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# In Vitro Fertilization: Third Party Motherhood and the Changing Definition of Legal Parent

With infertility on the rise, affecting one in six people,<sup>1</sup> lawyers are advising more couples and doctors about the legal ramifications of new reproductive technologies.<sup>2</sup> Although adoption is a more traditional means of providing children to infertile couples, adopting a child can take four to seven years<sup>3</sup> due to the reduced supply of available infants.<sup>4</sup> In recent years couples have been looking for alternatives to adoption resulting in an increased use of artificial insemination<sup>5</sup> and surrogate mothers.

In a surrogate motherhood arrangement a woman produces a child for a couple or single person by becoming impregnated through artificial insemination with the husband's sperm.<sup>6</sup> The woman carries the fetus to term, and surrenders the child for adoption to the couple.<sup>7</sup> Surrogate birth has the advantage of providing the couple with the biological child of the husband.<sup>8</sup> A similar technique becoming available is *in vitro fertilization* (IVF), commonly known as the "test tube baby" technique.<sup>9</sup>

IVF is a procedure by which an egg surgically is removed from the ovary and placed in a shallow dish with a special medium and

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1. *The New Origins of Life*, TIME, September 10, 1984, at 46 [hereinafter cited as *Origins*]. The National Center for Health Statistics reports the incidence of infertility among married women aged 20 to 24, normally the most fertile age group, jumped 17% between 1965 and 1982. *Id.*

2. See Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A.J. 50, 50 (August 1984).

3. See *Origins*, *supra* note 1, at 46; Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 639-40 (1983).

4. See *Origins*, *supra* note 1, at 46. The increased use of abortion to end unwanted pregnancies combined with the growing social acceptance of single motherhood have contributed to the decline in infants available for adoption. *Id.* See Comment, *Parenthood by Legal Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 387 (1982); V. Packard, *THE PEOPLE SHAPERS* 209 (1977).

5. Artificial insemination by donor is the introduction of semen into the vagina by artificial means DORLANDS ILLUSTRATED MEDICAL DICTIONARY 785 (25th ed. 1974). In artificial insemination by donor, a donor's sperm is used to inseminate the woman. *Id.*

6. See Comment, *Protecting Inheritance Rights of Children Born Through IVF and Embryo Transfer: Suggestions for a Legislative Approach*, 27 ST. LOUIS U.L.J. 901, 902 (1983).

7. *Id.*

8. See Comment, *supra* note 4, at 387.

9. See Andrews, *supra* note 2, at 50.

sperm from the husband.<sup>10</sup> If fertilization occurs, the embryo is implanted in the uterus of the wife or another woman.<sup>11</sup> The fetus then is carried to term.<sup>12</sup> IVF is an attractive alternative to the twenty-five percent of sterile women who are unable to conceive because of blockage or an abnormality of the fallopian tubes.<sup>13</sup> When the husband's sperm is used to fertilize the wife's egg and the embryo is implanted in the wife's uterus, few legal problems arise because the situation closely resembles a normal pregnancy.

For a woman who can produce eggs but is unable to carry a child to term, IVF is a technique that can allow the couple to have a child that is genetically their own.<sup>14</sup> The wife's eggs can be fertilized with the husband's sperm in a dish and the embryo implanted in the uterus of another woman, who provides the use of her womb.<sup>15</sup> IVF also may be an attractive alternative to women who, although physically able to have children, do not want to carry a fetus to term because of a history of difficult pregnancies or career demands.<sup>16</sup> The IVF carrier of the couple's embryo is similar to a surrogate mother because, as in surrogate motherhood, the IVF carrier is using her reproductive capabilities to have a child for another couple.<sup>17</sup>

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10. *Id.* In vitro fertilization is the process by which an oocyte is removed from the female, placed in a culture medium, and subsequently fertilized by sperm. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. MED. 336, 337-38 (1981). To retrieve the ripe oocyte from the female donor, the donor is placed under general anesthesia and a laparoscopy is performed. *Id.* The process involves making a small incision in the patient's abdomen and inserting into the incision a laparoscope, an instrument allowing the doctor to view the reproductive organs. *Id.* Follicular fluid containing the mature follicle or egg is then aspirated from the ovary by use of a needle. *Id.* The fluid is mixed with prewashed semen and diluted to simulate conditions found in the fallopian tubes. *Id.* A few hours later fertilization may occur, and about twelve hours later, the embryo is transferred to a solution supportive of embryo development. *Id.* Approximately two days later, the fertilized egg develops into an eight-celled embryo or blastocyst, and is transferred by means of a fine tube or cannula into the uterus of the carrier female for implantation in the uterine wall. *Id.*

11. See Andrews, *supra* note 2, at 50.

12. *Id.*

13. See Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B.J. 514, 518 (1977). The fallopian tubes are thin flexible structures that convey the egg from the ovaries to the uterus. See Origins, *supra* note 1, at 46, 48. If they are blocked, damaged or frozen in place by scar tissue, the egg will be unable to reach the uterus and fertilization will not occur. *Id.*

14. See Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation*, 35 SW. L.J. 973, 976 (1982); Bowal, *Surrogate Procreation: A Motherhood Issue in Legal Obscurity*, 9 QUEENS LAW JOURNAL 5, 9 (1983); S. KAUFMAN, *NEW HOPE FOR THE CHILDLESS COUPLE*, 23 (1970) (discussing physical disorders giving rise to female infertility).

15. See Origins, *supra* note 1, at 46. This technique has been attempted several times, but to date has not been successful. *Id.* at 52.

16. See Comment, *supra* note 4, at 388. Some commentators suggest that the primary reason for allowing artificial birth procedures is to benefit those couples who are otherwise physically unable to have children. Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U.L. REV. 777, 802 (1970); see *infra* notes 25-52 and accompanying text.

17. See Lorio, *supra* note 14, at 993. Some commentators claim the analogy to wet nurs-

Not all new conception technologies, including the IVF third-party-carrier technique, are available in every state because of restrictive state laws on private adoptions and fetal research. Although not drafted in contemplation of the IVF technique, these provisions create barriers to the IVF procedure.<sup>18</sup> Unless state laws are changed, general legal principles from contract, tort, and constitutional law will be employed to solve the unanticipated problems created by new conception technologies.<sup>19</sup> Application of legal principles created before the development of IVF may result in awkward and inappropriate results.<sup>20</sup> Therefore, development of a legal framework to resolve these new issues is imperative.

This author will discuss the legal implications of IVF when used by a husband and wife. Specifically, this author will focus on the use of an IVF carrier to carry the couple's embryo to term when the wife, although able to produce eggs, *physically* is unable to carry a child. The discussion will begin with an examination of the constitutional protection of marital privacy and privacy in intimate family matters.<sup>21</sup> The constitutional discussion will advance the argument that the IVF technique should be protected constitutionally when the only possibility for the couple to have a genetically related child is with the use of an IVF carrier.

A brief overview of surrogate motherhood<sup>22</sup> will then be provided. The similarities between the use of a surrogate mother and the use of an IVF carrier may prompt courts to use current law from the area of surrogate motherhood when dealing with an IVF situation. Judicial refusal to enforce surrogate mother contracts might be used to render IVF agreements between the couple and the IVF carrier unenforceable. To discourage the application of surrogate mother contract law to the IVF situation, this author will highlight the differences between surrogate motherhood and the IVF procedure. After distinguishing between surrogate motherhood and IVF, this author will demonstrate that the policy arguments relied upon to find surrogate mother contracts unenforceable as against public policy do not apply to the use of an IVF carrier.

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ing is perhaps more appropriate because the carrier has no genetic link to the child. *Id.* The American Medical Association considers the IVF procedure a method of artificial insemination. *Report of the Ethics Advisory Board of the Department of Health Education and Welfare*, II-b-11 (1979); Legal-Medical Studies, Inc., *Report on Human Reproduction and the Law* (1979-81).

18. See Andrews, *supra* note 2, at 50.

19. See Kinney, *supra* note 13, at 514.

20. *Id.*

21. See notes 25-52 and accompanying text.

22. See notes 53-59 and accompanying text.

After establishing that IVF may be protected constitutionally when used by a couple unable to have children without the technique and determining that public policy concerns are not great enough to find IVF contracts unenforceable, this author will discuss current law that will be applied to decide parental rights if a controversy arises between the couple and the IVF carrier.<sup>23</sup> An examination of the statutory provisions pertaining to parental rights will demonstrate that current law must be amended legislatively to ensure proper determination of parental rights when a child is born through IVF. Several legislative alternatives that can be enacted will be suggested.

