THE ADOPTIONS AND SURROGATE PARENTHOOD STUDY COMMISSION

REPORT TO THE GOVERNOR AND THE 1989 GENERAL ASSEMBLY OF NORTH CAROLINA

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North Carolina General Assembly

ADOPTIONS/SURROGATE PARENTHOOD STUDY COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

January 3, 1989

TO THE GOVERNOR OF NORTH CAROLINA AND THE MEMBERS OF THE 1989 GENERAL ASSEMBLY:

The Adoptions and Surrogate Parenthood Study Commission herewith submits to you for your consideration its interim report on Adoptions and Surrogate Parenthood. The report was prepared by the Adoptions and Surrogate Parenthood Study Commission pursuant to Part XXVI of Chapter 873 of the 1987 Session Laws and Part VII of Chapter 1100 of the 1987 Session Laws (1988 Session).

Respectfully submitted.

Mary P. Seymour
Senator Mary P. Seymour

Edith L. Lutz
Representative Edith L. Lutz

Cochairmen
Adoptions and Surrogate Parenthood Study Commission

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PREFACE

The Adoptions and Surrogate Parenthood Study Commission was created by Part XXVI of Chapter 873 of the 1987 Session Laws (1987 Session). That act provides that the Commission shall consist of twenty-five members to be appointed in the following manner: "The President of the Senate shall appoint 10 members as follows: four shall be members of the Senate; one shall be a county social services director; one shall be the director of a private licensed child placing agency; one shall be an attorney experienced in adoptions matters; one shall be a physician practicing medicine in North Carolina; one shall be an adoptions worker in a private licensed child placing agency; and one shall be a clerk of superior court. The Speaker of the House of Representatives shall appoint 10 members as follows: four shall be members of the House of Representatives; one shall be a county social services director; one shall be the director of a private licensed child placing agency; one shall be a member of the clergy; one shall be an attorney who represents an adoption agency; one shall be an adoptions worker in a county department of social services; and one shall be a clerk of superior court. The Governor shall appoint five members as follows: one shall be the Director of the North Carolina Division of Social Services or the Director's designee; one shall be an attorney on the staff of the Attorney General's office knowledgeable in adoptions law; one shall be an adoptive parent; one shall be the birth parent of a child placed for adoption; and one shall be an adopted person."

The Commission was directed to study "State adoptions practices, the adoptions statutes and related laws in North Carolina, and adoptions practices and laws of other states, some of which may be a model for North Carolina"

as well as "the issues relevant to surrogate parenthood to determine whether legal guidelines are needed to ensure that the needs and rights of parties who enter into surrogate parenthood arrangements are protected." It has been directed to report to the General Assembly on or before the first day of the 1989 and 1991 Sessions of the General Assembly and will terminate upon filing its report to the 1991 Session. See Part XXVI of Chapter 873 of the 1987 Session Laws (1987 Session) and Part VII of Chapter 1100 of the 1987 Session Laws (1988 Session). Relevant portions of Chapters 873 and 1100 of the 1987 Session Laws are included in Appendix A.

The Commission was cochaired by Senator Mary P. Seymour and Representative Edith L. Lutz. The full membership of the Commission is listed in Appendix B of this report.

COMMISSION PROCEEDINGS

The Adoptions and Surrogate Parenthood Study Commission met the equivalent of eight times, meeting either as a whole body or in the form of two subcommittees. The Commission as a whole met on December 8, 1987; January 5, 1988; April 5, 1988; September 13, 1988; November 15, 1988; and December 29, 1988. In addition, the two subcommittees of the Commission both met several times. Following is a brief synopsis of each of the meetings of the Commission and its subcommittees. Detailed minutes of these meetings are available in the Legislative Library.

December 8, 1987, Meeting

The first meeting of the Commission was primarily organizational in nature. The Cochairmen, Senator Mary P. Seymour and Representative Edith L. Lutz, welcomed the members of the Commission and called upon each member to introduce himself and explain his interest in serving on the Commission. The Commission Counsel, Leslie H. Davis, then gave a brief presentation on the bills that were ratified in the 1987 Session of the General Assembly or were eligible for consideration in the 1988 Session of the General Assembly that related to either adoptions or surrogate parenthood. Ms. Davis also noted that a prior study had been conducted by a Committee of the Legislative Research Commission in 1979 and 1980 on the rights of adopted children.

The Commission then heard from Ms. Joan Holland, who is Chief of the Family Services Section of the Department of Human Resources. Ms. Holland

provided each Commission member with a packet of information concerning adoptions in North Carolina, which she then explained, and pointed out some issues of concern relating to adoptions that the Commission could consider studying. She also expressed the willingness of the Department of Human Resources to assist the Commission in its work.

The Commission members were also provided with general information relating to surrogate parenthood by the Commission Counsel. Discussion followed concerning issues of interest to the Commission members. The members expressed particular interest in studying the opening of adoption records to reveal identifying information with the mutual consent of the parties to the adoption, independent adoptions, clarifying the adoption laws contained in Chapter 48 of the General Statutes, and whether more incentives are needed with respect to hard-to-place children. It was decided that the Commission should be later divided into two subcommittees, with one subcommittee to focus on adoption issues and the other to focus on surrogate parenthood, and that both subcommittees should report back to the full Commission with recommendations as to how the Commission should thereafter proceed. Membership of the subcommittees was to be announced at the Commission's next meeting.

Lastly, the Cochairmen expressed the Commission's willingness to hear from any member of the public who wished to address it and stated that persons interested in addressing the Commission should send a written request to do so to the Commission Counsel.

January 5, 1988, Meeting

At its second meeting, the Commission focused on two issues relating to adoptions: (1) the need to revise or rewrite Chapter 48 of the General Statutes, which governs adoptions; and (2) permitting greater disclosure of nonidentifying information concerning adoptees as proposed by Senate Bill 838 introduced in the 1987 Session of the General Assembly.

Ms. Robin Peacock, who is Program Manager for Adoption Services for the Department of Human Resources, and Ms. Jane Thompson, who is a member of the Commission and an attorney with the Attorney General's Office, spoke regarding the need to revise or rewrite Chapter 48 of our General Statutes. Ms. Peacock pointed out numerous specific statutory provisions in Chapter 48 that are currently confusing, conflicting, or ambiguous. (See Appendix F.) Ms. Thompson also pointed out several aspects of Chapter 48 that need to be revised or expanded. In addition, Ms. Thompson explained that there is a procedure currently available under G.S. 48-26 for opening adoption records in limited circumstances. G.S. 48-26 authorizes superior court judges to open confidential adoption records for necessary information upon request if the judge finds it to be in "the best interest of the child or of the public to have such information disclosed". She noted that this procedure has been rarely used.

