthy, as Ms. Nohe is the Kline Opinion's primary author. She divided sexual activities into two categories: 1) significant sexual conduct, and 2) less significant sexual conduct. Ms. Nohe went on to assert that the Attorney General sought reporting only of significant sexual conduct, which she limited to oral sex, penile/vaginal intercourse and anal sex. Counsel did not consider "less significant sexual conduct," such as deep kissing and lewd fondling or touching, to be reportable. However, in his trial testimony the Attorney General contradicted his own counsel's position by stating he was uncertain whether oral sex by fifteen-year-olds would have to be reported. Ultimately, the Attorney-General testified that "whatever the statute requires" should be reported.

District Attorney Foulston had a view different from any of those taken by the Attorney General's office.[8] First, Ms. Foulston testified that she had always interpreted the reporting statute to cover a broad range of activities. In her view, notwithstanding the position espoused in the Kline Opinion, the fondling of a fifteen-year-old girl's breasts would be reportable under all circumstances. This contradicts Ms. Nohe's statement that such fondling would be considered less significant conduct. So mandatory reporters are left to try to sort out what must be reported and what may remain confidential. The difficulties are obvious.

Third, based upon the testimony and other evidence, serious questions arise as to whether minors will continue to seek timely medical care and psychological services if all illegal sexual activity is automatically reported. As the evidence established, a fourteen-year-old female who is pregnant by her long-time fifteen-year-old boyfriend presents a very different scenario to a health care provider than does a fourteen-year-old pregnant female who presents to a doctor with no explanation for her pregnancy and who does not want to discuss her family situation. The legislature recognized the difference by vesting the reporter with discretion in determining whether "injury" had occurred because of sexual or any other kind of abuse. How is the best interest of the child served by not seeking health care in either circumstance? Clearly, it is not.

Since medical and psychological care providers have an obligation to disclose the scope of confidentiality at the onset of treatment, underage minors will be aware of the limits of confidentiality and the potential for state notification of underage sexual activity. Dr. Stanley Henshaw, sociologist and senior fellow at the Alan Guttmacher Institute, presented evidence concerning the effects of state reporting and parental notification on a minor's seeking treatment. At the outset, Dr. Henshaw was clear that a majority of parents are involved in their child's decision to seek contraception. However, there is

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[8] Those included: 1) the express language of the Kline Opinion, as well as the Attorney General's deposition testimony; 2) Ms. Nohe's position as expressed at trial; and 3) Attorney General Kline's views as expressed in his trial testimony.

a substantial decline in seeking medical care when service providers require parental involvement. For example, a Connecticut study found that the requirement of parental involvement in a minor's decision to [*1108] seek HIV testing decreased the number of young people seeking testing. Without parental involvement, twice as many minors were willing to seek HIV testing. A United Kingdom study found that requiring parental involvement decreased by thirty percent the number of young people seeking contraception. In a survey conducted in Wisconsin and published in the Journal of the American Medical Association, about half of minors under the age of eighteen reported that they would stop using a clinic if parental involvement was required. Approximately fifty-seven percent said they would use condoms instead of the pill, twenty-nine percent said they would use the withdrawal method, twenty-nine percent said they would have unprotected sex, and one percent said they would switch to oral sex.[9]

Dr. Henshaw testified that the consequences of reporting all sexual activity to a state agency would be different from the studies on parental notification and involvement in a minor's use of contraceptives or HIV testing. Mandatory reporting of all sexual activity to a state agency can be more frightening given the potential for criminal liability. If minors are told that there may be an investigation, they may be more inhibited in seeking care. Further, minors who otherwise would seek medical care with their parents' involvement may be deterred by the potential to involve their parents in a criminal investigation.

Automatic mandatory reporting of illegal sexual activity involving a minor will change the nature of the relationship between a health care provider and the minor patient to some degree. Based on studies that evaluated the effects of parental notification, there will be a significant decrease in minors seeking care and treatment related to sexual activity. In the context of a reporting statute, the effects may be greater since a state agency will be notified of the alleged "sexual abuse." According to several witnesses, in the long-term, forgoing or delaying medical care leads to risks to minors including the worsening of existing medical conditions and the spreading of undiagnosed diseases. The Wisconsin study indicates that at a minimum, young persons report that they will engage in riskier behavior if confidential care is not available. The cumulative, credible medical evidence presented at trial indicates that minors face irreparable harm in the face of a reporting statute that requires automatic disclosure of all illegal sexual activity.[10]

Finally, beyond the irreparable harm that all minors may be subject to, evidence supports a finding that mandatory reporting of all illegal underage sexual activity will harm those minors who are actual victims of "sexual abuse" as defined by SRS's working definition. SRS Director Sandra Hazlett stated that the Kline Opinion would increase the number of intake reports, increasing the workload without a corresponding increase in funding. Besides [*1109] overwhelming state agencies, reporting all sexual activity as sexual abuse tends to trivialize actual sexual abuse, according to Dr. Nancy Kellogg, pediatrician and professor at the University of Texas Health Science Center at San Antonio, Texas.[11]

Dr. Henshaw provided one concrete example of the consequence of applying a zero-tolerance policy in a

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[9] The total does not equal 100% because minors could respond with more than one answer.

[10] Defendants' expert, Dr. Allen Josephson, professor of psychiatry and associate chair of Child and Adolescent Programs in the Department of Psychiatry and Behavioral Sciences at the University of Louisville, acknowledged that some minors may not seek treatment in light of mandatory reporting. Another of defendants' experts, Dr. Elizabeth Shadigian, a physician specializing in obstetrics and gynecology and clinical associate professor at the University of Michigan Department of Obstetrics and Gynecology, testified that reporting illegal sexual activity might do more harm to a minor than any injury from the sexual activity itself. Both Dr. Josephson's and Dr. Shadigian's testimony are discussed in more detail below.

[11] The court finds Dr. Kellogg's testimony to be particularly insightful and compelling. Her experience extends across the entire spectrum of victims of sexual abuse -- she has examined over 8,500 persons in her practice and is widely published in peer-reviewed publications. Even Dr. Josephson testified that if Dr. Kellogg was doing every examination, he might be more comfortable with discretionary reporting. Dr. Kellogg testified, inter alia: 1) not all underage sexual activity, including intercourse, is injurious; 2) appropriate sexual activity, which will vary from person to person, is part of a normal person's development; 3) she takes whatever time she needs in conducting clinical interviews with her patients; and 4) maintaining discretion in reporting to determine if injury has occurred is important, as there are differences in patients and their situations.

state. He testified that the California legislature enacted a reporting statute that took an approach similar to that espoused in the Kline Opinion. California's state child protective services agency was so overwhelmed with reports that the legislature had to amend the statute one year later, claiming it was not what the legislature intended. Over-reporting made it difficult for the state to address legitimate cases of child abuse. Dr. Henshaw was aware of no other state that has the broad, zero-tolerance approach the Kline Opinion proposes.

For the reasons set forth above, the court finds that mandatory reporters, all minors, minor victims of sexual abuse, and SRS will suffer injury with no adequate means of mitigation if all consensual underage sexual activity must be reported. Plaintiffs therefore satisfy the irreparable harm requirement.

3. Threatened Injury Outweighs the Harm on Opposing Parties

Does the threatened injury outweigh the harm that the injunction may cause the opposing parties? The short answer is yes.

As set out in the foregoing section of this opinion, there is clear risk that mandatory reporting will reduce the number of minors seeking care, increase workload on SRS, require reporting of activities that SRS will not investigate, and may even lead to increased health risk to minors because they will delay or forego health care.

Because many licensed professionals play a dual role as both mandatory reporters and care providers, the confidentiality between licensed professionals and patients should be breached only sparingly. Dr. Robert Blum testified that confidentiality is the "cornerstone" of the doctor-patient relationship. If doctors have to breach confidentiality when a minor is seeking contraception or inquiring about a sexually transmitted disease ("STD"), the doctor-patient relationship becomes adversarial rather than cooperative. Under such circumstances, the doctor may be less able to treat the minor or provide information. It may lead to the unintended consequence of minors avoiding treatment until later stages of a condition, increasing risk to themselves and others. Minors may also be less willing to seek general information from health care providers if they fear they will be reported.

Dr. Stanley Henshaw's and Sandra Hazlett's testimony, as set out in the "irreparable injury" section of this opinion, also address the question of threatened harm.

[*1110] The court finds the testimony of Dr. Blum, Dr. Henshaw, Ms. Hazlett and Dr. Kellogg credible and gives great weight to their testimony.

Defendants' arguments rest on the state's interest in the reporting of sexual abuse. Their experts testified that sexual activity is inherently injurious in a number of ways. Dr. Allen Josephson testified that adolescents are immature and have difficulty assessing risk of sexual activity, such as STDs and pregnancy. Dr. Josephson stated that sexually active minors are at risk for depression, and there is a strong association with many possible contributing factors, one of which is sexual activity. When confronted with SRS's policy of screening out instances of consensual sexual activity, Dr. Josephson responded that this approach has a high risk of missing children that need to be protected and have resources offered to them.

Yet, while claiming to believe all underage sexual activity is inherently injurious, Dr. Josephson personally does not report all such activity. He uses his clinical judgment in determining whether certain types of penetrative and non-penetrative acts should be reported. In fact, he testified that he could not recall having reported consensual sexual activity between underage persons other than intercourse.

He also testified, quoting from his deposition as presented at trial, that reporting all such activity "would almost certainly involve parents and other systems in ways that . . . kids would be uncomfortable with." He subsequently asserted that while reporting sexual activity among underage adolescents might cause some of them to reassess their behavior, that "many of them would be ambivalent about [seeking health care knowing their activities would be reported]" and that "some might decide not to see the doctor."

In further apparent contradiction to at least part of his trial testimony, Dr. Josephson does not support mandatory reporting of all underage consensual genital fondling or digital penetration, both of which are illegal and must be reported under the Kline Opinion. Instead, he believes it is important to retain clinical judgment in those areas. He would limit mandatory reporting of consensual underage sexual activities to sexual intercourse, including oral sex.

Dr. Josephson also was of the view that persons under age sixteen should not be able to obtain prenatal care or contraception, including condoms, without parental consent. In fact, he testified that he would refuse prenatal care to a female under the age of sixteen if he felt she would follow through and obtain care elsewhere, but he would provide such care if he felt she likely would not follow through with another physician.

Finally, Dr. Josephson testified that over the course of considering becoming involved in this case, he had gone through "an interesting kind of journey" with Dr.

Vincent Rue.[12] After visiting with Dr. Rue and reviewing materials, Dr. Josephson changed his position from viewing such reporting as an intrusion on the patient's privacy to a means of involving the family in these matters. At that point, he agreed to become involved in this case.

The court finds Dr. Josephson's testimony to be inconsistent and therefore unreliable. In fact, his own practice and opinion as to what should be reported is not as [*1111] broad as the reporting requirements of the Kline Opinion.

Defendants' expert Dr. Kirk Johnson, senior policy analyst at the Heritage Foundation and adjunct professor in the School of Public Policy at George Mason University, presented evidence of a correlation between injury and early sexual debut. However, Dr. Johnson's statistical analysis did not include multivariant controls, and his work has not been published in peer-reviewed journals. He based his conclusions on incomplete data, and he avoided answering basic questions on cross-examination. Thus, the court did not find his testimony, research and analysis to be helpful.

Dr. Elizabeth Shadigian also asserted that sexual activity is inherently injurious to minors in both physical and psychological ways. With respect to persons under the age of sixteen, Dr. Shadigian argued that age alone gives rise to a suspicion of psychological injury. She also claimed on direct examination that minors have a greater chance of becoming pregnant than adults, but admitted on cross-examination that minors have the same chance if they use contraception correctly.

Dr. Shadigian spent some time describing what she called her "world view." For example, she testified that there is always a power differential between a man and a woman, and she indicated it was more pronounced among young persons. Her testimony inferred that women, particularly young women, cannot consent to sex; they can only submit to it. Thus, she claims that consensual sexual activity is a factual impossibility for an underage female. She also testified the harms of underage sex outweighed the benefits; this testimony was surprising only because no other witness had suggested any benefits at all to underage sex. When asked about the "benefits," Dr. Shadigian suggested that "spontaneous orgasm" was one benefit.

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[12] Dr. Rue was hired by the Attorney General's office to work in some manner on this case, although the exact nature of his involvement was not fully explained. From the testimony, it is clear that Dr. Rue was involved significantly in assembling the team of defendants' experts, although he himself did not testify.

Dr. Shadigian also testified that she does not report all illegal sexual activity of her underage patients, all of whom are female. She notes that one reason she does not report all such activity is because her reporting statute is different from the Kansas statute. As a second reason, she expressed concerns that the legal system might do more harm to a patient than the injury her patient suffered, whatever that may be.

Dr. Shadigian's testimony is contradictory and overly general. With respect to all persons under the age of sixteen, her position on the male-female power differential does not allow for any kind of consensual sexual activity involving a female in the first instance, a position unsupported by any other witness. Further, she would not permit others to allow for differences in emotional development among such persons, yet she does so in her own practice. Thus, the court rejects her testimony as inconsistent and not credible.

As noted in the preceding paragraphs, despite defendants' experts' testimony that sexual activity of minors is inherently injurious, both Dr. Shadigian and Dr. Josephson testified that they personally do not report all cases of underage sexual activity. These experts rested their assertion in part on the fact that their states do not require as broad reporting as Kansas, though none claimed to be experts on what [*1112] Kansas or their home state law requires. To provide sweeping generalizations on what constitutes an injury and then testify that they do not apply a similar standard in their own clinical practices undermines these doctors' credibility, particularly when the doctors claim early sexual debut has considerable dire consequences.

Defendants' expert analyses lead to the following question: if early sexual activity is inherently injurious, then why does SRS screen out any reports of early sexual activity? If young people are per se "injured" by sexual activity, state-provided services should be essential, yet this is not SRS's practice. SRS officials testified that when the sexual activity with an age-mate is consensual, they screen out the reports and provide no services to the minor because they do not perceive a harm, i.e., an injury. As discussed above, SRS has created a distinction between the broad statutory requirements as opposed to the narrower working definition, only the latter warranting state intervention. It is a distinction that the legislature has not attempted to amend since the enactment of the mandatory reporting statute and the development of SRS policy. And, as noted, the defendants' experts apply the distinction in their own practices.

The court also notes that both plaintiffs' and defendants' experts indicated that they tended to over-report suspected sexual abuse. Dr. Lazoritz argued that there was "rampant" under-reporting but then testified that in

his experience he tends to over-report. Attorney General Kline testified that he believed sexual abuse was under-reported in Kansas, but knew of only two clinics in the state that are even suspected of under-reporting. He declined to testify further since this investigation is under seal.

With limited or no evidence that the state's interest will be affected, the court *finds* the threatened injury outweighs the harm imposed on the opposing parties. The state may continue to enforce its laws as they are written.

4. Injunction Will Not Adversely Affect the Public Interest

This injunction action is limited in its scope to a determination of whether consensual sexual activity of underage minors is reportable based on a number of constitutional challenges. The state unquestionably has an interest in enforcing its criminal law, in protecting minors, and in promoting the health and welfare of the citizens of this state. As part of this obligation, the state enacted its mandatory [*1113] reporting statute in 1982 to assist in capturing sexual perpetrators, protecting minors from sexual abuse, and preventing a public health crisis through intervention in instances of sexual abuse. For the reasons already mentioned in prior sections, the court finds that this injunction will not adversely affect the public interest.

First, there is no indication that under-reporting is or has been a problem under the Kansas statute. As set out above, Attorney General Kline testified he believed sexual abuse was under-reported, but suspected only two clinics of violations. Other witnesses for the defendants also claimed to believe sexual abuse was under-reported, but had not a shred of supporting evidence. On the other hand, each person who addressed the issue of over-reporting vs. under-reporting indicated that when in question, one should report. And each witness claimed to do so.

The evidence as to prosecutions is also enlightening. The Sedgwick County District Attorney, who has held office for approximately seventeen years, testified that she had never prosecuted anyone for not reporting abuse. In fact, she has reviewed only one non-reporting incident for consideration of prosecution during that time; she declined to pursue it. Additionally, Kansas Assistant Attorney General Kevin Graham, who is in charge of prosecuting non-reporting of sexual abuse in the Kansas prison system, has yet to bring a case.[13] Thus, if under-reporting has been a problem in Kansas, it is not reflected in the number of cases in which prosecution was considered.

Second, as the court has already noted, there is no indication that the legislature has perceived under-reporting as a problem since there has been no change to the reporting statute since its enactment. Even during Attorney General Kline's eight-year tenure in the state legislature, he did not address perceived problems with under-reporting. Neither has the legislature has made any effort to amend or modify SRS's intake and screening policy.

The state has a strong interest in protecting minors and promoting public health. But this interest is at its ebb in the present action, where the Attorney General's Opinion goes beyond the scope of the reporting statute, potentially criminalizing the decisions health care providers make in utmost good faith, and solely with the physical and emotional health of their patients in mind. The Attorney General's over-expansive interpretation of the reporting statute not only fails to serve the public interest, it actually serves to undermine it by causing minors to avoid seeking medical services and potentially overburdening SRS.

The court's interpretation of the reporting statute promotes the public interest; injunctive relief advances the interests of society in general. The core of the reporting statute -- providing for the detection and protection of children suffering from incest or abusive sexual activity -- is unaffected by this opinion. Such acts were and will remain subject to mandatory reporting. But the statute was not intended to cover consensual sexual activity between age-mates that do not result in injury. Injunctive relief barring the Attorney General from instituting a per se rule that all illegal sexual activity involving a minor is injurious advances the public interest in protecting children by allowing reporting, administrative investigation, and law enforcement efforts to be concentrated on the legislature's real target -- true sexual [*1114] abuse. Injunctive relief also will prevent dissipation of scarce public resources on clear cases of consensual, same-age sexual relations, and it will avoid creating a government storage house of reported consensual sexual activity between age-mates.

Based on the court's reading of the reporting statute and the evidence presented at trial, the court finds that plaintiffs face irreparable harm, the threatened injury outweighs the harm the injunction may cause the opposing party, and this injunction will not hurt the public interest. By granting the injunction, the court maintains the statute's plain meaning as well as the historical interpre-

[13] Assistant AG Graham did testify that he has been made aware of sexual abuse in the prison system, and he is dissatisfied with the level of prison reporting.

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
DATE: 28 MAY 2004
CASE NO: 7728/2000

IN THE MATTER BETWEEN:

THE CHRISTIAN LAWYERS' ASSOCIATION	PLAINTIFF
AND	
NATIONAL MINISTER OF HEALTH	FIRST DEFENDANT
PREMIER OF THE PROVINCE OF GAUTENG	SECOND DEFENDANT
MEMBER OF THE EXECUTIVE COUNCIL OF HELATH	THIRD DEFENDANT
THE REPRODUCTIVE RIGHTS ALLIANCE	AMICUS CURIAE

JUDGMENT

MOJAPELO, J

Introduction

This is a judgment on an exception filed by the defendants against the plaintiff's particulars of claim on the grounds that the particulars of claim do not disclose a cause of action.

The plaintiff entitled an action in which it seeks an order declaring sections 5(2) and 5(3) read with the definition of "woman" in sections 1 and 5(1) of the Choice on Termination of Pregnancy Act 92 of 1998 ("the Choice Act") to be unconstitutional and an order striking down sections 5(2) and 5(3) and the definition of "woman" in section 1 of the Choice Act.

The provisions of the Act and Constitution

In section 1 of the Choice Act the word "woman" is defined as follows:

> " 'woman' means any female person of any age"

Subsections 5(1), 5(2) and 5(3) provide as follows:

> "(1) Subject to the provisions of (4) and (5) the termination of a pregnancy may only take place with the informed consent of the pregnant woman .
>
> (2) Notwithstanding any other law or the common law, but subject to the provisions of subsection (4) and (5), no consent other than that of the

pregnant woman shall be required for the termination of a pregnancy.

(3) In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: provided that the termination of the pregnancy shall not be denied because such minor chooses not consult them."

Subsections (4) and (5) deal with exceptional cases such as the case of a woman who is severely mentally disabled, is in a state of continuous unconsciousness or where the medical practitioners involved are of the opinion that continued pregnancy would pose the risk of injuries to the woman's physical or mental health, where there exist substantial risk that the fetus would suffer from severe physical or mental abnormality, where continued pregnancy would endanger the woman's life, result in severe malformation of the fetus or pose a risk of injuries to the fetus. The provisions of both subsections are therefore not in issue in the present case.

The constitutional pegs on which the plaintiff hangs its case are the following sections of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), read with section 7(1): claim A – section 28(1)(b), 28(1)(d), claim B – sections 28(2) and claim C – section 9(1).

The relevant sections of the Constitution read as follows:

Claim A-

Section 28(1)(b):

"Every child has the right to family care or parent care"

Section 28(1)(d):

"Everyone has the right to be protected from mal-treatment, neglect, abuse or degradation"

Claim B –

Section 28(2):

"A child's best interests are of paramount importance in every matter concerning the child."

Claim C

Section 9(1):

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

In addition to the above provisions section 7(1) of the Constitution provides as follows that:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The essence of the claim and the Exception

The provisions of the Choice Act that the plaintiff's claim is directed at are the provisions that allow women under the age of 18 years to choose to have their pregnancies terminated without (a) the consent of the parents or guardians, (b) consulting the parent' or guardians, (c) first undergoing counselling, and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are for the sake of convenience collectively hereafter referred to as parental consent control.

It is the plaintiff's case in essence that young women or girls below that of age are not capable on their own, that is, without parental consent control to take an informed decision whether or not to have an abortion which serves their best interests.

(f) The termination may only be performed at a facility designated by the Minister (section 3(1)).

(g) A pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife who has completed a prescribed course consent thereto (proviso to section 5).

The Choice Act also has the following ancillary provisions regulating the termination of the pregnancy: The State is obliged to promote the provision of counselling to women before and after the termination of pregnancy. The counselling is, however, not mandatory or directive (section 4). Young women (below the age of 18 years) are encouraged to consult with their parents, guardians, family members or friends before termination of their pregnancy. The medical practitioner or midwife who performs the termination, must advise them to do so before their pregnancy is terminated. The actual final decision is, however, left to them to decide whether or not to consult with their parents, guardians, family members and/or friends. (section 5(3)). The medical practitioner or midwife who performs a termination, must inform the woman of their rights under the Choice act (section 6).

It is therefore not as if the legislature left the termination of pregnancy totally unregulated. The cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Choice Act is the requirement of her informed consent. No women, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so.

I accordingly now turn to consider the meaning and effect of the requirement of informed consent.

The requirement of "informed consent" at law:

The Choice Act does not define or elaborate on what is meant by the requirement of "informed consent" for the termination of pregnancy.

The concept is, however, not alien to our common law. It forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. More particularly, day to day invasive medical treatment that would have otherwise have constituted a violation of a patient's right to privacy and personal integrity, is justified

and it is lawful only because as a requirement of the law, it is performed with the patient's informed consent. See *Van Wyk v Lewis* 1924 AD 438 at 451; *Castell v Greef* 1994 (4) SA 408 (C) at 425; *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300; Neethling, Potgieter and Visser: *Law of Delict*, 3rd ed pp100-101; Neethling: *Persoonlikheidsreg*, 4th ed pp121-122.

It has come to be settled in our law that in this context, the informed consent requirement rests on three independent legs of knowledge, appreciation and consent.

The courts have often endorsed the following statements by *INNES, CJ*, in *Waring & Gillow v Sherborne* 1904 TS 340 at 344 to found a defence of consent:

> "... it must be clearly shown that the risk was known, that it was realised, that it was voluntary undertaken. Knowledge, appreciation, consent – these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent. ..."

The requirement of "knowledge" means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risk". See *Castell v De Greef (supra)* at 425, *Neethling Potgieter & Visser* (op cit) at 100-101 and *Neethling* (op cit) at 121-122.

The requirement of "appreciation" implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy, "must also comprehend and understand the nature and extent of the harm or risk." See *Castell v De Greef* (*supra* at 425); *Neethling, Potgieter & Visser* (op cit) at 101 and *Neethling* (op cit) at 122.

The last requirement of "consent", means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its consequences". *Castell v De Greef, (supra),* at 425, *Neethling Potgieter & Visser,* (op cit) at 120 and *Neethling* (op cit) at 122.

The capacity to consent

In this context, valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will "capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to." *Van Heerden and Others Boberg's Law of Persons and the Family*, 2nd ed at p849.

Young and immature children do not have the capacity or real knowledge, appreciation and consent. *S v Marx* 1962 (1) SA 848 (N) at 854. A girl has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity, only if she is, "in fact mature enough to form an intelligent will" (*Van Heerden and Others op cit* at 850) and is "verstandelik ryp genoeg om die implikasie van (haar) handelinge te besef ..." (*Neetling, Potgieter &Visser op cit* at 100, *Neethling op cit* at 212).

Within the context of the Choice Act, actual capacity to give informed consent, as determined in each and every case by the medical practitioner based on the emotional and intellectual maturity of the

individual concerned and not arbitrarily predetermined and inflexible age as determined by a number of years is the distinguishing line between those who may access the option to terminate their pregnancies unassisted on the one hand and those who require assistance on the other.

The critical portions of plaintiff's particulars of claim:

As I have already stated above the plaintiff structured its claims into fine parts: an introduction (paragraphs 1-22), claim A (paragraphs 23-25), claim B (paragraphs 26-28), claim C (paragraphs 29-32) and conclusion (paragraphs 33-35).

In the particulars of claim the plaintiff makes a number of allegations in paragraphs 5 to 18 about *inter alia* the effect of the termination of pregnancy on a girl, the vulnerability of the girl when making such decisions, certain changes in the developmental stages of a girl and characteristics of such changes. In paragraphs 19 to 20 the plaintiff makes the following allegations which have far reaching consequences/implications for its claim –

> "19. Given paragraphs 16 to 18 above, a girl is not in a position to make an informed decision about whether

or not to have an abortion which serves her best interests without the assistance and/or guidance of her parents/guardian and/or counsellor."

20. Given paragraphs 16 to 18 above, a girl:

20.1 is unablefully to appreciate the need for and value of parental care and support, and the assistance and/or guidance of a counsellor;

20.2 is not capable of giving consent as required in section 5(1) of the Act."

These introductory paragraphs of the plaintiff's particulars of claim then conclude as follows in paragraph 21:

"21. Given paragraphs 10 to 20 above a pregnant girl requires special protection by the state, *inter alia* by ensuring that when enacting of legislation which affects her, she is not deprived in any way of the support, guidance and care of her parents/guardian and/or counsellor."

It is on the basis of these conclusionary factual allegations that the plaintiff concludes in its particulars of claim in paragraph 23 to 35 that the Choice Act is in conflict with the Constitution in the specific respects specified in claims A, B and C.

The essence of the various causes of action relied upon by the plaintiff is that the provisions under attack are unconstitutional because they permit a woman under the age of 18 years to choose to have her pregnancy terminated without (a) the consent of her parents or guardian, (b) consulting her parents for guidance, (c) first undergoing counselling, and (d) without reflecting on her decision for a prescribed period, in brief without parental consent or control.

Back to informed consent

As already mentioned above the Act makes informed consent, and not age, the cornerstone of its regulation of access to termination of pregnancy. Subject to the provisions of subsections (4) and (5), of the Choice Act, the termination of a pregnancy may only take place with the informed consent of the pregnant woman. Notwithstanding any other law but subject to the provisions of the said subsections, no consent other than that of the pregnant woman shall be required for the termination of the

pregnancy. The Act is, however, not totally blind to the question of minority or immaturity. In the case of a pregnant minor, a medical practitioner or registered midwife, is enjoined in peremptory language to advise such minor to consult with her parents, guardian, family members or friends, before the pregnancy is terminated. This is subject to the proviso that the termination of pregnancy shall not be denied because such minor should choose not to consult with them. A medical practitioner or registered midwife who is not satisfied that the pregnant minor has the capacity to give informed consent should therefore not perform the termination of pregnancy on such minor. This of course applies equally to pregnant adults. If in such a case the medical practitioner or registered midwife performs the termination of pregnancy, then his or her conduct will not be in accordance with the Choice Act and would therefore be unlawful. Informed consent required by the Act is therefore a consent that can be given by each and every person having the capacity to do so. It is a threshold with both intellectual and emotional attributes and those performing termination of pregnancy operations have to satisfy themselves that it is met.

Implications

The plaintiff alleges in paragraph 20.2 quoted above, that a girl below 18 years is not capable of giving informed consent as required in section 5(1) of the Choice Act, that is, to make the decision whether or not to have a termination of her pregnancy which serves her best interest without the assistance and/or guidance of her parents/guardian and/or counsellor. The plaintiff argues that it is because such a person is not in a position to appreciate the need for and value of parental care and support.

The plaintiff, the defendants and the *amicus curiae* are agreed that for the purposes of the exception, the allegations in the plaintiff's particulars of claim must be accepted as true. This is indeed the correct position. See in this regard *Nata Produce Growers Association and Others versus Agroserve (Pty) Ltd* 1990 (4) 749 (N) at 754I-755B and *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F.

Claims A, B and C of the plaintiff's particulars of claim must, for the present purposes, therefore be considered on the basis that a girl under the age of 18 years is not capable of giving informed consent.

In the leading judgment on the requirement of informed consent, *ACKERMAN, J* on behalf of the full bench of the CPD in *Castell v De Greef (supra)* made it clear that the ratio for that requirement was to give

effect to the patient's fundamental right to self determination. At 420J the court said that it was: "clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self determination." He explained again at 426E that: "it is in accord with the fundamental right of individual autonomy and self determination to which South African law is moving. This formulation also set its face against paternalism, from many other species whereof South Africa is now turning away."

This court more recently endorsed the approach in *Castell* on the basis of the patient's right to exercise her "fundamental right to self determination". See *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300.

The recognition of the right of every individual to self determination, has now become an imperative under the constitution and particularly the following provisions of the Bill of Rights:

(a) In terms of section 12(2), "everyone" has the right to bodily and psychological integrity which includes the right "to make decisions concerning reproduction" and "the security and control over their body".

(b) In terms of section 27(1)(a) "everyone" has the right to have access to "reproductive health care".

(c) In terms of section 10, "everyone" has "inherent dignity and the right to have their dignity respected and protected."

(d) In terms of section 14, "everyone" has "the right to privacy".

The Constitution accordingly not only permits the Choice Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional.

The South African Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is the right to bodily and psychological integrity which include the right to make decisions concerning reproduction, and secondly, under section 12(2)(b), that is, the right to control over ones body.

Evidence to establish cause of action

Throughout argument on the exception the plaintiff repeatedly alluded to evidence that will be lead at the trial. It is unnecessary to examine in detail the plaintiff's argument and submissions insofar as it relates to what the plaintiff will demonstrate at the trial, or to extent that it is based on what evidence the plaintiff undertakes to lead at the trial in order to establish or proof the cause of action. The cause of action must be disclosed in the particulars of claim the exception relates only to the particular's of claim and not to evidence or trial. It is equally not necessary for this court to deal in any detail with the defendant's or the *amicus curiae*'s argument which relate to the merits that may or may not be established at the trial.

It should be no answer to an exception based on the grounds that the plaintiff's particulars of claim do not disclose a cause of action, for the plaintiff to assert that evidence that will be lead to establish the cause of action. A cause of action must be established in the pleadings and evidence is required to proof and not to establish a cause of action. A pleading which does not disclose a cause of action is fatal and exceptable on that ground. It may be cured by an amendment and not by evidence.

The essence of an exception on this ground is to provide a speedy remedy and avoid a matter being dragged to the evidence stage at the trial where no cause of action exist.

Furthermore, evidence which seeks to establish a cause of action other than one disclosed on the pleadings may well be liable to be struck off on the basis of irrelevance.

Allegations in particulars of claim accepted as truth:

For the purposes of the exception this court must accept all the allegations the plaintiff's particulars of claim as true. I am indeed urged to do so but plaintiff, in paragraph 8 of its written heads of argument where I am referred to *Van Zyl NO v Bollon* 1994 (4) SA 648 (C) at 651E-F. See also *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) at 754B-755B. What has to be accepted as true include the allegation in paragraph 20.2 to the effect that a woman under the age of 18 "is not capable of giving informed consent" as required in section 5(1) of the Choice Act. If this is so then such woman or girl is incapable of giving the "informed consent" required for termination of pregnancy. While reserving for themselves the right to challenge the truth of the statement, the defendants and the Amicus also

argued that for the present purposes the truth of the allegations, particularly of the contents of paragraphs 20.2 must be accepted.

Section 5(1) of the Choice Act provides that the termination of pregnancy may only take place with the "informed consent of the pregnant woman". The implications of paragraphs 20.2 of the particulars of claim is therefore that girls under 18 years cannot (on their own) have their pregnancy terminated under the Choice Act.

The plaintiff's claim A, B and C complain about the legislative failure to impose stricter or additional control on the termination of pregnancies of girls under 18. It should, however, never be permissible for a girl under 18 years to have her pregnancy terminated because she is never capable of meeting the threshold required for termination imposed by section 5(1) of that Act, which is informed consent. The plaintiff therefore complains about the failure of the Choice Act to impose stricter regulation on something which the Act does not permit at all. The Act cannot possibly impose stricter control on something it prohibit altogether.

I specifically invited Mr Mathee SC who appeared for the plaintiff to address me on paragraph 20.5 as in my view it is clearly post

difficulties for the plaintiff, if one accepts its truth albeit for the present purposes (exception stage) only. He still maintained that one must accept its truth. He argued further that the allegations in the paragraph must be read and understood in the context of the preceeding allegations and that in the context the paragraph meant that such a girl is not capable of giving informed consent as required in the section without the assistance and/or guidance of parents, guardians and/or counsellors.

That argument, however, does not help the plaintiff. If the people who are in terms of paragraph 20.2 incapable of giving informed consent are unassisted girls under 18 years, then that becomes a category of persons in respect of whom the plaintiff complains. They are by virtue of their incapacity to give informed consent, excluded in the category of people for whom it is permissible to terminate pregnancy.

For the particulars of claim to disclose a cause of action the allegations contained in them must support the conclusion of fact reached by operation of law as well as the remedy sought. Because a category of persons to whom the plaintiff's complaint relate are those excluded by incapacity to give informed consent, the allegations in the particulars of claim do not support the conclusion. Claims A, B and C are excepiable because they assume that the Choice Act permits girls under 18 years to

have their pregnancies terminated when it in fact never permits them to do so. On the basis that it is true that a girl under the age of 18 years is not capable of giving informed consent required by section 51(1) of the Choice Act, and if in practice the pregnancy of such girls is terminated on the bases of their purported consent, then the plaintiff's remedy is not to attack the Choice Act but to stop the medical practitioners and midwife's who terminate the pregnancies of girls under the age of 18 because they are doing so and lawfully in violation of section 5(1) of the Choice Act. The constitutionality attack can therefore not be sustained on the particulars of claim.

Conclusion recapped:

To recap, the defendant has excepted to that the plaintiff's particulars of claim on the basis that they do not disclose a cause of action. In order to determine whether the particulars of claim disclose a cause of action, one must determine whether, the allegations contained in the particulars of claim, if proven, would entitle the plaintiff to the relief sought by the plaintiff as prayed for in such particulars of claim. To determine whether the allegations in the particulars of claim support the relief prayed for therein, the allegations must be presumed to be true. The test is therefore whether the allegations/statements in the particulars

of claim read together with the correct position of the law support the relief. The law requires "informed consent" from a person in order for such person to exercise the right to terminate pregnancy. The particulars of claim say that children under the age of 18 are incapable of giving "informed consent". The conclusion must therefore be that girls under 18 years of age cannot exercise the right to terminate pregnancy.

The particulars of claim, however, conclude that the law allows girls under 18 years of age to exercise the right to terminate pregnancy -- and leave them unprotected, unassisted, isolated and without counselling when they do so. The remedy is sought on this assumption is a correct conclusion.

The assumption is, however, wrong because if any person, whether under 18 years or not, cannot give "informed consent" then such a person cannot exercise the right.

A girl under the age of 18 years can, however, not lawfully exercise that right because she does not meet the jurisdictional threshold or informed consent. The factual allegations in the particulars of claim read with the law do not learnt support for the relief prayed for in the

particulars of claim. The particulars of claim therefore do not disclose a cause of action.

On the plaintiff's case, as pleaded, therefore there is no cause of action disclosed and the exception must be upheld.

Correctness or the assertion not accepted

If court, however, does not accept the correctness of the assertion, without clear evidence, but as a general position, girls below the age of 18 are incapable of giving informed consent. The true position will depend on the particular individual in position and circumstance of each and every woman. In enacting the Choice Act the, legislature assumed that there will be woman below and above the age of 18 who will be incapable of giving informed consent and for this category the legislature requires parental or some other assistance in giving the informed consent. The legislature also recognised that there will be women above and below the age of 18 who are capable of giving informed consent, and for this category the legislature requires no assistance when they give consent to termination of pregnancy. As to whether a particular individual, irrespective of age, is capable of giving such consent, the legislature has left the determination of the "factual position" to the medical professional

or registered midwife who performs the act. I cannot find that the exercise of this legislative choice is so unreasonable or otherwise flawed that judicial interference is called for in what is essentially a legislative function. Women or children under the age of 18 are not unprotected for as long as they are incapable of giving informed consent. What is more, the legislature makes provision to ensure that all young women below the age of 18 are encouraged to seek parental support and guidance when seeking to exercise the right to reproductive choice. I cannot find that the legislation is unconstitutional when it provides for what is constitutionally permissible and regulates it without affronting the constitution. The exercise of the right is not unregulated. For this reason too the plaintiff's particulars of claim do not disclose a cause of action.

The exception is accordingly upheld with costs.

P M MOJAPELO
JUDGE OF THE HIGH COURT

THE DETENTION, CONFINEMENT, AND INCARCERATION OF PREGNANT WOMEN FOR THE BENEFIT OF FETAL HEALTH

APRIL L. CHERRY*

In 1998, Yuriko Kawaguchi appeared before Cleveland, Ohio Municipal Court Judge Patricia Cleary and entered a guilty plea to a fifth-degree felony forgery count resulting from her use of a counterfeit credit card. Approximately two weeks before her sentencing hearing, Ms. Kawaguchi wrote to Judge Cleary, informing the judge that she was pregnant and wished to end her pregnancy by obtaining an abortion. At the sentencing hearing the judge objected to the defendant's plans to obtain an abortion and offered her a "quid pro quo" deal. If the defendant agreed to bring the fetus to term, Judge Cleary promised to sentence her to probation. If Ms. Kawaguchi insisted on having the abortion, then the Judge indicated that she would sentence Ms. Kawaguchi to a prison term of six months. Ms. Kawaguchi refused "the deal." By the time Ms. Kawaguchi was released by an order of the Eighth District Court of Appeals granting bond, she was too far along in her pregnancy to obtain a legal abortion in the State of Ohio.[1]

It is difficult, if not impossible, to know whether cases as egregious as Ms. Kawaguchi's are common in American courts because such quid pro quo "deals" between judges and criminal defendants usually are not on the record. Nevertheless, we do know that some judges use incarceration, and threats thereof, to control the behavior of pregnant women who come before them in order to protect the fetuses. Some pregnant women who pose no risk to their fetuses come before judges as a result of crimes that are completely unrelated to their pregnancies, as in the case of Ms. Kawaguchi. Other pregnant women are before judges on civil or criminal charges

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[1] These facts were taken from *Cleveland Bar Association v. Cleary*, 754 N.E.2d 235 (Ohio 2001). *See also* Ohio v. Kawaguchi, 739 N.E.2d 392 (Ohio Ct. App. 2000).

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related to their use of alcohol or illicit drugs—behavior that is believed to be detrimental to their fetuses. Others become involved with the state when their doctors report their non-conforming behavior, sometimes drug-related, to state social service agencies. Finally, others become involved with state agencies because their behaviors are restricted by state statutes designed to protect fetuses from the improvident behaviors of their mothers. Regardless of how these women become involved with the court or other state actors, judges use their power to detain women as a way to influence pregnancy-related decisions.

In *Kawaguchi*, the judge used incarceration to "encourage" the pregnant defendant to bring her fetus to term; in the end, incarceration prevented Ms. Kawaguchi from obtaining an abortion. In other cases, in hopes of benefiting the fetuses, judges have used incarceration as a way to prevent drug use by pregnant addicts.[2] Judges have also used incarceration, detention, orders of hospital confinement, and threats thereof, to compel pregnant women to access prenatal care or to submit to their physicians' directions regarding medical treatment for the benefit of fetal health,[3] even when such medical care is contrary to the pregnant woman's deeply held religious beliefs.[4] In every case, detention of the pregnant woman is predicated on some version of fetal rights and is meant to influence the pregnant woman's decision regarding the course of her pregnancy. Surely, in some cases, the threat of detention, confinement, or incarceration for the fetus's sake must inevitably lead some women to forego pregnancy altogether or to abort a fetus to avoid confinement. Finally, detentions, confinement, and incarceration for the sake of fetal health result in the normalization or standardization of motherhood. Only those who meet the state-enforced standard are permitted to reproduce without state interference. In the end, all of these detentions violate the pregnant woman's reproductive rights—rights to privacy and bodily integrity. Detention and commitment for the benefit of fetal health reduces pregnant women from citizens to "fetal containers" and "maternal environments."[5]

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[2] *See infra* notes 117-132 and accompanying text.

[3] *See infra* notes 51-116 and accompanying text.

[4] *See* Frank J. Murray, *Pregnant Woman in Custody After Refusing a Medial Exam*, WASH. POST, Sept. 1, 2000, at A4; Pamela Ferdinand, *Pregnant Sect Member Detained for Health Care*, WASH. POST, Sept. 1, 2000, at A4; David Abel, *Pregnant Sect Member in State Custody*, BOSTON GLOBE, Sept. 1, 2000, at A1.

[5] Many commentators have noted that pregnant women are reduced to pregnant "maternal environments" and "fetal containers" in obstetrical literature. *See, e.g.*, Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN'S L.J. 47,

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At the heart of these confinements lies the belief that the pregnant woman's behavior has a negative long-term effect on the health of the fetus. This assumption is often fallacious, particularly when applied to the use of illicit drugs.[6] Nevertheless, these restrictions of women's physical liberty are poor solutions to the problem of maternal drug and alcohol use or other maternal behaviors that *may* result in poor fetal outcomes. In addition to a lack of significantly better fetal outcomes, detention inappropriately violates these women's physical bodily integrity and restricts their reproductive decision making. This Article argues that all these methods—detention, confinement, and incarceration—violate women's constitutional rights and in the end leaves a jurisprudence of physical integrity and reproductive rights that permits coercive action on the part of the state, even when non-coercion is the principal constitutional norm and a necessary prerequisite of democratic citizenship.[7]

This Article examines both the state's role in the detention, confinement, and incarceration of pregnant women for the purported benefit of fetal health, the constitutionality of these actions, and the rights the state endangers when it does act. Although this Article is about rights, it recognizes the potential dangers of rights discourse. Rights discourse can be at the very least disingenuous, if not dangerous, particularly when the conditions of rights are disconnected from the real needs of the people they are ostensibly intended to protect. Such disconnection results in either

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97 n.61 (1997) (noting that women are referred to as "maternal environments" in modern obstetrical practice); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 19-23 (1989) (noting the increasingly commoditized language used to describe pregnant women); Barbara Katz Rothman, *When a Pregnant Woman Endangers Her Fetus*, 16 HASTING CTR. REP. 24, 24-25 (Feb. 1986) (noting that women are referred to as "maternal environments" in modern obstetrical practice); George J. Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CTR. REP. 13, 14 (Dec. 1986); Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J. L. & RELIGION 73, 76 (1994) (arguing that pregnant women are treated as fetal containers in legal discourse); Charles A. Gardner, *Is an Embryo a Person*, NATION, Nov. 13, 1989, at 558 (referring to pregnant woman as a "maternal environment").

[6] For further discussion, *see infra* notes 37-43 and accompanying text. *See also*, LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997).

[7] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3 (3d ed. 2005) (asserting that constitutional liberty consists of freedom from government coercion and freedom to participate in government).

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injustice or limited substantive justice.[8] In the cases of pregnant women who are confined or detained for the benefit of their fetuses,[9] rights discourse can divert our attention away from the social and economic conditions under which women live. Moreover, it can divert our attention away from the ways in which these women experience pregnancy and childbirth.[10] Nevertheless, rights discourse also can be of great assistance in the fight for social change.[11] In the circumstance of the detention and confinement of pregnant women for the purported benefit of fetal health, rights discourse has considerable merit. It recognizes both injustice and the social and economic conditions under which many women live. Furthermore, it reveals the very real need of women for social change by requiring respect for the bodies of women, refusing to objectify women and their bodies, and resisting the transformation of women into mere fetal containers.

Section One of this Article discusses the effect of drug policy on the detention and confinement of pregnant women. This section also outlines three types of "fetal protection measures" that result in the detention, confinement, or incarceration of pregnant women in the name of fetal health and examines the legal rationales behind these mechanisms. Section One then questions whether detention is an effective way to reach the state's articulated goal of better fetal outcomes. Section Two offers a discussion of the constitutional rights at issue. This section addresses the ways in which detention violates two essential components of women's

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[8] *See* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 566-67 (2002) [hereinafter Cherry, *Free Exercise Rights*]; April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 214 (1995) [hereinafter Cherry, *A Feminist Understanding*]; *see also* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2215 (1992) ("This process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged."); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401, 404-05 (1987).

[9] *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 566-67 (making a similar argument in the context of compelled medical treatment of pregnant women).

[10] Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 499 (1992) ("The call to rights has made clear these cases . . . could not occur but for the prior devaluation of women; that 'fetal interests' is a proxy for majoritarian interests; and that the utilitarian balancing test describes women as tools useful for serving the rest of society.").

[11] Williams, *supra* note 8, at 404.

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rights: the right to be free from unwarranted detention and confinement and the right to reproductive decision making that is based in both the privacy and liberty doctrines. Section Two also focuses on the standards currently used by the United States Supreme Court both to assess the constitutionality of civil commitment, detention, and other types of confinement by the state and to evaluate violations of women's reproductive rights. With respect to the Court's detention and confinement jurisprudence, the Article examines both *United States v. Salerno*[12] and *Addington v. Texas*[13] and argues that the physical restraint of non-compliant pregnant women is unconstitutional because the state can neither articulate a satisfactory compelling interest nor demonstrate that confinement is the least restrictive alternative available to protect the state's interest.

With respect to reproductive rights jurisprudence, this Article argues that the proper standard for review of these detentions is found in *Griswold v. Connecticut*[14] and *Eisenstadt v. Baird*,[15] cases in which the Court articulated women's fundamental rights to reproductive decision making outside of the context of abortion. In these cases the Court describes privacy as a fundamental right with which the government cannot interfere without a showing of a compelling state interest and a demonstration that the government's chosen action is the alternative that is least restrictive of the individual's right. The government fails on its requisite showing when these standards are applied to the cases under discussion. This Article argues that there is no compelling state interest in incarceration for fetal protection and that detention is not the least restrictive alternative for these women. Furthermore, this Article argues that the less protective standard relating to abortion regulations, the undue burden standard articulated in *Planned Parenthood v. Casey*,[16] while not applicable to these cases as they do not relate to abortion, is also violated under the circumstances described herein. At the very least, the undue burden standard must be read to mean that the state cannot coerce a woman's reproductive decision making without violating the rights of privacy and liberty. Because detention is highly coercive of women's reproductive decision making, it must be understood to violate the principles articulated by the Court in *Casey*.

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[12] 481 U.S. 739 (1987).

[13] 441 U.S. 418 (1979).

[14] 381 U.S. 479 (1965).

[15] 405 U.S. 438 (1972).

[16] 505 U.S. 833 (1992).

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Section Three suggests two additional ways of thinking about privacy and liberty that may better protect women's physical integrity and their other constitutional rights. First, the right to privacy should be viewed as an affirmative right. Second, privacy should be understood as an anti-totalitarian principle. Finally, this Article concludes by suggesting that investing our energies in basic health care and drug treatment for pregnant women is the more effective and constitutionally acceptable way to produce better fetal outcomes.[17]

I. PUNISHING PREGNANT WOMEN FOR THE BENEFIT OF FETAL HEALTH: CIVIL AND CRIMINAL SANCTIONS

The problem of poor fetal health is often blamed on pregnant women who use illicit drugs, alcohol, or otherwise behave in "unauthorized"[18] ways. In this context, physicians often act as state agents because they are encouraged and sometimes required to report women's "unauthorized" behavior to a state agency.[19] The state then seeks to "protect" the fetus from the unauthorized and unwise behavior of its mother in a variety of ways, including taking the pregnant woman into custody to ensure her "proper" or state-sanctioned behavior.

Court rulings and statutes that purport to protect fetuses are obviously hostile to women. They are designed to punish women who do not conform to our society's conception of women or our understanding of the good and proper mother. These women are deemed irresponsible or evil because they refuse to or are unable to comply with society's expectations

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[17] Another constitutional argument is that the detention, confinement, and incarceration of women who behave in deleterious ways to their fetuses due to religious decision making presents a violation of their free exercise rights. This First Amendment issue is not addressed in this article as I have previously addressed it at length. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 566-67.

[18] In this context, unauthorized behavior means any behavior that the healthcare provider or the state (through legislation and/or regulation) has delineated as harmful or potentially harmful to the fetus.

[19] For example, a current Wisconsin statute permits physicians and other health care professionals to violate their pregnant patients' confidentiality in order to report suspected drug or alcohol use to state authorities. *See* WIS. STAT. § 905.04(4)(e)(3) (2005). The author made a similar argument with respect to the use of physicians as state agents and its detrimental effect on pregnant women. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 619 (discussing physicians as state agents in the context of compelled medical treatment).

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regarding their behavior, leading them to be subject to public censure.[20] *New York Times* columnist Bob Herbert notes:

> [T]hese laws are hostile to women. [They] are designed to punish them and thrust them into perverse conflicts with their own bodies, [and] are light years away from the best solutions. Alcoholism and drug addiction are illnesses. But the fetal protection movement has not been accompanied by any serious effort to provide women with the alcohol and drug treatment that they need or even, for that matter, adequate prenatal care. That is not part of the agenda.[21]

Pregnant women who use or abuse drugs are not part of the agenda; they are seen to have violated the basic social belief that good mothers are self-sacrificing. A pregnant woman who uses drugs is "viewed as self-indulgent, placing her desire to get 'high' ahead of the need of her offspring to be born healthy,"[22] and hence deserves contempt and punishment.

Although the experiences of pregnant women who are incarcerated are probably more demeaning than the experiences of women detained in other settings, these experiences highlight the punitive and demeaning nature of detention. In a 1999 publication, Amnesty International reported on several cases where incarcerated women were transported to the hospital in shackles and forced to labor and give birth while chained to a hospital bed.[23] These highlighted cases are not out of the ordinary. In fact, as of 1999, only fifteen states banned restraining pregnant women during labor.[24] Furthermore, attorney Barrie Becker observes that "judges falsely believe that jails and prisons provide better health care for the woman and the fetus than the care an addicted woman would obtain on her own."[25] This belief is

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[20] *See generally* GOMEZ, *supra* note 6.

[21] Bob Herbert, *Fetal Protection Conceals Real Agenda*, MILWAUKEE JOURNAL SENTINEL, June 16, 1998, at 12, *available at* 1998 WLNR 3044594 at *1.

[22] JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 103 (2002).

[23] AMNESTY INTERNATIONAL, NOT PART OF MY SENTENCE: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, UNITED STATES OF AMERICA, RIGHTS FOR ALL (1999), *available at* http://web.amnesty.org/library/Index/engAMR510011999.

[24] *Id.*

[25] Barrie L. Becker, Note, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L. Q. 235, 237.

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prevalent even though considerable research concludes that the reason that drug-addicted pregnant women "do not receive the care they need is not lack of incentive on their part; rather, there is a severe shortage of drug treatment programs which will accept pregnant women and provide prenatal and drug treatment services which address their unique needs."[26]

While the punitive nature of these detentions and confinements and the harms they cause to women may be obvious, their negative effect on fetuses, although less apparent, is nevertheless very real. Detentions and confinements result in fetal harm in two ways: by decreasing access to prenatal care and by subjecting the fetus to harmful conditions inside of the prison itself.[27] Women who use drugs or refuse medical treatment do not access prenatal care for fear of being punished. Because prenatal care, including maternal nutrition, is paramount in ensuring the health of the fetus, decreased access to prenatal care results in poor fetal outcomes.[28] Indeed, the nation's leading medical associations, including the American Medical Association, the American Academy of Pediatrics, and the American Public Health Association, have all opposed punitive measures against pregnant women who use drugs. Their opposition is due in part to their understanding that such measures will deter women from accessing much needed prenatal care and that the absence of such care certainly will have deleterious consequences for both maternal and fetal health.[29]

Likewise, prison detentions are extremely deleterious to fetal health. The vast majority of prisons provide little or no prenatal care and no

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[26] *Id.* at 239-40.

[27] *See* San Durrenberger, *Solution Lies in Help, Not Jail*, ARIZONA REPUBLIC, May 21, 2004, at 4 (arguing that the incarceration of pregnant women to treat health problems is not in the best interest of fetuses or their mothers).

[28] American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS'N. 2663, 2667 (1990); U.S. GENERAL ACCOUNTING OFFICE, DRUG EXPOSED INFANTS: A GENERATION AT RISK (1990), *available at* http://www.gao.gov/cgi-bm/ getrpt?HRD-90-138.

[29] *See* American Medical Association Board of Trustees, *supra* note 28, at 2667; Committee on Substance Abuse, American Academy of Pediatrics, *Drug Exposed Infants*, 96 PEDIATRICS 364, 366-67 (1995) (This article champions rehabilitation and stresses the use of education and research to combat in-pregnancy drug use: "Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health . . . ."); American Public Health Association, *Public Policy Statement No. 9020, Illicit Drug Use by Pregnant Women*, 81 AM. J. PUB. HEALTH 253, 253 (1991) (recommending "that no punitive action be taken against pregnant women who are users of illegal drugs when no other illegal acts . . . have been committed").

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staff training regarding the needs of pregnant women.[30] Moreover, prison conditions such as overcrowding, poor nutrition, and exposure to contagious diseases present a considerable danger to the health of the fetus.[31] In fact, the pregnancies of women who are incarcerated are much more likely to end in miscarriage than those of women in general.[32] Studies have found that pregnant drug addicts in prison are more likely than non-incarcerated pregnant drug addicts to have miscarriages and to give birth to children with abnormalities.[33] Finally, incarcerated addicts often have access to illegal drugs as illegal drugs continue to be readily available in prison.[34] When judges and legislators turn their attention to the perceived fetal health problems resulting from behaviors such as the drug or alcohol use of pregnant women, they undertake to "protect" the fetus from its mother. These protective measures have included taking the pregnant woman into state custody in an attempt to ensure that her behavior will not deleteriously affect the fetus. Underlying state detention is a legal culture that seems to prefer the real or imagined needs of the fetus over and above the constitutional interests of the pregnant woman. The following sections discuss the effects of American drug and alcohol policy on pregnant women and the constitutional interests of pregnant women in avoiding detention or confinement for the perceived sake of the fetus.

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[30] *See* John C. Coughenour, *Separate and Unequal: Women in the Federal Criminal Justice System*, 8 FED. SENT. R. 142, 143 (1995), *available at* 1995 WL 862005, at 3 (federal prisons are ill equipped to care for pregnant women; inadequate prenatal and obstetric care are available); John Pacenti, *Prenatal Care at Jail Criticized*, PALM BEACH POST, May 9, 2004, at 1C; Ellen Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189 (1989); *see also* Robert T. Downs, *The Right to Procreate While Incarcerated: A Look at the 'Obvious' Differences Between Male and Female Inmates*, 12 S. CAL. REV. L & WOMEN'S STUD. 67, 100 (2002) (the needs of pregnant inmates are typically neglected by prisons that are already inadequate to provide medical care); Deborah J. Krauss, Note, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523, 537 (1991).

[31] Krauss, *supra* note 30, at 537; Alan Elsner, *Supermax Prison: A Growing Human Rights Problem*, 28 CHAMPION 36, 43 (2004) (noting that in most state prisons, pregnant women get the same food as other inmates).

[32] Jean Reith Schroedel & Paul Pertz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL'Y & L. 335, 350-51 (1994).

[33] *See, e.g.*, SCHROEDEL, *supra* note 22, at 105 (citations omitted).

[34] *See* Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, § 1, at 1; *see also* BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS & FETUSES 141 (1992) (noting the ease of obtaining illicit drugs in prison and the lack of prison prenatal care).

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A. The Effects of Drug and Alcohol Policy on the Detention of Pregnant Women

Many of the detentions of pregnant women for the purported benefit of the fetus are predicated on the woman's drug or alcohol use. Although the courts have long understood those dependent on drugs or alcohol as diseased and deserving of treatment,[35] courts have not treated pregnant women who are alcohol- or drug-dependent in the same regard. As one commentator noted, "it is an addicted woman who becomes pregnant, not a pregnant woman who becomes addicted."[36] Nevertheless, alcohol- and drug-dependent pregnant women have been increasingly subject to criminal and civil penalties arising out of their dual status as pregnant and substance-dependent. In the name of fetal health, authorities penalize women in order to protect fetuses from the unwise behavior of their mothers.

Undeniably some fetuses are harmed by in utero exposure to alcohol, illicit drugs, and other lawful substances. Newborns born to drug-dependent women can suffer from a host of medical, developmental, and behavioral problems.[37] However, not all children born to women who used illicit drugs during their pregnancies are permanently affected by that exposure.[38] Not only is the presence and severity of these problems dependent upon the nature of their mother's drug use,[39] the scientific evidence demonstrating the link is itself uncertain.[40] Medical evidence

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[35] *See, e.g.*, Linder v. United States, 268 U.S. 5, 18 (1925) (recognizing drug addiction as a disease); Robinson v. California, 370 U.S. 660, 666 (1962) (deeming punishment for the status of being addicted cruel and unusual punishment, impermissible under the Eighth Amendment); Huff v. State, 568 P.2d 1014, 1017 (Alaska 1977) (recognizing persons addicted to narcotics are diseased and proper subjects for medical treatment).

[36] Kathryn T. Jones, *Prenatal Substance Abuse: Oregon's Progressive Approach to Treatment and Child Protection Can Support Children, Women, and Families*, 35 WILLAMETTE L. REV. 797 (1999).

[37] Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 626 (1994).

[38] *Id.* at 627.

[39] *Id.* at 628.

[40] Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 336 (1999) [hereinafter De Ville & Kopelman, *Right Goal, Wrong Remedy*]; *see also* Kenneth A. De Ville and Loretta Kopelman, *Moral and Social Issues Regarding Pregnant Women Who*

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regarding the harmful effect of alcohol on a developing fetus is much better understood. Alcohol is a teratogen, an agent that causes malformation of the developing embryo.[41] Maternal alcohol consumption can result in mental retardation and other physical and mental handicaps in the resulting child.[42] But again, the severity of these problems is dependent on the nature of their mother's alcohol consumption.[43] Because the effects of alcohol and drug abuse on the fetus can vary widely, the state's actions regarding pregnant abusers are difficult to justify on the basis of scientific evidence.

Although there may be other possible solutions, many jurisdictions have invoked the criminal law to address the difficulties that result from maternal drug and alcohol use. For example, as of 1999, more than 200 women who were pregnant or who had recently given birth had been arrested for the avowed benefit of fetal rights and fetal health.[44] Furthermore, as Lynn Paltrow, Executive Director of the non-profit National Advocates for Pregnant Women, has reported, the vast majority of these women are "low-income women of color with untreated drug addictions."[45] These prosecutions have taken a particularly oppressive turn in South Carolina where the legislature declared, and the state supreme court concurred, that viable fetuses are children. Consequently, South

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Use and Abuse Drugs, 25 OBSTETRICS AND GYNECOLOGY CLINIC OF NORTH AMERICA 237, 237-54 (1998) [hereinafter De Ville & Kopelman, *Moral and Social Issues*]; GÓMEZ, *supra* note 6.

Initial Studies by Dr. Ira Chasnoff and his colleagues suggested a correlation between the use of cocaine during pregnancy and instances of premature birth, low birth weight, and higher rates of physical, mental, and emotional problems. *See* Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985). These claims have been refuted by many other scientists. *See, e.g.*, Nancy L. Day & Gale A. Richardson, *Comparative Teratogenicity of Alcohol and Other Drugs*, 18 ALCOHOL RES. WORLD 42 (1994).

[41] *See* Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses to Its Impact on Native Americans*, 70 N.D. L. REV. 1, 18 (1994).

[42] *Id.* at 4 ("Fetal alcohol syndrome (or FAS) is the name given to a pattern of major and minor physical malformations, growth deficiencies, and central nervous system abnormalities caused by maternal alcohol use during pregnancy. FAS is well defined for the children most severely affected by prenatal alcohol exposure." Fetal alcohol effects or FAE is a milder or more subtle form of FAS.).

[43] *Id.* at 18.

[44] Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1001 (1999).

[45] *Id.*

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Carolina's criminal child abuse and neglect and homicide statutes apply to any actions or activity of pregnant women that may result in fetal harm or fetal death.[46] Nor have the issues addressed by the criminal law been limited to drug and alcohol dependency. Pregnant women who simply refused to act as their physicians suggested or as the state agency thought appropriate have been subject to criminal sanction.[47] In addition to criminal approaches, many jurisdictions use child protection statutes to justify removal of alcohol- and drug-affected infants from their mothers directly after birth. As of 1999, twelve states required physicians to report drug use by pregnant women to state child welfare agencies.[48]

Unlike the use of criminal law, direct court intervention requiring the detention of pregnant women is less often noted and discussed. Intervention has included court orders that confine pregnant women to hospitals, sometimes for particular medical procedures, or in prisons for the duration of their pregnancies based on their unwillingness or inability to

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[46] Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1995), *cert. denied*, 523 U.S. 1145 (1998) (holding that behavior by pregnant woman that might endanger her fetus, including illegal drug use, is actionable under the state criminal child neglect statute and punishable by ten years in prison); State v. McKnight, 576 S.E.2d 168 (S.C. 2003), *cert. denied*, 540 U.S. 819 (2003) (woman who used crack cocaine sporadically during her pregnancy convicted of homicide by child abuse after delivering a stillborn child). A similar trend has been seen in Hawaii. *See, e.g.*, State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (reversing conviction of manslaughter for woman convicted of causing the death of her newborn as a result of smoking methampetamine); Editorial, *Reversal in Aiwohi Case Makes Sense*, HONOLULU ADVERTISER, July 8, 2005, at 18A (Aiwohi pled no contest to manslaughter in connection with the death of newborn and was sentenced to ten years probation on the theory that her methamphetamine use poisoned her infant in utero and caused its death.).

[47] *See* GOMEZ, *supra* note 6, at 42-46 (discussing the prosecution of Pamela Rae Stewart in San Diego, California).

[48] Indeed the most common legal action against women who use drugs or alcohol during their pregnancies is the use of child abuse and neglect statutes to remove newborns from their mothers as a result of a positive toxicology screen taken shortly after birth. *See, e.g.*, Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 519-25 (1992). Although this approach is popular with legislatures and district attorney offices, scientists and doctors warn that the "stigmatizing terms" used in the criminal law and by child protective agencies "not only lack scientific validity" but also "harm[] the children to which they are applied by . . . leading to policies that ignore factors including poverty, that play a much more significant role in their lives." Press Release, Top Medical Doctors, Scientists & Specialist Urge Major Medial Outlests Not to Create "Meth Baby" Myth (July 27, 2005) (on file with author) (press release sent to CBS National News, Minneapolis Star Tribune, New York Times and others from more than 90 doctors and scientists).

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comply with behavior that a state official or physician believes is important for the health of their fetuses. The relevant jurisdictions have taken three approaches. Some courts have used either *parens patriae* or child welfare statutes to take custody of a fetus the court views as endangered by its mother's behavior. Other courts have used their power in criminal proceedings to incarcerate pregnant women found guilty of minor crimes who have been discovered using alcohol or illicit drugs while pregnant. In these cases, women are incarcerated for the sole purpose of "protecting" their fetuses. Finally, some state legislatures have been directly involved. In at least three instances, state legislatures have passed statutes that permit the state to civilly commit pregnant women who use drugs or alcohol. [49] All of these solutions to the perceived problem of maternal non-compliance force forms of state mandated pregnancy and motherhood. Those who do not comply with these mandates are subject to penalty, censure, and most importantly loss of liberty and decision making power.

In the remainder of this section, this Article outlines and analyzes the three ways in which states have taken pregnant women into custody in order to protect fetal health without fully considering the legal interests of the pregnant woman that are at stake. These methods include: (1) the use of the court's *parens patriae* power, including judicial interpretation of child neglect and abuse statutes to include the protection of fetuses; (2) the use of civil commitment statutes to confine pregnant women in hospitals; and finally (3) the use of incarceration during the pregnancy as a way to ensure maternal compliance.[50] Underlying all of these methods of detention is the prioritization of fetal life and fetal health over the constitutional liberty interests of the pregnant woman and the development of a state-sanctioned form of mothering.

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[49] *See* MINN. STAT. ANN. § 253B.05 (West 2005); MINN. STAT. ANN. § 626.5561(1)-(2) (West 2005) (permitting emergency commitment of pregnant woman who have used a controlled substance); S.D. CODIFIED LAWS ANN. § 34-20A-63 (allowing pregnant women who use alcohol or drugs to be involuntarily committed to a treatment facility); WIS. STAT. §§ 48.133, 48.193, 48.213(l)(b) (2005) (establishing procedures for taking a pregnant woman into custody when fetus is in need of protection or services).

[50] This ultimate method (incarceration) ensures neither maternal compliance nor fetal health. *See* April Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 TEX. J. WOMEN & L. 245, 253 (1999).

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B. Use of *Parens Patriae* Power and Child Protection Statutes to Detain Pregnant Women

Courts have used civil law remedies to take pregnant women into state custody and to compel state-sanctioned maternal behavior deemed necessary for the health or life of fetuses. In some instances, courts have relied upon their common law *parens patriae* powers to permit the states' "limiting parental freedom and authority in things affecting the child's welfare."[51] In other instances, courts have relied upon statutory provisions in the state's child welfare law to take custody of the fetus, asserting that the legislative intent of the statute was to include a viable fetus within the statutory definition of "child."[52]

1. The Case of Compelled Medical Treatment

In compelled medical treatment cases, a court compels non-consensual medical treatment deemed necessary by a physician on a pregnant woman. In many cases, the state takes custody of the fetus under its *parens patriae* powers in order to compel the treatment.[53] As I have noted elsewhere, many of these cases involve a pregnant woman's religious objection to treatment.[54] *Jefferson v. Griffin Spalding County* is one such case.[55] *Jefferson* involved a pregnant woman who refused to consent to cesarean section surgery on religious grounds, even though the hospital physician predicted that her fetus would surely die and that she would likely die without surgery.[56] The trial court ordered the cesarean section surgery based on its finding that "as a matter of law . . . this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia."[57] The trial court also concluded that Jefferson's fetus was a child

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[51] Prince v. Massachusetts, 321 U.S. 158, 167 (1944); *see also In re* E.G., 549 N.E.2d 322, 327 (Ill. 1989) (finding that the *parens patriae* power was greatest when health care issues are potentially life threatening).

[52] Wisconsin *ex rel.* Kruzicki, 561 N.W.2d 729, 732 (Wis. 1997).

[53] See Cherry, *Free Exercise Rights*, *supra* note 8, at 596-99, 603-08, for a fuller discussion of this issue.

[54] *Id.*

[55] 274 S.E.2d 457 (Ga. 1981).

[56] *Id.* at 459.

[57] *Id.*

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"without the proper parental care and subsistence necessary for his or her physical life and health."[58] For that reason, the court granted temporary custody of the fetus to the state's child welfare agency, authorizing it "to make all decisions, including giving consent to the surgical delivery appertaining to the birth of this child."[59] Mrs. Jefferson filed a motion to stay the trial court's decision which the Supreme Court of Georgia denied summarily, citing, *inter alia*, the United States Supreme Court decision in *Roe v. Wade*.[60]

The District of Columbia Superior Court has also compelled at least one cesarean section surgery by taking custody of a fetus under the state's *parens patriae* power. In *In re Madyun*, the court compared the fetus to a child and asserted its *parens patriae* power to both detain Ms. Madyun at the hospital and to impose the non-consensual surgery over her religious objections. The court stated that its order was made to protect the state's interest in the viable fetus.[61]

New York State trial courts have also taken custody of fetuses and their mothers by asserting the state's *parens patriae* power. For example, in *In re Jamaica Hospital*, the trial court asserted that the state's significant interest in a non-viable, eighteen-week-old fetus outweighed the mother's right to refuse lifesaving medical treatment on religious grounds.[62] The court exercised its *parens patriae* power to appoint a special guardian for the fetus and to allow the guardian to order a blood transfusion for the mother, a Jehovah's Witness.[63] The court recognized that the eighteen-

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[58] *Id.*

[59] *Id.* The trial court further stated that the "intrusion . . . into the life of [Mrs.] Jefferson and her husband . . . [was] outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live." *Id.* at 460.

[60] *Id.* See also *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999) which reached a result similar to that in the *Jefferson* case but did not involve a religious objection. In *Pemberton*, the pregnant woman at issue was returned to the hospital by county sheriff's deputies as ordered by the state court after having left the hospital in order to avoid an unwanted cesarean section.

[61] *In re* Madyun, 114 Daily Wash. Law Rptr. 2233, 2240 (D.C. Super. Ct. 1986); *see also In re* Steven S., 178 Cal. Rptr. 525 (Cal. Ct. App. 1981) (pregnant woman detained in mental health hospital after trial court determines that her fetus is a "dependent child" under California child protection statutes, dismissed on appeal as moot).

[62] *In re* Jamaica Hospital, 491 N.Y.S. 2d 898 (N.Y. Sup. Ct. 1985).

[63] 491 N.Y.S. 2d at 899-900. The fetus at issue was only eighteen weeks old and in no way viable. *Id.*

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week-old fetus was not yet viable and, therefore, concluded that the state's interest was not "compelling," as defined by *Roe*.[64] Despite this realization, the court held that "in the context of abortion, . . . the state has a *significant interest* in protecting the potential of human life represented by an unborn fetus."[65] Moreover, the court in *In re Jamaica* likened the fetus to a child[66] and asserted its *parens patriae* jurisdiction to appoint a physician as guardian to the fetus.[67] The guardian was given the authority "to do all that in his medical judgment was necessary to save [the fetus's] life, including the transfusion of blood into the mother."[68]

2. The Detention of Drug-Dependent Pregnant Women and The "Protective Custody" of Their Fetuses

Wisconsin ex rel. Angela v. Kruzicki[69] is another example of how courts have used their power to take custody of a fetus in utero, thereby necessitating custody of the pregnant woman. The *Kruzicki* court based its detention of the pregnant woman on its statutory jurisdiction allowing it to detain and protect children in need of supervision.[70]

In some ways, the facts of *Kruzicki* are similar to the facts found in *Jefferson, In re Jamaica Hospital,* and *In re Madyun*. In each of these instances, court proceedings were initiated by the reports of physicians who believed that the women were putting their fetuses at risks due to the choices they were making. The choice in *Kruzicki*, however, did not involve

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[64] *Id.* (citing Roe v. Wade, 410 U.S. 113, 162-63 (1973)).

[65] *Id.* at 899 (emphasis added).

[66] *Id.* at 900. "For the purposes of this proceeding, therefore, the fetus can be regarded as a human being, to whom the court stands in *parens patriae*, and to whom the court has an obligation to protect." *Id.* at 899.

[67] *Id.* at 900; *see also* Pemberton v. Tallahassee Memorial Regional Medical Center, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999).

[68] In re Jamaica Hospital, 491 N.Y.S. 2d 898, 900 (N.Y. Sup. Ct 1985).

[69] 541 N.W.2d 482 (Wis. Ct. App. 1995), *overruled by* Wisconsin *ex rel.* Angela v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) (on statutory grounds). Several law review commentators have written specifically about the *Kruzicki* case, *see e.g.*, De Ville & Kopelman, *Right Goal, Wrong Remedy, supra* note 40; Carol Gosain, Casenote, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on Wisconsin ex rel. Angela v. Kruzicki*, 5 GEO. MASON L. REV. 799 (1997).

[70] *Kruzicki*, 561 N.W.2d 729; *see, e.g.*, WIS. STAT. ANN. §§ 48.19(1)(c), 48.13(10).

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a refusal to consent to a surgery necessary to preserve the life of her fetus; rather, Kruzicki's physician found that she tested positive for cocaine.[71] Her physician reported the positive findings to the County Department of Health and Human Services. The Department petitioned the juvenile court and requested an order to remove "the above-named unborn child from his or her present custody, and [to] plac[e] the unborn child in protective custody," because the fetus was a "child in need of protection or services" under the state's child welfare statutes.[72] The petition was supported by an affidavit of the pregnant woman's physician, who stated that "without intervention forcing [the pregnant woman] to cease her drug use," her fetus would suffer serious physical harm.[73] The juvenile court issued the requested order stating that, "the unborn child . . . be detained . . . by the Waukesha County Sheriff's Department and transported to Waukesha Hospital for inpatient treatment and protection. Such detention will by necessity result in the detention of the unborn child's mother."[74] This order was upheld by the Wisconsin Court of Appeals. The Court of Appeals held that a viable fetus is a "child" within the meaning of the child welfare statute, and that the application of the statute did not violate the pregnant woman's substantive due process rights because the statute was narrowly tailored to vindicate the state's compelling interest in the health, safety, and welfare of a viable fetus.[75] However, the juvenile court's order was overturned by the Wisconsin Supreme Court on statutory grounds.[76]

Unlike the courts below, the Wisconsin Supreme Court held that the statute used to detain the pregnant woman did not give the court jurisdiction over the viable fetus or its mother.[77] As a result, the Wisconsin high court did not reach the federal constitutional substantive due process issues raised by the state's detention of the defendant. The court stated: "Because we conclude that the legislature did not intend to equate a fetus

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[71] *Kruzicki*, 541 N.W. 2d at 485.

[72] *Kruzicki*, 561 N.W.2d at 732.

[73] *Id.*

[74] *Id.* (interpreting § 48 of the Wisconsin Statute, the juvenile court order was later revised on appeal to reflect the supreme court's decision that a fetus is not a "child" within the meaning of the state's child welfare statute).

[75] *Kruzicki*, 541 N.W. 2d at 493.

[76] *Kruzicki*, 561 N.W. 2d at 729.

[77] *Id.*

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with a child, we do not reach the question answered by the court of appeals."[78] Ultimately, the Wisconsin legislature amended the statute to clearly include viable fetuses in its definition of "child" under the Children in Need of Protective Services ("CHIPS") statute,[79] thereby allowing for pregnant women to be detained in the name of fetal health in future cases.

C. Civil Commitment Statutes as a Tool of Compliance

An increasing number of state legislatures have amended their civil commitment statutes to permit the detention of pregnant women who abuse drugs or alcohol or otherwise are believed to endanger their fetuses. The civil commitment statutes of Wisconsin, South Dakota, and Minnesota are three examples of this approach.

1. Wisconsin's Legislative Response to Angela M.W. v. Kruzicki

As noted above, the Wisconsin statute promulgated in 1997 in response to the state supreme court's holding in *State of Wisconsin ex rel Angela M.W. v. Kruzicki* was the first state statute permitting the civil commitment of a pregnant woman for the sake of the health of her fetus. The asserted purpose of the statute is

> [t]o recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcoholic beverages, controlled substances, or controlled substance analogs . . . .[80]

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[78] *Id.* at 739.

[79] WIS. STAT. ANN. §§ 48.01- 48.998 (West 2006). The Court of Appeals of Oregon has interpreted its civil commitment statute to allow for the commitment of pregnant women whose behavior poses specific threats to their fetuses. *See* Oregon v. Ayala, 991 P.2d 1100, 1103-04 (Or. Ct. App. 1999). Although the court held that the commitment order was premised on the pregnant woman's inability to care for her gestational diabetes and thereby harming her fetus was void as not based on clear and convincing evidence, the court seems to assume that had such evidence been part of the record, the commitment of Ms. Ayala for not complying with her physician's instructions during her pregnancy could legally or constitutionally result in her commitment under the state civil commitment statute. *Id.*

[80] WIS. STAT. ANN. §§ 48.01 (1) (am), 48.133 (2005).

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The legislature's objective thus elevates the purported needs of the fetus over the needs and decisional autonomy of the pregnant woman. Consequently, the statute allows the state to intervene in any woman's pregnancy in order to protect the fetus from any potentially serious harm that could be caused by habitual maternal ingestion of drugs or alcohol.[81]

In addition to the arguably unconstitutional restriction of pregnant women's liberty, the statute suffers from numerous other flaws. For example, the statute allows police officers to "take a pregnant woman into custody if he or she believes that the woman's use of alcohol is posing a substantial risk to the physical health of the child."[82] Any determination that a woman had violated the statute would necessarily be speculative since scientific research in this area is inconclusive; not all pregnant mothers who drink alcohol or consume illicit drugs will bear children with injuries.[83] Nor are those who are injured by their mother's prenatal alcohol or drug use injured in the same manner or to the same extent.[84] As a result, any commitment made pursuant to the statute is based not on the ordinary standard of clear and convincing evidence of harm, but rather on inconclusive scientific research and often speculative beliefs regarding harm to the fetus.[85] Moreover, because the statute protects an "unborn

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[81] WIS. STAT. ANN. § 48.02(1)(am) (2005). "Serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." *Id.* Kenneth DeVille and Loretta Kopelman have written an interesting analysis of the Wisconsin statute and how the use of "expectant mother" and "unborn child" instead of "pregnant woman" and "fetus" in the statutory language blur any differences between children and fetuses and refuse to see a woman as an individual possessed of rights. DeVille & Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 334. The language also "reflect[s] the underlying ideology that inspired the law and ha[s] a practical impact on how the policy is implemented." *Id.* at 334.

[82] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 1048 (summarizing WIS. STAT. ANN. § 48.193(1)(d)(2) (2005)).

[83] *See, e.g.*, Nancy L. Day & Gale A. Richardson, *supra* note 40 (comparing effects of in-pregnancy alcohol, marijuana, cocaine and crack, tobacco, and other drug use on children; effects of alcohol use are highly predictable; research on the effects of other drugs varies and is inconclusive).

[84] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 305; De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 335-36 & nn.44-55; *see e.g.*, D.R. Neuspiel, *Cocaine and the Fetus: Mythology of Severe Risk*, 15 NEUROTOXICOLOGY AND TERATOLOGY 305-06 (1993); GOMEZ, *supra* note 6, at 89.

[85] De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 336. Therefore, as De Ville and Kopelman note, "it may be difficult, if not impossible to establish

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child," defined therein as a "human being from the time of fertilization to the time of birth," all pregnant women would be subject to the statute regardless of fetal viability.[86] Accordingly, the statute may force any pregnant woman, at any stage of pregnancy, to choose between civil commitment and abortion in some circumstances. Compounding the problematic nature of the statute on its face, is the fact that the statute went into effect without any interpretive guidelines.[87] This lack of guidelines works to deny both law enforcement and the court any assistance as to how they might enforce the statute without running afoul of these difficulties.

Given the inconclusive scientific research, courts may be basing their determination of fetal harm on something even more problematic: their perception of the proper behavior of pregnant women.[88] Hence any pregnant woman who does not comply with her physician's instructions or the court's expectations regarding appropriate behavior may be subject to the Wisconsin child abuse and neglect statute and may be confined or committed for the duration of her pregnancy.[89] If her child is born with injuries sustained in utero because of alcohol or drug use, the mother may also be subject to criminal child abuse and neglect prosecution, furthering the coercive character of the Wisconsin statutory system and directly implicating women's right to reproductive freedom.[90]

The Wisconsin legislation goes further than empowering physicians to report pregnant women who use drugs or alcohol to state authorities. The statute empowers physicians and other health care providers, including social workers and counselors, to report a pregnant woman to authorities if

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a clearly defined threshold beyond which the risk to the resulting child will justify, as a matter of standing policy, coercive intervention or criminal prosecution." *Id.* at 336. Furthermore, De Ville and Kopelman argue that the "scientific evidence is sufficient to counsel women against substance use and abuse and to provide treatment services to those women who want to forgo those substances during their pregnancies. But given the current levels of knowledge regarding substance abuse and fetal harm, the risk of fetal injury will rarely be sufficieut to meet the clear and convincing evidence standard that is required when the state wishes to deprive an individual of his/her liberty." *Id.* at 336.

[86] WIS. STAT. ANN. § 48.02 (19) (West 2005).

[87] *Id.*

[88] *See* April L. Cherry, *Nurturing in the Service of White Culture*, 10 TEX. J. OF WOMEN & L. 83, 116 (2001).

[89] *See also* De Ville and Kopelman, *Right Goal, Wrong Remedy*, *supra* note 40, at 337.

[90] *See* WIS. STAT. § 940.06 (2006).