Finally, the rights and liabilities of the couple and the IVF carrier will be examined.<sup>24</sup> Specifically, the rights and liabilities discussion will focus on the issues regarding the right to control the activities of the carrier during the gestational period, the problems surrounding the decision to terminate the pregnancy, and visitation rights. Since the necessity of dealing with the many issues surrounding IVF only may arise if IVF is found to be embraced by the constitutional right of privacy, this author preliminarily will evaluate the constitutional issue.

#### CONSTITUTIONAL RIGHT TO IVF

When a husband and wife are unable to conceive a child naturally, they may decide to use other conception techniques to provide them with genetically related offspring. When the wife is fertile, but is unable to carry a child to term, IVF is an alternative that can provide the couple with a genetically related child.<sup>25</sup> The decision of a couple to enter into an agreement with an IVF carrier may be included in the constitutional protection of privacy in family matters<sup>26</sup> or the right of marital privacy.<sup>27</sup>

The right to privacy is a fundamental right.<sup>28</sup> When a fundamental right is impacted by government the state must show that the state objective is compelling and the means are narrowly drawn to achieve

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23. See *supra* notes 82-143 and accompanying text.

24. See *supra* notes 144-210 and accompanying text.

25. See *supra* notes 14-16 and accompanying text.

26. See Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295, 1304-05 (1979); Note, *In Vitro Fertilization: Hope for Childless Couples Breeds Legal Exposure for Physicians*, 17 UNIV. RICHMOND L.R. 311, 329-30 (1983); Lorio, *supra* note 14, at 1006-07.

27. See *infra* note 43 and accompanying text.

28. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1304-05.

that objective.<sup>29</sup> If IVF is included in the right of privacy, only a compelling state interest can justify imposing a burden on the couple's decision to use IVF. To establish that IVF is included in the right of privacy, an examination of the relevant U.S. Supreme Court cases must be made.

In *Meyer v. Nebraska*,<sup>30</sup> the United States Supreme Court found that the right to marry, establish a home, and raise children is included in the right of liberty guaranteed by the fourteenth amendment.<sup>31</sup> In *Skinner v. Oklahoma*,<sup>32</sup> the Court recognized that the right to be free of unwarranted government interference with procreation is a basic civil right.<sup>33</sup> The Court held that this "basic civil right" could be taken away only by a showing of compelling state justification.<sup>34</sup> In the IVF situation, if the wife *physically* is unable to carry the child to term, IVF may be the only procreative option enabling the couple to have genetically related children. Thus, state action restricting the availability of the couple's sole procreative option could infringe upon their *Skinner* right to procreate.<sup>35</sup>

The array of cases holding that the Constitution embraces the right to *marital* privacy may be broad enough to include the right to use IVF as a method to have a genetically related child. The decision to have a child has been held to be protected by the right of privacy in *Eisenstadt v. Baird*.<sup>36</sup> The Court stated that if the "right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or

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29. See *Carey v. Population Service International*, 431 U.S. 678, 686 (1977) ("Fundamental rights" are justified only by a "compelling state interest"); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

30. 262 U.S. 390 (1923).

31. *Id.* at 399.

32. 316 U.S. 535 (1942).

33. *Id.* at 541.

34. *Id.*

35. See Lorio, *supra* note 14, at 1008; Note, *supra* note 26, at 330; Note, *Surrogate Motherhood Contractual Issues and Remedies Under Legislative Proposals*, 23 WASHBURN L.J. 601, 612 (1984); Flannery, Weisman, Lipsett & Braverman *supra* note 26, at 1302. Couples might claim rights to use IVF in other factual situations involving the use of a surrogate. *Id.* at 1309-10 n.84

"For example, couples might want to use a surrogate (1) when the use of a surrogate is not necessary to create offspring genetically related to both parents, (2) when out of choice or necessity only one parent retains a genetic link to the blastocyst, or (3) when out of choice or necessity neither parent maintains a genetic link to the blastocyst. In these circumstances the claim of a fundamental right to IVF is more attenuated and is less likely to be recognized." *Id.*

36. 405 U.S. 438 (1972).

beget a child."<sup>37</sup> The decision whether to bear a child was held to be at "the very heart of . . . constitutionally protected choices"<sup>38</sup> in *Carey v. Population Services International*.<sup>39</sup> Both *Carey* and *Eisenstadt* dealt with government regulation of contraceptives,<sup>40</sup> but if the Court is willing to support an individual's right to use artificial means to prevent a pregnancy, the same court should be willing to recognize the constitutional right to use artificial means to promote a pregnancy.<sup>41</sup> Thus, the decision to use IVF should be characterized as a decision whether to bear or beget a child. Since this decision is as private and personal as the decision to conceive a child through intercourse, IVF should be constitutionally protected.<sup>42</sup>

The Supreme Court in *Griswold v. Connecticut*,<sup>43</sup> recognized the right of marital privacy as guaranteeing the right to be free of unjustified governmental interference in deciding how to conceive a child.<sup>44</sup> This guarantee also may include the right of a married couple to use IVF. Justice Goldberg, concurring, stated that the government was not given the power to disrupt the traditional relation of the family, including the decision how and when to have children, simply because no particular provision of the Constitution explicitly forbids state interference in this area.<sup>45</sup> If the decision to have a child falls within the protected area of privacy, presumably the actual method of carrying the child to term also would be protected. Thus, a couple's decision to use IVF would be protected under the right to privacy.<sup>46</sup>

Based upon the foregoing analysis of procreative rights, the right to privacy should be interpreted by the Court to encompass the decision of the husband and wife to have a child through the use of IVF.<sup>47</sup> Recent decisions protecting couples from government intrusions relating to marriage, procreation, and family relationships should be viewed as protecting the fundamental right of the husband and wife to have a genetically related child through the use of the IVF technique.<sup>48</sup>

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37. *Id.* at 453.

38. *Carey*, 431 U.S. at 685.

39. 314 U.S. 678, 685 (1977).

40. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1303.

41. See Note, *supra* note 26, at 331.

42. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1303.

43. 381 U.S. 479 (1965).

44. *Id.* at 482-86.

45. *Id.* at 495-96 (Goldberg, J., concurring).

46. See *id.*; Lorio, *supra* note 14, at 1008.

47. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1311; Note, *supra* note 26, at 329; Lorio, *supra* note 14, at 1006.

48. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1300-05; Note, *supra* note 26, at 329-32; Lorio, *supra* note 13, at 1008.

Therefore, state regulations<sup>49</sup> that limit the use of IVF may intrude upon the fundamental right to marital privacy.<sup>50</sup> As a result, any statute limiting the availability of IVF would have to serve a compelling state interest through the least restrictive means.<sup>51</sup> Legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.<sup>52</sup>

This author next will establish that current law being applied to surrogate mother contracts may not be constitutionally suspect because restriction of surrogate motherhood may not be infringing upon the only procreative option of a couple. In addition, the state may be able to show that restriction of surrogate motherhood is necessary because of strong state interests against private adoptions and custody battles. The distinguishing factors between surrogate motherhood and IVF, however, may result in a finding that the state interests are not as strong when applied to IVF. Therefore, the state laws that constitutionally restrict surrogate motherhood may be constitutionally suspect when applied to IVF. This author now will focus on the differences between surrogate motherhood and IVF and explain why the state interests restricting surrogate motherhood are not applicable to the IVF carrier situation.

#### DISTINGUISHING SURROGATE MOTHER CONTRACTS AND IVF CONTRACTS

The most significant legal obstacle to the use of an IVF carrier is judicial refusal to enforce surrogate mother contracts. In surrogate motherhood, a couple unable to produce a child because of the wife's infertility contracts with a healthy woman to bear a child.<sup>53</sup> The woman agrees to be artificially inseminated with the husband's semen, carry the child to term, and surrender the child for adoption at birth.<sup>54</sup> Surrogate birth has the advantage of providing the couple with the

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49. Current state laws that may be unconstitutional unless the state can show a compelling state interest in the regulation include: (1) those laws regarding presumptions of natural parent-hood, CAL. CIV. CODE §7003; (2) private adoptions, CAL. PENAL CODE §273; and (3) surrogate mother contracts. See *infra* notes 53-81 and accompanying text.

50. See Note, *supra* note 26, at 329.

51. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1302; Note, *supra* note 25, at 329; Lorio, *supra* note 14, at 1008.

52. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-08 (1940).