The Commission next examined Senate Bill 838, which was introduced in the 1987 Session of the General Assembly by Senator Mary Seymour and eligible for consideration in the 1988 Session. Commission Counsel first explained the bill and how it would change present law. She explained that this bill would amend G.S. 48-25 to make more nonidentifying information about an adopted child or a prospective adopted child disclosable and make

that information available to more persons and agencies than is presently permitted. Ms. Joan Holland then explained why the bill was needed. She explained that the current law has been interpreted by the Attorney General as prohibiting the disclosure of nonidentifying information about a prospective adoptee to prospective adoptive parents and that this was hindering efforts to place children in need of adoption. She also noted that some departments and agencies were disclosing this information despite the Attorney General's opinion. Thus, she said the current law makes for more uncertainty and inconsistency in current adoption practices. Senator Seymour also commented on her reasons for introducing this bill and how she hoped it would help licensed child-placing agencies in their efforts to place children in need of adoption.

The Commission then heard from members of the public who had requested to address it. Ms. Mary Taylor, speaking for The Children's Home Society of North Carolina, asked that the Commission particularly focus in its study on the topics of opening adoption records and independent adoptions. She said that the Children's Home Society favors the establishment of a mutual consent adoption registry in this State so as to permit identifying information about adoptees and their biological parents to be disclosed with their mutual consent.

Ms. Mildred Patterson, who is the biological mother of an adoptee, told the Commission of the trauma she had experienced as a result of having been located by her biological daughter. She generally spoke against efforts to facilitate contact between adoptees and their biological parents.

Ms. Janice Shaver, who is an adoptee and a member of Adoption Information Exchange, explained how and why she had located her biological parents and spoke generally in favor of opening adoption records.

Dr. Joe Wright, who is an adoptive parent, expressed his concerns regarding the need for a means of disclosing adoption information in such a way that the rights of all the parties to the adoption are protected.

Ms. Elizabeth Thurbee, who is the Director of Catholic Social Services in Charlotte and chairman of the N.C. Association of Licensed Child-Placing Agencies, expressed the concerns of these agencies regarding various adoption issues and surrogate parenthood, and spoke in favor of a mutual consent adoption registry.

Father Rod O'Conner, speaking on behalf of the Catholic Social Ministries, Inc. of Raleigh, expressed concerns relating to independent adoptions.

In addition, the Commission Counsel provided the members with a packet of information requested at the previous meeting, which included a copy of the statutes in Chapter 48 and the Model Act to Establish a Mutual Consent Adoption Registry as well as other model adoption acts.

Lastly, the membership of the two subcommittees of the Commission were announced. The Commission Cochairmen asked that the subcommittees meet briefly after the Commission meeting, that they meet again in February and March, and that they report back to the full Commission in April with their recommendations.

Immediately following the meeting, the two subcommittees met briefly to set their next meeting dates, discuss their future agendas, and prioritize the issues to be addressed.

February 2, 1988, Meetings

The Commission's two subcommittees met on February 2, 1988. On that date, the Adoptions Subcommittee, cochaired by Senator Anthony Rand and Representative Sharon Thompson, continued the examination of Senate Bill 838 and the issue of opening adoption records begun by the full Commission. Regarding Senate Bill 838, the Commission members at their January meeting had expressed their agreement with the purpose of the bill but some disagreement and concerns relating to the specific language of the bill. At the February 2, 1988, meeting of the Adoptions Subcommittee, Ms. Sue Glasby and Ms. Robin Peacock, speaking on behalf of the Department of Human Resources, suggested some alternative language for the bill. After considerable discussion, the Subcommittee members asked the Commission Counsel to work with the Department of Human Resources staff to draft a proposed substitute for Senate Bill 838 for them to consider at their next meeting.

On the issue of opening adoption records, the Adoptions Subcommittee heard from Ms. Susan Frost, who was Counsel for the 1979-80 Legislative Research Commission's ("LRC") Committee on the Rights of Adopted Children, and from members of the public who had requested to address the Commission on this issue. Ms. Frost explained that the 1979-80 LRC Committee on the Rights of Adopted Children had also studied the issue of opening adoption records and recommended legislation that would have permitted the disclosure of identifying information concerning adoptees and their biological relatives with the mutual consent of such persons. She explained in detail the legislation recommended by the prior study committee.

The Subcommittee then heard from four members of the public--Ms. John Cauble, an adult adoptee; Mr. Scott Matthews, an adult adoptee; Mrs. Mary Beth Mims, who is an adult adoptee, a biological mother who gave up her child for adoption, and an adoptive parent; and "Vivian",who is the biological mother of an adoptee--all of whom spoke in favor of opening adoption records.

The Surrogate Parenthood Subcommittee, cochaired by Senator Ralph Hunt and Representative Samuel Hunt, heard from two legal experts, Ms. Katharine Bartlett and Ms. Arlene Diosegy, as well as a medical expert, Dr. James Holman, on the topic of surrogate parenthood. In addition, the Commission Counsel distributed to the Subcommittee members written materials on legislation introduced in other states relating to surrogate parenthood.

Dr. Holman, who is an infertility specialist and a member of the American Fertility Society, shared with the Subcommittee a position paper on surrogate mothers issued by the Ethics Committee of the American Fertility Society. A copy of this paper is attached to this report as Appendix G. The term "surrogate mother" as used by that Committee means a woman who conceives and gestates a child to be reared by the biologic father and his wife. The Ethics Committee stated in its position paper that it "does not recommend widespread clinical application of surrogate motherhood at this time" but that "if surrogate motherhood is pursued, it should be pursued as a clinical experiment". The Committee also stated that it "believes that there are not adequate reasons to recommend legal prohibition of surrogate motherhood" and that further research needs to be done on this means of reproduction.

Ms. Bartlett, who is a professor at the Duke University School of Law, and Ms. Diosegy, who is an attorney in private practice who specializes in health

law, commented on legal considerations relating to surrogate parenthood agreements, including provisions in the present law that may have some relevance to such agreements and the constitutionality of legislation regulating or prohibiting such agreements. A copy of Ms. Bartlett's remarks is attached as Appendix H of this report. A copy of Ms. Diosegy's remarks is attached as Appendix I. Both of these legal experts said that they do not favor criminalization of surrogacy activity. Ms. Bartlett said that in her opinion it may be unconstitutional to prohibit surrogacy entirely but that it would not be unconstitutional to prohibit the exchange of money under surrogacy arrangements. Ms. Diosegy said that she favored the establishment of a regulatory scheme to enforce surrogate parenthood contracts, with the final determination of the custody of the child to be monitored by and subject to the approval of the courts.

Ms. Margaret Odom, who is with Planned Parenthood of Raleigh, also shared some general information concerning surrogate parenthood with the subcommittee members.

February 29, 1988, Meeting of the Surrogate Parenthood Subcommittee

The Surrogate Parenthood Subcommittee began its meeting by hearing again from Ms. Arlene Diosegy who explained the New Jersey Supreme Court's recent decision in the controversial Baby M case, which dealt with the enforceability of a surrogate contract, and answered other questions the subcommittee members had regarding the enforceability of surrogate contracts. In the Baby M case, the surrogate mother refused to give up the child born of the arrangement to the intended parents as agreed upon in the contract and sought instead to retain custody of the child. Ms. Diosegy explained that the

N.J. Supreme Court had refused to enforce the surrogate contract in the case on the grounds the contract conflicted with the law and public policy of New Jersey. She said the court also stated that the payment of money to a surrogate mother was illegal in New Jersey under the present law but that there is no offense to present laws when a woman voluntarily and without payment agrees to act as a surrogate mother, provided she is not subject to a binding agreement to surrender the child, and that the state legislature could alter the statutory scheme, within constitutional limits, so as to permit surrogate contracts if it wished. She also noted that the Baby M decision has no direct impact or precedential value on the law of North Carolina.