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he "suspects" that the health of the fetus will be compromised by the pregnant woman's drug or alcohol use. Section 146.0255(2) of the Wisconsin Statutes states:

> Any hospital employee who provides health care, social worker or intake worker under chapter 48 may refer an infant or an expectant mother of an unborn child . . . to a physician for testing of the bodily fluids of the infant or expectant mother for controlled substances or controlled substance analogs if the hospital employee . . . *suspects* that the infant or expectant mother has controlled substances or controlled substance analogs in the bodily fluids of the infant or expectant mother because of the use of controlled substances or controlled substance analogs by the mother while she was pregnant with the infant or by the expectant mother while she is pregnant with the unborn child. . . . If the results of the test indicate that the infant does have controlled substances or controlled substance analogs in the infant's bodily fluids, the physician shall make a report . . . . If the results of the test indicate that the expectant mother does have controlled substances or controlled substance analogs in the expectant mother's bodily fluids, the physician may make a report.[91]

Because the statute allows reporting by a large class of people, more women are likely to be turned over to the authorities and, as a result, confined under the statute.

Moreover, the Wisconsin legislation has far reaching implications concerning the abortion rights and other civil rights of pregnant women. Attorney and scholar Lynn Paltrow argues:

> The revised Wisconsin code also permits counties to appoint juvenile court commissioners to oversee cases and conduct hearing applicable to unborn children, but only allows lawyers with "a demonstrated interest in the welfare of . . . unborn children" to be eligible for appointment to such positions. . . . Because unborn children are defined to exist from the moment of fertilization, a guardian could be appointed even for pre-embryos. . . . Consequently, if a woman decided to have an abortion during the pendency of her case, the guardian would undoubtedly be expected to oppose it in the "best interests" of the "unborn child."

[91] WIS. STAT. § 146.0255(2) (2006) (emphasis added).

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> Guardians are also required to "assess the appropriateness and safety of the environment of the . . . "unborn child." The pregnant woman is thus reduced, by statutory terms to an "environment" for a fetus, or in other words, a fetal container.[92]

Finally, the Wisconsin statute requires in some instances and allows in others for physicians and other health care professions to disclose confidential information about the pregnant woman without her consent when "the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion . . . that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother . . . in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree."[93] While the Wisconsin statute is flawed for all of the reasons discussed above, an additional flaw concerns the harm the statute will cause to fetuses. In fact, it may harm more fetuses than it helps because pregnant women who would benefit from drug and alcohol counseling and services will be reluctant to seek prenatal care because of their fears of being turned over to state authorities.

2. Legislative Activity in South Dakota and Minnesota Permitting Civil Commitment of Pregnant Women Who Use Alcohol or Illicit Drugs

In 1998, the South Dakota legislature enacted a statute that permits the involuntary emergency civil commitment of pregnant women who

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[92] Paltrow, *Pregnant Drug Users*, *supra* note 44, at 1047 (citations omitted). As New York Times columnist Bob Herbert has noted: "The passage of laws purporting to protect fetuses by declaring them 'persons' is an accelerating national trend . . . in the long run, that would undermine a woman's right to have an abortion." Herbert, *supra* note 21, *available at* 1998 WLNR 3044594 at *1. Paltrow's concerns are not unfounded. Indeed, in at least one other state, Alabama, some judges have begun to appoint guardians for fetuses in cases involving judicial by-pass hearings for minors seeking abortions, thereby severely limiting minors' access to abortion in that state. *See, e.g.*, *In re* Anonymous, 720 So. 2d 497 (Ala. Civ. App. 1998); *In re* Anonymous, 733 So. 2d 429 (Ala. Civ. App. 1999); *see also* Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69 (2001) (arguing that such appointments are likely to meet the "undue burden" standard, but that the standard itself has become "undue" in states that recognize a strong interest in the unborn fetuses).

[93] WIS. STAT. § 905.04(4)(e)(3) (2006); *see also* WIS. STAT. § 905.04(4)(f) (2006) (allowing testing to be performed without consent of the pregnant woman).

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abuse alcohol or drugs.[94] The statute states that "[a]n intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs may be committed to an approved treatment facility for emergency treatment."[95] The statute further provides that the court can place a pregnant woman in state custody for the duration of her pregnancy if she is found to be abusing alcohol or drugs.[96] However, the statute fails to guide law enforcement officials or the judiciary in defining "abusing alcohol or drugs."[97] Hence every law enforcement officer and judge is left to determine, without any legislative guidance, how much of an illicit drug or alcohol is too much.[98]

In 1997, Minnesota enacted a similar statute permitting the involuntary civil commitment of pregnant women who were dependent on illegal drugs including cocaine, heroin, phencyclidine, methamphetamine, or amphetamines, and whose "habitual and excessive use" endangered her fetus.[99] Interestingly, the Minnesota statute does not include the use of alcohol or marijuana, even though alcohol's tertagenic effects are well known and marijuana use is illegal.[100] The Minnesota statute mandates that health care providers report to state agencies or authorities if they "know[] or ha[ve] reason to believe that a woman is pregnant and has used a controlled substance for a non-medical purpose during the pregnancy."[101] Anyone else may also report a pregnant woman to state authorities for the same reasons.[102] After someone makes a report, the local welfare agency

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[94] S.D. CODIFIED LAWS § 34- 20A-63(3) (1998).

[95] S.D. CODIFIED LAWS § 34-20A-63 (1998) (referring to emergency commitment—the statute does not discuss non-emergency commitment.).

[96] S.D. CODIFIED LAWS § 34-20A-63 to – 70 (1998).

[97] *Id.*

[98] S.D. CODIFIED LAWS § 34-20A-63 (1998); *see also* Paltrow, *Pregnant Users*, *supra* note 44, at 1049.

[99] MINN. STAT. ANN. § 253B.02 (2005).

[100] SCHROEDEL, *supra* note 22, at 178.

[101] MINN. STAT. ANN. § 626.5561, subdiv. 1 (West. Supp. 1999).

[102] *Id.*

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must "conduct an appropriate assessment and offer services indicated under the circumstances."[103]

Interestingly, nothing in the Minnesota statute mandates that these involuntarily confined women undergo drug treatment. The Center for Policy Research notes that at least one pregnant woman who was involuntarily committed under the statute was committed to a locked ward for people with eating disorders for several months where she received no treatment for her drug addiction.[104] In addition, the statute empowers the local welfare agency to seek an emergency confinement of the pregnant woman if she refuses the "recommended voluntary services or fails recommended treatment."[105] By assessing confinement as a penalty for non-compliance with "recommended" treatment, the legislature seems to miscomprehend the very nature of a "recommendation." Thus, the services under this model are neither recommended nor voluntary.

Rather, under this legislative model, services are mandatory if the pregnant woman wishes to avoid confinement. Ultimately, through the statute, the legislature has given physicians' recommendations the power of law.[106] The legislature has obliterated the power of pregnant women to give informed consent, even though informed consent is understood as an important democratic good. Informed consent helps protect patients' autonomy by shielding them from the undue influence of their physician's personal values and preferences regarding treatment.[107] The statute's resulting system works to deny these pregnant women basic rights to autonomy, including the right to refuse medical treatment—a basic human right and constitutional liberty.[108]

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[103] MINN. STAT. ANN. § 626.5561, subdiv. 2 ("Services offered may include, but are not limited to, a referral for chemical dependency assessment, a referral for chemical dependency treatment if recommended, and a referral for prenatal care.").

[104] SCHROEDEL, *supra* note 22, at 178.

[105] MINN. STAT. ANN. § 626.5561, subdiv. 2.

[106] Similarly, in compelled medical treatment cases, judges give doctors' recommendations the power of law and thereby destroy the foundation of informed consent. *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 590.

[107] *See* J. Steven Svoboda et. al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61, 71-72 (2000).

[108] *See* Cherry, *Free Exercise Rights*, *supra* note 8, at 589-93; April L. Cherry, *Roe's Legacy: The Non-Consensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. Pa. J. Const. L. 723, 736 (2004) [hereinafter Cherry, *Roe's Legacy*]. As of 2002, fewer than 100 women have been involuntarily

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Rebecca Corneau's situation resembled Jessie Mae Jefferson's and Angela M.W.'s. By refusing to comply with physician orders, Corneau found herself detained in a state hospital. Corneau came to the attention of the Commonwealth of Massachusetts as a member of the Attleboro-Robidoux Sect, a fundamentalist Christian group which, like the better-known and larger sect of Christian Scientists, rejects medical treatment.[109] The state believed that Corneau's rejection of medical treatment led to the death of her newborn son, Jeremiah, in 1999.[110] State officials asserted that Jeremiah died because Corneau or other sect members who attended his birth failed to aspirate his lungs after birth. Corneau refuted this claim and insisted that Jeremiah was stillborn.[111] Local authorities were also concerned because they believed that another infant child in the sect died during the same year as a consequence of being denied food. Eight members of the sect were jailed for failing to cooperate in the state's investigations into the two children's deaths. The state adjudicated Corneau an unfit parent of her three living children and removed them from her home.[112] Notably, the state chose not to charge Corneau with any crime relating to the death of Jeremiah or the other sect infant despite removing her children. Nevertheless, when Corneau became pregnant in 2000, the court ordered her to undergo a physical examination. Because her religion prohibits medical treatment, Corneau refused to comply.[113] Consequently, Corneau was held in contempt of court and the court ordered her to be detained at a state-run medical facility for pregnant prison inmates. The court stated that it feared for the health of the fetus if Corneau gave birth

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committed to residential drug treatment facilities under this statute. SCHROEDEL, *supra* note 22, at 178. Political scientist Jean Reith Schroedel reports that the average stay is less than one month. *Id.* (citing Judy Pasternak, *Wisconsin Oks Civil Detention for Fetal Abuse*, LA TIMES, May 2, 1998, at A1).

[109] Robin Power Morris, *The Corneau Case, Futhering Trends of Fetal Rights and Religious Freedom*, 28 N.E.J. ON CRIM. & CIV. CON. 89, 92 (2002). For a fuller discussion of the *Corneau* case, see Hedy Bower, *How Far Can a State Go to Protect a Fetus? The Rebecca Corneau Story*, 31 GOLDEN GATE U.L. REV. 123, 123 (2001).

[110] Bower, *How Far can a State Go, supra* note 109, at 124.

[111] *Id.* at 123-24.

[112] Dave Wedge, *Hearing Slated on Cult Baby's Future*, BOSTON HERALD, Oct. 18, 2000, at 18.

[113] Dave Wedge, *Defiant Mom—Pregnant Cultist Refuses Medical Assistance*, BOSTON HERALD, Aug. 31, 2000, at 1.

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without medical assistance.[114] The judge in the case reportedly stated to the courtroom that the fetus had told him that it did not want to die.[115]

D. The Incarceration of Drug Dependent Pregnant Women to Protect Fetal Health

Incarceration is the third and perhaps most egregious mechanism by which states have sought to protect fetal health from the imprudent behavior of non-compliant pregnant women. *United States v. Vaughn*[116] may be the first publicized case of a sentencing judge incarcerating a pregnant defendant solely to protect the health of her fetus. Brenda Vaughn was a first time offender who pled guilty to second-degree theft—a misdemeanor—for forging $700 worth of checks.[117] Although the crime was punishable by a fine of up to $1000 and one year in jail, the sentencing judge noted that "most judges of this court would probably impose a sentence of probation for most defendants with a first-time misdemeanor conviction."[118] Nevertheless, after determining that Vaughn tested positive

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[114] Dave Wedge, *Judge Confines Cult Mom to Secure Hospital; Judge's Ruling Locks up Defiant Pregnant Cult Mom*, BOSTON HERALD, Sept. 1, 2000, at 1; *see also* Morris, *The Corneau Case*, *supra* note 109, at 94.

[115] Mac Daniel, *Judge Keeps Mother Confined Says Fetus Told Him "I Do Not Want to Die,"* BOSTON GLOBE, Sept. 8, 2000, at B6.

[116] *U.S. v. Vaughn*, DAILY WASH. LAW REP., March 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988) (Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988); *see* Richard Cohen, *When a Fetus Has More Rights than the Mother*, WASH. POST, July 28, 1988, at A21; Isabelle Katz Pinzler, *Jailed Because She is Pregnant: A Superior Court Judge Went Beyond His Duty*, WASH. POST, Aug. 21, 1988, at C8. *See also* Becker, *supra* note 25, at 237 (discussing the Vaughn case and noting that judges in other jurisdictions "also use the sentencing phase of a trial to punish drug use during pregnancy"); *Id.* at 237-38 (noting that Indian tribal judges also use incarceration as a tool of fetal protection when dealing with Native American women who live on reservations and drink alcohol while pregnant); Barrie L. Becker & Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties*, 2 S. CAL. REV. L. & WOMEN'S STUD. 527, 530 (1993) (noting that, in a survey of judges at a course on alcohol and drugs and the courts at the National Judicial College, all of the judges, save one, responded that they would immediately remand the defendant into custody when asked what they would do if a pregnant, long-time heroin user who tested positive for heroin came before them for a probation violation on a drug case).

[117] *U.S. v. Vaughn*, *supra* note 116, at 441.

[118] *Id.* at 447.

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for cocaine and was six months pregnant, the same Judge sentenced Vaughn to six months incarceration.[119] He stated that he wanted "to be sure she would not be released until her pregnancy was concluded . . . because of concern for the unborn child."[120] The presiding judge believed that Ms. Vaughn would not have access to illicit drugs in jail and that, as a result, the fetus would suffer less harm. Moreover, the judge declared that such a sentence was also in the best interest of "the taxpaying public who would undoubtedly have to pay for . . . a child who could have severe and expensive problems at birth."[121]

Incarceration of pregnant women for the perceived benefit of the fetus continues to occur in trial courts.[122] *New Jersey v. Ikerd*[123] is one recent example. Although the appellate court later overturned the decision, *Ikerd* demonstrates the workings of trial courts, which, because much of their work is unreported, are often shielded from public scrutiny and legal academic analysis. Like in *Vaughn*, the court revoked the probation of a drug addicted pregnant woman in *Ikerd*.[124] Ikerd pled guilty to a third-degree felony and was sentenced to five years probation. When she violated her probation, she was eight weeks pregnant and addicted to drugs. At sentencing, she was eleven weeks pregnant and sentenced to prison for the duration of her pregnancy. The judge stated that he sentenced her to prison for the duration of her pregnancy, "[n]ot because we want to punish her, but because we want to save the baby."[125] The trial transcripts further indicate that the sole purpose of Ikerd's incarceration was to protect the health of her

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[119] *Id.* at 441.

[120] *Id.*; *see also* Rorie Surman, *Keeping Baby Safe From Mom,* NAT'L L.J., Oct. 3, 1988, at 1, col. 1.

[121] *U.S. v. Vaughn*, *supra* note 116, at 441; *see also* STEINBOCK, *supra* note 34, at 140.

[122] Another example of how the court uses threats of incarceration to control the behavior of pregnant women can be found in the Second Judicial District of New Mexico in Albuquerque. Under a court program, drug-using pregnant women who are arrested for non-violent crimes can avoid prosecution by participating in a drug treatment and prenatal care program coordinated by the court. For more detail, see GOMEZ, *supra* note 6, at 81.

[123] 850 A.2d 516 (N.J. Super. Ct. App. Div. 2004).

[124] *Id.*

[125] *Id.* at 519. Moreover, the sentencing judge discussed the possibility of confining Ikerd to a hospital for the duration of her pregnancy, but found that option unacceptable because of its cost to taxpayers. *Id.*

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fetus. For example, the judge indicated that he would reconsider the sentence when the baby was born or if Ikerd terminated her pregnancy.[126] In addition, the trial judge told the defendant's attorney, "if she loses the baby, if there is a problem, and she has the baby, I'll consider . . . any application that you wish to make at that time."[127]

Ikerd appealed her sentence on the grounds that her incarceration was unlawful because it conflicted with both the sentencing statute and constitutional guarantees.[128] The appellate court rightly held that the defendant had been incarcerated because she was a pregnant addict, not because of the crime to which she had pled guilty; as such, her sentence was unlawful. The appellate court stated:

> The transcript of the February hearing clearly discloses that the only reason that the judge sent Ikerd to prison was to protect the health of her fetus, a consideration wholly unrelated to Ikerd's underlying crime of welfare fraud. That the court was willing to reconsider its sentence if Ikerd's pregnancy terminated constitutes disturbing but compelling proof of this proposition. *Ikerd was punished by being subject to the extended prison term because she was pregnant and addicted, and for no other reason.*[129]

The appellate court noted that the sentencing judge's decision in this case implicated such constitutional issues as the protection against cruel and unusual punishment, protection of the right to privacy, including the right to procreation, and the due process and equal protection guarantees. Yet, the appellate court did not base its decision on constitutional grounds. Instead, it overturned Ikerd's sentence as a violation of state sentencing law and a violation of the principles of separation of powers,[130] holding that the sentencing judge had in effect "usurped the powers of the legislature."[131] In

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[126] *Id.* at 520.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 522 (emphasis added).

[130] *Id.* at 523 (violates the statute which states that "no conduct constitutes an offense unless the offense is defined by this code or another statute of this State") (citing State v. Stewart, 642 A.2d 942 (N.J. 1994); State v. Cannon, 608 A.2d 341 (N.J. 1992)).

[131] *Id.* at 523.

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sum, the appellate court held that incarceration of a pregnant criminal defendant for the sole purpose of protecting her fetus was impermissible under the applicable state statutes, but only hinted that it may also violate a number of constitutional principles.

In all of the cases discussed thus far, the pregnant women involved behaved in "unauthorized" ways by either refusing to consent to medical procedures recommended by physicians or by behaving in ways viewed as at odds with the delivery of a healthy infant. Because they refused to conform to mothering norms, they were subjected to censure and state control without any regard for their own constitutional rights to privacy, bodily integrity, and freedom from unwarranted detention and confinement.

II. FREEDOM FROM UNWARRANTED DETENTION AND THE RIGHT TO PRIVACY

The rights guaranteed by the Constitution protect the individual from state intervention or coercion in a limited number of circumstances.[132] They are thought to be necessary to preserve individual liberty, a prerequisite for democratic citizenship.[133] Such is the conventional understanding of both the right to be free from detention or incarceration without due process of law and the right to privacy related to reproductive decisions. When the state detains pregnant women, not for the protection of themselves but rather for the ostensible protection of their fetuses, the state coerces those women to behave in ways that it believes would be beneficial for their fetuses. This coercion represents a violation of two of the most basic constitutional rights—the right to be free from unwarranted detention and the right to privacy.

A. Freedom From Unwarranted Detention, Confinement and Incarceration: The Right to be Free From Physical Restraint

Both the Fifth and the Fourteenth Amendments maintain that the state cannot deprive a citizen of liberty without due process of law. In its simplest form, liberty in this context means freedom from incarceration or detention by the state, or, in other words, "freedom from bodily

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[132] BREYER, *supra* note 7.

[133] *Id.*

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restraint."[134] This right of physical liberty—the right to be free from physical restraint—is a fundamental right, and, as such, any restriction of this right is subject to strict scrutiny. In order to restrict a citizen's physical liberty, the state must show that such a restriction is the result of a compelling state interest and that the restriction is the least restrictive means of, or necessary for, protecting that state interest.[135]

Recognition of the right to physical liberty permeates both the criminal and civil law as demonstrated in the context of the use of preventative detention by states to detain criminal defendants. Under the doctrine of preventative detention, the state may hold or confine a criminal defendant prior to trial without bail if it fears that the defendant is dangerous to others.[136] The state must articulate a compelling interest and must show that no lesser restrictive alternatives are available or feasible. In the preventative detention context, the protection of third parties is the articulated compelling state interest. As the Court held in *United States v. Salerno*, the government must present "an identified and articulable threat to an individual or the community" for the detention to pass constitutional muster.[137] The state must also support its conclusion that the detention is necessary for the protection of the third party by clear and convincing evidence.[138] Furthermore, "the judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the sustainability of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release."[139]

Most of the pregnant women in the foregoing cases were not criminal defendants. Therefore, preventative detention was inappropriate. When the pregnant woman is a criminal defendant, preventative detention is

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[134] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[135] *See, e.g.*, City of Bourne v. Flores, 521 U.S. 507, 515-16 (1997) (holding that when infringing upon a fundamental right, state has the burden of proving that the state action is necessary to further a compelling state interest and that the action chosen represents the least restrictive means of furthering the state interest).

[136] 75 A.L.R.3d 956.

[137] U.S. v. Salerno, 481 U.S. 739, 751 (1987).

[138] *Id.* at 742-43.

[139] *Id.*

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only appropriate if she poses a danger to a third party. Because the fetus is not a legal person,[140] there is no support for considering the fetus a third party, even if the fetus is viable. When the pregnant woman is convicted of a crime and probation is ordered, to be constitutional the probation conditions must relate either to her criminal conviction or to her future criminality.[141] If the state subjects a pregnant woman to conditions of probation that bears no relationship to her convictions, then the conditions are invalid and unconstitutional.[142]

However, possibly with the hope of avoiding the issues related to criminal detention, some courts have confined and detained pregnant women for the preservation of fetal health through civil proceedings. Nevertheless, because freedom from physical restraint is a fundamental right, these civil courts must still overcome the highest of standards in order to justify these restrictions.

In *Addington v. Texas*, the Supreme Court articulated this strict standard, holding that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[143] As other commentators have noted, the state's interest in an individual's civil commitment can be justified by two traditional state powers: the police power and the *parens patriae* power.[144] The police power permits the state to act to protect the community from a dangerous person, while the *parens patriae* power permits the state to act to protect the individual from him or herself. Both powers are limited. For example, in terms of civil commitment, the police power cannot be used to protect the community from *all* dangers. The *parens patriae* power is similarly restricted. It cannot be used to protect the individual from all of his or her improvident acts. In fact, *parens patriae* is traditionally used to protect children and only those adults with mental disease or defects. When either state power is

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[140] Roe v. Wade, 410 U.S. 113, 158 (1973) ("The word 'person' as used in the Fourteenth Amendment, does not include the unborn."). Also, born alive rules in criminal and tort law require a live birth to support any claims on behalf of the child for injuries incurred in utero. *See, e.g.*, Ryan v. Brown, 827 N.E.2d 112 (Ind. Ct. App. 2005) (claim under Indiana Medical Malpractice Act was subject to summary judgment when the child was not born alive, therefore barring the claim).

[141] Becker & Hora, *supra* note 116, at 531; *see generally*, 21A AM. JUR. 2D *Criminal Law* § 907.

[142] Becker & Hora, *supra* note 116, at 532.

[143] 441 U.S. 418, 432 (1979).

[144] *See, e.g.*, Gosain, *supra* note 69, at 828.

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implicated, the individual's physical liberty may be constrained, but only if due process requirements have been met: the state must articulate a compelling state interest and demonstrate that the detention is necessary for the protection of that interest and that no less restrictive means exists to protect that interest.

Like the commitment of the mentally ill, the detention of pregnant women who use drugs or alcohol or who are otherwise non-compliant or unconventional in the care of their fetus interferes with physical liberty. As such, the detention must be subjected to strict scrutiny. In this context, the state articulates a compelling interest based on both of the traditional rationales: the *parens patriae* power to protect a pregnant woman from her own behavior and the police power to protect third parties from the pregnant woman's actions. In these cases, the court considers the fetus to be the third party in need of protection. Thus, in order for a civil detention or commitment to pass strict constitutional scrutiny, the state must show, by clear and convincing evidence,[145] that the pregnant woman is either a danger to herself or a danger to the fetus.

To invoke its *parens patriae* power, the state must show something more than that the woman is a danger to herself. The state must show that the pregnant woman falls into the category of persons protected under the *parens patriae* rationale. The making of poor choices does not generally constitute mental disease or defect. While the pregnant woman's behavior may be foolish or improvident, failure to abide by physicians' "orders"[146] or continuing to drink alcohol or take illicit drugs arguably does not rise to the level of mental disease and is consequently not subject to protection under the *parens patriae* power.

To invoke the police power, the state must demonstrate a danger to a third party. Thus, the state must show that the fetus constitutes a legally recognized "other" at risk from injury because of the pregnant woman's behavior. While the fetus may be at risk from the pregnant woman's poor or unconventional choices, it cannot constitute a third party. The fetus is not yet a legal person because it has no independent or legal existence outside of its mother.[147] Some commentators argue that because the Court has held

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[145] *Addington*, 441 U.S. at 432.

[146] "Orders"—in the context of pregnant women, physician's recommendations are not voluntary in that these detentions show that the pregnant woman must follow them or be subject to censure. They are not recommendations in the sense that the woman, relying on her on judgment, can decide not to abide by them —there is no sense in these determinations that informed consent principles apply.

[147] Roe v. Wade, 410 U.S. 113, 158 (1973).

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that the state has a compelling interest in the fetus at viability[148] and that the state has a "legitimate interest" in the fetus from the beginning of the pregnancy,[149] the state may act to protect a viable fetus from the actions of its improvident mother.[150] However, this argument fails to appreciate the limits of the state's power; even when the state's interest in the fetus becomes compelling, the state can only prevent the abortion of the fetus.[151] As such, the state's interest in the fetus is only compelling in the context of abortion. The state cannot detain the pregnant woman to protect the fetus. The state can only prevent the intentional destruction of the fetus; it cannot prevent the unintended consequences of the pregnant woman's poor or unconventional choices. Arguably, the Court has chosen to limit the state's power because of the fundamental, constitutional importance of protecting the woman's bodily integrity from state intrusion. Hence, the state's interest in the fetus, non-viable or viable, is not compelling outside of the abortion context. Therefore, the state cannot justify the detention of the pregnant woman for the benefit of fetal health.[152]

Assuming *arguendo* that the state could demonstrate the requisite compelling interest, it must still establish that the confinement is necessary to protect that interest. If less restrictive alternatives to detention exist, detention becomes unconstitutional. Less restrictive alternatives are in fact available for the protection or preservation of fetal health in the civil context. These include, but are not limited to, state-provided drug and alcohol rehabilitation for those who are interested, state-supported prenatal care, and increased state-supported nutrition assistance programs. Indeed, medical professionals assert that greater availability of alcohol and drug treatment for pregnant women and increased access to prenatal care and

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[148] *Id.* at 163-64.

[149] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

[150] *See, e.g.*, Jason M. Steffens, Note, *The "Peculiar" Being: The Rights of an Unborn Child in Iowa,* 88 IOWA L. REV 217, 256 (2002); Jeffrey P. Phelan, *The Maternal Abdominal Wall: A Fortress Against Fetal Health Care?*, 65 S. CAL. L. REV. 461, 479 (1991).

[151] For a further discussion of this issue, see *infra* notes 161-162 and accompanying text.

[152] Interestingly, the state also has an interest in the health of the woman—an interest in her rehabilitation. Such an interest may be enough to compel treatment in the case of drug or alcohol addiction, but the state's interest is not strong enough to compel detention.

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good nutrition would lead to better fetal outcomes than any sort of detention.[153]

Because civil detention and commitment restricts an individual's liberty, the state must demonstrate a compelling and necessary interest by clear and convincing evidence and show that no less restrictive alternatives exist before it authorizes detention. In the context of non-compliant and drug and alcohol using pregnant women, the state cannot meet this standard. Therefore, any detention for the sake of fetal health is unconstitutional.

B. Reproductive Rights: The Right to Privacy and Bodily Integrity

Conventionally, the right to privacy is the right to be left alone and to be free from state interference in decisions that pertain to one's self-definition. This notion also posits that privacy is an essential prerequisite to both personhood and citizenship, "encompassing such notions as autonomy, liberty of conscience, self-determination, and individual identity."[154] This understanding of privacy protects the right to be different or, in other words, the right to define our own identities. Jed Rubenfeld appropriately argues that, "In personhood's own view, the right to privacy protects iconoclasm; it allows people to define themselves in defiance of certain widely held, deeply entrenched values."[155] Because the protection of privacy can negatively affect others, Rubenfeld further asserts that this understanding of privacy can "offer[] a balancing test as its governing principle. The test would weigh the importance of certain conduct to an individual's identity against the importance of the state interest being served by the law restricting the conduct."[156] In this view, the state can nevertheless limit or

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[153] *See* American Medical Association Board of Trustees, *supra* note 28; Committee on Substance Abuse, American Academy of Pediatrics, *supra* note 29, at 366 ("[W]hen [anti-drug] education fails, effective drug treatment programs should be made readily available to pregnant women . . . . [The Academy] is concerned that . . . involuntary measures may discourage mothers and their infants from receiving crucial medical care and social support."); American Public Health Association, *supra* note 29 (recommending educational programs, outpatient program referrals, and development of treatment facilities, and rejecting punitive measures).

[154] Linda C. McClain, *The Poverty of Privacy*, 3 COLUM. J. GENDER & L. 119, 124 (1992); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-96 (1978) (discusses rights of privacy in the context of personhood).

[155] Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 759 (1989).

[156] *Id.* at 760.

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destroy the freedom to procreate and to avoid procreation, protected by the right of privacy and characterized by the Supreme Court as "one of the basic civil rights of man,"[157] if the state interest is compelling and no lesser restrictive means are available to accomplish the legitimate or compelling aims of the state.[158]

Reproductive rights then, are protected in most instances from state interference and coercion under the doctrine of privacy. Discussing privacy in the context of contraception, Justice Brennan asserted that "[if] the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."[159] Procreation is a fundamental right that the state can only regulate if the state interest in regulation is compelling and no less restrictive means are available. In the arena of reproduction, the Court has only found these factors satisfied in a single context: the abortion of a viable fetus. Although abortion cannot be prohibited by the state unless the fetus is viable, the Court has allowed regulation of abortion so long as the regulation is not unduly burdensome.[160] However, the facts offered in the cases and statutes presented herein (the use of the state's *parens patriae* power, the use of civil commitment statutes, and the incarceration of drug-dependent women) are not analogous to cases involving the abortions of viable fetuses. Neither do they fit into the narrow exception carved out in the Court's privacy jurisprudence allowing state intervention. Hence, in the regulation of pregnant women's behavior, the state must be held to the high standard articulated by the Court in other privacy cases regarding women's reproductive decision making and rights.

Accordingly, the Court's privacy jurisprudence presents a line of argument that contravenes state detention of pregnant women for the sake of fetal health. The Court has proffered two different standards of review

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[157] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that a statute requiring sterilization of some classes of criminals but not others is unconstitutional as discriminatory under the Equal Protection Clause).

[158] *See, e.g.*, Buck v. Bell, 274 U.S. 200, 205-07 (1927) (This case upheld a Virginia statute which permitted the nonconsensual sterilization of a woman deemed "feeble-minded" to prevent the birth of "feeble-minded" children who might lead lives of crime or indigency. The Court writes that "Three generations of imbeciles are enough.").

[159] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[160] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 876-77 (1992).

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with respect to reproductive rights: one for contraception issues and another for abortion issues.[161] Although the Court's abortion jurisprudence does not apply to the detention and civil commitment of pregnant women for the sake of fetal health, a close analysis of the undue burden standard used in abortion cases nevertheless demonstrates that such detentions violate pregnant women's rights of privacy. That is, even under the Court's undue burden standard, which allows greater state intervention, the confinement and detention of pregnant women for the benefit of fetal health unduly burdens a pregnant woman's privacy rights, including the right to be free from government intrusion, coercion, or physical restriction on account of pregnancy.

1. The Right to Be Free From Government Coercion in The Context of Reproduction and Reproductive Decision Making: The Court's Contraception Jurisprudence

In *Griswold v. Connecticut*, the Supreme Court held that the United States Constitution protected married couples' use of contraception from state intrusion.[162] Justice Douglas, writing for the majority, held that the right of privacy was a fundamental right implicit in the Bill of Rights, specifically the First, Third, Fourth, Fifth, and Ninth Amendments.[163] Moreover, for Justice Douglas the right of privacy was not primarily about avoiding procreation or making reproductive choices. Rather, the right to privacy reflects the need to protect married couples from state intrusion into

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[161] In other contexts, I have made the argument that the proper standard for analyzing cases of reproductive decision making outside of the context of abortion is to understand these decisions simply as medical decision making, protected by the individual's constitutional liberty interest in bodily integrity and in refusing unwanted medical treatment. *See* Cherry, *Roe's Legacy*, *supra* note 108. I continue to believe that this is certainly true in the context of the compelled medical treatment of pregnant women. But some of the aforementioned paradigmatic cases present a slightly different challenge. The criminal detention and civil commitment cases are not only about the protection of reproductive decision making. They are also about the protection of other choices (even though they may not be among the healthiest of choices), and more importantly for this essay, the protection of women from physical coercion of the state for the benefit of another—the fetus.

[162] Griswold v. Connecticut, 381 U.S. 479 (1965).

[163] *Id.* at 484. Fundamental rights are rights that the Court deems to be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed." Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

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their "home and . . . privacies of life," and the need to protect them from state coercion.[164] *Eisenstadt v. Baird* extended the right of privacy articulated in *Griswold* to protect unmarried adults' contraceptive use.[165] In *Eisenstadt*, the Court clearly recognized the individual's right to purchase and use contraception, thereby recognizing his or her right to make decisions concerning procreation.[166]

At the very least, *Griswold* and *Eisenstadt* articulate a constitutional right to engage in reproductive decision making. Detention, confinement, and threats thereof for the benefit of the fetus may discourage women from procreating or encourage some women to abort their fetuses to avoid incarceration. As such, these state actions violate pregnant women's right to privacy under the rubric articulated in *Griswold* and *Eisenstadt* and are therefore unconstitutional. These Supreme Court cases also reiterate a theme in constitutional jurisprudence affirming the inappropriateness of state coercion in individual decision making.[167] Under either understanding of these cases, judicial or legislative coercion, particularly in the form of detention or commitment, is inappropriate and unconstitutional.

2. Casey v. Population Services*: The Right to be Free from Unduly Burdensome Government Regulation of Abortion*

The privacy principle articulated in *Griswold* and *Eisenstadt* was further extended to include a woman's right to abort a non-viable fetus. In *Roe v. Wade*, the Supreme Court held that state interference with women's decision making regarding abortion of a non-viable fetus was invalid.[168] The Court reasoned that because abortion of a non-viable fetus was indeed a fundamental right, any state regulation restricting abortion had to pass strict scrutiny.[169] Since the state's interest in the fetus did not become

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[164] *Griswold*, 381 U.S. at 484 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

[165] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[166] *Id.* at 453.

[167] BREYER, *supra* note 7, at 5; *c.f.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1989) (holding that only state action that coerces individual to act contrary to her religious beliefs is constitutionally impermissible under free exercise clause).

[168] Roe v. Wade, 410 U.S. 113 (1973).

[169] *Id.* at 152-53.

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"compelling" until viability, any state action restricting abortion before fetal viability was deemed presumptively invalid.[170]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court abandoned this presumption.[171] The *Casey* Court articulated a new standard. It held that a regulation will fail to meet a constitutional challenge only if it places a substantial burden on a woman's right to have an abortion. If the reviewing court does not deem the regulation to place a substantial or undue burden on the woman seeking to access abortion services, it must then assess the constitutional validity of the regulation with a rational relationship review to determine whether the state's regulation is rationally related to the state's legitimate interest in preserving potential life.[172] In *Casey*, abortion clinics and physicians challenged, on substantive due process grounds, the constitutionality of a Pennsylvania abortion statute.[173]

Although the Court's commitment to stare decisis led it to continue to identify abortion as a "fundamental right,"[174] the Court in *Casey* nevertheless destroyed many of the safeguards protecting women's right to abortion that it had previously required under *Roe*.[175] The Court found that the trimester framework developed in *Roe* "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest

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[170] *Id.* at 162-63.

[171] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

[172] Justice O'Connor first suggested this standard in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 453 (1983) [hereinafter Akron I] (O'Connor, J., dissenting); *see also* O'Connor's opinions in Hodgson v. Minnesota, 497 U.S. 417 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) [hereinafter Akron II]; Webster v. Reprod. Health Services, 492 U.S. 490 (1989). In *Akron I*, Justice O'Connor stated that a statute imposes an undue burden only if it imposes absolute obstacles or severe limitations. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). She has since moderated her position. *See Casey*, 505 U.S. at 988-89.

[173] *Casey*, 505 U.S. 833. The statute included the following provisions: a mandatory twenty-four hour waiting period; an informed consent provision; a requirement for a physician-delivered, government-directed litany of information, including the availability of additional information providing in great detail the fetus' development, the possibility of state-funded prenatal care, and the liability of the man who impregnated the woman for child support; parental consent for minors; a reporting requirement mandating that information about each abortion be reported to the state; and a spousal notification provision. *See* 18 PA. CONS. STAT. ANN. § 3205 (1990). *See also Casey*, 505 U.S. 833.

[174] *Casey*, 505 U.S. at 833.

[175] *Id.* at 872.

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in potential life."[176] Accordingly, the *Casey* Court rejected the application of strict scrutiny, the standard traditionally used to evaluate the constitutionality of abortion regulations. Instead, the Court adopted the undue burden test, an intermediate form of review. Under this intermediate form of review, the Court questions only whether the state regulation at issue has the purpose or effect of placing a substantial obstacle in the path of a woman seeking the abortion of a non-viable fetus.[177] As the court stated, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[178] As *Casey* and later lower court decisions would demonstrate, the category of regulations and restrictions that are unduly burdensome is rather small. Only those regulations that have "a 'severe' or 'drastic' impact on the availability of legal abortion or absolutely vetoes a woman's choice" will be found unconstitutional.[179]

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[176] *Id.*

[177] Martha Field has argued that the "establishment of this new constitutional framework with which to evaluate the constitutionality of abortion regulation" is probably the most significant holding of Casey. Martha Field, *Abortion Law Today,* 14 J. LEGAL MED. 3, 12-13 (1993).

As I, and others, have previously noted, the "unduly burdensome" standard of the Court seems to be more conclusory than a clearly articulated analytical framework. *See, e.g.*, April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion*, *supra* note 8, at 223; *see also* Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 608 (1994).

Moreover, in their 1991 article, *Mediating the Polar Extremes: A Guide to Post-Webster Policy*, Richard Wilkins, Richard Sherlock, and Steven Clark speculated that three factors would influence the Court's decision of whether an abortion regulation is unduly burdensome. Wilkins et al. posit that in order for a regulation to avoid being found unduly burdensome: (1) it must be firmly grounded in an articulated state interest; (2) it must not completely bar access to abortion services; and (3) it must actually further the articulated state interest. Many scholars have argued that the unduly burdensome standard is inherently unworkable. Richard G. Wilkins et. al., *Mediating the Polar Extremes: A Guide to Post-Webster Policy*, 1991 BYU L. REV. 403, 440 (1991). Elizabeth A. Schneider, for example, asserts that the new standard is unworkable because it "invite[s] courts to ground their decisions in judges' subjective analysis. This becomes especially problematic when judges have limited knowledge about the availability of abortion" and because the test fails to assess each woman's individual needs in the unique situation of an abortion. Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMPLE L. REV. 1003, 1031-34 (1993).

[178] *Casey*, 505 U.S. at 877.

[179] Sylvia A. Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 924 (1992) (citing City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 464 (O'Connor, J., dissenting); *see also* Thornburgh v. Am. Coll. of

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Regulations that are found not to unduly burden a woman's right to access abortion services but rather are designed to persuade her to choose childbirth over abortion are analyzed under the reasonable relationship standard, and, as a result, will almost always be deemed constitutional.[180]

The Supreme Court's jurisprudence in this area seems clear on this point. The Court has yet to interpret the Constitution as creating an affirmative obligation upon the state to provide the necessary conditions in which citizens can freely exercise abortion rights.[181] Instead, the Court informs us that the state will only be prohibited from acting in ways that deny citizens the right to avoid reproduction through the use of contraception and abortion, and then only in some circumstances. The Court's jurisprudence seems clear on a second point as well. The Court believes that the Constitution allows the state to discourage the exercise of reproductive rights so long as the state's obstacles do not operate as a bar. The "funding cases" reinforce the understanding of the nature of reproductive rights as negative, protecting the individual from state interference,[182] while the constitutionality of informed consent provisions serves as evidence that state-created obstacles are permitted so long as the

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Obstetricians & Gynecologists (ACOG), 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

[180] *Casey*, 505 U.S. at 877-78. The arguments made by the Court in the plurality opinion in *Casey* echo its author's, Justice O'Connor, position in earlier abortion cases. For example, in *Thornburgh v. ACOG*, Justice O'Connor in her dissent argues:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests [ensuring maternal health and in protecting potential human life], with heightened scrutiny reserved for instances in which the state has imposed an "undue burden" on the abortion decision . . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision" not whether a state regulation "may 'inhibit' abortions to some degree."

Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron I*, 462 U.S. 416, 463-64 (1983)). *See also* Carey v. Population Services Int'l, 431 U.S. 687 (1977) (abortion regulation not unconstitutional unless it unduly burdens the right to seek an abortion).

[181] Cherry, *Roe's Legacy*, *supra* note 108, at 725.

[182] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 809-10 (2d ed. 2002).

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obstacle acts solely as a deterrent and not as an absolute bar.[183] Both types of regulations are constitutional under the standard articulated in *Casey*.

a. No Affirmative State Obligation: Prohibitions on the Public Funding of Abortion

The state can still achieve some of its goals by failing to provide assistance to pregnant women who make choices the state finds undesirable. *Maher v. Roe* and *Harris v. McRae* are important to our understanding of the undue burden standard. Although these cases were decided long before *Casey*, they nevertheless rest on the notion of undue burden; that is, as long as the government action does not act as a bar to abortion, the regulation is constitutionally permitted. In *Maher*, the Court considered whether the fundamental abortion right included a right to state funding of medically unnecessary abortions when the state funded prenatal and child birthing services.[184] In overturning the district court's holding that the regulation that authorized unequal funding violated the Equal Protection Clause of the Fourteenth Amendment, the Court stated that the district court had "misconceived the nature and the scope of the fundamental right recognized in *Roe*."[185] The *Maher* Court read *Roe* as doing no more than "protect[ing] the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[186] Ultimately, the Court held that the state's "value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds,"[187] did not amount to an undue burden, even if the result was that indigent women would be unable to access abortion services as a result of their poverty.[188] As is often quoted, the Court noted:

> An indigent woman who desires an abortion suffers from no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State

[183] *Id.* at 803.

[184] Maher v. Roe, 432 U.S. 464, 466 (1977).

[185] *Id.* at 471.

[186] *Id.* at 473-74.

[187] *Id.* at 474.

[188] *Id.*

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> may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation.[189]

Similarly, in *Harris*, the Court considered whether the Hyde Amendment, which severely limits the use of federal monies for the reimbursement of medically necessary abortions under Medicaid, was unconstitutional on the grounds that by denying funding for abortion, the statute denies poor women access to abortion and hence impinges on a fundamental right.[190] Again, the Court held that such governmental policies were not unduly burdensome of women's abortion right. The *Harris* Court stated:

> Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [*Roe*], it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.[191]

Hence, burdens that are not caused by direct state action are constitutionally permissible even if they act as an absolute barrier to the exercise of a fundamental right. The Court concluded that because the funding scheme imposed no governmental restrictions (or no undue burden) on women's access to abortion, the fundamental rights analysis was not appropriate.[192] Instead the court applied the rational basis test. It looked to see if the government restriction was rationally related to its objective; concluding

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[189] *Id.*

[190] Harris v. McRae, 448 U.S. 297, 301 (1980).

[191] *Id.* at 317.

[192] *Maher*, 432 U.S. at 475.

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that it was so related, the Court held that there was no constitutional violation.[193]

b. An Obstacle, Not a Bar: The Constitutionality of Informed Consent and Waiting Period Provisions

Because the state's interest in the life of the fetus is "substantial," the state can regulate abortion under the undue burden standard as articulated in *Casey* as long as the purpose or effect of the statute does not place a "substantial obstacle" in the path of a woman seeking an abortion of a non-viable fetus.[194] Hence, the state may enact measures that are designed to persuade a woman to choose childbirth over abortion even if those measures are solely "persuasive" in nature and in no way further a health interest.[195] However, the state may use only those means "calculated to inform the woman's free choice, not hinder it."[196] As Justice O'Connor stated:

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulation which does no more than create a structural mechanism by which the state ... may express profound respect for the life of the unborn is permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[197]

In applying the undue burden standard to the informed consent provisions of the Pennsylvania abortion statute and overruling its earlier decisions in *City of Akron v. Akron Center for Reproductive Health*[198] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[199] the

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[193] *Id.* at 475-76.

[194] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

[195] *Id.* at 886.

[196] *Id.* at 877.

[197] *Id.*

[198] 462 U.S. 416 (1983).

[199] Thornburgh v. ACOG, 476 U.S. 747, 764 (1986). In *Thornburgh*, the Court held that, "[t]his type of compelled information is the antithesis of informed consent." *Id.* at 764.

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Casey Court upheld the provisions. The Court found that the informed consent provision of the Pennsylvania statute furthers the legitimate state goal "of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[200] As long as the information that the state requires to be made available to the woman is not misleading, the statute does not amount to an undue burden to a woman seeking an abortion.[201]

In sum, the *Casey* Court articulated a new standard for laws and regulations that restrain the abortion decision. With regard to the non-viable fetus, instead of requiring the state to meet the burden of strict scrutiny by demonstrating that its interest is compelling and that its action is narrowly tailored to protect that interest, the state must only demonstrate that its restraint does not unduly burden the individual woman's right to abortion. Ultimately, the state may regulate the abortion of a not-yet-viable fetus so long as the state does not place a substantial obstacle in the way of a woman pursuing an abortion. With regard to a viable fetus, the state may prohibit its abortion because the state's interest becomes compelling at the point of viability; the only way to preserve the state's interest is to prohibit abortion at that point.

Since the undue burden standard allows for greater state intervention than the *Roe* standard did, the unduly burdensome standard can be understood as a standard meant to protect pregnant women from only the most serious forms of state coercion, of which prevention of decision making is but one form. In other words, in order to determine whether the state has unduly burdened a woman's abortion, privacy, or liberty right, two questions need to be asked. The first is the question asked by the *Casey* Court: does the law prevent reproductive decision making? This Article argues that the second question is the broader one implied by the Court: does the state action result in any impermissible form of coercion?

What remains to be answered with regard to the violation of reproductive rights is whether the detention, confinement, or commitment of a pregnant woman for the benefit of fetal health is unduly burdensome. Does this state intervention prevent reproductive decision making, or does it subject pregnant women to a serious form of state coercion through threats and the loss of liberty? If the state action results in either outcome, it should be deemed unconstitutional under the undue burden standard.

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[200] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 882 (1992).

[201] *Id.* at 883.

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3. Detention and Commitment of Pregnant Women for the Sake of Fetal Health is Unduly Burdensome

The detention and commitment of pregnant women for the benefit of fetal health, and threats thereof, are highly coercive and as such prevent reproductive decision making. To determine whether state action unduly burdens reproductive decision making, *Casey* instructs us to ask whether the state action hinders the woman's decision making or whether the state action is highly coercive. Further, as noted in *Maher* and *McRae*, the obstacle is only impermissible if it is of the state's making.[202] Any highly coercive state measure that creates a double bind for the woman and subjects her to censure or deprivation regardless of the option she chooses[203] should be deemed to be unduly burdensome of the woman's reproductive, privacy, and liberty rights under the reasoning in *Casey*.

Detention and commitment in this context are highly coercive to reproductive decision making. Coercion in this context is problematic because it violates the value of autonomous decision making, a value that is at the heart of our traditional understanding of the privacy doctrine. Both contraception and abortion cases, including *Casey*, clearly articulate that the decision whether or not to bear a child is the woman's alone until fetal viability. It is not the state's decision. By allowing detention and commitment for the benefit of fetal health, the state takes a significant part of that decision making away from the woman. The state tells the pregnant woman who is drug or alcohol dependent or who wants to make unconventional decisions about the birth of her child that she undergo the pregnancy in the way mandated by the state or be subject to incarceration or other form of state detention. This action by the state does not simply make procreation decision making more difficult; it makes decision making impossible for some. It means that some women will be forced into "choosing" between procreation and incarceration. Others will "choose" between abortion and incarceration. Neither option amounts to much of a choice. Regardless of the choice made, these women will be subjected to some sort of serious state censure that will result in the deprivation of their liberty.

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[202] Maher v. Roe, 432 U.S. 464, 466 (1977) (poverty is an obstacle not of the state's making); Harris v. McRae, 448 U.S. 297, 356 (1980) (same).

[203] Marilyn Frye, *Oppression, in* THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY (1983).

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The second question posed above, whether state action results in an impermissible form of coercion, must be answered by a more in-depth analysis of the privacy right itself.

III. PRIVACY AS AFFIRMATIVE OBLIGATION OR ANTI-TOTALITARIAN PRINCIPLE

A. Privacy as Mandating an Affirmative State Obligation

The personhood theory of privacy articulated earlier in this article represents the most prevalent interpretation of the privacy doctrine.[204] Nevertheless, conceptualizing the right to privacy as creating an affirmative obligation on the part of the state to assist in creating the conditions under which meaningful, uncoerced, and independent decision making can occur, is another way of understanding the privacy doctrine. Undoubtedly, the Fourteenth Amendment similarly has been interpreted as requiring an affirmative state obligation to ensure that equality is fostered and protected in order for people to develop the characteristics necessary for good citizenship.[205] Under this analysis, privacy at its smallest mandate must foster conditions under which meaningful decision making can take place.[206] Protecting individuals from state coercion—in this case, state endorsed forms of mothering—or the coercion of others, must be an integral part of privacy's promise. Detaining pregnant women for the protection of fetal health is highly coercive. Detention amounts to putting pregnant women in a classic double bind where none of their possible responses are fair or acceptable. This use of state power to detain and confine coerces every pregnancy related decision. The women in these circumstances can either abort their fetuses, follow the state prescribed practices, or be subject to the physical control of the state for the duration of their pregnancies. Thus, at the very least, such coercive practices like the detention of pregnant women for the benefit of their fetuses should be deemed impermissible under this conception of privacy.

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[204] *See supra* Section II.B.

[205] *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

[206] Susan James, *The Good Enough Citizen: Female Citizenship and Independence*, *in* BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS, AND FEMALE SUBJECTIVITY 48-65, 51 (Gisela Bock & Susan James eds., 1992).

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B. An Anti-totalitarian Analysis of Privacy

Jed Rubenfeld proposes yet another conception or understanding of the right to privacy. Rubenfeld argues that the right protected by privacy is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."[207] In other words, Rubenfeld believes that the rights or freedoms protected by privacy are those that protect individuals from the power of the state to control their lives. In addition, privacy as an anti-totalitarian principle "prevents the state from imposing on individuals a defined identity."[208] Therefore, privacy protects individuals from a state that might treat its citizens as instrumentalities.[209] Because he views the purpose and the content of the right to privacy slightly differently than the received wisdom of the personhood theory, Rubenfeld posits a different analysis. He believes that to better understand the contours of the right to privacy, we need not look at what the law prohibits when determining whether it violates the right to privacy. Instead, we should examine what is produced by the law. Rubenfeld argues that we must consider the affirmative aspects of the law or regulation at issue and determine whether the effect of the law is "to direct and occupy" the lives of individuals.[210] He asks whether the law at issue "operate[s] in any way to confine, normalize, and functionalize identity[.]"[211] If the law operates in such a manner, then it violates the fundamental right to privacy.

In testing his thesis, Rubenfeld considers the anti-abortion regulations at issue in *Roe v. Wade* and subsequent cases. He tries to determine what these laws produce. Do they confine, normalize, or functionalize women? He argues that these regulations violate privacy, but not because women are to be protected against state interference in personal decisions since the state interferes in the personal lives of its citizens much of the time. Rather, he argues that these regulations violate the privacy rights of women because of what they produce. They confine women to the role of motherhood with its inevitable concomitant physical, emotional, economic, and political ramifications. In sum, these laws violate privacy because they produce forced motherhood, a "pronounced bodily

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[207] Rubenfeld, *supra* note 155, at 784.

[208] *Id.* at 794.

[209] *Id.* at 790-91.

[210] *Id.* at 740.

[211] *Id.* at 788.

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intervention," as well as treating women as mere instrumentalities of the state.[212] Rubenfeld asserts:

> Anti-abortion laws produce motherhood: they take diverse women with every variety of career, life-plan, and so on, and make mothers of them all. To be sure, motherhood is no unitary phenomenon that is experienced alike by all women. Nonetheless, it is difficult to imagine a state-enforced rule whose ramifications within the actual, everyday life of the act are more far-reaching. . . . [I]t creates a perceived identity for women and confines them to it; and it gathers up a multiplicity of approaches to the problem of being a woman and reduces them all to the single norm of motherhood.[213]

But what is the danger of standardization? Rubenfeld argues that the danger of standardization is the resulting treatment of individuals as "mere instruments of the state, rather than as citizens with independent minds who themselves constitute the state."[214] Standardization and instrumentalization are both products of anti-abortion laws. These developments force women to bear children for the state and in the process become "maternal environments,"[215] instead of women with interests of their own, including interests in their own bodies and their own lives. The effect of standardization and instrumentalization are also products of the detention and confinement of pregnant women for the sake of fetal health. Indeed, the Wisconsin statute permitting involuntary confinement actually refers to pregnant women as "maternal environments."[216]

The anti-totalitarian analysis proffered by Rubenfeld provides us with the opportunity to think in new ways about whether the detention, confinement, and commitment of pregnant women for the benefit of fetal health violates the right to privacy. If Rubenfeld is correct, and the proper analysis involves determining what is produced instead of looking at what activities are prohibited by the state action, then we must ask what is occurring in the context of the detention and confinement of pregnant women? Much like Rubenfeld's analysis of anti-abortion laws, we find that

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[212] *Id.* at 788.

[213] *Id.*

[214] *Id.* at 790.

[215] WIS. STAT § 48.133 (2005).

[216] *Id.*

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the state action in detention and confinement produces a "pronounced bodily intervention," an obvious bodily seizure, and imposes a defined identity upon women.

Many of the detentions of pregnant women produce a "pronounced bodily intervention." The most apparent of these bodily interventions occur when pregnant women are confined to hospitals and ordered to have medical procedures to benefit their fetuses. The hospital detention with its attendant invasion of bodily integrity for surgery or other medical procedures for the health of the fetus produces a "pronounced bodily intervention on the pregnant woman."

Moreover, the detention and confinement of pregnant women for the benefit of fetal health produces bodily seizures. When pregnant women are detained in hospitals, mental health facilities, jails, or prisons for the purported benefit of fetal health, they obviously are not free to leave when they wish. In addition, they must then rely upon these state institutions for both their basic physical needs and any special needs resulting from the pregnancy. All forms of detention physically confine women's identity. The bodily seizures produced by the detentions reduce pregnant women to something less than a free citizen. Bodily seizures impose on pregnant women a defined identity—that of a bad or unacceptable mother, one not permitted the freedom of movement or decision. Detention signals that women's physical autonomy will not be protected unless women conform to state sanctioned mothering standards.

Lastly, the detention and confinement of pregnant women for the sake of fetal health produce and impose upon women a defined identity—a state legitimized form of motherhood. This form of motherhood requires that women be selfless. It requires mothers to be self-sacrificing with the penalty of state detention. Hence, the threat of detention is unlawful because coercion in this context substantially shapes women's lives by creating a normalized state-sanctioned motherhood identity for women. The creation of this identity goes hand in hand with treating pregnant women as instruments of the state whose duty is to produce healthy children.

If Rubenfeld is correct in asserting that the right to privacy is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state,"[217] then the deprivation of pregnant women's physical and decisional liberty for the purported benefit of the fetus must violate the privacy right. With the detention and commitment of pregnant women for the sake of fetal health, the state seeks to "direct and occupy" the lives of pregnant women and to treat them as instruments of the state. In the end, the result is a normalized, state-defined way of mothering.

[217] Rubenfeld, *supra* note 155, at 784.

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It is this state-enforced normalization that is prevented by the protection of privacy.

IV. CONCLUSION

Judges and legislatures have used the deprivation of physical liberty, and threats thereof, as a way to prevent drug use by pregnant addicts, to compel pregnant women to access prenatal care, or to force women to submit to their physicians' directions regarding medical treatment for the benefit of fetal health. In every case, the detention of the pregnant woman was predicated upon the "right" of fetuses to be born healthy.

Even if the restriction of the physical liberty of pregnant women is well-meaning, it is unwise because it deters the pregnant women who most need prenatal care from receiving it. The restriction of the physical liberty of pregnant women is also unconstitutional because it results in an inappropriate restriction on women's right to be free from unwarranted physical restriction and on their privacy and liberty rights to reproductive decision making free of unwarranted state interference. Accordingly, detention, confinement, and incarceration of pregnant women for the benefit of fetal health violate women's constitutional rights and leave us with a jurisprudence of physical integrity and reproductive rights that permits highly coercive action on the part of the state into one of the most intimate decisions and experiences of women. If the state is permitted to detain and confine pregnant women for the benefit of fetal health, women are reduced to nothing more than fetal containers whose rights and liberties are dependent upon their acquiescence to mothering rules dictated by the state.

Finally, if the health of the fetus is of central concern, more attention must be given to the health of women, poor women in particular. The experts in this area must be listened to, including experts from the public health and medical communities and the women themselves, who can best attest to their needs. Most importantly, there needs to be a wider availability of quality prenatal care that is inexpensive or free without the threat of confinement and more drug and alcohol treatment facilities that treat pregnant women. While these suggestions are not cost free, they are no more expensive than incarcerating and confining women during their pregnancies or treating infants born with problems resulting from prenatal exposure to drugs or alcohol, or insufficient prenatal care.[218] Without proper

[218] National Committee for Quality Assurance, *Prenatal and Postpartum Care*, The State of Managed Care Quality, 2001, www.ncqa.org/somc2001/prenatal/somc

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attention paid to the needs of pregnant women, fetal health will be at risk. The force of law cannot solve this problem. It can only be solved by a public policy that reflects a commitment to the real health needs of both women and children.

_2001_ppc.html (noting that based on hospital claims, the estimated cost of post natal care for women without pre-natal care was twice as much as the post natal care of a woman who received pre-natal care).

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Supreme Court of South Carolina.

Cornelia WHITNER, Respondent,
v.
STATE of South Carolina, Petitioner.

No. 24468. | Heard May 31, 1995. | Filed July 15, 1997. | Amended and Refiled on Grant of Rehearing Oct. 27, 1997. | Rehearing Denied Nov. 19, 1997.

Mother who pled guilty before the Circuit Court, Pickens County, Frank Eppes, J., to criminal child neglect based on her ingestion of crack cocaine during the third trimester of her pregnancy filed petition for postconviction relief (PCR). The Circuit Court, Larry R. Patterson, J., granted petition, and state appealed. The Supreme Court, Toal, J., held that: (1) viable fetus is a "child" within meaning of child abuse and endangerment statute, and thus petitioner could be charged under statute for ingesting crack cocaine during third trimester of pregnancy, causing baby to born with cocaine metabolites in its system; (2) counsel could not be deemed ineffective for failing to advise petitioner that statute under which she was being prosecuted might not apply to prenatal drug use; (3) statute gave petitioner fair notice that ingesting cocaine during third trimester of pregnancy was proscribed; and (4) prosecuting petitioner did not unconstitutionally burden her right of privacy, or, more specifically, her right to carry her pregnancy to term.

Reversed.

Finney, C.J., dissented in separate opinion.

Moore, J., dissented in separate opinion.

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John D. (Jay) Elliott, Columbia, for Amicus Curiae The Alliance for South Carolina's Children.

Opinion

TOAL, Justice.

This case concerns the scope of the child abuse and endangerment statute in the South Carolina Children's Code (the Code), S.C.Code Ann. § 20–7–50 (1985).[1] We hold the word "child" as used in that statute includes viable fetuses.

FACTS

On April 20, 1992, Cornelia Whitner (Whitner) pled guilty to criminal child neglect, S.C.Code Ann. § 20–7–50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of Whitner's ingestion ****779** of crack cocaine during the third trimester of her pregnancy. The circuit court judge sentenced Whitner to eight years in prison. Whitner did not appeal her conviction.

Thereafter, Whitner filed a petition for Post Conviction Relief (PCR), pleading the circuit court's lack of subject

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matter jurisdiction to accept her guilty plea as well as ineffective *5 assistance of counsel. Her claim of ineffective assistance of counsel was based upon her lawyer's failure to advise her the statute under which she was being prosecuted might not apply to prenatal drug use. The petition was granted on both grounds. The State appeals.

LAW/ANALYSIS

A. Subject Matter Jurisdiction

The State first argues the PCR court erred in finding the sentencing circuit court lacked subject matter jurisdiction to accept Whitner's guilty plea. We agree.

[1] Under South Carolina law, a circuit court lacks subject matter jurisdiction to accept a guilty plea to a nonexistent offense. *See Williams v. State,* 306 S.C. 89, 410 S.E.2d 563 (1991). For the sentencing court to have had subject matter jurisdiction to accept Whitner's plea, criminal child neglect under section 20–7–50 would have to include an expectant mother's use of crack cocaine after the fetus is viable.[2] All other issues are ancillary to this jurisdictional issue.

S.C.Code Ann. § 20–7–50 (1985) provides:

> Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20–7–490, the proper care and attention for such *child* or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).

*6 The State contends this section encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus.*

Under the Children's Code, "child" means a "person under the age of eighteen." S.C.Code Ann. § 20–7–30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

[2] [3] [4] [5] In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey,* 311 S.C. 555, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n,* 306 S.C. 41, 410 S.E.2d 245 (1991). Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *See Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993); 82 C.J.S. *Statutes* § 316, at 541–42 (1953).

[6] South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy,* 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died **780 four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, *inter alia,* a fetus is thought to have no separate being apart from the mother.

We found such a reason for exclusion from recovery "unsound, illogical and unjust," and concluded there was "no medical or other basis" for the "assumed identity" of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: "We have no difficulty in concluding that a fetus having reached *7 that period of prenatal maturity where it is capable of independent life apart from its mother *is a person.*" *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

Four years later, in *Fowler v. Woodward,* 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted *Hall* as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

> Since a viable child is a *person before separation from the body of its mother* and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges such an 'act, neglect or default' by the defendant, to the injury of the child....

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> *Once the concept of the unborn, viable child as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.

Id. at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

More recently, we held the word "person" as used in a *criminal* statute includes viable fetuses. *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina's murder statute, S.C.Code Ann. § 16–3–10 (1976). The defendant in that case stabbed his wife, who was nine months' pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

This Court disagreed. In a unanimous decision, we held it would be "grossly inconsistent ... to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward, supra*). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

***8** Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The policies enunciated in the Children's Code also support our plain meaning reading of "person." S.C.Code Ann. § 20–7–20(C) (1985), which describes South Carolina's policy concerning children, expressly states: "It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can be planned and implemented on behalf of children and their families." (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word "person" to ****781** include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies "to *all* children who have need of services." S.C.Code Ann. § 20–7–20(B) (1985) (emphasis added). When coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.

Whitner advances several arguments against an interpretation of "person" as used in the Children's Code to include viable fetuses. We shall address each of Whitner's major arguments in turn.

Whitner's first argument concerns the number of bills introduced in the South Carolina General Assembly in the past five years addressing substance abuse by pregnant women. Some of these bills would have criminalized substance abuse by ***9** pregnant women;[3] others would have addressed the issue through mandatory reporting, treatment, or intervention by social service agencies.[4] Whitner suggests that the introduction of several bills touching the specific issue at hand evinces a belief by legislators that prior legislation had not addressed the issue. Whitner argues the introduction of the bills proves that section 20–7–50 was not intended to encompass abuse or neglect of a viable fetus.

[7] We disagree with Whitner's conclusion about the significance of the proposed legislation. Generally, the legislature's subsequent acts "cast no light on the intent of the legislature which enacted the statute being construed." *Home Health Servs., Inc. v. DHEC,* 298 S.C. 258, 262 n. 1, 379 S.E.2d 734, 736 n. 1 (Ct.App.1989) (citations omitted). Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent. *E.g., State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991). Here, we see no reason to look beyond the statutory language. *See Timmons v. South Carolina Tricentennial Comm'n, supra* (where statute's meaning can be determined from its language, no need to look beyond such language). Additionally, our existing case law strongly supports ***10** our conclusion about the meaning of the statute's language.

Whitner also argues an interpretation of the statute that includes viable fetuses would lead to absurd results obviously not intended by the legislature. Specifically,

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she claims if we interpret "child" to include viable fetuses, *every* action by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect under the statute. For example, a woman might be prosecuted under section 20–7–50 for smoking or drinking during pregnancy. Whitner asserts these "absurd" results could not have been intended by the legislature and, therefore, the statute should not be construed to include viable fetuses.

We disagree for a number of reasons. First, the same arguments against the statute can be made whether or not the child has been born. After the birth of a child, a parent can be prosecuted under section 20–7–50 for an action that is likely to endanger ****782** the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act—consuming alcoholic beverages—is itself legal. Obviously, the legislature did not think it "absurd" to allow prosecution of parents for such otherwise legal acts when the acts actually or potentially endanger the "life, health or comfort" of the parents' born children. We see no reason such a result should be rendered absurd by the mere fact the child at issue is a viable fetus.

Moreover, we need not address this potential parade of horribles advanced by Whitner. In *this* case, which is the only case we are called upon to decide here, certain facts are clear. Whitner admits to having ingested crack cocaine during the third trimester of her pregnancy, which caused her child to be born with cocaine in its system. Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. *See, e.g.,* Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus,* 327 NEW ENG.J.MED. 399 (1992); Ira J. Chasnoff, M.D., et al., *Cocaine Use in Pregnancy,* 313 NEW ENG.J.MED. 666 (1985). There can be no question here Whitner endangered the life, health, and comfort of her child. We need not decide any cases other than the one before us.

We are well aware of the many decisions from other states' courts throughout the country holding maternal conduct before the birth of the child does not give rise to criminal prosecution under state child abuse/endangerment or drug distribution statutes. *See, e.g., Johnson v. State,* 602 So.2d 1288 (Fla.1992); *Commonwealth v. Welch,* 864 S.W.2d 280 (Ky.1993); *State v. Gray,* 62 Ohio St.3d 514, 584 N.E.2d 710 (1992); *Reyes v. Superior Court,* 75 Cal.App.3d 214, 141 Cal.Rptr. 912 (1977); *State v. Carter,* 602 So.2d 995 (Fla.Ct.App.1992); *State v. Gethers,* 585 So.2d 1140 (Fla.Ct.App.1991); *State v. Luster,* 204 Ga.App. 156, 419 S.E.2d 32 (1992), *cert. denied* (Ga.1992); *Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass.Super.Ct. Oct. 15, 1990); *People v. Hardy,* 188 Mich.App. 305, 469 N.W.2d 50, *app. denied,* 437 Mich. 1046, 471 N.W.2d 619 (1991); *Commonwealth v. Kemp,* 434 Pa.Super. 719, 643 A.2d 705 (1994). Many of these cases were prosecuted under statutes forbidding delivery or distribution of illicit substances and depended on statutory construction of the terms "delivery" and "distribution." *See, e.g., Johnson v. State, supra; State v. Luster, supra; People v. Hardy, supra.* Obviously, such cases are inapplicable to the present situation. The cases concerning child endangerment statutes or construing the terms "child" and "person" are also distinguishable, because the states in which these cases were decided have entirely different bodies of case law from South Carolina. For example, in *Commonwealth v. Welch,* the Kentucky Supreme Court specifically noted Kentucky law has not construed the word "person" in the criminal homicide statute to include a fetus (viable or not). *Welch,* 864 S.W.2d at 281. In *Reyes v. Superior Court,* the California Court of Appeals noted California law did not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes, and that it was thus improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. *Reyes,* 75 Cal.App.3d at 217, 141 Cal.Rptr. 912.

***12** Massachusetts, however, has a body of case law substantially similar to South Carolina's, yet a Massachusetts trial court has held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus. *See Commonwealth v. Pellegrini,* No. 87970, slip op. (Mass.Super.Ct. Oct. 15, 1990).[5] Specifically, Massachusetts law allows wrongful death actions on behalf of viable fetuses injured *in utero* who are not subsequently born alive. *Mone v. Greyhound Lines, Inc.,* 368 Mass. 354, 331 N.E.2d 916 (1975). Similarly, Massachusetts law permits homicide prosecutions of third parties who kill viable fetuses. *See* ****783** *Commonwealth v. Cass,* 392 Mass. 799, 467 N.E.2d 1324 (1984) (ruling a viable fetus is a person for purposes of vehicular homicide statute); *Commonwealth v. Lawrence,* 404 Mass. 378, 536 N.E.2d 571 (1989) (viable fetus is a person for purposes of common law crime of murder). Because of the similarity of the case law in Massachusetts to ours, the *Pellegrini* decision merits examination.

In *Pellegrini,* the Massachusetts Superior Court found that

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state's distribution statute does not apply to the distribution of an illegal substance to a viable fetus. The statute at issue forbade distribution of cocaine to persons under the age of eighteen. Rather than construing the word "distribution," however, the superior court found that a viable fetus is not a "person under the age of eighteen" within the meaning of the statute. *Pellegrini,* slip op. at 10. In so finding, the court had to distinguish *Lawrence* and *Cass, supra,* both of which held viable fetuses are "persons" for purposes of criminal laws in Massachusetts.

The Massachusetts trial court found *Lawrence* and *Cass* "accord legal rights to the unborn only where the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." *Pellegrini,* slip op. at 11. In other words, a viable fetus should only be accorded the rights of a person for the sake of its mother or both its parents. Under this rationale, the viable fetus lacks rights of its own that deserve vindication. Whitner suggests we should ***13** interpret our decisions in *Hall, Fowler,* and *Horne* to accord rights to the viable fetus only when doing so protects the special parent-child relationship rather than any individual rights of the fetus or any State interest in potential life. We do not think *Hall, Fowler,* and *Horne* can be interpreted so narrowly.

If the *Pellegrini* decision accurately characterizes the rationale underlying *Mone, Lawrence,* and *Cass,* then the reasoning of those cases differs substantially from our reasoning in *Hall, Fowler,* and *Horne, supra.* First, *Hall, Fowler,* and *Horne* were decided primarily on the basis of the meaning of "person" as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between mother and child. As a homicide case, *Horne* also rested on the *State's*—not the mother's—interest in vindicating the life of the viable fetus. Moreover, the United States Supreme Court has repeatedly held that the states have a compelling interest in the life of a viable fetus. *See Roe v. Wade,* 410 U.S. 113, 165, 93 S.Ct. 705, 732–33, 35 L.Ed.2d 147, 183–84 (1973); *see also Planned Parenthood v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Webster v. Reproductive Health Servs.,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). If, as Whitner suggests we should, we read *Horne* only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts. We decline to read *Horne* in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini.*

The dissent contends that our holding in this case is inconsistent with *Doe v. Clark,* 318 S.C. 274, 457 S.E.2d 336 (1995). Specifically, it suggests that *Doe v. Clark,* in which we construed another provision of the Children's Code, stands for the proposition that the definition of "child" in S.C.Code Ann. § 20–7–50 (1985) means a "child in being and not a fetus." Contrary to the dissent's characterization of that case, *Doe* ***14** turned on the specific language in the consent provisions of the Adoption Act, S.C.Code Ann. §§ 20–7–1690 and –1700 (Law.Co-op Supp.1994).

In *Doe,* Wylanda Clark, who was pregnant, signed a consent form allowing the Does to adopt the child upon its birth. After the child was born, Clark decided she wanted to keep the baby and attempted to argue that the consent she executed was void because it did not contain certain information required by statute. The trial judge held Clark's consent was valid. Clark appealed.

****784** On appeal, we reversed the trial court. However, the basis for our reversal was not that "child" as defined in the Children's Code only includes born children, but that the adoption statutes contemplate that the natural mother's consent to the adoption must be given after the birth of the child to be adopted. *Doe,* 318 S.C. at 276, 457 S.E.2d at 337. Specifically, section 20–7–1700(A)(3) requires the consent form to contain the race, sex, and *date of birth* of the adoptee, as well as any names by which the adoptee has been known. Clearly, the date of birth requirement could not be fulfilled until after the birth of the child. Furthermore, section 20–7–1690, which specifies who must consent to an adoption, provides that consent is required of "the mother of a child *born* when the mother was not married." (emphasis added). Citing these sections as well as the Children's Code's definition of child, we concluded that a natural mother cannot consent to adoption until after the birth of her child. *Id.* We did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly.

Finally, the dissent implies that we have ignored the rule of lenity requiring us to resolve any ambiguities in a criminal statute in favor of the defendant. The dissent argues that "[a]t most, the majority only suggests that the term 'child' as used in § 20–7–50 is ambiguous," and that the ambiguity "is created not by reference to our decisions

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under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide."

***15** Plainly, the dissent misunderstands our opinion. First, we do not believe the statute is ambiguous and, therefore, the rule of lenity does not apply. Furthermore, our interpretation of the statute is based primarily on the plain meaning of the word "person" as contained *in the statute.* We need not go beyond that language. However, because our prior decisions in *Murphy, Fowler,* and *Horne* support our reading of the statute, we have discussed the rationale underlying those holdings. We conclude that both statutory language and case law compel the conclusion we reach. We see no ambiguity.

B. Ineffective Assistance of Counsel

The State next argues the PCR court erred in holding Whitner received ineffective assistance of counsel. We agree.

[8] [9] To prove ineffective assistance of counsel, a PCR applicant must show (1) deficient performance by her attorney and (2) prejudice resulting therefrom. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove prejudice when challenging a guilty plea, the applicant must show that but for counsel's deficient performance, the applicant would not have pled guilty. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In this case, the basis for the ineffective assistance claim was the failure of Whitner's counsel to inform her section 20–7–50 did not apply to prenatal drug use. Whitner contends she would not have pled guilty if her lawyer had given her such advice.

Given our holding that section 20–7–50 *is* applicable to an expectant mother's illegal drug use after the fetus is viable, we cannot say Whitner's lawyer's failure to advise her of the statute's *inapplicability* constituted deficient performance. In fact, both the unambiguous language of the statute and this Court's prior case law justify counsel's belief the child neglect statute applied to Whitner's actions. Therefore, the PCR court erred in ruling Whitner received ineffective assistance of counsel.

C. Constitutional Issues

1. Fair Notice/Vagueness

[10] Whitner argues that section 20–7–50 does not give her ***16** fair notice that her behavior is proscribed.[6] We disagree.

The statute forbids any person having legal custody of a child from refusing or neglecting ****785** to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the *plain* meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20–7–50. Whitner had all the notice the Constitution requires.

2. Right to Privacy

[11] Whitner argues that prosecuting her for using crack cocaine after her fetus attains viability unconstitutionally burdens her right of privacy, or, more specifically, her right to carry her pregnancy to term. We disagree.

Whitner argues that section 20–7–50 burdens her right of privacy, a right long recognized by the United States Supreme Court. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). She cites *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), as standing for the proposition that the Constitution protects women from measures penalizing them for choosing to carry their pregnancies to term.

In *LaFleur,* two junior high school teachers challenged their school systems' maternity leave policies. The policies required "every pregnant school teacher to take maternity leave without pay, beginning [four or] five months before the expected birth of her child." *Id.* at 634, 94 S.Ct. at 794, 39 L.Ed.2d at 57. A teacher on maternity leave could not return to work "until the beginning of the next regular school semester which follows the date when her child attains the age of three months." *Id.* at 634–35, 94 S.Ct. at 794, 39 L.Ed.2d at 57. ***17** The two teachers, both of whom had become pregnant and were required against their wills to comply with the school systems' policies, argued that the policies were unconstitutional.

The United States Supreme Court agreed. It found that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.* at 640, 94 S.Ct. at 796, 39 L.Ed.2d at 60. The Court then scrutinized[7] the policies to determine whether "the interests advanced in support

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of" the policy could "justify the particular procedures [the School Boards] ha[d] adopted." *Id.* at 640, 94 S.Ct. at 796, 39 L.Ed.2d at 60. Although it found that the purported justification for the policy—continuity of instruction—was a "significant and legitimate educational goal," the Court concluded that the "absolute requirement[ ] of termination at the end of the fourth or fifth month of pregnancy" was not a rational means for achieving continuity of instruction and that such a requirement "may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote." *Id.* at 642–43, 94 S.Ct. at 797–98, 39 L.Ed.2d at 61–62. Finding no rational relationship between the purpose of the maternity leave policy and the means crafted to achieve that end, the Court concluded the policy violated the Due Process Clause of the Fourteenth Amendment.

Whitner argues that the alleged violation here is far more egregious than that in *LaFleur.* She first suggests that imprisonment is a far greater burden on her exercise of her freedom to carry the fetus to term than was the unpaid maternity leave in *LaFleur.* Although she is, of course, correct that imprisonment is more severe than unpaid maternity leave, Whitner misapprehends the fundamentally different nature of her own interests and those of the government in this case as compared to those at issue in *LaFleur.*

First, the State's interest in protecting the life and health of the viable fetus is not merely legitimate. It is compelling. *See, e.g.,* ***18** *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); ****786** *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The United States Supreme Court in *Casey* recognized that the State possesses a profound interest in the potential life of the fetus, not only after the fetus is viable, but *throughout* the expectant mother's pregnancy. *See Casey,* 505 U.S. at 877, 112 S.Ct. at 2821, 120 L.Ed.2d at 716 (plurality opinion).

Even more importantly, however, we do not think any fundamental right of Whitner's—or any right at all, for that matter—is implicated under the present scenario. It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

Moreover, as a practical matter, we do not see how our interpretation of section 20–7–50 imposes a burden on Whitner's right to carry her child to term. In *LaFleur,* the Supreme Court found that the mandatory maternity leave policies burdened women's rights to carry their pregnancies to term because the policies prevented pregnant teachers from exercising a freedom they would have enjoyed but for their pregnancies. In contrast, during her pregnancy after the fetus attained viability, Whitner enjoyed the same freedom to use cocaine that she enjoyed earlier in and predating her pregnancy—none whatsoever. Simply put, South Carolina's child abuse and endangerment statute as applied to this case does not restrict Whitner's freedom in any way that it was not already restricted. The State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather, the additional penalty simply recognizes that a third party (the viable fetus or newborn child) is harmed by the behavior.

***19** Section 20–7–50 does not burden Whitner's right to carry her pregnancy to term or any other privacy right. Accordingly, we find no violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the PCR Court is REVERSED.

WALLER and BURNETT, JJ., concur.

FINNEY, C.J., and MOORE, J., dissenting in separate opinions.

FINNEY, Chief Justice:

I respectfully dissent, and would affirm the grant of post-conviction relief to respondent Whitner.

The issue before the Court is whether a fetus is a "child" within the meaning of S.C.Code Ann. § 20–7–50 (1985), a statute which makes it a misdemeanor[1] for a "person having legal custody of any child or helpless person" to unlawfully neglect that child or helpless person. Since this

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is a penal statute, it is strictly construed against the State and in favor of respondent. *State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991).

The term child for purposes of § 20–7–50 is defined as a "person under the age of eighteen" unless a different meaning is required by the circumstances. S.C.Code Ann. § 20–7–30(1) (1985). We have already held that this same definition found in another part of the Children's Code means a child in being and not a fetus. *Doe v. Clark,* 318 S.C. 274, 457 S.E.2d 336 (1995). It would be incongruous at best to hold the definition of "child" in the civil context of *Doe* is more restrictive than it is in the criminal context we consider today.

More importantly, it is apparent from a reading of the entire statute that the word child in § 20–7–50 means a child in being and not a fetus. *See Jackson v. Charleston* ****787** *County* ***20** *School District,* 316 S.C. 177, 447 S.E.2d 859 (1994) (when construing a statute, we do not view its terms in isolation, but rather in the context of the entire statute and its intended purpose). A plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, and not those which may harm fetuses. First, § 20–7–50 does not impose criminal liability on every person who neglects a child, but only on a person having legal custody of that child. The statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus. *See Stone v. State,* 313 S.C. 533, 443 S.E.2d 544 (1994) (statutes are construed so as to avoid absurd results). Second, § 20–7–50 refers to S.C.Code Ann. § 20–7–490 (1985 and Supp.1994) for the definition of neglect. Section 20–7–490 defines a neglected child as one harmed or threatened with harm, and further defines harm. § 20–7–490(B), (C), and (D). The vast majority of acts which constitute statutory harm under § 20–7–490 are acts which can only be directed against a child, and not towards a fetus.[2] The reliance upon § 20–7–490 in § 20–7–50 is further evidence that the term child as used in the child neglect statute does not encompass a fetus. Read in context, and in light of the statutory purpose of protecting persons of tender years,[3] it is clear that "child" as used in § 20–7–50 means a child in being. *Jackson v. Charleston County School District, supra.*

At most, the majority only suggests that the term "child" as used in § 20–7–50 is ambiguous. This suggestion of ambiguity is created not by reference to our decisions under the Children's Code or by reference to the statutory language and applicable rules of statutory construction, but by reliance on decisions in two different fields of the law, civil wrongful death and common law feticide. Here, we deal with the Children's Code, and the meaning of language used in a criminal statute under that Code. We have already indicated that a child ***21** within the meaning of § 20–7–90(A) (1985), which criminalizes non-support, must be one already born. *State v. Montgomery,* 246 S.C. 545, 144 S.E.2d 797 (1965) (indictment for violation of predecessor of § 20–7–90(A) fatally defective for failing to identify the child by description or date of birth); *see also Doe v. Clark, supra.* Even if these wrongful death, common law, and Children's Code decisions are sufficient to render the term child in § 20–7–50 ambiguous, it is axiomatic that the ambiguity must be resolved in respondent's favor. *State v. Blackmon, supra.*

I would affirm.