53. See Bowal, *supra* note 14, at 6.

54. See Comment, *supra* note 6, at 902; Bowal, *supra* note 14, at 6.



biological child of the husband.<sup>55</sup> In some states the use of a surrogate mother may lead to criminal liability.<sup>56</sup>

Although the surrogate mother and the IVF-carrier situations are similar, they are distinguishable on the basis of genetic identity. A surrogate mother is related to the child biologically because she is the genetic mother of the child she is carrying. The IVF carrier, on the other hand, does not have the same biological relationship to the child since the husband and wife are the genetic parents. This distinction minimizes the policy concerns recognized in surrogate motherhood when applied to the IVF situation. The same public policy concerns of private adoption<sup>57</sup> and extensive litigation regarding custody<sup>58</sup> are likely to be offered as the compelling state interests that would prohibit the use of an IVF carrier. Thus, even if surrogate mother contracts continue to be prohibited, the IVF agreement should be permitted. The differences between IVF and surrogate motherhood reduce the state interests that are necessary to constitutionally prohibit a husband and wife from using the IVF carrier arrangement. A major argument that has been advanced to find surrogate mother contracts unenforceable is concern about private adoptions and the possibility of baby-bartering.<sup>59</sup> To understand why these concerns are inapplicable to IVF, the underlying rationale employed in support of private adoption prohibitions will be analyzed. This author contends that the underlying policy behind these prohibitions supports their application to surrogate mother contracts. The differences between surrogate motherhood and IVF then will be examined. This author will conclude that the distinctions between the two techniques should result in a finding that application of these laws to IVF is inappropriate.

### A. *Black Market Adoptions*

In at least twenty-four states, paying a mother in connection with the relinquishment of rights to her child is prohibited.<sup>60</sup> The typical

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55. See Comment, *supra* note 4, at 387.

56. See Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. UNIV. LAW J. 147, 148. Notwithstanding the fact that these statutes rarely are enforced, their mere existence deters surrogate motherhood arrangements. *Id.* at 153. In addition, these statutes render surrogate mother contracts void and unenforceable as contracts requiring an illegal act. *Id.* The purpose of these statutes is to prevent the "sale" of infants. *Id.* at 152.

57. See *infra* notes 60-71 and accompanying text.

58. See *infra* notes 72-81 and accompanying text.

59. See *infra* notes 60-71.

60. See Andrews, *supra* note 2, at 52; Goldfarb, *Two Mothers, One Baby, No Law*, 11 HUMAN RIGHTS 27 (1983); see, e.g., CAL. PENAL CODE §273.

baby-buying situation involves a pregnant woman who is unmarried.<sup>61</sup> The "buyer" takes advantage of the mother, who is not in a financial position to care for her child.<sup>62</sup> The adoptive parents are not related to the child biologically and no one has ascertained their fitness for adoption.<sup>63</sup> In *Doe v. Kelley*,<sup>64</sup> the Michigan Appeals Court found that the couple's right of privacy to use a surrogate mother did not override the compelling interest of the state to forbid financial agreements from influencing a mother to consent to the adoption of her child.<sup>65</sup> In *Kelley*, the court refused to allow payment to the surrogate mother; moreover, the court found that the Michigan statute prohibiting payment in connection with an adoption applied to surrogate motherhood because of a fear that a money market for the adoption of babies could develop.<sup>66</sup>

In Kentucky, surrogate mother contracts have been found unenforceable because they violate a statute prohibiting a mother from consenting to an adoption before birth.<sup>67</sup> Differentiating between carrying the child for the husband and wife and being paid for relinquishing parental rights to the child is difficult in the case of surrogate motherhood because of the strong concern over the possible buying and selling of children.<sup>68</sup> Although payment for *carrying* a child and payment *for* the child may be difficult to distinguish in the surrogate mother situation, the distinction is clearer in IVF. The parents are not receiving the genetic child of another woman, as in surrogate motherhood, but are paying a carrier to carry their child to term. The carrier is not the victim of an unwanted pregnancy or coercion on the part of the couple.<sup>69</sup> She enters into an agreement to carry another couple's child to term because the wife is incapable of bearing the child herself.<sup>70</sup> The child is not the genetic offspring of the carrier. Furthermore, custody of the child is given to the biological parents in IVF and not to strangers.<sup>71</sup> The biological parents of the IVF child should not be characterized as "buying" their genetic

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61. See Keane, *supra* note 56, at 155.

62. *Id.*

63. *Id.*

64. 307 N.W.2d 438 (Mich. 1981).

65. *Id.* at 441.

66. *Id.*

67. See Lorio, *supra* note 14 at 993; Ky. REV. STAT. §199.500.

68. See Lorio, *supra* note 14, at 993-95; Goldfarb, *supra* note 60, at 29; Origins, *supra* note 1, at 52.

69. See Keane, *supra* note 56, at 155.

70. *Id.*

71. *Id.*

child, and, therefore, baby-bartering statutes should not be used to invalidate IVF agreements.

Since private adoption concerns are inapplicable when a couple decides to use IVF, the custody issues in surrogate motherhood and IVF must now be examined. Custody issues are a major concern in surrogate motherhood because the woman who carries the child is the biological mother. Since the surrogate mother has a genetic relationship with the child, complicated custody litigation may result from a controversy between the husband and the surrogate mother. The state has an interest in protecting children from lengthy custody battles. This author will offer the argument, however, that concern of protracted litigation regarding custody is not of the same magnitude in IVF.

### *B. Examination of Custody Issues*

A surrogate mother is the biological mother of the child. Courts have been unwilling to enforce a contract when the surrogate mother agrees to give up her child before birth.<sup>72</sup> Litigation over custody rights arises when the surrogate mother refuses to give up the child after birth. In addition, the husband may refuse to take custody of the child if the baby is defective. The defect may be caused by the surrogate mother's negligence or breach of the terms of the contract.<sup>73</sup> Court battles could result over who should be primarily responsible for the child, since both the husband and the surrogate mother are the biological parents of the child.<sup>74</sup>

The welfare of the child must be paramount in determining the validity of surrogate mother contracts.<sup>75</sup> A state rationally could conclude that complex litigation regarding support, custody, and visitation rights is not in the best interest of the child.<sup>76</sup> The interest of the state in protecting children from protracted custody litigation may be sufficient to show a compelling interest in refusing to recognize surrogate mother contracts.<sup>77</sup> Upon a showing of a compelling state

72. See Comment, *supra* note 4, at 393. CAL. PENAL CODE §273; Iowa Code §600A.4(2)(d) (1981) (consent to adoption cannot be obtained until 72 hours *after* the birth of the child). See *supra* note 60 and accompanying text.

73. See *infra* notes 82-143 and accompanying text.

74. CAL. PENAL CODE §270 (criminal liability if legal parent fails to provide for child). SEE CAL. CIV. CODE §7010 (effect of judgment determining parent and child relationship); CAL. CIV. CODE §§4700-4732 (support of children).

75. See Bowal, *supra* note 14, at 25.

76. See Flannery, Weisman, Lipsett & Braverman, *supra* note 26, at 1318.

77. *Id.*

interest, refusal to recognize the surrogate mother contracts would not be constitutionally suspect.<sup>78</sup>

IVF should not give rise to the same custody concerns because both the husband and wife would be the biological parents of the child. The irrebuttable presumption that a woman who bears a child is the natural mother of that child<sup>79</sup> requires the IVF wife to adopt her own biological child from the carrier.<sup>80</sup> The IVF carrier, however, has no genetic link to the infant that statutorily is considered her natural child. The statutory presumption would treat an IVF carrier and a surrogate mother alike, and, therefore, the same custody litigation would ensue. The surrogate mother is the biological mother of the child and the state can require the wife to adopt the child of the husband and the surrogate mother only after birth because the state has an interest in restricting the relinquishment of parental rights before birth. Since the carrier in IVF is not the biological mother of the child, the interest of the state in refusing to allow the carrier to give up any rights to the IVF child before birth is not compelling. Absent concern over the relinquishment of parental rights before birth, the state will be unable to show any compelling reason to require the wife to adopt her child from the carrier. Under current law, custody litigation will continue to restrict the use of IVF in situations in which the decision to use IVF may be constitutionally protected.<sup>81</sup> Therefore, the statutory presumption of natural motherhood must be changed to include the possibility that a woman may bear a child not her genetic offspring.

#### PARENTAL RIGHTS IN IVF SITUATIONS

In the surrogate mother situation, the wife of the biological father has to adopt the child after the biological mother, the surrogate, has terminated her parental rights to the child.<sup>82</sup> In IVF, the wife of the biological father is the biological mother.<sup>83</sup> Current law, embracing

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78. *Id.* If the court determines that a restriction infringes upon a fundamental right, the restriction will be upheld only if necessary to satisfy a compelling state interest and the restriction is narrowly drawn to express only that interest. See *supra* note 29, and accompanying text.