The Subcommittee next heard from Dr. W.D. White, who is a professor at St. Andrews Presbyterian College who has done work in this area, regarding his views on surrogate parenthood. Dr. White recommended that the legislature make the exchange of money under a surrogacy arrangement illegal but not the surrogacy arrangement itself.

Dr. John Bowen and his wife, Dr. Nancy Morgan, who were parties to a surrogate contract entered into in this State, then addressed the Subcommittee. They explained that Dr. Morgan was unable to bear children because she had uterine cancer; that they entered into a surrogate contract with one of their relatives who had, without solicitation, volunteered to bear a child for them; that the child who was the subject of the arrangement had been recently borne; and that so far everyone involved had been extremely pleased with how the arrangement had worked out. Based on their experience, they recommended that the State permit surrogacy agreements and permit surrogate mothers to be reimbursed for expenses arising from the pregnancy as a part of those

agreements. They also stated that State regulation of surrogacy agreements is needed.

Commission Counsel then outlined the options available for legislative response to surrogacy and the issues that need to be addressed with respect to each of these options. In addition, copies of a report on surrogate parenting prepared by the staff of the New York legislature were distributed.

After a period of discussion, the Subcommittee decided to recommend that the full Commission further study the subject of surrogate parenthood but that it focus on a regulatory approach, rather than a prohibitory or wait-and-see approach, to this subject. They also decided to recommend that the Commission in studying this subject address the many issues identified by the Commission Counsel as needing to be addressed in considering a regulatory approach to surrogate parenthood, as well as any other issues concerning that approach that may arise. The Subcommittee further voted to recommend that the Commission request additional funds in the 1988 Session of the General Assembly so that the Commission could continue its work.

March 1, 1988, Meeting of the Adoptions Subcommittee

At this meeting, the Adoptions Subcommittee continued its examination of Senate Bill 838 and the issue of opening adoption records. Commission Counsel presented and explained a proposed substitute for Senate Bill 838 that she had drafted after consulting with the Department of Human Resources staff. The Subcommittee decided that the proposed substitute still did not resolve all of their concerns relating to the bill and voted to recommend to the full Commission that it take no further action on Senate Bill 838 at this time.

Senator Mary Seymour, who cochaired the 1979-80 LRC Committee on the Rights of Adopted Children, spoke to the Subcommittee about the legislation recommended by that Committee and how it was received by the General Assembly.

Commission Counsel then gave a presentation on how other states have handled the issue of access to adoption records. She explained that there are four basic statutory approaches taken to this issue and that these may be called the confidential record approach, the open records approach, the search and consent approach, and the mutual consent voluntary registry approach. Sixteen states follow the confidential record approach under which access to adoption records is permitted only by court order on a very limited basis. On the other extreme is the open records approach, followed by three states, under which adult adoptees are granted unlimited access to the identifying information contained in their adoption records. Eight states follow the search and consent approach. These states have enacted statutes that provide for a search by a state or private adoption agency for a party to the adoption when another party to the adoption requests such a search. The purpose of the search is to locate the party to obtain that person's consent to the disclosure of identifying information about himself. The remaining twenty-three states have created mutual consent voluntary adoption registries through which identifying adoption information may be disclosed with the mutual consent of the biological parent and the adult adoptee.

After considerable discussion, the Subcommittee decided to recommend the following to the full Commission: (1) that the Commission request additional funds in the 1988 Session of the General Assembly so that the Commission could continue its work; (2) that a complete rewrite of our adoption laws

contained in Chapter 48 of the General Statutes be undertaken by an appropriate body; (3) that the Commission further study whether a mutual consent voluntary adoption registry of some sort, or a health registry, should be established in North Carolina; (4) that the Commission at some point study independent adoptions and that the Commission make sure that any recommendations made by it regarding surrogate parenthood are consistent with its recommendations, if any, on independent adoptions; and (5) that no further action be taken at this time by the Commission regarding Senate Bill 838.

April 5, 1988, Meetings

Prior to the meeting of the full Commission, the Surrogate Parenthood Subcommittee met briefly to formally approve its recommendations as put into writing by the Commission Counsel.

At the outset of the full Commission's meeting, the cochairmen of the two subcommittees presented the recommendations of the subcommittees. Attached to this report as Appendix J is a copy of the recommendations of the subcommittees as presented to the Commission. The Commission then focused its attention on an appropriate body to undertake a rewrite of Chapter 48, mutual consent adoption registries, and surrogate parenthood.

The Commission heard from Ms. Janet Mason, who is with the Institute of Government ("Institute"), regarding how the Institute might be of assistance in rewriting Chapter 48 and regarding the process followed in the recent rewrite of our Guardianship laws. Mr. Charlie Murray, who is with the General Statutes Commission, next addressed the Commission. He indicated that a rewrite of Chapter 48 would be an appropriate project for the General Statutes

Commission to undertake and explained the process followed by that Commission when it takes on a project such as the rewrite of a Chapter of our General Statutes. He also said that if the General Statutes Commission took on the task of rewriting Chapter 48 that he thought the rewrite could probably be completed by the 1991 Session of the General Assembly.

The Commission then heard from three speakers regarding mutual consent adoption registries. Ms. Ruth McCracken, Executive Director for The Children's Home Society, spoke in favor of a move towards more openness in adoption and the establishment of a passive mutual consent adoption registry in this State. She said The Children's Home Society suggests that legislative changes in this regard include the following features:

"(1) An adoptee, upon reaching the age of 21, be permitted to file a consent with the placing agency indicating his or her desire to make contact with a birth parent.

(2) A birth parent be permitted to file a consent with the placing agency indicating desire to make contact with the adoptee who is 21 years of age or older.

(3) After filing the consent, the adoptee or the birth parent could revoke the consent at any time.

(4) No further steps could be taken by the adoptee or the birth parent unless both adults filed consents based on their own initiative.

(5) In a situation where both adults filed without the knowledge of the other, the placing agency would then be in touch with the adoptee and the birth parent to offer counseling and to bring them together if such a meeting seemed appropriate.

(6) No identifying information would be released nor would a reunion between the adoptee and the birth parent be arranged by the placing agency, unless all parties had filed consents.

(7) If the placing agency is no longer in existence, contacts would be made through the North Carolina Department of Social Services."

Senator James Speed next addressed the Commission regarding a bill he had introduced in the 1987 Session of the General Assembly, Senate Bill 846, that would have provided for the disclosure of adoption records upon the request of an adoptee who is age 21 or older. He explained his reasons for introducing the bill and how it was received by the General Assembly.