MOORE, Justice:

I concur with the dissent in this case but write separately to express my concerns with today's decision.

In my view, the repeated failure of the legislature to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance. This Court should not invade what is clearly the sole province of the legislative branch. At the very least, the legislature's failed attempts to enact a statute regulating a pregnant woman's conduct indicate the complexity of this issue. While the majority opinion is perhaps an argument for what the law *should* be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course of judicial activism rejected by every other court to address the issue.

As discussed in the Chief Justice's dissent, we are bound by the rules of statutory construction to strictly construe a criminal statute in favor of the defendant and resolve any ambiguity in her favor. *State v. Blackmon, supra.* I cannot accept the majority's assertion that the child abuse and neglect statute unambiguously includes a "viable fetus." If ****788** that is the case, then why is the majority compelled to go to such great lengths to ascertain that a "viable fetus" is a "child?"

Contrary to the majority's strained analysis in this case, one need look no further than the language of § 20–7–50 to clearly discern legislative intent that the statute apply only to children ***22** in being. "Legal custody" is not a qualification applicable to a viable fetus. I simply

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disagree the legislature intended a statute entitled "Unlawful neglect of child or helpless person by legal custodian" to render a pregnant woman criminally liable for any type of conduct potentially harmful to the unborn fetus.

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking? Although the majority dismisses this issue as not before it, the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this "down-the-road" consequence in a case of this import is unrealistic. The majority insists that parents may already be held liable for drinking after a child is born. This is untrue, however, without some further act on the part of the parent. A parent who drinks and then hits her child or fails to come home may be guilty of criminal neglect. The mere fact of drinking, however, does not constitute neglect of a child in being.

The majority attempts to support an overinclusive construction of the child abuse and neglect statute by citing other legal protections extended equally to a viable fetus and a child in being. The only law, however, that specifically regulates the conduct of a mother toward her unborn child is our abortion statute under which a viable fetus is in fact treated differently from a child in being.[1]

The majority argues for equal treatment of viable fetuses and children, yet its construction of the statute results in even greater inequities. If the statute applies only when a fetus is "viable," a pregnant woman can use cocaine for the first twenty-four weeks[2] of her pregnancy, the most dangerous period for the fetus, and be immune from prosecution under ***23** the statute so long as she quits drug use before the fetus becomes viable. Further, a pregnant woman now faces up to ten years in prison for ingesting drugs during pregnancy but can have an illegal abortion and receive only a two-year sentence for killing her viable fetus.[3]

Because I disagree with the conclusion § 20–7–50 includes a viable fetus, I would affirm the grant of post-conviction relief.

Parallel Citations

492 S.E.2d 777, 70 A.L.R.5th 723

Footnotes

1 Section 20–7–50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. *See* S.C.Code Ann. § 20–7–50 (Supp.1994). We cite the earlier version of the statute in this opinion because Whitner was prosecuted under that version. The language in the amended section relating to the actions constituting the crime is identical to the language under which Whitner was prosecuted. In other words, although the characterization of and penalty for the crime have changed, the acts constituting the crime have not.

2 The State argues we need not reach the issue of the applicability of section 20–7–50 to viable fetuses, because the indictment alleged a violation on the date of the child's birth. We disagree. The basis for the indictment was the presence of cocaine in the newborn infant. Unless Whitner gave her child cocaine after the child's birth, which no one has alleged, the behavior giving rise to the abuse and neglect charge necessarily occurred before the child was born. Moreover, the record of Whitner's original hearing and the hearing on her petition for Post Conviction Relief make clear the conviction was for her neglecting her child by ingesting crack cocaine during pregnancy. For that reason, we must determine whether section 20–7–50 applies to such behavior.

3 *See, e.g.,* S. 4032 (1993) (proposing making it a crime for a pregnant woman to ingest a controlled substance); H. 4486 (1994) (proposing amendment to section 20–7–50 to apply to actions of pregnant women).

4 *See S.* 1495 (1989–1990), reintroduced as S. 75 (1990–1991) (requiring drug testing of newborns and to include within civil definition of neglect any newborn testing positive for controlled substance); S. 1470 (1989–1990), reintroduced as S. 79 (1991) (mandating reporting to DSS pregnant woman believed to have used controlled substance; providing for education and drug treatment); H. 3858 (1990–1991) (requiring reporting of pregnant woman believed to be using controlled substance and expanding civil definition of "abused child" to include newborn testing positive for illegal drugs); S. 986 (1991) (mandating drug testing on newborn infants, requiring reporting such infants as abused under civil abuse laws, and requiring reversible sterilization or implantation of birth control until mother completes drug treatment program); S. 155 (1992–1994) (permitting testing newborns for controlled substances and reporting such test results to DSS for limited purposes); S. 1256 (1992), reintroduced as S. 150 (1992–1993) (permitting referral to DHEC of families with children prenatally exposed to drugs and giving pregnant women priority in drug treatment programs).

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5 We note that *Pellegrini* was decided by a Massachusetts superior court. To date, no appellate court in Massachusetts has addressed this issue directly.

6 In a related argument, Whitner suggests section 20–7–50 is void for vagueness. This argument lacks merit. As we noted in our interpretation of section 20–7–50, *supra, the* same argument could be made about the statute as applied to a child who has already been born.

7 The Court applied a rational relationship test, the least rigorous form of scrutiny.

1 After this case arose, the statute was amended to change the classification from misdemeanor to felony. 1993 Act No. 184, § 55 (effective January 1, 1994).

2 Examples include condoning delinquency, using excessive corporal punishment, committing sexual offenses against the child, and depriving her of adequate food, clothing, shelter or education.

3 *State v. Jenkins,* 278 S.C. 219, 294 S.E.2d 44 (1982) (construing § 16–3–1030, recodified as § 20–7–50).

1 A woman may have a legal abortion of a viable fetus if necessary to preserve her health, S.C.Code Ann. § 44–41–20(c) (1985), while, of course, she may not justify the death of a child in being on this ground.

2 Viability is presumed to occur no sooner than the twenty-fourth week of pregnancy. S.C.Code Ann. § 44–41–10(1) (1985).

3 S.C.Code Ann. § 44–41–80(b) (1985).

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828 N.W.2d 526
Supreme Court of North Dakota.

STATE of North Dakota, Plaintiff and Appellant
v.
Alexis STEGALL, Defendant and Appellee.
State of North Dakota, Plaintiff and Appellant
v.
Chelsea Hettich, Defendant and Appellee.
State of North Dakota, Plaintiff and Appellant
v.
Kimberlie Nicole Lamon, Defendant and Appellee.

Nos. 20120362, 20120365, 20120386. | April 4, 2013.

Synopsis

Background: In three separate cases, defendants were charged with endangerment of child after children tested positive for methamphetamine following birth. The Northwest Judicial District Court, Williams County, Joshua B. Rustad and David W. Nelson, JJ., granted defendants' motions to dismiss, and State appealed.

Holdings: On consolidated appeal, the Supreme Court, Mary Muehlen Maring, J., held that:

[1] fugitive dismissal rule did not apply to defendant's pretrial motion to dismiss information;

[2] it was within trial court's discretion to extend deadline for defendant's motion to dismiss; and

[3] defendant's unborn fetus was not "child," within meaning of endangerment of child.

Affirmed.

Dale V. Sandstrom, J., concurred in result.

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Robert W. Martin (appeared), N.D. Public Defenders' Office, Minot, N.D., for defendant and appellee Kimberlie Nicole Lamon.

Opinion

MARING, Justice.

[¶ 1] The State appeals the trial courts' orders dismissing three separate criminal complaints of endangerment of a child against Alexis Stegall, Chelsea Hettich, and Kimberlie Lamon ("Defendants"). We hold that the trial courts properly dismissed the criminal complaints against the Defendants by concluding the charge of endangerment of a child under N.D.C.C. § 19–03.1–22.2 does not apply to acts committed by the mother against an unborn child. We affirm the trial courts' orders.

I

[¶ 2] This case arises out of three separate criminal cases and has been consolidated on appeal. For purposes of clarity and our analysis, we discuss the factual background of each case separately.

A

[¶ 3] On December 28, 2011, Stegall gave birth to A.S. The State alleges, following the birth, A.S. tested positive for methamphetamine. On December 29, 2011, the State charged Stegall with endangerment of a child. The trial court established a scheduling order requiring all motions to be filed on or by March 16, 2012. Prior to the deadline, Stegall absconded and her trial counsel withdrew as counsel. The record indicates that Stegall was apprehended on July 9, 2012, and the trial court subsequently appointed her new counsel.

[¶ 4] On August 16, 2012, prior to trial, Stegall moved to dismiss the complaint under N.D.R.Crim.P. 12(b)(2). Stegall argued the State failed to allege in the complaint or affidavit of probable cause a crime under N.D.C.C. §

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19–03.1–22.2. Stegall argued that an individual cannot be charged with endangerment of a child for prenatal ingestion of a controlled substance, as an unborn child is not a child under the statute. The State resisted the motion and argued that, after the child's birth, A.S. continued to be exposed to the controlled substance. The trial court dismissed the State's complaint, concluding "there [were] no allegations that [Stegall] knowingly or intentionally caused, or permitted her child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia following A.S.'s birth."

B

[¶ 5] In April 2012, the State charged Hettich with two counts of endangerment of a child, after Hettich gave birth to twins who had methamphetamine present in their systems.

[¶ 6] At a preliminary hearing, Officer Ryan Zimmerman testified that a urinalysis first revealed that Hettich and the twin children had methamphetamine in their systems. A subsequent meconium, an infant's first stool, test was performed. John Doe I tested positive for methamphetamine, and John Doe II tested negative. Officer Zimmerman also testified, that after their birth but before testing, the children were not exposed to methamphetamine by Hettich or any other person. The exposure occurred prior to birth.

[¶ 7] Hettich moved to dismiss the complaint under N.D.R.Crim.P. 12(b)(2). She argued the State failed to allege she ***529** committed any criminal act upon her child postpartum. The State argued that the child was "exposed" to methamphetamine postpartum and the mother was criminally liable. The trial court dismissed the complaint, concluding the State failed to prove in its information or affidavit of probable cause allegations supporting a charge of endangerment of a child under N.D.C.C. § 19–03.1–22.2.

C

[¶ 8] In July 2012, the State charged Lamon with one count of endangerment of a child. The State's affidavit of probable cause alleged that Lamon gave birth to John Doe and, immediately following his birth, he tested positive for methamphetamine.

[¶ 9] Lamon moved to dismiss the complaint. She argued the State failed to allege she committed an act of endangerment against her child. The State argued that the child was "exposed" to methamphetamine postpartum, and the mother was criminally liable. The trial court dismissed the complaint, concluding "there [were] no allegations that [Lamon] knowingly or intentionally caused, or permitted her child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia following John Doe's birth."

II

[1] [¶ 10] The State argues the trial court should not have entertained Stegall's motion to dismiss. The State contends Stegall unjustly benefitted from absconding and, under the fugitive-dismissal rule, her motion should have been denied.

[2] [¶ 11] The fugitive-dismissal rule "allows courts to dismiss an appeal of a defendant who escapes during the pendency of his or her appeal." *State v. Bell,* 2000 ND 58, ¶ 4, 608 N.W.2d 232. We are unable to find any case law that suggests this rule should be applied to a defendant who absconds during pre-trial or trial proceedings, and we decline to extend its application.

[3] [¶ 12] A motion to dismiss a criminal information is governed by N.D.R.Crim.P. 12(b). *State v. Perreault,* 2002 ND 14, ¶ 7, 638 N.W.2d 541. The purpose of the motion is to test the sufficiency of the information. *Id.* Under N.D.R.Crim.P. 12(b)(2), a motion to dismiss raising a "defense, objection, or request that the court can determine without a trial of the general issue" may be raised before trial.

[4] [¶ 13] Here, although the trial court issued its scheduling order requesting all motions be submitted by March 16, 2012, and Stegall moved to dismiss the information on August 16, 2012, challenging its sufficiency, we conclude it was within the trial court's discretion to extend its own deadlines before trial.

III

[5] [¶ 14] The dispositive issue before this Court is whether the offense of endangerment of a child, N.D.C.C.

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§ 19–03.1–22.2, applies when a pregnant woman ingests a controlled substance that continues to affect the child postpartum; specifically, the child tests positive for a controlled substance following birth. The offense of endangerment of a child under N.D.C.C. § 19–03.1–22.2(2) states: "a person who knowingly or intentionally causes or permits a child or vulnerable adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia ... is guilty of a class C felony." The State conceded in oral argument that none of the Defendants committed any act exposing her child postpartum, but rather argued ***530** the prenatal act of each defendant continued to affect her child postpartum. The State argues that a child is still "exposed" to the controlled substance following birth, even though the initial ingestion by the pregnant woman occurred pre-birth.

[6] [7] [¶ 15] "The interpretation of a statute is a question of law, fully reviewable on appeal." *State v. Geiser,* 2009 ND 36, ¶ 6, 763 N.W.2d 469. "When interpreting statutes, this Court has a duty to ascertain the Legislature's intent." *Id.* at ¶ 8. "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." N.D.C.C. § 1–02–02. "Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition." N.D.C.C. § 1–02–03. If a statute is clear and free from ambiguity, we may not disregard the letter of the law. N.D.C.C. § 1–02–05.

[8] [9] [¶ 16] Further, we "construe[ ] statutes to avoid absurd or illogical results." *Mertz v. City of Elgin, Grant Cnty.,* 2011 ND 148, ¶ 7, 800 N.W.2d 710; *see* N.D.C.C. § 1–02–38 ("In enacting a statute, it is presumed that: ... [a] just and reasonable result is intended."). Extrinsic aids may be used to interpret a statute to avoid an absurd result, *Mertz,* at ¶ 7, and to determine whether the interpretation is consonant with legislative intent. *Geiser,* at ¶ 9. In *Geiser,* at ¶ 21, we held "N.D.C.C. § 19–03.1–22.2 does not apply to an unborn child." In reaching our decision, we said:

> The legislative history of N.D.C.C. § 19–03.1–22.2 does not indicate that the Legislature intended the statute to apply to unborn children. *Hearing on H.B. 1351 Before the House Judiciary Comm.,* 58th N.D. Legis. Sess. (Jan. 22, 2003).
>
> ....
>
> This Court has held: "When the plain language of a statute is not 'transparent,' our codified rules of statutory interpretation direct us to look to the Code itself in determining the meaning of statutory terms." *N. X–Ray Co., Inc. v. State ex rel. Hanson,* 542 N.W.2d 733, 735 (N.D.1996) (citing N.D.C.C. § 1–02–02). We review other provisions of the code to assist in the interpretation of N.D.C.C. § 19–03.1–22.2(1)(b).
>
> Section 14–10–01, N.D.C.C., states: "Minors are persons under eighteen years of age. In this code, unless otherwise specified, the term 'child' means 'minor'. Age must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority." Geiser asserts N.D.C.C. § 14–10–01, clearly establishes that: " 'child' means a person who is a 'minor', whose existence and age is reckoned from the first minute of the day on which the person is born." The State contends if the Legislature intended "child" and "minor" to mean the same thing, it could have used the word "minor." However, N.D.C.C. § 14–10–01, provides: "In this code, unless otherwise specified, the term 'child' means 'minor.' " Therefore, whether the Legislature used the word "child" or "minor" is irrelevant, because the terms are equivalent. Additionally, the State asserts if the Legislature wanted N.D.C.C. § 14–10–01 to apply to N.D.C.C. § 19–03.1–22.2, it could have provided a cross reference to N.D.C.C. § 14–10–01, or it could have expressly stated so. However, N.D.C.C. § 14–10–01 expressly applies to the entire code unless otherwise specified; therefore, a cross reference to N.D.C.C. § 14–10–01 would be unnecessary ***531** and redundant. The Legislature has provided that the age of a child is calculated from the day on which the child is born. N.D.C.C. § 14–10–01. An unborn child is not a child or minor according to N.D.C.C. § 14–10–01, and an unborn child is not a child under N.D.C.C. § 19–03.1–22.2(1)(b).

Geiser, at ¶¶ 10–13.

[¶ 17] Furthermore, we noted that if the legislature had expressly intended to criminalize endangerment of a child to include an unborn child it would have done so. *See Geiser,* at ¶ 17. Chapter 12.1–17.1, N.D.C.C., recognizes that the rights of unborn children are protected from third-party actors, criminalizing murder, manslaughter, negligent homicide, aggravated assault, and assault against an unborn child. *Geiser,* at ¶ 17; *see also* N.D.C.C. §§ 12.1–17.1–02 to 12.1–17.1–06. Under N.D.C.C. ch. 12.1–17.1, the legislature defined unborn child as, " 'the conceived but not yet born offspring of a human being, which, but for the action of the actor would beyond a reasonable doubt have subsequently been born

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alive.' " *Geiser,* at ¶ 17 (quoting N.D.C.C. § 12.1–17.1–01(3)). Therefore, as stated in *Geiser,* "[t]his makes it clear that when the Legislature wants to cover unborn children, it does so expressly" and, if the legislature "intended N.D.C.C. § 19–03.1–22.2(1)(b) to include unborn children, it could have provided a similar definition of unborn children, as in the previously existing N.D.C.C. ch. 12.1–17.1." *Geiser,* at ¶ 17.

[¶ 18] Chapter 12.1–17.1, N.D.C.C., also expressly excludes criminalizing acts committed on the unborn child by the pregnant woman:

> Charging a pregnant woman for a crime allegedly committed against her unborn child violates the express legislative policy of N.D.C.C. ch. 12.1–17.1. *Our holding that a pregnant woman cannot be charged for a crime allegedly committed against her unborn child under N.D.C.C. § 19–03.1–22.2(1)(b) coincides with ... N.D.C.C. ch. 12.1–17.1.*

Geiser, at ¶ 19 (emphasis added).

[¶ 19] The State argues *Geiser* is not applicable because Geiser's unborn child died in utero. Our conclusion and analysis in *Geiser* did not hinge on whether the unborn child was born alive or died in utero. Therefore, we hold that *Geiser* is controlling. Section 19–03.1–22.2, N.D.C.C., endangerment of a child, does not apply to acts committed on an unborn child, regardless if the child is subsequently born alive or dies in utero.

[10] [¶ 20] When a question of interpretation arises as to whether conduct is criminal or not, we construe the statute in the light most favorable to the defendant. *State v. Laib,* 2002 ND 95, ¶ 15, 644 N.W.2d 878. Furthermore, we presume the legislature, having had an opportunity to state otherwise, acquiesces to our construction and interpretation of N.D.C.C. § 19–03.1–22.2. *See Rodenburg v. Fargo–Moorhead Y.M.C.A.,* 2001 ND 139, ¶ 26, 632 N.W.2d 407 ("We presume the legislature is aware of judicial construction of a statute, and from its failure to amend a particular statutory provision, we may presume it acquiesces in that construction."). Therefore, the legislature's failure to amend N.D.C.C. § 19–03.1–22.2 " 'is evidence the court's interpretation is in accordance with the legislative intent.' " *Rodenburg,* at ¶ 26 (quoting *Clarys v. Ford Motor Co.,* 1999 ND 72, ¶ 16, 592 N.W.2d 573).

[¶ 21] Our decision in *Geiser* comports with a majority of jurisdictions. A majority of states have held that a viable fetus is not a child for purposes of criminal prosecution of a mother who ingests a controlled substance during pregnancy. *See Geiser,* 2009 ND 36, 763 N.W.2d 469; *see also* ***532** *Reinesto v. Superior Ct. of Ariz.,* 182 Ariz. 190, 894 P.2d 733 (Ct.App.1995) (holding a mother was not criminally liable for knowingly causing injury to a child under circumstances likely to produce death or serious physical injury after the mother's pre-birth ingestion of heroin caused her child to suffer heroin withdrawal symptoms postpartum); *Reyes v. Superior Ct. of San Bernardino Cnty.,* 75 Cal.App.3d 214, 141 Cal.Rptr. 912 (1977) (holding a mother not criminally liable for child endangerment for ingesting heroin while pregnant); *State v. Gethers,* 585 So.2d 1140 (Fla.Ct.App.1991) (holding child abuse statute clearly did not apply to fetuses and, therefore, did not apply to a mother who ingested cocaine during pregnancy); *State v. Aiwohi,* 109 Hawai'i 115, 123 P.3d 1210 (2005) (holding, for purposes of establishing the offense of reckless manslaughter against a pregnant woman, a fetus is not a person); *Commonwealth v. Welch,* 864 S.W.2d 280 (Ky.1993) (holding a mother's ingestion of a controlled substance while pregnant does not constitute child abuse, as an unborn child is not a person for purposes of criminal prosecution); *Kilmon v. State,* 394 Md. 168, 905 A.2d 306 (Ct.App.2006) (holding a mother may not be held criminally liable under a reckless endangerment statute for the effect that prenatal ingestion of a controlled substance may have on her child, pre- or post-birth); *People v. Hardy,* 188 Mich.App. 305, 469 N.W.2d 50 (1991) (holding a pregnant woman who uses cocaine is not criminally liable for delivery of a controlled substance, despite the possibility the drug may transfer to her infant postpartum via the umbilical cord); *Sheriff, Washoe Cnty. v. Encoe,* 110 Nev. 1317, 885 P.2d 596 (1994) (holding a criminal charge of endangerment of a child does not apply to a pregnant woman who ingests an illegal substance that results in the transmission of drugs to her child through the umbilical cord); *State v. Martinez,* 139 N.M. 741, 137 P.3d 1195 (Ct.App.2006) (holding an unborn viable fetus is not a "human being" under the New Mexico child abuse statute and the mother's use of cocaine during pregnancy was not child abuse); *State v. Gray,* 62 Ohio St.3d 514, 584 N.E.2d 710 (1992) (holding Ohio's child endangerment statute does not apply to mothers who abuse drugs during pregnancy); *Collins v. State,* 890 S.W.2d 893 (Tex.Ct.App.1994) (holding a fetus is not a child, person, or individual for purposes of criminal prosecution under the reckless injury to a child statute); *State v. Dunn,* 82 Wash.App. 122, 916 P.2d 952 (1996) (holding an unborn child is not a child for purposes of criminal prosecution of mistreatment of a

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child); *State v. J.Z.*, 228 Wis.2d 468, 596 N.W.2d 490 (1999) (holding reckless injury and attempted first-degree intentional homicide statutes were not applicable to a mother who consumed excessive amounts of alcohol causing injury to her child postpartum).

[¶ 22] Contrary to the majority of states, South Carolina and Alabama have held an unborn child is a child, person, or individual for purposes of criminal prosecution. *See Ex Parte Ankrom,* Nos. 1110176 and 1110219, 2013 WL 135748, at *1 (Ala. Jan. 11, 2013) (holding an unborn child is a child for purposes of prosecuting chemical endangerment of a child); *Whitner v. State,* 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied,* 523 U.S. 1145, 118 S.Ct. 1857, 140 L.Ed.2d 1104 (1998) (holding a woman may be prosecuted for child neglect and endangering a child for prenatal substance abuse).

[¶ 23] The facts of some of the above-referenced cases, including *Geiser,* dealt with prenatal conduct and its effect on the unborn child and not the effect of the controlled substance on a child born alive. We conclude there is no distinction between a factual scenario in which the pregnant woman prenatally ingests a controlled substance and the child subsequently dies in utero and the factual scenario in which *533 the child is born alive for purposes of criminal prosecution of the mother. This conclusion is supported by our decision in *Geiser* in which we held an unborn viable fetus is not a child under the endangerment of a child statute and, therefore, a mother is not criminally liable for endangerment of a child under N.D.C.C. § 19–03.1–22.2 for acts she commits that expose her unborn child to controlled substances. *Geiser,* 2009 ND 36, ¶¶ 10–13, 763 N.W.2d 469.

[¶ 24] Under our statutory interpretation of N.D.C.C. § 19–03.1–22.2 and our holding in *Geiser,* we hold a pregnant woman is not criminally liable for endangerment of a child for prenatal conduct that ultimately harms a child born alive. If we limited the scope of *Geiser* to only unborn children who died in utero, but held a pregnant woman liable if the child ultimately lives and tests positive for a controlled substance postpartum, we would be criminalizing a nonfatal injury while not criminalizing conduct resulting in a fatal injury. Such an interpretation would create an absurd result. It would criminalize conduct that is not a crime at the time the conduct occurs, is not a crime if the unborn child dies in utero, but is a crime only by virtue of its effect on the child born alive.

IV

[¶ 25] We affirm the trial courts' orders dismissing the criminal complaints.

[¶ 26] GERALD W. VANDE WALLE, C.J., DANIEL J. CROTHERS, and CAROL RONNING KAPSNER, JJ., concur.

DALE V. SANDSTROM, J., concurs in the result.

Parallel Citations

2013 ND 49

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Individual Interests in Conflict with Individual Rights

With the advent and more frequent use of nontraditional methods of pregnancy and gestation come new legal questions that were not previously addressed (or anticipated in some cases) by current law. The cases in this section address disputes over frozen embryos, surrogacy, and the rights of same-sex parents.

In *Roman v. Roman*, after filing for divorce, the parties reached a mediation agreement on division of marital property, with the exception of three frozen embryos. The trial court ordered that the wife be allowed to take possession of the embryos as part of the division of community property. 193 S.W.3d 40, 43 (Tex. App. 2006). On appeal, the court held that the embryo agreement entered into by the parties prior to beginning IVF provided that the frozen embryos be discarded in the event of divorce. *Id.* at 54-55. A similar outcome was reached in *Kass v. Kass*. 91 N.Y.2d 554, 558-60, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998). Query whether the rights of the party who wants the contested embryo to be destroyed (or donated) should trump in these cases. What is the argument for allowing the embryos to be implanted?

In a groundbreaking case supporting rights of a surrogate mother, the biological father and his wife sought enforcement of their surrogate agreement, compelling surrender of the infant, restraining any interference with their custody of the infant, and terminating the surrogate mother's parental rights so as to allow adoption of the child by the wife of the biological father. The court ruled that the surrogate contract conflicted with state law and public policy, and the surrogate was ruled a legal parent and granted visitation rights. *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

The opposite result was reached in *Johnson v. Calvert,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494 (1993). In *Johnson*, a married couple entered into a contract with a gestational surrogate that stated upon birth, the surrogate mother would relinquish all parental rights to the child, in return for a fee and a life insurance policy. *Id.* at 97. The California Supreme Court held that, under state statutes, both genetic consanguinity and giving birth are a means of establishing a mother and child relationship, but when the two means do not coincide in one woman, she who intended to procreate the child is the natural mother under California law. The court further held that the surrogacy agreement was not facially inconsistent with public policy. *Id.* at 100.

The rights, duties, and obligations of same-sex couples are beginning to parallel the rights, duties, and obligations of opposite-sex couples in family law today. In *Elisa B. v. Superior Court*, the California Supreme Court considered the parental rights and obligations of a woman regarding a child born to her partner. 37 Cal.4th 108, 33 Cal.Rptr.3d 46 (2005). The Court held that the woman is the children's parent and has an obligation to provide support because she agreed to raise children with her partner, supported the artificial insemination, welcomed the children into her home, and held them out as her own. *Id.* at 113. The court reasoned that holding otherwise would deprive the children of the support of their second parent. The court also ruled that both "natural" parents of a child could be women even if one was not biologically related. *Id.* at 119.

The case of *K.M. v. E.G.*, has an outcome that is consistent with *Elisa B.* 37 Cal.4th 130, 33 Cal.Rptr.3d 61 (2005). In this case, E.G. was implanted with ova from her same sex domestic partner, K.M., and soon thereafter, gave birth to twins. K.M. signed an agreement relinquishing her rights to any child conceived of her ova. Later, K.M. claimed that she did not intend to relinquish her parental rights, and would never have signed the agreement had she known E.G. intended to act as a sole parent. *Id.* at 135-36. The California Supreme Court held that when a woman provides her ova to impregnate her same-sex domestic partner and so as to produce a child to raise in their joint home, both women are parents of the child. *Id.* at 143.

193 S.W.3d 40
Court of Appeals of Texas,
Houston (1st Dist.).

Randy M. ROMAN, Appellant,
v.
Augusta N. ROMAN, Appellee.

No. 01-04-00541-CV. | Feb. 9, 2006. | Rehearing Overruled May 18, 2006.

Synopsis

Background: Husband filed for divorce, and husband and wife reached final, binding mediation agreement as to the division of marital property, with the exception of three frozen embryos. The 310th District Court, Harris County, Lisa Millard, J., ordered that wife take possession of the embryos as part of a just and right division of community property. Husband appealed.

Holdings: On issues of first impression, the Court of Appeals, Evelyn V. Keyes, J., held that:

[1] parties may voluntarily decide the disposition of a frozen embryo in advance of cryopreservation;

[2] embryo agreement between former husband and wife which provided that frozen embryos were to be discarded in the event of divorce was valid and enforceable.

Reversed and remanded.

Attorneys and Law Firms

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Panel consists of Justices TAFT, KEYES, and HANKS.

Opinion

OPINION

EVELYN V. KEYES, Justice.

In a case of first impression in Texas, appellant, Randy M. Roman, appeals the judgment of the trial court that awarded three frozen embryos[1] to appellee, Augusta *42 N. Roman, in the couple's final decree of divorce. In five issues, Randy argues that the trial court (1) failed to declare the rights of the parties pursuant to a contract; (2) erred in awarding the three frozen embryos to Augusta; (3) erred in failing to make findings of fact and conclusions of law concerning constitutional issues; (4) violated his constitutional rights by awarding the frozen embryos to Augusta; and (5) erred in awarding frozen embryos to Augusta when Randy had withdrawn his consent.

We reverse and remand the cause.

Background

Augusta and Randy married on July 5, 1997. After a few years of marriage, the parties began trying to have children. When the traditional avenues of childbirth proved unsuccessful, the parties tried artificial insemination. Several attempts at artificial insemination likewise proved unsuccessful.

In August 2001, the parties met with Dr. Vicki Schnell, the Medical Director at the Center for Reproductive Medicine (the "Center"). Augusta had laparoscopic surgery and three more attempts at artificial insemination, but was still unsuccessful at getting pregnant.

Dr. Schnell then recommended that the parties try in vitro fertilization ("IVF"). The process of IVF "involves the aspiration of ova or oocytes from the follicles of a woman's ovaries and fertilization of these ova in a laboratory procedure using the husband's or donor's sperm. The resulting [embryos] are transferred to the uterus of the potential mother, whereupon a viable pregnancy may occur. Because the IVF procedure frequently produces more [embryos] than safely may be transferred at one time, the extra [embryos] may be frozen for future use through a process called cryopreservation." *In the Interest of O.G.M.*, 988 S.W.2d 473, 474 (Tex.App.-Houston [1st Dist.] 1999, pet. dism'd).

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On March 27, 2002, the parties signed a number of documents at the Center, including one entitled "Informed Consent for Cryopreservation of Embryos" ("embryo agreement"). In this document, the parties authorized the storage of the embryos in a frozen state until the Center determined that appropriate conditions existed for transfer of the embryos to the woman's uterus and both husband and wife agreed to the transfer. In addition, the parties chose to discard the embryos in case of divorce. The document also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program.

On April 17, 2002, thirteen eggs were extracted from Augusta. Six of these eggs were successfully fertilized with Randy's sperm, resulting in six embryos. Of the six embryos that were fertilized, only three reached a stage of development to warrant the cryopreservation process. Dr. Schnell scheduled Augusta's implantation for April 20. On the night before the implantation, Randy expressed feelings to Augusta that led him to withdraw his consent to the implantation scheduled for the next day. The next day, the parties told Dr. Schnell that Augusta would not undergo the implantation procedure. A month after they decided to wait, the parties signed an agreement to unfreeze three embryos and implant them. The agreement was contingent ***43** on the parties' obtaining approval from a counselor. That agreement never took effect because Randy and Augusta did not progress through counseling.

On December 10, 2002, Randy filed for divorce and Augusta filed a counterclaim for divorce that included claims for fraud and intentional infliction of emotional distress.[2] The parties reached a final binding agreement during mediation as to the division of the marital property, except for the frozen embryos. At trial, Randy asked the trial court to uphold their written agreement, which specified that the embryos be discarded. Augusta wanted the opportunity to have the embryos implanted so that she could have a biological child.[3] If any children were born from the embryos, Augusta stated that Randy would not have parental rights or responsibilities. The day after the trial ended, the trial court ordered that Augusta take possession of the remaining three embryos. After the trial court awarded the embryos to Augusta, Randy complied with section 160.706(a) of the Texas Family Code, which allows him to seek parental rights to any child born from the embryos. *See* TEX. FAM.CODE ANN. § 160.706(a) (Vernon 2002).

On March 29, 2004, Randy filed a motion for new trial and a request for findings of fact and conclusions of law regarding the award of the frozen embryos to Augusta.[4] The trial court signed its first set of findings on April 26, 2004. The trial court's pertinent findings of fact provide as follows:

> 1. Three embryos, now frozen, were created during the marriage using the sperm of Randy Roman and the eggs of Augusta Roman.
>
> 2. The parties signed a mediation agreement addressing all issues involving the division of community property except for the three frozen embryos.
>
> 3. The three frozen embryos are community property.

The trial court's conclusions of law state:

> 1. The division of the community property agreed to by Petitioner and Respondent in their mediation agreement and the award to Respondent of the three frozen embryos as set forth in the Modified Final Decree of Divorce is just and right and a fair and equitable division of the community property.

On May 13, 2004, the trial court signed a second and more thorough set of findings submitted by Augusta. The record reflects that Randy never filed a request for additional findings.[5]

The trial court's second set of findings of fact state, in relevant part the following:

> 13. The Court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three (3) frozen embryos to AUGUSTA N. ROMAN.
>
> 14. The Court considered all evidence and testimony regarding documents ***44** the parties signed with the Center of Reproductive Medicine....

The second set of conclusions of law states,

> 7. The award of three (3) embryos to [Augusta] is part of a just and right division of the community estate having due regard for the constitutional rights of each party.
>
> 8. The order for the Center of Reproductive

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> Medicine to surrender the three (3) frozen embryos to [Augusta] is necessary to effect a just and right division of the community estate.

Analysis

In this case of first impression in Texas, we consider the merits of the trial court's award of frozen embryos to Augusta as part of a "just and right" division of community property in light of the parties' prior written agreement to discard the embryos. We answer the issue with which we are presented as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature.[6]

Award of Embryos

In his second issue on appeal, Randy argues that the trial court erred when it awarded the three frozen embryos to Augusta because the award violated the parties' embryo agreement. Randy contends that the agreement clearly provided for disposal of the frozen embryos in the case of divorce and that the trial court erred by not enforcing the agreement. Randy points to the following specific provisions in the embryo agreement:

> 2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and both husband and wife agree to the transfer.
>
> * * *
>
> 10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken:
>
> The frozen embryo(s) shall be ... Discarded.

Randy argues that these provisions of the embryo agreement allow transfer of the embryos only if both parties agree and that the trial court erred by not enforcing the agreement and ordering the embryos destroyed.[7] Randy also argues that no *45 evidence or insufficient evidence supports a finding that the embryo agreement was not enforceable or invalid. Although no Texas case has ruled on whether these types of agreements are enforceable, Randy contends that other jurisdictions have held that similar agreements are enforceable.

Augusta does not dispute that she signed and initialed the embryo agreement. She does dispute, however, the agreement's validity and the interpretation of the agreement. Specifically, Augusta argues that the trial court could have chosen not to enforce the agreement because other state supreme courts have found agreements similar to the one at issue here invalid. Because this issue has not been decided by any court in Texas, we will review the scant case law on the issue.

Prior cases involving frozen embryos

All but one of the cases surveyed involved an oral or written agreement regarding disposition of frozen embryos. In *Davis v. Davis,* the earliest case, the husband and wife did not have an agreement for the disposition of the embryos. 842 S.W.2d 588, 589 (Tenn.1992), *cert. denied sub nom, Stowe v. Davis,* 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed.2d 657 (1993). The trial court awarded custody of the frozen embryos to the wife, but the court of appeals reversed on the ground that the husband had a constitutional right not to beget a child. *Id.* at 589. In affirming the judgment of the court of appeals, the Supreme Court of Tennessee ultimately chose to weigh the interests of each party and concluded that the husband's interest in avoiding parenthood was more significant than the wife's interest in donating the embryos to another couple for implantation. *Id.* at 604.

Although the parties did not have an agreement concerning disposition of the frozen embryos, the court discussed the enforceability of a contract in this situation. The court stated, "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Id.* at 597. The court further stated that,

> [W]e recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds. Providing that the initial agreements may later be modified

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> *by agreement* will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.

Id. at 597 (emphasis in original).

In *Kass v. Kass,* prior to implantation, the parties signed a consent form which stated that the frozen embryos would not be released from storage without the written consent of both parties. 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174, 176 (1998). Another part of the consent agreement ***46** provided that if the parties could not reach a mutual decision on the frozen embryos, the embryos would be donated to research. *Id.* at 177. Before filing suit, the wife decided that she opposed the destruction of the embryos. *Id.* The trial court awarded custody of the embryos to the wife and directed her to implant them within a medically reasonable time. *Id.* The appellate division reversed. It unanimously agreed that the consent agreement regarding the disposition of unused fertilized eggs should control. *Id.* A two-justice plurality found that the parties' consent agreement indicated their desire to donate the embryos for research purposes if they could not both consent to the embryos' disposition. *Id.*

The highest court of New York affirmed the lower court's holding that the parties' consent agreement should control. The court noted that the parties had expressed their intent that if they could not agree on the embryos' disposition, they would be donated for research purposes. *Id.* at 178. It stated, "[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions." *Id.* at 180. The court further stated,

> Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.

Id.

A New Jersey appellate court, by contrast, rejected an alleged oral agreement to procreate as against public policy. *See J.B. v. M.B.,* 331 N.J.Super. 223, 751 A.2d 613, 615 (2000). In *J.B. v. M.B.,* the husband wanted to preserve the frozen embryos for his use or that of an infertile couple. 751 A.2d at 615. The wife wanted the frozen embryos destroyed, and she did not want her former husband to retain them for his own use or to donate them to anyone else. *Id.* at 616. The trial court ruled in favor of the wife, who wanted the embryos destroyed, because the family unit was no longer intact. *Id.*

The appellate court balanced the wife's right not to become a parent with the husband's right to procreate using the embryos under the Fourteenth Amendment and concluded that the husband's right would not be impaired if the embryos were destroyed because he still would be able to father children. *Id.* at 618–19. Thus, even if the Fourteenth Amendment applied, the court rejected the husband's argument that his constitutional rights would be violated if the embryos were destroyed. *Id.* at 619. The appellate court further held that a contract to procreate is contrary to New Jersey public policy and is unenforceable. *Id.* The court thus affirmed the trial court's order that the frozen embryos be destroyed. *Id.* at 620.

The Supreme Court of New Jersey affirmed, but modified the court of appeals' holding, recognizing "that persuasive reasons exist for enforcing preembryo disposition agreements." *J.B. v. M.B.,* 170 N.J. 9, 783 A.2d 707, 719 (2001). The supreme court held that the parties' consent agreement did not "manifest a clear intent by [the parties] regarding disposition of the preembryos in the event of a dissolution of their marriage." *Id.* at 713 (internal quotations omitted). In reaching its ultimate holding, the court considered the constitutional rights of the parties and stated that, "[w]e will not force [the wife] to become a ***47** biological parent against her will." *Id.* at 717. The court held that it will "enforce agreements entered into at the time in vitro fertilization [has] begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos." *Id.* at 719. If the parties disagree about disposition because one party has reconsidered their decision, the court stated, "the interests of both parties must be evaluated."[8] *Id.*

In *A.Z. v. B.Z.,* before the eggs were retrieved from the wife, the parties signed consent forms. 431 Mass. 150, 725 N.E.2d 1051, 1053–54 (2000). The wife filled out the form, which stated that if they "[s]hould become separated, [they] both agree[d] to have the embryo(s) ...

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return[ed] to [the] wife for implant." *Id.* at 1054. The court noted that the husband always signed a blank consent form. *Id.* After the husband signed the consent form, the wife would fill in the disposition and sign the form herself. *Id.*

The trial court permanently enjoined the wife from utilizing the frozen embryos held in cryopreservation. The supreme judicial court stated that "in view of the purpose of the form (drafted by and to give assistance to the clinic) and the circumstances of execution, we are dubious at best that it represents the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them." *Id.* at 1056.

Specifically, the court stated that neither the form nor the record indicated that the parties intended the form to be a binding agreement. *Id.* Instead, the court interpreted the form only to "define the donors' relationship as a unit with the clinic." *Id.* In reaching its decision, the court also noted that the consent form did not contain a duration provision and that it could not assume that the donors intended their consent form to govern a disposition of frozen preembryos four years after it was executed. *Id.* at 1056–57.

The court also looked to the donors' conduct in connection with the execution of the consent forms and determined that their conduct created doubt that the consent form represented the intentions of both donors. *Id.* at 1057. Because the husband signed a blank form and the wife later filled in her choice regarding disposition of the frozen embryos, the court concluded that the consent form did not represent the true intentions of the husband. *Id.*

In *Litowitz v. Litowitz,* the husband and wife contracted with an egg donor and an IVF clinic. *See* 146 Wash.2d 514, 48 P.3d 261, 263 (2002), *cert. denied,* 537 U.S. 1191, 123 S.Ct. 1271, 154 L.Ed.2d 1025 (2003). After the husband's sperm fertilized three of the donor's eggs, the eggs were implanted, resulting in the birth of a child. Before the birth, however, the parties separated, and sued for divorce. At trial, the wife asked to be awarded the remaining embryos to implant in a surrogate. The trial court awarded the embryos to the husband, who wanted to donate them to an out-of-state couple. The appeals court, in reviewing the egg donor contract, noted that it did not provide what would be done with the embryos if the parties could not agree or if they dissolved their marriage. The court concluded that the husband's right not to procreate compelled an award of the embryos to him. *Id.* at 265. The Supreme Court of Washington reversed, ***48** holding the parties to their preembryo cryopreservation contract, which provided that the remaining embryos would be thawed out, but not allowed to undergo further development, and that they would be disposed of after they had been maintained in cryopreservation for five years. *Id.* at 271.

The most recent case to consider the issue, *In re Marriage of Witten,* 672 N.W.2d 768, 771–72 (Iowa 2003), likewise focused on the embryo agreement. In *Witten,* the parties signed an embryo storage agreement with the IVF clinic prior to undergoing the IVF process. *Id.* at 772. The consent form provided that frozen embryos would be released only with the approval of both the husband and the wife. *Id.* The trial court concluded that the embryo storage agreement governed the dispute over the frozen embryos. *Id.* at 773. The parties were thus enjoined from taking any actions with the embryos unless both parties consented. *Id.*

The Iowa Supreme Court noted that the embryo agreement did not specifically address what would happen to the embryos upon divorce. *Id.* The court reviewed the three approaches that courts have used in resolving these types of disputes[9] and adopted the contemporaneous mutual consent model. *Id.* at 783. In adopting this model, the court found that it would be against Iowa public policy "to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."[10] *Id.* at 781. Nevertheless, the court recognized that an embryo agreement between embryo donor and fertility clinics "serves an important purpose ... ensuring that all parties understand their respective rights and obligations." *Id.* Given these different considerations, the court stated, "[W]e reject the contractual approach and hold that agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, 'subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo,' " providing that any change of intention is communicated in writing to all parties. *Id.* at 782–83 (quoting *J.B.,* 783 A.2d at 719). Because the agreement did not address disposition of the embryos upon divorce and neither party could agree on the embryos' disposition, the court enjoined both parties from utilizing the embryos without the other's written consent. *Id.* at 783.

We are mindful of the cases that have addressed this issue and particularly what we see as an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties

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have the opportunity to withdraw their consent to the terms of the agreement. Because we are not bound by state law from other jurisdictions, however, we will also review our own statutes to determine the public policy of this State in the context of embryo agreements.

Public Policy of Texas

Currently, the State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained *49 within the Uniform Parentage Act.[11] *See* TEX. FAM.CODE ANN. § 160.701–.707 (Vernon 2002), §§ 160.751–.763 (Vernon Supp.2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. *Id.* § 160.102(2)(D) (Vernon 2002). The statute requires that both husband and wife consent to assisted reproduction. *Id.* § 160.704(a). However, section 160.704(b) acknowledges that a child may be born without the husband's consent. *Id.* § 160.704(b). Section 160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* § 160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* § 160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling.

We also look to new legislation concerning gestational agreements. A gestational agreement is an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and which provides that the intended parents become the parents of the child. *See id.* § 160.752(a) (Vernon Supp.2005). The statute specifically authorizes a gestational mother, her husband if she is married, each donor, and each intended parent to enter into a written agreement that relinquishes all parental rights of the gestational mother and provides that the intended parents become the parents of the child. *See id.* § 160.754(a). The statute also requires that the parties to a gestational agreement must enter into the agreement before the 14th day preceding the date of transfer of eggs, sperm, or embryos to the gestational mother. *See id.* § 160.754(e).[12] Parental rights are transferred when a court validates the gestational agreement. *See id.* § 160.753(a), (b). To validate a gestational agreement, the court must find, in relevance to our issue, that each party to the agreement voluntarily entered into and understood the terms of the agreement. *Id.* § 160.756(b)(4). The statute also provides that "[b]efore a prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband if she is married, or either intended parent may terminate a gestational agreement...." *Id.* § 160.759(a).[13]

[1] We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such ***50** as divorce, death, or changed circumstances. We agree with the New York Court of Appeals that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass,* 673 N.Y.S.2d 350, 696 N.E.2d at 180. These agreements should thus be "presumed valid and should be enforced as between the progenitors." *Davis,* 842 S.W.2d at 597; *Kass,* 673 N.Y.S.2d 350, 696 N.E.2d at 180–181.

We believe that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. We hold, therefore, that an embryo agreement that satisfies these criteria does not violate the public policy of the State of Texas.

We now determine whether the embryo agreement in this case manifests a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce.

Embryo Agreement

[2] [3] [4] [5] [6] Absent ambiguity, we interpret a contract as a matter of law. *DeWitt County Elec. Co-op., Inc. v. Parks,* 1 S.W.3d 96, 100 (Tex.1999). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.,* 940 S.W.2d 587, 589 (Tex.1996). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not

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ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983). "An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations." *Am. Mfrs. Mut. Ins. Co. v. Schaefer,* 124 S.W.3d 154, 157 (Tex.2003). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. *DeWitt County Elec. Coop.,* 1 S.W.3d at 101. We presume that the parties intended every clause to have an effect. *Heritage Res., Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex.1996).

[7] [8] The following elements are required for the formation of a valid and binding contract: 1) an offer, 2) acceptance in strict compliance with the terms of the offer, 3) a meeting of the minds, 4) each party's consent to the terms, and 5) execution and delivery of the contract with the intent that it be mutual and binding. *Wal–Mart Stores, Inc. v. Lopez,* 93 S.W.3d 548, 555–56 (Tex. App.-Houston [14th Dist.] 2002, no pet.). Consideration is also a fundamental element of every valid contract.[14] *Turner–Bass Assocs. of Tyler v. Williamson,* 932 S.W.2d 219, 222 (Tex.App.-Tyler 1996, writ denied).

The evidence shows that the parties came to the Center on March 27, 2002 to sign a variety of forms. The parties received a cover page along with nine forms.[15] The cover page stated, "Many ***51** forms require careful thought regarding decisions you and your spouse will he asked to make." We focus our discussion on one of the documents entitled, "Informed Consent for Cryopreservation of Embryo."[16]

On page two, under the sub-heading "Consent for Cryopreservation," the document states,

> 1. We, Augusta Roman (wife) and Randy Roman (husband), the undersigned, hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participating in the IVF process.
>
> 2. We consent and authorize the embryo(s) to be stored in a frozen state until Dr. Schnell and the IVF Laboratory determine that appropriate conditions exist for transfer of the embryo(s) to the wife's uterus and both husband and wife agree to the transfer.

On page three, the document states,

> 7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.
>
> 8. We hereby authorize and require that the actions we have marked below be taken if either or both of us should die while any of our frozen embryos are still in possession of the Center of Reproductive Medicine IVF Program. We consent to the following: If only one of us survives, the surviving spouse shall have full authority to decide what is to be done with the embryo(s).
>
> 9. We understand that if both of us die, the frozen embryo(s) will be discarded.

On page four, the document states,

> 10. If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be ... Discarded.[17]
>
> 11. If other circumstances arise whereby embryos remain which are not used for the purpose of attempting to initiate a pregnancy in the wife or if the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded.

On page five, the document states,

> 16. We agree and acknowledge that we are voluntary participants, but we understand that we are free to withdraw ***52** our consent as to the disposition of our embryo(s) and to discontinue participation by requesting relocation of our embryo(s) to another suitable location at any time without prejudice.
>
> 20. Our questions regarding these procedures have been answered to our satisfaction. Our participation is voluntary. We understand that we may withdraw our consent at any time prior to the procedure. We have read and understand this form. We have received a copy of this form.

[9] Neither party disputes that he or she signed the agreement or initialed the bottom of each page of this agreement. They also do not dispute that each one of them specifically initialed section 8 (embryo disposition in the event of a death) and section 10 (embryo disposition in

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the event of divorce). They also do not dispute that their frozen embryos were still in the program or that, when they filed for divorce, they had not withdrawn consent as to the disposition of the embryos and discontinued in the participation in the program.

Rather, Augusta argues that she understood the embryo agreement to apply to remaining embryos only after implantation had occurred. She testified that she never agreed to destroy all the embryos without an opportunity to get pregnant. Although she does not refer specifically to it in her brief, Augusta is apparently relying on the first section of the embryo agreement, entitled *Consent for Cryopreservation.* This section provides, "[The parties] hereby authorize and consent to the freezing of some or all of the remaining embryos that result from our participation in the IVF process." We disagree with Augusta's interpretation of the embryo agreement.

[10] For this Court to follow Augusta's interpretation, we would necessarily have to impute language to the contract that is not present and disregard language that is. Specifically, Augusta would have us read the clause as stating that "the parties hereby authorize and consent to the freezing of some or all of the remaining embryos [after an initial set of embryos is implanted] that result from our participating in the IVF process." In an unambiguous contract, we will not imply language, add to language, or interpret it other than pursuant to its plain meaning. *See Schaefer,* 124 S.W.3d at 162; *Natural Gas Clearinghouse v. Midgard Energy Co.,* 113 S.W.3d 400, 407 (Tex.App.-Amarillo 2003, pet. denied).

Section 10 of the agreement specifically states, "If we are divorced or either of us files for divorce while *any of our frozen embryos are still in the program,* we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be ... Discarded." (Emphasis added). Although the parties could have chosen to release the frozen embryos either to Randy or Augusta, they chose the option to discard the frozen embryos in the event of divorce.

The embryo agreement's language could not be clearer. Section 10 specifically addresses the disposition of the frozen embryos in the event of a divorce. It is undisputed that Augusta and Randy both signed the entire embryo agreement, and they both initialed section 10. The evidence shows that the parties considered this section and did not sign it without thought.

Randy testified that before signing the embryo agreement, he and Augusta discussed their options about what would happen to the embryos upon divorce. Randy stated that they were both excited about taking the next step forward, but also nervous. Randy did not notice that Augusta was too emotionally upset to give ***53** consent. He also testified that they did not disagree as what to do in the event of a divorce. He further testified that no coercion, threats, bribery, or promises were used to make them sign the embryo agreement.

Dr. Schnell testified that the purpose of the cryopreservation form was to determine the parties' desires for the disposition of their embryos upon certain events such as divorce or death. Dr. Schnell testified that the couple had chosen to have the embryos discarded in the event that they divorced. On the day the parties signed the consent forms, Dr. Schnell testified that Augusta "was able to participate in the consult, and that she was able to understand the questions that I asked her, and she was able to state that she did initial those and that she understood the consents and that all her questions were answered concerning the process." At that time, Dr. Schnell did not notice any outward signs of an emotional problem that would prevent Augusta from understanding and making an informed consent.

Augusta testified that she would have signed anything to move forward because her goal was to have a child. She testified that it was possible that because she was taking birth control pills she was not in the right mental state to understand the agreement. Augusta further stated that she understood the agreement, "but I wasn't focusing on much on the [inaudible] to the outcome of the whole process of having a child." She also stated that no one was putting any force, coercion or threats on either of the parties to sign the agreement. She understood that one of the options she had been offered was to give the embryos to herself in the event of divorce. Augusta testified that she signed the agreement with the Center. When asked whether she and Randy had had a meeting of their minds as to what would happen in the unlikely event that they ever divorced, Augusta responded, "We didn't talk about divorce. I mean, it wasn't even a remote—it wasn't a conversation that we had. He signed and I signed—and I initialed it." She was also asked, "So you and Randy Roman never had an agreement on what would happen if you divorce, what would happen to the embryos if you divorced." She responded, "No, we didn't have a discussion." Augusta clarified that they did not have an agreement, other than that expressed in the consent form with the center.

[11] "[P]arties strike the deal *they* choose to strike and, thus, voluntarily bind themselves in the manner *they* choose." *Natural Gas,* 113 S.W.3d at 407. Although Augusta's choice may not have been fully considered, the

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evidence shows that she was aware of and understood the significance of her decision. The parties' embryo agreement clearly indicates their wishes in the event of divorce. We conclude that the parties' embryo agreement was not ambiguous so as to preclude a meeting of the minds.

Our conclusion that section 10 shows a meeting of the minds is bolstered by section 8 of the embryo agreement, which provides that in the event that one or both of the parties should die, they agree to give the embryos to the surviving spouse even though they could have chosen to discard the embryos. The parties' choice to give the surviving spouse full authority over the embryos indicates that the parties were aware of other options in the agreement. The agreement shows that when the parties wanted to discard the embryos, they made that choice. When the parties wanted to give the embryos to one party, they made that choice. In fact, the embryo agreement shows that at some point in signing section 8, Augusta's initials were on the option that would have discarded ***54** the embryos. Her initials were subsequently crossed out and re-entered on the choice giving the surviving spouse full authority for the embryos.

We also note that section 11 is applicable to this dispute. Section 11 states, "[I]f the husband and wife are not able to agree on disposition of remaining embryos for any reason, we hereby authorize and direct that the unused frozen embryo(s) will be discarded." Even without section 10, which clearly provides the course of action in the event of divorce, section 11 would also inform the trial court of what to do in the event of a contingency when the parties could not agree.

[12] Texas statutory law and section 16 of the embryo agreement allow a party to withdraw consent to assisted reproduction procedures. *See* TEX. FAM.CODE ANN. § 160.706(b) (Vernon 2002) (stating that consent may be withdrawn at any time before the placement of eggs, sperm, or embryos). Neither Randy nor Augusta withdrew consent to the provision in the embryo agreement that the frozen embryos were to be discarded in the event of divorce. Nor did they withdraw consent to the provision within section 11 of the embryo agreement—that if the parties could not agree on the disposition of the embryos, the frozen embryos were to be discarded. Rather, their embryos were still in the program, and the embryo agreement was still in effect when the parties divorced.[18]

Augusta also argues that Randy "breached the intent and purpose of the IVF agreements, thereby invalidating any decisions made by Mrs. Roman based upon her belief that the entire *agreement* would be honored." (Emphasis in original.) Augusta does not cite any argument or authority for this proposition. Therefore, we will not consider it on appeal. *See* TEX.R.APP. P. 38.1(h).

Augusta also argues that the embryo agreement did not reflect a meeting of the minds and was not a valid agreement concerning the disposition of the embryos. She reasons that because Randy deceived her as to his true state of mind, there could be no meeting of the minds. Although there was evidence that Randy had been upset with Augusta in the two years prior to the scheduled implantation, we cannot see how this precludes a meeting of the minds in regard to their mutual decision for the disposition of their embryos in the event of a divorce. *See CU Lloyd's of Texas v. Hatfield,* 126 S.W.3d 679, 682 (Tex.App.-Houston [14th Dist.] 2004, pet. denied) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is unambiguous, and [we] may not consider parol evidence as to the parties' intent."). Randy's deceit may have been relevant for proving fraud, but the trial court found against Augusta on that issue.

Augusta additionally argues that because the Center agreed to do whatever the Court ordered it to do, the Center's actions supersede the Center's cryopreservation document and render it moot. Augusta does not state why the embryo agreement is rendered moot, nor does she cite any authority for the proposition. We decline to address her argument. *See* TEX.R.APP. P. 38.1(h).

We hold that the embryo agreement provides that the frozen embryos are to be discarded in the event of divorce. By ***55** awarding the frozen embryos to Augusta, the trial court improperly rewrote the parties' agreement instead of enforcing what the parties had voluntarily decided in the event of divorce. Accordingly, the trial court abused its discretion in not enforcing the embryo agreement.

We sustain Randy's second issue.[19]

Because Randy's second issue is dispositive, we decline to address Randy's remaining issues. *See* TEX.R.APP. P. 47.1.

Conclusion

We reverse the judgment and remand the cause to the trial court to enter an order consistent with this opinion and with the parties' agreement that the frozen embryos be discarded. All pending motions are denied.

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Footnotes

1 Although "preembryo" is a medically accurate term for a zygote, or fertilized egg, that has not been implanted in a uterus, we will use the term embryo for linguistic convenience. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction,* 59 S. CAL. L.REV. 939, 952 n. 45 (1986). Frozen embryos is "the term of art denoting cryogenically-preserved preembyos." Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?,* 27 CONN. L.REV. 1377 n. 4 (1995).

2 In its modified decree of divorce, the trial court entered a take-nothing judgment on Augusta's fraud and intentional infliction of emotional distress causes of action. Augusta does not appeal the trial court's findings on these issues.

3 Dr. Schnell testified that Augusta has a 10% chance of becoming pregnant if the embryos are transferred to her.

4 Randy asserts that he inadvertently submitted this set of findings of fact and conclusions of law. In two of his issues on appeal (the first and third), Randy asks us to abate the appeal to have the trial court make additional findings of fact and conclusions of law.

5 Randy asserts that he never knew that the trial court signed the first or second set of findings.

6 At least three states have enacted legislation addressing frozen embryos. *See, e.g.,* FLA. STAT. ANN.. § 742.17 (couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances); N.H.REV.STAT. ANN. §§ 168–B:13–168–B:15, 168–B:18 (couples must undergo medical examinations and counseling; 14–day limit for maintenance of *ex utero* pre-zygotes); LA.REV.STAT. ANN. §§ 9:121–9:133 (pre-zygote considered "juridical person" that must be implanted); *see also* TEX. FAM.CODE ANN. §§ 160.102(2) (defining assisted reproduction), 160.706 (entitled "Effect of Dissolution of Marriage") (Vernon 2002), § 160.754(e) (Vernon Supp.2005) (stating that parties to gestational agreement must enter into agreement before the 14th day preceding the transfer of embryos).

7 We note that the parties also agreed in the embryo agreement that the frozen embryos would be their "joint property." Section seven of the agreement states,

> 7. We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife's oocytes by the husband's sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.

This section acknowledges that Texas laws regarding legal ownership of frozen embryos could change and that this area of the law continues to develop. Because it is not necessary to the disposition of this appeal, we do not address the parties' characterization of the frozen embryos as "joint property."

8 The court also stated, "We express no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment." 783 A.2d at 720.

9 The Iowa court stated that courts have used the following approaches to determine the disposition of frozen embryos: (1) a best interest test, (2) a contractual approach, and (3) a contemporaneous mutual consent model.

10 The court concluded that embryos are "fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements." *Id.* at 781.

11 The Uniform Parentage Act became effective on June 14, 2001. *See* TEX. FAM.CODE ANN. §§ 160.001–.763 (Vernon 2002 & Supp.2005). The act governs every determination of parentage in Texas. *See id.* § 160.103(a) (Vernon 2002).

12 Section (g) of this section provides that a gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo. *See* TEX. FAM.CODE ANN. § 160.754(g) (Vernon Supp.2005).

13 If the gestational mother terminates the gestational agreement, she is not liable to the intended parents. TEX. FAM.CODE ANN. § 160.759(d) (Vernon Supp.2005).

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14 At least one commentator has suggested that the consideration in embryo agreements is the gamete donation process that both husband and wife experience. Marysol Rosado, *Sign on the Dotted Line: Enforceability of Signed Agreements, upon Divorce of the Married Couple, Concerning the Disposition of Their Frozen Preembryos,* 36 NEW ENG. L.REV.. 1041, 1069 (2002).

15 The forms include: Informed Consent for Use of Oral Contraceptives, Informed Consent for Intracytoplasmic Sperm Injection, Request for and Consent for Anesthesia, Informed Consent for Cryopreservation of Embryos, IVF Clinical Contract, Pre-Pay IVF Contract, Informed Consent for the Use of Estrace and Progesterone in IVF, In Vitro Fertilization and Embryo Transfer Informed Consent, and Informed Consent for Assisted Hatching.

16 Page 1 of the agreement provides that after the embryos are cryopreserved they will be maintained for up to three years, unless the decision to thaw them sooner is made or cryopreservation is terminated. Neither party relies on this section of the agreement.

17 The embryo agreement also gave the parties the option of releasing the frozen embryos to either Randy or Augusta, which they declined.

18 Randy argues in his fifth issue that the trial court erred in awarding the embryos to Augusta after he had withdrawn his consent to their implantation. We note that Randy's withdrawal of consent to implantation of the embryos on April 20, 2002 did not constitute repudiation of the embryo agreement and withdrawal from the program.

19 Because we find that the embryo agreement is unambiguous as a matter of law and that its interpretation is therefore a matter of law for the Court, we do not address Randy's first issue, objecting to the trial court's failure to declare the rights of the parties pursuant to a contract. *See* TEX.R.APP. P. 47.1.

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91 N.Y.2d 554
Court of Appeals of New York.

Maureen KASS, Appellant,
v.
Steven KASS, Respondent.

May 7, 1998.

Wife brought a matrimonial action, seeking, inter alia, sole custody of five cryopreserved pre-zygotes produced during the parties' participation in an in vitro fertilization (IVF) program. Following entry of a divorce judgment, the Supreme Court, Nassau County, Roncallo and Davis, JJ., granted custody to the wife, and the husband appealed. The Supreme Court, Appellate Division, Sullivan, J., reversed and remitted, 235 A.D.2d 150, 663 N.Y.S.2d 581, and the wife appealed. The Court of Appeals, Kaye, C.J., addressing a matter of first impression, held that: (1) agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them, and (2) the informed consents signed by the parties before cryopreservation required that the custody dispute be resolved by donating the pre-zygotes to the IVF program for research.

Affirmed.

Attorneys and Law Firms

***351 *555 **175** Vincent F. Stempel and Lisa Ann Spero, Garden City, for appellant.

Linda T. Armatti–Epstein, Mineola, for respondent.

***556** Yueh-ru Chu and Donna Lieberman, New York City, for New York Civil Liberties Union, amicus curiae.

Opinion

OPINION OF THE COURT

KAYE, Chief Judge.

Although *in vitro* fertilization (IVF) procedures are now ***557** more than two decades old and in wide use, this is the first such dispute to reach our Court. Specifically in issue is the disposition of five frozen, stored pre-embryos, or "pre-zygotes,"[1] created five years ago, during the parties' marriage, to assist them in having a child. Now divorced, appellant (Maureen Kass) wants the pre-zygotes implanted, claiming this is her only chance for genetic motherhood; respondent (Steven Kass) objects to the burdens of unwanted fatherhood, claiming that the parties agreed at the time they embarked on the effort that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. Like the two-Justice plurality at the Appellate Division, we conclude that the parties' agreement providing for donation to the IVF program controls. The Appellate Division order should therefore be affirmed.

Facts

Appellant and respondent were married on July 4, 1988, and almost immediately began trying to conceive a child. While appellant believed that, owing to prenatal exposure to diethylstilbestrol (DES) she might have difficulty carrying a pregnancy to term, her condition in fact was more serious—she failed to become pregnant. In August 1989, the couple turned to John T. Mather Memorial Hospital in Port Jefferson, Long Island and, after unsuccessful efforts to conceive through artificial insemination, enrolled in the hospital's IVF program.

Typically, the IVF procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion—or pre-zygote—divides until it reaches the four- to eight-cell stage, after which several pre-zygotes are transferred to the woman's uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate and develop into a fetus. As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use. Cryopreservation serves to reduce both medical and physical costs because eggs do not have to be retrieved with each attempted implantation, and delay may actually improve the chances of pregnancy. At the same time, ***558** the preservation of "extra" pre-zygotes—those not immediately implanted—allows for later disagreements, as occurred here.

Beginning in March 1990, appellant underwent the egg retrieval process five times and ***352 **176** fertilized

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eggs were transferred to her nine times. She became pregnant twice—once in October 1991, ending in a miscarriage and again a few months later, when an ectopic pregnancy had to be surgically terminated.

Before the final procedure, for the first time involving cryopreservation, the couple on May 12, 1993 signed four consent forms provided by the hospital. Each form begins on a new page, with its own caption and "Patient Name." The first two forms, "GENERAL INFORMED CONSENT FORM NO. 1: IN VITRO FERTILIZATION AND EMBRYO TRANSFER" and "ADDENDUM NO. 1–1," consist of 12 single-spaced typewritten pages explaining the procedure, its risks and benefits, at several points indicating that, before egg retrieval could begin, it was necessary for the parties to make informed decisions regarding disposition of the fertilized eggs. ADDENDUM NO. 1–1 concludes as follows:

> "We understand that it is general IVF Program Policy, as medically determined by our IVF physician, to retrieve as many eggs as possible and to inseminate and transfer 4 of those mature eggs in this IVF cycle, unless our IVF physician determines otherwise. It is necessary that we decide * * * [now] how excess eggs are to be handled by the IVF Program and how many embryos to transfer. *We are to indicate our choices by signing our initials where noted below.*
>
> "1. We consent to the retrieval of as many eggs as medically determined by our IVF physician. If more eggs are retrieved than can be transferred during this IVF cycle, we direct the IVF Program to take the following action (choose one):
>
> "(a) The excess eggs are to be inseminated and cryopreserved for possible use by us during a later IVF cycle. We understand that our choice of this option requires us to complete an additional Consent Form for Cryopreservation" (emphasis in original).

The "Additional Consent Form for Cryopreservation," a seven-page, single-spaced typewritten document, is also in two parts. The first, "INFORMED CONSENT FORM NO. 2: CRYOPRESERVATION OF HUMAN PRE–ZYGOTES," provides:

> ***559** "III. *Disposition of Pre–Zygotes.*
>
> "We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of *both* of us, consistent with the policies of the IVF Program and applicable law. In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.* * *
>
> "The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes. THESE IMPORTANT DECISIONS MUST BE DISCUSSED WITH OUR IVF PHYSICIAN AND OUR WISHES MUST BE STATED (BEFORE EGG RETRIEVAL) ON THE ATTACHED ADDENDUM NO. 2–1, STATEMENT OF DISPOSITION. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLYY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM" (emphasis in original).

The second part, titled "INFORMED CONSENT FORM NO. 2—ADDENDUM NO. 2–1: CRYOPRESERVATION—STATEMENT OF DISPOSITION," states:

> "We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. *We are to indicate our choices by signing our initials where noted below.*
>
> "1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use * * * by us in a future IVF cycle. * * *
>
> "2. In the event that we no longer wish to initiate a ***560** pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now *****353 **177** indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one): * * *
>
> "(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program" (emphasis in original).

On May 20, 1993, doctors retrieved 16 eggs from appellant, resulting in nine pre-zygotes. Two days later, four were transferred to appellant's sister, who had

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volunteered to be a surrogate mother, and the remaining five were cryopreserved. The couple learned shortly thereafter that the results were negative and that appellant's sister was no longer willing to participate in the program. They then decided to dissolve their marriage. The total cost of their IVF efforts exceeded $75,000.

With divorce imminent, the parties themselves on June 7, 1993—barely three weeks after signing the consents—drew up and signed an "uncontested divorce" agreement, typed by appellant, including the following:

> "The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes."

On June 28, 1993, appellant by letter informed the hospital and her IVF physician of her marital problems and expressed her opposition to destruction or release of the pre-zygotes.

One month later, appellant commenced the present matrimonial action, requesting sole custody of the pre-zygotes so that she could undergo another implantation procedure. Respondent opposed removal of the pre-zygotes and any further attempts by appellant to achieve pregnancy, and counterclaimed for specific performance of the parties' agreement to permit the IVF program to retain the pre-zygotes for research, as specified in ADDENDUM NO. 2–1. By stipulation dated December 17, 1993, the couple settled all issues in the matrimonial action except each party's claim with respect to the pre-zygotes, which was submitted to the court for determination. While this aspect of the case remained open, a divorce judgment was entered on May 16, 1994.

***561** In connection with the continuing litigation over the pre-zygotes, by letter dated January 9, 1995 the parties agreed that the matter should be decided on the existing record.

Supreme Court granted appellant custody of the pre-zygotes and directed her to exercise her right to implant them within a medically reasonable time. The court reasoned that a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus, and that appellant had not waived her right either in the May 12, 1993 consents or in the June 7, 1993 "uncontested divorce" agreement.

While a divided Appellate Division reversed that decision (235 A.D.2d 150, 663 N.Y.S.2d 581), all five Justices unanimously agreed on two fundamental propositions. First, they concluded that a woman's right to privacy and bodily integrity are not implicated before implantation occurs. Second, the court unanimously recognized that when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

The panel split, however, on the question whether the agreement at issue was sufficiently clear to control disposition of the pre-zygotes. According to the two-Justice plurality, the agreement unambiguously indicated the parties' desire to donate the pre-zygotes for research purposes if the couple could not reach a joint decision regarding disposition. The concurring Justice agreed to reverse but found the consent fatally ambiguous. In his view, but for the most exceptional circumstances, the objecting party should have a veto over a former spouse's proposed implantation, owing to the emotional and financial burdens of compelled parenthood. A fact-finding hearing would be authorized only when the party desiring *****354 **178** parenthood could make a threshold showing of no other means of achieving genetic or adoptive parenthood, which was not shown on this stipulated record.

While agreeing with the concurrence that the informed consent document was ambiguous, the two-Justice dissent rejected a presumption in favor of either party and instead concluded that the fate of the pre-zygotes required a balancing of the parties' respective interests and burdens, as well as their personal backgrounds, psychological makeups, financial and physical circumstances. Factors would include appellant's independent ability to support the child and the sincerity of ***562** her emotional investment in this particular reproductive opportunity, as well as the burdens attendant upon a respondent's unwanted fatherhood and his motivations for objecting to parenthood. Finding that the record was insufficient to permit a fair balancing, and that the parties' January 9, 1995 stipulation that there would be no further submissions violated public policy because it precluded full review, the dissent would remit the case to the trial court for a full hearing.

We now affirm, agreeing with the plurality that the parties clearly expressed their intent that in the circumstances presented the pre-zygotes would be donated to the IVF

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program for research purposes.

Analysis

A. *The Legal Landscape Generally.* We begin analysis with a brief description of the broader legal context of this dispute. In the past two decades, thousands of children have been born through IVF, the best known of several methods of assisted reproduction. Additionally, tens of thousands of frozen embryos annually are routinely stored in liquid nitrogen canisters, some having been in that state for more than 10 years with no instructions for their use or disposal (*see,* New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy,* at 289 [Apr.1998] ["*Assisted Reproductive Technologies* "]; Caplan, Due Consideration: Controversy in the Age of Medical Miracles, at 63 [1998]). As science races ahead, it leaves in its trail mind-numbing ethical and legal questions (*see generally,* Robertson, Children of Choice: Freedom and the New Reproductive Technologies [1994] ["Children of Choice"]).

The law, whether statutory or decisional, has been evolving more slowly and cautiously. A handful of States—New York not among them—have adopted statutes touching on the disposition of stored embryos (*see, e.g.,* Fla. Stat.. Annot § 742.17 [couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances]; N.H. Rev. Stat. Annot. §§ 168–B:13 – 168–B:15, 168–B:18 [couples must undergo medical exams and counseling; 14–day limit for maintenance of *ex utero* pre-zygotes]; ***563** La.Rev.Stat.Annot. §§ 9:121 – 9:133 [pre-zygote considered "juridical person" that must be implanted]).[2]

In the case law, only *Davis v. Davis,* 842 S.W.2d 588, 604 [Tenn. 1992], *cert. denied sub nom. Stowe v. Davis,* 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed.2d 657, attempts to lay out an analytical framework for disputes between a divorcing couple regarding the disposition of frozen embryos (*see also, York v. Jones,* 717 F.Supp. 421 [E.D. Va.]; *Del Zio v. Columbia Presbyt. Hosp.,* 1978 U.S.Dist. LEXIS 14450 [U.S.Dist. Ct., S.D.N.Y., Apr. 12, 1978, 74 Civ. 3588]; *AZ v. BZ,* Mass. Probate Ct., Mar. 25, 1996). Having declared that embryos are entitled to "special respect because of their potential for human life" (842 S.W.2d at 597, *supra*), *Davis* recognized the procreative autonomy of both gamete providers, which includes an interest in avoiding genetic parenthood as well as an interest in becoming a genetic parent. In the absence of any prior written agreement *****355 **179** between the parties—which should be presumed valid, and implemented—according to *Davis,* courts must in every case balance these competing interests, each deserving of judicial respect. In *Davis* itself, that balance weighed in favor of the husband's interest in avoiding genetic parenthood, which was deemed more significant than the wife's desire to donate the embryos to a childless couple.

Although statutory and decisional law are sparse, abundant commentary offers a window on the issues ahead, particularly suggesting various approaches to the issue of disposition of pre-zygotes. Some commentators would vest control in one of the two gamete providers (*see, e.g.,* Poole, *Allocation of Decision–Making Rights to Frozen Embryos,* 4 Am J. Fam. L. 67 [1990] [pre-zygotes to party wishing to avoid procreation]; Andrews, *The Legal Status of the Embryo,* 32 Loy. L. Rev. 357 [1986] [woman retains authority when she desires to implant]). Others would imply a contract to procreate from participation in an IVF program (*see, e.g.,* Note, *Davis v. Davis: What About Future Disputes?,* 26 Conn. L. Rev. 305 [1993]; Comment, *Frozen Embryos: Towards An Equitable Solution,* 46 U. Miami L. Rev. 803 [1992]).

***564** Yet a third approach is to regard the progenitors as holding a "bundle of rights" in relation to the pre-zygote that can be exercised through joint disposition agreements (*see,* Robertson, *Prior Agreements for Disposition of Frozen Embryos,* 51 Ohio St. L.J. 407 [1990] ["*Prior Agreements* "]; Robertson, *In the Beginning: The Legal Status of Early Embryos,* 76 Va. L. Rev. 437 [1990] ["*Early Embryos* "]). The most recent view—a "default rule"—articulated in the report of the New York State Task Force on Life and the Law, is that, while gamete bank regulations should require specific instructions regarding disposition, no embryo should be implanted, destroyed or used in research over the objection of an individual with decision-making authority (*see, Assisted Reproductive Technologies, op. cit.,* at 317–320).

Proliferating cases regarding the disposition of embryos, as well as other assisted reproduction issues, will unquestionably spark further progression of the law[3] What is plain, however, is the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated. Against that backdrop we turn to the present appeal.

[1] [2] B. *The Appeal Before Us.* Like the Appellate Division, we conclude that disposition of these pre-zygotes does not implicate a woman's right of privacy

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or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as "persons" for constitutional purposes (*see, Roe v. Wade,* 410 U.S. 113, 162, 93 S.Ct. 705, 731, 35 L.Ed.2d 147; *Byrn v. New York City Health & Hosps. Corp.,* 31 N.Y.2d 194, 203, 335 N.Y.S.2d 390, 286 N.E.2d 887, *appeal dismissed* 410 U.S. 949, 93 S.Ct. 1414, 35 L.Ed.2d 683). The relevant inquiry thus becomes who has dispositional authority over them. Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we ***565** have no cause to decide whether the pre-zygotes are entitled to "special respect" (*cf., Davis v. Davis,* 842 S.W.2d 588, 596–597, *supra; see also,* Ethics Comm. of Am. Fertility Socy., *Ethical Considerations of the New Reproductive Technologies,* 46 Fertility & Sterility 1S, 32S [Supp. 1 1986]).[4]

*****356** [3] ****180** Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them (*see, Davis v. Davis,* 842 S.W.2d at 597, *supra; see also, Early Embryos, op. cit.,* 76 Va. L. Rev. at 463–469). Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs (*see, Prior Agreements, op. cit.,* 51 Ohio St. L. Rev. at 414–418; *see also,* Children of Choice, *op. cit.,* at 107, 113).

While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. All agreements looking to the future to some extent deal with the unknown. Here, however, the uncertainties inherent in the IVF process itself are vastly complicated by cryopreservation, which extends the viability of pre-zygotes indefinitely and allows time for minds, and circumstances, to change. Divorce; death, disappearance or incapacity of one or both partners; aging; the birth of other children are but a ***566** sampling of obvious changes in individual circumstances that might take place over time.

These factors make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.

[4] Here, the parties prior to cryopreservation of the pre-zygotes signed consents indicating their dispositional intent. While these documents were technically provided by the IVF program, neither party disputes that they are an expression of their own intent regarding disposition of their pre-zygotes. Nor do the parties contest the legality of those agreements, or that they were freely and knowingly made. The central issue is whether the consents clearly express the parties' intent regarding disposition of the pre-zygotes in the present circumstances. Appellant claims the consents are fraught with ambiguity in this respect; respondent urges they plainly mandate transfer to the IVF program.

[5] [6] [7] [8] [9] [10] The subject of this dispute may be novel but the common-law principles governing contract interpretation are not. Whether an agreement is ambiguous is a question of law for the courts (*see, Van Wagner Adv. Corp. v. S & M Enters.,* 67 N.Y.2d 186, 191, 501 N.Y.S.2d 628, 492 N.E.2d 756). Ambiguity is determined by looking within the four corners of the document, not to outside sources (*see, W.W.W. Assocs. v. Giancontieri,* 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639). And in deciding whether an agreement is ambiguous courts

> "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered,, *****357 **181** not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (*Atwater & Co. v. Panama R.R. Co.,* 246 N.Y. 519, 524, 159 N.E. 418).

***567** Where the document makes clear the parties' over-all intention, courts examining isolated provisions " 'should then choose that construction which will carry out the plain purpose and object of the [agreement]' " (*Williams Press v. State of New York,* 37 N.Y.2d 434, 440, 373 N.Y.S.2d 72, 335 N.E.2d 299, quoting *Empire Props. Corp. v. Manufacturers Trust Co.,* 288 N.Y. 242, 249, 43 N.E.2d 25).

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Applying those principles, we agree that the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program.

The conclusion that emerges most strikingly from reviewing these consents as a whole is that appellant and respondent intended that disposition of the pre-zygotes was to be their joint decision. The consents manifest that what they above all did not want was a stranger taking that decision out of their hands. Even in unforeseen circumstances, even if they were unavailable, even if they were dead, the consents jointly specified the disposition that would be made. That sentiment explicitly appears again and again throughout the lengthy documents. Words of shared understanding—"we," "us" and "our"—permeate the pages. The overriding choice of these parties could not be plainer: "*We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF Program and applicable law*" (emphasis added).

That pervasive sentiment—both parties assuming "principal responsibility to decide the disposition of [their] frozen pre-zygotes"—is carried forward in ADDENDUM NO. 2–1:

> "In the event that we * * * are unable to make a decision regarding disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to * * *
>
> "Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program."

Thus, only by joint decision of the parties would the pre-zygotes be used for implantation. And otherwise, by mutual consent they would be donated to the IVF program for research purposes.

***568** The Appellate Division plurality identified, and correctly resolved, two claimed ambiguities in the consents. The first is the following sentence in INFORMED CONSENT NO. 2: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction." Appellant would instead read that sentence: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined by a court of competent jurisdiction." That is not, however, what the sentence says. Appellant's construction ignores the direction that ownership of the pre-zygotes "must be determined in a property settlement"—words that also must be given meaning, words that connote the parties' anticipated agreement as to disposition. Indeed, appellant and respondent did actually reach a settlement stipulation, reserving only the issue of the pre-zygotes (the subject of their earlier consents).

[11] [12] Additionally, while extrinsic evidence cannot *create* an ambiguity in an agreement, the plurality properly looked to the "uncontested divorce" instrument, signed only weeks after the consents, to *resolve* any ambiguity in the cited sentence. Although that instrument never became operative, it reaffirmed the earlier understanding that neither party would alone lay claim to possession ****182** of the pre-zygotes.[5]

*****358** Apart from construing the sentence in isolation, the plurality also read it in the context of the consents as a whole. Viewed in that light, we too conclude that the isolated sentence was not dispositional at all but rather was "clearly designed to insulate the hospital and the IVF program from liability in the event of a legal dispute over the pre-zygotes arising in the context of a divorce" (235 A.D.2d at 160, 663 N.Y.S.2d 581). To construe the sentence as appellant suggests—surrendering all control over the pre-zygotes to the courts—is directly at odds with the intent of the parties plainly manifested throughout the consents that disposition be only by joint agreement.