79. CAL. CIV. CODE §7003. See *State v. Superior Court*, 86 Cal. App. 3d 475, 482, 150 Cal. Rptr. 308, 313 (1978) (by law, a parent is the natural guardian entitled to custody of the child).

80. See *infra* note 113 and accompanying text.

81. See *supra* notes 25-52 and accompanying text (discussion of the constitutional implications of IVF).

82. See *supra* notes 53-81 and accompanying text.

83. See *supra* notes 13-15 and accompanying text.

the concern over the buying and selling of children, prohibits relinquishment of parental rights to children that do not yet exist.<sup>84</sup> Current law requires the wife using IVF to adopt her genetic child from a woman who carried the child to term but is not genetically the mother.<sup>85</sup>

Precluding the wife from adopting her child until after the carrier has terminated her statutory parental rights could result in subsequent custody battles between the carrier, who would be the presumptive natural mother, and the true biological parents.<sup>86</sup> If the carrier decided to keep the child after birth, the genetic parents would have difficulty obtaining custody of their child.<sup>87</sup> The legitimacy of the IVF child and the custody rights of the parents should be determined before the birth of the child.<sup>88</sup> Since infants tend to form psychological ties with the person who has custody, deciding the custody issue before birth is in the best interest of the child.<sup>89</sup> In addition, the state has an interest in protecting the family unit and the child from custody battles that could arise if the rights are not decided until after birth.<sup>90</sup> The implications of current law when applied to the custody issues created by IVF now must be addressed. Certain recommendations on how legally to accomodate IVF also will be discussed.

#### A. *Who is the Father?*

If current law is not amended to provide parental rights to the couple before the birth of an IVF child, the husband still could claim paternity of the child. If the carrier is not married, the husband will have less difficulty showing that he is the father because no competing legal claim to paternity exists.<sup>91</sup> If the IVF carrier is married, the IVF husband would have to rebut the strong presumption that a woman's husband is the father of her children born during marriage.<sup>92</sup> To rebut

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84. See Comment, *supra* note 4, at 393; CAL. PENAL CODE §273; IOWA CODE §600.3(2) (1981) (requiring a termination of parental rights before an adoption petition can be filed); *supra* notes 60-71 and accompanying text (explanation of baby-bartering concerns).

85. See Andrews, *supra* note 2, at 53; Comment, *supra* note 4, at 393.

86. See Comment, *supra* note 4, at 393.

87. See Andrews, *supra* note 2, at 53.

88. See Comment, *supra* note 6, at 923.

89. See Keane, *supra* note 56, at 168-69.

90. See Comment, *supra* note 6, at 923. Not only will the family unit benefit, but society in general will benefit if the legitimacy of the IVF child is established prior to the birth of the child. *Id.* Determining legitimacy can prevent subsequent disputes involving custody, support, and inheritance rights. Comment, *supra* note 4, at 393.

91. See Sappideen, *The Surrogate Mother—A Growing Problem*, 6 U. NEW S. WALES L.J. 79, 86 (1983).

92. See Andrews, *supra* note 2, at 53.

the presumption and succeed in a custody suit, a biological father must prove two elements. First, he must show beyond a reasonable doubt<sup>93</sup> that he is the biological father.<sup>94</sup> Blood tests or testimony of the physician who performs the IVF probably would be sufficient to establish this requirement.<sup>95</sup> Once paternity is established, the biological father must show that placing custody of the child with him, instead of the woman who gave birth to the child, would be in the best interest of the child.<sup>96</sup> Showing that the interests of the child would best be served by placing the child with the genetic parents in the IVF situation would not be as difficult as attempting to remove the child from the custody of a surrogate mother. In IVF, the carrier would be opposing the biological parents. In surrogate motherhood, both parties claiming custody, the husband and the surrogate mother, would be biological parents.<sup>97</sup>

State law that forces the use of paternity suits and adoption to obtain custody of their child leaves the husband and wife in a precarious situation because of the possibility that the carrier may change her mind and want to keep the child. Alternatively, if artificial insemination by donor statutes, although not drafted in anticipation of IVF, are applied, the carrier and her husband might find themselves legally responsible for the IVF child if the IVF husband and wife refuse to take custody.<sup>98</sup> Artificial insemination statutes consider the husband of the woman artificially inseminated as the father of the child because the husband consents to the use of the wife's reproductive abilities in order to have a child.<sup>99</sup> Application of the artificial insemination statutes may lead a court to conclude that the husband of the carrier, by consenting to the use of her reproductive abilities through IVF, has become the legal parent of the child.<sup>100</sup>

Although the IVF husband can prove paternity notwithstanding any

93. See Smith, *supra* note 3, at 652.

94. See Comment, *supra* note 4, at 394-95.

95. See W. STATSKY, *DOMESTIC RELATIONS*, 376 (1978) (analogy can be made to evidence required to rebut the presumption when a woman is artificially inseminated).

96. Unless the natural mother presumption is changed, the IVF carrier would be in the same position as a surrogate mother. See Annas, *Contracts to Bear a Child: Compassion and Commercialism?*, 11 HASTINGS CENTER REP. 23, 24 (April 1981); Smith, *supra* note 3, at 652.

97. See W. STATSKY, *supra* note 95, at 382. A strong presumption favors an award of custody to biological parents that would work against the IVF carrier. *Id.* In surrogate motherhood, the presumption would work equally in favor of the surrogate mother and the husband because they both are biological parents. *Id.*

98. See Sappideen, *supra* note 91, at 85; Note, *supra* note 35, at 616.

99. CAL. CIV. CODE §7005. The husband's consent must be in writing. *Id.*

100. See Sappideen, *supra* note 91, at 85; Note, *supra* note 35, at 616.

action by the carrier or her husband, a more troublesome issue is deciding who the mother is. The IVF wife is the genetic mother of the infant, but without the use of the carrier's womb, the child would not have been born.<sup>101</sup> The states must develop a legal framework to decide which woman, the wife or the IVF carrier, is the legal mother. Absent this framework, the decision to use IVF, possibly a constitutionally protected right, may not be available to couples who are unable to have children.<sup>102</sup> In addition, new laws are needed to avoid custody battles between the couple and the IVF carrier that will arise if current laws are applied.<sup>103</sup>

### B. *Who is the Mother?*

Under the common law<sup>104</sup> and most state statutes,<sup>105</sup> including California,<sup>106</sup> a child born to a married woman is presumptively the child of that woman and her spouse.<sup>107</sup> The presumption is appropriate in most instances because this ensures legitimization of the child. The best interests of both the child and the state are served<sup>108</sup> since parental support for the child is assured.<sup>109</sup> The presumption is contrary to the best interest of the child in the IVF situation, however, because the carrier is presumed to be the natural mother of the child<sup>110</sup> and her husband the father,<sup>111</sup> even though neither are genetically related to the child. The biological parents, the husband and wife, are precluded from obtaining custody of the child if the presumption is followed and the carrier refuses to relinquish custody.<sup>112</sup>

The natural mother presumption became law before the possibility of a woman carrying a child that was not her genetic child was imagined. The gestational link between the infant and the woman carrying the child to term provides for the argument that the natural mother presumption should remain, despite the IVF possibility, because of

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101. See Lorio, *supra* note 14, at 993.

102. See *supra* notes 25-52 and accompanying text.

103. See *supra* notes 89-90 and accompanying text.

104. See Note, *supra* note 35, at 614 n.80.

105. *Id.* at 614 n.81.

106. CAL. CIV. CODE §7003.

107. See Note, *supra* note 35, at 614.

108. See W. Statsky, *supra* note 95, at 453. Historically, the purpose of this presumption was to prevent bastardization of the child, and to ensure the legal status of the child. *Id.*; H. KRAUS, FAMILY LAW 397 (1976).

109. See *supra* note 74 and accompanying text.

110. CAL. CIV. CODE §7003.

111. Note, *supra* note 35, at 614.

112. *Id.* at 614 n.83.

the effect the uterine environment has on the development of the fetus.<sup>113</sup> The argument becomes more complicated due to the continuing controversy whether intelligence is ordained genetically or nurtured by the environment within the maternal host and affected by the stresses that affect the woman carrying the child.<sup>114</sup> Studies have established the possibility that the major determinants of viability, physical growth and health, mental ability, and personality, may be those that operate during gestation.<sup>115</sup> Any etiological study of differences in personality, intelligence, and health no longer is complete without taking prenatal factors into consideration.<sup>116</sup>

The importance of the uterine environment to the subsequent development of the child is largely unknown.<sup>117</sup> The gestational link argument may support maintaining a rebuttable presumption in favor of the carrier.<sup>118</sup> In light of the arguments favoring a constitutionally protected right for an infertile couple to use IVF, however, the non-rebuttable presumption of natural motherhood now in effect should be modified.<sup>119</sup>

### C. Possible Changes in the Law

#### 1. Artificial Insemination by Donor

Litigation involving IVF situations may ensue before IVF legislation is enacted. The cases involving artificial insemination by donor, although not drafted in contemplation of IVF, may be used by analogy in the absence of specific IVF legislation.<sup>120</sup> The artificial insemination donor is donating his sperm much like the IVF carrier is donating

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113. See Sappideen, *supra* note 91, at 86. In addition, recent artificial insemination by donor cases and child placement decisions have stressed the idea that a genetic relationship between the parent and child is not necessarily the most important factor to consider when deciding custody issues. *Id.* at 86-87.