Father Rod O'Conner, speaking on behalf of the Private Child-Placing Agencies of North Carolina, spoke in favor of the establishment of a mutual consent adoption registry in this State. He made the following recommendations regarding the establishment of such a registry: (1) that the agency that placed the child for adoption be responsible for sharing information under regulated conditions; (2) that counseling be provided as a necessary component of the information sharing; (3) that the agency respond to the request from the adoptee or birth parent by taking reasonable means to contact the other party, to advise that party of the inquiry, to offer counseling to that party, and to establish whether that party consents to or refuses the sharing of personal information; (4) that agencies not accept consents from nor undertake contacts or searches on behalf of adoptees who are not yet age 21, and that no similar inquiry from a birth parent be acted upon by the agency if the adoptee is not at least age 21; (5) that written consent for the sharing of information be given to the agency by the birth parent and by the adoptee before identifying information is shared, and that either party may revoke that

consent; (6) that biological fathers who acknowledged paternity be considered as having the same rights to confidentiality and to access as birth mothers; and (7) that private adoption agencies apply their usual counseling fee scales to compensate them for the costs of providing the services related to these requests.

To provide the full Commission with an overview of the issues related to surrogate parenthood, three speakers addressed the Commission. Dr. James Holman presented the position paper on surrogate mothers issued by the Ethics Committee of the American Fertility Society that he had previously presented to the Surrogate Parenthood Subcommittee. Ms. Arlene Diosegy presented an overview of the legal issues related to surrogate parenthood. (See Appendix K.) In her presentation, she addressed the Baby M case, relevant North Carolina statutes, proposed approaches to surrogate parenthood, and constitutional concerns related to surrogate parenthood. Lastly, Commission Counsel told the Commission about a model act on surrogate parenthood, the "Model Surrogacy Act", that had been recently approved by the Family Law Section of the American Bar Association.

Discussion followed concerning the recommendations of the subcommittees and whether the Commission should report to the 1988 Session of the General Assembly. It was decided that the Commission would informally request that in the 1988 Session of the General Assembly additional funds for the Commission be appropriated and that the Commission be continued in existence at least until the 1991 Session of the General Assembly.

September 13, 1988, Meeting

The Commission began its meeting by hearing from Ms. Sue Glasby who presented the Department of Human Resources' suggestions regarding the establishment of a mutual consent voluntary adoption registry. She explained that the Department of Human Resources favors the establishment of a registry in this State and recommends that the registry be an active one, with provisions for a search to be made if an inquiry is received and consent for contact is not on file with the registry; that the Department of Human Resources and licensed child-placing agencies both be involved with the registry and the search process; that counseling be available, but not mandatory, for persons using the registry; and that siblings of adoptees be permitted to use the registry. The Department's suggestions regarding the establishment of a registry as presented to the Commission are set forth in greater detail in Appendix L of this report.

The Commission Counsel then briefly reviewed the recommendations of the Commission's two subcommittees. She also informed the Commission that legislation was enacted in the 1988 Session of the General Assembly that extended the life of the Commission until the 1991 Session of the General Assembly and made additional funds available to the Commission to fund its work. (See Appendix A.) She then presented to the Commission proposed legislation she had drafted at the direction of the Cochairmen that required the Department of Human Resources and each licensed child-placing agency in the State to establish a mutual consent voluntary adoption registry that could be used by adoptees age 21 and older and their biological parents. She explained that the bill was to serve as a starting point for discussion on proposed legislation establishing such a registry and that the language of the proposed legislation was drawn from the Model Act to Establish a Mutual Consent Voluntary Adoption Registry, which was prepared by the National Committee

for Adoption; the legislation recommended by the 1979-80 LRC Committee on the Rights of Adopted Children; and the recommendations made by The Children's Home Society at the Commission's last meeting.

After extensive discussion, the Commission asked its Counsel to prepare alternate drafts of a bill establishing a registry for them to consider at their next meeting. One draft was to establish a registry that is passive in nature that biological siblings of adoptees, as well as adoptees and biological parents, could use. In that draft, counseling for persons using the registry was to be optional. The second draft was to establish a registry that is active and therefore takes more of a search and consent approach. Siblings of adoptees would not be permitted to use that registry and counseling would be mandatory for persons using the registry. The Commisson also asked its Counsel to draft a separate bill that would permit more nonidentifying information about biological parents to be disclosed to adoptees and adoptive parents than is permitted under the present law.

The Commission then discussed the need for a rewrite of Chapter 48 and decided that it would be best for the General Statutes Commission to do the rewrite. They asked the Commission Counsel to look into whether they had the authority to direct the General Statutes Commission to undertake the rewrite and into some other related matters.

Next, the Commission Counsel presented an update on legislation enacted in other states dealing with surrogate parenthood. See Appendix M for a summary of this legislation that was subsequently distributed to the Commission members. After some discussion, the Commission decided that it would like to focus on legislation dealing with surrogate brokers at its next

meeting. The Commission members also expressed interest in focusing on independent adoptions at a later meeting.

November 15, 1988, Meeting

The Commission began its meeting by reviewing the alternate bill drafts establishing a mutual consent voluntary adoption registry prepared by the Commission Counsel. The Commission voted to adopt the active registry draft prepared by its Counsel with a number of modifications, which modifications were to include amending the bill to add an active health registry feature and to permit siblings and half-siblings of adoptees to use the registry.

Next, the Commission Counsel reported that she had found that the Commission did not have the authority to direct the General Statutes Commission to undertake a rewrite of Chapter 48, that only the General Assembly had this authority, but that she had been told that there was a good chance the General Statutes Commission would agree voluntarily to take on this project if it were asked to do so. The Commission decided that in its report to the 1989 Session of the General Assembly it would recommend that the General Statutes Commission undertake a rewrite of Chapter 48 to be completed by the 1991 Session of the General Assembly, request that the General Statutes Commission let it and the General Assembly know by April 1, 1989, whether it was going to voluntarily take on this project, and recommend that the General Assembly direct the General Statutes Commission to take on this project if the Commission did not voluntarily agree to do so.

The Commission Counsel then presented and explained the proposed legislation she had prepared at the Commission's request that would permit

more nonidentifying information about biological parents to be disclosed to adoptees and adoptive parents than is permitted under the present law. The Commission voted to amend the draft so as to also permit nonidentifying information about adoptees to be disclosed to biological parents who request such information and to recommend the draft, as amended, in its report to the 1989 General Assembly.

Lastly, the Commission Counsel gave a presentation on legislation in other states dealing with surrogate brokers. She explained that the term "surrogate broker" is used to refer to someone who receives compensation for arranging or assisting in, or facilitating, the formation of a surrogate parenthood contract. She further explained that so far no state has enacted legislation dealing solely with surrogate brokers but that two states-Michigan and Kentucky-have enacted more comprehensive legislation that deals both with surrogate mothers and surrogate brokers. She also cautioned the Commission that if it recommended legislation dealing solely with surrogate brokers, the legislation would no doubt be closely scrutinized regarding the implications it has regarding the enforceability of surrogate contracts generally.