For much the same reason, we agree with the plurality's conclusion that ADDENDUM NO. 2–1—the "STATEMENT OF DISPOSITION"—was not strictly limited to instances of "death or other ***569** unforseen circumstances." Those are contingencies that would be resolved by the ADDENDUM, but they are not the only ones. We reach this conclusion, again, from reviewing the provisions in isolation and then in the context of the consents as a whole. While we agree that the words "death or other unforeseen circumstances" in INFORMED CONSENT NO. 2 did not create a condition precedent (235 A.D.2d at 159, 663 N.Y.S.2d 581), we also note that the present circumstances—including the parties' inability to reach the anticipated settlement—might well be seen as an "unforeseen" circumstance. Moreover, viewing the ADDENDUM in isolation, there is no hint of the claimed condition in the document itself. The document is a free-standing form,

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separately captioned and separately signed by the parties. Finally, viewing the issue in the context of the consents as a whole, as the plurality noted, "the overly narrow interpretation advocated by [appellant] is refuted not only by the broad language of the dispositional provision itself, but by other provisions of the informed consent document as well" (235 A.D.2d at 159, 663 N.Y.S.2d 581).

As they embarked on the IVF program, appellant and respondent—"husband" and "wife," signing as such—clearly contemplated the fulfillment of a life dream of having a child during their marriage. The consents they signed provided for other contingencies, most especially that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. These parties having clearly manifested their intention, the law will honor it.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

TITONE, BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

Order affirmed, with costs.

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91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350, 1998 N.Y. Slip Op. 04450

Footnotes

1 We use the parties' term "pre-zygotes," which are defined in the record as "eggs which have been penetrated by sperm but have not yet joined genetic material."

2 Recently, the New York State Task Force on Life and the Law issued a comprehensive report, *Assisted Reproductive Technologies,* together with recommendations for regulation. The report, following two years of study by the full Task Force, addresses a wide range of relevant subjects, such as the commercial aspects of what has become a sizable business, and impacts on children born of assisted reproductive technologies (*see also,* 1997–1998 N.Y. Senate Bill S 5815 [Nov. 24, 1997] [requiring that couples specify in writing how embryos are to be disposed of before a facility can accept them for storage]).

3 Within recent months, for example, the press has carried news of a divorcing New Jersey couple now litigating the disposition of frozen embryos, with the *husband* wanting them for implantation in a future spouse and the wife objecting (*see,* Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore: With No Precedent, Court to Decide on Request to Destroy Fertilized Ova,* N.J.L.J., Mar. 9, 1998, at 1, col. 2). And a now-divorced California couple is litigating the issue of support of a child conceived during their marriage through a donor egg, donor sperm and surrogate mother (*see, In re Marriage of Buzzanca,* 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 [Ct.App 4th Dist.]; *see also,* Hernandez and Maharaj, *O.C. Couple Who Used Surrogate Ruled Parents; Custody: In Closely Watched Case, Appeals Court Declares That Intent Is More Important Than Biological Ties,* L.A. Times, Mar. 11, 1998, at A1).

4 Parties' agreements may, of course, be unenforceable as violative of public policy (*see, e.g.,* Domestic Relations Law § 121 *et seq.* [declaring surrogate parenting contracts contrary to policy, void and unenforceable]; Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law § 122, 1998 Pocket Part, at 255 ["commercial surrogacy arrangements involve a form of procreation for profit, if not prostitution"]). Significantly changed circumstances also may preclude contract enforcement. Here, however, appellant does not urge that the consents violate public policy, or that they are legally unenforceable by reason of significantly changed circumstances.

5 As noted by the Appellate Division, unless public policy is violated, parties to a litigation are free to chart their own procedural course—as they did here. On January 9, 1995, both sides agreed that the matter should be determined on the submissions, and one week later plaintiff's attorney indicated that the last affidavit had been submitted. "The record upon which we must rule was thereby established" (235 A.D.2d at 162, 663 N.Y.S.2d 581).

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International Surrogacy

TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW

Barbara Stark[a1]

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I. INTRODUCTION

Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep.[1] Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her.[2] In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor's sperm.[3] In gestational surrogacy, a fertilized egg is implanted in the surrogate.[4] Because the overwhelming majority of surrogates no longer use their own eggs, in this Article, "surrogacy" will refer to gestational surrogacy.[5] Surrogacy may be altruistic, in which the surrogate is not paid for her labor,[6] or commercial, in which she is.[7] Surrogacy may also use ***370** donor sperm, in which case the intended parents have no biological relationship to the baby or babies.[8] There may be multiple surrogates, fathers, mothers, donors, and babies. It can get very complicated. Surrogacy exposes parenthood, not as a biological fact, but as a legally and socially constructed status with responsibilities and obligations as well as benefits.

As set out in a recent report by the Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states.[9] In a minority of states, it is allowed and regulated, and in some states, it is completely unregulated. As the *Hague Report* notes, this has produced a booming business in transnational surrogacy.[10] In India alone, reproductive tourism is a $400 to $500 million per year business.[11] In addition to the monetary costs, there are human costs. Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights.[12]

A similarly unsettled situation exists among the states in the United States (U.S.). While the U.S. Constitution requires states to give full faith and credit to the judgments of sister states, there has always been a public ***371** policy exception in family law.[13] That is, states have refused to give full faith and credit to judgments of sister states that offended their own public policy, such as marriage between first cousins. The federal Defense of Marriage Act, along with the similar acts passed in

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many states, extend this to recognition of same-sex marriages.[14]

Like international surrogacy, surrogacy in America encompasses a broad range of approaches, from supportive states, such as California,[15] to states in which all surrogacy contracts are barred and criminal sanctions may be imposed, as in Michigan.[16] Unlike surrogates in much of the rest of the world, surrogates in the United States are unlikely to be trafficked, enslaved, or held to onerous contracts.[17] Indeed, surrogacy in America seems to be increasingly open.[18] Transnational surrogacy, in contrast, seems to be increasingly corporate, drawing on a wide range of domestic laws, including some notably lax domestic laws and dramatically disparate economic circumstances, to create new families.[19]

Part I of this Article introduces the subject and explains why the domestic family laws of the participating states are inadequate to address it. Part II explains how international human rights law provides some useful guidelines, especially three major human rights treaties:[20]
1) The International Covenant on Economic, Social and Cultural Rights;[21]

2) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[22] and

***372** 3) The Convention on the Rights of the Child (CRC).[23]

While none of these treaties explicitly address surrogacy, they each address rights crucial in this context, including the right to health,[24] the right to support,[25] the right to know one's origins,[26] and the right to a family.[27] The argument here is that, at the very least, where surrogacy is allowed, the protections of well-established human rights norms should be assured. In some cases, this may be accomplished through regulations[28] or contractual provisions, such as the assurance for the gestational mother of free pre-natal care. In other cases, this may be more difficult, such as treatment for as yet unknown conditions that may result from the hormonal treatments necessary for surrogacy. If, for any reason, such assurances are impossible, surrogacy should be barred as a violation of human rights.

Because there is no human "right to a child,"[29] even those who can *only* have a genetically-related child with the help of a surrogate, including single gay men and gay couples, have no basis for a claim. Once a child has been born, however-assuming the child is not the result of a coerced pregnancy or a similarly egregious violation of human rights-a growing international jurisprudence supports the right of that child's gay father, or fathers, to raise her.[30]

The usefulness of private international law to resolve disputes arising out of surrogacy is similarly problematic. Fundamental considerations of judicial comity, in which the courts of one state defer to the judgment of another, are trumped by public policy in this context.[31] Thus, notwithstanding the virtually universal concern for the children produced through surrogacy, some states prohibiting surrogacy refuse to grant such children citizenship, because they fear that doing so would only encourage the prohibited practice.[32] As the Permanent Bureau notes, this plainly calls for further study.[33] While the range of applicable laws regarding surrogacy complicates--and may even preclude--harmonization, it should be noted that the legality of surrogacy does not necessarily correspond to its prevalence in a particular state. Roughly 5% of gestational surrogacy in vitro fertilization (IVF) procedures in the United States take place in New York, for example, where surrogacy contracts are void.[34]

II. WHY SURROGACY IS DIFFERENT

Pre-existing family law is inadequate to address surrogacy, in part because of the multiple parents, and in part because of the breakdown in traditional parenting functions.[35] State laws governing parentage, for example, generally provide that a woman giving birth is the child's legal mother.[36] The birth mother does not lose her status as legal mother until and unless she voluntarily surrenders the baby.[37] As a matter of law, a child cannot be surrendered for adoption before birth.[38] The premise is that a mother cannot be certain that she wants to surrender the baby until he or she ***374** arrives.[39] For this reason, several states have decided that traditional surrogacy contracts are unenforceable.[40] Rather, the surrogate cannot be required to surrender a baby on the grouud that she agreed to do so before it was born.

These laws assume that the woman giving birth is also the baby's biological mother--that is, that the baby developed from her egg.[41] When the baby is not the biological offspring of the surrogate, but rather biologically related to a separate egg donor,

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the law--and the arguments--change.[42] Legislators have often left these sensitive issues to the courts. There has been considerable commentary since the *Baby M*[43] case almost twenty-five years ago.[44] Those who have addressed surrogacy have generally focused on the most vulnerable, starting with the infant.[45] While at least one commentator[46] rejects the "best interest of the child test" itself as inapplicable in this context, most raise more concrete, specific questions. Who is legally responsible? What if the intending parents split up? What if ***375** they change their minds or die? What if the baby is premature or has health problems? What if the baby has health problems resulting from the surrogate's drug use or alcohol intake during pregnancy? How will the child deal with her unusual origins?

Commentators are also concerned about protecting presumably poorer, less educated surrogates from exploitation. Dorothy Roberts has pointed out the risks, especially high once gestational surrogacy allows a black surrogate to carry a white egg, of exploiting women of color.[47] In *Johnson v. Calvert*, the California court held that the black gestational surrogate had no right to the white baby she carried.[48] What about the surrogate mother's reproductive rights? Like Mary Beth Whitehead in *Baby M*, she might not appreciate how attached she is to the baby until it is born. On the other hand, what if the surrogate changes her mind before birth and decides to have an abortion?

Commentators have further noted that surrogates incur even greater risks and burdens than those usually associated with pregnancy and childbirth.[49] A gestational surrogate must have her menstrual cycles precisely matched to that of the egg donor, so that her womb is receptive to the fertilized egg just when it is ready to be implanted.[50] This requires surrogates to ingest large doses of hormones, the long-term effects of which are unknown.[51]

***376** Early empirical studies provide little support for some of these arguments, at least in Canada, the United Kingdom, and the United States. This research suggests that surrogates are not necessarily poor.[52] Nor are they pressured into surrogacy[53] or unable to separate from the babies that they have carried.[54] The surrogates in these studies are white, married, Christian,[55] and not especially poor. They do not feel exploited. They are glad to have the $20,000 to $25,000 average fee,[56] but they are surrogates for other reasons. Many report that they enjoy being pregnant. They are proud of their accomplishment, and glad that they could make such a difference in the lives of otherwise childless couples.[57] Finally, the expense of surrogacy is also a concern. As Professor Roberts asks, "[b]ut can we justify devoting such exorbitant sums to a risky, non-therapeutic procedure ***377** with an 80 percent failure rate when so many basic health needs go unmet?"[58]

As Professor Garrison notes, surrogacy can easily be banned since, in contrast to "ordinary surrogacy, gestational surrogacy invariably involves IVF, which requires the participation of licensed medical personnel who will rarely be willing to risk their licenses by performing illegal procedures."[59]

III. SURROGACY AND HUMAN RIGHTS

A. Reproductive Rights

Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran Conference on Human Rights in 1968, which recognized the "rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights."[60] It was not until the World Conference on Population in 1994 (Cairo Conference) that reproductive rights were clearly articulated.[61] Although convened to address population issues, the participants in the Cairo Conference recognized that:

1) Family-planning programs should not involve any form of coercion;

2) Governmentally-sponsored economic incentives and disincentives were only marginally effective; and

***378** 3) Governmental goals "should be defined in terms of unmet needs for information and services," rather than quotas or targets imposed on service providers.[62]

"The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice."[63] The Cairo Conference recognized that reproductive rights include both "the

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basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[64] This broad formulation reflects the participating states' disparate approaches to reproductive rights as well as the failure of many states to address these rights at all.[65]

Reproductive rights are increasingly recognized in international human rights law.[66] These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to health. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.[67]

Surrogacy was not on the agenda at Cairo; it was neither supported nor condemned. To the extent surrogacy enables those otherwise unable to "achieve their reproductive goals and ... have children by choice,"[68] Cairo arguably supports surrogacy. At the very least, it would weigh against an outright government ban of the practice.[69]

***379** The counterweight, of course, would be the impact on the gestational surrogate and the resulting baby. CEDAW assures the rights of pregnant women.[70] Article 11.2, for example, sets out the measures to be taken by states to "prevent discrimination ... on the grounds of marriage or maternity and to ensure [women's] effective right to work."[71] These measures include the prohibition of dismissal for pregnancy or maternity leave,[72] maternity leave with pay or "comparable social benefits,"[73] and the "necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment ... of childcare facilities."[74] Article 12 requires the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement in the postnatal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."[75] Article 14 reiterates the right to family planning services for rural women in particular.[76] Finally, Article 16 requires states to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."[77] In addition to these specific guarantees, Article 5 more broadly ***380** demands recognition of maternity as "a social fuuction," rather than a commercial function.[78]

To the extent CEDAW focuses on the health of the pregnant woman, it is not inconsistent with gestational surrogacy.[79] Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To the extent CEDAW focuses on maternity as a "social function," however, it is difficult to reconcile with commercial surrogacy, or at least those forms of commercial surrogacy in which the intending parents and the surrogate remain strangers.[80]

B. A "Right to Parent" for Gay Men?

For gay men who want to parent a genetically-related child, surrogacy may be their only hope.[81] Just as surrogacy was not on the agenda at Cairo, neither was parenting by same-sex couples or gay or lesbian individuals. But LGBT&Q--Lesbian, Gay, Bisexual, Transsexual and Queer or Lesbian, Gay, Bisexual, Transsexual and Questioning--rights have achieved widespread recognition since 1994. Since reproductive rights, including the right to parent, are human rights, like other human rights, they should be universally assured.[82]

As Justice Albie Sachs explained in *Minister of Home Affairs v. Fourie*, extending the benefits of marriage to same-sex partners is fundamentally a matter of equality:

> [O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. [...] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. [...] The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage .... [A]t issue ***381** is a need to affirm the very character of our society as one based on tolerance and mutual respect.[83]

Like racial discrimination, discrimination on the basis of sexual orientation is grounded in intolerance and exclusion. In

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validating same-sex marriage, courts and legislatures throughout the world have rejected the notion of a ""natural" sexual division of labor requiring marriage to be restricted to a union between a man and a woman. Rather, there is growing recognition that a state committed to democratic values, especially the equality of its citizens, can no longer endorse laws that discriminate against some of those citizens.

The European Union, with its twenty-seven member states, has been a leader in recognizing the equal rights of same-sex couples.[84] The European Court of Human Rights, for example, has interpreted the European Convention on Human Rights to require contracting nations to recognize family rights of same-sex couples.[85] The Court relied on Article 14, which provides that the rights set forth in the Convention are to be secured "without discrimination on any ground" to allow the surviving member of a gay couple to remain in his flat.[86] Under the 1997 Treaty of Amsterdam, similarly, the European Council passed Council Directive 2000/78/EC, which prohibits "any direct or indirect discrimination based on ... sexual ***382** orientation."[87] In 2008, the European Court of Justice relied on this Directive to hold that the surviving partner of a German same-sex partner might be able to claim a pension.[88] The Treaty of Lisbon,[89] which entered into force on December 1, 2009, assures the right to marriage without any language limiting such right to "men and women" and expressly prohibits discrimination on the basis of sexual orientation.[90]

Same-sex couples in other regions have also drawn on human rights law to challenge discrimination. In South America, for example, same sex-couples have sought assistance from the Inter-American Commission on Human Rights. In the case of *Marta Lucia Alvarez Giraldo*, the Commission reviewed a complaint brought by the applicant against Colombia, alleging that the director of the prison in which the applicant was incarcerated had refused her request for intimate visits from her female life partner on the basis of her sexual orientation.[91] Finding that Colombian law afforded prisoners a right to intimate visits, the Commission determined that the applicant had stated a colorable claim of arbitrary and abusive interference with her private life, in violation of Article 11(2) of the American Convention on Human Rights.[92]

On June 3, 2008, the General Assembly of the Organization of American States (OAS), with the support of thirty-four OAS member countries, adopted the Resolution on Human Rights, Sexual Orientation, and Gender Identity.[93] The resolution takes note of the importance of the adoption of the Yogyakarta Principles and affirms the core principles of non-discrimination and universality in international law.[94] States also agreed to hold a special meeting "to discuss the application of the principles ***383** and norms of the Inter-American system on abuses based on sexual orientation and gender identity."[95]

In North America, Canada passed the Civil Marriage Act in 2005, which recognizes same-sex marriage.[96] In the United States, six states currently allow same-sex marriage.[97] Forty-three states have laws explicitly prohibiting such marriages, including twenty-nine with constitutional amendments restricting marriage to one man and one woman.[98] In *Perry v. Schwarzenegger*, Judge Vaughn Walker relied on the Fourteenth Amendment to strike down California's Proposition 8, which barred same-sex marriage.[99] In doing so, Judge Walker raised the question of same-sex marriage in the United States to the constitutional level for the first time.[100]

On the international level, too, the trend is clearly toward the recognition of rights for same-sex couples. In *Toonen v. Australia*, for example, the Human Rights Committee determined that the provisions of the Tasmanian Criminal Code, which criminalized private same-gender sexual conduct between consenting adults, constituted an arbitrary interference with the author's privacy, in violation of Article 17 of the International Covenant on Civil and Political Rights.[101] Nor could the provisions be upheld for the purpose of preventing the spread of AIDS.[102] The Committee also held, however, that the rights of same-sex couples to ***384** marry cannot be grounded in the Civil Covenant because of its specific language.[103]

In part because of such limitations in existing human rights law,[104] in 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles regarding sexual orientation and gender identity. Twenty-nine distinguished experts in human rights law from twenty-five countries unanimously adopted the Yogyakarta Principles,[105] which they agreed reflect the existing state of international human rights law in relation to issues of "sexual orientation and gender identity."[106] As set out in the Statute of the International Court of Justice, the views of such experts may be relied upon in determining rules of law.[107] The Yogyakarta Principles, rigorously supported by sixty-six pages of jurisprudential annotations,[108] affirm a broad range of rights, including "the core human rights principles of equality, universality and non-discrimination ... it is unthinkable to exclude persons from these protections because of their ... sexual ***385** orientation or gender identity."[109] The Principles also set out concrete measures states must take to assure these rights.[110]

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On December 12, 2008, sixty-six nations at the U.N. General Assembly supported a groundbreaking Statement confirming that international human rights protections apply to sexual orientation and gender identity.[111] The Statement was read by Argentina, and a Counterstatement, signed by fifty-nine states, was read by the Syrian Arab Republic.[112] The states opposing human rights for same-sex couples do not seek to ground their arguments in international law, however. Rather, they claim that the Statement endorsing these rights "lack[ed] ... legal grounds [and] delves into matters which fall essentially within the domestic jurisdiction of States."[113] This is belied by the exhaustive research supporting the Yogyakarta Principles.[114] While there is no state consensus on the issue, there is a clear trend toward recognizing the rights of same-sex couples. Thus, although homosexuality remains a crime in seventy-six countries and is still punishable by death in five, a growing body of international equality jurisprudence increasingly supports these rights.[115]

*386C. *The Child's Rights*

Surrogacy implicates several rights of the child under the CRC. First, the child's rights are to be "respect[ed] and ensure[d] ... without discrimination *of any kind* ... [including] birth or other status."[116] While this provision was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children born of surrogacy.[117]

Article 7 is the most problematic here. Article 7.1 provides in pertinent part that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents."[118] There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state.[119]

IV. CONCLUSION

This Article has described transnational surrogacy and indicated a few of the many issues the subject raises under international human rights law. It has not addressed many other troublesome issues, including donor anonymity, the right of the child to "social," as opposed to "biological," information, and issues of exploitation, especially when what is contemplated is not rare, altruistic surrogacy, but a $400 to $500 million per year business.[120]

Footnotes

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1 In the Matter of Baby M, 537 N.J. 396, 410 (1988).

2 *Id.*

3 *Id.*

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4 JANET L. DOLGIN & LOIS L. SHEPHERD, BIOETHICS AND THE LAW 69 (2nd ed. 2009).

5 J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 355 (2011) (noting that in 2011, "95% of surrogates carry embryos created by genetic materials other than their own."); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000) (noting that "there is no sexual analog to this particular form of technological conception.").

6 An altruistic surrogate may be the sister of an intended parent who would otherwise be unable to have a biologically related child, for example. *See, e.g.*, DOLGIN & SHEPHERD, *supra* note 4, at 172.

7 Medical expenses are generally covered in commercial surrogacy. MAGDALINA GUGUCHEVA, SURROGACY IN AMERICA 3 (Council for Responsible Genetics 2010), *available at* http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf (last visited Mar. 13, 2012) (describing commercial surrogacy arrangements); Melanie Thernstrom, *My Futuristic Insta-Family*, N.Y. TIMES, Jan. 2, 2011, at 34, *available at* http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html? pagewanted=all (last visited Mar. 13, 2012) (describing financial arrangements in a commercial surrogacy arrangement). While it seems likely that they are also covered in altruistic surrogacy; only anecdotal evidence is available.

8 For a detailed account of some of the major procedures available, *see* Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 283 (2009).

9 Surrogacy has been banned in much of Europe, for example, usually on the ground that it commodifies women. *See* Arlie Hochschild, *Childbirth at the Global Crossroads*, 20 AMERICAN PROSPECT, Sept. 19, 2009, at 25, 27 (stating that surrogacy is banned in China, New York and much of Europe), *available at* http://prospect.org/article/childbirth-global-crossroads-0 (last visited Mar. 13, 2012); Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, at 3, Prel. Doc. No. 11 (Mar. 2011), *available at* http://www.hcch.net/upload/wop/genaff2011pd11e.pdf (last visited Mar. 13, 2012) [hereinafter Hague Conf. on Private Int'l Law].

10 Hague Conf. on Private Int'l Law, *supra* note 9, at 6. Transnational surrogacy, as used in this Article, refers to surrogacy arrangements in which one or more of the parties are nationals of different nation states.

11 *Id.*; Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 225 (2009).

12 Hague Conf. on Private Int'l Law, *supra* note 9, at 3-4.

13 IRA M. ELLMAN & PAUL M. KURTZ, FAMILY LAW: CASES, TEXT, PROBLEMS 175 (5th ed. 2010).

14 Defense of Marriage Act, 28 U.S.C. § 1738C (1996).

15 Johnson v. Calvert, 851 P.2d 776, 778 (1993); CAL. FAM. CODE § 7606 (2012).

16 MICH. COMP. LAWS § 722.857 (1988).

17 This is not to suggest that such practices are unknown in this country. They are not, however, appealing to middle class Americans seeking surrogates. *See, e.g.*, Melanie Thernstrom, *supra* note 7, at 28.

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18 *Id.*

19 For an insightful exploration, *see* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 327 (2005).

20 For some of the reasons for this refusal, *see* Catherine Powell, *Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 375 (2005); Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 107, 108 (2011).

21 G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976), *available at* http://www1.umn.edu/humanrts/instree/b2esc.htm (last visited Mar. 18, 2012) [hereinafter International Covenant].

22 Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res 34/180, art. 1, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981) [hereinafter CEDAW].

23 *See generally* Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980) (entered into force Sept. 2, 1990) [hereinafter CRC].

24 International Covenant, *supra* note 21, art. 12.

25 *Id.* art. 10.

26 CRC, *supra* note 23, art. 7.

27 *Id.*

28 Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 146 (2009) (noting that, "well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy.").

29 Those instruments that contemplate parenthood focus instead on limiting state interference with reproductive rights. *See, e.g.*, CEDAW, *supra* note 22, art. 11.2 (measures to be taken by states to "prevent discrimination ... on the grounds of marriage or maternity and to ensure [women's] effective right to work."); *id.* art. 11(2) (requiring the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."); *id.* art. 12 (reiterating the right to family planning services for rural women in particular.). *But see Part II.A. Reproductive Rights* (suggesting support for an argument against state interference with intending parents' efforts to "achieve their reproductive goals.").

30 Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL'Y 261, 274-78 (2011).

31 Hague Conf. on Private Int'l Law, *supra* note 9, at 10.

32 *Id.*

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33 *Id.* at 22.

34 GUGUCHEVA, *supra* note 7, at 15.

35 *Id.* at 26 (noting that, commercial surrogates are generally paid from $12,000 to $25,000 for their services. This averages out to roughly $.50 per hour). *Fertility Law*, AM. BAR ASSOC., http:// www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_ magazine_index/erickson.html (last visited Mar. 18, 2012) (The payment is for the surrogate's services; if it were for the baby it would amount to baby-selling, which is illegal everywhere.).

36 ARK. CODE ANN. § 9-10-201(c)(2)(2008) (West 2011) (stating that the surrogate mother is presumed to be the natural mother of the child and this information is listed on the birth certificate); KAN. STAT. ANN. § 11-38-1113 (West 2011) (stating that the mother of the child is the one who gives birth to the child).

37 Or is determined by an appropriate court to be so unfit, and so incapable of becoming fit that her parental rights are legally terminated. *See, e.g.*, Santosky II v. Kramer, 102 S. Ct. 1388, 1390 (1982) ("[T]he State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is permanently neglected.").

38 Hague Conf. on Private Int'l Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Convention 29, art. 4 (May 1993), *available at* http:// www.hcch.net/upload/conventions/txt33en.pdf (last visited Mar. 13, 2012). *See also*MONT. CODE ANN. § 42-2-408 (West 2011) (stating that the relinquishment and the consent to adoption of a child can only occur 72 hours after the child has been born); NEB. REV. STAT. § 127.070 (West 2010) (stating that release and consent for adoption that occur before the birth of a child are invalid).

39 Surrogate Parenting Assoc. v. Commonwealth of KY *ex rel.* Armstrong, 704 S.W.2d 209, 213 (1986) ("The policy ... is to preserve to the mother her right of choice regardless of decisions made before the birth of the child.").

40 D.C. CODE § 16-402 (West 2011) ("Surrogate parenting contracts are prohibited and rendered unenforceable."); MICH. COMP. LAWS ANN. § 722.855 (West 2011) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); NEB. REV. STAT. § 21.200 (West 2011) ("A surrogate parenthood contract entered into shall be void and unenforceable."); N.D. CENT. CODE ANN. § 14-18-05 (West 2011) ("Any agreement in which a woman agrees to become a surrogate ... through assisted conception is void.").

41 Adoptive Parents of M.L.V. & A.L.V. v. Wilkens, 598 N.E.2d 1054, 1059 (1992) (stating that "[b]ecause it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."); A.L.A. v. E.A.G, No. A10-443, 2011 N.W.2d WL 4181449, at *2 (D. Minn. Ct. App. Jan. 18, 2011) ("The parent and child relationship between a child and the child's biological mother 'may be established by proof of her having given birth to the child.'").

42 *Cf.*MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME SEX AND UNWED PARENTS 111 (2001) (assuming traditional surrogacy); DEBORA L. SPAR, THE BABY BUSINESS, HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 85 (2006).

43 In the Matter of Baby M, *supra* note 1.

44 DiFonzo & Stern, *supra* note 5, at 347 (noting "the revolution in reproductive demographics that had occurred since *Baby M.*").

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45 Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification, in*THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 299, 302 (Nancy Ehrenreich ed., 2008) (Ertman identifies four negative implications of the alternative insemination (AI) market: eugenics, lack of access for poor women, depriving children of relationship or support from biological father, and treating children like chattel. She defends AI, arguing that these concerns "are not unique to the AI market, or because addressing the concern would itself trigger other negative effects."); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437-42 (2011) (explaining the problem with the best interest test in this context).

46 Cohen, *supra* note 45, at 437.

47 Dorothy Roberts, *Race and the New Reproduction, in*THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 308 (Nancy Ehrenreich, ed., 2008) (while noting that surrogacy is not the same as slavery's "dehumanization," makes a powerful case that "it is the enslavement of Blacks that enables us to imagine the commodification of human beings, and that makes the vision of fungible breeder women so real.").

48 *Johnson*, 851 P.2d at 782.

49 GUGUCHEVA, *supra* note 7, at 21.

50 Amrita Pande, *Not an 'Angel,' not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIA J. GEND. STUD. 141, 147 (2009). As Pande explains:
Gestational surrogacy is a much more complex medical process than traditional surrogacy, since the surrogate is not genetically related to the baby and her body has to be 'prepared' for artificial pregnancy. The transfer of the embryo itself is not very difficult by the process of getting the surrogate ready for that transfer and the weeks after that require heavy medical intervention. First, birth-control pills and shots of hormones are required to control and suppress the surrogate's own ovulatory cycle and then injections of estrogen are given to build her uterine lining. After the transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.
Id.; DiFonzo & Stern, *supra* note 5, at 363-64 (noting risks of "hormonally stimulated egg production.").

51 GUGUCHEVA, *supra* note 7, at 21; Pande, *supra* note 50, at 147.

52 Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 44 (2009) ("Importantly, no empirical study reviewed for this paper indicates that any surrogate mothers become involved with surrogacy because they were experiencing financial distress.").

53 *Id.* at 50 ("One consistent finding in the empirical research is that the idea of becoming a surrogate mother started with the women themselves; there was no evidence in any study indicating that women were being pressured or coerced into becoming surrogate mothers.").

54 *Id.* at 68.
The empirical research does not support the concerns about pre-natal maternal bonding or emotional instability during pregnancy. Van den Akker's 2007 study of 61 British surrogate mothers reported that anxiety was not high during the pregnancy among surrogate mothers and detachment is reported early and maintained throughout the pregnancy, with little post-variation post-delivery.
Id. at 48.
This may be due, in part, to agency preferences for women who are already mothers. Clinics and agencies report that they will only agree to work with women who have given birth because this status increases the chances of a successful pregnancy and delivery and means that the women have a more realistic perception of what it would mean for them to surrender a child.
Id. at 48.

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55 Busby & Vun, *supra* note 52, at 42 ("[S]tudies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their late 20--early 30s.").

56 DiFonzo & Stern, *supra* note 5, at 357. *See also* GUGUCHEVA, *supra* note 7, at 26.

57 Busby & Vun, *supra* 52, at 71.
Other longitudinal studies also showed that positive attitudes remained stable over time. Teman concluded, following a review of the research, that "almost all of the studies ... find, in the end, that the overwhelming majority of surrogates do not regret their decision and they even express feelings of pride and accomplishment.
Id.

58 *See, e.g.*, Roberts, *supra* note 47, at 317.

59 Garrison, *supra* note 5, at 916.

60 Proc. of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 3 (1968), *available at* http:// 1.umn.edu/humanrts/instree/l2ptichr.htm (last visited Mar. 13, 2012). *See* Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1158 (1997). Reproductive rights encompass a wide range of activities. These include surrogacy, other forms of assisted conception, female genital surgeries, and the health needs of women with HIV/AIDS. For a comprehensive overview, *see*REBECCA J. COOK, BERNARD M. DICKENS, & MAHMOUD E. FATHALLA, REPRODUCTIVE HEALTH AND HUMAN RIGHTS, INTEGRATING MEDICINE, ETHICS, AND LAW, at v (2003). *See generally* Malcolm L. Goggin, Deborah A. Orth, Ivar Bleiklie, & Christine Rothmayr, *The Comparative Policy Design Perspective, in*COMPARATIVE BIOMEDICAL POLICY 1 (Ivar Bleiklie, Malcolm L. Goggin, & Christine Rothmayr eds., 2004); Protocol to the African charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003 African Charter on Human and Peoples' Rights, art. 66, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%C20the%C20Rights%C20of% 20Women.pdf (last visited Mar. 13, 2012). *See* CEDAW, *supra* note 22, arts. 4, 6 (CEDAW does not necessarily include a right to assisted conception, nor does CEDAW necessarily bar surrogacy--on the basis that it perpetuates gender stereotypes, for example).

61 U.N. Population Information Network, *Report of the ICPD*, ¶ 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), *available at* http:// www.un.org/popin/icpd/conference/offeng/poa.html (last visited Mar. 13, 2012) [hereinafter *Rep. of the ICPD*].

62 *Id.* ¶ 7.12.

63 *Id.* ¶ 7.16 (A number of countries entered reservations, specifically objecting to the word "individuals" in ¶ 7.16).

64 *Id.* ¶ 7.3. These goals were reiterated at the United Nations, Fourth World Conference on Women. As set out in the Beijing Platform, the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Report of the Fourth World Conference on Women, Beijing, China, Sept. 4, 1995, ¶ 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), *available at* http:// www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%C20report%20E.pdf (last visited Mar. 13, 2012).

65 D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 819-20 (2009) (describing the absence of reproductive rights in Lebanon).

66 RUTH DIXON-MUELLER, POPULATION POLICY & WOMEN'S RIGHTS, TRANSFORMING REPRODUCTIVE CHOICE 128 (1993) (describing customs in the Sahel); Abd-el Kader Boye et al., Population Council, *Marriage Law and Practice in the*

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*Sahel, in*STUDIES IN FAMILY PLANNING 347 (John Bongaarts & Gary Bologh, eds., 1991).

67 *See*BLAIR ET AL., *supra* note 65, at 794.

68 *Rep. of the ICPD, supra* note 61, at ¶ 7.16.

69 For a rigorous analysis of the concerns about commodification in this contest, *see*MARGARET J. RADIN, CONTESTED COMMODITIES 140 (1996) (Radin's analysis assumes traditional surrogacy. She notes that cases in which both would-be-parents contribute their genetic material [may] become more prevalent in the future.).

70 CEDAW, *supra* note 22, art. 1.

71 *Id.* art. 11.

72 *Id.*

73 *Id.*

74 CEDAW, *supra* note 22, art. 11.

75 General Comment by Convention on the Elimination of All Forms of Discrimination against Women art. 12, Sept. 3, 1981, U.N. A/54/38/Rev.1, ch. I, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm #article12 (last visited Mar. 13, 2012). The Committee's General Recommendation No. 24 elaborates on Article 12.1, addressing women's access to health care, including family planning services. The Committee recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion." *Id.* at 12(2). For a more detailed formulation of these rights, *see*CTR. FOR REPRODUCTIVE RTS., THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND SEXUAL RIGHTS 1 (2003), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_ africa.pdf (last visited Mar. 13, 2012).

76 CEDAW, *supra* note 22, art. 14.

77 CEDAW, *supra* note 22, art. 16 (Article 16 has received an unprecedented number of reservations); Luisa Blanchfield, The U.N. Convention on the Elimination of All Forms of Discrimination Against Women: Issues in the U.S. Ratification Debate, Cong. Res. Serv. 7-5700, at 2 (2010) (two States Parties to the Convention--Malta and Monaco--stated in their reservations to CEDAW that they do not interpret Article 16(1)(e) as imposing or forcing the legalization of abortion in their respective countries); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L 643, 702 (1990).

78 CEDAW, *supra* note 22, art. 5.

79 *See, e.g.*, Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9; *See generally* Scott, *supra* note 28.

80 CEDAW, *supra* note 22, art. 5.

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81 Anne R. Dana, *The State of Surrogacy Laws: Determining Legal parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 363 (2011).

82 *See, e.g.*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) (stating that,"[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

83 Minister of Home Affairs v. Fourie, 2005 (1) SA 19 (CC) at 37 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2005/19.html (last visited Mar. 13, 2012) (finding a right to same-sex marriage in the South African Constitution). *See also*Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a thoughtful comparison of *Goodridge* and *Fourie, see* Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, 803 (2007). For a discussion of developments in the United States, *see* Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J. L. & POL'Y 79, 83 (2007) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a survey, *see* Harvard Law Review Assoc., *Developments in the Law--The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2087-2091 (2003).

84 Katharina Boel-Woelki, *The Legal recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1951 (2008).

85 *See, e.g.*, Karner v. Austria, App. No. 40016/98, Eur. Ct. H.R. 41 (2003) (while welcoming measures taken by the State party to eliminate gender segregation in the labor market, including through training programs in the area of equal opportunities, the Committee is concerned about the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large ... [and] recommends that policies be developed and programs implemented to ensure the eradication of traditional sex role stereotypes in the family, labor market, the health sector, academia, politics and society at large).

86 *Id.* at 29 (the *Karner* Court also cited Article 8, which guarantees each individual "the right to respect for his private and family life.").

87 Council Directive 2000/78, art. 16, 2000 O.J. (L 303) 12 (EC), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:en:PDF (last visited Mar. 13, 2012) (establishing a general framework for equal treatment in employment and occupation).

88 Case C-267/06, Maruko v. Versorgungsanstal Der Deutschen Buhnen, 2008 E.C.R. 1-1757.

89 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1 (the Treaty of Lisbon is also called the "Treaty on the Functioning of the European Union.").

90 *Id.* art. 1.3; Elizabeth F. Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT'L & COMP. L. 413, 419 (2010).

91 Giraldo v. Colombia, Case 11,656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106 Doc. 3 rev., at 211 (1999) (Colom.).

92 *Id.* (following unsuccessful attempts to resolve the matter by friendly settlement, the Commission declared the case admissible, and agreed to publish the decision, to continue analyzing the merits of the case, and to renew its efforts to conclude a friendly settlement).

93 Rex Wockner, *Norway Legalizes Marriage*, BAY TIMES, June 19, 2008, http://www.sfbaytimes.com/index.php?sec=article&article_*Id*=8382 (last visited Mar. 13, 2012).

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94 *Id.*

95 *Id.*

96 Civil Marriage Act, 2005, SC, c.33 (Can.); *see generally* Peter Bowal & Carlee Campbell, *The Legalization of Same-Sex Marriage in Canada*, 21 AM. J. FAM. L. 37 (2007).

97 They are: Massachusetts, *see Goodridge, supra* note 83; Connecticut, *see*Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Iowa, *see*Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Vermont, *see*VT. STAT. ANN. CIVIL MARRIAGE TIT. 15 § 8 (West 2009); New Hampshire, *see*N.H. REV. STATE. ANN. § 45:1 (2010); and New York, *see*N.Y. DOM. REL. Law § 10(a) (McKinney 2011). *See generally* Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005). *See* J. Thomas Oldham, *Developments in the US-The Struggle over the Creation of a Status for Same-Sex Partners, in*THE INT'L SURVEY OF FAMILY LAW 485 (Andrew Bainham ed., 2006).

98 BLAIR ET AL., *supra* note 65, at 234. *See also* Maria Godoy, *State by State: The Legal Battle Over Gay Marriage*, NAT'L PUBLIC RADIO (Feb. 7, 2012, 11:37 AM), http://www.npr.org/2009/12/15/112448663/state-by-state-the-legal-battle-over-gay-marriage (last visited Mar. 18, 2012).

99 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (2010).

100 Editorial, *Marriage is a Constitutional Right*, N.Y TIMES, Aug. 4, 2010, at A26. On February 23, 2011, the Obama Administration advised the Speaker of the House that it would no longer defend the constitutionality of Sec. 3 of DOMA. Marc Ambinder, *Obama Won't Go to Court Over Defense of Marraige Act*, NAT'L J. (Feh. 24, 2011), http://www.nationaljournal.com/obama-won-t-gotocourt-over-defense-of-marriage-act-20110223 (last visited Mar. 18, 2012).

101 Toonen v. Australia, [1994] 6.1 Comm'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Austl.), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm (last visited Mar. 18, 2012).

102 *Id.* at 6.5.

103 As the Committee explained in *Joslin v. New Zealand*:
Article 23, paragraph 2 of the Covenant is the only substantive provision ... which defines a right by using the term "men and women," rather than "every human being," "everyone" and "all persons." Use of the term "men and women," rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and woman ....
Joslin v. New Zealand, [2002] Comm'n No. 902/1999 U.N. Doc. CCPR/C/75/D/902/1999 (N.Z.), *available at* http://www.unhchr.ch/tbs/doc.nsf/ (Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument (last visited Mar. 18, 2012) (upholding New Zealand's refusal to permit same-gender couples to marry); Quilter v. Attorney-General, [1998] 1 NZLR 523 (N.Z.). For a provocative discussion, *see generally* Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007).

104 Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Priciples*, 8 HUM. RTS. L. REV. 207, 232 (2008) (noting that "[t]he High Commissioner for Human Rights, Louise Arbour, has expressed concern about the inconsistency of approach in law and practice ... [regarding] ... sexual orientation and gender identity.").

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105 *Id.* at 233.

106 *Id.* at 247.

107 Int'l Court of Justice, *Statute of the International Court of Justice*, art. 38, http://www.icjcij.org/documents/index.php?p1=4&p2=2&p3=0 #CHAPTER_II (last visited Mar. 18, 2012) ("The court ... shall apply ... the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

108 Michael O'Flaherty, Annotation, Jurisprudential Annotations to the Yogyakarta Principles, 8 UNIV. OF NOTTINGHAM HUM. RTS. LAW CTR 1 (2007), *available at* http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf (last visited Mar. 13, 2012).

109 Michael O'Flaherty & John Fisher, *supra* note 104, at 241.

110 *Id.*

111 U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30, U.N. Doc. A/63/PV.70 (Dec. 18, 2008).

112 *Id.* The Counterstatement, signed by 59 states, condemned the Statement, arguing further that:
More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behavior between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including pedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.
Id. at 31.

113 *Id.; see also* O'Flaherty & Fisher, *supra* note 104, at 238-43 (describing the "Reaction by States and other Actors within United Nations Fora.").

114 *See* O'Flaherty & Fisher, *supra* note 104, at 238.

115 DANIEL OTTOSSON, INT'L LESBIAN & GAY ASSOC., STATE-SPONSORED HOMOPHOBIA, A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 4, 45 (2011), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (last visited Mar. 13, 2012) (This jurisprudence includes the recent decision of the High Court of Delhi, which ruled in 2009 that section 377 of the Indian Penal Code could not be applied to sexual activities between consenting adults. The ruling affects all of India, except Jammu and Kashmir, where a different penal code applies, and affects approximately one sixth of the human population); Anjuli W. McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1076 (2006) (the absence of consensus only matters in ascertaining customary international law, which is not in issue. It could be argued, however, that there is *regional* customary international law with respect to same-sex relationships in Europe).

116 CRC, *supra* note 26, art. 2(1).

117 CRC, *supra* note 26, art. 1.

118 CRC, *supra* note 26, art. 7(1).

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119 Courtney G. Joslin, *Protecting Children: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1228 (2010).

120 Hague Conf. on Private Int'l Law, *supra* note 9, at 6; Krawiec, *supra* note 11, at 225.

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5 Cal.4th 84
Supreme Court of California,
In Bank.

Anna JOHNSON, Plaintiff and Appellant,
v.
Mark CALVERT et al., Defendants and Respondents.

No. S023721. | May 20, 1993.

Husband and wife brought suit seeking declaration that they were legal parents of child born of woman in whom couple's fertilized egg had been implanted. The Superior Court, Orange County, Nos. X63 31 90, AD 57638, Richard N. Parslow, Jr., J., ruled in favor of husband and wife. Woman appealed. The Court of Appeal, affirmed. Review was granted, superseding the opinion of the Court of Appeal. The Supreme Court, Panelli, J., granted review, superseding opinion of Court of Appeal, and held that woman was not "natural mother" of child.

Affirmed.

Arabian, J., filed a concurring opinion.

Kennard, J., filed a dissenting opinion.

Opinion, 286 Cal.Rptr. 369, superseded.

Attorneys and Law Firms

***495 *86 **777** Richard C. Gilbert and Diane J. Marlowe, Orange, for plaintiff and appellant.

Van Deusen, Youmans & Walmsley, Christian R. Van Deusen and Robert R. Walmsley, Santa Ana, for defendants and respondents.

Harold LaFlamme, Michelle Ben–Hur, John L. Dodd and Karen J. Dodd, Santa Ana, for minor.

Jon Davidson, Paul L. Hoffman, Carol A. Sobel, Rogers & Wells, Rebecca C. Klipfel and Suzanne M. Madison, Los Angeles, as amici curiae.

Opinion

*87 PANELLI, Justice.

In this case we address several of the legal questions raised by recent advances in reproductive technology. When, pursuant to a surrogacy agreement, a zygote[1] ***496** formed of the gametes[2] of a husband and **778** wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's "natural mother" under California law? Does a determination that the wife is the child's natural mother work a deprivation of the gestating woman's constitutional rights? And is such an agreement barred by any public policy of this state?

We conclude that the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy.

FACTS[3]

Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was forced to undergo a hysterectomy in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989 Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.

On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna $10,000 in a series of installments, the last to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a $200,000 life insurance policy on Anna's life.[4]

The zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.

Unfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required *88 insurance policy. She also felt abandoned during an onset of premature labor in June.

In July 1990, Anna sent Mark and Crispina a letter demanding the balance of the payments due her or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit,

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seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated. The parties agreed to an independent guardian ad litem for the purposes of the suit.

The child was born on September 19, 1990, and blood samples were obtained from both Anna and the child for analysis. The blood test results excluded Anna as the genetic mother. The parties agreed to a court order providing that the child would remain with Mark and Crispina on a temporary basis with visits by Anna.

At trial in October 1990, the parties stipulated that Mark and Crispina were the child's genetic parents. After hearing evidence and arguments, the trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother, that Anna had no "parental" rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims. The court also terminated the order allowing visitation. Anna appealed from the trial court's judgment. The Court of Appeal for the Fourth District, Division Three, affirmed. We granted review.

DISCUSSION

Determining Maternity Under the Uniform Parentage Act

The Uniform Parentage Act (the Act) was part of a package of legislation introduced ***497** in 1975 as Senate Bill No. 347. The legislation's purpose was to eliminate the **779** legal distinction between legitimate and illegitimate children. The Act followed in the wake of certain United States Supreme Court decisions mandating equal treatment of legitimate and illegitimate children. (See, e.g., *Levy v. Louisiana* (1968) 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 [state could not deny illegitimate child right to bring tort action for wrongful death of parent if it gave legitimate child the same right]; *Glona v. American Guarantee Co.* (1968) 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 [state could not deny parent of illegitimate child right to bring tort action for wrongful death of child if it gave parent of legitimate child the same right].) A press release issued on October 2, 1975, described Senate Bill No. 347 this way: "The bill, as amended, would revise or repeal various laws which *89 now provide for labeling children as legitimate or illegitimate and defining their legal rights and those of their parents accordingly. In place of these cruel and outmoded provisions, SB 347 would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents."

The pertinent portion of Senate Bill No. 347, which passed with negligible opposition, became Part 7 of Division 4 of the California Civil Code, sections 7000–7021.[5]

Civil Code sections 7001 and 7002 replace the distinction between legitimate and illegitimate children with the concept of the "parent and child relationship." The "parent and child relationship" means "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." (Civ.Code, § 7001.) "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Civ.Code, § 7002.) The "parent and child relationship" is thus a legal relationship encompassing two kinds of parents, "natural" and "adoptive."

[1] Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to *any* parentage determination, including the rare case in which a child's maternity is in issue. We are invited to disregard the Act and decide this case according to other criteria, including constitutional precepts and our sense of the demands of public policy. We feel constrained, however, to decline the invitation. Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature. For example, in *People v. Salemme* (1992) 2 Cal.App.4th 775, 3 Cal.Rptr.2d 398, the court upheld a conviction of burglary when the felony the defendant entered the residence to commit was that of the fraudulent sale of securities. This scenario likely was not within the Legislature's contemplation when it enacted Penal Code section 459. Nonetheless, the burglary statute, on its face, addressed the defendant's conduct and was properly interpreted to apply to it. Similarly, the Act offers a mechanism to resolve this dispute, albeit one not specifically tooled for it. We therefore proceed to analyze the parties' contentions within the Act's framework.

[2] These contentions are readily summarized. Anna, of course, predicates her claim of maternity on the fact that she gave birth to the child. The *90 Calverts contend that Crispina's genetic relationship to the child establishes that she is his mother. Counsel for the minor joins in that

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contention and argues, in addition, that several of the presumptions created by the Act dictate the same result. As will appear, we conclude that presentation of blood test evidence is one means of establishing maternity, as is proof of having given birth, ***498** but that the presumptions cited by minor's counsel do not apply to this case.

**780 We turn to those few provisions of the Act directly addressing the determination of maternity. "Any interested party," presumably including a genetic mother, "may bring an action to determine the existence ... of a mother and child relationship." (Civ.Code, § 7015.) Civil Code section 7003 provides, in relevant part, that between a child and the natural mother a parent and child relationship "*may* be established by proof of her having given birth to the child, or under [the Act]." (Civ.Code, § 7003, subd. (1), emphasis added.) Apart from Civil Code section 7003, the Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, it declares that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. (Civ.Code, § 7015.) Thus, it is appropriate to examine those provisions as well.

A man can establish a father and child relationship by the means set forth in Civil Code section 7004. (Civ.Code, §§ 7006, 7004.) Paternity is presumed under that section if the man meets the conditions set forth in section 621 of the Evidence Code. (Civ.Code, § 7004, subd. (a).) The latter statute applies, by its terms, when determining the questioned paternity of a child born to a married woman, and contemplates reliance on evidence derived from blood testing. (Evid.Code, § 621, subds. (a), (b);[6] see Evid.Code, §§ 890–897 [Uniform Act on Blood Tests to Determine Paternity].) Alternatively, Civil Code section 7004 creates a presumption of paternity based on the man's conduct toward the child (e.g., receiving the child into his home *91 and openly holding the child out as his natural child) or his marriage or attempted marriage to the child's natural mother under specified conditions.[7]

***499 **781 [3] In our view, the presumptions contained in Civil Code section 7004 do not apply here. They describe situations in which substantial evidence points to a particular man as the natural father of the child. (9B West's U.Laws Ann. (1987) Unif. Parentage Act, com. foll. § 4, p. 299.) In this case, there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman's claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants.

Significantly for this case, Evidence Code section 892 provides that blood testing may be ordered in an action when paternity is a relevant fact. When maternity is disputed, genetic evidence derived from blood testing is likewise admissible. (Evid.Code, § 892; see Civ.Code, § 7015.) The Evidence Code further provides that if the court finds the conclusions of all the experts, as disclosed by the evidence based on the *92 blood tests, are that the alleged father is not the father of the child, the question of paternity is resolved accordingly. (Evid.Code, § 895.) By parity of reasoning, blood testing may also be dispositive of the question of maternity. Further, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of a certain number of genetic markers. (Evid.Code, § 895.5.)

[4] Disregarding the presumptions of paternity that have no application to this case, then, we are left with the undisputed evidence that Anna, not Crispina, gave birth to the child and that Crispina, not Anna, is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act. (Civ.Code, §§ 7003, subd. (1), 7004, subd. (a), 7015; Evid.Code, §§ 621, 892.) Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.[8]

[5] We see no clear legislative preference in Civil Code section 7003 as between blood testing evidence and proof of having given birth.[9] "May" indicates that proof of having given birth is a permitted method of establishing a mother and child relationship, although perhaps not the exclusive one. The disjunctive "or" indicates that blood test evidence, as prescribed in the Act, constitutes an alternative to proof of having given birth. It may be that the language of the Act merely reflects "the ancient dictum *mater est quam [gestation] demonstrat* (by gestation the mother is demonstrated). This phrase, by its use of the word 'demonstrated,' has always reflected an ambiguity in the meaning of the presumption. It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal **782 rights. Under this ***500 *93 latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship." (Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology As the Basis for Parental Rights* (1991) 66 N.Y.U.L.Rev. 353, 370, fns. omitted.) This ambiguity, highlighted by the

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problems arising from the use of artificial reproductive techniques, is nowhere explicitly resolved in the Act.

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

[6] [7] We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[10]

Our conclusion finds support in the writings of several legal commentators. (See Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology* **94** *As the Basis for Parental Rights, supra,* 66 N.Y.U.L.Rev. 353; Shultz, *Reproductive Technology and Intent–Based Parenthood: An Opportunity for Gender Neutrality* (1990) Wis.L.Rev. 297 [Shultz]; Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) 96 Yale L.J. 187, 197–202 [note].) Professor Hill, arguing that the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context, notes that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents....* [¶] ... [T]he intended parents are the first cause, or the prime movers, of the procreative relationship." (Hill, *op. cit. supra,* at p. 415, emphasis in original.)

Similarly, Professor Shultz observes that recent developments in the field of reproductive *****501 **783** technology "dramatically extend affirmative intentionality.... Steps can be taken to bring into being a child who would not otherwise have existed." (Shultz, *op. cit. supra,* p. 309.) "Within the context of artificial reproductive techniques," Professor Shultz argues, "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood." (*Id.,* at p. 323, fn. omitted.)

Another commentator has cogently suggested, in connection with reproductive technology, that "[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child." (Note, *op. cit. supra,* 96 Yale L.J. at p. 196.)

Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are "[un]likely to run contrary to those of adults who choose to bring them into being." (Shultz, *op. cit. supra,* at p. 397.) Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike." (*Ibid.*) Under Anna's interpretation of the Act, by contrast, a woman who agreed to gestate a fetus genetically related to the intending parents would, contrary to her expectations, be held to be the child's natural mother, with all the responsibilities that ruling would entail, if the intending mother declined to accept the child after its birth. In what we must hope will be the extremely rare situation in ***95** which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.

In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.

[8] Preliminarily, Mark and Crispina urge us to interpret the Legislature's 1992 passage of a bill that would have regulated surrogacy as an expression of this state's public policy despite the fact that Governor Wilson's veto prevented the bill from becoming law. Senate Bill No.

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937 contained a finding that surrogate contracts are not against sound public and social policy. (Sen. Bill No. 937 (1991–1992 Reg.Sess.).) Had Senate Bill No. 937 become law, there would be no room for argument to the contrary. The veto, however, raises a question whether the legislative declaration truly expresses California's public policy.

In the Governor's veto message we find, not unequivocal agreement with the Legislature's public policy assessment, but rather reservations about the practice of surrogate parenting. "Surrogacy is a relatively recent phenomenon. The full moral and psychological dimensions of this practice are not yet clear. In fact, they are just beginning to emerge. Only two published court opinions in California have treated this nettlesome subject.... Comprehensive regulation of this difficult moral issue is premature.... [¶] To the extent surrogacy continues to be practical, it can be governed by the legal framework already established in the family law area." (Governor's veto message to Sen. on Sen. Bill No. 937 (Sept. 26, 1992) Sen. Daily File (1991–1992 Reg.Sess.) p. 68.) Given this less than ringing endorsement of surrogate parenting, we conclude that the passage of Senate Bill No. 937, in and of itself, does not establish that surrogacy contracts are consistent with public policy. (Of course, neither do we draw the opposite conclusion from the fact of the Governor's veto.)

Anna urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting ****784 ***502** the payment for consent to adoption of a child.[11] She argues further that the policies underlying the adoption laws of this state are violated by the ***96** surrogacy contract because it in effect constitutes a prebirth waiver of her parental rights.

[9] [10] We disagree. Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes. For the same reasons, we conclude these contracts do not implicate the policies underlying the statutes governing termination of parental rights. (See Welf. & Inst.Code, § 202.)

[11] It has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. (See U.S. Const., Amend. XIII; Cal. Const., art. I, § 6; Pen.Code, § 181.) Involuntary servitude has been recognized in cases of criminal punishment for refusal to work. (*Pollock v. Williams* (1944) 322 U.S. 4, 18, 64 S.Ct. 792, 799, 88 L.Ed. 1095, 1104; see, generally, 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 411–414, pp. 591–596.) We see no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking. We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the ***97** absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.

[12] Finally, Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed. *****503 **785** However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences.

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise

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undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.[12]

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

***98 Constitutionality of the Determination That Anna Johnson Is Not the Natural Mother**

Anna argues at length that her right to the continued companionship of the child is protected under the federal Constitution.

First, we note the constitutional rights that are *not* implicated here.

There is no issue of procedural due process: although Anna broadly contends that the procedures prescribed for adoptions should be followed in the situation of a gestational surrogate's relinquishment to the genetic parents of the child she has carried and delivered, she cites no specific deficiency in the notice or hearing this matter received.

Furthermore, neither Anna nor amicus curiae ACLU articulates a claim under the equal protection clause, and we are unable to discern in these facts the necessary predicate to its operation. This is because a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting child.

[13] Anna relies mainly on theories of substantive due process, privacy, and procreative freedom, citing a number of decisions recognizing the fundamental liberty interest of natural parents in the custody and care of their children. (See, e.g., *Santosky v. Kramer* (1982) 455 U.S. 745, 768, 102 S.Ct. 1388, 1402, 71 L.Ed.2d 599; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640; *Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14; *Stanley v. Illinois* (1972) 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551.) Most of the cases Anna cites deal with the rights of unwed fathers in the face of attempts to terminate their parental relationship to their children. (See, e.g., *Stanley v. Illinois, supra,* 405 U.S. at pp. 658–659, 92 S.Ct. at pp. 1216–1217; *Quilloin v. Walcott* (1978) 434 U.S. 246, 247–248, 98 S.Ct. 549, 550–551, 54 L.Ed.2d 511; *Caban v. Mohammed* (1979) 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297; *Lehr v. Robertson* (1983) 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614.) These cases do not support recognition of parental rights for a gestational surrogate. Although Anna quotes language stressing the primacy of a developed *****504 **786** parent-child relationship in assessing unwed fathers' rights (see *Lehr v. Robertson, supra,* 463 U.S. at pp. 260–262, 103 S.Ct. at pp. 2992–2994), certain language in the cases reinforces the importance of genetic parents' rights. (*Lehr v. Robertson, supra,* 463 U.S. at p. 262, 103 S.Ct. at p. 2993 ["The significance of the biological connection is that it offers the natural ***99** father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."]; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 838, 4 Cal.Rptr.2d 615, 823 P.2d 1216 ["The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship."].)

Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law because she, not Anna, provided the ovum for the in vitro fertilization procedure, intending to raise the child as her own, it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother. As counsel for the minor points out, the issue in this case is not whether Anna's asserted rights as a natural mother were unconstitutionally violated, but rather whether the determination that she is not the legal natural mother at all is constitutional.[13]

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Anna relies principally on the decision of the United States Supreme Court in *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, to support her claim to a constitutionally protected liberty interest in the companionship of the child, based on her status as "birth mother." In that case, a plurality of the court held that a state may constitutionally deny a man parental rights with respect to a child he fathered during a liaison with the wife of another man, since it is the marital family that traditionally has been accorded a protected liberty interest, as reflected in the historic presumption of legitimacy of a child born into such a family. (491 U.S. at pp. 124–125, 109 S.Ct. at pp. 2342–2343 (plur. opn. by Scalia, J.).) The reasoning of the plurality in *Michael H.* does not assist Anna. Society has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own; such arrangements are of too recent an origin to claim the protection of tradition. To the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures.

***100** Moreover, if we were to conclude that Anna enjoys some sort of liberty interest in the companionship of the child, then the liberty interests of Mark and Crispina, the child's natural parents, in their procreative choices and their relationship with the child would perforce be infringed. Any parental rights Anna might successfully assert could come only at Crispina's expense. As we have seen, Anna has no parental rights to the child under California law, and she fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by Mark and Crispina.

[14] Amicus curiae ACLU urges that Anna's right of privacy, embodied in the California Constitution (Cal. Const., art. I, § 1), requires recognition and protection of her status as "birth mother." We cannot *****505 **787** agree. Certainly it is true that our state Constitution has been construed to provide California citizens with privacy protections encompassing procreative decisionmaking—broader, indeed, than those recognized by the federal Constitution. (Compare *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 263, 172 Cal.Rptr. 866, 625 P.2d 779 with *Harris v. McRae* (1980) 448 U.S. 297, 315–318, 100 S.Ct. 2671, 65 L.Ed.2d 784 [reaching opposing results on the question of whether state and federal Constitutions, respectively, permit legislative denial of funding for abortions for indigent women].) However, amicus curiae fails to articulate persuasively how Anna's claim falls within even the broad parameters of the state right of privacy. Amicus curiae appears to assume that the choice to gestate and deliver a baby for its genetic parents pursuant to a surrogacy agreement is the equivalent, in constitutional weight, of the decision whether to bear a child of one's own. We disagree. A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.

Drawing an analogy to artificial insemination, Anna argues that Mark and Crispina were mere genetic donors who are entitled to no constitutional protection. That characterization of the facts is, however, inaccurate. Mark and Crispina never intended to "donate" genetic material to anyone. Rather, they intended to procreate a child genetically related to them by the only available means. Civil Code section 7005, governing artificial insemination, has no application here.[14]

Finally, Anna argues that the Act's failure to address novel reproductive techniques such as in vitro fertilization indicates legislative disapproval of ***101** such practices. Given that the Act was drafted long before such techniques were developed, we cannot agree. Moreover, we may not arrogate to ourselves the power to disapprove them. It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy. Rather, our task has been to resolve the dispute before us, interpreting the Act's use of the term "natural mother" (Civ.Code, § 7003, subd. (1)) when the biological functions essential to bringing a child into the world have been allocated between two women.

DISPOSITION

The judgment of the Court of Appeal is affirmed.

LUCAS, C.J., and MOSK, BAXTER and GEORGE, JJ., concur.

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ARABIAN, Justice, concurring to opinion by PANELLI, Justice.

I concur in the decision to find under the Uniform Parentage Act that Crispina Calvert is the natural mother of the child she at all times intended to parent and raise as her own with her husband Mark, the child's natural father. That determination answers the question on which this court granted review, and in my view sufficiently ***506 **788** resolves the controversy between the parties to warrant no further analysis. I therefore decline to subscribe to the dictum in which the majority find surrogacy contracts "not ... inconsistent with public policy." (Maj. opn., *ante,* pp. 501–503 of 19 Cal.Rptr.2d, pp. 783–785 of 851 P.2d.)

Surrogacy contracts touch upon one of the most, if not *the* most, sensitive subjects of human endeavor. Not only does the birth of a new generation perpetuate our species, it allows every parent to contribute, both genetically and socially, to our collective understanding of what it means to be human. Every child also offers the opportunity of a unique lifetime relationship, potentially more satisfying and fulfilling than any other pursuit. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 837, 4 Cal.Rptr.2d 615, 823 P.2d 1216.)

***102** The multiplicity of considerations at issue in a surrogacy situation plainly transcend traditional principles of contract law and require careful, nonadversarial analysis. For this reason, I do not think it wise for this court to venture unnecessarily into terrain more appropriately cleared by the Legislature in the first instance. In this regard, the Florida Supreme Court made the following pertinent observations; although the factual context obviously differs, socially and morally it compares in the most profound respects: "Because the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals be properly accommodated." (*Satz v. Perlmutter* (Fla.1980) 379 So.2d 359, 360, affg (Fla.Dist.Ct.App.1978) 362 So.2d 160.) The New Jersey Supreme Court echoed similar cautionary tones in *Matter of Conroy* (1985) 98 N.J. 321, 486 A.2d 1209: "As an elected body, the Legislature is better able than any other single institution to reflect the social values at stake. In addition, it has the resources and ability to synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations." (*Id.,* 486 A.2d at pp. 1220–1221; accord, *Matter of Guardianship of Hamlin* (1984) 102 Wash.2d 810, 821–822, 689 P.2d 1372, 1378–1379.)

Clearly, this court should not avoid proper resolution of the issue before it. "[T]he law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." (*In re Quinlan* (1976) 70 N.J. 10, 44, 355 A.2d 647, 665, cert. den. *sub nom. Garger v. New Jersey,* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289.) Nevertheless, I would not move beyond the available legal mechanism into such socially and morally uncharted waters. The implications of addressing the general soundness of surrogacy contracts are vast and profound. To date, the legislative process has failed to produce a satisfactory answer. This court should be chastened and not emboldened by that failure.

KENNARD, Justice, dissenting.

When a woman who wants to have a child provides her fertilized ovum to another woman who carries it through pregnancy and gives birth to a child, who is the child's legal mother? Unlike the majority, I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed ***103** the ovum. In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.

***507 **789** For each child, California law accords the legal rights and responsibilities of parenthood to only one "natural mother." When, as here, the female reproductive role is divided between two women, California law requires courts to make a decision as to which woman is the child's natural mother, but provides no standards by which to make that decision. The majority's resort to "intent" to break the "tie" between the genetic and gestational mothers is unsupported by statute, and, in the absence of appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the

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standard most protective of child welfare—the best interests of the child.

I. FACTUAL BACKGROUND

This case arises from an agreement made between Mark and Crispina Calvert, a married couple, and Anna Johnson, a single woman. As the result of a hysterectomy, Crispina was unable to become pregnant, although her ovaries could still produce eggs. When she and her husband Mark desired to have a child, they arranged with Anna for Anna's impregnation with an embryo formed from Crispina's egg and Mark's sperm. Mark and Crispina agreed to pay Anna installment payments totaling $10,000, the last installment not due until six weeks after Anna gave birth. In exchange, Anna agreed to carry the child to term and, after giving birth, to relinquish her parental rights to the child.

Six months into the pregnancy, Anna's relationship with Mark and Crispina broke down. Both sides filed lawsuits seeking declarations of parental rights in the unborn child. While these consolidated actions were still pending, on September 19, 1990, Anna gave birth. By agreement of the parties, the court awarded immediate custody of the child to Mark and Crispina, but granted visitation rights to Anna.

The matter went to trial in October 1990. The parties stipulated that Mark and Crispina were the genetic parents of the child to whom Anna had given birth. The trial court ruled in favor of Mark and Crispina, concluding that as the child's "genetic" and "biological" father and mother, they were also his "natural" father and mother. The Court of Appeal affirmed.

***104** We granted review to address an issue of first impression: Under California law, how does a court determine who is the legal mother of a child born of a gestational surrogacy arrangement?

II. THIS OPINION'S APPROACH

The determination of a question of parental rights to a child born of a surrogacy arrangement was before the New Jersey Supreme Court in *Matter of Baby M.* (1988) 109 N.J. 396, 537 A.2d 1227, a case that received worldwide attention. But in the surrogacy arrangement at issue there the woman who gave birth to the child, Marybeth Whitehead, had been impregnated by artificial insemination with the sperm of the intending father, William Stern. Whitehead thus provided the genetic material and carried the fetus to term. This case is different, because here those two aspects of the female role in reproduction were divided between two women. This process is known as "gestational" surrogacy, to distinguish it from the surrogacy arrangement involved in *Baby M.*[1]

*****508 **790** In this opinion, I first discuss gestational surrogacy in light of the medical advances that have made it a reality. I next consider the wider social and philosophical implications of using gestational surrogacy to give birth to a child, and set out some of the suggested models for deciding the child's parentage in this situation. I then review a comprehensive model legislative scheme, not enacted in California, designed to accommodate the interests of all participants in surrogacy arrangements. I next turn to California's Uniform Parentage Act, and critique the majority's reliance on "intent" as the determinative factor under that act in deciding who is the "natural," and thus legal, mother of a child born of a gestational surrogacy arrangement. Finally, I explain why, in the absence of legislation designed to address the unique problems of gestational surrogacy, courts deciding who is the legal mother of a child born of gestational surrogacy should look to the best interests of that child.

*105 III. GESTATIONAL SURROGACY

Recent advances in medical technology have dramatically expanded the means of human reproduction. Among the new technologies are in vitro fertilization, embryo and gamete freezing and storage, gamete intra-fallopian transfer, and embryo transplantation. (Shultz, *Reproductive Technology and Intent–Based Parenthood: An Opportunity for Gender Neutrality,* 1990 Wis.L.Rev. 297, 299 fn. 5 [hereafter *Reproductive Technology*].) Gestational surrogacy is the result of two of these techniques: in vitro fertilization and embryo transplantation. (See Shalev, Birth Power: The Case for Surrogacy (Yale U. Press 1989) p. 115.)

In vitro fertilization or IVF is the fertilization of a human egg outside the human body in a laboratory. Children that have been conceived this way are often called "test tube babies," because their actual conception took place in a petri dish. The first live birth of a child conceived in vitro occurred in 1979 in Great Britain after 20 years of research by a British team. (Shalev, Birth Power: The Case for Surrogacy, *supra,* at p. 105.)

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To facilitate the retrieval or "harvesting" of eggs for in vitro fertilization, a woman ingests fertility hormones to induce "superovulation" or the production of multiple eggs. The eggs are then removed through aspiration, a nonsurgical technique, or through an invasive surgical procedure known as laparoscopy. (See generally *Developments in the Law: Medical Technology and the Law* (1990) 103 Harv.L.Rev. 1519, 1537–1542 [hereafter *Medical Technology*].) To undergo superovulation and egg retrieval is taxing, both physically and emotionally; the hormones used for superovulation produce bodily changes similar to those experienced in pregnancy, while the surgical removal of mature eggs has been likened to caesarian-section childbirth. (*Id.,* at p. 1540; Shalev, Birth Power: The Case for Surrogacy, *supra,* at pp. 117–118.)

After removal, eggs are exposed to live sperm in a petri dish. If an egg is fertilized, the resulting zygote is allowed to divide and become multicellular before uterine implantation. The expense and low success rate of in vitro fertilization demonstrate just how much prospective parents are willing to endure to achieve biological parenthood. (*Medical Technology, supra,* 103 Harv.L.Rev. at p. 1539.)

Generally, an egg fertilized in vitro is implanted in the uterus of the woman who produced it. The technique, however, allows for embryo transplantation, which is the transfer of an embryo formed from one woman's egg to the uterus of another woman who will gestate the fetus to term. This can ***106** take place in at least three different situations: (1) a woman may donate an egg that, when fertilized, will be implanted in the uterus of a woman who intends to raise the child; (2) the woman who provides the egg may herself intend to raise the child carried to term by a gestational surrogate; or (3) a couple desiring a child may arrange for a surrogate to gestate an embryo produced from an egg and sperm, both donated (perhaps by close relatives of the couple). (Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo* ****791 ***509** *Transplantation, and Gestational Surrogacy Arrangements* (1992)26 Fam.L.Q. 275, 276–277 [hereafter *Determination of Legal Parentage*].)

The division of the female reproductive role in gestational surrogacy points up the three discrete aspects of motherhood: genetic, gestational and social. The woman who contributes the egg that becomes the fetus has played the genetic role of motherhood; the gestational aspect is provided by the woman who carries the fetus to term and gives birth to the child; and the woman who ultimately raises the child and assumes the responsibilities of parenthood is the child's social mother. (Shalev, Birth Power: The Case for Surrogacy, *supra,* at p. 115; see also Macklin, *Artificial Means of Reproduction and Our Understanding of the Family* (1991) 21 Hastings Center Rep. 5, 6.)

IV. POLICY CONSIDERATIONS

The ethical, moral and legal implications of using gestational surrogacy for human reproduction have engendered substantial debate. A review of the scholarly literature that addresses gestational surrogacy reveals little consensus on the desirability of surrogacy arrangements, particularly those involving paid surrogacy, or on how best to decide questions of the parentage of children born of such arrangements.

Surrogacy proponents generally contend that gestational surrogacy, like the other reproductive technologies that extend the ability to procreate to persons who might not otherwise be able to have children, enhances "individual freedom, fulfillment and responsibility." (Shultz, *Reproductive Technology, supra,* 1990 Wis.L.Rev. 297, 303.) Under this view, women capable of bearing children should be allowed to freely agree to be paid to do so by infertile couples desiring to form a family. (Shalev, Birth Power: The Case for Surrogacy, *supra,* at p. 145 [arguing for a "free market in reproduction" in which the "reproducing woman" operates as an "autonomous moral and economic agent"]; see also Posner, Economic Analysis of Law (3 ed. 1986) p. 139; Landes & Posner, *The Economics of the Baby Shortage* (1978) 7 J. Legal Stud. 323 [proposing a "market in babies"].) The "surrogate mother" is expected "to weigh the prospective investment in her birthing labor" ***107** before entering into the arrangement, and, if her "autonomous reproductive decision" is "voluntary," she should be held responsible for it so as "to fulfill the expectations of the other parties...." (Shalev, Birth Power: The Case for Surrogacy, *supra,* at p. 96.)

One constitutional law scholar argues that the use of techniques such as gestational surrogacy is constitutionally protected and should be restricted only on a showing of a compelling state interest. (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth* (1983) 69 Va.L.Rev. 405; Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction,* in Surrogate Motherhood, *supra,* pp. 24–26, 35; Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction* (1986) 59 So.Cal.L.Rev. 939, 960.) Professor Robertson reasons that procreation is itself

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protected under decisions of the United States Supreme Court that affirm the basic civil right to marry and raise children. (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, supra,* 69 Va.L.Rev. at p. 414, fns. 22, 23, citing *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 ["right ... to marry, establish a home and bring up children" protected by the Fourteenth Amendment]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 [describing marriage and procreation as basic human civil rights]; *Stanley v. Illinois* (1972) 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 [emphasizing the importance of the rights "to conceive and raise one's children"].) From this premise, he argues that the right to procreate should extend to persons who cannot conceive or bear children. (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, supra,* 69 Va.L.Rev. at p. 411 ["Sterility bars one from conceiving or bearing only to the extent that medicine ***510 **792 or society cannot overcome the particular cause of infertility"]; Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, supra,* 59 So.Cal.L.Rev. at p. 960 ["The use of noncoital techniques ... should ... also be protected."].)

Professor Robertson's thesis of broad application of the right of privacy for all procreational techniques has been questioned, however, in ligbt of recent United States Supreme Court jurisprudence. See *Medical Technology, supra,* 103 Harv.L.Rev. 1519, 1530, citing *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 as evidence of the high court's reluctance "to extend the right of privacy to new relationships and activities" that the court has not perceived to merit "traditional protection."

Surrogacy critics, however, maintain that the payment of money for the gestation and relinquishment of a child threatens the economic exploitation *108 of poor women who may be induced to engage in commercial surrogacy arrangements out of financial need. (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in Surrogate Motherhood, *supra,* p. 62.) Some fear the development of a "breeder" class of poor women who will be regularly employed to bear children for the economically advantaged. (See *Women and Children Used in Systems of Surrogacy: Position Statement of the Institute on Women and Technology,* in Surrogate Motherhood, *supra,* at p. 322; and Corea, *Junk Liberty,* testimony before Cal.Assem. Judiciary Com., April 5, 1988, in Surrogate Motherhood, *supra,* at pp. 325, 335.) Others suggest that women who enter into surrogacy arrangements may underestimate the psychological impact of relinquishing a child they have nurtured in their bodies for nine months. (See Macklin, *Artificial Means of Reproduction and Our Understanding of the Family, supra,* 21 Hastings Center Rep. 5, 10.)

Gestational surrogacy is also said to be "dehumanizing" (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in Surrogate Motherhood, *supra,* at p. 62) and to "commodify" women and children by treating the female reproductive capacity and the children born of gestational surrogacy arrangements as products that can be bought and sold (Radin, *Market–Inalienability* (1987) 100 Harv.L.Rev. 1849, 1930–1932). The commodification of women and children, it is feared, will reinforce oppressive gender stereotypes and threaten the well-being of all children. (*Medical Technology, supra,* 103 Harv.L.Rev. 1519, 1550; Annas, *Fairy Tales Surrogate Mothers Tell,* in Surrogate Motherhood, *supra,* p. 50.) Some critics foresee promotion of an ever-expanding "business of surrogacy brokerage." (E.g., Goodwin, *Determination of Legal Parentage, supra,* 26 Fam.L.Q. at p. 283.)

Whether surrogacy contracts are viewed as personal service agreements or agreements for the sale of the child born as the result of the agreement, commentators critical of contractual surrogacy view these contracts as contrary to public policy and thus not enforceable. (Radin, *Market–Inalienability, supra,* 100 Harv.L.Rev. at p. 1924, fn. 261; Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood, supra,* in Surrogate Motherhood, at pp. 62–63; see also Kriminel, *Can Surrogate Parenting Be Stopped? An Inspection of the Constitutional and Pragmatic Aspects of Outlawing Surrogate Mother Arrangements* (1992) 27 Val.U.L.Rev. 1, 4–5.)

Organizations representing diverse viewpoints share many of the concerns highlighted by the legal commentators. For example, the American Medical Association considers the conception of a child for relinquishment after birth *109 to pose grave ethical problems. (Rep. of the Judicial Council, in Surrogate Motherhood, *supra,* at p. 304.) Likewise, the official position of the Catholic Church is that surrogacy arrangements are " 'contrary to the unity of marriage and to the dignity of the procreation of the human person.' " (Magisterium of the Catholic Church, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions ***511 **793 of the Day 25 (Feb. 22, 1987), cited in Radin, *Market–Inalienability, supra,* 100 Harv.L.Rev. 1849, 1928, fn. 271.)

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The policy statement of the New York State Task Force on Life and the Law sums up the broad range of ethical problems that commercial surrogacy arrangements are viewed to present: "The gestation of children as a service for others in exchange for a fee is a radical departure from the way in which society understands and values pregnancy. It substitutes commercial values for the web of social, affective and moral meanings associated with human reproduction.... This transformation has profound implications for childbearing, for women, and for the relationship between parents and the children they bring into the world. [¶] ... [¶] Surrogate parenting allows the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring.... [¶] ... [¶] ... Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and children.... [¶] ... [It] is premised on the ability and willingness of women to abdicate [their parental] responsibility without moral compunction or regret [and] makes the obligations that accompany parenthood alienable and negotiable." (New York State Task Force on Life and the Law, *Surrogate Parenting: Analysis and Recommendations for Public Policy* (May 1988) in Surrogate Motherhood, *supra,* at pp. 317–318.)

Proponents and critics of gestational surrogacy propose widely differing approaches for deciding who should be the legal mother of a child born of a gestational surrogacy arrangement. Surrogacy advocates propose to enforce pre-conception contracts in which gestational mothers have agreed to relinquish parental rights, and, thus, would make "bargained-for intentions determinative of legal parenthood." (Shultz, *Reproductive Technology, supra,* 1990 Wis.L.Rev. at p. 323.) Professor Robertson, for instance, contends that "The right to noncoital, collaborative reproduction also includes the right of the parties to agree how they should allocate their obligations and entitlements with respect to the child. Legal presumptions of paternity and maternity would be overridden by this agreement of the parties." (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, supra,* 69 Va.L.Rev. 405, 436; see also Shalev, Birth Power: The Case ***110** for Surrogacy, *supra,* at p. 141 [arguing for enforcing the parties' legal expectations].)

Surrogacy critics, on the other hand, consider the unique female role in human reproduction as the determinative factor in questions of legal parentage. They reason that although males and females both contribute genetic material for the child, the act of gestating the fetus falls only on the female. (See Radin, *Market–Inalienability, supra,* 100 Harv.L.Rev. 1849, 1932, fn. 285 [pointing out the "asymmetrical" interests of males and females in human reproduction].) Accordingly, in their view, a woman who, as the result of gestational surrogacy, is not genetically related to the child she bears is like any other woman who gives birth to a child. In either situation the woman giving birth is the child's mother. (See Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in Surrogate Motherhood, *supra,* at pp. 64–65.) Under this approach, the laws governing adoption should govern the parental rights to a child born of gestational surrogacy. Upon the birth of the child, the gestational mother can decide whether or not to relinquish her parental rights in favor of the genetic mother. (*Ibid.*)

V. MODEL LEGISLATION

The debate over whom the law should recognize as the legal mother of a child born of a gestational surrogacy arrangement prompted the National Conference of Commissioners on Uniform State Laws to propose the Uniform Status of Children of Assisted Conception Act. (9B West's U. Laws Ann. (1992 Supp.) Uniform Status of Children of Assisted Conception Act (1988 Act) pp. 122–137 [hereafter also *****512** USCACA].) ****794** This model legislation addresses many of the concerns discussed above.

The commissioners gave careful consideration to the competing interests of the various participants in assisted conception arrangements, and sought to accommodate those interests in the model legislation. Their overriding concern, however, was the well-being of children born of gestational surrogacy and other types of assisted conception. As the foreword to the model legislation notes, the extraordinary circumstances of these children's births deprive them of parentage in the traditional sense. (9B West's U. Laws Ann. (1992 Supp.) USCACA, *supra,* at p. 123.) Thus, the intent of the proposed legislation was to define with precision the legal status of these children as well as to codify the rights of the other participants in a surrogacy arrangement. The commissioners proposed alternative versions of the USCACA: one that would disallow gestational surrogacy and another that would permit it only under court supervision.

***111** In its key components, the proposed legislation provides that "a woman who gives birth to a child is the child's mother" (USCACA, § 2) unless a court has approved a surrogacy agreement before conception

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(USCACA, §§ 5, 6). In the absence of such court approval, any surrogacy agreement would be void. (USCACA, § 5, subd. (b).) If, however, the arrangement for gestational surrogacy has court approval, "the intended parents are the parents of the child." (USCACA, § 8, subd. (a)(1).)