114. *Id.* See generally THE I.O. CONTROVERSY 474 (N.J. Block and G. Dworkin eds. 1976) (discussion of the different elements affecting intelligence).

115. MODERN PERSPECTIVES IN INTERNATIONAL CHILD PSYCHIATRY 27-37 (J. Howells 1st U.S. ed. 1971); Sappideen, *supra* note 94, at 86-87.

116. See Sappideen, *supra* note 94, at 86-87.

117. *Id.* at 86.

118. The carrier's right to the child should be weaker than the right of the husband and wife due to the fact that the carrier would be opposing both genetic parents. See Lorio, *supra* note 14, at 996.

119. See *supra* notes 25-52 and accompanying text (discussion of constitutional argument). See *supra* notes 104-18 and accompanying text (discussion of changing the current statutory presumption).

120. See Note, *supra* note 26, at 328. Most artificial insemination by donor statutes mandate that children conceived by artificial insemination are presumed to be legitimate for all purposes. *Id.*



the use of her womb.<sup>121</sup> The donor is allowed to relinquish his right to the child before birth and the husband of the woman inseminated by the donated sperm is presumptively the father of the child.<sup>122</sup> This avoids adoption and custody litigation regarding the child after birth, which is in the best interest of the child.<sup>123</sup> In addition, the sperm donor is relieved of any responsibility for the child.<sup>124</sup>

In the absence of legislation specifically enacted to regulate IVF, courts could follow artificial insemination by donor law in IVF situations to allow the carrier to relinquish any rights to the child before birth.<sup>125</sup> The fact that the artificial insemination donor statutorily is allowed to relinquish any rights to his genetic child *before* birth may persuade a court to enforce the IVF contract and allow a carrier, who is only the gestational carrier and has no genetic link to the child, contractually to relinquish parental rights notwithstanding the statutory presumption that she is the natural mother.<sup>126</sup> In IVF cases, the responsibility of support would remain with the husband and wife if the artificial insemination by donor cases are used by analogy.<sup>127</sup>

Significant differences exist, however, between IVF and the artificial insemination by donor situation. An artificial insemination donor never has physical contact with the child, while an IVF carrier gives nine months of her life and creates an emotional bond with the life inside her.<sup>128</sup> In addition, a change of physical custody—taking the infant from the carrier and placing the child with the husband and wife—is not necessary in an artificial insemination by donor situation, but must

121. See Lorio, *supra* note 14, at 996.

122. See ARK. STAT. ANN. §61-141(c)(1983); CAL. CIV. CODE §7005; COLO. REV. STAT. §19-6-106 (1973); CONN. GEN. STAT. §45-69f (1983); FLA. STAT. ANN. §742.11 (West 1973); MD. EST. & TRUSTS CODE ANN. §1-206(b) (1974); MONT. CODE ANN. §40-6-106 (1981); N.Y. DOM. REL. LAW §75 (McKinney 1982-83); N.C. GEN. STAT. §49A-1 (1974); OKLA. STAT. ANN. tit. 10 §552 (West 1982-83); OR. REV. STAT. §109.243 (1981); TEX. FAM. CODE ANN. §12.03 (Vernon 1977); VA. CODE §64.1-7.1 (1980); WASH. REV. CODE ANN. §26.26.050(1) (West 1983-84); Lorio, *supra* note 14, at 988-89. "Father" in the California support statute was interpreted to include a "husband who is unable to accomplish his objective of creating a child by using his own semen, purchases semen from a donor and uses it to inseminate his wife to achieve his purpose." *People v. Sorenson* 68 Cal. 2d 280, 286, 437 P.2d 495, 499-500, 66 Cal. Rptr. 7, 12 (1968).

123. See *supra* notes 89-90 and accompanying text.

124. See Andrews, *supra* note 2, at 53.

125. The legislation also could provide that the carrier relinquish any rights to the child before the embryo is implanted.

126. See Note, *supra* note 26, at 328. See notes 104-19 and accompanying text (explaining the statutory presumption).

127. See *supra* note 122 and accompanying text.

128. See Smith, *supra* note 3, at 661 (discussion of the emotional ties a surrogate mother develops with the embryo she carries).

take place in IVF.<sup>129</sup> These differences between artificial insemination by donor and IVF may result in judicial hesitation to apply artificial insemination by donor principles to IVF cases.<sup>130</sup> To avoid the necessity of utilizing principles of the law not developed in anticipation of IVF, states should adopt legislation that addresses the technological advances and resulting parentage problems presented by IVF.

## 2. *Legislative Alternatives to Provide for IVF*

California should enact legislation to ensure that use of a woman's womb will not, in itself, lead to the conclusive presumption that she is the natural mother of the child. The California Surrogate Parent Act of 1982<sup>131</sup> divided parentage between the surrogate mother and the biological father.<sup>132</sup> Application of divided parentage in IVF would accommodate the husband because he no longer would be required to rebut the presumption that the husband of the carrier is the father of the IVF child. The provision is inadequate, however, because there would be no change in the legal status of the wife. If the carrier decided to keep the child, the wife would have difficulty obtaining custody.<sup>133</sup>

Statutes could address surrogate motherhood and IVF by providing that a child is presumed to be the legitimate child of the sperm donor and his wife, regardless of whether she carries the child or supplies the ovum.<sup>134</sup> A similar presumption was included in a Kansas proposal which provided that a child born with the use of a surrogate mother would be presumed to be the child of the sperm donor and his wife.<sup>135</sup> With the enactment of this presumption, the wife of the

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129. See Comment, *supra* note 4, at 394 (using the change of physical custody to distinguish surrogate motherhood arrangements and artificial insemination by donor).

130. See Note, *supra* note 26, at 328.

131. Assembly Bill 3771, 1981-82 Regular Session (proposed additions and amendments to §§7500-7518 of the CAL. CIV. CODE).

132. *Id.* §7508(b).

The husband shall be presumed to be the father of any child born to a woman who agrees to act as a surrogate pursuant to this part that was conceived during that period of time in which it was possible for her to have conceived as a result of insemination pursuant to a contract incorporated in a petition approved pursuant to this part. *Id.*

See Note, *supra* note 35, at 624-25.

133. The wife would be in the same position as the wife of a sperm donor in a surrogate mother situation. See notes, *supra* note 35, at 624-25. The divided parentage presumption subjects the wife of the sperm donor to custody battles if the surrogate mother decides not to relinquish custody of the child. *Id.*

134. See Lorio, *supra* note 14 at 1010.

135. See Note, Contractual Issues, *supra* note 35, at 619. Kansas Senate Bill No. 485, §2(b).

sperm donor would not be required to adopt the child after birth. Custody, support, and physical responsibility for the child would be decided early and the surrogate, who is not within the nuclear family, would be relieved by statute of all legal rights and obligations to the child.<sup>136</sup> The Kansas proposal, however, included a second presumption of dual parentage shared by the surrogate mother and the sperm donor if the surrogate mother declares the surrogate mother contract void.<sup>137</sup> The second presumption, if applied to the IVF situation, would give the carrier the unilateral ability to create the same adoption-before-birth disputes that should be avoided.<sup>138</sup> The husband and wife may be denied an award of custody of their biological child. Ironically, the husband still could be responsible for support of the child because of the dual parentage presumption.<sup>139</sup>

The interests of the child must be paramount when considering new proposals. The state has a strong interest in ensuring that support for the child clearly is established before birth.<sup>140</sup> Since both husband and wife are the biological parents of the child, they should be primarily responsible for support of a child born through the use of IVF. Unlike the surrogate mother, the IVF carrier is not a biological parent. The law should provide that she can relinquish any claim to the child before the embryo is implanted. At that time, the carrier should no longer be responsible for support or physical custody of the child upon birth.