After some discussion, the Commission voted to recommend in its report that the General Assembly not enact any legislation concerning surrogate parenthood until the Adoptions and Surrogate Parenthood Study Commission has completed its study and submitted its final report to the 1991 General Assembly.

December 29, 1988, Meeting

The Commission began its meeting by hearing from two speakers-Mr. Elijah Peterson from the Governor's Advocacy Council on Children and Youth

and Ms. Sue Glasby from the Department of Human Resources-on the need to increase the State's adoption assistance payment rates in order to enhance the placement of special needs foster children in adoptive homes. The Commission then reviewed and discussed the proposed report of the Commission to the 1989 Session of the General Assembly prepared by its Counsel, including the proposed legislation that its Counsel had amended pursuant to the Commission's directions, and approved this report.

RECOMMENDATIONS

RECOMMENDATIONS

The Adoptions and Surrogate Parenthood Study Commission makes the following recommendations to the 1989 Session of the General Assembly:

(1) That the General Assembly enact Legislative Proposal I, set forth in Appendix D, "A BILL TO BE ENTITLED AN ACT TO GIVE ADOPTEES AND THEIR BIOLOGICAL RELATIVES GREATER ACCESS TO RELEVANT MEDICAL INFORMATION AND TO ESTABLISH A MUTUAL CONSENT VOLUNTARY ADOPTION REGISTRY."

(2) That the General Assembly enact Legislative Proposal II, set forth in Appendix E, "A BILL TO BE ENTITLED AN ACT TO PERMIT MORE NONIDENTIFYING INFORMATION CONCERNING ADOPTEES AND THEIR BIOLOGICAL PARENTS TO BE DISCLOSED."

(3) That the General Statutes Commission undertake a rewrite of Chapter 48 of the General Statutes to correct the inconsistencies and ambiguities in that Chapter as well as to make it easier to understand, that the Commission take into consideration the areas of concern listed in Appendix F in rewriting that Chapter, that the Commission complete the proposed rewrite by the 1991 Session of the General Assembly, and that the Commission inform the Adoptions and Surrogate Parenthood Study Commission and the General Assembly no later than April 1, 1989, whether it will voluntarily undertake this rewrite. The Adoptions and Surrogate Parenthood Study Commission further recommends that the General Assembly direct the General Statutes

Commission to undertake a rewrite of Chapter 48 to be completed by the 1991 Session of the General Assembly if that Commission has not by April 1, 1989, voluntarily agreed to take on this project.

(4) That the General Assembly not enact any legislation concerning surrogate parenthood until the Adoptions and Surrogate Parenthood Study Commission has completed its study and submitted its final report to the 1991 Session of the General Assembly.

(5) That the State equalize the adoption assistance monthly cash payments available for the adoptive parents of an adoptee who is from North Carolina and who is physically or mentally handicapped, older, or otherwise hard to place for adoption with the foster care assistance payments available in this State for such children so that the amount of the adoption assistance payments will no longer serve as a financial disincentive to the adoption of these children.

APPENDICES

APPENDIX A

GENERAL ASSEMBLY OF NORTH CAROLINA
1987 SESSION
RATIFIED BILL

CHAPTER 873
HOUSE BILL 1

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE AND CONTINUE VARIOUS COMMITTEES AND COMMISSIONS, TO MAKE APPROPRIATIONS THEREFOR, AND TO AMEND STATUTORY LAW.

The General Assembly of North Carolina enacts:

PART I. TITLE

Section 1. This act shall be known as "The Study Commissions and Committees Act of 1987."

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PART XXVI.-----ADOPTIONS/SURROGATE PARENTHOOD STUDY COMMISSION

Sec. 26.1. There is created the Adoptions and Surrogate Parenthood Study Commission. The Commission shall consist of 25 members. The President of the Senate shall appoint 10 members as follows: four shall be members of the Senate; one shall be a county social services director; one shall be the director of a private licensed child placing agency; one shall be an attorney experienced in adoptions matters; one shall be a physician practicing medicine in North Carolina; one shall be an adoptions worker in a private licensed child placing agency; and one shall be a clerk of superior court. The Speaker of the House of Representatives shall appoint 10 members as follows: four shall be members of the House of Representatives; one shall be a county social services director; one shall be the director of a private licensed child placing agency; one shall be a member of the clergy; one shall be an attorney who represents an adoption agency; one shall be an adoptions worker in a county department of social services; and one shall be a clerk of superior court. The Governor shall appoint five members as follows: one shall be the Director of the North Carolina Division of Social Services or the Director's designee; one shall be an attorney on the staff of the Attorney General's office knowledgeable in adoptions law; one shall be an adoptive parent; one shall be the birth parent of a child placed for adoption; and one shall be an adopted person.

Sec. 26.2. All initial appointments shall be made on or before September 15, 1987. Vacancies shall be filled in the same manner as initial appointments.

Sec. 26.3. The President of the Senate and the Speaker of the House of Representatives shall each designate a cochairman of the Commission. The cochairmen shall alternate as presiding officers at the meetings.

Sec. 26.4. The Commission shall study State adoptions practices, the adoptions statutes and related laws in North Carolina, and adoptions practices and laws of other states, some of which may be a model for North Carolina. The Commission shall also study the issues relevant to surrogate parenthood to determine

whether legal guidelines are needed to ensure that the needs and rights of parties who enter into surrogate parenthood arrangements are protected.

Sec. 26.5. The Commission's first meeting shall be called by the cochairmen and held on or before October 1, 1987. The Commission shall submit a final report of its findings and recommendations to the General Assembly on or before the first day of the 1989 Session of the General Assembly by filing the report with the President of the Senate, the Speaker of the House of Representatives, and the Governor. Upon filing its final report, the Commission shall terminate.

Sec. 26.6. Upon the approval of the Legislative Services Commission, the Legislative Administrative Officer shall assign professional staff to assist in the work of the Commission. Clerical staff shall be furnished to the Commission through the offices of House and Senate Supervisors of Clerks. The expenses of employment of the clerical staff shall be borne by the Commission.

Sec. 26.7. The Commission may also employ additional professional, technical, and clerical assistance for itself, hire consultants which it may need, and contract for materials and services needed to perform its duties, in accordance with procedures adopted by the Division of Purchase and Contract. With consent of the Secretary of Human Resources, staff personnel from the Department of Human Resources and any of its divisions may be assigned permanently or temporarily to assist the Commission or its consultants. By request of the Commission or its consultants, all State departments and agencies shall furnish the Commission or its consultants with any information in their possession or available to them. The Commission may meet in the Legislative Building or the Legislative Office Building.

Sec. 26.8. The Commission members shall receive no salary for their services but shall receive subsistence and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5, and 138-6 as applicable.

Sec. 26.9. There is appropriated from the General Fund to the Legislative Services Commission for the 1987-88 fiscal year the sum of twenty-five thousand dollars ($25,000) to fund the Commission. Unexpended funds at the end of the 1987-88 fiscal year shall not revert but shall remain in the budget to fund the Commission until it terminates. Upon termination of the Commission, any unexpended funds shall revert to the General Fund.