To obtain court approval, the parties to the surrogacy arrangement must file a petition. (USCACA, § 6, subd. (a).) The model legislation provides for the court to appoint a guardian ad litem for the intended child and legal counsel for the surrogate mother. (*Ibid.*) Before approving a surrogacy arrangement, the trial court must conduct a hearing and enter detailed findings, including the following: medical evidence shows the intended mother's inability to bear a child or that for her to do so poses an unreasonable risk to the unborn child or to the physical or mental health of the intended mother; all parties to the surrogacy agreement (including the surrogate's husband if she has one) meet the standards of fitness of adoptive parents; the agreement was voluntary and all parties understand its terms; the surrogate mother has undergone at least one successful pregnancy and medical evidence shows that another pregnancy will not endanger her physical or mental health or pose an unreasonable risk to the unborn child; and all parties have received professional mental health counseling pertaining to the effect of the surrogacy arrangement. (USCACA, § 6, subd. (b).) These provisions serve to minimize the potential for overreaching and to ensure that all parties to a surrogacy arrangement understand their respective roles and obligations.

The USCACA offers predictability in delineating the parentage of children born of gestational surrogacy arrangements. Under the model legislation, if enacted, there would never be a question as to who has the legal responsibility for a child born of a gestational surrogacy arrangement: If the couple who initiated the surrogacy had complied with the provisions of the legislation, they would be the child's legal parents. If they had not, the rights and responsibilities of parenthood would go to the woman who gave birth to the child and her spouse.

Because California Legislature has not enacted the Uniform Status of Children of Assisted Conception Act, its provisions were not followed in this case.

*112 VI. THE UNIFORM PARENTAGE ACT

The only California statute defining parental rights is the Uniform Parentage Act (hereafter also UPA). (See Civ.Code, § 7000 et seq.).[2] The Legislature enacted the UPA to abolish the concept of illegitimacy and to replace it with the concept of parentage. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828, 4 Cal.Rptr.2d 615, 823 P.2d 1216.) The UPA was never intended by the Legislature to govern the issues arising from new reproductive technologies ***513** such as gestational **795** surrogacy. Nevertheless, the UPA is on its face broadly applicable, and it is in any event the only statutory guidance this court has in resolving this case.

The provisions of the UPA "extend[ ] equally to every child and to every parent, regardless of the marital status of the parents." (§ 7002.) The parent-child relationship defined by the UPA accords a child's parents both rights and obligations. (§ 7001.) A primary focus of the UPA is the determination of paternity and enforcement of financial responsibility. (§§ 7006 [actions to determine paternity], 7012 [specifying financial support obligations].)

When a child is born by gestational surrogacy, as happened here, the two women who played biological roles in creating the child will both have statutory claims under the UPA to being the child's natural mother. The UPA permits a woman to establish that she is "the natural mother" of a child by "proof of ... having given birth to the child...." (§ 7003, subd. (1).) Thus, a gestational mother qualifies as a "natural mother" under the statute. (*Ibid.*) Alternatively, the UPA allows a woman to prove she is a mother in the same manner as a man may prove he is a father. (§§ 7003, subd. (1), 7015 [permitting actions to establish a mother and child relationship using parts of the UPA "applicable to the father and child relationship"].) A man may demonstrate he is a child's natural father through genetic marker evidence derived from blood testing. (§ 7004, subd. (a); Evid.Code, §§ 621, 892, 895.) Accordingly, a genetic mother may also demonstrate she is a child's natural mother through such genetic evidence. Here, both Anna, the gestational mother, and Crispina, the genetic mother, have offered proof acceptable under the UPA to qualify as the child's natural mother.

By its use of the phrase "*the* natural mother," however, the UPA contemplates that a child will have only one natural mother. (§ 7003, subd. (1), italics added.) But the UPA provides no standards for determining who that natural mother should be when, as here, two different women can offer biological proof of being the natural mother of the same child under its *113 provisions. Thus, the UPA by its terms cannot resolve the conflict in this case.

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VII. ANALYSIS OF THE MAJORITY'S "INTENT" TEST

Faced with the failure of current statutory law to adequately address the issue of who is a child's natural mother when two women qualify under the UPA, the majority breaks the "tie" by resort to a criterion not found in the UPA—the "intent" of the genetic mother to be the child's mother.

This case presents a difficult issue. The majority's resolution of that issue deserves serious consideration. Ultimately, however, I cannot agree that "intent" is the appropriate test for resolving this case.

The majority offers four arguments in support of its conclusion to rely on the intent of the genetic mother as the exclusive determinant for deciding who is the natural mother of a child born of gestational surrogacy. Careful examination, however, demonstrates that none of the arguments mandates the majority's conclusion.

The first argument that the majority uses in support of its conclusion that the intent of the genetic mother to bear a child should be dispositive of the question of motherhood is "but-for" causation. Specifically, the majority relies on a commentator who writes that in a gestational surrogacy arrangement, " 'the child would not have been born *but for* the efforts of the intended parents.' " (Maj. opn., *ante,* at p. 500, of 19 Cal.Rptr.2d, p. 782 of 851 P.2d, quoting Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights* (1991) 66 N.Y.U.L.Rev. 353, 415, original italics omitted, italics added.)

The majority's resort to "but-for" causation is curious. The concept of "but-for" causation is a "test used in determining tort liability...." (Black's Law Dict. (6th ed. 1990) p. 200.) In California, the test for causation is whether the conduct was a "substantial factor" in bringing about the event. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049, 1054, 1056 [disapproving ****796** *****514** "but-for" jury instruction in tort cases].) Neither test for causation assists the majority, as I shall discuss.

The proposition that a woman who gives birth to a child after carrying it for nine months is a "substantial factor" in the child's birth cannot reasonably be debated. Nor can it reasonably be questioned that "but for" the gestational mother, there would not be a child. Thus, the majority's reliance on principles of causation is misplaced. Neither the "but for" nor the "substantial factor" test of causation provides any basis for preferring the ***114** genetic mother's intent as the determinative factor in gestational surrogacy cases: Both the genetic and the gestational mothers are indispensable to the birth of a child in a gestational surrogacy arrangement.

Behind the majority's reliance on "but-for" causation as justification for its intent test is a second, closely related argument. The majority draws its second rationale from a student note: " 'The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers.' " (Maj. opn., *ante,* at p. 501, of 19 Cal.Rptr.2d, p. 783 of 851 P.2d, quoting Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) 96 Yale L.J. 187, 196.)

The "originators of the concept" rationale seems comfortingly familiar. The reason it seems familiar, however, is that it is a rationale that is frequently advanced as justifying the law's protection of intellectual property. As stated by one author, "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self." (Hughes, *The Philosophy of Intellectual Property* (1988) 77 Geo.L.J. 287, 330.) Thus, it may be argued, just as a song or invention is protected as the property of the "originator of the concept," so too a child should be regarded as belonging to the originator of the concept of the child, the genetic mother.

The problem with this argument, of course, is that children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration, or made freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property. Accordingly, I cannot endorse the majority's "originators of the concept" or intellectual property rationale for employing intent to break the "tie" between the genetic mother and the gestational mother of the child.

Next, the majority offers as its third rationale the notion that bargained-for expectations support its conclusion regarding the dispositive significance of the genetic mother's intent. Specifically, the majority states that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.' " (Maj. opn., *ante,* at p. 501, of 19 Cal.Rptr.2d, p. 783 of 851 P.2d, quoting Schultz, *Reproductive Technology, supra,* 1990 Wis.L.Rev. at p.

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323.)

It is commonplace that, in real or personal property transactions governed by contracts, "intentions that are voluntarily chosen, deliberate, express and ***115** bargained-for" ought presumptively to be enforced and, when one party seeks to escape performance, the court may order specific performance. (See, e.g., § 3384 et seq.; 11 Witkin, Summary of Cal. Law (9th ed. 1990), Equity, § 21, p. 698.) But the courts will not compel performance of all contract obligations. For instance, even when a party to a contract for personal services (such as employment) has wilfully breached the contract, the courts will not order specific enforcement of an obligation to perform that personal service. (§ 3390; see 11 Witkin, Summary of Cal. Law, *supra,* Equity, § 59, p. 736.) The unsuitability of applying the notion that, because contract intentions are "voluntarily chosen, deliberate, express and bargained-for," their performance ought to be compelled by the courts is even more clear when the concept of specific performance is used to determine the course of the life of a child. Just *****515** as children ****797** are not the intellectual property of their parents, neither are they the personal property of anyone, and their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts.

Thus, three of the majority's four arguments in support of its exclusive reliance on the intent of the genetic mother as determinative in gestational surrogacy cases cannot withstand analysis. And, as I shall discuss shortly, the majority's fourth rationale has merit, but does not support the majority's conclusion. But before turning to the majority's fourth rationale, I shall discuss two additional considerations, not noted by the majority, that in my view also weigh against utilizing the intent of the genetic mother as the sole determinant of the result in this case and others like it.

First, in making the intent of the genetic mother who wants to have a child the dispositive factor, the majority renders a certain result preordained and inflexible in every such case: as between an intending genetic mother and a gestational mother, the genetic mother will, under the majority's analysis, always prevail. The majority recognizes no meaningful contribution by a woman who agrees to carry a fetus to term for the genetic mother beyond that of mere employment to perform a specified biological function.

The majority's approach entirely devalues the substantial claims of motherhood by a gestational mother such as Anna. True, a woman who enters into a surrogacy arrangement intending to raise the child has by her intent manifested an assumption of parental responsibility in addition to her biological contribution of providing the genetic material. (See *Adoption of Kelsey S., supra,* 1 Cal.4th at pp. 838, 849, 4 Cal.Rptr.2d 615, 823 P.2d 1216.) But the gestational mother's biological contribution of carrying a child for nine months and giving birth is likewise an assumption of parental responsibility. (See Dolgin, *Just a Gene:* ***116** *Judicial Assumptions About Parenthood* (1993) 40 UCLA L.Rev. 637, 659.) A pregnant woman's commitment to the unborn child she carries is not just physical; it is psychological and emotional as well. The United States Supreme Court made a closely related point in *Lehr v. Robertson* (1983) 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614, explaining that a father's assertion of parental rights depended on his having assumed responsibility for the child after its birth, whereas a mother's "parental relationship is clear" because she "carries and bears the child." (*Id.* at p. 260, fn. 16, 103 S.Ct. at p. 2992, fn. 16, quoting *Caban v. Mohammed* (1979) 441 U.S. 380, 397, 99 S.Ct. 1760, 1770, 60 L.Ed.2d 297 (dis. opn. of Stewart, J.).)[3] This court too has acknowledged that a pregnant woman and her unborn child comprise a "unique physical unit" and that the welfare of each is "intertwined and inseparable." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1080, 9 Cal.Rptr.2d 615, 831 P.2d 1197.) Indeed, a fetus would never develop into a living child absent its nurturing by the pregnant woman. (See Tribe, American Constitutional Law (2d ed. 1988) at p. 1357, citing Law, *Rethinking Sex and the Constitution* (1984) 132 U.Pa.L.Rev. 955, 1023.) A pregnant woman intending to bring a child into the world is more than *****516 **798** a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.

To summarize, the woman who carried the fetus to term and brought a child into the world has, like the genetic mother, a substantial claim to be the natural mother of the child. The gestational mother has made an indispensable and unique biological contribution, and has also gone beyond biology in an intangible respect that, though difficult to label, cannot be denied. Accordingly, I cannot agree with the majority's devaluation of the role of the gestational mother.

I find the majority's reliance on "intent" unsatisfactory for yet another reason. By making intent determinative of parental rights to a child born of ***117** a gestational surrogacy arrangement, the majority would permit enforcement of a gestational surrogacy agreement without

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requiring any of the protections that would be afforded by the Uniform Status of Children of Assisted Conception Act. Under that act, the granting of parental rights to a couple that initiates a gestational surrogacy arrangement would be conditioned upon compliance with the legislation's other provisions. They include court oversight of the gestational surrogacy arrangement before conception, legal counsel for the woman who agrees to gestate the child, a showing of need for the surrogacy, medical and mental health evaluations, and a requirement that all parties meet the standards of fitness of adoptive parents. (USCACA, §§ 5, 6.)

In my view, protective requirements such as those set forth in the USCACA are necessary to minimize any possibility in gestational surrogacy arrangements for overreaching or abuse by a party with economic advantage. As the New Jersey Supreme Court recognized, it will be a rare instance when a low income infertile couple can employ an upper income surrogate. (*Matter of Baby M., supra,* 109 N.J. 396, 537 A.2d 1227, 1249.) The model act's carefully drafted provisions would assure that the surrogacy arrangement is a matter of medical necessity on the part of the intending parents, and not merely the product of a desire to avoid the inconveniences of pregnancy, together with the financial ability to do so. Also, by requiring both pre-conception psychological counseling for all parties and judicial approval, the model act would assure that parties enter into a surrogacy arrangement only if they are legally and psychologically capable of doing so and fully understand all the risks involved, and that the surrogacy arrangement would not be substantially detrimental to the interests of any individual. Moreover, by requiring judicial approval, the model act would significantly discourage the rapid expansion of commercial surrogacy brokerage and the resulting commodification of the products of pregnancy. In contrast, here the majority's grant of parental rights to the intending mother contains no provisions for the procedural protections suggested by the commissioners who drafted the model act. The majority opinion is a sweeping endorsement of unregulated gestational surrogacy.

The majority's final argument in support of using the intent of the genetic mother as the exclusive determinant of the outcome in gestational surrogacy cases is that preferring the intending mother serves the child's interests, which are " '[u]nlikely to run contrary to those of adults who choose to bring [the child] into being.' " (Maj. opn., *ante,* at p. 501, of 19 Cal.Rptr.2d, p. 783 of 851 P.2d, quoting Schultz, *Reproductive Technology, supra,* 1990 Wis.L.Rev. at p. 397.)

I agree with the majority that the best interests of the child is an important goal; indeed, as I shall explain, the best interests of the child, rather than the ***118** intent of the genetic mother, is the proper standard to apply in the absence of legislation. The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case.

I express no view on whether the best interests of the child in this case will be served by determining that the genetic mother is or is not the natural mother under California's Uniform Parentage Act. ***517** It may be that in ****799** this case the child's interests will be best served by recognizing Crispina as the natural mother. But this court is not just making a rule to resolve this case. Because the UPA does not adequately address the situation of gestational surrogacy, this court is of necessity making a rule that, unless new legislation is enacted, will govern all future cases of gestational surrogacy in California. And all future cases will not be alike. The genetic mother and her spouse may be, in most cases, considerably more affluent than the gestational mother. But "[t]he mere fact that a couple is willing to pay a good deal of money to obtain a child does not vouchsafe that they will be suitable parents...." (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in Surrogate Motherhood, *supra,* at pp. 65–66.) It requires little imagination to foresee cases in which the genetic mothers are, for example, unstable or substance abusers, or in which the genetic mothers' life circumstances change dramatically during the gestational mothers' pregnancies, while the gestational mothers, though of a less advantaged socioeconomic class, are stable, mature, capable and willing to provide a loving family environment in which the child will flourish. Under those circumstances, the majority's rigid reliance on the intent of the genetic mother will not serve the best interests of the child.

VIII. THE BEST INTERESTS OF THE CHILD

As I have discussed, in California the existing statutory law applicable to this case is the Uniform Parentage Act, which was never designed to govern the new reproductive technology of gestational surrogacy. Under the UPA, both the genetic mother and the gestational mother have an equal right to be the child's natural mother. But the UPA allows one natural mother for each child, and thus this court is required to make a choice. To break this "tie" between the genetic mother and the gestational mother, the majority uses the legal concept of intent. In so doing, the majority has articulated a rationale for using the

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concept of intent that is grounded in principles of tort, intellectual property and commercial contract law.

But, as I have pointed out, we are not deciding a case involving the commission of a tort, the ownership of intellectual property, or the delivery of goods under a commercial contract; we are deciding the fate of a child. In ***119** the absence of legislation that is designed to address the unique problems of gestational surrogacy, this court should look not to tort, property or contract law, but to family law, as the governing paradigm and source of a rule of decision.

The allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interests of the child. (See §§ 222.20, 222.36, 224.64 [matters relating to adoption and temporary placement], 4600 [child custody], 4601 [visitation].) Indeed, it is highly significant that the UPA itself looks to a child's best interests in deciding another question of parental rights. (§ 7017, subd. (d)(2).) This "best interests" standard serves to assure that in the judicial resolution of disputes affecting a child's well-being, protection of the minor child is the foremost consideration. Consequently, I would apply "the best interests of the child" standard to determine who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement.[4]

*****518 **800** The determination of a child's best interests does not depend on the parties' relative economic circumstances, which in a gestational surrogacy situation will usually favor the genetic mother and her spouse. (See *Matter of Baby M., supra,* 537 A.2d at p. 1249.) As this court has recognized, however, superior wealth does not necessarily equate with good parenting. (See *Burchard v. Garay* (1986) 42 Cal.3d 531, 540, 229 Cal.Rptr. 800, 724 P.2d 486.)

***120** Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically (Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation,* in Surrogate Motherhood, *supra,* at p. 160), and to provide ethical and intellectual guidance (see *In re Marriage of Carney* (1979) 24 Cal.3d 725, 739, 157 Cal.Rptr. 383, 598 P.2d 36). Also crucial to a child's best interests is the "well recognized right" of every child "to stability and continuity." (*Burchard v. Garay, supra,* 42 Cal.3d at p. 546, 229 Cal.Rptr. 800, 724 P.2d 486 (conc. opn. of Mosk, J.).) The intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive.

Here, the child born of the gestational surrogacy arrangement between Anna Johnson and Mark and Crispina Calvert has lived continuously with Mark and Crispina since his birth in September 1990. The trial court awarded parental rights to Mark and Crispina, concluding that as a matter of law they were the child's "genetic, biological and natural" parents.[5] In reaching that conclusion, the trial court did not treat Anna's statutory claim to be the child's legal mother as equal to Crispina's, nor did the trial court consider the child's best interests in deciding between those two equal statutory claims. Accordingly, I would remand the matter to the trial court to undertake that evaluation.

CONCLUSION

Recent advances in medical technology have made it possible for the human female reproductive role to be divided between two women, the genetic mother and the gestational mother. Such gestational surrogacy arrangements call for sensitivity to each of the adult participauts. But the paramount concern must be the well-being of the child that gestational surrogacy has made possible.

The model legislation proposed by the National Conference of Commissioners on Uniform Laws would protect such children's well-being by precisely defining their parentage. Such precision is not possible using a "best interests of the child" standard, which requires a case-by-case evaluation after the birth of the child. But that evaluation would afford many protections similar to those set out in USCACA, such as judicial oversight, legal counsel, and an opportunity for the court to determine who best can provide for the child.

I recognize that, for couples such as Mark and Crispina, gestational surrogacy offers the only hope of raising a child who is genetically related to ***121** both. But the desire for a genetically related child does not diminish the substantial concerns expressed by a broad spectrum of commentators that surrogacy left unregulated poses a fundamental threat to the well-being of *****519 **801** women and children. This threat could largely be allayed by legislation permitting gestational surrogacy, but under court supervision and with the type of procedural requirements proposed in the USCACA that serve to protect all of those affected by a gestational surrogacy arrangement, particularly the child. In my view, the Legislature should turn its attention to the complex issues

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posed by gestational surrogacy.

In this opinion, I do not purport to offer a perfect solution to the difficult questions posed by gestational surrogacy; perhaps there can be no perfect solution. But in the absence of legislation specifically designed to address the complex issues of gestational surrogacy and to protect against potential abuses, I cannot join the majority's uncritical validation of gestational surrogacy.

I would reverse the judgment of the Court of Appeal, and remand the case to the trial court for a determination of disputed parentage on the basis of the best interests of the child.

Parallel Citations

5 Cal.4th 84, 851 P.2d 776, 61 USLW 2721

Footnotes

1 An organism produced by the union of two gametes. (McGraw–Hill Dict. of Scientific and Technical Terms (4th ed. 1989) p. 783.)

2 A cell that participates in fertilization and development of a new organism, also known as a germ cell or sex cell. (McGraw–Hill Dict. of Scientific and Technical Terms, *supra,* p. 2087.)

3 The statement of facts and the discussion of the legislative history of the Uniform Parentage Act, *post,* pages 496–497 of 19 Cal.Rptr.2d, pages 778–779 of 851 P.2d, are adapted from the opinion of the Court of Appeal.

4 At the time of the agreement, Anna already had a daughter, Erica, born in 1987.

5 Effective January 1, 1994, Civil Code sections 7000–7021 have been repealed and replaced with equivalent provisions in the Family Code. (Stats.1992, ch. 162, § 4; see Fam.Code, §§ 7600–7650 [eff. Jan. 1, 1994].)

6 Evidence Code section 621 provides in relevant part as follows: "(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. [¶] (b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly." Effective January 1, 1994, Evidence Code sections 621 and 890 through 897 have been repealed and replaced with equivalent provisions of the Family Code. (Stats.1992, ch. 162, §§ 8, 9; see Fam.Code, §§ 7500–7501, 7550–7557 [eff. Jan. 1, 1994].)

7 Civil Code section 7004 provides as follows: "(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following paragraphs: [¶] (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. [¶] (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following are true: [¶] (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (i) With his consent, he is named as the child's father on the child's birth certificate. [¶] (ii) He is obligated to support the child under a written voluntary promise or by court order. [¶] (4) He receives the child into his home and openly holds out the child as his natural child. [¶] (5) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. [¶] This paragraph shall remain in effect only until January 1, 1997, and on that date shall become inoperative. [¶] ... [¶] (c) Except as provided in Section 621 and 621.1 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which, on the facts, is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man."

8 We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has

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two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.

9 The Court of Appeal interpreted Civil Code section 7003, subdivision (1), to mean that only a "natural" mother can establish a mother and child relationship by proof of having given birth, and that a woman must first demonstrate, through blood test evidence, that she is the "natural" mother of the child before her evidence of having given birth can establish that she is the child's natural mother. We disagree with the Court of Appeal's reading of the statute. In our view, the term "natural" as used in subdivision (1) of Civil Code section 7003 simply refers to a mother who is not an adoptive mother. Section 7003 does not purport to answer the question before us, i.e., who is to be deemed the natural mother when the biological functions essential to bringing a child into the world have been allocated between two women.

10 Thus, under our analysis, in a true "egg donation" situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.

The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception. Moreover, the best interests standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.

11 Penal Code section 273 provides, in pertinent part, as follows: "(a) It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his or her child. [¶] (b) This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption."

See also Penal Code section 181, which provides: "Every person who holds, or attempts to hold, any person in involuntary servitude, or assumes, or attempts to assume, rights of ownership over any person, or who sells, or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody, or under the power or control of another, or who buys, or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his custody, or under his power or control, or who knowingly aids or assists in any manner any one thus offending, is punishable by imprisonment in the state prison for two, three, or four years."

12 See Andrews and Douglass, *Alternative Reproduction* (1991) 65 So.Cal.L.Rev. 623, 673–678.

13 The trial court analogized Anna's relationship with the child to that of a foster mother, whose liberty interest, if any, in her relationship with the foster child is surely more attenuated than that of the natural parents with the child. (See *Smith v. Organization of Foster Families, supra,* 431 U.S. at pp. 845–847, 97 S.Ct. at pp. 2110–2111 [declining to define the constitutional contours of the foster relationship].)

14 Civil Code section 7005 provides as follows: "(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown. [¶] (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

1 The terms "surrogacy" and "surrogate" have been criticized as being inaccurate, particularly when applied to the type of arrangement involved in *Baby M.,* in which the child a woman bears, intending to relinquish at birth, was formed from her own egg. (See Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in Surrogate Motherhood (Gostin edit. 1990) p. 72, fn. 2; Annas, *Fairy Tales Surrogate Mothers Tell,* in Surrogate Motherhood, *supra,* at p. 46

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[suggesting that the phrase "surrogate mother" derives from Harlow's monkey studies, in which the responses of newborn monkeys were tested by isolating them in cages with cloth or wire "surrogate mothers."].)

Because "gestational surrogacy" is now widely used to describe the situation in which one woman agrees to be impregnated with an embryo formed from another woman's fertilized egg, I use the phrase throughout this opinion and occasionally also refer to the woman who gestates the fetus as the "surrogate."

2 Further undesignated statutory references are to the Civil Code.

3 In my view, the United States Supreme Court's decision in *Lehr v. Robertson, supra,* 463 U.S. 248, 103 S.Ct. 2985, does not, despite the language I have just quoted, compel a conclusion that either the gestational mother or the genetic mother in a gestational surrogacy arrangement has, at the birth of the child, a fully vested and matured constitutional right to be a parent. Rather, I read the quoted language as indicating that the high court considers that a woman who conceives by traditional means and carries a fetus to term is a parent, and that a critical indicator of parenting status for a woman is gestation. Gestation is neither necessary nor sufficient to establish motherhood; it is, however, a factor the significance of which cannot be ignored, as the majority in effect does.

This reading of *Lehr v. Robertson* seems consistent with the plurality opinion in *Michael H. v. Gerald D., supra,* 491 U.S. 110, 123, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91, holding that a claim to fatherhood premised on biology plus "an established parental relationship" did not necessarily warrant constitutional protection. The court's precedents are, however, not entirely clear as to what will establish motherhood in a gestational surrogacy case, undoubtedly because the court has never dealt with such a case.

4 In a footnote responding to this opinion, the majority confuses questions of custody, which I do not address, with the issue of maternal parentage, which I do address. (See maj. opn., *ante,* at p. 500, fn. 10 of 19 Cal.Rptr.2d, p. 782, fn. 10 of 851 P.2d.) The majority suggests that it is somehow inappropriate for a court to look to the child's best interests when deciding a question of parentage under the UPA; this is refuted by the express terms of the UPA itself, which, as noted above, requires the court to consider the child's best interests in deciding another question of parentage. (§ 7017, subd. (d)(2).)

The majority is also wrong when it suggests that the "best interests" approach for resolving the disputed issue of parentage, more than the majority's "intent" approach, raises the "specter of governmental interference" in fundamentally private matters. (Maj. opn., *ante,* at p. 500, fn. 10 of 19 Cal.Rptr.2d, p. 782, fn. 10 of 851 P.2d.) This court's grant of review to decide who is the natural mother of the child placed one branch of government squarely in the middle of this controversy—as did the parties' decisions to resort to the court system in the first place. Judicial resolution of family law matters, by its nature, necessarily involves some governmental interference in what would otherwise be private concerns.

On another point, the majority writes that the gestational mother could "voluntarily contract[ ] away any rights to the child," and that this would represent a "concession" as to the child's best interests. (Maj. opn., *ante,* at p. 500, fn. 10 of 19 Cal.Rptr.2d, p. 782, fn. 10 of 851 P.2d.) It is questionable whether the parentage of children is a proper subject of contract. But even assuming that a parent could contract away parental rights to a child—for instance, by selling the child into slavery—this would not logically amount to a binding "concession" that such a sale would be in the child's best interests.

5 It is uncontested that Mark is the natural father of this child.

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109 N.J. 396
Supreme Court of New Jersey.

In the Matter of BABY M, a pseudonym for an actual person.

Argued Sept. 14, 1987. | Decided Feb. 3, 1988.

SYNOPSIS

Natural father and his wife brought suit seeking to enforce surrogate parenting agreement, to compel surrender of infant born to surrogate mother, to restrain any interference with their custody of infant, and to terminate surrogate mother's parental rights to allow adoption of child by wife of natural father. The Superior Court, Chancery Division/Family Part, Bergen County, 217 N.J.Super. 313, 525 A.2d 1128, held that surrogate contract was valid, ordered that mother's parental rights be terminated and that sole custody of child be granted to natural father, and authorized adoption of child by father's wife. Mother appealed, and the Supreme Court granted direct certification. The Supreme Court, Wilentz, C.J., held that: (1) surrogate contract conflicted with laws prohibiting use of money in connection with adoptions, laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or adoption is granted, and laws making surrender of custody and consent to adoption revocable in private placement adoptions; (2) surrogate contract conflicted with state public policy; (3) right of procreation did not entitle natural father and his wife to custody of child; (4) best interests of child justified awarding custody to father and his wife; and (5) mother was entitled to visitation with child.

Affirmed in part; reversed in part; and remanded.

Attorneys and Law Firms

**1232 *407 Harold J. Cassidy, Red Bank, and Alan J. Karcher, Sayreville, for appellants, Mary Beth and Richard Whitehead (Cassidy, Foss & San Filippo, attorneys; Harold J. Cassidy, Red Bank, Alan J. Karcher, Sayreville, Robert W. Ruggieri, Somerville, Randolph H. Wolf, Red Bank, and Louis N. Rainone, Sayreville, on the briefs).

Gary N. Skoloff, Livingston, for respondents, William and Elizabeth Stern (Skoloff & Wolfe, attorneys; Gary N. Skoloff, Francis W. Donahue, and Edward J. O'Donnell, on the brief).

Lorraine A. Abraham, Hackensack, Guardian ad litem, pro se (Lorraine A. Abraham, attorney; Lorraine A. Abraham and Steven T. Kearns, on the brief).

Annette M. Tobia, Lawrenceville, submitted a brief on behalf of amicus curiae Dr. Betsy P. Aigen, (Spivak & Tobia, attorneys).

George B. Gelman, Hackensack, submitted a brief on behalf of amicus curiae American Adoption Congress (Gelman & McNish, attorneys).

Steven N. Taieb, Mount Laurel, and Steven F. McDowell, Milwaukee, Wis., a member of the Wisconsin bar, submitted a brief on behalf of amicus curiae Catholic League for Religious and Civil Rights.

Steven P. Weissman submitted a brief on behalf of amicus curiae Communications Workers of America, AFL–CIO.

John R. Holsinger, Merrill O'Brien, Roseland, Mary Sue Henifin, and John H. Hall, and Terry E. Thornton, New York City, members of the New York bar, submitted a brief on behalf of amicus curiae Concerned United Birthparents, Inc. (Ellenport & Holsinger, Roseland, attorneys).

David H. Dugan, III, Moorestown, and Joy R. Jowdy, a member of the Texas bar, submitted a brief on behalf of amici curiae Concerned Women for America, Eagle Forum, National Legal Foundation, Family Research Council of America, United Families Foundation, and Judicial Reform Project.

*408 Alfred F. Russo, Woodbridge, and Andrew C. Kimbrell, a member of the Pennsylvania bar, and Edward Lee Rogers, Washington, D.C., a member of the District of Columbia bar, submitted a brief on behalf of amici curiae The Foundation on Economic Trends, Jeremy Rifkin, Betty Friedan, Gloria Steinem, Gena Corea, Barbara Katz–Rothman, Lois Gould, Marilyn French, Hazel Henderson, Grace Paley, Evelyn Fox Keller, Shelly Mindin, Rita Arditti, Dr. Janice Raymond, Dr. Michelle Harrison, Dr. W.D. White, Sybil Shainwald, Mary Daly, Cathleen Lahay, Karen Malpede, Phylis Chesler, Kristen Golden, Letty Cottin Pogrebin, and Ynestra King (Russo & Casey, Woodbridge, attorneys).

Louis E. Della Torre, Jr., Jersey City, submitted a brief on behalf of amicus curiae The Gruter Institute for Law and

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Behavioral Research, Inc. (Schumann, Hession, Kennelly & Dorment, attorneys).

Kathleen E. Kitson, Hoboken, Sharon F. Liebhaber, Teaneck, and Myra Sun, a member of the Washington bar, submitted a brief on behalf of amici curiae Hudson County Legal Services Corporation and National Center on Women and Family Law, Inc. (Timothy K. Madden, Director, Hudson County Legal Services Corporation, Jersey City, attorney).

Priscilla Read Chenoweth, Newark, submitted a brief on behalf of amici curiae Committee for Mother and Child Rights, Inc. and Origins.

Herbert D. Hinkle, Lawrenceville, submitted a brief on behalf of amicus curiae National Ass'n of Surrogate Mothers.

Joseph M. Nardi, Jr., Haddonfield, and Edward F. Canfield, Washington, D.C., a ****1233** member of the District of Columbia bar, submitted a brief on behalf of amicus curiae The National Committee for Adoption, Inc. (Lario, Nardi & Gleaner, Haddonfield, attorneys).

Charlotte Rosin, pro se, submitted a letter in lieu of brief on behalf of amicus curiae National Infertility Network Exchange.

William F. Bolan, Jr., Trenton, submitted a brief on behalf of amicus curiae New Jersey Catholic Conference.

***409** Paul J. McCurrie, Kearny, and Cyril C. Means, Jr., a member of the Michigan bar, with whom Priscilla Read Chenoweth and Cathleen M. Halko were on the brief, submitted a brief on behalf of amici curiae Odyssey Institute International, Inc., Odyssey Institute of Connecticut, Inc., Florence Fisher, Judianne Densen–Gerber, Senator Connie Binsfeld, and Angela Holder.

Merrilee A. Scilla, pro se, submitted a letter in lieu of brief on behalf of amicus curiae RESOLVE of Central New Jersey.

Jerrold N. Kaminsky, North Brunswick, submitted a brief on behalf of amicus curiae RESOLVE, Inc.

Richard J. Traynor, Morristown, and John W. Whitehead, Manassas, Va., a member of the Virginia bar, and David A. French, Ann Arbor, Mich., a member of the Michigan bar, submitted a brief on behalf of amicus curiae The Rutherford Institute (Traynor and Hogan, Morristown, attorneys).

Nadine Taub, Newark, submitted a brief on behalf of amici curiae Women's Rights Litigation Clinic at Rutgers Law School, The New York State Coalition on Women's Legislative Issues, and the National Emergency Civil Liberties Committee.

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Opinion

WILENTZ, C.J.

In this matter the Court is asked to determine the validity of a contract that purports to provide a new way of bringing children into a family. For a fee of $10,000, a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry it to term, and after its birth surrender it to the natural father and his wife. The intent of the contract is that the child's natural mother will thereafter be forever separated from her child. The wife is to adopt the child, and she and the natural father are to be *411 regarded as its parents for all purposes. The contract providing for this is called a "surrogacy contract," the natural mother

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inappropriately called the "surrogate mother."

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child. We remand the issue **1235 of the natural mother's visitation rights to the trial court, since that issue was not reached below and the record before us is not sufficient to permit us to decide it *de novo*.

We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child. Moreover, our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts. Under current law, however, the surrogacy agreement before us is illegal and invalid.

I.

FACTS

In February 1985, William Stern and Mary Beth Whitehead entered into a surrogacy contract. It recited that Stern's wife, Elizabeth, was infertile, that they wanted a child, and that Mrs. Whitehead was willing to provide that child as the mother with Mr. Stern as the father.

*412 The contract provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child. Mrs. Whitehead's husband, Richard,[1] was also a party to the contract; Mrs. Stern was not. Mr. Whitehead promised to do all acts necessary to rebut the presumption of paternity under the Parentage Act. *N.J.S.A.* 9:17–43a(1), –44a. Although Mrs. Stern was not a party to the surrogacy agreement, the contract gave her sole custody of the child in the event of Mr. Stern's death. Mrs. Stern's status as a nonparty to the surrogate parenting agreement presumably was to avoid the application of the baby-selling statute to this arrangement. *N.J.S.A.* 9:3–54.

Mr. Stern, on his part, agreed to attempt the artificial insemination and to pay Mrs. Whitehead $10,000 after the child's birth, on its delivery to him. In a separate contract, Mr. Stern agreed to pay $7,500 to the Infertility Center of New York ("ICNY"). The Center's advertising campaigns solicit surrogate mothers and encourage infertile couples to consider surrogacy. ICNY arranged for the surrogacy contract by bringing the parties together, explaining the process to them, furnishing the contractual form,[2] and providing legal counsel.

The history of the parties' involvement in this arrangement suggests their good faith. William and Elizabeth Stern were *413 married in July 1974, having met at the University of Michigan, where both were Ph.D. candidates. Due to financial considerations and Mrs. Stern's pursuit of a medical degree and residency, they decided to defer starting a family until 1981. Before then, however, Mrs. Stern learned that she might have multiple sclerosis and that the disease in some cases renders pregnancy a serious health risk. Her anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal. Nonetheless that anxiety was evidently quite real, Mrs. Stern fearing that pregnancy might precipitate blindness, paraplegia, or other forms of debilitation. Based on the perceived risk, the Sterns decided to forego having their own children. The decision had special significance for Mr. Stern. Most of his family had been destroyed in the Holocaust. As the family's only survivor, he very much wanted to continue his bloodline.

**1236 Initially the Sterns considered adoption, but were discouraged by the substantial delay apparently involved and by the potential problem they saw arising from their age and their differing religious backgrounds. They were most eager for some other means to start a family.

The paths of Mrs. Whitehead and the Sterns to surrogacy were similar. Both responded to advertising by ICNY. The Sterns' response, following their inquiries into adoption, was the result of their long-standing decision to have a child. Mrs. Whitehead's response apparently resulted from her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the "gift of life"); she also wanted the $10,000 to help her family.

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Both parties, undoubtedly because of their own self-interest, were less sensitive to the implications of the transaction than they might otherwise have been. Mrs. Whitehead, for instance, appears not to have been concerned about whether the Sterns would make good parents for her child; the Sterns, on their part, while conscious of the obvious possibility that surrendering ***414** the child might cause grief to Mrs. Whitehead, overcame their qualms because of their desire for a child. At any rate, both the Sterns and Mrs. Whitehead were committed to the arrangement; both thought it right and constructive.

Mrs. Whitehead had reached her decision concerning surrogacy before the Sterns, and had actually been involved as a potential surrogate mother with another couple. After numerous unsuccessful artificial inseminations, that effort was abandoned. Thereafter, the Sterns learned of the Infertility Center, the possibilities of surrogacy, and of Mary Beth Whitehead. The two couples met to discuss the surrogacy arrangement and decided to go forward. On February 6, 1985, Mr. Stern and Mr. and Mrs. Whitehead executed the surrogate parenting agreement. After several artificial inseminations over a period of months, Mrs. Whitehead became pregnant. The pregnancy was uneventful and on March 27, 1986, Baby M was born.

Not wishing anyone at the hospital to be aware of the surrogacy arrangement, Mr. and Mrs. Whitehead appeared to all as the proud parents of a healthy female child. Her birth certificate indicated her name to be Sara Elizabeth Whitehead and her father to be Richard Whitehead. In accordance with Mrs. Whitehead's request, the Sterns visited the hospital unobtrusively to see the newborn child.

Mrs. Whitehead realized, almost from the moment of birth, that she could not part with this child. She had felt a bond with it even during pregnancy. Some indication of the attachment was conveyed to the Sterns at the hospital when they told Mrs. Whitehead what they were going to name the baby. She apparently broke into tears and indicated that she did not know if she could give up the child. She talked about how the baby looked like her other daughter, and made it clear that she was experiencing great difficulty with the decision.

Nonetheless, Mrs. Whitehead was, for the moment, true to her word. Despite powerful inclinations to the contrary, she ***415** turned her child over to the Sterns on March 30 at the Whiteheads' home.

The Sterns were thrilled with their new child. They had planned extensively for its arrival, far beyond the practical furnishing of a room for her. It was a time of joyful celebration—not just for them but for their friends as well. The Sterns looked forward to raising their daughter, whom they named Melissa. While aware by then that Mrs. Whitehead was undergoing an emotional crisis, they were as yet not cognizant of the depth of that crisis and its implications for their newly-enlarged family.

Later in the evening of March 30, Mrs. Whitehead became deeply disturbed, disconsolate, stricken with unbearable sadness. She had to have her child. She could not eat, sleep, or concentrate on anything other than her need for her baby. The next day she went to the Sterns' home and told them how much she was suffering.

The depth of Mrs. Whitehead's despair surprised and frightened the Sterns. She told them that she could not live without ****1237** her baby, that she must have her, even if only for one week, that thereafter she would surrender her child. The Sterns, concerned that Mrs. Whitehead might indeed commit suicide, not wanting under any circumstances to risk that, and in any event believing that Mrs. Whitehead would keep her word, turned the child over to her. It was not until four months later, after a series of attempts to regain possession of the child, that Melissa was returned to the Sterns, having been forcibly removed from the home where she was then living with Mr. and Mrs. Whitehead, the home in Florida owned by Mary Beth Whitehead's parents.

The struggle over Baby M began when it became apparent that Mrs. Whitehead could not return the child to Mr. Stern. Due to Mrs. Whitehead's refusal to relinquish the baby, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract. He alleged, accurately, that Mrs. Whitehead had not ***416** only refused to comply with the surrogacy contract but had threatened to flee from New Jersey with the child in order to avoid even the possibility of his obtaining custody. The court papers asserted that if Mrs. Whitehead were to be given notice of the application for an order requiring her to relinquish custody, she would, prior to the hearing, leave the state with the baby. And that is precisely what she did. After the order was entered, *ex parte,* the process server, aided by the police, in the presence of the Sterns, entered Mrs. Whitehead's home to execute the order. Mr. Whitehead fled with the child, who had been handed to him through a window while those who came to enforce the order were thrown off balance by a dispute over the child's current name.

The Whiteheads immediately fled to Florida with Baby M. They stayed initially with Mrs. Whitehead's parents,

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where one of Mrs. Whitehead's children had been living. For the next three months, the Whiteheads and Melissa lived at roughly twenty different hotels, motels, and homes in order to avoid apprehension. From time to time Mrs. Whitehead would call Mr. Stern to discuss the matter; the conversations, recorded by Mr. Stern on advice of counsel, show an escalating dispute about rights, morality, and power, accompanied by threats of Mrs. Whitehead to kill herself, to kill the child, and falsely to accuse Mr. Stern of sexually molesting Mrs. Whitehead's other daughter.

Eventually the Sterns discovered where the Whiteheads were staying, commenced supplementary proceedings in Florida, and obtained an order requiring the Whiteheads to turn over the child. Police in Florida enforced the order, forcibly removing the child from her grandparents' home. She was soon thereafter brought to New Jersey and turned over to the Sterns. The prior order of the court, issued *ex parte,* awarding custody of the child to the Sterns *pendente lite,* was reaffirmed by the trial court after consideration of the certified representations of the parties (both represented by counsel) concerning the unusual sequence of events that had unfolded. Pending final ***417** judgment, Mrs. Whitehead was awarded limited visitation with Baby M.

The Sterns' complaint, in addition to seeking possession and ultimately custody of the child, sought enforcement of the surrogacy contract. Pursuant to the contract, it asked that the child be permanently placed in their custody, that Mrs. Whitehead's parental rights be terminated, and that Mrs. Stern be allowed to adopt the child, *i.e.,* that, for all purposes, Melissa become the Sterns' child.

The trial took thirty-two days over a period of more than two months. It included numerous interlocutory appeals and attempted interlocutory appeals. There were twenty-three witnesses to the facts recited above and fifteen expert witnesses, eleven testifying on the issue of custody and four on the subject of Mrs. Stern's multiple sclerosis; the bulk of the testimony was devoted to determining the parenting arrangement most compatible with the child's best interests. Soon after the conclusion of the trial, the trial court announced its opinion from the bench. 217 *N.J.Super.* 313, 525 *A.*2d 1128 (1987). It held that the surrogacy contract was valid; ordered that Mrs. Whitehead's parental rights be terminated ****1238** and that sole custody of the child be granted to Mr. Stern; and, after hearing brief testimony from Mrs. Stern, immediately entered an order allowing the adoption of Melissa by Mrs. Stern, all in accordance with the surrogacy contract. Pending the outcome of the appeal, we granted a continuation of visitation to Mrs. Whitehead, although slightly more limited than the visitation allowed during the trial.

Although clearly expressing its view that the surrogacy contract was valid, the trial court devoted the major portion of its opinion to the question of the baby's best interests. The inconsistency is apparent. The surrogacy contract calls for the surrender of the child to the Sterns, permanent and sole custody in the Sterns, and termination of Mrs. Whitehead's parental rights, all without qualification, all regardless of any evaluation ***418** of the best interests of the child. As a matter of fact the contract recites (even before the child was conceived) that it is in the best interests of the child to be placed with Mr. Stern. In effect, the trial court awarded custody to Mr. Stern, the natural father, based on the same kind of evidence and analysis as might be expected had no surrogacy contract existed. Its rationalization, however, was that while the surrogacy contract was valid, specific performance would not be granted unless that remedy was in the best interests of the child. The factual issues confronted and decided by the trial court were the same as if Mr. Stern and Mrs. Whitehead had had the child out of wedlock, intended or unintended, and then disagreed about custody. The trial court's awareness of the irrelevance of the contract in the court's determination of custody is suggested by its remark that beyond the question of the child's best interests, "[a]ll other concerns raised by counsel constitute commentary." 217 *N.J.Super.* at 323, 525 *A.*2d 1128.

On the question of best interests—and we agree, but for different reasons, that custody was the critical issue—the court's analysis of the testimony was perceptive, demonstrating both its understanding of the case and its considerable experience in these matters. We agree substantially with both its analysis and conclusions on the matter of custody.

The court's review and analysis of the surrogacy contract, however, is not at all in accord with ours. The trial court concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money in connection with adoptions, do not apply to surrogacy contracts. *Id.* at 372–73, 525 *A.*2d 1128. It reasoned that because the Legislature did not have surrogacy contracts in mind when it passed those laws, those laws were therefore irrelevant. *Ibid.* Thus, assuming it was writing on a clean slate, the trial court analyzed the interests involved and the power of the court to accommodate them. It then held that surrogacy contracts are valid and should be enforced, ***419** *id.* at 388, 525 *A.*2d 1128, and furthermore that Mr. Stern's rights under the surrogacy contract were

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constitutionally protected. *Id.* at 385–88, 525 *A.*2d 1128.

Mrs. Whitehead appealed. This Court granted direct certification. 107 *N.J.* 140, 526 *A.*2d 203 (1987). The briefs of the parties on appeal were joined by numerous briefs filed by *amici* expressing various interests and views on surrogacy and on this case. We have found many of them helpful in resolving the issues before us.

Mrs. Whitehead contends that the surrogacy contract, for a variety of reasons, is invalid. She contends that it conflicts with public policy since it guarantees that the child will not have the nurturing of both natural parents—presumably New Jersey's goal for families. She further argues that it deprives the mother of her constitutional right to the companionship of her child, and that it conflicts with statutes concerning termination of parental rights and adoption. With the contract thus void, Mrs. Whitehead claims primary custody (with visitation rights in Mr. Stern) both on a best interests basis (stressing the "tender years" doctrine) as well as on the policy basis of discouraging surrogacy contracts. She maintains that even if custody would ordinarily go to Mr. Stern, here it should be ****1239** awarded to Mrs. Whitehead to deter future surrogacy arrangements.

In a brief filed after oral argument, counsel for Mrs. Whitehead suggests that the standard for determining best interests where the infant resulted from a surrogacy contract is that the child should be placed with the mother absent a showing of unfitness. All parties agree that no expert testified that Mary Beth Whitehead was unfit as a mother; the trial court expressly found that she was *not* "unfit," that, on the contrary, "she is a good mother for and to her older children," 217 *N.J.Super.* at 397, 525 *A.*2d 1128; and no one now claims anything to the contrary.

One of the repeated themes put forth by Mrs. Whitehead is that the court's initial *ex parte* order granting custody to the Sterns during the trial was a substantial factor in the ultimate "best interests" determination. That initial order, claimed to be erroneous by Mrs. Whitehead, not only established Melissa as part of the Stern family, but brought enormous pressure on Mrs. Whitehead. The order brought the weight of the state behind the Sterns' attempt, ultimately successful, to gain possession of the child. The resulting pressure, Mrs. Whitehead contends, caused her to act in ways that were atypical of her ordinary behavior when not under stress, and to act in ways that were thought to be inimical to the child's best interests in that they demonstrated a failure of character, maturity, and consistency. She claims that any mother who truly loved her child might so respond and that it is doubly unfair to judge her on the basis of her reaction to an extreme situation rarely faced by any mother, where that situation was itself caused by an erroneous order of the court. Therefore, according to Mrs. Whitehead, the erroneous *ex parte* order precipitated a series of events that proved instrumental in the final result.[3]

The Sterns claim that the surrogacy contract is valid and should be enforced, largely for the reasons given by the trial court. They claim a constitutional right of privacy, which includes the right of procreation, and the right of consenting adults to deal with matters of reproduction as they see fit. As for the child's best interests, their position is factual: given all of the circumstances, the child is better off in their custody with no residual parental rights reserved for Mrs. Whitehead.

[1] Of considerable interest in this clash of views is the position of the child's guardian *ad litem,* wisely appointed by the court at the outset of the litigation. As the child's representative, her role in the litigation, as she viewed it, was solely to protect the child's best interests. She therefore took no position on the validity of the surrogacy contract, and instead ***421** devoted her energies to obtaining expert testimony uninfluenced by any interest other than the child's. We agree with the guardian's perception of her role in this litigation. She appropriately refrained from taking any position that might have appeared to compromise her role as the child's advocate. She first took the position, based on her experts' testimony, that the Sterns should have primary custody, and that while Mrs. Whitehead's parental rights should not be terminated, no visitation should be allowed for five years. As a result of subsequent developments, mentioned *infra,* her view has changed. She now recommends that no visitation be allowed at least until Baby M reaches maturity.

Although some of the experts' opinions touched on visitation, the major issue they addressed was whether custody should be reposed in the Sterns or in the Whiteheads. The trial court, consistent in this respect with its view that the surrogacy contract was valid, did not deal at all with the question of visitation. Having concluded that the best interests of the child called for custody in the Sterns, the trial court enforced the operative provisions of the surrogacy contract, terminated Mrs. Whitehead's parental rights, and granted an adoption to Mrs. Stern. Explicit in the ****1240** ruling was the conclusion that the best interests determination removed whatever impediment might have existed in enforcing the surrogacy contract. This Court, therefore, is without guidance from the trial court on the visitation issue, an issue of considerable importance in any event, and especially

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important in view of our determination that the surrogacy contract is invalid.

II.

INVALIDITY AND UNENFORCEABILITY OF SURROGACY CONTRACT

We have concluded that this surrogacy contract is invalid. Our conclusion has two bases: direct conflict with existing ***422** statutes and conflict with the public policies of this State, as expressed in its statutory and decisional law.

[2] One of the surrogacy contract's basic purposes, to achieve the adoption of a child through private placement, though permitted in New Jersey "is very much disfavored." *Sees v. Baber,* 74 *N.J.* 201, 217, 377 *A.*2d 628 (1977). Its use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—is illegal and perhaps criminal. *N.J.S.A.* 9:3–54. In addition to the inducement of money, there is the coercion of contract: the natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple. Such an agreement is totally unenforceable in private placement adoption. *Sees,* 74 *N.J.* at 212–14, 377 *A.*2d 628. Even where the adoption is through an approved agency, the formal agreement to surrender occurs only *after* birth (as we read *N.J.S.A.* 9:2–16 and –17, and similar statutes), and then, by regulation, only after the birth mother has been offered counseling. *N.J.A.C.* 10:121A–5.4(c). Integral to these invalid provisions of the surrogacy contract is the related agreement, equally invalid, on the part of the natural mother to cooperate with, and not to contest, proceedings to terminate her parental rights, as well as her contractual concession, in aid of the adoption, that the child's best interests would be served by awarding custody to the natural father and his wife—all of this before she has even conceived, and, in some cases, before she has the slightest idea of what the natural father and adoptive mother are like.

The foregoing provisions not only directly conflict with New Jersey statutes, but also offend long-established State policies. These critical terms, which are at the heart of the contract, are invalid and unenforceable; the conclusion therefore follows, without more, that the entire contract is unenforceable.

*423 A. Conflict with Statutory Provisions

The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

[3] (1) Our law prohibits paying or accepting money in connection with any placement of a child for adoption. *N.J.S.A.* 9:3–54a. Violation is a high misdemeanor. *N.J.S.A.* 9:3–54c. Excepted are fees of an approved agency (which must be a non-profit entity, *N.J.S.A.* 9:3–38a) and certain expenses in connection with childbirth. *N.J.S.A.* 9:3–54b.[4]

****1241** Considerable care was taken in this case to structure the surrogacy arrangement so as not to violate this prohibition. The arrangement was structured as follows: the adopting parent, Mrs. Stern, was not a party to the surrogacy contract; the money paid to Mrs. Whitehead was stated to be for her services—not for the adoption; the sole purpose of the contract was stated as being that "of giving a child to William Stern, its natural and biological father"; the money was purported to be "compensation for services and expenses and in no way ... a fee for termination of parental rights or a payment in exchange for consent to surrender a child for adoption"; the fee to the Infertility Center ($7,500) was stated to be for legal representation, advice, administrative work, and other "services." Nevertheless, it seems clear that the money was paid and accepted in connection with an adoption.

The Infertility Center's major role was first as a "finder" of the surrogate mother whose child was to be adopted, and second as the arranger of all proceedings that led to the adoption. Its role as adoption finder is demonstrated by the provision requiring Mr. Stern to pay another $7,500 if he uses Mary Beth Whitehead again as a surrogate, and by ICNY's agreement to "coordinate arrangements for the adoption of the child by the wife." The surrogacy agreement requires Mrs. Whitehead to surrender Baby M for the purposes of adoption. The agreement notes that Mr. *and Mrs.* Stern wanted to have a child, and provides that the child be "placed" with Mrs. Stern in the event Mr. Stern dies before the child is born. The payment of the $10,000 occurs only on surrender of custody of the child and "completion of the duties and obligations" of Mrs. Whitehead, including termination of

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her parental rights to facilitate adoption by Mrs. Stern. As for the contention that the Sterns are paying only for services and not for an adoption, we need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only $1,000 if the child were stillborn, even though the "services" had been fully rendered. Additionally, one of Mrs. Whitehead's estimated costs, to be assumed by Mr. Stern, was an "Adoption Fee," presumably for Mrs. Whitehead's incidental costs in connection with the adoption.

Mr. Stern knew he was paying for the adoption of a child; Mrs. Whitehead knew she was accepting money so that a child might be adopted; the Infertility Center knew that it was being paid for assisting in the adoption of a child. The actions of all three worked to frustrate the goals of the statute. It strains ***425** credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.

The prohibition of our statute is strong. Violation constitutes a high misdemeanor, *N.J.S.A.* 9:3–54c, a third-degree crime, *N.J.S.A.* 2C:43–1b, carrying a penalty of three to five years imprisonment. *N.J.S.A.* 2C:43–6a(3). The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. N. Baker, *Baby Selling: The Scandal of Black Market Adoption* 7 (1978). The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. *Id.* at 44. Furthermore, the adoptive parents[5] may not be fully informed of the natural parents' medical history.

****1242** Baby-selling potentially results in the exploitation of all parties involved. *Ibid.* Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child. H. Witmer, E. Herzog, E. Weinstein, & M. Sullivan, *Independent Adoptions: A Follow–Up Study* 32 (1967). The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.

[4] [5] (2) The termination of Mrs. Whitehead's parental rights, called for by the surrogacy contract and actually ordered by the court, 217 *N.J.Super.* at 399–400, 525 *A.*2d 1128, fails to comply ***426** with the stringent requirements of New Jersey law. Our law, recognizing the finality of any termination of parental rights, provides for such termination only where there has been a voluntary surrender of a child to an approved agency or to the Division of Youth and Family Services ("DYFS"), accompanied by a formal document acknowledging termination of parental rights, *N.J.S.A.* 9:2–16, –17; *N.J.S.A.* 9:3–41; *N.J.S.A.* 30:4C–23, or where there has been a showing of parental abandonment or unfitness. A termination may ordinarily take one of three forms: an action by an approved agency, an action by DYFS, or an action in connection with a private placement adoption. The three are governed by separate statutes, but the standards for termination are substantially the same, except that whereas a written surrender is effective when made to an approved agency or to DYFS, there is no provision for it in the private placement context. *See N.J.S.A.* 9:2–14; *N.J.S.A.* 30:4C–23.

N.J.S.A. 9:2–18 to –20 governs an action by an approved agency to terminate parental rights. Such an action, whether or not in conjunction with a pending adoption, may proceed on proof of written surrender, *N.J.S.A.* 9:2–16, –17, "forsaken parental obligation," or other specific grounds such as death or insanity, *N.J.S.A.* 9:2–19. Where the parent has not executed a formal consent, termination requires a showing of "forsaken parental obligation," *i.e.*, "willful and continuous neglect or failure to perform the natural and regular obligations of care and support of a child." *N.J.S.A.* 9:2–13(d). *See also N.J.S.A.* 9:3–46a, –47c.

Where DYFS is the agency seeking termination, the requirements are similarly stringent, although at first glance they do not appear to be so. DYFS can, as can any approved agency, accept a formal voluntary surrender or writing having the effect of termination and giving DYFS the right to place the child for adoption. *N.J.S.A.* 30:4C–23. Absent such formal written surrender and consent, similar to that given to approved agencies, DYFS can terminate parental rights in an ***427** action for guardianship by proving that "the best interests of such child require that he be placed under proper guardianship." *N.J.S.A.* 30:4C–20. Despite this "best interests" language, however, this Court has recently held in *New Jersey Div. of Youth & Family Servs. v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986), that in order for DYFS to terminate parental rights it must prove, by clear and convincing evidence, that "[t]he child's health and development have been or will be seriously impaired by the parental relationship," *id.* at 604, 512 *A.*2d 438, that "[t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm," *id.* at 605, 512 *A.*2d 438, that "[t]he court has

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considered alternatives to termination," *id.* at 608, 512 *A.*2d 438, and that "[t]he termination of parental rights will not do more harm than good," *id.* at 610, 512 *A.*2d 438. This interpretation of the statutory language requires a most substantial showing of harm to the child if the parental relationship were to continue, far exceeding anything that a "best interests" test connotes.

In order to terminate parental rights under the private placement adoption statute, there must be a finding of "intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future." *N.J.S.A.* 9:3–48c(1). This requirement is similar to that of the prior law (*i.e.*, "forsaken parental obligations," *L.*1953, *c.* 264, § 2(d) (codified at ****1243** *N.J.S.A.* 9:3–18(d) (repealed))), and to that of the law providing for termination through actions by approved agencies, *N.J.S.A.* 9:2–13(d). *See also In re Adoption by J.J.P.,* 175 *N.J.Super.* 420, 427, 419 *A.*2d 1135 (App.Div.1980) (noting that the language of the termination provision in the present statute, *N.J.S.A.* 9:3–48c(1), derives from this Court's construction of the prior statute in *In re Adoption of Children by D.,* 61 *N.J.* 89, 94–95, 293 *A.*2d 171 (1972)).

In *Sees v. Baber,* 74 *N.J.* 201, 377 *A.*2d 628 (1977) we distinguished the requirements for terminating parental rights in a private placement adoption from those required in an approved agency adoption. We stated that in an unregulated private placement, "neither consent nor voluntary surrender is singled out as a ***428** statutory factor in terminating parental rights." *Id.* at 213, 377 *A.*2d 628. *Sees* established that without proof that parental obligations had been forsaken, there would be no termination in a private placement setting.

[6] As the trial court recognized, without a valid termination there can be no adoption. *In re Adoption of Children by D., supra,* 61 *N.J.* at 95, 293 *A.*2d 171. This requirement applies to all adoptions, whether they be private placements, *ibid.,* or agency adoptions, *N.J.S.A.* 9:3–46a, –47c.

[7] [8] [9] [10] Our statutes, and the cases interpreting them, leave no doubt that where there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect. *See, e.g., Sorentino v. Family & Children's Soc'y of Elizabeth,* 74 *N.J.* 313, 378 *A.*2d 18 (1977) (*Sorentino II*); *Sees v. Baber,* 74 *N.J.* 201, 377 *A.*2d 628 (1977); *Sorentino v. Family & Children's Soc'y of Elizabeth,* 72 *N.J.* 127, 367 *A.*2d 1168 (1976) (*Sorentino I*); *In re Adoption of Children by D., supra,* 61 *N.J.* 89, 293 *A.*2d 171. That showing is required in every context in which termination of parental rights is sought, be it an action by an approved agency, an action by DYFS, or a private placement adoption proceeding, even where the petitioning adoptive parent is, as here, a stepparent. While the statutes make certain procedural allowances when stepparents are involved, *N.J.S.A.* 9:3–48a(2), –48a(4), –48c(4), the substantive requirement for terminating the natural parents' rights is not relaxed one iota. *N.J.S.A.* 9:3–48c(1); *In re Adoption of Children by D., supra,* 61 *N.J.* at 94–95, 293 *A.*2d 171; *In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 426–28, 419 *A.*2d 1135; *In re N.,* 96 *N.J.Super.* 415, 423–27, 233 *A.*2d 188 (App.Div.1967). It is clear that a "best interests" determination is never sufficient to terminate parental rights; the statutory criteria must be ***429** proved.[6]

[11] In this case a termination of parental rights was obtained not by proving the statutory prerequisites but by claiming the benefit of contractual provisions. From all that has been stated above, it is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental ****1244** rights if it had intended to allow termination to be achieved by one short sentence in a contract.

Since the termination was invalid,[7] it follows, as noted above, that adoption of Melissa by Mrs. Stern could not properly be granted.

[12] (3) The provision in the surrogacy contract stating that Mary Beth Whitehead agrees to "surrender custody ... and terminate all parental rights" contains no clause giving her a right to rescind. It is intended to be an irrevocable consent to surrender the child for adoption—in other words, an irrevocable ***430** commitment by Mrs. Whitehead to turn Baby M over to the Sterns and thereafter to allow termination of her parental rights. The trial court required a "best interests" showing as a condition to granting specific performance of the surrogacy contract. 217 *N.J.Super.* at 399–400, 525 *A.*2d 1128. Having decided the "best interests" issue in favor of the Sterns, that court's order included, among other things, specific performance of this agreement to surrender custody and terminate all parental rights.

Mrs. Whitehead, shortly after the child's birth, had attempted to revoke her consent and surrender by refusing, after the Sterns had allowed her to have the child "just for one week," to return Baby M to them. The trial court's award of specific performance therefore reflects

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its view that the consent to surrender the child was irrevocable. We accept the trial court's construction of the contract; indeed it appears quite clear that this was the parties' intent. Such a provision, however, making irrevocable the natural mother's consent to surrender custody of her child in a private placement adoption, clearly conflicts with New Jersey law.

Our analysis commences with the statute providing for surrender of custody to an approved agency and termination of parental rights on the suit of that agency. The two basic provisions of the statute are *N.J.S.A.* 9:2–14 and 9:2–16. The former provides explicitly that

> [e]xcept as otherwise provided by law or by order or judgment of a court of competent jurisdiction or by testamentary disposition, no surrender of the custody of a child shall be valid in this state unless made to an approved agency pursuant to the provisions of this act....

There is no exception "provided by law," and it is not clear that there could be any "order or judgment of a court of competent jurisdiction" validating a surrender of custody as a basis for adoption when that surrender was not in conformance with the statute. Requirements for a voluntary surrender to an approved agency are set forth in *N.J.S.A.* 9:2–16. This section allows an approved agency to take a voluntary surrender of ***431** custody from the parent of a child but provides stringent requirements as a condition to its validity. The surrender must be in writing, must be in such form as is required for the recording of a deed, and, pursuant to *N.J.S.A.* 9:2–17, must

> be such as to declare that the person executing the same desires to relinquish the custody of the child, acknowledge the termination of parental rights as to such custody in favor of the approved agency, and acknowledge full understanding of the effect of such surrender as provided by this act.

If the foregoing requirements are met, the consent, the voluntary surrender of custody

> shall be valid whether or not the person giving same is a minor and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction, setting aside such surrender upon proof of fraud, duress, or misrepresentation. [*N.J.S.A.* 9:2–16.]

The importance of that irrevocability is that the surrender itself gives the agency ****1245** the power to obtain termination of parental rights—in other words, permanent separation of the parent from the child, leading in the ordinary case to an adoption. *N.J.S.A.* 9:2–18 to –20.

[13] This statutory pattern, providing for a surrender in writing and for termination of parental rights by an approved agency, is generally followed in connection with adoption proceedings and proceedings by DYFS to obtain permanent custody of a child. Our adoption statute repeats the requirements necessary to accomplish an irrevocable surrender to an approved agency in both form and substance. *N.J.S.A.* 9:3–41a. It provides that the surrender "shall be valid and binding without regard to the age of the person executing the surrender," *ibid.*; and although the word "irrevocable" is not used, that seems clearly to be the intent of the provision. The statute speaks of such surrender as constituting "relinquishment of such person's parental rights in or guardianship or custody of the child *named therein* and consent by such person to adoption of the child." *Ibid.* (emphasis supplied). We emphasize "named therein," for we construe the statute to allow a surrender only after the birth of the child. The formal consent ***432** to surrender enables the approved agency to terminate parental rights.

Similarly, DYFS is empowered to "take voluntary surrenders and releases of custody and consents to adoption[s]" from parents, which surrenders, releases, or consents "when properly acknowledged ... shall be valid and binding irrespective of the age of the person giving the same, and shall be irrevocable except at the discretion of the Bureau of Childrens Services [currently DYFS] or upon order of a court of competent jurisdiction." *N.J.S.A.* 30:4C–23. Such consent to surrender of the custody of the child would presumably lead to an adoption placement by DYFS. *See N.J.S.A.* 30:4C–20.

It is clear that the Legislature so carefully circumscribed all aspects of a consent to surrender custody—its form and substance, its manner of execution, and the agency or agencies to which it may be made—in order to provide the basis for irrevocability. It seems most unlikely that the Legislature intended that a consent not complying with these requirements would also be irrevocable, especially where, as here, that consent falls radically short of

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compliance. Not only do the form and substance of the consent in the surrogacy contract fail to meet statutory requirements, but the surrender of custody is made to a private party. It is not made, as the statute requires, either to an approved agency or to DYFS.

These strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child. *See Sees v. Baber, supra,* 74 *N.J.* at 217, 377 *A.*2d 628. Because of those consequences, the Legislature severely limited the circumstances under which such consent would be irrevocable. The legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully ***433** understand and appreciate the consequences of their acts. *N.J.A.C.* 10:121A–5.4(c).

Contractual surrender of parental rights is not provided for in our statutes as now written. Indeed, in the Parentage Act, *N.J.S.A.* 9:17–38 to –59, there is a specific provision invalidating any agreement "between an alleged or presumed father and the mother of the child" to bar an action brought for the purpose of determining paternity "[r]egardless of [the contract's] terms." *N.J.S.A.* 9:17–45. Even a settlement agreement concerning parentage reached in a judicially-mandated consent conference is not valid unless the proposed settlement is approved beforehand by the court. *N.J.S.A.* 9:17–48c and d. There is no doubt that a contractual provision purporting to constitute an irrevocable agreement ****1246** to surrender custody of a child for adoption is invalid.

In *Sees v. Baber, supra,* 74 *N.J.* 201, 377 *A.*2d 628, we noted that a natural mother's consent to surrender her child and to its subsequent adoption was no longer *required* by the statute in private placement adoptions. After tracing the statutory history from the time when such a consent had been an essential prerequisite to adoption, we concluded that such a consent was now neither necessary nor sufficient for the purpose of terminating parental rights. *Id.* at 213, 377 *A.*2d 628. The consent to surrender custody in that case was in writing, had been executed prior to physical surrender of the infant, and had been explained to the mother by an attorney. The trial court found that the consent to surrender of custody in that private placement adoption was knowing, voluntary, and deliberate. *Id.* at 216, 377 *A.*2d 628. The physical surrender of the child took place four days after its birth. Two days thereafter the natural mother changed her mind, and asked that the adoptive couple give her baby back to her. We held that she was entitled to the baby's return. The effect of our holding in that case necessarily encompassed our conclusion that "in an unsupervised private placement, since there is no statutory obligation to consent, there can be no legal barrier to its retractiou." *Id.* at 215, 377 *A.*2d 628. The only possible relevance of ***434** consent in these matters, we noted, was that it *might* bear on whether there had been an abandonment of the child, or a forsaking of parental obligations. *Id.* at 216, 377 *A.*2d 628. Otherwise, consent in a private placement adoption is not only revocable but, when revoked early enough, irrelevant. *Id.* at 213–15, 377 *A.*2d 628.

[14] The provision in the surrogacy contract whereby the mother irrevocably agrees to surrender custody of her child and to terminate her parental rights conflicts with the settled interpretation of New Jersey statutory law.[8] There is only one irrevocable consent, and that is the one explicitly provided for by statute: a consent to surrender of custody and a placement with an approved agency or with DYFS. The provision in the surrogacy contract, agreed to before conception, requiring the natural mother to surrender custody of the child without any right of revocation is one more indication of the essential nature of this transaction: the creation of a contractual system of termination and adoption designed to circumvent our statutes.

B. Public Policy Considerations

[15] The surrogacy contract's invalidity, resulting from its direct conflict with the above statutory provisions, is further underlined when its goals and means are measured against New Jersey's public policy. The contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody. *See Fantony v. Fantony,* 21 *N.J.* 525, 536–37, 122 *A.*2d 593 (1956); *see also Sheehan v. Sheehan,* 38 *N.J.Super.* 120, 125, 118 *A.*2d 89 (App.Div.1955) ("whATEVER THE AGREEMENT OF THE PARENTS, The Ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as *parens patriae.*"). The fact that the trial court remedied that aspect of the contract through the "best interests" phase does not make the contractual provision any less offensive to the public policy of this State.

The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, ****1247** children should remain with and be brought up by

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both of their natural parents. That was the first stated purpose of the previous adoption act, *L.*1953, *c.* 264, § 1, codified at *N.J.S.A.* 9:3–17 (repealed): "it is necessary and desirable (a) to protect the child from unnecessary separation from his natural parents...." While not so stated in the present adoption law, this purpose remains part of the public policy of this State. *See, e.g., Wilke v. Culp,* 196 *N.J.Super.* 487, 496, 483 *A.*2d 420 (App.Div.1984), certif. den., 99 *N.J.* 243, 491 *A.*2d 728 (1985); *In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 426, 419 *A.*2d 1135. This is not simply some theoretical ideal that in practice has no meaning. The impact of failure to follow that policy is nowhere better shown than in the results of this surrogacy contract. A child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father.[9]

The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father's right no greater than the mother's. "The parent ***436** and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *N.J.S.A.* 9:17–40. As the Assembly Judiciary Committee noted in its statement to the bill, this section establishes "the principle that regardless of the marital status of the parents, all children *and all parents* have equal rights with respect to each other." *Statement to Senate No. 888,* Assembly Judiciary, Law, Public Safety and Defense Committee (1983) (emphasis supplied). The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.

The policies expressed in our comprehensive laws governing consent to the surrender of a child, discussed *supra* at 1244–1246, stand in stark contrast to the surrogacy contract and what it implies. Here there is no counseling, independent or otherwise, of the natural mother, no evaluation, no warning.

The only legal advice Mary Beth Whitehead received regarding the surrogacy contract was provided in connection with the contract that she previously entered into with another couple. Mrs. Whitehead's lawyer was referred to her by the Infertility Center, with which he had an agreement to act as counsel for surrogate candidates. His services consisted of spending one hour going through the contract with the Whiteheads, section by section, and answering their questions. Mrs. Whitehead received no further legal advice prior to signing the contract with the Sterns.

Mrs. Whitehead was examined and psychologically evaluated, but if it was for her benefit, the record does not disclose that fact. The Sterns regarded the evaluation as important, particularly in connection with the question of whether she would change her mind. Yet they never asked to see it, and were content with the assumption that the Infertility Center had made an evaluation and had concluded that there was no danger that the surrogate mother would change her mind. From Mrs. Whitehead's point of view, all that she learned from ***437** the evaluation was that "she had passed." It is apparent that the profit motive got the better of the Infertility Center. Although the evaluation was made, it was not put to any use, and understandably so, for the psychologist warned that Mrs. Whitehead demonstrated certain traits that might make surrender of the ****1248** child difficult and that there should be further inquiry into this issue in connection with her surrogacy. To inquire further, however, might have jeopardized the Infertility Center's fee. The record indicates that neither Mrs. Whitehead nor the Sterns were ever told of this fact, a fact that might have ended their surrogacy arrangement.

Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction.

Although the interest of the natural father and adoptive mother is certainly the predominant interest, realistically the *only* interest served, even they are left with less than what public policy requires. They know little about the natural mother, her genetic makeup, and her psychological and medical history. Moreover, not even a superficial attempt is made to determine their awareness of their responsibilities as parents.

Worst of all, however, is the contract's total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.

This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being ***438** that one of the purchasers is the father. Almost every evil that prompted the prohibition on the

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payment of money in connection with adoptions exists here.

The differences between an adoption and a surrogacy contract should be noted, since it is asserted that the use of money in connection with surrogacy does not pose the risks found where money buys an adoption. Katz, "Surrogate Motherhood and the Baby–Selling Laws," 20 *Colum.J.L. & Soc.Probs.* 1 (1986).

First, and perhaps most important, all parties concede that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few. That conclusion contrasts with adoption; for obvious reasons, there remains a steady supply, albeit insufficient, despite the prohibitions against payment. The adoption itself, relieving the natural mother of the financial burden of supporting an infant, is in some sense the equivalent of payment.

Second, the use of money in adoptions does not *produce* the problem—conception occurs, and usually the birth itself, before illicit funds are offered. With surrogacy, the "problem," if one views it as such, consisting of the purchase of a woman's procreative capacity, at the risk of her life, is caused by and originates with the offer of money.

Third, with the law prohibiting the use of money in connection with adoptions, the built-in financial pressure of the unwanted pregnancy and the consequent support obligation do not lead the mother to the highest paying, ill-suited, adoptive parents. She is just as well-off surrendering the child to an approved agency. In surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted.

Fourth, the mother's consent to surrender her child in adoptions is revocable, even after surrender of the child, unless it be to an approved agency, where by regulation there are protections ***439** against an ill-advised surrender. In surrogacy, consent occurs so early that no amount of advice would satisfy the potential mother's need, yet the consent is irrevocable.

The main difference, that the unwanted pregnancy is unintended while the situation ****1249** of the surrogate mother is voluntary and intended, is really not significant. Initially, it produces stronger reactions of sympathy for the mother whose pregnancy was unwanted than for the surrogate mother, who "went into this with her eyes wide open." On reflection, however, it appears that the essential evil is the same, taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree.

In the scheme contemplated by the surrogacy contract in this case, a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction. The demand for children is great and the supply small. The availability of contraception, abortion, and the greater willingness of single mothers to bring up their children has led to a shortage of babies offered for adoption. *See* N. Baker, *Baby Selling: The Scandal of Black Market Adoption, supra; Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. On Children and Youth of the Senate Comm. on Labor and Public Welfare,* 94th Cong.1st Sess. 6 (1975) (Statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc.). The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money.

Intimated, but disputed, is the assertion that surrogacy will be used for the benefit of the rich at the expense of the poor. *See, e.g.,* Radin, "Market Inalienability," 100 *Harv.L.Rev.* 1849, 1930 (1987). In response it is noted that the Sterns are not rich and the Whiteheads not poor. Nevertheless, it is clear to us ***440** that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. *Ibid.* Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.

In any event, even in this case one should not pretend that disparate wealth does not play a part simply because the contrast is not the dramatic "rich versus poor." At the time of trial, the Whiteheads' net assets were probably negative—Mrs. Whitehead's own sister was foreclosing on a second mortgage. Their income derived from Mr. Whitehead's labors. Mrs. Whitehead is a homemaker, having previously held part-time jobs. The Sterns are both professionals, she a medical doctor, he a biochemist. Their combined income when both were working was about $89,500 a year and their assets sufficient to pay for the surrogacy contract arrangements.

[16] The point is made that Mrs. Whitehead *agreed* to the surrogacy arrangement, supposedly fully understanding the consequences. Putting aside the issue of how compelling her need for money may have been, and how

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significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. *West Coast Hotel Co. v. Parrish,* 300 *U.S.* 379, 57 *S.Ct.* 578, 81 *L.Ed.* 703 (1937). Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," 29 *U.S.C.* § 206 (1982), or buy women's labor for less money than paid to men for the same job, 29 *U.S.C.* § 206(d), or purchase the agreement of children to perform oppressive labor, 29 *U.S.C.* § 212, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions, 29 *U.S.C.* §§ 651 to 678. (Occupational Safety and Health Act of 1970). There are, in short, ***441** values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life. Whether this principle ****1250** recommends prohibition of surrogacy, which presumably sometimes results in great satisfaction to all of the parties, is not for us to say. We note here only that, under existing law, the fact that Mrs. Whitehead "agreed" to the arrangement is not dispositive.

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct. Literature in related areas suggests these are substantial considerations, although, given the newness of surrogacy, there is little information. *See* N. Baker, *Baby Selling: The Scandal of Black Market Adoption, supra; Adoption and Foster Care, 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare,* 94th Cong. 1st Sess. (1975).

[17] The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws.[10] It guarantees ***442** the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

Beyond that is the potential degradation of some women that may result from this arrangement. In many cases, of course, surrogacy may bring satisfaction, not only to the infertile couple, but to the surrogate mother herself. The fact, however, that many women may not perceive surrogacy negatively but rather see it as an opportunity does not diminish its potential for devastation to other women.

In sum, the harmful consequences of this surrogacy arrangement appear to us all too palpable. In New Jersey the surrogate mother's agreement to sell her child is void.[11] Its irrevocability ***444** infects the entire contract, as does the money that purports to buy it.

****1251 III.**

TERMINATION

We have already noted that under our laws termination of parental rights cannot be based on contract, but may be granted only on proof of the statutory requirements. That conclusion was one of the bases for invalidating the surrogacy contract. Although excluding the contract as a basis for parental termination, we did not explicitly deal with the question of whether the statutory bases for termination existed. We do so here.

[18] As noted before, if termination of Mrs. Whitehead's parental rights is justified, Mrs. Whitehead will have no further claim either to custody or to visitation, and adoption by Mrs. Stern may proceed pursuant to the private placement adoption statute, *N.J.S.A.* 9:3–48. If termination is not justified, Mrs. Whitehead remains the legal mother, and even if not entitled to custody, she would ordinarily be expected to have some rights of visitation. *Wilke v. Culp, supra,* 196 *N.J.Super.* at 496, 483 *A.*2d 420.

As was discussed, *supra* at 1241–1244, the proper bases for termination are found in the statute relating to proceedings by approved agencies for a termination of parental rights, *N.J.S.A.* 9:2–18, the statute allowing for termination leading to a private placement adoption, *N.J.S.A.* 9:3–48c(1), and the statute authorizing a termination pursuant to an action by DYFS, *N.J.S.A.* 30:4C–20. The statutory descriptions ****1252** of the conditions required to terminate parental rights differ; their interpretation in case law, however, tends to equate them. *Compare New Jersey* ***445** *Div. of Youth and Family Servs. v. A.W., supra,* 103 *N.J.* at 601–11, 512 *A.*2d 438 (attempted termination by DYFS)*with In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 426–28, 419

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*A.*2d 1135 (attempted termination in connection with private placement adoption).

[19] Nothing in this record justifies a finding that would allow a court to terminate Mary Beth Whitehead's parental rights under the statutory standard. It is not simply that obviously there was no "intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of reversal of that conduct in the future," *N.J.S.A.* 9:3–48c(1), quite the contrary, but furthermore that the trial court never found Mrs. Whitehead an unfit mother and indeed affirmatively stated that Mary Beth Whitehead had been a good mother to her other children. 217 *N.J.Super.* at 397, 525 *A.*2d 1128.

[20] [21] Although the question of best interests of the child is dispositive of the custody issue in a dispute between natural parents, it does not govern the question of termination. It has long been decided that the mere fact that a child would be better off with one set of parents than with another is an insufficient basis for terminating the natural parent's rights. *See New Jersey Div. of Youth and Family Servs. v. A.W., supra,* 103 *N.J.* at 603, 512 *A.*2d 438; *In re Adoption of Children by D., supra,* 61 *N.J.* at 97–98, 293 *A.*2d 171; *In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 428, 419 *A.*2d 1135. Furthermore, it is equally well settled that surrender of a child and a consent to adoption through private placement do not alone warrant termination. *See Sees v. Baber, supra,* 74 *N.J.* 201, 377 *A.*2d 628. It must be noted, despite some language to the contrary, that the interests of the child are not the only interests involved when termination issues are raised. The parent's rights, both constitutional and statutory, have their own independent vitality. *See New Jersey Div. of Youth and Family Servs. v. A.W., supra,* 103 *N.J.* at 601, 512 *A.*2d 438.

Although the statutes are clear, they are not applied rigidly on all occasions. The statutory standard, strictly construed, appears harsh where the natural parents, having surrendered ***446** their child for adoption through private placement, change their minds and seek the return of their child and where the issue comes before the court with the adoptive parents having had custody for years, and having assumed it quite innocently.

These added dimensions in *Sees v. Baber, supra,* 74 *N.J.* 201, 377 *A.*2d 628, failed to persuade this Court to vary the termination requirements. The natural parent in that case changed her mind two days after surrendering the child, sought his return unequivocally, and so advised the adoptive parents. Since she was clearly fit, and clearly had not abandoned the child in the statutory sense, termination was denied, despite the fact that the adoptive parents had had custody of the child for about a year, and the mother had never had custody at all.