California law should provide a new presumption when IVF is used. If the sperm donor and egg donor are married<sup>141</sup> and choose to use

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That proposal provided:

Unless a surrogate mother declares a contract under section 9 to be void, any child born as a result of heterologous artificial insemination pursuant to the contract and in accordance with this act shall be considered at law in all respects the same as a naturally conceived child of the sperm donor and his wife. If the surrogate mother declares the contract to be void, any child born as a result of heterologous artificial insemination pursuant to the contract and in accordance with the provisions of this act shall be considered at law in all respects the same as a naturally conceived child of the sperm donor and the surrogate mother, and the sperm donor shall have all rights and responsibilities of a natural father. *Id.*

136. See Lorio, *supra* note 14, at 1010.

137. See Note, *supra* note 35, at 619.

138. See *supra* notes 60-71 and accompanying text (explanation of adoption-before-birth problems giving rise to public policy concerns).

139. See Note, *supra* note 35, at 619.

140. See *supra* notes 75-77 and accompanying text.

141. The marriage requirement is necessary to provide for the possibility of a couple who needs to use the egg of an anonymous donor fertilized with the sperm of the husband and implanted in his wife. With no marriage requirement, the egg donor, and not the wife being implanted with the embryo, would be presumed to be the natural mother.

IVF to bring their child to term, the law should provide that the husband-sperm donor and the wife-egg donor are the natural parents of the child no matter whose womb is used to carry the child to term. Under this presumption, the husband and wife would be responsible for support of the child. Moreover, the IVF carrier would not have the opportunity to declare the contract void and unilaterally declare herself the natural mother, as in the Kansas surrogate mother proposal,<sup>142</sup> because she is not the biological mother. The carrier would know before implantation that she has no legal rights or obligation concerning the IVF child.

Litigation concerning the rights and obligations of the parties would be minimized because the husband and wife would be in the same position as natural parents and would not be able to challenge their responsibility for support of the child.<sup>143</sup> Other issues concerning the rights of the husband, wife, and the carrier still must be resolved. The problems of contractual control over the carrier's activities during gestation, abortion, and visitation rights now will be explored.

#### RIGHTS AND LIABILITIES OF THE HUSBAND, WIFE, AND CARRIER

The emergence of IVF, especially when a third party carrier is involved, will present difficult questions for the courts. Many areas of the law that have been considered well-settled will be challenged by new and unanticipated factual situations. The problems surrounding visitation rights, the decision to terminate the pregnancy, and restriction of the IVF carrier's activities must be explored before the widespread implications involved in IVF can be appreciated. Development of the fetus will be of primary importance to the couple. Therefore, the husband and the wife will want to contractually restrict the carrier's activity during the gestational period.

##### *A. Right to Control the Carrier's Actions*

Since the uterine environment strongly influences the health of the fetus, the activities of the carrier potentially could harm the child.<sup>144</sup> The husband and wife will seek to ensure that the carrier will do what is necessary for the health of the child. The carrier likely will attempt to remain emotionally detached from the child and may not

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142. See *supra* note 135 and accompanying text.

143. See CAL. CIV. CODE §270.

144. See Andrews, *supra* note 2, at 56. A surrogate mother gave birth to a child with fetal alcohol syndrome due to the surrogate mother's alcoholism. *Id.*

be as concerned with the development of the fetus.<sup>145</sup> The limits of the contractual rights to restrict the activities of the carrier need to be defined as do the remedies in case of a breach.

Requiring a certain number of medical check-ups during the pregnancy will be an important part of the IVF agreement for the husband and wife. Certain activities, such as drinking, smoking, and drug consumption are known to have a deleterious effect on the fetus<sup>146</sup> and the husband and wife will want to place restrictions in the IVF agreement on the carrier's ability to engage in these activities. These restrictions, which are in the best interest of the child and the couple, will collide with the civil liberties and personal privacy of the carrier.<sup>147</sup>

Enforcement of IVF contracts may not be available since courts often are unwilling to order specific performance of personal service agreements.<sup>148</sup> The possibility that enforcement of restrictions would severely limit constitutional freedoms of life, liberty, and the pursuit of happiness will prohibit enforcement of the terms of an IVF contract restricting the physical activities of the carrier.<sup>149</sup> Since the courts are unwilling or unable to specifically enforce these clauses in the IVF contract, alternative remedies available to the husband and wife must be established.

The interests of the unborn child must prevail when considering enforcement of IVF agreements.<sup>150</sup> The Kansas proposal regarding surrogate motherhood discussed earlier provided that if the surrogate mother, who is the biological mother of the child, breaches the surrogate mother contract and engages in activities that result in a defective child, the presumption that the wife of the sperm donor is the

145. See Bowal, *supra* note 14, at 25.

146. See Lorio, *supra* note 14, at 995.

147. See Bowal, *supra* note 14, at 25.

148. See *Millcarek v. Miami Herald Publishing Co.*, 388 F. Supp. 1002, 1005 (S.D. Fla. 1975) (newspaper carrier); *Nassau Sports v. Peters*, 352 F. Supp. 870, 875 (E.D.N.Y. 1972) (professional hockey player); Keane, *supra* note 56, at 167-68.

149. See Note, *supra* note 35, at 631-32.

While damages are a wholly inadequate remedy for breach of a promise to render personal services, two analogous difficulties stand in the way of specific enforcement:

1. Long and minute supervision might be needed to secure the proper execution of the decree.

2. The proper performance of the services to the best of the defendant's ability is uncertain and difficult to gage. And any attempt to overcome these difficulties might involve too serious an infringement of personal liberty to be tolerable. Therefore, such promises are generally not enforceable by affirmative decree.

11 WILLISTON ON CONTRACTS §1423 (3rd ed. 1968).

150. See Bowal, *supra* note 14, at 25.

natural mother would change. The surrogate mother would be considered the natural mother of the child<sup>151</sup> and would be responsible for support and custody of the child.<sup>152</sup> Under legislation similar to the proposal in Kansas the sperm donor husband, being the biological father, still would be liable for half the support of the child, but would be entitled to litigate the issue because of the added expense in rearing a physically or mentally impaired child.<sup>153</sup> The possibility of custody battles over the child between the surrogate mother and the husband give rise to public concerns over the fate of the child. These concerns have led courts to refuse to recognize surrogate mother contracts<sup>154</sup> since the courts want to protect the child from complex litigation over custody issues.<sup>155</sup>

In the IVF situation, however, both husband and wife will be considered the natural parents of the child if the natural mother presumption is changed.<sup>156</sup> Like the sperm donor husband who is not relieved from responsibility for the child because of the surrogate mother's breach,<sup>157</sup> the husband and wife should not be released from responsibility. The risk of breach of contract resulting in a defective child should fall on the couple because the state has an interest in assuring support for the child and avoiding complex custody battles. The husband and wife may be able to sue the carrier for damages resulting from the breach,<sup>158</sup> but the interests of society and the child require that the husband and wife not be relieved from responsibility for the child simply because a carrier they contracted with to carry their embryo did not follow the terms of the contract.<sup>159</sup> The responsibility of the couple for the child should begin upon fertilization of the embryo. The husband and wife will not be forced by a court to accept an unwanted child, however, because that could jeopardize the

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151. See Note, *supra* note 35, at 619 (discussion of the Kansas proposal).

152. See *Surrogate Mothers: The Legal Issues*, 7 AM. J. OF LAW AND MEDICINE 323, 339 (1981).

153. See *supra* notes 53-81 and accompanying text (discussion of surrogate mother contracts).

154. See *supra* notes 72-81 and accompanying text.

155. *Id.*

156. See *supra* notes 120-43 and accompanying text (discussion of changing the current natural mother presumption).

157. See Note, *supra* note 35, at 619.

158. Since damages will be difficult to determine if the carrier breaches the IVF contract, the husband and wife will want to include in the terms of the contract a liquidated damages provision in case of a breach. See Bowal, *supra* note 14, at 25-26. Although the damages clause may be struck down as a penalty or the carrier may be judgment-proof, hopefully the provision would act as a deterrent against the carrier breaching the standard of performance to which she originally consented. *Id.*

159. See *Surrogate Mothers: The Legal Issues*, 7 AM. J. OF LAW AND MEDICINE 323, 339 (1981); Andrews, *supra* note 2, at 52.

welfare of the child.<sup>160</sup> Therefore, if the husband and wife refuse to accept the child, they should be liable for the cost of adoption<sup>161</sup> or possibly be ordered to pay lifetime medical expenses or child support.<sup>162</sup>

The couple will not only desire an assurance that the IVF carrier will follow the contractually agreed upon restrictions of certain activities. The husband and wife must anticipate the possibility that the carrier may decide to terminate the pregnancy. Conversely, the couple may want the ability to decide that their embryo should be aborted. These decisions must be explored in light of the constitutional implications of the right to abortion.