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PART XXXI.-----EFFECTIVE DATE

Sec. 31. This act is effective on July 1, 1987.

In the General Assembly read three times and ratified this the 14th day of August, 1987.

ROBERT B. JORDAN III

Robert B. Jordan III
President of the Senate

LISTON B. RAMSEY

Liston B. Ramsey
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
1987 SESSION
RATIFIED BILL

CHAPTER 1100
SENATE BILL 257

AN ACT TO CREATE AND CONTINUE VARIOUS COMMITTEES AND COMMISSIONS AND TO MAKE CHANGES IN THE BUDGET OPERATIONS OF THE STATE.

The General Assembly of North Carolina enacts:

SUBCHAPTER A
STUDY COMMISSIONS AND COMMITTEES

. . . .

PART VII-----ADOPTIONS AND SURROGATE PARENTHOOD STUDY COMMISSION (S.B. 1583 - Rand)

Sec. 7.1. Section 26.5 of Chapter 873 of the 1987 Session Laws reads as rewritten:

"Sec. 26.5. The Commission's first meeting shall be called by the cochairmen and held on or before October 1, 1987. The Commission shall submit ~~a final report~~ reports of its findings and recommendations to the General Assembly on or before the first day of the 1989 and 1991 ~~Session~~ Sessions of the General Assembly by filing the ~~report~~ reports with the President of the Senate, the Speaker of the House of Representatives, and the Governor. Upon filing its ~~final~~ report to the 1991 Session, the Commission shall terminate."

Sec. 7.2. From the funds available to the General Assembly, the Legislative Services Commission shall allocate monies to fund the work of the Adoptions and Surrogate Parenthood Study Commission. Unexpended funds at the end of the 1987-88 fiscal year shall not revert but shall remain in the budget to fund the Commission until it terminates.

APPENDIX B

ADOPTIONS/SURROGATE PARENTHOOD

Authority: Chapter 873, Part XXVI, (SB 871-Rand)
Report by: Adoptions/Surrogate Parenthood Study Commission
Report to: President of Senate, Speaker of the House of Representatives, and the Governor

Date: 1989 and 1991 Sessions of the General Assembly

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Ms. Robin Peacock
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Assistant Attorney General
N. C. Department of Justice

Ms. Mary Taylor
Children's Home Society

Ms. Mildred K. Patterson
(biological mother of adopted child)

Ms. Janice Shaver
(Adoption Information Exchange/
Adult Adoptee)

Dr. Joe Wright
(Adoptive Parent)

Father Rod O'Conner
Catholic Social Ministries

Ms. Elizabeth Thurbee
Association of Licensed
Child-Placing Agencies of N.C.

Ms. Sue Glasby, Head
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Department of Human Resources

Ms. Susan Frost
1981 Study Commission Counsel

Scott Matthews
(adult adoptee)

Mrs. John Cauble
(adult adoptee)

Ms. Mary Beth Mims
(adult adoptee; biological mother of adopted child; natural parent; adoptive parent)

"Vivian"
(biological mother of adopted child)

Dr. James F. Holman
Infertility Specialist

Ms. Katherine T. Bartlett
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Duke University School of Law

Ms. Arlene Diosegy
Attorney in Private Practice

Dr. W. D. White
Professor at St. Andrews Presbyterian College

Dr. Nancy Morgan and Dr. John Bowen
(participants in surrogate arrangement)

Ms. Janet Mason
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Mr. Charlie Murray
General Statutes Commission

Senator James D. Speed

Ms. Ruth McCracken
Children's Home Society of N. C.

Ms. Margaret Odom
Planned Parenthood

Mr. Elijah Peterson
Governor's Advocacy Council on Children & Youth

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

D

88d-LHD-035V2-1RU
THIS IS A DRAFT 12/1/88 3:30 p.m.

Short Title: Voluntary Adoption Registry. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO GIVE ADOPTEES AND THEIR BIOLOGICAL RELATIVES GREATER ACCESS TO RELEVANT MEDICAL INFORMATION AND TO ESTABLISH A MUTUAL CONSENT VOLUNTARY ADOPTION REGISTRY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 48-25(e) is repealed.

Sec. 2. Chapter 48 of the General Statutes is amended by adding the following new sections to read:

"§48-25.1. Disclosure of medical information.--(a) Notwithstanding any other provision of law, a complete health history of the adoptee's biological relatives, to the extent it is available, shall be given by the county department of social services or licensed child-placing agency that has the information to:

(1) the adoptive parent or parents not later than the date of finalization of the adoption proceedings;

(2) the adoptee at any time upon his written request; and

(3) the adoptive parent or parents or legal guardian of any minor adoptee at any time upon the written request of such person.

Notwithstanding any other provision of law, a complete health history of the adoptee, to the extent it is available, shall be given by the county department of social services or licensed child-placing agency that has the information to a biological relative of the adoptee at any time upon the written request of such person.

The information available under this subsection shall be given on a standardized form provided by the Department of Human Resources and shall include any information that would have a substantial bearing on the mental or physical health of the adoptee or his biological relative.

(b) An adoptee, a biological relative, or an adoptive parent, upon presenting satisfactory proof of his identity, may submit any relevant medical information concerning an adoptee or the biological relative of an adoptee to the department or agency that has the health history described by subsection (a) of this section and that department or agency shall add the information to the health histories maintained by it.

(c) An adoptee who has reached the age of 21 years or the adoptive parent of an adoptee under the age of 21 years who wishes to obtain nonidentifying medical information about a biological relative of the adoptee, or a biological relative who wishes to obtain nonidentifying medical information about an adoptee, that is not otherwise available under subsection (a) of this section may request the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption to conduct a search for the biological

relative or the adoptee to obtain the information. The request must be accompanied by a statement from a licensed physician certifying that there is a need for the information.

Upon receiving such a request, the department or agency shall undertake a diligent search for the person about whom the information has been requested and, upon locating that person, notify him of the request and the need for the information. If the person agrees to provide the information requested, the department or agency shall relay the medical information provided to the requesting person. If the person refuses to provide the information requested or if the department or agency is unable to locate the person, the requesting person shall be informed of that fact. If it is determined that the person about whom the medical information has been requested is deceased, the fact and the cause of the person's death may be disclosed to the requesting person.

Under no circumstances is the identity or location of the person about whom the information has been requested to be disclosed to the requesting person except as provided under G.S. 48-25.2 or G.S. 48-26.

The diligent search required by this subsection shall be completed no later than six months from the date the request for the search was received by the department or agency.

(d) The Department of Human Resources shall cooperate with any county department of social services or licensed child-placing agency undertaking a search pursuant to this section and shall make any records within its control needed to conduct the search available to the department or agency.

(e) A reasonable fee for the cost of conducting a search pursuant to this section may be charged to the person who requested the search. This fee may be waived in whole or in

part, however, for any person who provides satisfactory proof of his financial inability to pay the fee.