A significant variation on these facts, however, occurred in *Sorentino II, supra,* 74 *N.J.* 313, 378 *A.*2d 18. The surrender there was not through private placement but through an approved agency. Although the consent to surrender was held invalid due to coercion by the agency, the natural parents failed to initiate the lawsuit to reclaim the child for over a year after relinquishment. By the time this Court reached the issue of whether the natural parents' rights could be terminated, the adoptive parents had had custody for three years. These circumstances ultimately persuaded this Court to permit termination of the natural parents' rights and to allow a subsequent adoption. The unique facts of *Sorentino II* were found to amount to a forsaking of parental obligations. *Id.* at 322, 378 *A.*2d 18.

****1253** The present case is distinguishable from *Sorentino II.* Mary Beth Whitehead had custody of Baby M for four months before the child was taken away. Her initial surrender of Baby M was pursuant to a contract that we have declared illegal and unenforceable. The Sterns knew almost from the very day that they took Baby M that their rights were being challenged by the natural mother. In short, the factors that persuaded this Court to terminate the parental rights in *Sorentino II* are not found here.

***447** There is simply no basis, either in the statute or in the peculiar facts of that limited class of case typified by *Sorentino II,* to warrant termination of Mrs. Whitehead's parental rights. We therefore conclude that the natural mother is entitled to retain her rights as a mother.

IV.

CONSTITUTIONAL ISSUES

[22] Both parties argue that the Constitutions—state and federal—mandate approval of their basic claims. The source of their constitutional arguments is essentially the same: the right of privacy, the right to procreate, the right to the companionship of one's child, those rights flowing either directly from the fourteenth amendment or by its incorporation of the Bill of Rights, or from the ninth amendment, or through the penumbra surrounding all of the Bill of Rights. They are the rights of personal

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intimacy, of marriage, of sex, of family, of procreation. Whatever their source, it is clear that they are fundamental rights protected by both the federal and state Constitutions. *Lehr v. Robertson,* 463 *U.S.* 248, 103 *S.Ct.* 2985, 77 *L.Ed.*2d 614 (1983); *Santosky v. Kramer,* 455 *U.S.* 745, 102 *S.Ct.* 1388, 71 *L.Ed.*2d 599 (1982); *Zablocki v. Redhail,* 434 *U.S.* 374, 98 *S.Ct.* 673, 54 *L.Ed.*2d 618 (1978); *Quilloin v. Walcott,* 434 *U.S.* 246, 98 *S.Ct.* 549, 54 *L.Ed.*2d 511 (1978); *Carey v. Population Servs. Int'l,* 431 *U.S.* 678, 97 *S.Ct.* 2010, 52 *L.Ed.*2d 675 (1977); *Roe v. Wade,* 410 *U.S.* 113, 93 *S.Ct.* 705, 35 *L.Ed.*2d 147 (1973); *Stanley v. Illinois,* 405 *U.S.* 645, 92 *S.Ct.* 1208, 31 *L.Ed.*2d 551 (1972); *Griswold v. Connecticut,* 381 *U.S.* 479, 85 *S.Ct.* 1678, 14 *L.Ed.*2d 510 (1965); *Skinner v. Oklahoma,* 316 *U.S.* 535, 62 *S.Ct.* 1110, 86 *L.Ed.* 1655 (1942); *Meyer v. Nebraska,* 262 *U.S.* 390, 43 *S.Ct.* 625, 67 *L.Ed.* 1042 (1923). The right asserted by the Sterns is the right of procreation; that asserted by Mary Beth Whitehead is the right to the companionship of her child. We find that the right of procreation does not extend as far as claimed by the Sterns. As for the right asserted by Mrs. ***448** Whitehead,[12] since we uphold it on other grounds (*i.e.,* we have restored her as mother and recognized her right, limited by the child's best interests, to her companionship), we need not decide that constitutional issue, and for reasons set forth below, we should not.

[23] The right to procreate, as protected by the Constitution, has been ruled on directly only once by the United States Supreme Court. *See Skinner v. Oklahoma, supra,* 316 *U.S.* 535, 62 *S.Ct.* 1110, 86 *L.Ed.* 1655 (forced sterilization of habitual criminals violates equal protection clause of fourteenth amendment). Although *Griswold v. Connecticut, supra,* 381 *U.S.* 479, 85 *S.Ct.* 1678, 14 *L.Ed.*2d 510, is obviously of a similar class, strictly speaking it involves the right *not* to procreate. The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that. Mr. Stern has not been deprived of that right. Through artificial insemination of Mrs. Whitehead, Baby M is his child. The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that ****1254** involve many considerations other than the right of procreation. To assert that Mr. Stern's right of procreation gives him the right to the custody of Baby M would be to assert that Mrs. Whitehead's right of procreation does *not* give her the right to the custody of Baby M; it would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation.

We conclude that the right of procreation is best understood and protected if confined to its essentials, and that when dealing with rights concerning the resulting child, different ***449** interests come into play. There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child. We therefore disagree with the trial court: there is no constitutional basis whatsoever requiring that Mr. Stern's claim to the custody of Baby M be sustained. Our conclusion may thus be understood as illustrating that a person's rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights.[13]

[24] Mr. Stern also contends that he has been denied equal protection of the laws by the State's statute granting full ***450** parental rights to a husband in relation to the child produced, with his consent, by the union of his wife with a sperm donor. *N.J.S.A.* 9:17–44. The claim really is that of Mrs. Stern. It is that she is in precisely the same position as the husband in the statute: she is presumably infertile, as is the husband in the statute; her spouse by agreement with a third party procreates with the understanding that the child will be the couple's child. The alleged unequal protection is that the understanding is honored in the statute when the husband is the infertile party, but no similar understanding is honored when it is the wife who is infertile.

It is quite obvious that the situations are not parallel. A sperm donor simply cannot be equated with a surrogate mother. The State has more than a sufficient basis to distinguish the two situations—even if the only difference is between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy—so as to justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother. Some basis for an equal protection argument might exist if ****1255** Mary Beth Whitehead had contributed her egg to be implanted, fertilized or otherwise, in Mrs. Stern, resulting in the latter's pregnancy. That is not the case here, however.

[25] [26] [27] Mrs. Whitehead, on the other hand, asserts a claim that falls within the scope of a recognized fundamental interest protected by the Constitution. As a mother, she claims the right to the companionship of her child. This is a fundamental interest, constitutionally protected. Furthermore, it was taken away from her by the action of the court below. Whether that action under these circumstances would constitute a constitutional

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deprivation, however, we need not and do not decide. By virtue of our decision Mrs. Whitehead's constitutional complaint—that her parental rights have been unconstitutionally terminated—is moot. We have decided that both the statutes and public policy of this state require that that termination be ***451** voided and that her parental rights be restored. It therefore becomes unnecessary to decide whether that same result would be required by virtue of the federal or state Constitutions. *See Ashwander v. Tennessee Valley Auth.*, 297 *U.S.* 288, 341, 346–48, 56 *S.Ct.* 466, 482–83, 80 *L.Ed.* 688, 707, 710–12 (1936) (Brandeis, J., concurring). Refraining from deciding such constitutional issues avoids further complexities involving the full extent of a parent's right of companionship,[14] or questions involving the fourteenth amendment.[15]

Having held the contract invalid and having found no other grounds for the termination of Mrs. Whitehead's parental rights, we find that nothing remains of her constitutional claim. It seems obvious to us that since custody and visitation encompass practically all of what we call "parental rights," a total denial of both would be the equivalent of termination of parental rights. *Franz v. United States,* 707 *F.*2d 582, 602 (D.C.Cir.1983). That, however, as will be seen below, has not occurred here. We express no opinion on whether a prolonged suspension of visitation would constitute a termination of parental rights, or whether, assuming it would, a showing of unfitness ***452** would be required.[16]

V.

CUSTODY

[28] Having decided that the surrogacy contract is illegal and unenforceable, we ****1256** now must decide the custody question without regard to the provisions of the surrogacy contract that would give Mr. Stern sole and permanent custody. (That does not mean that the existence of the contract and the circumstances under which it was entered may not be considered to ***453** the extent deemed relevant to the child's best interests.) With the surrogacy contract disposed of, the legal framework becomes a dispute between two couples over the custody of a child produced by the artificial insemination of one couple's wife by the other's husband. Under the Parentage Act the claims of the natural father and the natural mother are entitled to equal weight, *i.e.*, one is not preferred over the other solely because he or she is the father or the mother. *N.J.S.A.* 9:17–40.[17] The applicable rule given these circumstances is clear: the child's best interests determine custody.

***454** We note again that the trial court's reasons for determining what were the child's best interests were somewhat different from ours. It concluded that the surrogacy contract was valid, but that it could not grant specific performance unless to do so was in the child's best interests. The approach was that of a Chancery judge, unwilling to give extraordinary remedies unless they well served the most important interests, in this case, the interests of the child. While substantively indistinguishable from our approach to the question of best interests, the purpose of the inquiry was not the usual purpose of determining custody, but of determining a contractual remedy.

We are uot concerned at this point with the question of termination of parental rights, either those of Mrs. Whitehead or of Mr. Stern. As noted in various places in this opinion, such termination, in the absence ****1257** of abandonment or a valid surrender, generally depends on a showing that the particular parent is unfit. The question of custody in this case, as in practically all cases, assumes the fitness of both parents, and no serious contention is made in this case that either is unfit. The issue here is which life would be *better* for Baby M, one with primary custody in the Whiteheads or one with primary custody in the Sterns.

[29] The circumstances of this custody dispute are unusual and they have provoked some unusual contentions. The Whiteheads claim that even if the child's best interests would be served by our awarding custody to the Sterns, we should not do so, since that will encourage surrogacy contracts—contracts claimed by the Whiteheads, and we agree, to be violative of important legislatively-stated public policies. Their position is that in order that surrogacy contracts be deterred, custody should remain in the surrogate mother unless she is unfit, regardless of the best interests of the child. We disagree. Our declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements. We need not sacrifice the child's interests in order to make that point sharper. ***455** *Cf. In re Adoption of Child by I.T. and K.T.*, 164 *N.J.Super.* 476, 484–86, 397 *A.*2d 341 (App.Div.1978) (adoptive parents' participation in illegal placement does not mandate denial of adoption); *In the Matter of the Adoption of Child by N.P. and F.P.*, 165 *N.J.Super.* 591, 398 *A.*2d 937 (Law Div.1979) (use of unapproved intermediaries and the payment of money in connection with adoption is insufficient to establish that the would-be adoptive parents are unfit or that adoption would not be in child's best interests).

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[30] The Whiteheads also contend that the award of custody to the Sterns *pendente lite* was erroneous and that the error should not be allowed to affect the final custody decision. As noted above, at the very commencement of this action the court issued an *ex parte* order requiring Mrs. Whitehead to turn over the baby to the Sterns; Mrs. Whitehead did not comply but rather took the child to Florida. Thereafter, a similar order was enforced by the Florida authorities resulting in the transfer of possession of Baby M to the Sterns. The Sterns retained custody of the child throughout the litigation. The Whiteheads' point, assuming the *pendente* award of custody *was* erroneous, is that most of the factors arguing for awarding permanent custody to the Sterns resulted from that initial *pendente lite* order. Some of Mrs. Whitehead's alleged character failings, as testified to by experts and concurred in by the trial court, were demonstrated by her actions brought on by the custody crisis. For instance, in order to demonstrate her impulsiveness, those experts stressed the Whiteheads' flight to Florida with Baby M; to show her willingness to use her children for her own aims, they noted the telephone threats to kill Baby M and to accuse Mr. Stern of sexual abuse of her daughter; in order to show Mrs. Whitehead's manipulativeness, they pointed to her threat to kill herself; and in order to show her unsettled family life, they noted the innumerable moves from one hotel or motel to another in Florida. Furthermore, the argument continues, one of the most important factors, whether mentioned or not, in favor of custody in the Sterns is their continuing custody during the litigation, now having lasted for one-and-a-half ***456** years. The Whiteheads' conclusion is that had the trial court not given initial custody to the Sterns during the litigation, Mrs. Whitehead not only would have demonstrated her perfectly acceptable personality—the general tenor of the opinion of experts was that her personality problems surfaced primarily in crises—but would also have been able to prove better her parental skills along with an even stronger bond than may now exist between her and Baby M. Had she not been limited to custody for four months, she could have proved all of these things much more persuasively through almost two years of custody.

[31] The argument has considerable force. It is of course possible that the trial ****1258** court was wrong in its initial award of custody. It is also possible that such error, if that is what it was, may have affected the outcome. We disagree with the premise, however, that in determining custody a court should decide what the child's best interests *would be* if some hypothetical state of facts had existed. Rather, we must look to what those best interests *are, today,* even if some of the facts may have resulted in part from legal error. The child's interests come first: we will not punish it for judicial errors, assuming any were made. *See Wist v. Wist,* 101 *N.J.* 509, 513–14, 503 *A.*2d 281 (1986); *see also In re J.R. Guardianship,* 174 *N.J.Super.* 211, 416 *A.*2d 62 (App.Div.), certif. den., 85 *N.J.* 102, 425 *A.*2d 266 (1980) (although not explicitly mentioned, natural mother's loss of parental rights based substantially on failures of DYFS to arrange visitation with her child). The custody decision must be based on all circumstances, on everything that *actually* has occurred, on everything that is relevant to the child's best interests. Those circumstances include the trip to Florida, the telephone calls and threats, the substantial period of successful custody with the Sterns, and all other relevant circumstances. We will discuss the question of the correctness of the trial court's initial orders below, but for purposes of determining Baby M's best interests, the correctness of those initial orders has lost relevance.

***457** [32] There were eleven experts who testified concerning the child's best interests, either directly or in connection with matters related to that issue. Our reading of the record persuades us that the trial court's decision awarding custody to the Sterns (technically to Mr. Stern) should be affirmed since "its findings ... could reasonably have been reached on sufficient credible evidence present in the record." *Beck v. Beck,* 86 *N.J.* 480, 496, 432 *A.*2d 63 (1981) (quoting *State v. Johnson,* 42 *N.J.* 146, 161, 199 *A.*2d 809 (1964)); *see Palermo v. Palermo,* 164 *N.J.Super.* 492, 498, 397 *A.*2d 349 (App.Div.1978) (noting that family court judge was experienced in dealing with such matters and had opportunity to observe parties and become immersed in details of case). More than that, on this record we find little room for any different conclusion. The trial court's treatment of this issue, 217 *N.J.Super.* at 391–400, 525 *A.*2d 1128, is both comprehensive and, in most respects, perceptive. We agree substantially with its analysis with but few exceptions that, although important, do not change our ultimate views.

Our custody conclusion is based on strongly persuasive testimony contrasting both the family life of the Whiteheads and the Sterns and the personalities and characters of the individuals. The stability of the Whitehead family life was doubtful at the time of trial. Their finances were in serious trouble (foreclosure by Mrs. Whitehead's sister on a second mortgage was in process). Mr. Whitehead's employment, though relatively steady, was always at risk because of his alcoholism, a condition that he seems not to have been able to confront effectively. Mrs. Whitehead had not worked for quite some time, her last two employments having been part-time. One of the Whiteheads' positive attributes was

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their ability to bring up two children, and apparently well, even in so vulnerable a household. Yet substantial question was raised even about that aspect of their home life. The expert testimony contained criticism of Mrs. Whitehead's handling of her son's educational difficulties. Certain of the experts noted that Mrs. Whitehead perceived herself as omnipotent and omniscient concerning her ***458** children. She knew what they were thinking, what they wanted, and she spoke for them. As to Melissa, Mrs. Whitehead expressed the view that she alone knew what that child's cries and sounds meant. Her inconsistent stories about various things engendered grave doubts about her ability to explain honestly and sensitively to Baby M—and at the right time—the nature of her origin. Although faith in professional counseling is not a *sine qua non* of parenting, several experts believed that Mrs. Whitehead'scontempt ****1259** for professional help, especially professional psychological help, coincided with her feelings of omnipotence in a way that could be devastating to a child who most likely will need such help. In short, while love and affection there would be, Baby M's life with the Whiteheads promised to be too closely controlled by Mrs. Whitehead. The prospects for wholesome, independent psychological growth and development would be at serious risk.

The Sterns have no other children, but all indications are that their household and their personalities promise a much more likely foundation for Melissa to grow and thrive. There *is* a track record of sorts—during the one-and-a-half years of custody Baby M has done very well, and the relationship between both Mr. and Mrs. Stern and the baby has become very strong. The household is stable, and likely to remain so. Their finances are more than adequate, their circle of friends supportive, and their marriage happy. Most important, they are loving, giving, nurturing, and open-minded people. They have demonstrated the wish and ability to nurture and protect Melissa, yet at the same time to encourage her independence. Their lack of experience is more than made up for by a willingness to learn and to listen, a willingness that is enhanced by their professional training, especially Mrs. Stern's experience as a pediatrician. They are honest; they can recognize error, deal with it, and learn from it. They will try to determine rationally the best way to cope with problems in their relationship with Melissa. When the time comes to tell her about her origins, they will probably have found a means of doing so that accords with the ***459** best interests of Baby M. All in all, Melissa's future appears solid, happy, and promising with them.

Based on all of this we have concluded, independent of the trial court's identical conclusion, that Melissa's best interests call for custody in the Sterns. Our above-mentioned disagreements with the trial court do not, as we have noted, in any way diminish our concurrence with its conclusions. We feel, however, that those disagreements are important enough to be stated. They are disagreements about the evaluation of conduct. They also may provide some insight about the potential consequences of surrogacy.

It seems to us that given her predicament, Mrs. Whitehead was rather harshly judged—both by the trial court and by some of the experts. She was guilty of a breach of contract, and indeed, she did break a very important promise, but we think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there? We do not know of, and cannot conceive of, any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not. We know of no authority suggesting that the moral quality of her act in those circumstances should be judged by referring to a contract made before she became pregnant. We do not countenance, and would never countenance, violating a court order as Mrs. Whitehead did, even a court order that is wrong; but her resistance to an order that she surrender her infant, possibly forever, merits a measure of understanding. We do not find it so clear that her efforts to keep her infant, when measured against the Sterns' efforts to take her away, make one, rather than the other, the wrongdoer. The Sterns suffered, but so did she. And if we go beyond suffering to an evaluation of the human stakes involved in the struggle, how much weight should be given to her nine months of pregnancy, the labor of childbirth, the risk to her life, compared to the ***460** payment of money, the anticipation of a child and the donation of sperm?

There has emerged a portrait of Mrs. Whitehead, exposing her children to the media, engaging in negotiations to sell a book, granting interviews that seemed ****1260** helpful to her, whether hurtful to Baby M or not, that suggests a selfish, grasping woman ready to sacrifice the interests of Baby M and her other children for fame and wealth. That portrait is a half-truth, for while it may accurately reflect what ultimately occurred, its implication, that this is what Mary Beth Whitehead wanted, is totally inaccurate, at least insofar as the record before us is concerned. There is not one word in that record to support a claim that had she been allowed to continue her possession of her newly born infant, Mrs. Whitehead would have ever been heard of again; not one word in the record suggests that her

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change of mind and her subsequent fight for her child was motivated by anything other than love—whatever complex underlying psychological motivations may have existed.

[33] We have a further concern regarding the trial court's emphasis on the Sterns' interest in Melissa's education as compared to the Whiteheads'. That this difference is a legitimate factor to be considered we have no doubt. But it should not be overlooked that a best-interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life. "Best interests" does not contain within it any idealized lifestyle; the question boils down to a judgment, consisting of many factors, about the likely future happiness of a human being. *Fantony v. Fantony, supra,* 21 *N.J.* at 536, 122 *A.*2d 593. Stability, love, family happiness, tolerance, and, ultimately, support of independence—all rank much higher in predicting future happiness than the likelihood of a college education. We do not mean to suggest that the trial court would disagree. We simply want to dispel any possible misunderstanding on the issue.

***461** Even allowing for these differences, the facts, the experts' opinions, and the trial court's analysis of both argue strongly in favor of custody in the Sterns. Mary Beth Whitehead's family life, into which Baby M would be placed, was anything but secure—the quality Melissa needs most. And today it may be even less so.[18] Furthermore, the evidence and expert opinion based on it reveal personality characteristics, mentioned above, that might threaten the child's best development. The Sterns promise a secure home, with an understanding relationship that allows nurturing and independent growth to develop together. Although there is no substitute for reading the entire record, including the review of every word of each experts' testimony and reports, a summary of their conclusions is revealing. Six experts testified for Mrs. Whitehead: one favored joint custody, clearly unwarranted in this case; one simply rebutted an opposing expert's claim that Mary Beth Whitehead had a recognized personality disorder; one testified to the adverse impact of separation on *Mrs. Whitehead;* one testified about the evils of adoption and, to him, the probable analogous evils of surrogacy; one spoke only on the question of whether Mrs. Whitehead's consent in the surrogacy agreement was "informed consent"; and one spelled out the strong bond between mother and child. None of them unequivocally stated, or even necessarily implied, an opinion that custody in the Whiteheads was in the best interests of Melissa—the ultimate issue. The Sterns' experts, ***462** both well qualified—as were the Whiteheads'—concluded that the best interests of Melissa required custody in Mr. Stern. Most convincingly, the three ****1261** experts chosen by the court-appointed guardian *ad litem* of Baby M, each clearly free of all bias and interest, unanimously and persuasively recommended custody in the Sterns.

[34] Some comment is required on the initial *ex parte* order awarding custody *pendente lite* to the Sterns (and the continuation of that order after a plenary hearing). The issue, although irrelevant to our disposition of this case, may recur; and when it does, it can be of crucial importance. When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother *pendente lite, i.e.,* only in the most unusual case should the child be taken from its mother before the dispute is finally determined by the court on its merits. The probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father. A substantial showing that the mother's continued custody would threaten the child's health or welfare would seem to be required.

[35] [36] In this case, the trial court, believing that the surrogacy contract might be valid, and faced with the probable flight from the jurisdiction by Mrs. Whitehead and the baby if *any* notice were served, ordered, *ex parte,* an immediate transfer of possession of the child, *i.e.,* it ordered that custody be transferred immediately to Mr. Stern, rather than order Mrs. Whitehead not to leave the State. We have ruled, however, that the surrogacy contract is unenforceable and illegal. It provides no basis for either an *ex parte,* a plenary, an interlocutory, or a final order requiring a mother to surrender custody to a father. Any application by the natural father in a surrogacy dispute for custody pending the outcome of the litigation will henceforth ***463** require proof of unfitness, of danger to the child, or the like, of so high a quality and persuasiveness as to make it unlikely that such application will succeed. Absent the required showing, all that a court should do is list the matter for argument on notice to the mother. Even her threats to flee should not suffice to warrant any other relief unless her unfitness is clearly shown. At most, it should result in an order enjoining such flight. The erroneous transfer of custody, as we view it, represents a greater risk to the child than removal to a foreign jurisdiction, unless parental unfitness is clearly proved. Furthermore, we deem it likely that, advised of the law and knowing that her custody cannot seriously be challenged at this stage of the litigation, surrogate mothers will obey any court order to remain in the jurisdiction.

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VI.

VISITATION

[37] [38] The trial court's decision to terminate Mrs. Whitehead's parental rights precluded it from making any determination on visitation. 217 *N.J.Super.* at 399, 408, 525 *A.*2d 1128. Our reversal of the trial court's order, however, requires delineation of Mrs. Whitehead's rights to visitation. It is apparent to us that this factually sensitive issue, which was never addressed below, should not be determined *de novo* by this Court. We therefore remand the visitation issue to the trial court for an abbreviated hearing and determination as set forth below.[19]

***464** For the benefit of all concerned, especially the child, we would prefer to end ****1262** these proceedings now, once and for all. It is clear to us, however, that it would be unjust to do so and contrary to precedent.

The fact that the trial court did not address visitation is only one reason for remand. The ultimate question is whether, despite the absence of the trial court's guidance, the record before us is sufficient to allow an appellate court to make this essentially factual determination. We can think of no issue that is more dependent on a trial court's factual findings and evaluation than visitation.

When we examine the record on visitation, the only testimony explicitly dealing with the issue came from the guardian *ad litem* 's experts. Examination of this testimony in light of the complete record, however, reveals that it was an insignificant part of their opinions. The parties, those with a real stake in the dispute, offered no testimony on the issue. The cause for this insufficiency of guidance on the visitation issue was unquestionably the parties' concentration on other, then seemingly much more important, questions: custody, termination of parental rights, and the validity of the surrogacy contract.

Even if we were willing to rely solely on the opinions of the guardian *ad litem* 's experts, their testimony was not fully developed because the issue was not the focus of the litigation. Moreover, the guardian's experts concentrated on determining "best interests" as it related to custody and to termination of parental rights. Their observations about visitation, both in quality and quantity, were really derivative of their views about custody and termination. The guardian's experts were concerned that given Mrs. Whitehead's determination to have custody, visitation might be used to undermine the Sterns' parental authority and thereby jeopardize the stability and security so badly needed by this child. Two of the experts recommended suspension of visitation for five years and the other suspension for an undefined period. None of them fully considered the ***465** factors that have led our courts ordinarily to grant visitation in other contexts, with no suspension, even where the non-custodial parent was less than a paragon of virtue. *See, e.g., Wilke v. Culp, supra,* 196 *N.J.Super.* at 496, 483 *A.*2d 420; *In re Adoption by J.J.P., supra,* 175 *N.J.Super.* at 430, 419 *A.*2d 1135. Based on the opinions of her experts, the guardian *ad litem* recommended suspension of Mrs. Whitehead's visitation rights for five years, with a reevaluation at that time. The basis for that recommendation, whether one regards it as the right or the wrong conclusion, was apparently bolstered when it was learned that Mrs. Whitehead had become pregnant, divorced Richard Whitehead, and then married the father of her new child-to-be. Without any further expert testimony, the guardian *ad litem* revised her position. She now argues that instead of five years, visitation should be suspended until Melissa reaches majority. This radical change in the guardian *ad litem* 's position reinforces our belief that further consideration must be given to this issue.

The foregoing does not fully describe the extent to which this record leaves us uninformed on the visitation issue. No one, with one exception, included a word about visitation in the final briefs before the trial court. The exception was Mrs. Whitehead's parents who argued for their own visitation. This claim was denied by the trial court and is not now before us. The oral summations of counsel before the trial court were almost equally bereft of even a reference to the visitation issue. Mrs. Whitehead's counsel did not mention visitation. The Sterns' counsel referred to the guardian *ad litem* 's expert testimony about visitation, not to argue for or against visitation but only to support his argument in favor of termination of Mrs. Whitehead's parental rights. The guardian *ad litem* did argue the visitation issue, devoting a minimal portion of her summation to it. Only the grandparents dealt with visitation, but with their visitation, not with the issue of Mrs. Whitehead's visitation. Finally, on appeal before this Court the record on visitation is inadequate—especially when compared to the treatment of other issues.

****1263 *466** We join those who want this litigation to end for the benefit of this child. To spare this two-year-old another sixty to ninety days of litigation, however, at the risk of wrongly deciding this matter,

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which has life-long consequences for the child and the parties, would be unwise.

[39] [40] We also note the following for the trial court's consideration: First, this is not a divorce case where visitation is almost invariably granted to the non-custodial spouse. To some extent the facts here resemble cases where the non-custodial spouse has had practically no relationship with the child, see *Wilke v. Culp, supra,* 196 *N.J.Super.* 487, 483 *A.*2d 420; but it only "resembles" those cases. In the instant case, Mrs. Whitehead spent the first four months of this child's life as her mother and has regularly visited the child since then. Second, she is not only the natural mother, but also the legal mother, and is not to be penalized one iota because of the surrogacy contract. Mrs. Whitehead, as the mother (indeed, as a mother who nurtured her child for its first four months—unquestionably a relevant consideration), is entitled to have her own interest in visitation considered. Visitation cannot be determined without considering the parents' interests along with those of the child.

In all of this, the trial court should recall the touchstones of visitation: that it is desirable for the child to have contact with both parents; that besides the child's interests, the parents' interests also must be considered; but that when all is said and done, the best interests of the child are paramount.

[41] We have decided that Mrs. Whitehead is entitled to visitation at some point, and that question is not open to the trial court on this remand. The trial court will determine what kind of visitation shall be granted to her, with or without conditions, and when and under what circumstances it should commence. It also should be noted that the guardian's recommendation of a five-year delay is most unusual—one might argue that it begins to border on termination. Nevertheless, if the circumstances as further developed by appropriate proofs ***467** or as reconsidered on remand clearly call for that suspension under applicable legal principles of visitation, it should be so ordered.

In order that the matter be determined as expeditiously as possible, we grant to the trial court the broadest powers to reach its determination. A decision shall be rendered in no more than ninety days from the date of this opinion.

The trial court shall, after reviewing the transcripts and other material, determine in its discretion whether further evidence is needed and through what witnesses it shall be presented. The trial court should consider limiting the witnesses to the experts who testified and to Mr. and Mrs. Stern and Mr. and Mrs. Whitehead, using its own judgment in deciding which of them, if any, shall be called on to give further evidence. The trial court, in its discretion, may either hear testimony or receive verified written submissions, relaxing the Rules of Evidence to the extent compatible with reliable fact-finding and desirable for an expeditious decision.[20] Many significant facts bearing on visitation have already been adduced. Although additional evidence may be important, we believe that fairness does not necessarily require that it be produced with all of the procedural safeguards implicit in the Evidence Rules. When it comes to custody matters, application of ****1264** rules, including those concerning evidence, must on some occasions be flexible, *New Jersey Div. of Youth & Family Servs. v. S.S.,* 185 *N.J.Super.* 3, 447 *A.*2d 183 (App.Div.), certif. den., 91 *N.J.* 572, 453 *A.*2d 883 (1982), especially in view of the child's interests in this unique situation.

***468** Any party wishing to appeal from the trial court's judgment on visitation shall file a notice of appeal within ten days thereafter, the Court hereby reducing the ordinary time to appeal pursuant to *Rule* 2:12–2. Any such appeal is hereby certified to this Court.

Any further proceedings in this matter, or related thereto, if made by application to the trial court shall be made to the judge to whom the matter is assigned on remand. That direction applies to applications related to this matter in any way: whether made before, during, or after proceedings on remand, and regardless of the nature of the application. Any applications for appellate review shall be made directly to this Court.

We would expect that after the visitation issue is determined the trial court, in connection with any other applications in the future, will attempt to assure that this case is treated like any other so that this child may be spared any further damaging publicity.

While probably unlikely, we do not deem it unthinkable that, the major issues having been resolved, the parties' undoubted love for this child might result in a good faith attempt to work out the visitation themselves, in the best interests of their child.

CONCLUSION

This case affords some insight into a new reproductive arrangement: the artificial insemination of a surrogate mother. The unfortunate events that have unfolded illustrate that its unregulated use can bring suffering to all involved. Potential victims include the surrogate mother

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and her family, the natural father and his wife, and most importantly, the child. Although surrogacy has apparently provided positive results for some infertile couples, it can also, as this case demonstrates, cause suffering to participants, here essentially innocent and well-intended.

We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do ***469** we find any legal prohibition against 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. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.

If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms. We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—*in vitro* fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

For affirmance in part, reversal in part and remandment—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

****1265 APPENDIX A**

SURROGATE PARENTING AGREEMENT

THIS AGREEMENT is made this 6th day of February, 1985, by and between MARY BETH WHITEHEAD, a married woman (herein referred to as "Surrogate), RICHARD WHITEHEAD, her husband (herein referred to a "Husband"), and WILLIAM STERN, (herein referred to as "Natural Father").

RECITALS

THIS AGREEMENT is made with reference to the following facts:

(1) WILLIAM STERN, Natural Father, is an individual over the age of eighteen (18) years who is desirous of entering into this Agreement.

(2) The sole purpose of this Agreement is to enable WILLIAM STERN and his infertile wife to have a child which is biologically related to WILLIAM STERN.

(3) MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, are over the age of eighteen (18) years and desirous of entering into this Agreement in consideration of the following:

NOW THEREFORE, in consideration of the mutual promises contained herein and the intentions of being legally bound hereby, the parties agree as follows:

1. MARY BETH WHITEHEAD, Surrogate, represents that she is capable of conceiving children. MARY BETH WHITEHEAD understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to WILLIAM STERN, Natural Father, immediately upon birth of the child; and terminate all parental rights to said child pursuant to this Agreement.

2. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, have been married since 12/2/73, and RICHARD WHITEHEAD is in agreement with the purposes, intents and provisions of this Agreement and acknowledges that his wife, MARY BETH WHITEHEAD, Surrogate, shall be artificially

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inseminated pursuant to the provisions of this Agreement. RICHARD WHITEHEAD agrees that in the best interest of the child, he will not form or attempt to form a parent-child relationship with any child or children MARY BETH WHITEHEAD, Surrogate, may conceive by artificial insemination as described herein, and agrees to freely and readily surrender immediate custody of the child to WILLIAM STERN, Natural Father; and terminate his parental rights; RICHARD WHITEHEAD further acknowledges he will do all acts necessary to rebut the presumption of paternity of any offspring conceived and born pursuant to aforementioned agreement as provided by law, including blood testing and/or HLA testing.

3. WILLIAM STERN, Natural Father, does hereby enter into this written contractual Agreement with MARY BETH WHITEHEAD, Surrogate, where MARY BETH WHITEHEAD shall be artificially inseminated with the semen of WILLIAM STERN by a physician. MARY BETH WHITEHEAD, Surrogate, upon becoming pregnant, acknowledges that she will carry said embryo/fetus(s) until delivery. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree that they will cooperate with any background investigation into the **1266 Surrogate's medical, family and personal history and warrants the information to be accurate to the best of their knowledge. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, agree to surrender custody of the child to WILLIAM STERN, Natural Father, immediately upon birth, acknowledging that it is the intent of this Agreement in the best interests of the child to do so; as well as institute and cooperate in proceedings to terminate their respective parental rights to said child, and sign any and all necessary affidavits, documents, and the like, in order to further the intent and purposes of this Agreement. It is understood by MARY BETH WHITEHEAD, and RICHARD WHITEHEAD, that the child to be conceived is being done so for the sole purpose of giving said child to WILLIAM STERN, its natural and biological father. MARY BETH WHITEHEAD and RICHARD WHITEHEAD agree to sign all necessary affidavits prior to and after the birth of the child and voluntarily participate in any paternity proceedings necessary to have WILLIAM STERN'S name entered on said child's birth certificate as the natural or biological father.

4. That the consideration for this Agreement, which is compensation for services and expenses, and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for a consent to surrender the child for adoption, in addition to other provisions contained herein, shall be as follows:

(A) $10,000 shall be paid to MARY BETH WHITEHEAD, Surrogate, upon surrender of custody to WILLIAM STERN, the natural and biological father of the child born pursuant to the provisions of this Agreement for surrogate services and expenses in carrying out her obligations under this Agreement;

(B) The consideration to be paid to MARY BETH WHITEHEAD, Surrogate, shall be deposited with the Infertility Center of New York (hereinafter ICNY), the representative of WILLIAM STERN, at the time of the signing of this Agreement, and held in escrow until completion of the duties and obligation of MARY BETH WHITEHEAD, Surrogate, (see Exhibit "A" for a copy of the Escrow Agreement), as herein described.

(C) WILLIAM STERN, Natural Father, shall pay the expenses incurred by MARY BETH WHITEHEAD, Surrogate, pursuant to her pregnancy, more specifically defined as follows:

(1) All medical, hospitalization, and pharmaceutical, laboratory and therapy expenses incurred as a result of MARY BETH WHITEHEAD's pregnancy, not covered or allowed by her present health and major medical insurance, including all extraordinary medical expenses and all reasonable expenses for treatment of any emotional or mental conditions or problems related to said pregnancy, but in no case shall any such expenses be paid or reimbursed after a period of six (6) months have elapsed since the date of the termination of the pregnancy, and this Agreement specifically excludes any expenses for lost wages or other non-itemized incidentals (see Exhibit "B") related to said pregnancy.

(2) WILLIAM STERN, Natural Father, shall not be responsible for any latent medical expenses occurring six (6) weeks subsequent to the birth of the child, unless the medical problem or abnormality incident thereto was known and treated by a physician prior to the expiration of said six (6) week period and in written notice of the same sent to ICNY, as representative of WILLIAM STERN by certified mail, return receipt requested, advising of this treatment.

(3) WILLIAM STERN, Natural Father, shall be responsible for the total costs of all paternity testing. Such paternity testing may, at the option of WILLIAM STERN, Natural Father, be required prior to release of the surrogate fee from escrow. In the event WILLIAM STERN, Natural Father, is conclusively determined not to be the biological father of the child as a result of an HLA

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test, this Agreement will be deemed breached and MARY BETH **1267 WHITEHEAD, Surrogate, shall not be entitled to any fee. WILLIAM STERN, Natural Father, shall be entitled to reimbursement of all medical and related expenses from MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband.

(4) MARY BETH WHITEHEAD'S reasonable travel expenses incurred at the request of WILLIAM STERN, pursuant to this Agreement.

5. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, understand and agree to assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, including but not limited to, postpartum complications. A copy of said possible risks and/or complications is attached hereto and made a part hereof (see Exhibit "C").

6. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, hereby agree to undergo psychiatric evaluation by JOAN EINWOHNER, a psychiatrist as designated by WILLIAM STERN or an agent thereof. WILLIAM STERN shall pay for the cost of said psychiatric evaluation. MARY BETH WHITEHEAD and RICHARD WHITEHEAD shall sign, prior to their evaluations, a medical release permitting dissemination of the report prepared as a result of said psychiatric evaluations to ICNY or WILLIAM STERN and his wife.

7. MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, hereby agree that it is the exclusive and sole right of WILLIAM STERN, Natural Father, to name said child.

8. "Child" as referred to in this Agreement shall include all children born simultaneously pursuant to the inseminations contemplated herein.

9. In the event of the death of WILLIAM STERN, prior or subsequent to the birth of said child, it is hereby understood and agreed by MARY BETH WHITEHEAD, Surrogate, and RICHARD WHITEHEAD, her husband, that the child will be placed in the custody of WILLIAM STERN'S wife.

10. In the event that the child is miscarried prior to the fifth (5th) month of pregnancy, no compensation, as enumerated in paragraph 4(A), shall be paid to MARY BETH WHITEHEAD, Surrogate. However, the expenses enumerated in paragraph 4(C) shall be paid or reimbursed to MARY BETH WHITEHEAD, Surrogate. In the event the child is miscarried, dies or is stillborn subsequent to the fourth (4th) month of pregnancy and said child does not survive, the Surrogate shall receive $1,000.00 in lieu of the compensation enumerated in paragraph 4(A). In the event of a miscarriage or stillbirth as described above, this Agreement shall terminate and neither MARY BETH WHITEHEAD, Surrogate, nor WILLIAM STERN, Natural Father, shall be under any further obligation under this Agreement.

11. MARY BETH WHITEHEAD, Surrogate, and WILLIAM STERN, Natural Father, shall have undergone complete physical and genetic evaluation, under the direction and supervision of a licensed physician, to determine whether the physical health and will-being of each is satisfactory. Said physical examination shall include testing for venereal diseases, specifically including but not limited to, syphilis, herpes and gonorrhea. Said venereal disease testing shall be done prior to, but not limited to, each series of insemination.

12. In the event that pregnancy has not occurred within a reasonable time, in the opinion of WILLIAM STERN, Natural Father, this Agreement shall terminate by written notice to MARY BETH WHITEHEAD, Surrogate, at the residence provided to the ICNY by the Surrogate, form ICNY, as representative of WILLIAM STERN, Natural Father.

**1268 13. MARY BETH WHITEHEAD, Surrogate, agrees that she will not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of MARY BETH WHITEHEAD or the child has been determined by said physician to be physiologically abnormal. MARY BETH WHITEHEAD further agrees, upon the request of said physician to undergo amniocentesis (see Exhibit "D") or similar tests to detect genetic and congenital defects. In the event said test reveals that the fetus is genetically or congenitally abnormal, MARY BETH WHITEHEAD, Surrogate, agrees to abort the fetus upon demand of WILLIAM STERN, Natural Father, in which event, the fee paid to the Surrogate will be in accordance to Paragraph 10. If MARY BETH WHITEHEAD refuses to abort the fetus upon demand of WILLIAM STERN, his obligations as stated in this Agreement shall cease forthwith, except as to obligations of paternity imposed by statute.

14. Despite the provisions of Paragraph 13, WILLIAM STERN, Natural Father, recognizes that some genetic and congenital abnormalities may not be detected by amniocentesis or other tests, and therefore, if proven to be the biological father of the child, assumes the legal responsibility for any child who may possess genetic or congenital abnormalities. (See Exhibits "E" and "F").

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15. MARY BETH WHITEHEAD, Surrogate, further agrees to adhere to all medical instructions given to her by the inseminating physician as well as her independent obstetrician. MARY BETH WHITEHEAD also agrees not to smoke cigarettes, drink alcoholic beverages, use illegal drugs, or take non-prescription medications or prescribed medications without written consent from her physician. MARY BETH WHITEHEAD agrees to follow a prenatal medical examination schedule to consist of no fewer visits than: one visit per month during the first seven (7) months of pregnancy, two visits (each to occur at two-week intervals) during the eighth and ninth month of pregnancy.

16. MARY BETH WHITEHEAD, Surrogate, agrees to cause RICHARD WHITEHEAD, her husband, to execute a refusal of consent form as annexed hereto as Exhibit "G".

17. Each party acknowledges that he or she fully understands this Agreement and its legal effect, and that they are signing the same freely and voluntarily and that neither party has any reason to believe that the other(s) did not freely and voluntarily execute said Agreement.

18. In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, then said provision shall be deemed valid to the extent of the scope or breadth permitted by law.

****1269** 19. The original of this Agreement, upon execution, shall be retained by the Infertility Center of New York, with photocopies being distributed to MARY BETH WHITEHEAD, Surrogate and WILLIAM STERN, Natural Father, having the same legal effect as the original.

2/6/85

DATE
/s/ signature

WILLIAM STERN
Natural Father
State of New York)
) SS.:
County of New York)

On the 6th day of February, 1985, before me personally came WILLIAM STERN, known to me, and to me known, to be the individual described in the foregoing instrument and he acknowledged to me that he executed the same as his free and voluntary act.

/s/ signature

NOTARY PUBLIC

APPENDIX B

We have read the foregoing five pages of this Agreement, and it is our collective intention by affixing our signatures below, to enter into a binding legal obligation.

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/s/ signature 1-30-85

MARY BETH WHITEHEAD, Surrogate DATE

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/s/ signature 1-30-85

RICHARD WHITEHEAD DATE

Surrogate's Husband

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.....

STATE OF New York)

) SS.:

COUNTY OF New York)

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On the 6th day of February, 1985, before me personally came MARY BETH WHITEHEAD, known to me, and to me known to be the individual described in the foregoing instrument and she acknowledged to me that she executed the same as her free and voluntary act.

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/s/ signature

NOTARY PUBLIC

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STATE OF New York)

) SS.:

COUNTY OF New York)

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On the 6th day of February, 1985, before me personally came RICHARD WHITEHEAD, known to me, and to me known to be the individual described in the foregoing instrument and he acknowledged to me that he executed the same as his free and voluntary act.

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/s/ signature

NOTARY PUBLIC

AGREEMENT

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THIS AGREEMENT is made this Third day of December 1984, by and between William Stern hereinafter referred to as Natural Father, and the Primary Research Associates of United States, Inc., d/b/a/ Infertility Center of New York, (hereinafter referred to as "ICNY").

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WHEREAS, Natural Father is desirous of taking part in the process of surrogate parenting wherein he will attempt to conceive a child by artificial insemination of a surrogate mother;

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WHEREAS, ICNY is a corporation duly organized and existing under the laws of the State of New York for the purpose inter alia of engaging in research, developmental work and design in the areas of surrogate parenting, ovum transfer and in vitro fertilization with implantation in a surrogate; and additionally providing administrative and supportive services for the above; and

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WHEREAS, Natural Father is desirous of contracting with ICNY for such services; and

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WHEREAS ICNY is desirous of contracting with the Natural Father to provide such services;

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NOW THEREFORE, in consideration of the actual promises contained herein, and with the intentions of being legally bound hereby, the parties mutually agree as follows:

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(1) Natural Father hereby contracts with ICNY for the services offered by ICNY and ICNY agrees to contract with the Natural Father to use its best efforts to assist the Natural Father in the selection of the "surrogate mother" as hereinafter defined, it being understood that the final selection of the "surrogate mother" is solely within the discretion of the Natural Father. In addition to assisting the Natural Father in the selection of a "surrogate mother", ICNY shall also provide the services set forth in Exhibit "A" annexed hereto and made a part hereof and these services shall continue until the completion of the duties and obligations of surrogate or until such time as the Natural Father decides not to utilize ICNY's services, provided that the Natural Father is not in breach of this Agreement.

.....

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(2) Natural Father agrees and understands that he must enter into an agreement with the selected surrogate mother whereby Natural Father agrees to the process of artificial insemination with the use of his semen for the purpose of impregnating the surrogate mother. Thereafter, the surrogate mother shall give birth to a child fathered by the Natural Father and voluntarily surrender custody of said child to the Natural Father.

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(3) Natural Father hereby agrees to pay ICNY as compensation for the services provided by ICNY the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00) incurred by ICNY on behalf of the Natural Father. The Natural Father understands and agrees that said sum is non-refundable. A partial list of costs and expenses is annexed hereto and made a

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part hereof as Exhibit "B". ICNY shall on a periodic basis bill the Natural Father for the costs and expenses incurred on behalf of the Natural Father.

The Natural Father agrees that ICNY shall act as escrow agent for the fee to be paid by the Natural Father to the selected surrogate mother.

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(4) The following list of definitions shall apply throughout this Agreement:

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(a) "Child" is defined as all children born simultaneously as a result of the insemination contemplated by this Agreement.

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(b) "Natural Father" is defined as the individual over the age of eighteen (18) who has selected the surrogate mother and whose semen is used in the insemination contemplated herein resulting in the birth of the child.

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(c) "Surrogate mother" is defined as a woman over the age of eighteen (18) selected by the

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Natural Father to be impregnated by the process of artificial insemination with semen of the Natural Father for the purpose of becoming pregnant and giving birth to a child and surrendering the child to the Natural Father.

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(5) ICNY agrees to provide the services detailed in Exhibit "A". Said services including the offering, at the option of the Natural Father, of legal representation of the Natural Father in his negotiations and agreement with the surrogate mother. The Natural Father understands and acknowledges that ICNY offers these legal services through the law firm retained by ICNY but, ICNY makes no representations or warranties with respect to matters of law or the legality of surrogate parenting and is not rendering legal services or providing legal advice. However, the Natural Father has the absolute right to seek legal counsel of his own selection in his negotiations and agreement with the selected surrogate mother or her representative. In the event the Natural Father utilizes the legal services of counsel other than the law firm retained by ICNY, all legal fees and cost shall be borne by the Natural Father and such fees and costs shall be in addition to the fees and costs set forth in Paragraph 3 of this Agreement.

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(6) Prior to signing this Agreement, each party has been given the opportunity to consult with an attorney of his own choice concerning the terms and legal significance of the Agreement, and the effect which it has upon any and all interests of the parties. Each party acknowledges that he fully understands the Agreement and its legal effect, and that he is signing the same freely and voluntarily and that neither party has any reason to believe that the other did not understand fully the terms and effects of this Agreement, or that he did not freely and voluntarily execute this Agreement.

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(7) Natural Father warrants and represents the following to ICNY:

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(a) That the Natural Father's semen is of sufficient nature both quantitatively and qualitatively to impregnate the selected surrogate mother.

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(b) That the Natural Father is medically free from disease or other hereditary medical problems which could cause injury, defect, or disease to the surrogate mother or child.

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(c) That the Natural Father will not make or attempt to make directly or through a representative, a subsequent agreement with the selected surrogate mother or any other surrogates introduced to the Natural Father by ICNY before or at any time after the birth of his child. In the event of a further arrangement with the surrogate for a child is made, the Natural Father agrees to pay to ICNY a second fee in the amount specified in Paragraph 3 of this Agreement.

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(8) Natural Father agrees that breach of any of his warranties and representations shall

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cause this Agreement to immediately terminate but in no way relieve the Natural Father from his obligations under this Agreement. Further; the Natural Father agrees that his warranties and representations shall survive the termination of this Agreement.

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(9) Natural Father hereby acknowledges that ICNY makes no representations or warranties with respect to any agreement or understanding which may be reached, or may have been reached, between himself and a prospective "surrogate mother." Natural Father further acknowledges that the nature of any such agreement or understanding as well as all ramifications, obligations and enforcement matters relating thereto are subjects which he must seek advice from his attorney.

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(10) It is expressly understood that ICNY does not guarantee or warrant that the "surrogate mother" will in fact conceive a child fathered by Natural Father; nor does ICNY guarantee or warrant that if a child is conceived, it will be a healthy child, free from all defects; nor does ICNY guarantee or warrant the "surrogate mother" (and her husband, if applicable) will comply with the terms and provisions of the separate agreement entered into between herself and Natural Father including but not limited to, the "surrogate mother's" refusal to surrender custody of the child upon birth.

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(11) Natural Father hereby specifically releases ICNY and its officers, employees, agents and representatives from any and all liability and responsibility of any nature whatsoever except willful and gross negligence, which may result from complications, breaches, damages, losses, claims, actions, liabilities, whether actual or asserted of any kind, and all other costs or detriments of any kind, in any way related to or arising from any agreement or

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understanding between himself and a "surrogate mother" located through the services of ICNY. Moreover, the Natural Father understands the relationship between ICNY and the relationship of the doctors used in connection with insemination, monitoring and any other medical or psychiatric procedure or treatment of the surrogate or of the child is that of an independent contractor and that there is no other relationship between the parties.

.....

.....

(12) This Agreement is binding on each party's respective executors, heirs, assigns and successors.

.....

.....

(13) This Agreement has been drafted, negotiated and executed in New York, New York, and shall be governed by, continued and enforced in accordance with the laws of the State of New York.

.....

.....

(14) In the event any of the provisions of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the reminder of this Agreement. If such provision(s) shall be deemed invalid due to its scope or breadth, then said provision(s) shall be deemed valid to the extent of the scope or breadth permitted by law.

.....

.....

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.....

<signature>

Witness

<signature>

Natural Father

.....

.....

.....

<signature>

Witness

By: /s/ signature

PRIMARY RESEARCH ASSOCIATES

OF UNITED STATES, INC. d/b/a

INFERTILITY CENTER OF NEW

YORK.

537 A.2d 1227, 77 A.L.R.4th 1, 56 USLW 2442

Parallel Citations

Footnotes

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1 Subsequent to the trial court proceedings, Mr. and Mrs. Whitehead were divorced, and soon thereafter Mrs. Whitehead remarried. Nevertheless, in the course of this opinion we will make reference almost exclusively to the facts as they existed at the time of trial, the facts on which the decision we now review was reached. We note moreover that Mr. Whitehead remains a party to this dispute. For these reasons, we continue to refer to appellants as Mr. and Mrs. Whitehead.

2 The Stern–Whitehead contract (the "surrogacy contract") and the Stern–ICNY contract are reproduced below as Appendices A and B respectively. Other ancillary agreements and their attachments are omitted.

3 Another argument advanced by Mrs. Whitehead is that the surrogacy agreement violates state wage regulations, *N.J.S.A.* 34:11–4.7, and the Minimum Wage Standard Act, *N.J.S.A.* 34:11–56a to –56a30. Given our disposition of the matter, we need not reach those issues.

4 *N.J.S.A.* 9:3–54 reads as follows:

> a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith
> (1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or
> (2) Take, receive, accept or agree to accept any money or any valuable consideration.
> b. The prohibition of subsection a. shall not apply to the fees or services of any approved agency in connection with a placement for adoption, nor shall such prohibition apply to the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child, or to the acceptance of such reimbursement by a parent of the child.
> c. Any person, firm, partnership, corporation, association or agency violating this section shall be guilty of a high misdemeanor.

5 Of course, here there are no "adoptive parents," but rather the natural father and his wife, the only adoptive parent. As noted, however, many of the dangers of using money in connection with adoption may exist in surrogacy situations.

6 Counsel for the Sterns argues that the Parentage Act empowers the court to terminate parental rights solely on the basis of the child's best interests. He cites *N.J.S.A.* 9:17–53c, which reads, in pertinent part, as follows:

> The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, the repayment of any public assistance grant, or *any other matter in the best interests of the child.* [Emphasis supplied].

We do not interpret this section as in any way altering or diluting the statutory prerequisites to termination discussed above. Termination of parental rights differs qualitatively from the matters to which this section is expressly directed, and, in any event, we have no doubt that if the Legislature had intended a substantive change in the standards governing an area of such gravity, it would have said so explicitly.

7 We conclude not only that the surrogacy contract is an insufficient basis for termination, but that no statutory or other basis for termination existed. See *infra* at 1251–1253.

8 The surrogacy situation, of course, differs from the situation in *Sees,* in that here there is no "adoptive couple," but rather the natural father and the stepmother, who is the would-be adoptive mother. This difference, however, does not go to the basis of the *Sees* holding. In both cases, the determinative aspect is the vulnerability of the natural mother who decides to surrender her child in the absence of institutional safeguards.

9 And the impact on the natural parents, Mr. Stern and Mrs. Whitehead, is severe and dramatic. The depth of their conflict about Baby M, about custody, visitation, about the goodness or badness of each of them, comes through in their telephone conversations, in which each tried to persuade the other to give up the child. The potential adverse consequences of surrogacy are poignantly captured here—Mrs. Whitehead threatening to kill herself and the baby, Mr. Stern begging her not to, each blaming the other. The dashed hopes of the Sterns, the agony of Mrs. Whitehead, their suffering, their hatred—all were caused by the unraveling of this arrangement.

10 We note the argument of the Sterns that the sperm donor section of our Parentage Act, *N.J.S.A.* 9:17–38 to –59, implies a legislative policy that would lead to approval of this surrogacy contract. Where a married woman is artificially inseminated by another with her husband's consent, the Parentage Act creates a parent-child relationship between the husband and the resulting child. *N.J.S.A.* 9:17–44. The Parentage Act's silence, however, with respect to surrogacy, rather than supporting, defeats any contention that surrogacy should receive treatment parallel to the sperm donor artificial insemination situation. In the latter case the statute expressly transfers parental rights from the biological father, *i.e.,* the sperm donor, to the mother's husband. *Ibid.* Our

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Legislature could not possibly have intended any other arrangement to have the consequence of transferring parental rights without legislative authorization when it had concluded that legislation was necessary to accomplish that result in the sperm donor artificial insemination context.

This sperm donor provision suggests an argument not raised by the parties, namely, that the attempted creation of a parent-child relationship through the surrogacy contract has been preempted by the Legislature. The Legislature has explicitly recognized the parent-child relationship between a child and its natural parents, married and unmarried, *N.J.S.A.* 9:17–38 to –59, between adoptive parents and their adopted child, *N.J.S.A.* 9:3–37 to –56, and between a husband and his wife's child pursuant to the sperm donor provision, *N.J.S.A.* 9:17–44. It has not recognized any others—specifically, it has never legally equated the stepparent-stepchild relationship with the parent-child relationship, and certainly it has never recognized any concept of adoption by contract. It can be contended with some force that the Legislature's statutory coverage of the creation of the parent-child relationship evinces an intent to reserve to itself the power to define what is and is not a parent-child relationship. We need not, and do not, decide this question, however.

11 Michigan courts have also found that these arrangements conflict with various aspects of their law. *See Doe v. Kelley,* 106 *Mich.App.* 169, 307 *N.W.*2d 438 (1981), *cert.* den., 459 *U.S.* 1183, 103 *S.Ct.* 834, 74 *L.Ed.*2d 1027 (1983) (application of sections of Michigan Adoption Law prohibiting the exchange of money to surrogacy is constitutional); *Syrkowski v. Appleyard,* 122 *Mich.App.* 506, 333 *N.W.*2d 90 (1983) (court held it lacked jurisdiction to issue an "order of filiation" because surrogacy arrangements were not governed by Michigan's Paternity Act), *rev'd,* 420 *Mich.* 367, 362 *N.W.*2d 211 (1985) (court decided Paternity Act should be applied but did not reach the merits of the claim).

Most recently, a Michigan trial court in a matter similar to the case at bar held that surrogacy contracts are void as contrary to public policy and therefore are unenforceable. The court expressed concern for the potential exploitation of children resulting from surrogacy arrangements that involve the payment of money. The court also concluded that insofar as the surrogacy contract may be characterized as one for personal services, the thirteenth amendment should bar specific performance. *Yates v. Keane,* Nos. 9758, 9772, slip op. (Mich.Cir.Ct. Jan. 21, 1988).

The Supreme Court of Kentucky has taken a somewhat different approach to surrogate arrangements. In *Surrogate Parenting Assocs. v. Commonwealth ex. rel. Armstrong,* 704 *S.W.*2d 209 (Ky.1986), the court held that the "fundamental differences" between surrogate arrangements and baby-selling placed the surrogate parenting agreement beyond the reach of Kentucky's baby-selling statute. *Id.* at 211. The rationale for this determination was that unlike the normal adoption situation, the surrogacy agreement is entered into before conception and is not directed at avoiding the consequences of an unwanted pregnancy. *Id.* at 211–12.

Concomitant with this pro-surrogacy conclusion, however, the court held that a "surrogate" mother has the right to void the contract if she changes her mind during pregnancy or immediately after birth. *Id.* at 212–13. The court relied on statutes providing that consent to adoption or to the termination of parental rights prior to five days after the birth of the child is invalid, and concluded that consent before conception must also be unenforceable. *Id.* at 212–13.

The adoption phase of an uncontested surrogacy arrangement was analyzed in *Matter of Adoption of Baby Girl, L.J.,* 132 *Misc.*2d 972, 505 *N.Y.S.*2d 813 (Sur.1986). Although the court expressed strong moral and ethical reservations about surrogacy arrangements, it approved the adoption because it was in the best interests of the child. *Id.* at 815. The court went on to find that surrogate parenting agreements are not void, but are voidable if they are not in accordance with the state's adoption statutes. *Id.* at 817. The court then upheld the payment of money in connection with the surrogacy arrangement on the ground that the New York Legislature did not contemplate surrogacy when the baby-selling statute was passed. *Id.* at 818. Despite the court's ethical and moral problems with surrogate arrangements, it concluded that the Legislature was the appropriate forum to address the legality of surrogacy arrangements. *Ibid.*

In contrast to the law in the United States, the law in the United Kingdom concerning surrogate parenting is fairly well-settled. Parliament passed the Surrogacy Arrangements Act, 1985, ch. 49, which made initiating or taking part in any negotiations with a view to making or arranging a surrogacy contract a criminal offense. The criminal sanction, however, does not apply to the "surrogate" mother or to the natural father, but rather applies to other persons engaged in arranging surrogacy contracts on a commercial basis. Since 1978, English courts have held surrogacy agreements unenforceable as against public policy, such agreements being deemed arrangements for the purchase and sale of children. *A. v. C.,* [1985] *F.L.R.* 445, 449 (Fam. & C.A.1978). It should be noted, however, that certain surrogacy arrangements, *i.e.,* those arranged without brokers and revocable by the natural mother, are not prohibited under current law in the United Kingdom.

12 Opponents of surrogacy have also put forth arguments based on the thirteenth amendment, as well as the Peonage Act, 42 *U.S.C.* § 1994 (1982). We need not address these arguments because we have already held the contract unenforceable on the basis of state law.

13 As a general rule, a person should be accorded the right to make decisions affecting his or her own body, health, and life, unless that choice adversely affects others. Thus, the United States Supreme Court, while recognizing the right of women to control their own bodies, has rejected the view that the federal constitution vests a pregnant woman with an absolute right to terminate her pregnancy. Instead, the Court declared that the right was "not absolute" so that "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Roe v. Wade, supra,* 410 *U.S.* at 155, 93 *S.Ct.* at 728, 35 *L.Ed.*2d at 178. The balance struck in *Roe v. Wade* recognizes increasing rights in the fetus and correlative restrictions on the mother as the

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pregnancy progresses. Similarly, in the termination-of-treatment cases, courts generally have viewed a patient's right to terminate or refuse life-sustaining treatment as constrained by other considerations including the rights of innocent third parties, such as the patient's children. *Matter of Farrell,* 108 *N.J.* 335, 352, 529 *A.*2d 404 (1987); *Matter of Conroy,* 98 *N.J.* 321, 353, 486 *A.*2d 1209 (1985). Consistent with that approach, this Court has directed a mother to submit to a life-saving blood transfusion to protect the interests of her unborn infant, even though the mother's religious scruples led her to oppose the transfusion. *Raleigh–Fitkin Paul Morgan Hosp. v. Anderson,* 42 *N.J.* 421, 423, 201 *A.*2d 537 (1964); see also *Application of President & Directors of Georgetown College,* 331 *F.*2d 1000, 1008 (D.C.Cir.), *cert.* den., 377 *U.S.* 978, 84 *S.Ct.* 1883, 12 *L.Ed.*2d 746 (1964) (ordering blood transfusion because of mother's "responsibility to the community to care for her infant").

In the present case, the parties' right to procreate by methods of their own choosing cannot be enforced without consideration of the state's interest in protecting the resulting child, just as the right to the companionship of one's child cannot be enforced without consideration of that crucial state interest.

14 This fundamental right is not absolute. The parent-child biological relationship, by itself, does not create a protected interest in the absence of a demonstrated commitment to the responsibilities of parenthood; a natural parent who does not come forward and seek a role in the child's life has no constitutionally protected relationship. *Lehr v. Robertson, supra,* 463 *U.S.* at 258–62, 103 *S.Ct.* at 2991–93, 77 *L.Ed.*2d at 624–27; *Quilloin v. Walcott, supra,* 434 *U.S.* at 254–55, 98 *S.Ct.* at 554, 54 *L.Ed.*2d at 519–20. The right is not absolute in another sense, for it is also well settled that if the state's interest is sufficient the right may be regulated, restricted, and on occasion terminated. *See Santosky v. Kramer, supra,* 455 *U.S.* 745, 102 *S.Ct.* 1388, 71 *L.Ed.*2d 599.

15 Were we to find such a constitutional determination necessary, we would be faced with the question of whether it was state action—essential in triggering the fourteenth amendment—that deprived her of that right *i.e.,* whether the judicial decision enforcing the surrogacy contract should be considered "state action" within the scope of the fourteenth amendment. *See Shelley v. Kraemer,* 334 *U.S.* 1, 68 *S.Ct.* 836, 92 *L.Ed.* 1161 (1948); Cherminsky, "Rethinking State Action," 80 *Nw.U.L.Rev.* 503 (1985).

16 If the Legislature were to enact a statute providing for enforcement of surrogacy agreements, the validity of such a statute might depend on the strength of the state interest in making it more likely that infertile couples will be able to adopt children. As a value, it is obvious that the interest is strong; but if, as plaintiffs assert, ten to fifteen percent of all couples are infertile, the interest is of enormous strength. This figure is given both by counsel for the Sterns and by the trial court, 217 *N.J.Super.* at 331, 525 *A.*2d 1128. We have been unable to find reliable confirmation of this statistic, however, and we are not confident of its accuracy. We note that at least one source asserts that in 1982, the rate of married couples who were both childless and infertile was only 5.8%. B. Wattenberg, The Birth Dearth 125 (1987).

On such quantitative differences, constitutional validity can depend, where the statute in question is justified as serving a compelling state interest. The quality of the interference with the parents' right of companionship bears on these issues: if a statute, like the surrogacy contract before us, made the consent given prior to conception irrevocable, it might be regarded as a greater interference with the fundamental right than a statute that gave that effect only to a consent executed, for instance, more than six months after the child's birth. There is an entire spectrum of circumstances that strengthen and weaken the fundamental right involved, and a similar spectrum of state interests that justify or do not justify particular restrictions on that right. We do not believe it would be wise for this Court to attempt to identify various combinations of circumstances and interests, and attempt to indicate which combinations might and which might not constitutionally permit termination of parental rights.

We will say this much, however: a parent's fundamental right to the companionship of one's child can be significantly eroded by that parent's consent to the surrender of that child. That surrender, if voluntarily and knowingly made, may reduce the strength of that fundamental right to the point where a statute awarding custody and all parental rights to an adoptive couple, especially one that includes a parent of the child, would be valid.

17 At common law the rights of women were so fragile that the husband generally had the paramount right to the custody of children upon separation or divorce. *State v. Baird,* 21 *N.J.Eq.* 384, 388 (E. & A. 1869). In 1860 a statute concerning separation provided that children "within the age of seven years" be placed with the mother "unless said mother shall be of such character and habits as to render her an improper guardian." *L.*1860, *c.* 167. The inequities of the common-law rule and the 1860 statute were redressed by an 1871 statute, providing that "the rights of both parents, in the absence of misconduct, shall be held to be equal." *L.*1871, *c.* 48, § 6 (currently codified at *N.J.S.A.* 9:2–4). Under this statute the father's superior right to the children was abolished and the mother's right to custody of children of tender years was also eliminated. Under the 1871 statute, "the happiness and welfare of the children" were to determine custody, *L.*1871, *c.* 48, § 6, a rule that remains law to this day. *N.J.S.A.* 9:2–4.

Despite this statute, however, the "tender years" doctrine persisted. *See, e.g., Esposito v. Esposito,* 41 *N.J.* 143, 145, 195 *A.*2d 295 (1963); *Dixon v. Dixon,* 71 *N.J.Eq.* 281, 282, 71 *A.* 1133 (E. & A.1906); *M.P. v. S.P.,* 169 *N.J.Super.* 425, 435, 404 *A.*2d 1256 (App.Div.1979). This presumption persisted primarily because of the prevailing view that a young child's best interests necessitated a mother's care. Both the development of case law and the Parentage Act, *N.J.S.A.* 9:17–40, however, provide for equality in custody claims. In *Beck v. Beck,* 86 *N.J.* 480, 488, 432 *A.*2d 63 (1981), we stated that it would be inappropriate "to establish a presumption ... in favor of any particular custody determination," as any such presumption may "serve as a disincentive for the meticulous fact-finding required in custody cases." This does not mean that a mother who has had custody of her child for three, four, or five months does not have a particularly strong claim arising out of the unquestionable bond that exists at that point between the child and its mother; in other words, equality does not mean that all of the considerations

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underlying the "tender years" doctrine have been abolished.

18 Subsequent to trial, and by the time of oral argument, Mr. and Mrs. Whitehead had separated, and the representation was that there was no likelihood of change. Thereafter Mrs. Whitehead became pregnant by another man, divorced Mr. Whitehead, and remarried the other man. Both children are living with Mrs. Whitehead and her new husband. Both the former and present husband continue to assert the desire to have whatever parental relationship with Melissa that the law allows, Mrs. Whitehead continuing to maintain her claim for custody.

We refer to this development only because it suggests less stability in the Whiteheads' lives. It does not necessarily suggest that Mrs. Whitehead's conduct renders her any less a fit parent. In any event, this new development has not affected our decision.

19 As we have done in similar situations, we order that this matter be referred on remand to a different trial judge by the vicinage assignment judge. The original trial judge's potential "commitment to its findings," *New Jersey Div. of Youth & Family Servs. v. A.W., supra,* 103 *N.J.* at 617, 512 *A.*2d 438, and the extent to which a judge "has already engaged in weighing the evidence," *In re Guardianship of R.*, 155 *N.J.Super.* 186, 195, 382 *A.*2d 654 (App.Div.1977), persuade us to make that change. On remand the trial court will consider developments subsequent to the original trial court's opinion, including Mrs. Whitehead's divorce, pregnancy, and remarriage.

20 Ordinarily relaxation of the Rules of Evidence depends on specific authority, either within the Rules or in statutes. *See* N.J.Rules of Evidence, Comment 2 to Evid.R. 2(2), 72–76 (1987). There are numerous examples, however, of relaxation of these Rules in judicial proceedings for reasons peculiar to the case at hand. We regard the circumstances of the visitation aspect of this case as most unusual. In addition to the ordinary risks to the stability of an infant caused by prolonging this type of litigation, here there are risks from publicity that we simply cannot quantify. We have no doubt that these circumstances justify any sensible means of abbreviating the remand hearing.

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37 Cal.4th 108
Supreme Court of California

ELISA B., Petitioner,
v.
The SUPERIOR COURT of El Dorado County,
Respondent;
Emily B. et al., Real Parties in Interest.

No. S125912. | Aug. 22, 2005.

Synopsis
Background: County filed action to establish that former lesbian partner was obliged to pay child support to mother, who was receiving public assistance, for children who were conceived intentionally while relationship was extant. The Superior Court, El Dorado County, No. PFS20010244, Gregory Ward Dwyer, Commissioner, ordered former partner to pay child support. Former partner petitioned for writ of mandate. The Court of Appeal issued writ. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Moreno, J., held that:

[1] under the Uniform Parentage Act (UPA), a child may have two parents, both of whom are women, and

[2] former partner was presumed parent under UPA, circumstances existed which made this an inappropriate action in which the presumption should be rebutted, and thus former partner was obliged to pay child support, disapproving *Curiale v. Reagan,* 222 Cal.App.3d 1597, 272 Cal.Rptr. 520, *Nancy S. v. Michele G.,* 228 Cal.App.3d 831, 279 Cal.Rptr. 212, and *West v. Superior Court,* 59 Cal.App.4th 302, 69 Cal.Rptr.2d 160.

Judgment of Court of Appeal reversed.

Kennard, J., filed concurring opinion.

Opinion, 13 Cal.Rptr.3d 494, superseded.

Attorneys and Law Firms

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No appearance for Respondent.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, James M. Humes, Chief Assistant Attorney General, Thomas R. Yanger, Assistant Attorney General, Margarita Altamirano and Kara Read-Spangler, Deputy Attorneys General for the public interest pursuant to Family Code sections 17406–17407.

Louis B. Green, County Counsel, Edward L. Knapp, Chief Assistant County Counsel; Mary A. Roth, San Francisco; and Mary Jane Hamilton, Carmichael, for Real Party in Interest County of El Dorado.

National Center for Lesbian Rights, Shannon Minter and Courtney Joslin, San Francisco, for Real Party in Interest Emily B.

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Alice Bussiere for The Center for Children's Rights at Whittier Law School, The Legal Aid Foundation of Los Angeles, The National Center for Youth Law, The Youth Law Center and Joan Heifetz Hollinger and the Children's Advocacy Project, Boalt Hall as Amici Curiae on behalf of Real Party in Interest Emily B.

Jennifer C. Pizer and Amber Garza for Children of Lesbians and Gays Everywhere, Equality California, Family Matters, Family Pride Coalition, Growing Generations, Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, Our Family Coalition, the Pop Luck Club and Southern California Assisted Reproduction Attorneys as Amici Curiae on behalf of Real Party in Interest Emily B.

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ACLU Foundation of Southern California, Clare Pastore, Christine Sun, San Francisco; ***48** ACLU Foundation

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of Northern California, Alan Schlosser, San Francisco; ACLU Foundation of San Diego and Imperial Counties, Jordan Budd, Elvira Cacciavillani; ACLU Foundation Lesbian and Gay Rights Project and James Esseks for the American Civil Liberties Union of Southern California, the American Civil Liberties Union of Northern California, the American Civil Liberties Union of San Diego and Imperial Counties and the American Civil Liberties Union as Amici Curiae on behalf of Real Party in Interest Emily B.

Maxie Rheinheimer Stephens & Vrevich, Darin L. Wessel, Los Angeles; Laura J. Maechtlen, Sacramento; and Vanessa H. Eisemann, Pasadena, for Tom Homann Law Association, Bay Area Lawyers for Individual Freedom, Lesbian and Gay Lawyers Association of Los Angeles, and Sacramento Lawyers for the Equality of Gays and Lesbians as Amici Curiae on behalf of Real Parties in Interest Emily B. and El Dorado County.

Donna Wickham Furth, San Francisco; Wilke, Fleury, Hoffelt, Gould & Birney and William A. Gould, Jr., San Francisco, for Northern California Association of Counsel for Children, National Association of Counsel for Children and The California Psychological Association as Amici Curiae on behalf of Minors.

Geragos & Geragos, Gregory R. Ellis, San Francisco; and Rebekah A. Frye for The Los Angeles County Bar Association, The San Fernando Valley Bar Association and its Family Law Center, The Family Law Section of the Beverly Hills Bar Association, The Bar Association of San Francisco, The Association of Certified Law Specialists and Women Lawyers Association of Los Angeles as Amici Curiae on behalf of Minors.

Morrison & Foerster, Ruth N. Borenstein, San Francisco, and Johnathan E. Mansfield, San Francisco, for California NOW, Inc., and California Women's Law Center as Amici Curiae.

Opinion

MORENO, J.

***113 **662** We granted review in this case, as well as in *K.M. v. E.G.* (Aug. 22, 2005, S125643) 37 Cal.4th 130, 33 Cal.Rptr.3d 61, 117 P.3d 673, 2005 WL 2000860, and *Kristine H. v. Lisa R.* (Aug. 22, 2005, S126945) 37 Cal.4th 156, 33 Cal.Rptr.3d 81, 117 P.3d 690, 2005 WL 2000908 to consider the parental rights and obligations, if any, of a woman with regard to a child born to her partner in a lesbian relationship.

In the present action for child support filed by the El Dorado County District Attorney, we conclude that a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children's parent under the Uniform Parentage Act and has an obligation to support them.

FACTS

On June 7, 2001, the El Dorado County District Attorney filed a complaint in superior court to establish that Elisa B. is a parent of two-year-old twins Kaia B. and Ry B., who were born to Emily B.,[1] and to order Elisa to ****663** pay child support.[2] Elisa *****49** filed an answer in which she denied being the children's parent.

A hearing was held at which Elisa testified that she entered into a lesbian relationship with Emily in 1993. They began living together six months later. Elisa obtained a tattoo that read "Emily, por vida," which in Spanish means Emily, for life. They introduced each other to friends as their "partner," exchanged rings, opened a joint bank account, and believed they were in a committed relationship.

***114** Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily "would be the stay-at-home mother" and Elisa "would be the primary breadwinner for the family." At a sperm bank, they chose a donor they both would use so the children would "be biological brothers and sisters."

After several unsuccessful attempts, Elisa became pregnant in February, 1997. Emily was present when Elisa was inseminated. Emily began the insemination process in June of 1997 and became pregnant in August, 1997. Elisa was present when Emily was inseminated and, the next day, Elisa picked up additional sperm at the sperm bank and again inseminated Emily at their home to "make sure she got pregnant." They went to each other's medical appointments during pregnancy and attended childbirth classes together so that each could act as a "coach" for the other during birth, including cutting the children's umbilical cords.

Elisa gave birth to Chance in November, 1997, and Emily gave birth to Ry and Kaia prematurely in March, 1998. Ry had medical problems; he suffered from Down's

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Syndrome, and required heart surgery.

They jointly selected the children's names, joining their surnames with a hyphen to form the children's surname. They each breast-fed all of the children. Elisa claimed all three children as her dependents on her tax returns and obtained a life insurance policy on herself naming Emily as the beneficiary so that if "anything happened" to her, all three children would be "cared for." Elisa believed the children would be considered both of their children.

Elisa's parents referred to the twins as their grandchildren, and her sister referred to the twins as part of their family and referred to Elisa as the twins' mother. Elisa treated all of the children as hers and told a prospective employer that she had triplets. Elisa and Emily identified themselves as co-parents of Ry at an organization arranging care for his Down's Syndrome.

Elisa supported the household financially. Emily was not working. Emily testified that she would not have become pregnant if Elisa had not promised to support her financially, but Elisa denied that any financial arrangements were discussed before the birth of the children. Elisa later acknowledged in her testimony, however, that Emily "was going to be an at-home mom for maybe a couple of years and then the kids were going to go into day care and she was going to return to work."

They consulted an attorney regarding adopting "each other's child," but never did so. Nor did they register as domestic partners or execute a written ***115** agreement concerning the children. Elisa stated she later reconsidered adoption *****50** because she had misgivings about Emily adopting Chance.

Elisa and Emily separated in November, 1999. Elisa promised to support Emily and the twins "as much as I possibly could" and initially paid the mortgage payments of approximately $1,500 per month on the house in which Emily and the twins continued to live, as well as other expenses. Emily applied for aid. When they sold the house and Emily and the twins moved into an apartment in November, 2000, Elisa paid Emily $1,000 a month. In early 2001, Elisa stated ****664** she lost her position as a full-time employee and told Emily she no longer could support her and the twins. At the time of trial, Elisa was earning $95,000 a year.

The superior court rendered a written decision on July 11, 2002, finding that Elisa and Emily had rejected the option of using a private sperm donor because "[t]hey wanted the child to be raised *exclusively* by them as a couple." The court further found that they intended to create a child and "acted in all respects as a family," adding "that a person who uses reproductive technology is accountable as a de facto legal parent for the support of that child. Legal parentage is not determined exclusively by biology."

The court further found that Elisa was obligated to support the twins under the doctrine of equitable estoppel, finding Emily "agreed to have children with Respondent, and relied on her promise to raise and support her children. She would not have agreed to impregnation but for this agreement and understanding." "The need for the application of this doctrine is underscored by the fact that the decision of Respondent to create a family and desert them has caused the remaining family members to seek county assistance. One child that was created has special needs that will require the remaining parent or the County to be financially responsible for those needs. The child was deprived of the right to have a traditional father to take care of the financial needs of this child. Respondent chose to step in those shoes and assume the role and responsibility of the 'other' parent. This should be her responsibility and not the responsibility of the taxpayer." Elisa was subsequently ordered to pay child support in the amount of $907.50 per child for a total of $1815 per month.

Elisa petitioned the Court of Appeal for a writ of mandate, and the court directed the superior court to vacate its order and dismiss the action, concluding that Elisa had no obligation to pay child support because she was not a parent of the twins within the meaning of the Uniform Parentage Act (Fam.Code, § 7600 et seq.). We granted review.

*116 DISCUSSION

[1] We must determine whether the Court of Appeal erred in ruling that Elisa could not be a parent of the twins born to her lesbian partner, and thus had no obligation to support them. This question is governed by the Uniform Parentage Act (UPA). (Fam.Code, § 7600 et seq.)[3] The UPA defines the " '[p]arent and child relationship' " as "the legal relationship existing between a child and the child's natural or adoptive parents.... The term includes the mother and child relationship and the father and child relationship." (§ 7601.) One purpose of the UPA was to eliminate distinctions based upon whether a child was born into a marriage, and thus was "legitimate," or was born to unmarried parents, and thus was "illegitimate." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 88, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Thus, *****51** the UPA provides that the parentage of a child does not depend

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upon " 'the marital status of the parents' " (*Johnson, supra,* at p. 89, 851 P.2d 776), stating: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (§ 7602.)

The UPA contains separate provisions defining who is a "mother" and who is a "father." Section 7610 provides that "[t]he parent and child relationship may be established ...:[¶] (a) Between a child and the natural mother ... by proof of her having given birth to the child, or under this part." Subdivision (b) of section 7610 states that the parental relationship "[b]etween a child and the natural father ... may be established under this part."

Section 7611 provides several circumstances in which "[a] man is presumed to be the natural father of a child," including: if he is the husband of the child's mother, is not impotent or sterile, and was cohabiting with her (§ 7540); if he signs a voluntary declaration of paternity stating he is the "biological father of the child" (§ 7574, subd. (a)(6)); and if "[h]e receives the child into his home and openly holds out the child as his natural child" (§ 7611, subd. (d)).

****665** Although, as noted above, the UPA contains separate provisions defining who is a mother and who is a father, it expressly provides that in determining the existence of a mother and child relationship, "[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply." (§ 7650.)

The Court of Appeal correctly recognized that, under the UPA, Emily has a parent and child relationship with each of the twins because she gave birth to them. (§ 7610, subd. (a).) Thus, the Court of Appeal concluded, Emily is the ***117** twins' natural mother. Relying upon our statement in *Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776, that "for any child California law recognizes only one natural mother," the Court of Appeal reasoned that Elisa, therefore, could not also be the natural mother of the twins and thus "has no legal maternal relationship with the children under the UPA."

The Attorney General, appearing pursuant to section 17406 to "represent the public interest in establishing, modifying, and enforcing support obligations," argues that the Court of Appeal erred, stating: "*Johnson's* one-natural-mother comment cannot be thoughtlessly interpreted to deprive the child of same-sex couples the same opportunity as other children to two parents and to two sources of child support when only two parties are eligible for parentage." As we shall explain, the Attorney General is correct that our statement in *Johnson* that a child can have "only one natural mother" does not mean that both Elisa and Emily cannot be parents of the twins.