### B. *The Problems of Abortion*<sup>163</sup>

The United States Supreme Court in *Roe v. Wade*<sup>164</sup> held that a woman's right of privacy, including her right to have an abortion during the first trimester of pregnancy, is fundamental.<sup>165</sup> State restrictions on the exercise of fundamental constitutional rights will be upheld only if the restrictions are necessary to further a compelling state interest.<sup>166</sup> Although a state cannot show a compelling state interest during the first trimester of pregnancy to justify restricting abortions, the state can show that a viable life exists at the end of the second

160. See *Surrogate Mothers: The Legal Issues*, 7 AM. J. OF LAW AND MEDICINE 323, 338 (1981).

161. See Note, *supra* note 35, at 635 (sperm donor in surrogate motherhood must pay adoption costs if he rejects custody of the child). If the husband and wife in a surrogate mother situation refuse to take custody, the surrogate mother can put the child up for adoption and sue the husband and wife for the cost. Keane, *supra* note 56, at 167.

162. See Andrews, *supra* note 2, at 52 (couple may be ordered to pay adoption costs in surrogate situation if they do not take custody of the child).

163. The fact that the parents do not have the right to have their embryo aborted from the carrier does not indicate necessarily that the embryo has to be implanted once it is fertilized. *A Legal, Moral, Social Nightmare: Society Seeks to Define the Problems of the Birth Revolution*, Time, Sept. 10, 1984, at 54. If the embryo was given the right to be implanted, public policy probably would demand that the husband and wife be responsible for the resulting children. *Id.* In most cases this would make IVF an impossible alternative because more than one egg normally is removed from the ovary. *Id.* Since fertilization does not occur in every case, several attempts are made. *Id.* If the husband and wife were required to implant every embryo, they ultimately could be responsible for several children. *Id.* Most experts would deny the right of implantation to the embryo. *Id.* Australia recently recognized the right of the parents to allow the embryo to expire. *Id.*

164. 410 U.S. 113 (1973).

165. The Court held that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The risks attendant to an abortion after the first three months of a pregnancy were considered a compelling state interest and justify the state in restricting a woman's right to terminate her pregnancy during the first trimester of the pregnancy. J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 745-46 (1983).

166. J. NOWAK, R. ROTUNDA & J. YOUNG, *Constitutional Law*, 745-46 (1983).

trimester. Therefore, the state has a compelling interest in the potential life that will justify restrictions on abortions after the second trimester.<sup>167</sup> The carrier will not lose her right to an abortion when carrying the embryo of another couple until the second trimester because the state would be unable to show that "viable" life needed protection.<sup>168</sup> The husband and wife will find themselves in a position similar to a father who is unable to veto the decision of the mother to abort their child.<sup>169</sup> Since statutes requiring spousal consent to abortion have been struck down, any statute giving the IVF parents control over the decision of the carrier to have an abortion would be unconstitutional because they would involve state action restricting abortion within the first trimester.<sup>170</sup>

If the IVF carrier contractually agrees with the husband and wife to refrain from having an abortion, however, the state may not be restricting the carrier's right to an abortion.<sup>171</sup> *Roe v. Wade* makes clear that the right of a woman to terminate her pregnancy at any time is not absolute.<sup>172</sup> Questions remain whether the carrier contractually can waive her constitutionally protected right to have an abortion.<sup>173</sup> Some constitutional rights can be waived,<sup>174</sup> but the waiver probably is not irrevocable.<sup>175</sup> A contract between the couple and the carrier restricting or waiving the right of the carrier to terminate her pregnancy may not be void as against public policy, but the contractual waiver most likely is revocable by the carrier and unenforceable.<sup>176</sup>

Even assuming the carrier contractually can waive her right to have an abortion, she later may decide to breach the contract and abort. The carrier could be stopped only by physically preventing her from obtaining the abortion and requiring her to carry the child to term. Contract law normally will not specifically enforce contracts for per-

167. *Id.* at 746. At this point the fetus could have a "meaningful life" outside the mother. *Id.*

168. *Id.* see Lorio, *supra* note 14, at 990.

169. See *Surrogate Mothers: The Legal Issues*, 7 AM. J. OF LAW AND MEDICINE 323, 334 (1981).

170. Special consent statutes have been struck down as unconstitutional. J. Nowak, R. Rotunda & J. Young, *supra* note 165, at 751. The state cannot delegate powers it is prohibited from exercising. *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976); J. Nowak, R. Rotunda & J. Young, *supra* note 165, at 751.

171. See Note, *supra* note 35, at 612.

172. See J. NOWAK, R. ROTUNDA & J. YOUNG *supra* note 165 at 745-46 (explaining how the state can restrict a woman's right to have an abortion by a compelling state interest); Note, *supra* note 35, at 613.

173. See Note, *supra* note 35, at 612.

174. The right to a jury trial may be waived. *State v. Jelks*, 461 P.2d 473, 475 (Ariz. 1969).

175. See *Surrogate Mothers: The Legal Issues*, 7 AM. J. OF LAW AND MEDICINE 323, 334 (1981).

176. See Lorio, *supra* note 14, at 995.



sonal services.<sup>177</sup> Courts would be hesitant to specifically enforce an IVF contract because of the length of a pregnancy. In addition, the court would be concerned about the negative effects to the potential child that might be caused by forcing a woman to carry an unwanted child to term.<sup>178</sup>

Unlike the custody issue, therefore, the state cannot protect the husband and wife from the carrier's decision to abort the IVF child.<sup>179</sup> Statutory changes in the law would eliminate custody battles between the couple and the carrier because the statutes can be amended to provide that the carrier has no legal right over the child/the husband and wife should be given exclusive custody. The state however cannot restrict the carrier's right to an abortion during the first trimester. Any contract between the couple and the carrier cannot be specifically enforced and the husband and wife will be left with money damages as their only remedy.

The carrier may be liable in damages for pecuniary loss under the contract if she aborts the child.<sup>180</sup> Although damages for emotional distress usually are not recoverable in contract actions,<sup>181</sup> courts seem to be increasingly willing to protect the interest in freedom from emotional distress.<sup>182</sup> Damages for mental suffering may be granted for an intentional or reckless breach of contract if the defendant had reason to know when the contract was entered into that a breach would cause mental suffering for reasons other than pecuniary loss.<sup>183</sup> Since the IVF contract will include a clause restricting the carrier's ability to abort, the husband and wife will be able to show that this type of a breach was contemplated at the time the contract was made. The contract was not entered into on the part of the husband and wife for pecuniary benefit, but rather for personal and emotional reasons. Therefore, the husband and wife may be able to convince a court that emotional distress damages are appropriate for a breach of an IVF contract.<sup>184</sup> The parents could sue in tort for intentional

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177. 5A Corbin on Contracts §1204 (1964). See Lorio, *supra* note 14, at 995.

178. See Lorio, *supra* note 14, at 995.

179. See *supra* notes 82-143 and accompanying text.

180. See Lorio, *supra* note 14, at 995.

181. 11 WILLISTON ON CONTRACTS §1341 (3rd ed. 1968).

182. *Id.*

183. *Id.* (citing *Kansas City v. Industrial Gas Co.* 138 Kan. 755, 28 P.2d 968).

184. The husband and wife will have to show that this breach was particularly likely to result in serious emotional distress. FARNSWORTH, CONTRACTS, 895 (1982). Examples of the types of breach that have produced emotional distress damages in contract actions are refusal to comply with a contract for medical services, failure to deliver a bride's trousseau before

or negligent infliction of emotional distress.<sup>185</sup> In addition, the husband and wife may be able to recover for the loss of their embryo through a wrongful death action.<sup>186</sup> Determining whether the husband and wife have standing to sue could pose another problem unless the husband and wife are considered the natural parents of the embryo. The husband and wife should not be precluded from bringing a wrongful death action against the carrier if statutory amendments that recognize the husband and wife as the natural parents<sup>187</sup> of the child upon fertilization are enacted.<sup>188</sup>

If a couple discovers their embryo is mentally or physically deformed they may choose to have an abortion. The IVF husband and wife will not have this alternative. The right to have an abortion was guaranteed in *Roe v. Wade* because the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>189</sup> The *Roe* right will not apply to the wife because she will not be carrying the child.<sup>190</sup> The husband and wife could agree contractually with the carrier that in the case of a defective embryo the carrier would have an abortion. Again, contract law would not allow specific enforcement of the agreement because the contract would involve personal services.<sup>191</sup> Public policy probably would not allow the husband and wife to recover damages in this situation and would require the couple to support the child notwithstanding their desire to have the pregnancy terminated. In providing for the use of IVF, the state must be assured that the IVF child will be supported. Society should place the responsibility of support for the child upon the couple utilizing the procedure. Thus the husband and wife should be responsible for the embryo upon fertilization.<sup>192</sup>

Assuming the IVF carrier has fulfilled her obligations during the gestational period, and the pregnancy is not terminated, the issue of visitation rights could arise. The carrier may decide she wants to see

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the wedding, harassing collection techniques, an undertaker's breach of his duty, and errors in delivery of telegrams announcing the death of a family member. 11 WILLISTON ON CONTRACTS §1341 (3rd ed. 1968).