"§ 48-25.2. Mutual consent voluntary adoption registry.--(a) The Department of Human Resources shall establish and maintain a mutual consent voluntary adoption registry for the purpose of facilitating voluntary contact between mutually consenting adopted persons and their biological relatives.

(b) The use of the registry shall be limited to adoptees who have reached the age of 21 years and their biological relatives. For purposes of this section, 'biological relative' includes only:

(1) The biological mother of an adoptee; and

(2) The biological father of an adoptee if such person:

a. Is presumed by law to be the biological father of the adoptee;

b. Established his paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources;

c. Legitimated the adoptee pursuant to the provisions of G.S. 49-10 or by marriage to the biological mother of the adoptee; or

d. Provided substantial financial support or consistent care with respect to the adoptee and the biological mother prior to the adoption; and

(3) An adoptee's biological sibling or biological half-sibling who has reached the age of 21 years. A half-sibling related to an adoptee through his biological father shall only be eligible to use the registry if his biological father is eligible to use the registry.

No person shall be permitted to use the registry to obtain identifying information until the person about whom the information is requested has reached the age of 21 years.

(c) A person eligible to use the registry may indicate his consent to the disclosure of identifying information about himself or request the disclosure of identifying information about an adoptee or a biological relative by filing with the Department of Human Resources a consent form that sets forth the following information to the extent known by the person submitting the form:

(1) The current name, address, and telephone number of the person submitting the form;

(2) Any prior names used by that person;

(3) The original and adopted names of the adoptee;

(4) The place and date of birth, and sex, of the adoptee;

(5) The name and address of the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption;

(6) The persons to whom identifying information about the person submitting the consent form may be disclosed; and

(7) If submitted by a biological relative, the relationship of the relative to the adoptee.

The person submitting the consent form shall notify the registry of any change in his name, address, or telephone number that occurs after he files the consent form.

No identifying information about an adoptee may be disclosed to a biological relative unless that relative has been designated to receive identifying information by the adoptee on his consent form.

(d) Any adoptee or biological relative who does not want to ever be contacted regarding a request made for the disclosure of identifying information about himself shall file a denial of consent form with the registry, which shall remain in effect until such time, if ever, the person revokes that form. If a person has on file with the registry an unrevoked denial of consent form, he shall not under any circumstances be contacted by the Department of Human Resources, a county department of social services, or a licensed child-placing agency regarding a request made for the disclosure of identifying information about himself.

(e) Any form filed with the registry:

(1) Shall be notarized;

(2) Is effective as of the time it is filed with the registry; and

(3) May be revoked at any time by the person who submitted it.

(f) No consent, denial of consent, or revocation form may be accepted by the registry until the person submitting it presents satisfactory proof of his identity in accordance with rules promulgated by the Secretary of the Department of Human Resources.

(g) Before any identifying information may be disclosed pursuant to this section, the persons filing corresponding consent forms shall participate in not less than two hours of counseling with a trained social worker who has expertise in post-adoption services employed by a county department of social services or a licensed child-placing agency. County departments of social services and licensed child-placing agencies shall make counseling available to persons using the registry.

(h) The Department of Human Resources shall process each consent form filed with the registry in an attempt to match the

adoptee with a biological relative. It shall be determined that there is a match when an adoptee and a biological relative have both filed consent forms with the registry designating the other as a person to whom identifying information may be disclosed.

If it is determined that there is a match, then the Department of Human Resources shall, within one week of the filing of the second of the corresponding consent forms, send a copy of the corresponding consent forms to the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption for contact to be made with the persons who submitted the consent forms. The department or agency shall then notify the persons submitting the consent forms of the match and remind them of the requirement for counseling. After the persons submitting the corresponding consent forms have completed the counseling required by this section, the department or agency shall disclose to them the identifying information contained in the consent forms. No identifying information may be disclosed pursuant to this section, however, until it is determined there is a match and, except as provided in subsection (j) of this section, the persons submitting the corresponding consent forms have completed the required counseling.

If it is determined that there is not a match and if the person about whom identifying information has been requested does not have a denial of consent form on file with the registry, then the Department of Human Resources shall, within one week of the filing of the consent form requesting the disclosure of identifying information, send a copy of the consent form to the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption for contact to be made with the person about whom identifying information has been requested. The department or agency shall then make a diligent effort to contact the person about whom

identifying information has been requested to inform him of the existence of the registry and the request that has been made.

If, upon being so informed, the person wishes to have his identity disclosed to the requesting person, he shall indicate that fact by filing a consent form, as described in subsection (c) of this section, with the registry. Upon the filing of the consent form and completion of the required counseling, the identifying information contained in the corresponding consent forms shall be disclosed to the persons submitting the consent forms.

If the person does not wish to have his identity disclosed, the department or agency shall inform the requesting person of that fact and no identifying information shall be disclosed to the requesting person.

If after a diligent search the department or agency is unable to locate the person about whom identifying information has been requested, the department or agency shall inform the requesting person of that fact and no identifying information shall be disclosed to the requesting person.

The diligent search required by this subsection shall be completed no later than six months from the date the consent form requesting the disclosure of identifying information was filed with the registry.

If the adoptee was placed by a licensed child-placing agency that is no longer in existence at the time the consent form is filed with the registry, then any notification, disclosure, or search required by this subsection shall be made by an employee or agent of the Department of Human Resources.

All communications with adoptees and biological relatives required by this subsection shall be made in a confidential manner by a trained social worker who has expertise in post-adoption services.

(i) The Department of Human Resources shall cooperate with any county department of social services or licensed child-placing agency undertaking a search pursuant to this section and shall make any records within its control needed to conduct the search available to the department or agency.

(j) If it is determined that the person about whom identifying information is requested is deceased, the fact of the person's death shall be disclosed to the requesting person. No identifying information about the deceased person may be disclosed, however, unless the registry has on file an unrevoked consent form filed by the deceased authorizing the disclosure of identifying information to the requesting person in which case the identifying information may be disclosed regardless of whether the deceased participated in the counseling required by this section.

(k) Costs for establishing and maintaining the registry may be obtained through users' fees charged to persons who use the registry. In addition, reasonable fees for counseling and for the cost of conducting a search pursuant to this section may be charged to persons using the registry. Any fees authorized by this subsection may be waived in whole or in part for any person who provides satisfactory proof of his financial inability to pay the fee.

(l) Notwithstanding any other provision of law, the information acquired by the registry may not be disclosed under any public records law or under any sunshine or freedom of information legislation, rules, or practice.

(m) Nothing contained in this section shall limit a person's right to proceed under G.S. 48-26 to obtain confidential adoption information."

Sec. 3. The Department of Human Resources shall develop and furnish any forms necessary to carry out the provisions of

this act. The Secretary of the Department of Human Resources shall adopt rules necessary to carry out the intent of this act.

Sec. 4. G.S. 48-25(b) reads as rewritten:

"(b) With the exception of the information contained in the final order, it shall be a misdemeanor for any person having charge of the file or the record to disclose, except as provided in subsection (d) of this section, G.S. 48-25.1, G.S. 48-25.2, G.S 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding."