The issue before us in *Johnson* was whether a wife whose ovum was fertilized in vitro by her husband's sperm and implanted in a surrogate mother was the mother of the child so produced, rather than the surrogate. (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 87, 19 Cal.Rptr.2d 494, 851 P.2d 776.) The surrogate claimed that she was the child's mother because she had given birth to the child. No provision of the UPA expressly addresses the parental rights of a woman who, like the wife in *Johnson v. Calvert,* has not given birth to a child, but has a genetic relationship because she supplied the ovum used to impregnate the birth mother. But, as noted above, the UPA does provide that provisions applicable to determining a father and child relationship shall be used to determine a mother and child relationship "[i]nsofar as practicable." (Former *****52** Civ.Code, § 7015, now Fam.Code, § 7650.) Accordingly, we looked to the provisions regarding presumptions of paternity and concluded that "genetic consanguinity" could be the basis for a finding of maternity just as it is for paternity. (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

We concluded, therefore, that both women—the surrogate who gave birth to the child and the wife who supplied the ovum—had "adduced evidence of a mother and child relationship as contemplated by the Act." (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Anticipating this result, the American Civil Liberties Union appearing as amicus curiae urged this court to rule that the child, therefore, had two mothers. Because it was undisputed that the husband, who had supplied the semen used to impregnate the surrogate, was the child's father, this would have left the child with three parents. We declined the invitation, stating: "Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a ***118** stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish [the wife]'s role as mother." (*Id.* at p. 92, fn. 8, 19 Cal.Rptr.2d 494, 851 P.2d 776.) We held instead that "for any child California law recognizes only one natural mother" (*id.* at p. 92, 19 Cal.Rptr.2d 494, 851 P.2d 776), and proceeded to conclude that the wife, rather than the surrogate, was the child's mother: "We conclude that although the Act recognizes both genetic consanguinity

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and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended ****666** to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law." (*Id.* at p. 93, 19 Cal.Rptr.2d 494, 851 P.2d 776, fn. omitted.)

[2] In *Johnson,* therefore, we addressed the situation in which three people claimed to be the child's parents: the husband, who undoubtedly was the child's father, and two women, who presented conflicting claims to being the child's mother. We rejected the suggestion of amicus curiae that both the wife and the surrogate could be the child's mother, stating that a child can have only one mother, but what we considered and rejected in *Johnson* was the argument that a child could have three parents: a father and two mothers.[4] We did not address the question presented in this case of whether a child could have two parents, both of whom are women.[5] *****53** The Court of Appeal in the present case erred, therefore, in concluding that our statement in *Johnson* that a child can have only one mother under California law resolved the issue presented in this case. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citation.]" (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689.)[6]

***119** We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes, which took effect this year. (§ 297 et seq.) Two women "who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" and have a common residence (§ 297) can file with the Secretary of State a "Declaration of Domestic Partnership" (§ 298). Section 297.5, subdivision (d) provides, in pertinent part: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."

Prior to the effective date of the current domestic partnership statutes, we recognized in an adoption case that a child can have two parents, both of whom are women. In *Sharon S. v. Superior Court, supra,* 31 Cal.4th 417, 2 Cal.Rptr.3d 699, 73 P.3d 554, we upheld a "second parent" adoption in which the mother of a child that had been conceived by means of artificial insemination consented to adoption of the child by the mother's lesbian partner. If both parents of an adopted child can be women, we see no reason why the twins in the present case cannot have two parents, both of whom are women.

[3] Having determined that our decision in *Johnson* does not preclude a child from having two parents both of whom are women and that no reason appears that a child's two parents cannot both be women, we proceed to examine the UPA to determine whether Elisa is a parent to the twins in addition to Emily. As noted above, section 7650 provides that provisions applicable to determining ****667** a father and child relationship shall be used to determine a mother and child relationship "insofar as practicable." (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 90, 19 Cal.Rptr.2d 494, 851 P.2d 776; *in rE marriage OF buzzanca* (1998) 61 caL.app.4th 1410, 1418, 72 caL.rptr.2d 280 [the declaration in section 7613 that a husband who consents to artificial insemination is "treated in law" as the father of the child applies equally to the wife if a surrogate, rather than the wife, is artificially inseminated, making both the wife and the husband the parents of the child so produced].)

[4] Subdivision (d) of section 7611 states that a man is presumed to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child." The Court of Appeal in *In re Karen C.* (2002) 101 Cal.App.4th 932, 938, 124 Cal.Rptr.2d 677, held that subdivision (d) of section 7611 "should apply equally to women." *****54** This conclusion was echoed by the court in *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357, 4 Cal.Rptr.3d 705, which stated: "Though most of the decisional law has focused on the definition of the presumed father, the ***120** legal principles concerning the presumed father apply equally to a woman seeking presumed mother status. [Citation.]"[7]

Applying section 7611, subdivision (d), we must determine whether Elisa received the twins into her home and openly held them out as her natural children. There is no doubt that Elisa satisfied the first part of this test; it is undisputed that Elisa received the twins into her home. Our inquiry focuses, therefore, on whether she openly held out the twins as her natural children.

The circumstance that Elisa has no genetic connection to the twins does not necessarily mean that she did not hold out the twins as her "natural" children under section 7611. We held in *In re Nicholas H.* (2002) 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932 that the presumption under section 7611, subdivision (d), that a man who receives a child into his home and openly holds the child out as his natural child is not necessarily rebutted when he admits he is not the child's biological father.

The presumed father in *Nicholas H.,* Thomas, met the child's mother, Kimberly, when she was pregnant with

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Nicholas. Nevertheless, Thomas was named as the child's father on his birth certificate and provided a home for the child and his mother for several years. Thomas did not marry Kimberly. When Nicholas was removed by the court from Kimberly's care, Thomas sought custody as the child's presumed father, although he admitted he was not Nicholas's biological father.

We held in *Nicholas H.* that Thomas was presumed to be Nicholas's father despite his admission that he was not Nicholas's biological father. The Court of Appeal had reached the opposite conclusion, observing that "the Legislature has used the term 'natural' to mean 'biological' " and concluding that the presumption under section 7611, subdivision (d) is rebutted under section 7612, subdivision (a) by clear and convincing evidence "that the man is not the child's natural, biological father." (*In re Nicholas H., supra,* 28 Cal.4th 56, 62–63, 120 Cal.Rptr.2d 146, 46 P.3d 932.) We noted, however, that the UPA does not state that the presumption under section 7611, subdivision (d), *is* rebutted by evidence that the presumed father is not the child's biological father, but rather that it *may* be rebutted *in an appropriate action* by such evidence. (*In re Nicholas H., supra,* at p. 63, 120 Cal.Rptr.2d 146, 46 P.3d 932.) We held that *Nicholas H.* was not an appropriate action in which to rebut the presumption because no one had raised a conflicting claim to being the child's father. Applying the presumption, therefore, would produce the "harsh result" of leaving the child fatherless. (*Id.* at p. 59, 120 Cal.Rptr.2d 146, 46 P.3d 932.) We quoted language from the Court of Appeal opinion in ***121** *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116–1117, 39 Cal.Rptr.2d 535, recognizing that " ' " ' "[a] man who has lived with a child, treating it as his son or daughter, has developed a relationship ****668** with the child that should not be lightly dissolved.... This social relationship is much more important, to the child at least, than a biological relationship of actual paternity...." ' " ' " (*In* *****55** *re Nicholas H., supra,* 28 Cal.4th at p. 65, 120 Cal.Rptr.2d 146, 46 P.3d 932; *In re Jesusa V.* (2004) 32 Cal.4th 588, 604, 10 Cal.Rptr.3d 205, 85 P.3d 2 ["the statute did not contemplate a reflexive rule that biological paternity would rebut the section 7611 presumption in all cases, without concern for whether rebuttal was 'appropriate' in the particular circumstances"].)

The Court of Appeal in *In re Karen C., supra,* 101 Cal.App.4th 932, 938, 124 Cal.Rptr.2d 677, applied the principles discussed in *Nicholas H.* regarding presumed fathers and concluded that a woman with no biological connection to a child could be a presumed mother under section 7611, subdivision (d). Twelve-year-old Karen C. petitioned for an order determining the existence of a mother and child relationship between her and Leticia C., who had raised her from birth. Leticia admitted she was not Karen's biological mother, explaining that Karen's birth mother had tried unsuccessfully to abort her pregnancy and then agreed to give the child to Leticia. The birth mother falsely told the hospital staff that her name was Leticia C. so that Leticia's name would appear on the child's birth certificate. The birth mother gave Karen to Leticia promptly after the child was born. The juvenile court denied Karen's petition, ruling that Leticia could not be Karen's mother because she had not given birth to her and they had no genetic relationship. The Court of Appeal reversed, determining that Leticia was the child's presumed mother under section 7611 because she had taken Karen into her home and raised her as her child. (*In re Karen C., supra,* 101 Cal.App.4th at p. 938, 124 Cal.Rptr.2d 677.) The court remanded the matter to the juvenile court to apply the rule in *Nicholas H.* to determine whether this was " 'an appropriate action' " in which to find the presumption that Leticia was Karen's mother was rebutted by the fact that she had not given birth to her. (*Ibid.*)

[5] Similarly, the Court of Appeal in *In re Salvador M., supra,* 111 Cal.App.4th 1353, 1357–1358, 4 Cal.Rptr.3d 705, held that a woman who had raised her half brother as her son could be the child's presumed mother under section 7611, subdivision (d). In that case, the child's mother died when he was three years old and he was raised by his 18–year–old half sister, who had a four-year-old daughter of her own and later gave birth again. The child believed that his half sister was his mother and that her offspring were his siblings. His half sister revealed her true relation to the child " 'in official matters, such as school registration,' " but maintained that " 'to the rest of the world [the child] is my son.' " (*In re Salvador M., supra,* at p. 1356, 4 Cal.Rptr.3d 705.) The Court of Appeal applied section 7611, subdivision (d), stating: "The paternity presumptions are driven, not by biological paternity, but by the state's interest in ***122** the welfare of the child and the integrity of the family. [Citation.]" (*In re Salvador M., supra,* at pp. 1357–1358, 4 Cal.Rptr.3d 705.) The court concluded that the half sister had openly held out the child as her own, despite admitting to various officials that she was the child's half sister, noting that "the most compelling evidence" that she held out the child as her own was that the eight-year-old child "*believed* appellant was his mother" which supported the conclusion that she held the child "out to the community as her son." (*Id.* at p. 1358, 4 Cal.Rptr.3d 705.) Having concluded that she was the child's presumed mother under section 7611, subdivision (d), the court concluded that this was "clearly *not* an appropriate case" to find the presumption was rebutted by the fact that she

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was not the child's birth mother, "because there was no competing maternal ***56** interest and to sever this deeply rooted mother/child bond would contravene the state's interest in maintaining the family relationship." (*In re Salvador M., supra,* at p. 1359, 4 Cal.Rptr.3d 705.)

We conclude that the present case, like *Nicholas H.* and *Salvador M.,* is not "an appropriate action" in which to rebut the presumption of presumed parenthood with proof that Elisa is not the twins' biological parent. This is generally a matter within the discretion of the superior court (*In re Jesusa V., supra,* 32 Cal.4th 588, 606, 10 Cal.Rptr.3d 205, 85 P.3d 2), but we need not remand the ****669** matter to permit the superior court to exercise its discretion because it would be an abuse of discretion to conclude that the presumption may be rebutted in the present case. It is undisputed that Elisa actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by Emily and her as coparents, and they did act as coparents for a substantial period of time. Elisa received the twins into her home and held them out to the world as her natural children. She gave the twins and the child to whom she had given birth the same surname, which was formed by joining her surname to her partner's. The twins were half siblings to the child to whom Elisa had given birth. She breast-fed all three children, claimed all three children as her dependents on her tax returns, and told a prospective employer that she had triplets. Even at the hearing before the superior court, Elisa candidly testified that she considered herself to be the twins' mother.

Declaring that Elisa cannot be the twins' parent and, thus, has no obligation to support them because she is not biologically related to them would produce a result similar to the situation we sought to avoid in *Nicholas H.* of leaving the child fatherless. The twins in the present case have no father because they were conceived by means of artificial insemination using an anonymous semen donor. Rebutting the presumption that Elisa is the twin's parent would leave them with only one parent and would deprive them of the support of their second parent. Because Emily is financially unable to support the twins, the financial burden of supporting the twins would be borne by the county, rather than Elisa.

***123** In establishing a system for a voluntary declaration of paternity in section 7570, the Legislature declared: "There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights...."

By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public. (See *Librers v. Black* (2005) 129 Cal.App.4th 114, 123, 28 Cal.Rptr.3d 188 ["whenever possible, a child should have the benefit of *two* parents to support and nurture him or her"]; *In re Marriage of Pedregon* (2003) 107 Cal.App.4th 1284, 132 Cal.Rptr.2d 861 [recognizing the importance to a child of having the support of two parents]; *Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658, 662, 11 Cal.Rptr. 707.)

We observed in dicta in *Nicholas H.* that it would be appropriate to rebut the section 7611 presumption of parentage if "a court decides that the legal rights and obligations of parenthood should devolve ***57** upon an unwilling candidate." (*In re Nicholas H., supra,* 28 Cal.4th 56, 70, 120 Cal.Rptr.2d 146, 46 P.3d 932.) But we decline to apply our dicta in *Nicholas H.* here, because we did not consider in *Nicholas H.* a situation like that in the present case.

Although Elisa presently is unwilling to accept the obligations of parenthood, this was not always so. She actively assisted Emily in becoming pregnant with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting children. She accepted those obligations and enjoyed those rights for years. Elisa's present unwillingness to accept her parental obligations does not affect her status as the children's mother based upon her conduct during the first years of their lives.

Further, our observation in *Nicholas H.* that the obligations of parenthood should not be forced upon an unwilling candidate who is not biologically related to the child must be understood in light of the circumstances before us in *Nicholas H.* In that case, as noted above, the presumed father met the child's mother when she was pregnant and voluntarily accepted the unborn child as his own. When the child later was removed from the ****670** mother's custody, the presumed father was denied custody of the child because he was not the child's biological father.

In the present case, Elisa did not meet Emily after she was pregnant, but rather was in a committed relationship with her when they decided to have ***124** children together. Elisa actively assisted Emily in becoming pregnant, with

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the understanding that they would raise the resulting children together. Having helped cause the children to be born, and having raised them as her own, Emily should not be permitted to later abandon the twins simply because her relationship with Emily dissolved.

[6] As we noted in the context of a husband who consented to the artificial insemination of his wife using an anonymous sperm donor, but later denied responsibility for the resulting child: "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible." (*People v. Sorensen* (1968) 68 Cal.2d 280, 285, 66 Cal.Rptr. 7, 437 P.2d 495; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 191, 98 Cal.Rptr.2d 44.) We observed that the "intent of the Legislature obviously was to include every child, legitimate or illegitimate, born or unborn, and enforce the obligation of support against the person who could be determined to be the lawful parent." (*People v. Sorensen, supra,* 68 Cal.2d at pp. 284–285, 66 Cal.Rptr. 7, 437 P.2d 495, fn. omitted.) Further: "a reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.... [I]t is safe to assume that without defendant's active participation and consent the child would not have been procreated." (*Id.* at p. 285, 66 Cal.Rptr. 7, 437 P.2d 495; see *Dunkin v. Boskey, supra,* 82 Cal.App.4th at p. 190, 98 Cal.Rptr.2d 44.)

We were careful in *Nicholas H.,* therefore, not to suggest that every man who begins living with a woman when she is pregnant and continues to do so after the child is born necessarily becomes a presumed father of the child, even against his wishes. The Legislature surely did not ***58** intend to punish a man like the one in *Nicholas H.* who voluntarily provides support for a child who was conceived before he met the mother, by transforming that act of kindness into a legal obligation.

But our observation in *Nicholas H.* loses its force in a case like the one at bar in which the presumed mother under section 7611, subdivision (d), acted together with the birth mother to cause the child to be conceived. In such circumstances, unlike the situation before us in *Nicholas H.,* we believe the Legislature would have intended to impose upon the presumed father or mother the legal obligation to support the child whom she caused to be born. As stated by amicus curiae the California State Association of Counties, representing all 58 counties in California: "A person who actively participates in bringing children into the world, takes the children into her home and *125 holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation."

We conclude, therefore, that Elisa is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.

Elisa relies upon the Court of Appeal decisions in *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597, 272 Cal.Rptr. 520, *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 279 Cal.Rptr. 212, and **671 *West v. Superior Court* (1997) 59 Cal.App.4th 302, 69 Cal.Rptr.2d 160, for the proposition that "non-biological partners from a same-sex relationship, who have not adopted their partners' children, are deemed 'nonparents' for purposes of custody or visitation" and thus "must also be deemed nonparents for purposes of establishing child support orders for those same children." As we explain below, these decisions predated our recognition in *Nicholas H.* and *Jesusa V.* that a person with no biological relationship could be a presumed parent under section 7611, subdivision (d). Accordingly, we do not find these cases persuasive.

Curiale involved a situation similar to that in the present case in which two women in a lesbian relationship agreed that one of them "would conceive a child through artificial insemination and that the child would be raised by both of them." (*Curiale v. Reagan, supra,* 222 Cal.App.3d 1597, 1599, 272 Cal.Rptr. 520.) The couple's relationship dissolved when the child was two years old, and the plaintiff filed " 'a complaint to establish de facto parent status/maternity and for custody and visitation." (*Ibid.*) The Court of Appeal summarily dismissed the plaintiff's reliance upon the UPA, stating "it has no application where, as here, it is undisputed defendant is the natural mother of the child. [Citation.]" (*Curiale v. Reagan, supra,* at p. 1600, 272 Cal.Rptr. 520.) The decision, therefore, did not consider the applicability of the predecessor to section 7611, subdivision (d), which

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was former Civil Code section 7004 (Stats.1987, ch. 192, § 1, p. 1155). The court concluded, without discussion or explanation: "The Legislature has not conferred upon one in plaintiff's position, a nonparent in a same-sex bilateral relationship, any right of custody or visitation ***59** upon the termination of the relationship." ***126** (*Curiale v. Reagan, supra,* 222 Cal.App.3d at p. 1600, 272 Cal.Rptr. 520.) But the court's reasoning was circular, because it began its analysis by assuming the plaintiff was a "nonparent" even though the issue to be decided was whether the plaintiff was a parent under the UPA.

Nancy S. involved two women in a lesbian relationship who had two children by artificially inseminating Nancy on two occasions. (*Nancy S. v. Michele G., supra,* 228 Cal.App.3d 831, 834, 279 Cal.Rptr. 212.) Michele was listed on the birth certificates as the father, and the children were given Michele's family surname. The children referred to both Nancy and Michele as "mom." After the couple's relationship dissolved, Nancy filed an action under the UPA to obtain a declaration that she was the sole parent of the children. The Court of Appeal determined that Michele was not a parent under the UPA based in part on the circumstance that "[i]t is undisputed that [Michele] is not the natural mother" of the children. (*Nancy S., supra,* at p. 836, 279 Cal.Rptr. 212.) *Nancy S.* was decided before we recognized in *In re Nicholas H., supra,* 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, that "natural" as used in the UPA does not always mean "biological."

In *West v. Superior Court, supra,* 59 Cal.App.4th 302, 69 Cal.Rptr.2d 160, two women in a lesbian relationship agreed that one of them, Barbara West, would conceive a child through artificial insemination and that the child would be raised by them jointly. When the couple's relationship ended, West's partner, Pamela Lockrem, filed an action to be declared the child's parent under the UPA. The same Court of Appeal that had decided *Curiale* simply relied upon its earlier decision without providing additional authority or analysis and concluded that Lockrem had no parental relationship with the child.

As noted above, we held in *In re Nicholas H., supra,* 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, and *In re Jesusa V., supra,* 32 Cal.4th 588, 604, 10 Cal.Rptr.3d 205, 85 P.3d 2, that a natural parent within the meaning of the UPA could be a person with no biological connection to the child, and the Court of Appeal in *In re Karen C., supra,* 101 Cal.App.4th 932, 938, 124 Cal.Rptr.2d 677, held that a woman with no biological connection to a child could be a presumed mother under section 7611, subdivision (d). Similarly, the Court of Appeal in *In re Salvador M., supra,* 111 Cal.App.4th 1353, 1357, 4 Cal.Rptr.3d 705, held that a woman who was the half sister of a child could, nevertheless, be the child's natural mother under the UPA. The courts in *Curiale v. Reagan, supra,* 222 Cal.App.3d 1597, 272 Cal.Rptr. 520, *Nancy S. v.* ***672** *Michele G., supra,* 228 Cal.App.3d 831, 279 Cal.Rptr. 212, and *West v. Superior Court, supra,* 59 Cal.App.4th 302, 69 Cal.Rptr.2d 160, did not have the benefit of this authority and did not consider the applicability of section 7611, subdivision (d) regarding presumed fathers. Accordingly, these decisions do not aid our analysis and we disapprove them to the extent they are inconsistent with the present opinion.

*127 DISPOSITION

The judgment of the Court of Appeal is reversed.

GEORGE, C.J., BAXTER, WERDEGAR and CHIN, J., concur.

Concurring Opinion by KENNARD, J.

I concur in the majority's decision. I write separately to point out that, in my view, this court's recent decision *In re Nicholas H.* (2002) 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932 (*Nicholas H.*), ***60** which holds that a nonbiological father may nonetheless meet the statutory definition of a "presumed" father, makes the majority's outcome in this case a foregone conclusion.

I.

Emily B. and Elisa B. began living as a couple in 1993. Each woman wanted to bear her own child; eventually each underwent artificial insemination with sperm from the same donor so that their offspring would be genetically related. In 1997, Elisa gave birth to a son, Chance. In 1998, Emily gave birth to twins (son Ry and daughter Kaia). Ry was born with serious health problems, including Down's syndrome. All three children were given the same hyphenated surname. As they had planned, Emily stayed home and cared for the three children, while Elisa worked to support the family. Elisa claimed all three children as her dependents for tax purposes and on an application for health insurance, and she described herself in a job interview as the mother of triplets.

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In late 1999, the couple separated, but for some time Elisa continued to pay rent and living expenses for Emily and the twins. In December 1999, Emily began receiving public assistance from El Dorado County. In May 2001, Elisa told Emily that because she no longer had a full-time job she could not continue to support Emily and the twins. The next month, the county filed a petition in the superior court to determine that Elisa was a parent of the twins born to Emily, the first step in making Elisa financially responsible for them.

The trial court, relying on this court's test in *Johnson v. Calvert* (1993) 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (the preconception intent to become a parent), ruled that Elisa had intended to bring about the birth of Emily's children, and thus her obligation to them should be "the same legal duty and responsibility of a man found to be a presumed father"—that is, a man who has received a child into his home and openly held it out as his ***128** natural child. (Fam.Code, § 7611, subd. (d).)[8] It ordered Elisa to pay child support for the twins. Elisa successfully petitioned the Court of Appeal for writ relief. The Court of Appeal reasoned that under California's statutory scheme Elisa was neither the natural nor the adoptive mother of her partner's twins, nor could she be their father, and therefore Elisa had no legally recognized parental status with respect to the twins. Accordingly, it directed the trial court to vacate the child support order.

II.

Under California law, a man "is presumed to be the natural father of a child" in various circumstances involving his marriage or attempted marriage to the child's mother, or if he "receives the child into his home and openly holds out the child as his natural child." (Fam.Code, § 7611, subd. (d).) Section 7650 expressly directs that "[i]nsofar as practicable," the provisions pertaining to the father and child relationship apply in determining the existence of a mother and child relationship. (§ 7650.)

In *Nicholas H., supra,* 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, this court held ****673** that a nonbiological father who receives a child into his home and holds the child out as his natural child can be the "presumed" father of the child. If a nonbiological father can by his conduct meet the statutory definition of a presumed father, then by parity of reasoning a nonbiological mother can become a presumed mother, as the majority concludes. Here, *****61** Elisa became a presumed mother of the twins to which Emily gave birth when she both received the twins into her home and openly held them out as her natural children. (§ 7611, subd. (d).)

The legal presumption of fatherhood or motherhood created by receiving and holding out the child as one's natural child "may be rebutted in an appropriate action only by clear and convincing evidence." (§ 7612, subd. (a).) We concluded in *Nicholas H, supra,* 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, that the action was not an appropriate one in which to allow rebuttal of the presumption, because the result there would have been to leave Nicholas fatherless.

This case too is not "an appropriate action" in which to rebut the presumption of presumed motherhood. (§ 7612, subd. (a).) The county, which since 1999 has provided the twins with public financial assistance and medical care, brought on their behalf an action in superior court to establish their parentage as a predicate to obtaining a court order requiring Elisa to pay child support. Young Ry and Kaia, no less than any other children in this state, have a right to support from *both* their parents. Those parents are ***129** Emily, as the biological mother, and Elisa, because she meets the statutory definition of a presumed mother. To permit rebuttal of the legal presumption that Elisa is the presumed mother of the twins would leave the twins with the support of only one parent, Emily, who, until now, has been receiving financial support and medical care from the taxpayers of the county in which she and the twins reside.

Had a man who, like Elisa, lacked any biological connection to the twins received them into his home and held them out as his natural children, this case would, under this court's holding in *Nicholas H., supra,* 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, undoubtedly have resulted in a determination that he met the statutory criteria for being the presumed father of the twins. These legal principles apply with equal force in this case, where Elisa, whom the county seeks to hold financially accountable for support of the twins, meets the statutory criteria of a presumed mother, a status that brings with it the benefits as well as the responsibilities of parenthood. The flip side of a familiar adage comes to mind: What is sauce for the gander is sauce for the goose.

Parallel Citations

37 Cal.4th 108, 117 P.3d 660, 05 Cal. Daily Op. Serv. 7498, 2005 Daily Journal D.A.R. 10,196

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Footnotes

1 In order to protect the confidentiality of the minors, we will refer to the parties by their first names.

2 Family Code section 17400, subdivision (a), provides, in pertinent part: "Each county shall maintain a local child support agency ... that shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations ... and determining paternity in the case of a child born out of wedlock. The local child support agency shall take appropriate action, including criminal action in cooperation with the district attorneys, to establish, modify, and enforce child support...."

3 Further statutory references are to the Family Code, unless otherwise noted.

4 We have not decided "whether there exists an overriding legislative policy limiting a child to two parents." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 427, fn. 6, 2 Cal.Rptr.3d 699, 73 P.3d 554.)

5 The situation is analogous to that in *Sharon S. v. Superior Court, supra,* 31 Cal.4th 417, 2 Cal.Rptr.3d 699, 73 P.3d 554, in which we held that a mother could consent to a "second parent" adoption by her lesbian partner despite our earlier dictum in *Estate of Jobson* (1912) 164 Cal. 312, 317, 128 P. 938, that the "duties of a child cannot be owed to two fathers at one time." We explained that this statement was "uttered in the context of concluding that a birth father who 'by virtue of the adoption proceeding [in that case], ceased to sustain the legal relation of father' could not thereafter inherit the adopted person's estate [citation], we did not consider the contingency before us today—viz., two parties who voluntarily have waived the benefit of section 8617 in order to effect a second parent adoption, where the natural parent's relationship with the child is not superseded." (*Sharon S.,* at p. 430, fn. 7, 2 Cal.Rptr.3d 699, 73 P.3d 554.)

6 Elisa also relies upon our observation in *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, 43 Cal.Rptr.2d 445, 898 P.2d 891, that "In essence, therefore, our statutory scheme creates three classes of parents: mothers, fathers who are presumed fathers, and fathers who are not presumed fathers. [Citation.]" The issue in that case was whether an unwed father was a presumed father and thus could withhold his consent to the mother's planned adoption of their child. We did not consider the questions raised in the present case.

7 The fact that questions involving the determination of parentage "focus on paternity is likely due to the fact the identify of a child's birth mother is rarely in dispute." (*In re Karen C., supra,* 101 Cal.App.4th 932, 936, 124 Cal.Rptr.2d 677.)

8 All further statutory references are to the Family Code.

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37 Cal.4th 130
Supreme Court of California

K.M., Plaintiff and Appellant,
v.
E.G., Defendant and Respondent.

No. S125643. | Aug. 22, 2005. | Rehearing Denied Oct. 19, 2005.*

Synopsis

Background: Woman who had donated her eggs so that her former lesbian partner, with whom she was registered in domestic partnership, could bear a child through in vitro fertilization filed petition to establish parental relationship with partner's twin children after the relationship ended. The Superior Court, Marin County, No. CV020777, Randolph E. Heubach, J., granted partner's motion to quash and dismiss petition. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Moreno, J., held that:

[1] both lesbian partners were parents of these children, and

[2] statute providing that law treats sperm donor as if he was not natural father of child so conceived did not apply to this situation.

Judgment of Court of Appeal reversed.

Kennard and Werdegar, JJ., filed dissenting opinions.

Opinion, 13 Cal.Rptr.3d 13, superseded.

Attorneys and Law Firms

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Opinion

MORENO, J.

***134 **675** We granted review in this case, as well as in *Elisa B. v. Superior Court* (Aug. 22, 2005, S125912) 37 Cal.4th 108, 33 Cal.Rptr.3d 46, 117 P.3d 660, 2005 WL 2000864, and *Kristine H. v. Lisa R.* (Aug. 22, 2005, S126945) 37 Cal.4th 156, 33 Cal.Rptr.3d 81, 117 P.3d 690, 2005 WL 2000908, to consider the parental rights and obligations, if any, of a woman with regard to a child born to her partner in a lesbian relationship.

In the present case, we must decide whether a woman who provided ova to her lesbian partner so that the partner could bear children by means of in vitro fertilization is a parent of those children. For the reasons that follow, we conclude that Family Code section 7613, subdivision (b), which provides that a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife, does not apply when a woman provides her ova to impregnate her partner in a lesbian relationship in order to produce children who will be raised in their joint home. Accordingly, when partners in a lesbian relationship decide to produce children in this manner, both the woman who provides her ova and her partner who bears the children are the children's parents.

FACTS

On March 6, 2001, petitioner K.M.[1] filed a petition to establish a parental relationship *****64** with twin five-year-old girls born to respondent E.G., her former lesbian partner. K.M. alleged that she "is the biological parent of the minor children" because "[s]he donated her egg to respondent, the gestational mother of the children." E.G. moved to dismiss the petition on the grounds that, although K.M. and E.G. "were lesbian partners who lived together until this action was filed," K.M. "explicitly donated her ovum under a clear written agreement by which she relinquished any claim to offspring born of her donation."

On April 18, 2001, K.M. filed a motion for custody of and visitation with the twins.

A hearing was held at which E.G. testified that she first considered raising a child before she met K.M., at a time when she did not have a partner. She met K.M. in October, 1992 and they became romantically involved in June 1993. E.G. told K.M. that she planned to adopt a baby as a single mother. E.G. applied for adoption in November, 1993. K.M. and E.G. began living together in March, 1994 and registered as domestic partners in San Francisco.

E.G. visited several fertility clinics in March, 1993 to inquire about artificial insemination and she attempted artificial insemination ****676** , without ***135** success, on 13 occasions from July, 1993 through November, 1994. K.M. accompanied her to most of these appointments. K.M. testified that she and E.G. planned to raise the child together, while E.G. insisted that, although K.M. was very supportive, E.G. made it clear that her intention was to become "a single parent."

In December, 1994, E.G. consulted with Dr. Mary Martin at the fertility practice of the University of California at San Francisco Medical Center (UCSF). E.G.'s first attempts at in vitro fertilization failed because she was unable to produce sufficient ova. In January, 1995, Dr. Martin suggested using K.M.'s ova. E.G. then asked K.M. to donate her ova, explaining that she would accept the ova only if K.M. "would really be a donor" and E.G. would "be the mother of any child," adding that she would not even consider permitting K.M. to adopt the child "for at least five years until [she] felt the relationship was stable and would endure." E.G. told K.M. that she "had seen too many lesbian relationships end quickly, and [she] did not want to be in a custody battle." E.G. and K.M. agreed they would not tell anyone that K.M. was the ova donor.

K.M. acknowledged that she agreed not to disclose to anyone that she was the ova donor, but insisted that she only agreed to provide her ova because she and E.G. had agreed to raise the child together. K.M. and E.G. selected the sperm donor together. K.M. denied that E.G. had said she wanted to be a single parent and insisted that she would not have donated her ova had she known E.G. intended to be the sole parent.

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On March 8, 1995, K.M. signed a four-page form on UCSF letterhead entitled "Consent Form for Ovum Donor (Known)." The form states that K.M. agrees "to have eggs taken from my ovaries, in order that they may be donated to another woman." After explaining the medical procedures involved, the form states on the third page: "It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy ***65** or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children." The following appears on page 4 of the form, above K.M.'s signature and the signature of a witness: "I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof." E.G. signed a form entitled "Consent Form for Ovum Recipient" that stated, in part: "I acknowledge that the child or children produced by the IVF procedure is and shall be my own legitimate child or children and the heir or heirs of my body with all rights and privileges accompanying such status."

E.G. testified she received these two forms in a letter from UCSF dated February 2, 1995, and discussed the consent forms with K.M. during **136** February and March. E.G. stated she would not have accepted K.M.'s ova if K.M. had not signed the consent form, because E.G. wanted to have a child on her own and believed the consent form "protected" her in this regard.

K.M. testified to the contrary that she first saw the ovum donation consent form 10 minutes before she signed it on March 8, 1995. K.M. admitted reading the form, but thought parts of the form were "odd" and did not pertain to her, such as the part stating that the donor promised not to discover the identity of the recipient. She did not intend to relinquish her rights and only signed the form so that "we could have children." Despite having signed the form, K.M. "thought [she] was going to be a parent."

Ova were withdrawn from K.M. on April 11, 1995, and embryos were implanted in E.G. on April 13, 1995. K.M. and E.G. told K. M's father about the resulting pregnancy by announcing that he was going to be a grandfather. The twins were born on December 7, 1995. The twins' birth certificates listed E.G. as their mother and did not reflect a father's name. As they had agreed, neither E.G. nor K.M. told anyone K.M. had donated the ova, including their friends, family and the twins' pediatrician. Soon after the twins were born, E.G. asked K.M. to marry her, and on Christmas Day, the couple exchanged rings.

**677 Within a month of their birth, E.G. added the twins to her health insurance policy, named them as her beneficiary for all employment benefits, and increased her life insurance with the twins as the beneficiary. K.M. did not do the same.

E.G. referred to her mother, as well as K.M.'s parents, as the twins' grandparents and referred to K.M.'s sister and brother as the twins' aunt and uncle, and K.M.'s nieces as their cousins. Two school forms listed both K.M. and respondent as the twins' parents. The children's nanny testified that both K.M. and E.G. "were the babies' mother."

The relationship between K.M. and E.G. ended in March, 2001 and K.M. filed the present action. In September, 2001, E.G. and the twins moved to Massachusetts to live with E.G.'s mother.

The superior court granted E.G.'s motion to dismiss finding, in a statement of decision, "that [K.M.] ... knowingly, voluntarily and intelligently executed the ovum donor form, thereby acknowledging her understanding that, by the donation of her ova, she was relinquishing and waiving all rights to claim legal parentage of any children who might result from the *in vitro* fertilization and implantation of her ova in a recipient (in this case, a known recipient, her domestic partner [E.G.])..... [K.M.]'s testimony on the subject ***66** of her execution of the ovum donor form was contradictory and not always credible.

*137 "[K.M.] and [E.G.] agreed prior to the conception of the children that [E.G.] would be the sole parent unless the children were later adopted, and [E.G.] told [K.M.] prior to her ovum donation that she ([E.G.]) would not consider an adoption by [K.M.] until some years later. [E.G.] and [K.M.] agreed in advance of the ovum donation that they would not tell others of [K.M.]'s genetic connection to the children (they also agreed that if and when it became appropriate they would consider how to inform the children); and they abided by this agreement until late 1999.

"... By voluntarily signing the ovum donation form, [K.M.] was donating genetic material. Her position was analogous to that of a sperm donor, who is treated as a legal stranger to a child if he donates sperm through a licensed physician and surgeon under Family Code section 7613[, subdivision] (b). The Court finds no reason to treat ovum donors as having greater claims to parentage than sperm donors....

"The Court accepts the proposition that a child may have two legal mothers and assumed it to be the law in its

analysis of the evidence herein. [¶] ... [¶]

"[K.M.]'s claim to 'presumed' parenthood rests upon her contention that she has met the criteria of Family Code section 7611[, subdivision] (d).... [K.M.] ... has failed to establish either that she received the twins into her home or that she held them out 'as [her] natural child[ren.]' Although [K.M.] *treated* the twins in all regards as though they were her own (and there can be no question but that they are fully bonded to her as such), the children were *received* into the parties' home as [E.G.]'s children and, up until late 1999, both parties scrupulously held confidential [petitioner]'s 'natural,' i.e., in this case, her genetic relationship to the children.

"[E.G.] is not estopped by her conduct.... The Court finds that [petitioner] was not misled by any such conduct; that she knew that [respondent] did not intend thereby to confer parental rights upon her...."

The Court of Appeal affirmed the judgment, ruling that K.M. did not qualify as a parent "because substantial evidence supports the trial courts factual finding that *only* E.G. intended to bring about the birth of a child whom she intended to raise as her own." The court observed that "the status of K.M. .... is consistent with the status of a sperm donor under the [Uniform Parentage Act], i.e., treated in law as if he were not the natural father of a child thereby conceived. [Citation.]" Having concluded that the parties intended at the time of conception that only E.G. would be the child's mother, the court concluded that the parties actions following the birth did not alter this agreement. The Court of Appeal concluded that if the parties ***138** had changed their intentions and ****678** wanted K.M. to be a parent, their only option was adoption.

We granted review.

DISCUSSION

[1] [2] K.M. asserts that she is a parent of the twins because she supplied the ova that were fertilized in vitro and implanted in her lesbian partner, resulting in the birth of the twins. As we will explain, we agree that K.M. is a parent of the twins because she supplied the ova that produced the children, and Family Code section 7613, subdivision (b)[2] (hereafter section 7613(b)), which provides that a man is not a father if he provides semen to a *****67** physician to inseminate a woman who is not his wife, does not apply because K.M. supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home.[3]

The determination of parentage is governed by the Uniform Parentage Act (UPA). (§ 7600 et seq.) As we observe in the companion case of *Elisa B. v. Superior Court, supra,* 37 Cal.4th 108, 116, 33 Cal.Rptr.3d at 51, 117 P.3d at 664–665, the UPA defines the " '[p]arent and child relationship, [which] extends equally to every child and to every parent, regardless of the marital status of the parents.' (§ 7602.)"

[3] In *Johnson v. Calvert* (1993) 5 Cal.4th 84, 87, 19 Cal.Rptr.2d 494, 851 P.2d 776, we determined that a wife whose ovum was fertilized in vitro by her husband's sperm and implanted in a surrogate mother was the "natural mother" of the child thus produced. We noted that the UPA states that provisions applicable to determining a father and child relationship shall be used to determine a mother and child relationship "insofar as practicable." (*Johnson v. Calvert, supra,* at p. 90, 19 Cal.Rptr.2d 494, 851 P.2d 776, citing former Civ.Code, § 7015, now Fam.Code, § 7650.) We relied, therefore, on the provisions in the UPA regarding presumptions of paternity and concluded that "genetic consanguinity" could be the basis for a finding of maternity just as it is for paternity. (*Johnson v. Calvert, supra,* 5 Cal.4th at p. 92, 19 Cal.Rptr.2d 494, 851 P.2d 776; *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1415, 72 Cal.Rptr.2d 280.) Under this authority, K.M.'s genetic relationship to the children in the present case constitutes "evidence of a mother and child relationship as contemplated by the Act. [Citations.]" (*Johnson, supra,* at p. 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

[4] ***139** The Court of Appeal in the present case concluded, however, that K.M. was not a parent of the twins, despite her genetic relationship to them, because she had the same status as a sperm donor. Section 7613(b) states: "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." In *Johnson,* we considered the predecessor statute to section 7613(b), former Civil Code section 7005. (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 100, fn. 14, 19 Cal.Rptr.2d 494, 851 P.2d 776.) We did not discuss whether this statute applied to a woman who provides ova used to impregnate another woman, but we observed that "in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law." (*Id.* at p. 93, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) We held that the statute did not apply

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under the circumstances in *Johnson,* because the husband and wife in *Johnson* did not intend to "donate" their sperm and ova to the surrogate mother, but rather "intended to procreate a child genetically related to them by the only available ****679** means." *****68** (*Johnson, supra,* at p. 100, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

The circumstances of the present case are not identical to those in *Johnson,* but they are similar in a crucial respect; both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home. In *Johnson,* it was clear that the married couple did not intend to "donate" their semen and ova to the surrogate mother, but rather permitted their semen and ova to be used to impregnate the surrogate mother in order to produce a child to be raised by them. In the present case, K.M. contends that she did not intend to donate her ova, but rather provided her ova so that E.G. could give birth to a child to be raised jointly by K.M. and E.G. E.G. hotly contests this, asserting that K.M. donated her ova to E.G., agreeing that E.G. would be the sole parent. It is undisputed, however, that the couple lived together and that they both intended to bring the child into their joint home. Thus, even accepting as true E.G.'s version of the facts (which the superior court did), the present case, like *Johnson,* does not present a "true 'egg donation' " situation. (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 93, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home. Even if we assume that the provisions of section 7613(b) apply to women who donate ova, the statute does not apply under the circumstances of the present case. An examination of the history of 7613(b) supports our conclusion.

The predecessor to section 7613(b), former Civil Code section 7005, was enacted in 1975 as part of the UPA. (Stats.1975, ch. 1244, § 11, pp. 3197–3198.) Section 5, subdivision (b), of the Model UPA states: "The ***140** donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." The comment to this portion of the model act notes that this provision was not intended to solve all questions posed by the use of artificial insemination: "This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was though[t] useful, however, to single out and cover in this Act at least one fact situation that occurs frequently." (9B West's. U. Laws Ann. (1987) U. Parentage Act, com. to § 5, pp. 301–302.)

Although the predecessor to section 7613 was based upon the Model UPA, the California Legislature made one significant change; it expanded the reach of the provision to apply to both married and unmarried women. "Section 7005 is derived almost verbatim from the UPA as originally drafted, with one crucial exception. The original UPA restricts application of the nonpaternity provision of subdivision (b) to a '*married* woman other than the donor's wife.' [Citation.] The word 'married' is excluded from subdivision (b) of section 7005, so that in California, subdivision (b) applies to all women, married or not. [¶] Thus, the California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support." (*Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386, 392, 224 Cal.Rptr. 530, fn. omitted.)

Under the Model UPA, a man who donated semen that was used to impregnate *****69** a woman who was married to someone other than the donor would not be considered the father of the resulting child. But the provision would not apply, and the semen donor *would* be considered the father of the child, if the woman impregnated was unmarried. Therefore, this provision of the model act would not apply if a man provided semen that was used to impregnate his unmarried partner in order to produce a child that would be raised in their joint home, and the man would be considered the father of the resulting child.

In adopting the model act, California expanded the reach of this provision by omitting the word "married," so that unmarried ****680** women could avail themselves of artificial insemination. This omission was purposeful. As originally introduced in 1975, Senate Bill No. 347 (1975–1976 Reg. Sess.) proposed adopting verbatim the language of the model UPA and, thus, would have limited the reach of former Civil Code section 7005 to "married women." (Sen. Bill No. 347 (1975–1976 Reg. Sess.) § 11, as introduced Feb. ***141** 4, 1975.) On May 8, 1975, however, the bill was amended in the Senate to delete the word "married."[4]

It is clear, therefore, that California intended to expand the protection of the model act to include unmarried women so that unmarried women could avail themselves of artificial insemination. But there is nothing to indicate that California intended to expand the reach of this provision so far that it would apply if a man provided semen to be used to impregnate his unmarried partner in order to produce a child that would be raised in their joint

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home. It would be surprising, to say the least, to conclude that the Legislature intended such a result. The Colorado Supreme Court considered a related issue and reached a similar conclusion.

In *In Interest of R.C.* (Colo.1989) 775 P.2d 27, 29, the Colorado Supreme Court addressed a Colorado statute identical to section 7613(b), which applied to both married and unmarried women. At issue were the parental rights, if any, of a man who provided semen to a physician that was used to impregnate an unmarried friend of the man. The man claimed that the woman had promised that he would be treated as the child's father. The court recognized that the Model UPA addressed only the artificial insemination of a woman married to someone other than the semen donor, adding that the parental rights of a semen donor are "least clearly understood when the semen donor is known and the recipient is unmarried." (*R.C., supra,* 775 P.2d at pp. 31, 33–34.) The court concluded that the statute did not apply when a man donated semen to an unmarried woman with the understanding that he would be the father of the resulting child: "[W]e conclude that the General Assembly neither considered nor intended to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived. [The statute] simply does not apply in that circumstance." (*Id.* at p. 35.)

The Colorado Supreme Court was thus faced with a situation in which a man provided semen, through a physician, to an unmarried "friend" who allegedly had promised that the man would be the father of the resulting child. The court concluded that the Model UPA, and the Colorado ***70** statute based upon it, were not intended to apply to such circumstances. We are faced with an even more compelling situation, because K.M. and E.G. were more than "friends" when K.M. provided her ova, through a physician, to be used to impregnate E.G.; they lived together and were registered domestic partners. Although the parties dispute whether both women were intended to **142** be parents of the resulting child, it is undisputed that they intended that the resulting child would be raised in their joint home. Neither the Model UPA, nor section 7613(b) was intended to apply under such circumstances.[5]

As noted above, K.M.'s genetic relationship with the twins constitutes evidence of a mother and child relationship under the UPA (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776) and, as explained above, section 7613(b) does not apply to exclude K.M. as a parent of the twins. The circumstance that E.G. gave birth to the twins also constitutes evidence of a mother and child relationship. (*Johnson v. Calvert,* ***681** *supra,* 5 Cal.4th at p. 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Thus, both K.M. and E.G. are mothers of the twins under the UPA.[6]

It is true we said in *Johnson* that "for any child California law recognizes only one natural mother." (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.) But as we explain in the companion case of *Elisa B. v. Superior Court, supra,* 37 Cal.4th 108, 119, 33 Cal.Rptr.3d at 53, 117 P.3d at 666–667, this statement in *Johnson* must be understood in light of the issue presented in that case; "our decision in *Johnson* does not preclude a child from having two parents both of whom are women."

Justice Werdegar's dissent argues that we should determine whether K.M. is a parent using the "intent test" we developed in *Johnson v. Calvert, supra,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776. In *Johnson,* an embryo created using the sperm and egg of a married couple was implanted in a surrogate mother. It was undisputed that the husband was the father of the resulting child, but the wife and the surrogate both claimed to be the mother. We recognized that both women "have adduced evidence of a mother and child relationship" under the UPA—the wife because she is genetically related to the child and the surrogate because she gave birth to the child—but we rejected the suggestion that, under the circumstances of that case, the child could have two mothers, leaving the child with three parents. (*Id.* at p. 92, fn. 8, 19 Cal.Rptr.2d 494, 851 P.2d 776.) In order to determine which woman was the child's sole mother under the UPA, we looked to their respective intents: "Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions...." (*Id.* at p. 93, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

***143** As the dissent acknowledges, a child can have two mothers. Thus, this case ***71** differs from *Johnson* in that both K.M. and E.G. can be the children's mothers. Unlike in *Johnson,* their parental claims are not mutually exclusive. K.M. acknowledges that E.G. is the twins' mother. K.M. does not claim to be the twins' mother *instead of* E.G., but *in addition to* E.G., so we need not consider their intent in order to decide between them. (*In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1224, 30 Cal.Rptr.2d 893 [*Johnson* intent test does not apply when "[t]here is no 'tie' to break."].) Rather, the parentage of the twins is determined by application of the UPA. E.G. is the twins' mother because she gave birth to them and K.M. also is the twins' mother because she

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provided the ova from which they were produced.

Justice Werdegar's dissent claims that we are "changing the law" by creating a "new rule" for determining whether a woman who supplies an ovum is the mother of the resulting child. (Dis. opn. of Werdegar, J., *post,* 33 Cal.Rptr.3d at pp. 76–77, 117 P.3d at pp. 685–687.) We are not. Nothing in *Johnson* suggests that the intent test applies in cases not involving surrogacy agreements, and the dissent agrees that the linchpin of the decision in *Johnson*—that a child cannot have two mothers—does not apply here. (*Id.,* 33 Cal.Rptr.3d at p. 63, 117 P.3d at p. 675.) We simply hold that section 7613(b), which creates an exception to the usual rules governing parentage that applies when a man donates semen to inseminate a woman who is not his wife, does not apply under the circumstances of this case in which K.M. supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home. Because the exception provided in section 7613(b) does not apply, K.M.'s parentage is determined by the usual provisions of the UPA. As noted above, under the UPA, K.M.'s genetic relationship to the twins constitutes "evidence of a mother and child relationship." (*Johnson v. Calvert, supra,* 5 Cal.4th 84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

It would be unwise to expand application of the *Johnson* intent test as suggested by Justice Werdegar's dissent beyond the circumstances ****682** presented in *Johnson.* Usually, whether there is evidence of a parent and child relationship under the UPA does not depend upon the intent of the parent. For example, a man who engages in sexual intercourse with a woman who assures him, falsely, that she is incapable of conceiving children is the father of a resulting child, despite his lack of intent to become a father.

Justice Werdegar's dissent states that predictability in this area is important, but relying upon a later judicial determination of the intent of the parties, as the dissent suggests, would not provide such predictability. The present case is a good example. Justice Werdegar's dissent concludes that K.M. did not intend to become a parent, because the superior court "found on the basis of conflicting evidence that she did not," noting that "[w]e must defer to the trial court's findings on this point because substantial evidence ***144** supports them." (Dis. opn. of Werdegar, J., *post,* 33 Cal.Rptr.3d at pp. 76–77, 117 P.3d at pp. 685–687.) Had the superior court reached the opposite conclusion, however, the dissent presumably again would defer to the trial court's findings and reach the opposite conclusion that K.M. is a parent of the twins. Rather than provide predictability, therefore, using the intent test would rest the determination of parentage upon a later judicial determination of intent made years after the birth of the child.

Justice Werdegar's dissent cites *Troxel v. Granville* (2000) 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 for the proposition that "We cannot recognize K.M. as a *****72** parent without diminishing E.G.'s existing parental rights." (Dis. opn. of Werdegar, J., *post,* 33 Cal.Rptr.3d at p. 79, 117 P.3d at p. 688.) The high court's decision in *Troxel* has no application here. Neither K.M.'s nor E.G.'s claim to parentage preceded the other's. K.M.'s claim to be the twins' mother because the twins were produced from her ova is equal to, and arose at the same time as, E.G.'s claim to be the twins' mother because she gave birth to them.

The superior court in the present case found that K.M. signed a waiver form, thereby "relinquishing and waiving all rights to claim legal parentage of any children who might result." But such a waiver does not affect our determination of parentage. Section 7632 provides: "Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this chapter." (See *In re Marriage of Buzzanca, supra,* 61 Cal.App.4th 1410, 1426, 72 Cal.Rptr.2d 280 ["It is well established that parents cannot, by agreement, limit or abrogate a child's right to support." (Fn.omitted.)].) A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.

In light of our conclusion that section 7613(b) does not apply and that K.M. is the twins' parent (together with E.G.), based upon K.M.'s genetic relationship to the twins, we need not, and do not, consider whether K.M. is presumed to be a parent of the twins under section 7611, subdivision (d), which provides that a man is presumed to be a child's father if "[h]e receives the child into his home and openly holds out the child as his natural child."

DISPOSITION

The judgment of the Court of Appeal is reversed.

GEORGE, C.J., BAXTER and CHIN, JJ., concur.

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*145 Dissenting Opinion by KENNARD, J.

Unlike the majority, I would apply the controlling statutes as written. The statutory scheme for determining parentage contains two provisions that resolve K.M.'s claim to be a parent of the twins born to E.G. Under one provision, a man who donates sperm for physician-assisted artificial insemination of a woman to whom he is not married is not the father of the resulting child. (Fam.Code, § 7613, subd. (b).)[1] Under the other provision, rules for determining fatherhood **683 are to be used for determining motherhood "[i]nsofar as practical." (*Id.*, § 7650.) Because K.M. donated her ova for physician-assisted artificial insemination and implantation in another woman, and knowingly and voluntarily signed a document declaring her intention *not* to become a parent of any resulting children, she is not a parent of the twins.

I.

In 1994, K.M. and E.G. began living together as a couple, and some months later they registered as domestic partners. E.G. had long wanted to become a mother but had been unsuccessful in conceiving. She eventually pursued in vitro fertilization, but her body failed to produce sufficient ova. Her physician then suggested that she obtain ova from K.M., her partner. K.M. orally agreed that she would ***73 donate ova, and that E.G. would be the only parent of any resulting child unless K.M. were later to become a parent through a formal second-parent adoption. K.M. evidenced her intent that E.G. was to be the sole parent by signing the ova donor form, which provided that she renounced any claim to her donated ova, a fetus, or a child born from her ova.

K.M. donated her ova, which were fertilized with sperm from an anonymous donor and implanted in E.G., who ultimately gave birth to twin girls. The twins lived with the couple for five years. After the couple separated, K.M. petitioned the superior court for establishment of a parental relationship with the twins, and for rights to custody and visitation.

After a week-long hearing, at which considerable evidence was presented, the superior court dismissed K.M.'s parentage action. Describing K.M.'s testimony about her misunderstanding of the ova donor form as "not always credible," the trial court found that K.M. and E.G. had agreed "prior to the conception of the children" that E.G. would be their only parent. The court observed that E.G.'s intent to be the sole parent "responsible for the support and maintenance of any children born" of the ova implanted in her uterus was evidenced when she signed the ova recipient form acknowledging that the "children produced" by the in vitro fertilization procedure would be her *146 children "with all the rights and privileges accompanying such status." The court also noted that K.M. had failed to show that she had no choice but to sign the standard form provided by the in vitro fertilization clinic, and that she could not have donated her ova under a different agreement in which she was "designated" as "an intended parent" of any child born to E.G. Hence it ruled that K.M. had voluntarily relinquished any claim to being a mother of any children born to E.G.

The court further ruled that K.M. did not meet the statutory definition of a "presumed" mother (§ 7611, subd. (d); *Elisa B. v. Superior Court* (Aug. 22, 2005, S125912) 37 Cal.4th 108, 125, 33 Cal.Rptr.3d at 58, 117 P.3d at 670–671 (*Elisa B.*)), because she had failed to meet both prongs of the statutory test: receiving the children into her home, and holding them out as her natural children. Although K.M. had received the twins into her home, she had not held them out as her natural children;[2] indeed she had not disclosed to others "her genetic connection" to the twins until 1999, when the couple's relationship began to falter.

The Court of Appeal affirmed the trial court.

II.

The Court of Appeal held that K.M. had made a voluntary and informed choice to donate her ova to E.G., and that K.M.'s status with respect to any child born as a result of the ova donation was analogous to that of a sperm donor, who, by statute, is treated as if he were not the natural father of any child conceived as a result of the sperm donation. "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he **684 were not the natural father of a child thereby conceived." (§ 7613, subd. (b).) By analogy I would ***74 apply that statute here. Section 7650 states that "[i]nsofar as is practicable" the provisions "applicable" to a father and child relationship are to be used to determine a mother and child relationship.

Here it is "practicable" to treat a woman who donates ova to a licensed physician for in vitro fertilization and implantation in another woman,[3] in the same fashion as a man who donates sperm to a licensed physician for artificial insemination of a woman to whom he is not

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married. Treating male ***147** and female donors alike is not only practicable, but it is also consistent with the trial court's factual finding here that K.M. intended "to donate ova to E.G." so that E.G. would be the sole mother of a child born to her.

As the majority here explains, California's Legislature has drafted the sperm donor statute in such a way as to allow unmarried women to use artificial insemination to conceive, and to permit them to become the sole parent of any child so conceived, if they use sperm that the donor has provided to a licensed physician. (Maj. opn., *ante,* 33 Cal.Rptr.3d at pp. 68–69, 117 P.3d at pp. 679–680.) Here, E.G. used sperm donated in that fashion, ensuring that the sperm donor would have no claim of fatherhood to any child to whom she gave birth. This she was entitled to do under California law. (*Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386, 392, 224 Cal.Rptr. 530.)

I recognize that California law does not expressly address the maternal status of ova donors. But, as I have explained in the past, the Uniform Parentage Act, as codified in our Family Code, remains "the only statutory guidance this court has in resolving this case." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 112, 19 Cal.Rptr.2d 494, 851 P.2d 776 (dis. opn. of Kennard, J.) (*Johnson*).) Accordingly, as I said earlier, I would apply the sperm donor statute to women who donate their ova in compliance with section 7613, subdivision (b). As the trial court here explained: K.M.'s "position was analogous to that of a sperm donor, who is treated as a legal stranger to the child if he donates sperm through a licensed physician and surgeon." Like the trial court, I see "no reason to treat ovum donors as having greater claims to parentage than sperm donors."

The analogy between sperm and ova donors is not new. Indeed, in *Johnson, supra,* 5 Cal.4th page 93, footnote 10, 19 Cal.Rptr.2d 494, 851 P.2d 776, this court signalled its view that an ova donor would not be treated as the child's mother. *Johnson* held that "in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another women with the intent to raise the child as her own, the birth mother is the natural mother under California law." (*Ibid.*) Nearly two years after that decision, E.G. in this case undertook in vitro fertilization with ova from K.M.

In the 12 years since this court's decision in *Johnson, supra* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, an unknown number of Californians have made procreative choices in reliance on it. For example, in the companion case of *Kristine H. v. Lisa R.* (Aug. 22, 2005, S126945) 37 Cal.4th 156, 161, 33 Cal.Rptr.3d 83, 84, 117 P.3d 691, 693, a lesbian couple obtained a *****75** prebirth stipulated judgment declaring them to be "the ***148** joint *intended legal parents* " (italics added) of the child born to one of them, language they presumably used in order to bring themselves within *Johnson* where the preconception intent to be come a parent is the determinative inquiry. (*Johnson, supra,* 5 Cal.4th at p. 93, 19 Cal.Rptr.2d 494, 851 P.2d 776.) We do know that prebirth judgments of parentage on behalf of the nonbiologically related partner of a child's biological parent have been entered in this state, and that such judgments were touted to same-sex couples as less expensive and time consuming than second parent adoption. (Doskow, *The Second* ****685** *Parent Trap: Parenting For Same–Sex Couples in a Brave New World* (1999) 20 J. Juv. L. 1, 21, fns. 117 & 118 [citing judgments entered in San Francisco, Los Angeles, and San Luis Obispo Counties]; see also Mak, *Partners in Law,* 24 L.A. Law. (July–Aug.2001) 35, 38, 40.) How will today's majority holding affect the validity of the various procreative choices made in reliance on *Johnson?* The majority's decision offers no answers.

The majority's desire to give the twins a second parent is understandable and laudable. To achieve that worthy goal, however, the majority must rewrite a statute and disregard the intentions that the parties expressed when the twins were conceived. The majority amends the sperm-donor statute by inserting a new provision making a sperm donor the legal father of a child born to a woman artificially inseminated with his sperm whenever the sperm donor and the birth mother "*intended that the resulting child would be raised in their joint home,*" even though both the donor and birth mother also intended that the donor *not* be the child's father. (Maj. opn., *ante,* 33 Cal.Rptr.3d at p. 70, 117 P.3d at pp. 680–681, italics added.) Finding nothing in the statutory language or history to support this construction, I reject it. Relying on the plain meaning of the statutory language, and the trial court's findings that both K.M. and E.G. intended that E.G. would be the only parent of any children resulting from the artificial insemination, I would affirm the judgment of the Court of Appeal, which in turn affirmed the trial court, rejecting K.M.'s claim to parentage of the twins born to E.G.

Dissenting Opinion by WERDEGAR, J.

The majority determines that the twins who developed from the ova K.M. donated to E.G. have two mothers rather than one. While I disagree, as I shall explain, with that ultimate conclusion, I agree with the majority's premise that a child can have two mothers. Our previous holding that "for any child California law recognizes only one natural mother" (*Johnson v. Calvert* (1993) 5 Cal.4th

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84, 92, 19 Cal.Rptr.2d 494, 851 P.2d 776 (*Johnson*)) must be understood in the context in which it arose—a married couple who intended to become parents and provided their fertilized ova to a gestational surrogate who did not intend to become a parent—and, thus understood, may properly be limited to cases in which to recognize a second mother would inject an unwanted third parent into an ***149** existing family. When, in contrast to *Johnson,* no natural[1] or adoptive father exists, two women who intend to become mothers of the same child may do so either through adoption (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 2 Cal.Rptr.3d 699, 73 P.3d 554) or because both qualify as natural mothers under the Uniform Parentage Act (Fam.Code, § 7600 et seq.) (UPA), one having donated the ovum and the other *****76** having given birth (see *Johnson,* at p. 92, 19 Cal.Rptr.2d 494, 851 P.2d 776).

While scientific advances in reproductive technology now afford individuals previously unimagined opportunities to become parents, the same advances have also created novel, sometimes heartbreaking issues concerning the identification of the resulting children's legal parents. Declarations of parentage in this context implicate complex and delicate biological, personal, legal and social policy considerations. For these reasons, courts have sought above all to avoid foreseeable disputes over parentage with rules that provide predictability by permitting the various persons who must cooperate to bring children into the world through assisted reproduction to determine in advance who will and will not be parents, based on their expressed and voluntarily chosen intentions. (See, e.g., *Johnson, supra,* 5 Cal.4th 84, 93–95, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

Precisely because predictability in this area is so important, I cannot agree with the majority that the children in this case do in fact have two mothers. Until today, when one woman has provided the ova and another has given birth, the established rule for determining disputed claims to motherhood was clear: we looked to the intent of the parties. "[I]n a true 'egg donation' situation, where a ****686** woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law." (*Johnson, supra,* 5 Cal.4th 84, 93, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Contrary to the majority's apparent assumption, to limit *Johnson's* holding that a child can have only one mother to cases involving existing two-parent families does not require us to abandon *Johnson's* intent test as the method for determining disputed claims of motherhood arising from the use of reproductive technology. Indeed, we have no other test sufficient to the task.

Furthermore, to apply *Johnson's* intent test to the facts of this case necessarily leads to the conclusion that E.G. is a mother and K.M. is not. That E.G. intended to become the mother—and the only mother—of the children to whom she gave birth is unquestioned. Whether K.M. for her part also intended to become the children's mother was disputed, but the trial court found on the basis of conflicting evidence that she did not. We must defer to the trial court's findings on this point because substantial evidence ***150** supports them. K.M. represented in connection with the ovum donation process, both orally and in writing, that she did not intend to become the children's mother, and consistently with those representations subsequently held the children out to the world as E.G.'s but not her own. Thus constrained by the facts, the majority can justify its conclusion that K.M. is also the children's mother only by changing the law. This the majority does by displacing *Johnson's* intent test—at least for the purposes of this case—with the following new rule: a woman who has "supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home" (maj. opn., *ante,* 33 Cal.Rptr.3d at p. 67, 117 P.3d at p. 678; see also *id.,* 33 Cal.Rptr.3d at pp. 63, 67–68, 70, 71, 72, 117 P.3d at pp. 674–675, 678–679, 680–681, 681–682, 682–683) is a mother of the resulting children regardless of any preconception manifestations of intent to the contrary.

I find the majority's reasons for not applying the *Johnson* intent test unpersuasive. The majority criticizes the test as basing "the determination of parentage upon a later judicial determination of intent made years after the birth of the *****77** child." (Maj. opn., *ante,* 33 Cal.Rptr.3d at pp. 71–72, 117 P.3d at pp. 681–683.) But the task of determining the intent of persons who have undertaken assisted reproduction is not fundamentally different than the task of determining intent in the context of disputes involving contract, tort or criminal law, something courts have done satisfactorily for centuries. The expectation that courts will in most cases accurately decide factual issues such as intent is one of the fundamental premises of our judicial system. Indeed, the majority itself expresses willingness to continue applying the *Johnson* intent test to determine whether gestational surrogacy agreements are enforceable. This position leaves no plausible basis for refusing to apply the same test to determine whether ovum donation agreements are enforceable. Ovum donation and gestational surrogacy agreements are two sides of the same coin; each involves an ovum provider, a gestator, and an agreement about who will become the parent or parents of any resulting offspring. Indeed, when two women divide in this way the genetic and gestational

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components of motherhood, only an examination of their intent permits us to determine whether we are dealing with an ovum donation agreement, a gestational surrogacy agreement, or neither. If courts can perform one of these tasks acceptably, they can also perform the other.[2]

No more persuasive is the majority's suggestion that to respect the formally expressed intent of the parties to an ovum donation agreement is prohibited by the rule that parental obligations may not be waived by contract. (Maj. opn., *ante*, 33 Cal.Rptr.3d at pp. 71–72, 117 P.3d at pp. 681–683.) We expressly rejected a similar ***151** argument directed against a gestational surrogacy agreement in ****687** *Johnson, supra,* 5 Cal.4th 84, 95–97, 19 Cal.Rptr.2d 494, 851 P.2d 776. Certainly parental obligations may not be waived by contract. (Fam.Code, § 7632.) But *Johnson's* intent test does not *enforce* ovum donation and gestational surrogacy agreements; it merely directs courts to consider such documents, along with all other relevant evidence, in determining preconception intent.

As a final reason for rejecting the intent test, the majority suggests that to apply the test outside the context of *Johnson* might shield from the obligations of fatherhood, contrary to existing law, a man who, lacking the intent to become a father, "engages in sexual intercourse with a woman who assures him, falsely, that she is incapable of conceiving children...." (Maj. opn., *ante*, 33 Cal.Rptr.3d at p. 71, 117 P.3d at pp. 681–682.) But no one, to my knowledge, proposes to apply the intent test to determine the parentage of children conceived through ordinary sexual reproduction. This court adopted the intent test to resolve cases of assisted reproduction in which disputes over motherhood arise because one woman has provided the ova and another has gestated them. Both *Johnson, supra,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, and the case before us belong to that category. Although the majority may be correct in asserting that "[u]sually, whether there is evidence of a parent and child relationship under the UPA does not depend upon the intent of the parent" (maj. opn., *ante,* 33 Cal.Rptr.3d at p. 71, 117 P.3d at pp. 681–682), we adopted the intent test precisely *****78** because the UPA does not expressly resolve conflicting claims to motherhood arising from ovum transplants. The majority's speculation about men who engage in sexual activity despite mental reservations about fatherhood is irrelevant.

The new rule the majority substitutes for the intent test entails serious problems. First, the rule inappropriately confers rights and imposes disabilities on persons because of their sexual orientation. In a standard ovum donation agreement, such as the agreement between K.M. and E.G., the donor confirms her intention to assist another woman to become a parent without the donor becoming a parent herself. The majority's rule vitiates such agreements when its conditions are satisfied—conditions that include the fact the parties to the agreement are lesbian. Although the majority denies that its rule depends on sexual orientation (maj. opn., *ante,* 33 Cal.Rptr.3d at p. 67, 117 P.3d at p. 678, fn. 3), the opinion speaks for itself. The majority has chosen to use the term "lesbian" no less than six times in articulating its holding. (*Id.,* 33 Cal.Rptr.3d at pp. 63, 67, 117 P.3d at pp. 674–675, fn. 3, 9, 15, 17.) Moreover, the majority prevents future courts from applying its holding automatically to persons other than lesbians by stating that it "decide[s] only the case before us, which involves a lesbian couple who registered as domestic partners." (*Id.*, 33 Cal.Rptr.3d at p. 67, 117 P.3d at p. 678, fn. 3.) I see no rational basis—and the majority articulates none—for permitting the enforceability of an ovum donation agreement to depend on the sexual orientation of the parties. Indeed, lacking a rational basis, the rule may well violate equal protection. (See ***152** *Romer v. Evans* (1996) 517 U.S. 620, 631–636, 116 S.Ct. 1620, 134 L.Ed.2d 855; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 467–475, 156 Cal.Rptr. 14, 595 P.2d 592.) Why should a lesbian not have the same right as other women to donate ova without becoming a mother, or to accept a donation of ova without accepting the donor as a coparent, even if the donor and recipient live together and both plan to help raise the child?[3]

Having created a new rule to decide certain cases of disputed parentage arising from assisted reproduction, the majority seeks through various means to limit the number of cases to which the new rule will apply. Through this effort, the majority creates more problems than it solves.

Although the majority at one point seems to suggest that its holding applies only to persons who have registered as domestic partners (maj. opn., ****688** *ante*, 33 Cal.Rptr.3d at p. 67, 117 P.3d at p. 678, fn. 3), it elsewhere articulates its holding without reference to domestic partnership. (*Id.*, 33 Cal.Rptr.3d at pp. 63, 67, 68, 71, 72, 117 P.3d at pp. 674–675, 678, 679, 681–682, 682–683.) The resulting ambiguity flags a serious problem. K.M. and E.G. registered as domestic partners in October 1994 and terminated their domestic partnership in March 2001. Not until January 1, 2003, however, did California law give domestic partners rights and responsibilities with respect to each others' children. (Fam.Code, § 297.5, subd. (d), added by Stats.2003, ch. 421, eff. Jan. 1, 2005.) The new law expressly does not apply to persons like K.M. and E.G., who terminated their domestic partnerships before January 1, 2005. (*id.*, § 299.3, subd. (a).) for the majority

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to base its holding, even in part, ***79** on K.M.'s and E.G.'s domestic partnership is to hold, contrary to statute and apparent legislative intent, that domestic partnership under prior laws did affect parental rights and obligations.

Other problems arise from the majority's attempt to limit its holding to cases in which the ovum donor and birth mother intend to raise the children together. Except in the context of the majority's new rule, a person's pre-conception intent to participate in *raising* a child has no relevance to the determination of natural parentage. The duty to raise children (by personal care or through payment of child support) is imposed by law regardless of the parents' intent or wishes. Many persons who become parents do not intend to raise children (e.g., casual inseminators and parents who abandon their babies) and, conversely, many people intend to raise children without becoming parents (e.g., nannies and some stepparents and grandparents). To make the determination of natural parentage rest in part on the intent to *raise* a child injects into that determination a best interests factor—something we ***153** have previously refused to do. (*Johnson, supra,* 5 Cal.4th 84, 93, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) I realize the court in *Johnson* wrote that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law." (*Id.,* at p. 93, 19 Cal.Rptr.2d 494, 851 P.2d 776.) But the phrase "*raise as her own* " (*ibid.,* italics added) in that context did not refer simply to providing childcare; instead, it meant that the woman in question intended to be a *parent*—to raise a child of *her own.* In no sense did the *Johnson* court base its decision of parentage on the question of who would provide childcare. By analogy, Family Code section 7611, subdivision (d), which creates the presumption that a man who "receives [a] child into his home and openly holds out the child as his natural child" is not satisfied simply because a man receives the child into his home; to become a presumed father he must also hold out the child *as his natural child.*

Perhaps the most serious problem with the majority's new rule is that it threatens to destabilize ovum donation and gestational surrogacy agreements. One important function of *Johnson's* intent test was to permit persons who made use of reproductive technology to create, before conception, settled and enforceable expectations about who would and would not become parents. *Johnson, supra,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, thus gave E.G. a right at the time she conceived to expect that she alone would be the parent of her children—a right the majority now retrospectively abrogates. E.G.'s expectation has a constitutional dimension. (See *Troxel v. Granville* (2000) 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 [due process clause protects a parent's fundamental right to make decisions concerning the care, custody and control of her children].) We cannot recognize K.M. as a parent without diminishing E.G.'s existing parental rights. In light of the majority's abrogation of *Johnson* and apparent willingness to ignore preconception manifestations of intent, at least in some cases, women who wish to donate ova without becoming mothers, serve as gestational surrogates without becoming mothers, or accept ovum donations without also accepting the donor as a coparent would be well advised to proceed with the most extreme caution. While the majority purports to limit its holding to cohabiting lesbians, and possibly only to those cohabiting lesbians who are also domestic partners, these limitations, as I have explained, rest on ****689** questionable legal grounds and may well not stand the test of time.

***80** I find the majority's extensive discussion of Family Code section 7613, subdivision (b), irrelevant and illogical. The statute provides that "[t]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." The majority concludes the statute does not apply to the case before us. I agree. Although provisions of the UPA that determine the father and child relationship apply "[i]nsofar as practicable" (Fam.Code, § 7650) to determine the mother and ***154** child relationship, the act's drafters did not contemplate that *all* provisions concerning fatherhood would be construed as affecting motherhood. Indeed, the drafters considered it "obvious that certain provisions [of the act] would not apply in an action to establish the mother and child relationship" and expressly left to courts the decision of which provisions should apply. (9B West's U. Laws Ann. (2001) U. Parentage Act (1973) com. to § 21, p. 494.) That the statute governing sperm donations (Fam.Code, § 7613, subd. (b)) was not intended to govern ovum donations is easy to conclude since the act was drafted in 1973, long before assisted reproduction and gestational surrogacy became commonplace. (9B West's U. Laws Ann., *supra,* U. Parentage Act (2000) Prefatory Note, p. 297.) The drafters' response to these scientific developments has not been to endorse a counter-textual reading of the provision governing sperm donation, but instead to withdraw the 1973 act entirely and replace it with a new act expressly addressing some of the issues that have arisen from the use of reproductive technology. (9B West's U. Laws Ann, *supra,* U. Parentage Act (2000) p. 303 et seq.) In short, Family Code section 7613, subdivision (b), has nothing to do with this case.

The majority seems to believe that, having concluded the

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sperm donation statute (Fam.Code, § 7613, subd. (b)) does not apply, one must necessarily conclude that K.M. is the mother of the children who developed from the ova she donated to E.G. This reasoning entails a non sequitur. The statute, when it applies, merely *excludes* someone as a possible parent; it does not *establish* parentage. In order to reach the further conclusion that K.M. is a parent, the majority must entertain a string of questionable assumptions: first, that we would refuse to apply the sperm donation statute (Fam.Code, § 7613, subd. (b), quoted *ante,* 33 Cal.Rptr.3d at p. 67, 117 P.3d at p. 678), despite its plain language, to cut off the parental rights and responsibilities of a man who donates his sperm through a physician to a woman who is not his wife but with whom he lives (maj. opn., *ante*, 33 Cal.Rptr.3d at pp. 68–70, 117 P.3d at pp. 679–681), and, second, that two women who live together and divide between themselves the genetic and gestational aspects of pregnancy must be treated in exactly the same way as the man and woman just posited (*id.*, 33 Cal.Rptr.3d at p. 70, 117 P.3d at p. 681). The latter assumption, in turn, embodies additional, unstated assumptions about the effect of the equal protection clause. But ovum donation, which requires substantial medical and scientific assistance, is not sufficiently like sperm donation, which can easily be accomplished by unassisted laypersons, to require equal treatment under the law for all purposes. Accordingly, to recognize the sperm donation statute's inapplicability does not dispose of this case; it merely leaves us with the same question with which we began, namely, whether K.M. is a second mother of E.G.'s children. Until today, the *Johnson* intent test would have required us to answer the question in the negative. In my view, it still should.

***81 *155** Perhaps the best way to understand today's decision is that we appear to be moving in cases of assisted reproduction from a categorical determination of parentage based on formal, preconception manifestations of intent to a case-by-case approach implicitly motivated at least in part by our intuitions about the children's best interests. We expressly eschewed a best interests approach in *Johnson, supra,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, explaining that it "raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and **690 confuses concepts of parentage and custody." (*Id.,* at p. 93, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) This case, in which the majority compels E.G. to accept K.M. as an unintended parent to E.G.'s children, in part because of E.G.'s and K.M.'s sexual orientation and the character of their private relationship, shows that *Johnson's* warning was prescient. Only legislation defining parentage in the context of assisted reproduction is likely to restore predictability and prevent further lapses into the disorder of ad hoc adjudication.

Parallel Citations

37 Cal.4th 130, 117 P.3d 673, 05 Cal. Daily Op. Serv. 7504, 2005 Daily Journal D.A.R. 10,203

Footnotes

* Kennard, J., did not participate therein. Werdegar, J., dissented.

1 In order to protect the confidentiality of the minors, we will refer to the parties by their initials.

2 Further undesignated statutory references are to the Family Code.

3 Justice Werdegar's dissent asserts that our decision "inappropriately confers rights and imposes disabilities on persons because of their sexual orientation." (Dis. opn. of Werdegar, J., *post*, 33 Cal.Rptr.3d at pp. 77–78, 117 P.3d at pp. 686–688.) We do not. We decide only the case before us, which involves a lesbian couple who registered as domestic partners. We express no view regarding the rights of others and, of course, our "opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689.)

4 The combined minutes of the May 3, 1975 and June 14, 1975 meetings of the Committee on Family Law, which are attached to the report of the Senate Committee on Judiciary on Senate Bill No. 347 (1975–1976 Reg. Sess.), states that "[t]he committee recommended the deletion of 'married' " in the original version of the bill.

5 The Court of Appeal in *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, 326, 25 Cal.Rptr.3d 482, held that section 7613(b) applied where the semen donor was known to the impregnated woman and they had had a sexual relationship. But the semen donor in that case did not live with the impregnated woman, so the court did not address whether the statute would apply if the child was to be raised in the semen donor's home.

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6 Contrary to the suggestion in Justice Werdegar's dissent (dis. opn. of Werdegar, J., *post*, 33 Cal.Rptr.3d at pp. 78–79, 80–81, 117 P.3d at pp. 687–688, 689–690), we do not consider whether it is in the twins' best interest for the woman who supplied the ova from which they were produced, intending to raise the children in her home, to be declared their natural mother. We simply follow the dictates of the UPA.

1 All further statutory references are to the Family Code.

2 This case is factually distinguishable from the companion case of *Elisa B.* because here K.M. did not, by her behavior *after* their birth, meet the statutory test triggering the presumption (§ 7611, subd. (d)) that she was a presumed mother of the twins. (*Elisa B., supra,* 37 Cal.4th at pp. 119–122, 33 Cal.Rptr.3d at 53–56, 117 P.3d at 666–669.)

3 K.M. and E.G. were registered in San Francisco as domestic partners in 1995 at the time of the twins' birth. On March 30, 2001, E.G. filed a notice with the Clerk of the City and County of San Francisco dissolving the domestic partnership. As of January 1, 2005, domestic partners who are registered with the California Secretary of State have the same "rights and obligations" to "a child of either of them" as do spouses. (§ 297.5, subd. (d).) Obviously, this new statute has no application here.

1 As when an unmarried woman becomes pregnant through physician-assisted artificial insemination pursuant to Family Code section 7613, subdivision (b).

2 Having alternately embraced and criticized intent tests, the majority ironically concludes by making intent part of its own new test for parentage. That new test appears to require courts to determine whether the donor and recipient intended any offspring to be raised in their joint home. (See maj. opn., 33 Cal.Rptr.3d at pp. 63, 66–68, 71, 72, 117 P.3d at pp. 674–675, 677–679, 681–682.)

3 That the majority's rule expressly applies only to lesbians creates the additional problem of requiring a formal, legal definition of "lesbian." Unless we are willing to adopt such a definition and to authorize courts to inquire into the private facts necessary to apply it, the rule is likely unworkable.

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International and Regional Instruments and Government Policies

The ability of an individual to control their reproductive present and future including the right to determine the number and spacing of their children is a basic human right. The foundations for reproductive and sexual rights, along with the right to create (or avoid creating) a family, are found in other extant, internationally-recognized rights such as:

- The right to life, liberty, and security;
- The right to health, reproductive health, and family planning;
- The right to decide the number and spacing of one's children;
- The right to consent to marriage and to equality in marriage;
- The right to privacy;
- The right to be free from discrimination;
- The right to modify tradition and customs that violate women's rights;
- The right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment;
- The right to be free from sexual violence; and
- The right to enjoy scientific progress and to consent to experimentation.

These rights are enshrined in several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention of the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD), as well as other consensus documents. The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (I/A Court) are just two examples of the types of bodies that can hold states accountable for their actions or inaction under regional and international law when dealing with reproductive rights and family law issues.

Non-U.S. courts have relied on these treaties when considering issues central to family law, including the use of IVF. Of note is the 2012 decision by the Inter-American Court of Human Rights in *Artavia Murillo et al. v. Costa Rica* (case 12.361) in which the I/A Court declared Costa Rica's ban on IVF in violation of the American Convention on Human Rights. The I/A Court ruled that the ban violated the rights to privacy and family, and also infringed the principle of non-discrimination. It ordered Costa Rica to take steps to remove the prohibition on IVF, introduce the regulation of fertility treatment, and make IVF available under its social health system. The ruling also required the state to pay compensation for "material and moral" damages and the reimbursement of costs or expenses. The claimants received $5,000 each in compensation for being required to travel abroad for IVF and $20,000 for "anxiety, uncertainty and frustration" as a result of having been prevented from exercising "autonomous rights." After reading the decision, consider the challenges Costa Rica may face while implementing the ruling.

CEDAW General Recommendation 21, Art. 16

(13th session, 1994)

1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Comment

Public and private life

11. Historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.

12. As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. Reports of States parties disclose that there are still countries where de jure equality does not exist. Women are thereby prevented from having equal access to resources and from enjoying equality of status in the family and society. Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.

Various forms of family

13. The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

Polygamous marriages

14. States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

Article 16 (1) (a) and (b)

15. While most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.

16. A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.

Article 16 (1) (c)

17. An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have

wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the Convention.

18. Moreover, generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.

Article 16 (1) (d) and (f)

19. As provided in article 5 (b), most States recognize the shared responsibility of parents for the care, protection and maintenance of children. The principle that "the best interests of the child shall be the paramount consideration", has been included in the Convention on the Rights of the Child (General Assembly resolution 44/25, annex) and seems now to be universally accepted. However, in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married. The children of such unions do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children.