185. RESTATEMENT (SECOND) OF TORTS §46 (1965). See also Keane, *supra* note 35, at 167-68 (discussing liability of a surrogate mother).

186. See Note, *supra* note 35, at 632.

187. See *supra* notes 130-43 and accompanying text.

188. See Note, *supra* note 35, at 633. However, most wrongful death actions involving unborn children have only been granted to parents of viable unborn children. *Id.*

189. See *Roe*, 410 U.S. at 153.

190. See Lorio, *supra* note 14, at 990.

191. See *supra* note 177 and accompanying text.

192. See *supra* notes 130-43 and accompanying text.

the IVF child after she has relinquished the child to the husband and wife. Several issues surrounding the visitation problem will be addressed next.

### C. Visitation Rights

Confusion over visitation rights in the IVF situation adds to the necessity of changing the current statutory natural mother presumption.<sup>193</sup> If legislation is not enacted to provide legal recognition of the IVF carrier contract,<sup>194</sup> the courts will be forced to decide what visitation rights the husband and wife will have if the carrier refuses to relinquish custody of the child.

Courts are required to award reasonable visitation rights unless visitation would be detrimental to the child.<sup>195</sup> The right to visitation by natural parents may be protected constitutionally.<sup>196</sup> Under current law, the husband will be considered the natural father by a showing of paternity,<sup>197</sup> which probably could be proven by testimony of the IVF doctor.<sup>198</sup> With advances in medical technology, the wife may be able to prove her biological interest in the child in the same manner. When granting visitation rights, however, the welfare of the child is of primary importance.<sup>199</sup> The IVF child might be confused by the existence of two mothers and possibly two fathers. The husband and wife may have difficulty showing that the interests of the child are best served by allowing visitation rights. As a result, a carrier who agreed to carry the embryo of another couple to term may be able to effect the denial of not only custodial but also visitation rights to the biological parents.

The husband and wife would be left only with a monetary damages remedy based upon the contract with the carrier or upon tort theory. The husband and wife most likely will be able to show that they suffered from emotional distress and disappointment resulting from their failed parental aspirations. Unfortunately, damages for emotional distress usually are not recoverable in contract actions, unless, as

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193. See *supra* notes 104-18 and accompanying text.

194. See *supra* notes 120-43 and accompanying text (discussion of enforcing IVF contracts).

195. See Note, *supra* note 35, at 616-17 n.90.

196. *Stanley v. Illinois*, 405 U.S. 645, 658. See Note, *supra* note 35, at 616-17 n. 90.

197. See *supra* notes 91-103 and accompanying text (discussion of proving paternity).

198. See *supra* notes 101-03 and accompanying text.

199. CAL. CIV. CODE §4601. Reasonable visitation rights will be awarded to a parent unless the visitation rights would be detrimental to the best interest of the child. *Id.* See *Wingard v. Sill*, 576 P.2d 620, 624-25 (Kan. 1978); Note, *supra* note 35, at 617.

discussed previously, the husband and wife can show that serious emotional distress was the foreseeable result of this type of breach at the time the contract was made.<sup>200</sup> An alternative theory of recovery might be intentional or negligent infliction of emotional distress.<sup>201</sup> The result of either possible suit would be frustrated by the fact that few women who become carriers will be able to satisfy a substantial judgment.<sup>202</sup>

Other visitation right concerns involve those of the carrier. Once the carrier relinquishes custody of the child to the husband and wife, even if no change is made in the statutory presumption, the courts should not recognize any legal relationship between the carrier and the child.<sup>203</sup> The carrier, however, may attempt to assert visitation rights because she is presumptively the natural mother.

The artificial insemination by donor cases can be used by analogy to refuse visitation rights to the carrier. In the artificial insemination by donor cases, the sperm donor relinquishes any obligations and rights, including visitation rights to the child.<sup>204</sup> In *C.M. v. C.C.*,<sup>205</sup> an unmarried woman who had been artificially inseminated by the sperm of a friend was required to allow visitation privileges to the sperm donor.<sup>206</sup> The sperm donor had to convince the court that visitation rights were in the best interest of the child because welfare of the child is the primary factor when determining visitation rights.<sup>207</sup> The carrier would be unable to make the same showing and convince a court that she should be entitled to visitation rights.<sup>208</sup> The courts must consider that the welfare of the child will not be served by the interference with the relationship between the child and the biological and custodial parents.<sup>209</sup> If the proposed changes in the natural mother presumption are adopted, an IVF carrier would have no grounds to

200. See *supra* notes 181-84 and accompanying text.

201. See Keane, *supra* note 35, at 167-68 (discussing liability of a surrogate mother who did not relinquish custody of the child); Note, *supra* note 35, at 632; see also *supra* note 185 and accompanying text (discussion of emotional distress damages if the carrier terminates the pregnancy).

202. See Keane, *supra* note 56, at 167-68 (discussion of liability of surrogate mother).

203. See Comment, *supra* note 6, at 923.

204. CAL. CIV. CODE §7005. See *supra* notes 120-29 and accompanying text.

205. 377 A.2d 821 (N.J. Super. 1977).

206. *Id.* at 822. See Smith, *supra* note 3, at 643.

207. See Smith, *supra* note 3, at 643.

208. See *supra* note 199 and accompanying text.

209. The IVF carrier's relationship with the IVF child only would cause confusion and complications in the child's family unit. See *supra* notes 195-98 and accompanying text (discussion of how IVF carrier could exclude husband and wife from visiting their child if she refused to relinquish custody of the child).

claim visitation rights because the husband and wife would be considered the natural parents of the child. The carrier would not be considered a biological parent and would have no legal relationship with the IVF child.<sup>210</sup>

### CONCLUSION

IVF clearly is a future alternative for couples who are unable to have children through natural conception. Current laws invalidating surrogate mother contracts, as well as statutory irrebuttable presumptions declaring the woman who bears a child the natural mother of that child, will interfere with the availability of IVF. Several Supreme Court cases outlining a constitutionally protected zone of marital privacy, may embrace the right of infertile couples to use IVF as a means of having children. If IVF is a constitutionally protected right, the states will have to develop a legal framework that provides for the IVF alternative unless a compelling state interest exists for the restriction of the technique. Even if the IVF procedure is not a constitutionally protected right, the distinguishing features between surrogate motherhood and IVF arrangements, combined with the desire to provide alternatives for couples who are unable to have children of their own, should convince the states to change their laws to recognize IVF contracts.

This author has demonstrated that a state may meet the burden of showing a compelling state interest in restricting the use of surrogate motherhood because of the complex issues of support, custody, and visitation rights that can result if the surrogate mother or the husband and wife breach the contract. The same concerns do not arise when an infertile couple fertilizes their embryo in vitro for implantation in a woman who is not genetically related to the child. Therefore, the state will not be able to show the compelling state interest needed to justify restrictions on the IVF procedure.

The other major obstacle restricting IVF in California is the irrebuttable statutory presumption providing that the natural mother is the woman who carried the child to term. Unless state legislators begin to examine the law and enact statutes that remove restrictions prohibiting couples from using IVF, including this statutory presumption, the courts will be forced to decide custody issues without statutory

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210. See *supra* notes 130-43 and accompanying text (discussion of possible changes in the statutory presumption of who is considered the natural mother).

guidelines because IVF may be constitutionally protected. To avoid this problem and to ensure that responsibility for the support and custody of an IVF child will not be questioned, California should provide statutorily that a couple who chooses to use the IVF procedure will be responsible for the support of the embryo from the time of fertilization. The couple should not be allowed to relinquish this responsibility even in the case of a breach of contract on the part of the carrier causing a defective embryo. The current statutory presumption considering the natural mother of a child to be the mother who bore that child should be changed to provide that the wife-egg donor and the husband-sperm donor, who are married and using IVF and an IVF carrier, are the presumed natural parents of the child.

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