20. The shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.

Article 16 (1) (e)

21. The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.

22. Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government. In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.

23. There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development.

Article 16 (1) (g)

24. A stable family is one which is based on principles of equity, justice and individual fulfilment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in article 11 (a) and (c) of the Convention. Moreover, each partner should have the right to choose his or her name, thereby preserving individuality and identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or at its dissolution, she is denied these rights.

Article 16 (1) (h)

25. The rights provided in this article overlap with and complement those in article 15 (2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.

26. Article 15 (l) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.

27. In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.

28. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.

29. All of these rights should be guaranteed regardless of a woman's marital status.

Marital property

30. There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or

relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.

31. Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.

32. In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.

33. In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.

Inheritance

34. Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884 D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession. That provision has not been generally implemented.

35. There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

Article 16 (2)

36. In the Vienna Declaration and Programme of Action 12 adopted by the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, States are urged to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child. Article 16 (2) and the provisions of the Convention on the Rights of the Child

preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. In the context of the Convention on the Rights of the Child, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.

37. This not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.

38. Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner.

39. States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.

Recommendations

Violence against women

40. In considering the place of women in family life, the Committee wishes to stress that the provisions of General Recommendation 19 (eleventh session) 13 concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. States parties are urged to comply with that general recommendation to ensure that, in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms as individuals.

Reservations

41. The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2, claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country's economic or political status.

42. Many of these countries hold a belief in the patriarchal structure of a family which places a father, husband or son in a favourable position. In some countries where fundamentalist or other extremist views or economic hardships have encouraged a return to old values and traditions, women's place in the family has deteriorated sharply. In others, where it has been recognized that a modern society depends for its economic advance and for the general good of the community on involving all adults equally, regardless of gender, these taboos and reactionary or extremist ideas have progressively been discouraged.

43. Consistent with articles 2, 3 and 24 in particular, the Committee requires that all States parties gradually progress to a stage where, by its resolute discouragement of notions of the inequality of women in the home, each country will withdraw its reservation, in particular to articles 9, 15 and 16 of the Convention.

44. States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to article 16, will be withdrawn.

45. The Committee noted, on the basis of its examination of initial and subsequent periodic reports, that in some States parties to the Convention that had ratified or acceded without reservation, certain laws, especially those dealing with family, do not actually conform to the provisions of the Convention.

46. Their laws still contain many measures which discriminate against women based on norms, customs and socio-cultural prejudices. These States, because of their specific situation regarding these articles, make it difficult for the Committee to evaluate and understand the status of women.

47. The Committee, in particular on the basis of articles 1 and 2 of the Convention, requests that those States parties make the necessary efforts to examine the de facto situation relating to the issues and to introduce the required measures in their national legislations still containing provisions discriminatory to women.

Reports 48. Assisted by the comments in the present general recommendation, in their reports States parties should:

(a) Indicate the stage that has been reached in the country's progress to removal of all reservations to the Convention, in particular reservations to article 16;

(b) Set out whether their laws comply with the principles of articles 9, 15 and 16 and where, by reason of religious or private law or custom, compliance with the law or with the Convention is impeded.

Legislation

49. States parties should, where necessary to comply with the Convention, in particular in order to comply with articles 9, 15 and 16, enact and enforce legislation.

Encouraging compliance with the Convention

50. Assisted by the comments in the present general recommendation, and as required by articles 2, 3 and 24, States parties should introduce measures directed at encouraging full compliance with the principles of the Convention, particularly where religious or private law or custom conflict with those principles.

CEDAW General Recommendation 24, Art. 12

General Recommendation No. 24 (20th session, 1999)

Introduction

1. The Committee on the Elimination of Discrimination against Women, affirming that access to health care, including reproductive health is a basic right under the Convention on the Elimination of Discrimination against Women, determined at its 20th session, pursuant to article 21, to elaborate a general recommendation on article 12 of the Convention.

Background

2. States parties' compliance with article 12 of the Convention is central to the health and well-being of women. It requires States to eliminate discrimination against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period. The examination of reports submitted by States parties pursuant to article 18 of the Convention demonstrates that women's health is an issue that is recognized as a central concern in promoting the health and well-being of women. For the benefit of States parties and those who have a particular interest in and concern with the issues surrounding women's health, the present general recommendation seeks to elaborate the Committee's understanding of article 12 and to address measures to eliminate discrimination in order to realize the right of women to the highest attainable standard of health.

3. Recent United Nations world conferences have also considered these objectives. In preparing this general recommendation, the Committee has taken into account relevant programmes of action adopted at United Nations world conferences and, in particular, those of the 1993 World Conference on Human Rights, the 1994 International Conference on Population and Development and the 1995 Fourth World Conference on Women. The Committee has also noted the work of the World Health Organization (WHO), the United Nations Population Fund (UNFPA) and other United Nations bodies. It has also collaborated with a large number of non-governmental organizations with a special expertise in women's health in preparing this general recommendation.

4. The Committee notes the emphasis which other United Nations instruments place on the right to health and to the conditions which enable good health to be achieved. Among such instruments are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights,

the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.

5. The Committee refers also to its earlier general recommendations on female circumcision, human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS), disabled women, violence against women and equality in family relations, all of which refer to issues which are integral to full compliance with article 12 of the Convention.

6. While biological differences between women and men may lead to differences in health status, there are societal factors which are determinative of the health status of women and men and which can vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.

7. The Committee notes that the full realization of women's right to health can be achieved only when States parties fulfil their obligation to respect, protect and promote women's fundamental human right to nutritional well-being throughout their life span by means of a food supply that is safe, nutritious and adapted to local conditions. Towards this end, States parties should take steps to facilitate physical and economic access to productive resources especially for rural women, and to otherwise ensure that the special nutritional needs of all women within their jurisdiction are met.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

8. States parties are encouraged to address the issue of women's health throughout the woman's lifespan. For the purposes of this general recommendation, therefore, *women* includes girls and adolescents. This general recommendation will set out the Committee's analysis of the key elements of article 12.

Key elements

Article 12 (1)

9. States parties are in the best position to report on the most critical health issues affecting women in that country. Therefore, in order to enable the Committee to evaluate whether *measures to eliminate discrimination against women in the field of health care* are *appropriate*,

States parties must report on their health legislation, plans and policies for women with reliable data disaggregated by sex on the incidence and severity of diseases and conditions hazardous to women's health and nutrition and on the availability and cost-effectiveness of preventive and curative measures. Reports to the Committee must demonstrate that health legislation, plans and policies are based on scientific and ethical research and assessment of the health status and needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture.

10. States parties are encouraged to include in their reports information on diseases, health conditions and conditions hazardous to health that affect women or certain groups of women differently from men, as well as information on possible intervention in this regard.

11. Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

12. States parties should report on their understanding of how policies and measures on *health care* address the health rights of women from the perspective of women's needs and interests and how it addresses distinctive features and factors which differ for women in comparison to men, such as:

(a) Biological factors which differ for women in comparison with men, such as their menstrual cycle and their reproductive function and menopause. Another example is the higher risk of exposure to sexually transmitted diseases which women face;

(b) Socio-economic factors that vary for women in general and some groups of women in particular. For example, unequal power relationships between women and men in the home and workplace may negatively affect women's nutrition and health. They may also be exposed to different forms of violence which can affect their health. Girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability;

(c) Psychosocial factors which vary between women and men include depression in general and post-partum depression in particular as well as other psychological conditions, such as those that lead to eating disorders such as anorexia and bulimia;

(d) While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing , for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.

13. The duty of States parties to *ensure, on a basis of equality between men and women, access to health care* services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12.

14. The obligation to *respect rights* requires States parties to refrain from obstructing action taken by women in pursuit of their health goals. States parties should report on how public and private health care providers meet their duties to respect women's rights to have access to health care. For example, States parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried[25] or because they are women. Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.

15. The obligation to *protect rights* relating to women's health requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations. Since gender-based violence is a critical health issue for women, States parties should ensure:

(a) The enactment and effective enforcement of laws and the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services;

(b) Gender-sensitive training to enable health care workers to detect and manage the health consequences of gender-based violence;

(c) Fair and protective procedures for hearing complaints and imposing appropriate sanctions on health care professionals guilty of sexual abuse of women patients;

(d) The enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children.

16. States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict and women refugees.

17. The duty to *fulfil rights* places an obligation on States parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care. Studies such as those which emphasize the high maternal mortality and morbidity rates worldwide and the large numbers of couples who would like to limit their family size but lack access to or do not use any form of contraception provide an important indication for States parties of possible breaches of their duties to ensure women's access to health care. The Committee asks States parties to report

on what they have done to address the magnitude of women's ill-health, in particular when it arises from preventable conditions, such as tuberculosis and HIV/AIDS. The Committee is concerned at the growing evidence that States are relinquishing these obligations as they transfer State health functions to private agencies. States parties cannot absolve themselves of responsibility in these areas by delegating or transferring these powers to private sector agencies. States parties should therefore report on what they have done to organize governmental processes and all structures through which public power is exercised to promote and protect women's health. They should include information on positive measures taken to curb violations of women's rights by third parties, to protect their health and the measures they have taken to ensure the provision of such services.

18. The issues of HIV/AIDS and other sexually transmitted disease are central to the rights of women and adolescent girls to sexual health. Adolescent girls and women in many countries lack adequat eaccess to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the rist of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are also particularly vulnerable to these diseases. States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, including those who have been trafficked, even if they are not legally resident in the country. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their rights to privacy and confidentiality.

19. In their reports States parties should identify the test by which they assess whether women have access to health care *on a basis of equality of men and women* in order to demonstrate compliance with article 12. In applying these tests, States parties should bear in mind the provisions of article 1 of the Convention. Reports should therefore include comments on the impact that health policies, procedures, laws and protocols have on women when compared with men.

20. Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.

21. States parties should report on measures taken to eliminate barriers that women face in gaining *access to health care services* and what measures they have taken to ensure women timely and affordable access to such services. Barriers include requirements or conditions that prejudice women's access such as high fees for health care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and absence of convenient and affordable public transport.

22. States parties should also report on measures taken to ensure access to quality health care services, for example, by making them acceptable to women. Acceptable services are those

which are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.

23. In their reports, States parties should state what measures they have taken to ensure timely access to the range of services which are *related to family planning*, in particular, and to sexual and reproductive health in general. Particular attention should be paid to the health education of adolescents, including information and counselling on all methods of family planning.[26]

24. The Committee is concerned about the conditions of health care services for older women, not only because women often live linger than men and are more likely than men to suffer from disabling and degenerative chronic diseases, such as osteoporosis and dementia, but because they often have the responsibility for their ageing spouses. Therefore, States parties should take appropriate measures to ensure the access of older women to health services that address the handicaps and disabilities associated with ageing.

25. Women with disabilities, of all ages, often have difficulty with physical access to health services. Women with mental disabilities are particularly vulnerable, while there is limited understanding, in general, of the broad range of risks to mental health to which women are disproportionately susceptible as a result of gender discrimination, violence, poverty, armed conflict, dislocation and other forms of social deprivation. States parties should take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity.

Article 12 (2)

26. Reports should also include what measures States parties have taken to ensure women appropriate services *in connection with pregnancy, confinement and the post-natal period.* Information on the rates at which these measures have reduced maternal mortality and morbidity in their countries, in general, and in vulnerable groups, regions and communities, in particular, should also be included.

27. States parties should include in their reports how they supply *free services where necessary* to ensure safe pregnancies, childbirth and post-partum periods for women. Many women are at risk of death or disability from pregnancy-related causes because they lack the funds to obtain or access the necessary services, which include ante-natal, maternity and post-natal services. The Committee notes that it is the duty of States parties to ensure women's right to safe motherhood and emergency obstetric services and they should allocate to these services the maximum extent of available resources.

Other relevant articles in the Convention

28. When reporting on measures taken to comply with article 12, States parties are urged to recognize its interconnection with other articles in the Convention that have a bearing on

women's health. Those articles include article 5 (b), which requires States parties to ensure that family education includes a proper understanding of maternity as a social function; article 10, which requires States parties to ensure equal access to education, thus enabling women to access health care more readily and reducing female students' drop-out rates, which are often due to premature pregnancy; article 10(h) which provides that States parties provide to women and girls specific educational information to help ensure the well-being of families, including information and advice on family planning; article 11, which is concerned, in part, with the protection of women's health and safety in working conditions, including the safeguarding of the reproductive function, special protection from harmful types of work during pregnancy and with the provision of paid maternity leave; article 14 (2) (b), which requires States parties to ensure access for rural women to adequate health care facilities, including information, counselling and services in family planning, and (h), which obliges States parties to take all appropriate measures to ensure adequate living conditions, particularly housing, sanitation, electricity and water supply, transport and communications, all of which are critical for the prevention of disease and the promotion of good health care; and article 16 (1) (e), which requires States parties to ensure that women have the same rights as men to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights. Article 16 (2) also proscribes the betrothal and marriage of children, an important factor in preventing the physical and emotional harm which arise from early childbirth.

Recommendations for government action

29. States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.

30. States parties should allocate adequate budgetary, human and administrative resources to ensure that women's health receives a share of the overall health budget comparable with that for men's health, taking into account their different health needs.

31. States parties should also, in particular:

(a) Place a gender perspective at the centre of all policies and programmes affecting women's s health and should involve women in the planning, implementation and monitoring of such policies and programmes and in the provision of health services to women;

(b) Ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health, and, in particular, allocate resources for programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS;

(c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance.

When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion;

(d) Monitor the provision of health services to women by public, non-governmental and private organizations, to ensure equal access and quality of care;

(e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice;

(f) Ensure that the training curricula of health workers includes comprehensive, mandatory, gender-sensitive courses on women's health and human rights, in particular gender-based violence.

1 Adopted by the Committee at its 24th meeting on 11 August 1983.

2 Official Records of the General Assembly, Forty-first Session, Supplement No. 45 (A/41/45), para. 362.

3 General recommendation 1 was adopted at the Committee's fifth session.

4 E/CN.4/Sub.2/1989/42 of 21 August 1989.

5 E/CN.4/1986/42.

6 E/CN.6/1989/6/Add.1.

7 HR/AIDS/1989/3.

8 Report of the World Conference to Review and Appraise the Achievements of the United Nations for Women: Equality. Development and Peace, Nairobi, 15-26 July 1985 (United Nations publication, Sales No. E.85.IV.10), chapter I, section A.

9 Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985 (United Nations publication, Sales No. E.85.IV.10), chapter I, section A.

10 A/37/351/Add.1 and Add.1/Corr.1, annex, section VIII.

11 See Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985 (United Nations publications, Sales No. E.85.IV.10), chap. I, sect. A.

12 A/CONF.157/24 (Part I), chap. III.

13 See Official Records of the General Assembly, Forth-seventh Session, Supplement No. 38 (A/47/38), chap. I.

14 General Assembly resolution 217 A (III).

15 General Assembly resolution 2200 A (XXI), annex.

16 General Assembly resolution 640 (VII).

17 Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

18 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I.

19 See Official Records of the General Assembly, Forty-third Session, Supplement No. 38 (A/43/38), chap. V.

20 CCPR/C/21/Rev.1/Add.7, 27 August 1996.

21 96/694/EC, Brussels, 2 December 1996.

22 European Commission document V/1206/96-EN (March 1996).

23 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I.

24 See para. 141 of the Platform for Action adopted by the Fourth World Conference on Women, held at Beijing from 4 to 15 September 1995 (A/CONF.177/20, chap. I, resolution 1, annex II). See also para. 134, which reads in part: "The equal access and full participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security."

25 General recommendation 21, paragraph 29.

26 Health education for adolescents should further address, *inter alia*, gender equality, violence, prevention of sexually transmitted diseases and reproductive and sexual health rights.

27 Reference to resolutions in which the Committee adopted the Cairo and Beijing recommendations to reduce maternal mortality and morbidity.

ORDER OF THE PRESIDENT OF THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

OF AUGUST 6, 2012

CASE OF ARTAVIA MURILLO *ET AL.* ("*IN VITRO* FERTILIZATION") *v.* COSTA RICA

HAVING SEEN:

1. The brief of July 29, 2011, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") a case against the Republic of Costa Rica (hereinafter "Costa Rica" or "the State"). On that occasion, the Commission offered four expert opinions, indicated the names of three expert witnesses, and described the purpose of the four proposed expert opinions.

2. The brief of August 3, 2011, in which the Inter-American Commission provided the name of one of the expert witnesses offered in its brief submitting the case, and the brief of August 5, 2011, forwarding the curricula vitae of the four proposed expert witnesses.

3. The note of the Secretariat of October 18, 2011, advising that, in view of the failure of the presumed victims to agree on the appointment of a common intervener, the President of the Court had designated Boris Molina Acevedo (hereinafter "representative Molina Acevedo") and Gerardo Trejos Salas (hereinafter "representative Trejos Salas") as common interveners with autonomous participation.

4. The brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief") presented on December 19, 2011, by representative Molina Acevedo, on behalf of twelve presumed victims,[1] in which he offered two statements and one expert opinion.

5. The pleadings and motions brief presented on December 19, 2011, by representative Trejos Salas, on behalf of six presumed victims,[2] in which he offered four statements and four expert opinions.

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[1] Boris Molina Acevedo was designated as the representative of Enrique Acuña Cartín, Ileana Hénchoz Bolaños, Miguel Antonio Yamuni Zeledón, Viktor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María Del Socorro Calderón Porras, Joaquina Arroyo Fonseca, Giovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza

[2] Gerardo Trejos Salas was designated as the representative of Grettel Artavia Murillo, Miguel Mejía Carballo, Claudia María Carro Maklouf, Andrea Regina Bianchi Bruna, German Alberto Moreno Valencia and Ana Cristina Castillo León.

6. The briefs of January 25 and 27, 2012, and their attachments, whereby representative Trejos Salas forwarded the curricula vitae of two proposed expert witnesses and a summary of the curriculum of another proposed expert witness.

7. The brief with preliminary objections, answering the submission of the case of the Inter-American Commission on Human Rights and with observations on the pleadings and motions brief (hereinafter "the answer to the application") presented by Costa Rica on April 30, 2012, in which it offered four expert opinions.

8. The brief of May 8, 2012, and its attachments, in which Hubert May Cantillano (hereinafter "representative May Cantillano") advised that "owing to the decease of [...] Gerardo Trejos Salas, the presumed victims that [the latter had] represented [...] had decided to appoint [him] as their new representative."

9. The communication of May 14, 2012, and its attachments, in which the State forwarded clarifications in response to the Secretariat's observations concerning the documentary evidence attached to its answer to the application.

10. The notes of the Secretariat of May 21, 2012, in which, on the instructions of the President of the Court and in accordance with Article 46(1) of the Rules of Procedure of the Court applicable to this case[3] (hereinafter "the Court's Rules of Procedure" or "the Rules of Procedure"), the State, the representatives and the Inter-American Commission were asked to forward their respective final list of deponents, in order to schedule the public hearing on the preliminary objections and eventual merits, reparations and costs in this case. In addition, based on the principle of procedural economy, they were asked to indicate which deponents could provide their testimony by affidavit and who they considered should be called to testify at the public hearing.

11. The brief of June 6, 2012, in which the State presented its final list of deponents. The State confirmed the offer of the four expert witnesses it had proposed (*supra* having seen paragraph 7) and asked that all of them be called to testify at the public hearing.

12. The brief of June 6, 2012, in which the Inter-American Commission presented its final list of deponents. In this brief, the Commission confirmed the offer of the four proposed expert witnesses (*supra* having seen paragraphs 1 and 2). It asked that two of them be called to declare at the public hearing; advised that one expert witness could provide her expert opinion by affidavit and that the expert opinion of the fourth expert witness could only be received by affidavit owing to his impossibility of attending the scheduled hearing.

13. The brief of June 6, 2012, in which representative May Cantillano forwarded his final list of deponents, indicating who he considered should be called to testify at the public hearing, and who could testify by affidavit. In this brief, he requested the substitution of one presumed victim proposed as a deponent in the pleadings and motions brief by another presumed victim.

14. The brief of June 6, 2012, in which representative Molina Acevedo forwarded his final list of deponents, indicating who he considered should be called to testify at the public hearing, and who could testify by affidavit.

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[3] Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

15. The notes of the Secretariat of June 8, 2012, forwarding the final lists of deponents to the parties and advising them that they had 15 days to present any observations they deemed pertinent.

16. The brief of June 14, 2012, in which the Inter-American Commission indicated that it had no observations to make on the final lists of deponents of the State and of the two representatives. In addition, the Commission asked permission to pose questions to the four expert witnesses proposed by the State.

17. The briefs of June 21, 2012, in which representatives May Cantillano and Molina Acevedo presented their observations on the preliminary objections filed by the State in its answer to the application.

18. The brief of June 22, 2012, in which the Inter-American Commission presented its observations on the preliminary objections filed the State in its answer to the application.

19. The brief of June 22, 2012, in which the State presented its observations on the final lists of deponents of the representatives. In the brief, the State indicated that it "ha[d] no objection to any of the deponents offered by the victims' representatives or by the Commission," but "it [was] worth noting that [Gerardo Escalante López and Delia Ribas Valdés, expert witnesses proposed by representative May Cantillano]" are "the petitioners who initiated this case and have a direct interest in its result, because in the private exercise of their profession, they performed the technique of *in vitro* fertilization."

20. The note of the Secretariat of June 29, 2012, in which, on the instructions of the President, it forward to Dr. Escalante López and to Dr. Ribas Valdés the State's brief of June 22, 2012, granting them until July 9, 2012, at the latest, to submit their observations on the State's arguments.

21. The note of the Secretariat of June 29, 2012, placing on record that the Commission had no observations to make on the final list of deponents of the State and of the representatives, and that the representatives had not presented observations on the final lists of deponents presented by the Commission and the State.

22. The brief of July 9, 2012, in which Dr. Escalante López and Dr. Ribas Valdés presented clarifications in relation to the observations of the State.

CONSIDERING THAT:

1. The offer and admission of evidence, as well as the summoning of the presumed victims and expert witnesses, are regulated in Articles 35(1)(f), 40(2)(c), 41(1)(c), 42(2), 46(1), 50, 57 and 58 of the Court's Rules of Procedure.

2. The Commission proposed that the Court receive four expert opinions. Representative May Cantillano offered as evidence the testimony of four presumed victims and four expert witnesses. Representative Molina Acevedo offered as evidence the testimony of two presumed victims and one expert witness. The State offered as evidence the testimony of four expert witnesses. The evidence offered by the Commission, the representatives and the State was indicated at the appropriate procedural opportunity.

3. The parties have been granted the right of defense with regard to the evidence offered by each of them in their briefs submitting the case, with pleadings and motions, and in answer to the application, as well as in their final lists of deponents (*supra* having seen paragraphs 10 and 15).

4. The Commission indicated that it had no observations to make on the testimony and expert opinions offered by the representatives and by the State (*supra* having seen paragraph 21). For their part, the representatives did not present observations on the final lists of deponents presented by the Commission and the State (*supra* having seen paragraph 21). The State presented observations on expert witnesses proposed by representative May Cantillano.

a) Testimony of the presumed victims and expert witnesses offered by the representatives and the State that have not been contested

5. Regarding the testimony and expert opinions offered by the representatives and the State that have not been contested, the President considers it appropriate to admit this evidence, so that the Court can assess its usefulness at the correct procedural opportunity, in the context of the existing body of evidence and according to the rules of sound judicial discretion.

6. In his brief of June 6, 2012, representative May Cantillano asked that Miguel Mejía Carballo be allowed to replace his wife, Grettel Artavia Murillo, as a deponent. He indicated that "[t]he reason for the substitution [...] is the consideration that he is the person who was most victimized by the *in vitro* ban. His specific health problem (he is a paraplegic) prevents him absolutely from procreating by any other means than assisted fertilization. The purpose of the testimony is the same as already indicated."

7. Taking into account the reasons why representative May Cantillano has requested this substitution and that the other parties have not raised any objection, as well as the fact that the purpose of the testimony is substantially the same, the President finds that it is appropriate to receive the testimony of Miguel Mejía Carballo as indicated in the operative paragraphs of this Order (*infra* fifth operative paragraph), because this testimony can assist the Court in determining the facts of the instant case.

8. Consequently, the President orders the admission of the statements of six presumed victims: Andrea Regina Bianchi Bruna, Miguel Mejía Carballo, Ana Cristina Castillo León, Claudia María Carro Maklouf, Víctor Hugo Sanabria León and Ileana Hénchoz Bolaños; and the expert opinions of seven expert witnesses: Andrea Mesén Fainardi, Antonio Marlasca López, Alicia Neuburger, Maureen Condic, Anthony Caruso, Marco Gerardo Monroy Cabra and Martha Garza. The purpose of these statements and the way in which they will be received are specified in the operative paragraphs of this Order (*infra* first and fifth operative paragraphs).

b) Expert evidence presented by representative May Cantillano

9. Representative May Cantillano proposed Dr. Gerardo Escalante López and Dr. Delia Ribas Valdés as expert witnesses. The purpose of the testimony of Dr. Escalante López would be "the necessity that individuals who require and want this are able to have recourse to *in vitro* fertilization techniques so that this treatment may contribute to its purpose; also that the percentage of success of this technique is high in the world and on the American continent, and regarding the treatment provided to several couples in order to perform successful *in vitro* fertilizations in Costa Rica." The purpose of the testimony of Dr. Ribas

Valdés would be "the necessity that individuals who require and want this are able to have recourse to *in vitro* fertilization techniques so that this treatment may contribute to its purpose; also that the percentage of success of this technique is high in the world and on the American continent, and regarding the treatment provided to several couples in order to perform successful *in vitro* fertilizations in Costa Rica and, especially, about the cases of Grettel Artavia Murillo and Andrea Bianchi Bruna."

10. The State indicated that it "d[id] not contest the intervention of any of the deponents offered by the representatives of the victims [...], based on the obligation of good faith imposed on the State in compliance with its procedural obligations before the inter-American human rights system." Nevertheless, it noted "that Dr. Gerardo Escalante López and Dr. Delia Ribas Valdés, expert witnesses offered in the brief signed by Hubert May Cantillano, are the petitioners who initiated this case and have a direct interest in its result, because in the private exercise of their profession they practiced the technique of *in vitro* fertilization."

11. In their brief of July 9, 2012, Drs. Escalante López and Ribas Valdés indicated that "the State [...] has not filed, either *stricto sensu* or formally, an objection to or a disqualification of the undersigned, [but rather] a concern about whether any of the causes for disqualification established in Article 48(b), (c) and (f) of the Court's Rules of Procedure exists or has been constituted." They considered that they "have never been either formal or *de facto* representatives of any of the [presumed] victims." They observed that they "have never had any type of relationship of subordination or dependency with regard to any of the [presumed] victims," or a "close relationship [with the presumed victims], given that medical deontology requires a distance between doctor and patient." They denied that they had "any personal or private interest because the only interest [...] is to explain, from a scientific point of view, [...] the technique of *in vitro* fertilization, the implications of modern treatments in this field, [and] the problem of infertility, as a public health problem."

12. Article 48(1) of the Rules of Procedure indicates the following:

> 1. An expert witness may be disqualified based on the following grounds:
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> [...]
>
> b. he or she is or has been a representative of one of the alleged victims in proceedings regarding the facts of the case before the Court, either at the domestic level or before the inter-American system for the promotion and protection of human rights;
>
> c. he or she currently has, or has had, close ties with the proposing party, or is, or has been, a subordinate of the proposing party, and the Court considers that his or her impartiality may be affected; [...]
>
> f. he or she has previously intervened, in any capacity and before any organ, whether national or international, in relation to the same case.

13. The President finds that, even though the State did not indicate a formal and explicit disqualification with regard to the two expert witnesses proposed by representative May Cantillano, a disqualification can be indicated implicitly when the parties or the Commission submit concerns as regards the impartiality of the expert witnesses. Consequently, in this case, the Court must analyze the causes for disqualification contained in Article 48(1) of the Rules of Procedure.

14. The President observes that on January 10, 2001, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica decided that "having seen the request presented by Gerardo Escalante López and Delia Ribas Valdés, [...] it considered withdrawn the appeal for

clarification and further information which they had filed" against the judgment of the Supreme Court of Justice of March 15, 2000, concerning the prohibition of *in vitro* fertilization.[4]

15. Subsequently, Dr. Escalante López, as legal representative of the *Instituto Costarricense de Fertilidad* [the Costa Rican Fertility Institute], granted a power of attorney to representative Trejos Salas, for the latter to lodge a petition before the Commission on behalf of the Costa Rican Fertility Institute, in order "to obtain fair compensation for the damage caused, because the [said] enterprise has made the necessary investments in the preparation of professionals abroad by means of training internships in international *in vitro* fertilization centers. On their return to our country, these professionals were unable to work in this field and, owing to their forced inactivity during the time required to reinstate this practice, they will suffer an evident deterioration in their skills and upgrading, a factor that will make it necessary to male another investment in their preparation."[5]

16. In its admissibility report, the Commission indicated that, on January 19, 2001, representative Trejos Salas, acting as petitioner, had lodged a petition against the State based on the presumed violation of the American Convention to the detriment of, *inter alia*, the Costa Rican Fertility Institute.[6]

17. Furthermore, on December 24, 2002, Dr. Escalante López and Dr. Ribas Valdés, together with the other presumed victims in this case, submitted a brief to the Inter-American Commission in which they qualified themselves as "direct victims" of "the arbitrary decision of the Constitutional Chamber [...] that prohibited the practice of *in vitro* fertilization" and requested the Commission "to merge the admissibility and the merits stages and to deliver a ruling in the case as soon as possible." In addition, they stated that they "waived [...] the friendly settlement procedure established in the Rules of Procedure."[7]

18. Based on these facts, the President observes, first, that Drs. Escalante López and Ribas Valdés have not acted as legal representatives of the presumed victims in this case at either the national or the international level[8]; rather, as doctors, they have attended several of the presumed victims in relation to the medical treatment of infertility. Their intervention in the treatment as doctors is not related to any juridical action of legal representation under the law.[9] Hence, the cause of disqualification of expert witnesses stipulated in Article 48(1)(b) of the Rules of Procedure is not applicable in this case.

19. Second, with regard to the grounds established in Article 48(1)(c) of the Rules of Procedure, it is necessary: (i) that the proposed expert witness has or has had close ties with the proposing party, or is or has been his or her subordinate, and (ii) that the Court considers that the impartiality of the expert witness may be affected. Even though it may be considered that the relationship between doctor and patient constitutes a close tie in the

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4 File of attachments to the merits report of the Commission (tome I, folio 119).

5 File of attachments to the merits report of the Commission (tome I, folio 118).

6 IACHR, Admissibility Report No. 25/04, Petition 12,361, Ana Victoria Sánchez Villalobos *et al.*, Costa Rica, March 11, 2004, paras. 1 and 2.

7 File of attachments to the merits report of the Commission (tome III, folios 1121 to 1125).

8 Regarding the requirement of "is or has been a representative" under Article 48(1)(b) of the Rules of Procedure, *cf. Case of Mohamed v. Argentina*. Order of the Inter-American Court of Human Rights of June 18, 2012, considering paragraph 12.

9 Likewise, *cf. Case of Cabrera García and Montiel Flores v. Mexico*. Order of the Inter-American Court of Human Rights of August 23, 2010, considering paragraph 13.

case of a prolonged medical treatment and based on confidentiality, specific evidence must be provided from which the presumed lack of impartiality of the expert witness can be inferred in relation to the purpose of the proposed expert opinion.

20. Furthermore, alleging the existence of a direct interest of the expert witness that could affect his or her impartiality requires proving that the person opposed will benefit personally from the determination of facts of the case or their legal consequences.[10] On previous occasions, it has been indicated that, even when the statement of an expert witness contained elements that support the arguments of one of the parties this, *per se,* does not disqualify the expert witness.[11] A direct interest in the result of these proceedings may exist when the determination of the facts and their legal consequences will grant some benefit to the proposed expert witness.[12]

21. The President considers that the instant case is related to the compatibility with the American Convention of a judicial ruling issued by the Constitutional Chamber of the Supreme Court of Justice concerning abstract control of constitutionality. Thus, a direct and individualized personal benefit to the proposed expert witnesses is not observed, given that the effects of the Court's decision on the compatibility of the judicial ruling with the American Convention will have general effects. In addition, the purpose of the expert opinion is limited to a scientific aspect relating to the techniques, implications and procedures of *in vitro* fertilization. Therefore, the President finds that there is no risk that impartiality will be impaired in the terms of Article 48(1)(c) of the Rules of Procedure.

22. Third, regarding the grounds for disqualification under Article 48(1)(f) of the Rules of Procedure, the President of the Court considers that the filing of an appeal for clarification and further information and the subsequent withdrawal of this appeal in relation to the ruling on the prohibition of *in vitro* fertilization constitutes a previous intervention before a national organ in relation to the same case as established in Article 48(1)(f) of the Rules of Procedure. Regarding the proceedings before the inter-American system, the two proposed expert witnesses were not named as presumed victims in the Commission's admissibility report.[13] Therefore, the expert witnesses have not acquired the status of presumed victims in the case before the inter-American system. However, in view of the expression "in any capacity" of Article 48(1)(f) of the Rules of Procedure, it must be noted that Dr. Escalante López intervened before the Commission as legal representative of a juridical person that

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10 *Cf. Case of Boyce et al. v. Barbados.* Order of the President of the Inter-American Court of Human Rights of May 29, 2007, considering paragraph 22; Case of *Tristán Donoso v. Panama.* Order of the President of the Inter-American Court of Human Rights of June 9, 2008, considering paragraph 19, and *Case of Reverón Trujillo v. Venezuela.* Order of the President of the Inter-American Court of Human Rights of September 24, 2008, considering paragraph 34.

11 *Cf. Case of Boyce et al., supra* note 10, considering paragraph 22; *Case of Tristán Donoso, supra* note 10, considering paragraph 19; *Case of Reverón Trujillo, supra* note 10, considering paragraph 34, and *Case of Radilla Pacheco v. Mexico.* Order of the President of the Inter-American Court of Human Rights of May 29, 2009, considering paragraph 46.

12 *Cf. Case of Boyce et al., supra* note 10, considering paragraph 22; *Case of García Prieto et al. v. El Salvador.* Order of the President of the Court of December 14, 2006, considering paragraph 11.

13 IACHR, Admissibility Report No. 25/04, Petition 12,361, Ana Victoria Sánchez Villalobos *et al.,* Costa Rica, March 11, 2004, para. 49. Although the petition lodged before the Commission included as presumed victims the companies *Costa Rica Ultrasonografía S.A* and *Instituto Costarricense de Fertilidad,* for which Dr. Escalante López was the legal representative, the Commission decided that "[r]egarding the companies *Costa Rica Ultrasonografía S.A.* and *Instituto Costarricense de Fertilidad,* the Commission ratifies its established practice and legal doctrine [...], declaring that it does not have competence *ratione personae* to examine a petition lodged before the Commission by a juridical person, since such entities are excluded from the persons to which the Convention grants protection."

acted as petitioner. In addition, in a brief, Dr. Escalante López, Dr. Ribas Valdés and the presumed victims confirmed that they were "direct victims" and asked the Commission to issue a report as soon as possible. On this basis, the President finds that the grounds for disqualification of Article 48(1)(f) of the Rules of Procedure are applicable with regard to Dr. Escalante López and Dr. Ribas Valdés.

23. Nevertheless, the President finds it pertinent to receive their statements for information purposes only, because they know how *in vitro* fertilization was performed in Costa Rica before it was banned and because they have treated several of the presumed victims for infertility. In addition, the President notes that the State did not contest their participation in these proceedings. The purpose of their testimony as deponents for information purposes only will be defined in the operative paragraphs of this Order (*infra* first operative paragraph), so that the Court may assess their usefulness at the appropriate opportunity, within the context of the existing body of evidence and according to the rules of sound judicial discretion.

c) Expert evidence offered by the Inter-American Commission

24. Under Article 35(1)(f) of the Rules of Procedure, the "possible appointment of expert witnesses" may be made by the Inter-American Commission "when the Inter-American public order of human rights is affected in a significant manner," and the grounds for and purpose of their intervention must be justified satisfactorily. This provision means that the appointment of expert witnesses by the Commission must be exceptional and subject to this requirement, which is not complied with merely because the intended expert opinion is related to an alleged violation of human rights. The Inter-American public order of human rights must be "affected in a significant manner," and the Commission must substantiate this situation.[14]

25. In this case, the Commission offered four expert witnesses indicating that "the [case] includes matters of inter-American public order." It considered that "the general prohibition to practice *in vitro* fertilization in Costa Rica transcends the victims in this specific case and gives rise to a discussion on the content and scope of the rights embodied in Articles 11 and 17 of the American Convention," because it allows the Court to analyze "the protection of the right to form a family in the sense of including the decision to become a biological father or mother, as well as the choice of and access to the pertinent means of achieving this, [...] the international standards applicable to the examination of permissible restrictions to the exercise of the rights to private and family life and to form a family, on an issue related to reproductive health, [... and] the international standards concerning the right to equality and non-discrimination from two perspectives[:] [... the] State's responsibility for preventing a group of people from having access to a treatment that would have allowed them to overcome their situation of disadvantage regarding the possibility of having biological children, and [...] the disproportionate impact [...] on women."

26. In its brief with the final list of deponents, the Commission added that "the substantial analysis of the compatibility or incompatibility of the absolute prohibition [of *in vitro* fertilization] with the American Convention, calls for the Court to have at its disposal

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[14] *Cf. Case of Vera Vera et al. v. Ecuador.* Order of the President of the Court of December 23, 2010, considering paragraph 9; *Case of Torres et al. v. Argentina.* Order of the President of the Court of April 29, 2011, considering paragraph 8, and *Case of the Barrios Family v. Venezuela.* Order of the President of the Court of June 1, 2011, considering paragraph 7.

the necessary normative and empirical elements on *in vitro* fertilization and its possible regulation, including a comparative perspective."

27. First, the Commission offered the expert opinion of Fernando Zegers-Hochschild, to testify "on the assisted reproduction technique of *in vitro* fertilization, what the technique consists in and how it is carried out, including a comparative perspective." With regard to the inter-American public order, it indicated that "the expert opinion of Fernando Zegers-Hochschild will provide the Court with information on the assisted reproduction technique of *in vitro* fertilization, and the procedures that it includes. In addition, given the experience of the expert witness, the Court will have relevant information on the technique from a comparative perspective. The Commission considered that a clear conceptualization of the technique and its procedures, as well as a comparative perspective, constituted an important starting point for deciding the case."

28. Second, the Commission offered the expert opinion of Paola Bergallo to testify about "the international standards on reproductive rights, particularly on arbitrary interferences in private and family life and the principles of equality and non-discrimination." Thus, the expert witness "will also discuss the implications of a State ban on the practice of *in vitro* fertilization in light of those standards." The Commission indicated that this expert opinion is related to inter-American public order because "it will provide the Court with the required conceptual elements to allow the Court to include questions relating to reproductive rights within the normative framework of the right to private and family life, the right to form a family, and the principle of equality and non-discrimination. In addition to examining the normative framework of these rights, the expert witness will contribute to the legal analysis of whether or not the ban on *in vitro* fertilization is compatible with the American Convention. All these aspects will be dealt with based on the applicable international standards."

29. Third, the Commission offered the expert opinion of Florencia Luna on "the different regulations governing the assisted reproductive technique of in vitro fertilization from a comparative point of view." Regarding inter-American public order, it indicated that the expert opinion "will allow the Court to know how the other States in the region have regulated *in vitro* fertilization in order to accommodate the different interests at stake in a different way from an approach that prohibits access to the technique absolutely. This comparative analysis is relevant for determining whether or not the ban on *in vitro* fertilization constitutes a restriction that is permissible under the American Convention."

30. Fourth, the Commission offered the expert opinion of Paul Hunt about "the concept of 'disproportionate impact' as a form of violation of the principle of equality and non-discrimination, and how the application of this concept particularly affects women by unduly restricting their exercise of their reproductive rights." Regarding the inter-American public order, the Commission indicated that "the concept of disproportionate impact has not been dealt with directly in the case law of the Inter-American Court in relation to the principle of equality and non-discrimination. This expert opinion will allow the Court to incorporate the international standards concerning this concept into the analysis of the instant case, specifically the examination of the effects that a prohibition such as this one has on women."

31. Based on the purpose of each of the proposed expert opinions and inter-American public order, the President considers that the four expert opinions transcend the interest and purpose of the instant case to include scientific and legal aspects related to artificial reproduction techniques that involve fundamental issues related to respect for and guarantee of the right to private and family life, and the right to equality and non-

discrimination. The four expert opinions that deal with scientific, empirical and normative aspects from the perspective of international and comparative law in relation to the technique of *in vitro* fertilization in light of the rights of the individual will be useful for the analysis of the prohibition adopted by the State in this case in relation to the American Convention. Based on the foregoing, the President finds it appropriate to admit the expert opinions of the four proposed expert witnesses, in keeping with the purpose and method determined in the operative paragraphs of this Order (*infra* first and fifth operative paragraphs).

d) Method for receiving the testimony and expert opinions

32. It is necessary to ensure that the truth can be known and also the most extensive presentation of the facts and arguments by the parties on everything that is pertinent for deciding disputed matters, guaranteeing both the latter's right to defend their respective positions and also the Court's ability to give adequate attention to the cases submitted to its consideration, taking into account that their number has increased significantly and is growing constantly. It must also be ensured that the proceedings are completed within a reasonable time, as required by effective access to justice. Consequently, it is necessary to receive the greatest possible number of statements by affidavit and to hear the presumed victims and expert witnesses whose direct testimony is truly essential at the public hearing, taking into account the circumstances of the case and the purpose of the testimony and opinions.

d.1) Testimony and expert opinions to be provided by affidavit

33. Taking into account the provisions of Article 50(1) of the Rules of Procedure, the information provided by the parties with their final lists of deponents, the purpose of the statements offered and their relationship to the facts of the case, as well as the principle of procedural economy, the President finds it desirable to receive by affidavit the following statements and expert opinions: the statements for information purposes only of Gerardo Escalante López and Delia Ribas Valdés, proposed by representative May Cantillano; the statements of the presumed victims Andrea Regina Bianchi Bruna, Ana Cristina Castillo León and Claudia María Carro Maklouf, proposed by representative May Cantillano; the statement of the presumed victim Víctor Hugo Sanabria León, proposed by representative Molina Acevedo; the expert opinions of Andrea Mesén Fainardi and Antonio Marlasca López, proposed by representative May Cantillano, the expert opinion of Alicia Neuburger, proposed by representative Molina Acevedo, the expert opinions of Maureen Condic and Martha Garza, proposed by the State, and the expert opinions of Florencia Luna and Paul Hunt, proposed by the Commission.

34. The President notes that Article 50(5) of the Court's Rules of Procedure applicable to this case establishes the possibility that the presumed victims or their representatives and the respondent State may provide a list of questions to pose to those persons called on to testify by affidavit. In application of the provisions of the said article, the President proceeds to grant an opportunity for the parties to submit, if they so wish, any questions they deem pertinent to the deponents and expert witnesses referred to in the preceding paragraph. The Commission may pose questions to the expert witnesses Maureen Condic and Martha Garza (*infra* considering paragraph 39). When preparing their affidavit, the deponents must answer the said questions, unless the President decides to the contrary. The corresponding time frames will be determined below in the first operative paragraph of this Order. The pertinent parts of the said statements and expert opinions will be forwarded to the Commission and to the parties. The Commission and the parties may present any observations they deem pertinent within the time frame indicated in the operative

paragraphs of this Order (*infra* fourth operative paragraph). The Court will determine the probative value of the said statements at the appropriate moment, taking into account any views expressed by the parties, if applicable.

d.2) The Commission's request to question the expert witnesses offered by the State

35. The Commission requested "the possibility of questioning, orally or in writing, as reasonable and relevant, the four expert witnesses offered by the State of Costa Rica whose opinions related both to inter-American public order and to the matters dealt with by the expert opinions offered by the Commission." It indicated that "the expert opinions of Anthony Caruso and Martha Garza [...] are directly related to the expert opinion to be provided by Fernando Zegers-Hochschild." Regarding the expert opinion of Maureen Condic, the Commission considered that "even though its content is not identical to the expert opinion to be provided by Fernando Zegers-Hochschild, since it touches on so-called scientific [*sic*] matters that could have an impact on the Court's understanding [...] of the technique of *in vitro* fertilization, the relationship between the two expert opinions is verified." Regarding the expert opinion of Marco Gerardo Monroy Cabra, the Commission observed that "it is related to part of the expert opinion to be provided by Paola Bergallo."

36. Regarding the Commission's request, the President recalls the limitations established in the Rules of Procedure currently in force concerning the reception of testimony proposed by the Commission, as well as in relation to the latter's authority to question the deponents offered by the other parties.[15]

37. In particular, the provisions of Article 50(5) of the Rules of Procedure should be recalled establishing that "[t]he alleged victims or their representatives, the respondent State, and, if applicable, the petitioning State may formulate questions in writing for the declarants offered by the opposing party and, if applicable, by the Commission who have been convened by the Court to render their statements through affidavits," which should be read in conjunction with Article 52(3) of the Rules of Procedure, which establishes the possibility that the Commission may question the expert witnesses proposed by the other parties, "if authorized by the Court upon receiving a well-grounded request therefor, when the inter-American public order of human rights is affected in a significant manner and the statement in question regards a topic included in the statement of an expert witness offered by the Commission." Thus, in each case, the Commission must justify the relationship both to inter-American public order and to the matter included in an expert opinion that it offers, so that the Court or its President may assess the request and, if appropriate, authorize the Commission to pose its questions.[16]

38. The President observes that the purpose of the expert opinion of Maureen Condic, proposed by the State, and by which the State seeks "to obtain a scientific criterion on the moment at which human life begins," the purpose of the expert opinion of Anthony Caruso on the techniques, implications and risks of *in vitro* fertilization, and the purpose of the expert opinion of Martha Garza about *in vitro* fertilization techniques and their implications, are related to the expert opinion of Fernando Zegers-Hochschild regarding scientific techniques and procedures for *in vitro* fertilization. They involve inter-American public order because they deal with aspects such as the initiation of life from the scientific perspective and the treatment of embryos in the context of the scientific techniques used to facilitate

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15 *Cf. Case of González Medina and Family Members v. Dominican Republic.* Order of the President of the Inter-American Court of Human Rights of June 3, 2011, considering paragraph 44.

16 *Cf. Case of Torres v. Argentina*, *supra* note 13, considering paragraph 19.

artificial reproduction. Meanwhile, the expert opinion of Marco Gerardo Monroy Cabra about "the moment at which the protection of the right to life begins" is related to the analysis of the expert Paola Bergallo on the State's ban on the practice of *in vitro* fertilization in light of the international standards. A comparison of the purposes of the two expert opinions leads to the conclusions that they both examine relevant aspects of the compatibility with the American Convention of the ban on the practice of *in vitro* fertilization. The purpose of this expertise, which includes an analysis of the scope of the protection of the right to life, as well as its relationship to the reproductive rights of the individual, constitutes an important matter for the inter-American system.

39. Therefore, based on Articles 50(5) and 52(3) of the Court's Rules of Procedure, the Commission may question the four expert witnesses proposed by the State, whose opinions will be received at the public hearing and by affidavit, because these questions could have an impact on inter-American public order.

d.3) Testimony and expert opinions to be received during the hearing

40. The case is ready for the oral proceedings on the preliminary objections and eventual merits, reparations and costs. Hence, the President finds it pertinent to convene a public hearing to receive the following seven statements: statement of the presumed victim, Miguel Mejía Carballo, proposed by representative May Cantillano; statement of the presumed victim, Ileana Hénchoz Bolaños, proposed by representative Molina Acevedo; expert opinion of Anthony Caruso and Marco Gerardo Monroy Cabra, proposed by the State, and expert opinion of Fernando Zegers-Hochschild and Paola Bergallo, proposed by the Commission. It will also receive the final oral arguments of the representatives and of the State, as well as the final oral observations of the Commission.

e) Final oral and written arguments and observations

41. When the statements have concluded, the representatives and the State may submit to the Court their respective final oral arguments on the preliminary objections and eventual merits, reparations and costs in this case. As established in the Rules of Procedure, once the arguments have concluded, the Inter-American Commission will present its final oral observations.

42. Under Article 56 of the Rules of Procedure, the representatives, the State and the Commission may present their final written arguments and final written observations, respectively, on the preliminary objections and eventual merits, reparations and costs, within the time frame established in the twelfth operative paragraph of this Order.

THEREFORE:

THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in accordance with Articles 24(1) and 25(2) of the Statute of the Court, Article 34 of the previous Rules of Procedure, and Articles 4, 15(1), 26(1), 31(2), 35(1), 40(2), 41(1), 45, 46, 48, 50 to 56, 58 and 60 of the Rules of Procedure of the Court

DECIDES:

1. To require the following persons to provide their testimony by affidavit for the reasons set out in this Order (*supra* considering paragraphs 32 to 34), in keeping with the principle of procedural economy, and in exercise of the authority granted by Article 50(1) of the Court's Rules of Procedure:

A) Statement for information purposes only

Proposed by representative May Cantillano:

1) Gerardo Escalante López, who will testify about: "the regulation of *in vitro* fertilization in Costa Rica, the techniques and practices that he used as a doctor and their effectiveness and their implications for the medical treatment of infertility from a scientific perspective," as relevant to this case, and

2) Delia Ribas Valdés, who will testify about: "the regulation of *in vitro* fertilization in Costa Rica, the techniques and practices that she used as a doctor and their effectiveness and their implications for the medical treatment of infertility from a scientific perspective, especially in the cases of Grettel Artavia Murillo and Andrea Regina Bianchi Bruna."

B) Presumed victims

Proposed by representative May Cantillano:

3) Andrea Regina Bianchi Bruna, who will testify about: "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica";

4) Ana Cristina Castillo León, who will testify about: "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica," and

5) Claudia María Carro Maklouf, who will testify about "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica."

Proposed by representative Molina Acevedo:

6) Víctor Hugo Sanabria León, who will testify about: "the [presumed] effects of the ban on *in vitro* fertilization on [his] life project and the State's [alleged] acts and omissions in his specific case."

C) Expert witnesses

Proposed by representative May Cantillano:

7) Andrea Mesén Fainardi, who will testify about: "the [presumed] non-pecuniary damage that may be caused to a person by the impossibility of having a child owing to sterility and about the ban on the practice of *in vitro* fertilization in Costa Rica," and

8) Antonio Marlasca López, who will testify about: "the distinction between the concepts of 'human life and human person'" as "fundamental concepts to judge this case."

Proposed by representative Molina Acevedo:

9) Alicia Neuburger, who will testify about: "the [presumed] effects and [alleged] consequences on the life projects of the victims owing to the State's [supposed] acts and omissions," because of the ban on *in vitro* fertilization.

Proposed by the State

10) Maureen Condic, who will testify about: "the moment at which life begins from a scientific point of view,"

11) Martha Garza, who will testify about: "*in vitro* fertilization techniques and their implications."

Proposed by the Commission

12) Florencia Luna, who will testify about: "the different regulations on the assisted reproduction technique of *in vitro* fertilization from a comparative perspective", and

13) Paul Hunt, who will testify about: "the concept of 'disproportionate impact' as a violation of the principle of equality and non-discrimination, and how the application of this concept particularly affects women by unduly restricting their exercise of their reproductive rights."

2. To require the parties and the Commission to forward, if they deem pertinent and as it relates to them and within the non-extendible time frame that expires on August 10, 2012, any questions they consider it relevant to pose through the Inter-American Court to the deponents providing information only, the presumed victims, and the expert witnesses mentioned in the first operative paragraph of this Order. The statements and expert opinions required in the first operative paragraph must be submitted by August 24, 2012, at the latest.

3. To require the representatives, the State, the Commission and the Secretariat of the Court to coordinate and take the necessary measures to ensure that, once the respective questions of the State, the representatives, and the Commission have been received, the proposed deponents and expert witnesses include the respective answers in their affidavits, in keeping with considering paragraphs 33 and 34 of this Order.

4. To establish that, when the statements and expert opinions required in the first operative paragraph have been received, the Secretariat of the Inter-American Court shall transmit them to the other parties so that they may submit their observations on the said statements and expert opinions by September 4, 2012, at the latest.

5. To convene the representatives, the State, and the Inter-American Commission to a public hearing, to be held during the ninety-sixth regular session of the Court, which will take place at the seat of the Court on September 5, 2012, starting at 9 a.m. and on September 6, 2012, starting at 9 a.m. to receive their final oral arguments and final oral observations, respectively, on the preliminary objections and eventual merits, reparations and costs, as well as the statements of the following persons:

A) *Presumed victim proposed by representative May Cantillano*

1) Miguel Mejía Carballo, who will testify about: "the [presumed] harm suffered by himself and by Grettel Artavia owing to the ban on the practice of *in vitro* fertilization."

B) *Presumed victim proposed by representative Molina Acevedo*

2) Ileana Hénchoz Bolaños, who will testify about: "the [presumed] effects of the ban on *in vitro* fertilization on [her] life project and the State's [alleged] acts and omissions in her specific case."

C) *Expert witness proposed by the Commission*

3) Fernando Zegers-Hochschild, who will refer to: "the assisted reproduction technique of *in vitro* fertilization, what the technique consists of and how it is carried out, including a comparative perspective," as relevant to this case.

D) *Expert witness proposed by the State*

4) Anthony Caruso, who will refer to: "*in vitro* fertilization techniques, their practice from a comparative perspective, and the risks for the mother and the embryo," as relevant to this case.

E) *Expert witness proposed by the Commission*

5) Paola Bergallo, who will refer to: (i) "the international standards applicable to reproductive rights, in particular, in relation to arbitrary interference in private family life and to the principles of equality and non-discrimination," and (ii) "the ban on the practice of *in vitro* fertilization by the State in light of the said standards," as relevant to this case.

F) *Expert witness proposed by the State*

6) Marco Gerardo Monroy Cabra, who will refer "to the recognition of life from the moment of conception established in the American Convention on Human Rights and its compatibility with Costa Rica's domestic law," as relevant to this case.

6. To call upon the State to facilitate the entry into and exit from its territory of the deponents, if they reside or are present in it [*sic*], who have been summoned in this Order to testify at the public hearing on the preliminary objections and eventual merits, reparations and costs in this case, as established in Article 26(1) of the Court's Rules of Procedure.

7. To call upon the representatives, the State, and the Inter-American Commission to notify this Order to the persons they have proposed, in accordance with the provisions of Article 50(2) and 50(4) of the Rules of Procedure.

8. To inform the representatives, the State, and the Inter-American Commission that they must cover any expenses arising from providing or giving the evidence they have proposed, as established in Article 60 of the Rules of Procedure.

9. To call upon the representatives, the State, and the Inter-American Commission to advise the deponents convened by the Court to testify that, according to the provisions of Article 54 of the Rules of Procedure, the Court will inform the State of any case in which the persons summoned to appear or to testify fail to appear or refuse to testify without legitimate cause, or in which, in the Court's opinion, they have violated their oath or solemn declaration, for the effects established in the relevant domestic legislation.

10. To inform the representatives, the State, and the Inter-American Commission that when all the testimony has been given at the public hearing, they may present the Court with their final oral arguments and final oral observations, respectively, on the preliminary objections and eventual merits, reparations and costs in this case.

11. To require the Secretariat of the Court, as established in Article 55(3) of the Rules of Procedure, to advise the Inter-American Commission, the representatives, and the State of the link where the recording of the public hearing on the preliminary objections and eventual merits, reparations and costs is available, as soon as possible.

12. To advise the representatives, the State, and the Inter-American Commission that they have until October 6, 2012, to present their final written arguments and final written observations, respectively, on the preliminary objections and eventual merits, reparations and costs in this case. This time frame cannot be extended and is unrelated to the transmittal of the copy of the recording of the public hearing.

13. To require the Secretariat of the Inter-American Court to notify this order to the representatives of the presumed victims, the State of Costa Rica, and the Inter-American Commission on Human Rights.

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

Supreme Court of India
Supreme Court of India
Smt. Seema vs Ashwani Kumar on 14 February, 2006
Author: A Pasayat
Bench: A Pasayat, S Kapadia
CASE NO.:

Transfer Petition (civil) 291 of 2005

PETITIONER:

Smt. Seema

RESPONDENT:

Ashwani Kumar

DATE OF JUDGMENT: 14/02/2006

BENCH:

ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:

J U D G M E N T

ARIJIT PASAYAT, J.

The origin of marriage amongst Aryans in India, as noted in Mayne's Hindu Law and Usage, as amongst other ancient peoples is a matter for the Science of anthropology. From the very commencement of the Rigvedic age, marriage was a well- established institution, and the Aryans ideal of marriage was very high.

The Convention on the Elimination of All Forms of Discrimination Against Women (in short 'CEDAW') was adopted in 1979 by the United Nations General Assembly. India was a signatory to the Convention on 30th July, 1980 and ratified on 9th July, 1993 with two Declaratory Statements and one Reservation. Article 16(2) of the Convention says "though India agreed on principle that compulsory registration of marriages is highly desirable, it was said as follows:

"'It is not practical in a vast country like India with its variety of customs, religions and level of literacy' and has expressed reservation to this very clause to make registration of marriage compulsory".

While a transfer petition was being heard it was noted with concern that in large number of cases some unscrupulous persons are denying the existence of marriage taking advantage of the situation that in most of the States there is no official record of the marriage. Notice was issued to various States and Union Territories and learned Solicitor General and Mr. Ranjit Kumar, learned senior counsel were requested to act as Amicus Curiae to assist the Court in laying down guidelines in the matter of registration of marriages. Without exception, all the States and the Union Territories indicated their stand to the effect that registration of marriages is highly desirable.

It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country. In the Constitution of India, 1950

(in short the 'Constitution') List III (the Concurrent List) of the Seventh Schedule provides in Entries 5 and 30 as follows:

"5. Marriage and divorce; infants and

minors; adoption; wills, intestacy and

succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the

commencement of this Constitution subject to their personal law.

30. Vital statistics including registration of births and deaths."

It is to be noted that vital statistics including registration of deaths and births is covered by Entry 30. The registration of marriages would come within the ambit of the expression 'vital statistics'.

From the compilation of relevant legislations in respect of registration of marriages, it appears that there are four Statutes which provide for compulsory registration of marriages. They are: (1) The Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra and Gujarat), (2) The Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976, (3) The Himachal Pradesh Registration of Marriages Act, 1996, and (4) The Andhra Pradesh Compulsory Registration of Marriages Act, 2002. In five States provisions appear to have been made for voluntary registration of Muslim marriages. These are Assam, Bihar, West Bengal, Orissa and Meghalaya. The "Assam Moslem Marriages and Divorce Registration Act, 1935," the "Orissa Muhammadan Marriages and Divorce Registration Act, 1949" and the "Bengal Muhammadan Marriages and Divorce Registration Act, 1876" are the relevant statutes. In Uttar Pradesh also it appears that the State Government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenance of its records relating to births and deaths. Under the Special Marriage Act, 1954 which applies to Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under the Indian Christian Marriage Act, 1872. Under the said Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony along with the signatures of bride and bridegroom, the officiating priest and the witnesses. The Parsi Marriage and Divorce Act, 1936 makes registration of marriages compulsory. Under Section 8 of the Hindu Marriage Act, 1955 (in short the 'Hindu Act') certain provisions exist for registration of marriages. However, it is left to the discretion of the contracting parties to either solemnize the marriage before the Sub-Registrar or register it after performing the marriage ceremony in conformity with the customary beliefs. However, the Act makes it clear that the validity of the marriage in no way will be affected by omission to make the entry in the register. In Goa, the Law of Marriages which is in force in the territories of Goa, Daman and Diu w.e.f. 26.11.1911 continues to be in force. Under Articles 45 to 47 of the Law of Marriages, registration of marriage is compulsory and the proof of marriage is ordinarily by production of Certificate of Marriage procured from the Register maintained by the Civil Registrar and issued by the concerned Civil Registrar appointed for the purpose by the Government. The procedural aspects about registration of marriages are contained in Articles 1075 to 1081 of the Portuguese (Civil) Code which is the common Civil Code in force in the State. It is pointed out in the affidavit filed on behalf of the respondent-State of Goa that the Hindu Act is not in force in the said State since it has not been extended to the State either by the Goa, Daman and Diu Laws Regulations, 1962 or by the Goa, Daman and Diu Laws No.2 Regulations, 1963 by which Central Acts have been extended to the State after the liberation of the State. Procedure for marriages is also provided in Code of Civil Registration (Portuguese) which is in force in the State. The Foreign Marriage Act, 1969 also provides for registration of marriages.

As noted above, the Hindu Act enables the State Government to make rules with regard to the registration of marriages. Under Sub-section (2) of Section 8 if the State Government is of the opinion that such registration

should be compulsory it can so provide. In that event, the person contravening any rule made in this regard shall be punishable with fine.

In various States different marriage Acts are in operation e.g. in Jammu and Kashmir, Jammu and Kashmir Hindu Marriage Act, 1980 empowers the Government to make rules to provide that the parties (Hindus) shall have their particulars relating to marriages entered in such a manner as may be prescribed for facilitating proof of such marriages. Admittedly, no rules have been framed. As regards Muslims, Section 3 of the Jammu and Kashmir Muslim Marriages Registration Act, 1981 provides that marriage contracted between Muslims after the commencement of the Act shall be registered in the manner provided therein within 30 days from the date of conclusion of Nikah ceremony. However, the Act has not been enforced. So far as Christians are concerned, the Jammu and Kashmir Christian Marriage and Divorce Act, 1957 provides for registration of marriages in terms of Sections 26 and 37 for registration of marriages solemnized by Minister of Religion and marriages solemnized by, or in the presence of a Marriage Registrar respectively.

In exercise of powers conferred by Section 8 of the Hindu Act the State of U.P. has framed U.P. Hindu Marriage Registration Rules, 1973 which have been notified in 1973. In the affidavit filed by the State Government it is stated that the marriages are being registered after enactment of the Rules.

In Pondicherry, the Pondicherry Hindu Marriage (Registration) Rules, 1969 have come into force w.e.f. 7th April, 1969. All Sub-Registrars of Pondicherry have been appointed under Section 6 of the Indian Registration Act, 1908 (in short the 'Registration Act') as Marriage Registrars for the purposes of registering marriages. In the State of Haryana, the Haryana Hindu Marriage Registration Rules, 2001 under Section 8 of the Hindu Act have been notified. In the State of West Bengal, Hindu Marriage Registration Rules, 1958 have been notified.

From the affidavit filed on behalf of the State of Tripura, it appears that the said State has introduced rules called Tripura Hindu Marriage Registration Rules, 1957. It has also introduced Tripura Special Marriage Rules, 1989 under the Special Marriage Act, 1954. So far as the State of Karnataka is concerned, it appears that Registration of Hindu Marriages (Karnataka) Rules, 1966 have been framed. It further appears that Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976 has been introduced. Section 3 of the Act requires compulsory registration of all marriages contracted in the State.

So far as the Union Territory of Chandigarh is concerned, Hindu Marriage Registration Rules, 1966 have been framed.

In the affidavit filed on behalf of the National Commission for Women (in short the 'National Commission') it has been indicated as follows:

"That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women related issues such as:

(a) prevention of child marriages and to ensure minimum age of marriage.

(b) prevention of marriages without the

consent of the parties.

(c) Check illegal bigamy/polygamy

(d) Enabling married women to claim their right to live in the matrimonial house,

maintenance, etc.

(e) Enabling widows to claim their

inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.

(f) Deterring men from deserting women

after marriage.

(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage."

As noted supra, except four statutes applicable to States of Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh registration of marriages is not compulsory in any of the other States.

As is evident from narration of facts though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable. The legislative intent in enacting Section 8 of the Hindu Act is apparent from the use of the expression "for the purpose of facilitating the proof of Hindu Marriages".

As a natural consequence, the effect of non registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered.

Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.

Accordingly, we direct the States and the Central Government to take the following steps:

(i) The procedure for registration should be notified by respective States within three months from today. This can be done by

amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

(ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status

(unmarried, divorcee) shall be clearly stated. The consequence of non-registration of

marriages or for filing false declaration shall also be provided for in the said Rules.

Needless to add that the object of the said Rules shall be to carry out the directions of this Court.

(iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.

(iv) Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

The Registry is directed to handover a copy of this order to learned Solicitor General for necessary follow-up action. We record our appreciation for the valuable assistance rendered by Mr. G.E. Vahanvati, the Solicitor General and Mr. Ranjeet Kumar, senior advocate, who appeared as amicus curiae.

REPORT Nº 71/03[1]
PETITION 12.191
FRIENDLY SETTLEMENT
MARÍA MAMÉRITA MESTANZA CHÁVEZ
PERU
October 22, 2003

I. SUMMARY

1. In a petition lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") on June 15, 1999, the nongovernmental organizations Office for the Defense of Women's Rights (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the *Asociación Pro Derechos Humanos* [Association for Human Rights] (APRODEH), which subsequently accredited as co-petitioners the Center for Reproductive Law and Policy (CRLP) and the Center for Justice and International Law (CEJIL), (hereinafter "the petitioners"), alleged that the Republic of Peru (hereinafter "Peru") violated the human rights of Ms. María Mamérita Mestanza Chávez, by forced sterilization that ultimately caused her death.

2. The original petitioners alleged that the facts denounced constitute violation by the Peruvian State of the rights to life, personal integrity, and equality before the law, contained in Articles 4, 5, 1, and 24 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and violation of Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter "the Convention of Belém do Pará"), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador.") and Articles 12 and 14 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

3. On February 22, 2001, the Peruvian State signed a joint press release with the Inter-American Commission on Human Rights, in which it was agreed to pursue friendly settlement of some cases before the Commission, including this one, in accordance with Articles 48(1)(f) and 49 of the American Convention on Human Rights.

4. On March 2, 2001, during the 110th session of the Inter-American Commission on Human Rights, the Peruvian State and the victims' representatives signed the Preliminary Agreement for Friendly Settlement with intervention and approval by the IACHR. The final friendly settlement was agreed upon on August 26, 2003, when the act setting out the friendly

settlement reached by the parties was signed in Lima.

5. This friendly settlement report, pursuant to Article 49 of the Convention and Article 41.5 of the Commission's Regulations, presents a brief summary of the facts alleged by the petitioners, the friendly solution reached, and agreement for its publication.

II. PROCESSING WITH THE COMMISSION

6. The Commission received the claim on June 15, 1999. On July 14, 1999 the IACHR opened the case, transmitted pertinent parts of the petition to the Peruvian State, and requested information within 90 days. Peru asked for additional time to prepare its reply, which was approved by the IACHR. Peru replied on January 14, 2000. The petitioners made comments on the State's reply on April 12, 2000. On October 3, 2000 the Inter-American Commission on Human Rights approved the Report on Admissibility Nº 66/00.

7. On March 2, 2001, with intervention and approval by the Inter-American Commission on Human Rights, the parties signed the Preliminary Agreement for Friendly Settlement, in which the Peruvian State admitted its international responsibility for the acts alleged by the petitioners and promised to take the necessary measures to compensate the victims.

8. On August 26, 2003, in the city of Lima, the representatives of the victims and the State signed the Agreement for Friendly Settlement, requesting that the Commission ratify the entire contents.

III. FACTS

9. They alleged that the case of Ms. María Mamérita Mestanza is one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women. They noted that the Ombudsman had received several complaints on this matter, and that between November 1996 and November 1998 CLADEM had documented 243 cases of human rights violations through the performance of birth control surgery in Peru.

10. They stated that Ms. María Mamérita Mestanza, a rural woman about 33 years old and mother of seven children, was pressured to accept sterilization starting in 1996 by the Health Center of Encañada District. She and her husband Jacinto Salazar Suárez were subjected to various forms of harassment, including several visits in which health personnel threatened to report her and Mr. Salazar Suárez to the police, and told them that the government had approved a law requiring anyone who had more than five children to pay a fine and go to jail.

11. They state that finally, under coercion, Ms. Mestanza agreed to have tubal ligation surgery. The procedure was performed on March 27, 1988 at the Cajamarca Regional Hospital, without any pre-surgery medical examination. Ms. Mestanza was released the next day, March 28, 1988, although she had serious symptoms including nausea and sharp headaches. In the following days Mr. Jacinto Salazar reported to personnel of La Encañada Health Center on Ms. Mestanza's condition, which worsened daily, and was told by them that this was due to post-operative effects of the anesthesia.

12. They state that Ms. Mestranza Chavez died at home on April 5, 1998, and that the death certificate specified a "sepsis" as the direct cause of death and bilateral tubal blockage as a precedent cause. They report that a few days later a doctor from the Health

Center offered a sum of money to Mr. Jacinto Salazar in an effort to put an end to the matter.

13. They indicate that on April 15, 1998 Mr. Jacinto Salazar filed charges with the Provisional Combined Prosecutor of Baños del Inca against Martín Ormeño Gutiérrez, Chief of La Encañada Health Center, in connection with the death of Ms. Mestanza, for crimes against life, body, and health, in premeditated homicide (first degree murder). They add that on May 15, 1998 this Provincial Prosecutor indicted Mr. Ormeño Gutiérrez and others before the local Provincial Judge, who on June 4, 1998 ruled that there were insufficient grounds to prosecute. This decision was confirmed on July 1, 1998 by the Circuit Criminal Court, so on December 16, 1998 the Provincial Prosecutor ordered the case dismissed.

IV. FRIENDLY SETTLEMENT

14. The State and the petitioner signed the friendly settlement agreement, the text of which follows:

FIRST: BACKGROUND

Ms. María Mamérita Mestanza Chávez was forced to undergo sterilization surgery, which ultimately resulted in her death. The petitioner organizations allege that her rights to life, personal integrity, and equality before the law were violated, in contravention of Articles 4, 5, 1, and 24 of the American Convention on Human Rights, Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and Articles 12 and 14.2 of the Convention on the Elimination of All Forms of Discrimination Against Women.

On July 14, 1999 the Inter-American Commission on Human Rights transmitted the pertinent parts of the complaint to the Peruvian State and requested information. On October 3, 2000 the IACHR approved Report No. 66/00 on admissibility, and continued reviewing the substance of the case, concerning alleged violations of the American Convention and the Convention of Belém do Pará.

On March 2, 2001 during the 110th regular session of the IACHR a Preliminary Agreement for Friendly Settlement was reached.

SECOND: RECOGNITION

The Peruvian State, aware that protection and total respect for human rights is the cornerstone for a just, honorable, and democratic society, in strict compliance with its obligations assumed with the signing and ratification of the American Convention on Human Rights and other international human rights instruments to which it is a party, and aware that any violation of an international obligation that results in injury brings with it the duty for adequate reparation, which can most justly be done through compensation of the victim, investigation of the facts, and administrative, civil, and criminal penalties for the responsible parties, recognizes its international responsibility for the violation of Articles 1.1, 4, 5, and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against women in the harm done to victim María Mamérita Merstanza Chávez.

This recognition was reflected in the Preliminary Agreement for Friendly Settlement signed between the Peruvian State and the victim's legal representatives, with intervention and approval by the Inter-American Commission on Human Rights, on March 2, 2001 during the 110th session of the Inter-American Commission on Human Rights. In that agreement the Peruvian State admitted international responsibility for the facts described and pledged to take steps for material and moral reparation of the harm done and to initiate a thorough investigation and trial of the perpetrators and take steps to prevent the recurrence of similar incidents in the future.

THIRD: INVESTIGATION AND PUNISHMENT

The Peruvian State promises to make a thorough investigation of the facts and apply legal punishments to any person determined to have participated in them, as either planner, perpetrator, accessory, or in other capacity, even if they be civilian or military officials or employees of the government.
In this regard, the Peruvian State pledges to carry out administrative and criminal investigations into the attacks on the personal liberty, life, body, and health of the victim, and to punish:

a. Those responsible for the acts of pressuring the consent of Ms. María Mamérita Mestanza Chávez to submit to tubal ligation.

b. The health personnel who ignored the need for urgent care for Ms. Mestanza after her surgery.

c. Those responsible for the death of Ms. María Mamérita Mestanza Chávez.

d. The doctors who gave money to the spouse of the deceased woman in an attempt to cover up the circumstances of her demise.

e. The Investigative Commission, named by Cajamara Sub-Region IV of the Health Ministry, which questionably exonerated the health personal from responsibility for Ms. Mestanza's death.

Apart from the administrative and criminal penalties, the Peruvian state pledges to report any ethical violations to the appropriate professional association so that it can apply sanctions to the medical personnel involved in these acts, as provided in its statutes.

In addition, the State pledges to conduct administrative and criminal investigations into the conduct of agents of the Office of Public Prosecution and the judicial branch who failed to take action to clarify the facts alleged by Ms. Mamérita Mestanza's widower.

FOURTH: INDEMNIFICATION

1. Beneficiaries of this Agreement

The only persons recognized by the Peruvian State as beneficiaries of any indemnification are Jacinto Salazar Suárez, huband of María Mamérita Mestanza Chávez, and her children: Pascuala Salazar Mestanza, Maribel Salazar Mestanza, Alindor Salazar Mestanza, Napoleón Salazar Mestanza, Amancio Salazar

Mestanza, Delia Salazar Mestanza, and Almanzor Salazar Mestanza.

2. Monetary compensation

a. Moral damages

The Peruvian State awards one-time compensation to each of the beneficiaries of ten thousand U.S. dollars ($10,000.00) for reparation of moral injury, which totals eighty thousand U.S. dollars ($80,000.00).

The State will deposit the amount due the minors in a trust account in accordance with the best terms available under sound banking practice. Arrangements will be made jointly with the Salazar Mestanza family's legal representatives.

b. Corollary damages

Injury caused as a direct consequence of the event giving rise to the claim consists of expenses incurred by the family as a direct result of the acts. These expenses were incurred to file and follow-up criminal charges with the Office of Public Prosecutions for aggravated homicide of María Mamérita Mestanza, as well as the costs of Ms. Mestanza's funeral and burial. The amount expended for these purposes is two thousand U.S. dollars ($2,000.00), which the Peruvian State shall pay to the beneficiaries.

FIFTH: INDEMNIFICATION FROM THOSE CRIMINALLY RESPONSIBLE FOR THE ACTS

The Agreement for Peaceful Settlement does not include the beneficiaries' right to damages from all those responsible for violation of Ms. María Mamérita Mestanza's human rights, as determined by a competent court in accordance with Article 92 of the Peruvian Penal Code, a right which is recognized by the Peruvian State. This agreement expressly waives any other claim by the beneficiaries against the Peruvian State as responsible party, a co-defendant, or in any other capacity.

SIXTH: RIGHT OF RECOVERY

The Peruvian State reserves the right of recovery against all persons found to be responsible in this case through the definitive sentence of a competent national tribunal, in accordance with current domestic law.

SEVENTH: TAX EXEMPTION, COMPLIANCE, AND LATE PENALTY

The damages awarded by the Peruvian State shall not be subject to payment of any present or future tax, assessment, or fee, and shall be paid no later than six months after the Inter-American Commission on Human Rights has sent notification of this agreement's ratification, after which the State shall pay the maximum late fee and interest required or permitted by domestic legislation.

EIGHTH: MEDICAL PAYMENTS

The Peruvian State promises to make a one-time payment to the beneficiaries of seven thousand U.S. dollars ($7,000.00) for psychological rehabilitation treatment they require as a result of the death of María Mamérita Mestanza

Chávez. That sum shall be paid in trust to a public or private institution, designated as the trustee, which will administer the resources spent on providing psychological care needed by the beneficiaries. The institution will be chosen jointly by the State and representatives of the Salazar Mestanza family, with support from the National Human Rights Coordination, DEMUS, APRODEH, and the Archbishop of Cajamarca. Expenses for legal establishment of the trust shall be paid by the Peruvian State.

In addition, the Peruvian State promises to give the husband and children of María Mamérita Mestanza Chávez permanent health insurance with the Ministry of Health or other competent entity. The surviving spouse's health insurance will be permanent, as will that of the children until they have their own public and/or private coverage.

NINTH: EDUCATION PAYMENTS

The Peruvian State promises to give the victim's children free primary and secondary education in public schools. The victim's children will receive tuition-free university education for a single degree at state schools, provided they qualify for admission.

TENTH: OTHER PAYMENTS

The Peruvian State agrees to make an additional payment of twenty thousand U.S. dollars ($20,000.00) to Mr. Jacinto Salazar Suárez to buy land or a house in the name of the children he had with Ms. María Mamérita Mestanza. Within one year of the date of this agreement Mr. Salazar Suárez must register the purchase by delivering the deed to the Executive Secretariat of the National Human Rights Council of the Ministry of Justice. Furthermore, Mr. Salazar Suárez agrees not to sell or lease the property purchased until the youngest of his children is of legal age, unless authorized by the court.

Peru's National Coordinator of Human Rights will be responsible for the necessary follow-up to ensure compliance with the provisions of this clause.

ELEVENTH: CHANGES IN LAWS AND PUBLIC POLICIES ON REPRODUCTIVE HEALTH AND FAMILY PLANNING

The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy.
The Peruvian State also promises to adopt and implement recommendations made by the Ombudsman concerning public policies on reproductive health and family planning, among which are the following:

a. Penalties for human rights violators and reparation for victims

1) Conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, to break out and duly punish the perpetrators, requiring them to pay the appropriate civil damages, including the State if it is determined to have some responsibility for the acts that gave rise to the criminal cases.

2) Review the administrative proceedings initiated by the victims and/or

their family members, linked to the cases in the previous paragraph, which are pending or have concluded concerning denunciations of human rights violations.

b. Methods for monitoring and guaranteeing respect for human rights of health service clients

1) Adopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country's health centers. Although the rules of the Family Planning Program require this evaluation, it is not being done.

2) Continuously conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights, and gender equity, in coordination with civil society organizations that specialize in these topics.

3) Adopt the necessary administrative measures so that that rules established for ensuring respect for the right of informed consent are scrupulously followed by health personnel.

4) Guarantee that the centers that offer sterilization surgery have proper conditions required by standards of the Family Planning Program.

5) Take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honored.

6) Take drastic action against those responsible for forced sterilization without consent.

7) Implement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.

TWELFTH: LEGAL BASIS

This agreement is signed in accordance with the provisions of Articles 1, 2, and 48.1.f of the American Convention on Human Rights and Article 41 of the Regulations of the Inter-American commission on Human Rights; on Articles 2 (paragraphs 1 and 24, point 8), 44, 55, 205 and fourth final provision of Peru's Constitution; and on the provisions of Articles 1205, 1306, 1969, and 1981 of the Civil Code of Peru.

THIRTEENTH: INTERPRETATION

The meaning and scope of this agreement will be interpreted in accordance with Article 29 and 30 of the American Convention on Human Rights as applicable, and the principle of good faith. In case of doubt or disagreement between the parties on the content of this agreement, the Inter-American Commission on Human Rights shall resolve the interpretation. It shall also be responsible for monitoring the agreement's compliance; the parties shall report to it every three months on the status of compliance.

FOURTEENTH: HOMOLOGATION

The parties hereto agree to refer this Agreement for Friendly Settlement to the

Inter-American Commission on Human Rights for confirmation and ratification of all aspects.

FIFTEENTH: ACCEPTANCE

The parties signing this agreement express their free and voluntary acceptance of and concurrence with each and every one of its clauses, stating for the record that it resolves the dispute and any claim regarding the international responsibility of the Peruvian State for violation of the human rights of Ms. María Mamérita Mestanza Chávez.
Signed with three copies in the City of Lima this twenty-sixth day of August of the year two thousand three.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

15. The IACHR reiterates that as provided in Articles 48.1.f and 49 of the Convention, this procedure is intended for "reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention."[GDM1] Agreement to follow this procedure reflects the State's good will to comply with the purposes and objectives of the Convention by virtue of the *pacta sunt servanda* principle, according to which states must show good faith in honoring obligations assumed in treaties. It also wishes to reiterate that the friendly settlement procedure contemplated in the Convention permits settlement of individual cases without recourse to litigation, and has demonstrated in the case of several countries that it is an important tool for solution that can be used by both parties.

16. The Inter-American Commission has closely followed development of the friendly settlement reached in this case. The Commission greatly appreciates the effort shown by both parties to reach a solution that is compatible with the objective and purpose of the Convention. As the Commission has said repeatedly, protection and promotion of women's rights is a priority for our hemisphere, in order that women may attain the full and effective enjoyment of their basic rights, especially equality, nondiscrimination, and living free from gender-based violence.

VI. CONCLUSIONS

17. On the basis of the preceding considerations, and by virtue of the proceeding envisioned in Articles 48.1.f and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the parties' efforts and its satisfaction with the friendly settlement agreement reached in this case in keeping with the objective and purpose of the American Convention.

18. Taking into account the considerations and conclusions expressed in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the Agreement for Friendly Settlement signed by the parties on August 26, 2003.

2. To continue following up and monitoring each and every point of the friendly settlement, and in this context to remind the parties of their obligation to submit reports to the IACHR every three months on compliance with this agreement.

3. To publish this report and include it in its annual report to the OAS General Assembly.