Sec. 5. G.S. 48-25(c) reads as rewritten:

"(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its biological, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except as provided by G.S. 48-25.1 or G.S. 48-25.2 or by order of the clerk of superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19."

Sec. 6. This act shall become effective January 1, 1990.

Summary of Legislative Proposal I

The purpose of this bill is twofold: (1) to give adoptees and their biological relatives greater access to medical information concerning each other; and (2) to establish a mutual consent voluntary adoption registry to facilitate voluntary contact between mutually consenting adoptees and their biological relatives. The bill seeks to accomplish its purpose by adding two new sections to the chapter in our General Statutes governing adoptions, Chapter 48.

The first new section, §48-25.1, would replace the existing provision in Chapter 48 that addresses the disclosure of health information about biological relatives of adoptees and expand that provision so as to allow adoptees, adoptive parents of minor adoptees, and biological relatives of adoptees access to the updated medical information they need. Currently, G.S. 48-25(e) requires county departments of social services and licensed child-placing agencies to give, if available, a complete health history of the adoptee's biological relatives to the adoptive parents no later than the date of finalization of the adoption proceedings and to give that information to the adoptee and the adoptive parents of a minor adoptee at any time upon the written request of such person. There is no provision in the law, however, regarding the exchange of updated medical information concerning adoptees and their biological relatives and no means by which the biological relative of an adoptee can get necessary medical information concerning the adoptee.

This bill, by adding §48-25.1 to the law, would provide adoptees and their biological relatives with the means by which they could obtain the medical information they need. §48-25.1 requires county departments of social services

and licensed child-placing agencies to give, to the extent it is available, a complete health history of the adoptee's biological relatives to the adoptive parents by the date of finalization of the adoption proceedings and to give that information to the adoptee and the adoptive parents of a minor adoptee at any time upon the written request of such person, and to give, to the extent it is available, a complete health history of the adoptee to a biological relative of the adoptee upon the written request of such person. Under this new section, adoptees and their biological relatives may update the health histories maintained by the departments of social services and licensed child-placing agencies by filing with the appropriate department or agency relevant medical information and thereby make it available to the persons that need it.

§48-25.1 further provides that an adoptee who has reached the age of 21, an adoptive parent of an adoptee under the age of 21, or a biological relative of an adoptee who wishes to obtain additional nonidentifying medical information about an adoptee or biological relative may request the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption to conduct a diligent search for the person about whom the medical information is needed to see if that person is willing to share the information. Such a request must be accompanied by a statement from a licensed physician certifying that there is a need for the information. If the person about whom the medical information is needed is willing to share the information, the department or agency that conducted the search is to relay the medical information to the requesting person. If the person about whom the information has been requested does not wish to share the information or if he cannot be located, the requesting person is to be informed of that fact. Under no circumstances is the identity or location of the person about whom

the information has been requested to be disclosed to the person who requested the medical information.

This new section also authorizes the department or agency that conducted the search to charge a reasonable fee for the cost of the search. Section 1 of the bill repeals G.S. 48-25(e) to conform to the addition of §48-25.1 to the law.

The second new section created by the bill, §48-25.2, directs the Department of Human Resources to establish and maintain a mutual consent voluntary adoption registry for the purpose of facilitating voluntary contact between mutually consenting adoptees and their biological relatives. At least 23 states have established a registry of this type to provide a means whereby adoptees and their biological relatives can indicate their willingness to reveal their identity to and possibly meet each other. Clearly there is a national trend towards the establishment of such registries. These other states have established mutual consent voluntary adoption registries in recognition of the strong psychological need of many adoptees to learn more about their biological parents and siblings and their heritage and the similar need of many biological parents to find and perhaps contact the child they gave up for adoption. In many states, the registry established is a passive one, that is, persons filing with the registry have done so on their own initiative without having been previously contacted by anyone associated with the registry requesting their consent to the disclosure of information. In contrast, an active registry is one that requires that a search be conducted for the person about whom information has been requested if that person has not on his own initiative previously filed with the registry. Because of the low matching rates associated with passive registries, the Adoptions and Surrogate Parenthood

Study Commission recommends, by Legislative Proposal I, that an active registry be established in this State.

Use of the registry established pursuant to §48-25.2 would be limited to adoptees who have reached the age of 21 and their biological parents, siblings, and half-siblings. Under this new section, a person eligible to use the registry may indicate his consent to the disclosure of identifying information about himself or request the disclosure of identifying information about an adoptee or biological relative by filing with the registry a notarized consent form setting forth certain information, including the persons to whom identifying information may be disclosed. An adoptee or biological relative who does not want to ever be contacted regarding a request made for the disclosure of identifying information about himself may file a denial of consent form with the registry, in which case he shall not under any circumstances be contacted regarding any such requests made. A person who has filed a consent or denial of consent form may revoke that form at any time.

§48-25.2 requires the Department of Human Resources to process each consent form filed with the registry in an attempt to match the adoptee with a biological relative. If it is determined that there is a match, then the identifying information is to be disclosed to the persons who submitted the corresponding consent forms. However, the information may not be disclosed until the persons who filed the corresponding consent forms have participated in at least two hours of counseling. If there is not a match, then the county department of social services or licensed child-placing agency that placed the adoptee or investigated the adoption is to conduct a diligent search for the person about whom identifying information has been requested to see if that person wishes to consent to the disclosure of the information about himself.

Thereafter, identifying information about that person may only be disclosed if the person, upon being located, indicates he wishes to consent to the disclosure, files a consent form with the registry indicating that fact, and completes the required counseling.

The bill provides that costs for establishing and maintaining the registry may be obtained through user's fees and also authorizes reasonable fees for the cost of counseling and for conducting a search to be charged to persons using the registry.

The bill directs the Department of Human Resources to develop and furnish any forms necessary to carry out the provisions of the bill and authorizes the Secretary of the Department of Human Resources to adopt rules necessary to carry out the intent of the bill. In addition, the bill makes necessary conforming changes to G.S. 48-25(b) and (c).

The bill would become effective January 1, 1990.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

D

88d-LHD-036-RU
THIS IS A DRAFT 30-NOV-88 08:36:53

Short Title: Adoption Information Disclosure. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PERMIT MORE NONIDENTIFYING INFORMATION CONCERNING ADOPTEES AND THEIR BIOLOGICAL PARENTS TO BE DISCLOSED.

The General Assembly of North Carolina enacts:

Section 1. G.S. 48-25(d) reads as rewritten:

"(d) Notwithstanding any other provision of law, ~~certain~~ nonidentifying information, if known, shall be given by the county department of social services or licensed child-placing agency which has such information in writing on a form provided by the Department of Human Resources to the adoptive parent or parents not later than the date of finalization of the adoption proceedings. The information described in this subsection, if known, shall, upon written request ~~of the adoptee~~, be made available to the adoptee upon his reaching the age of 21 and to the adoptee's biological parent. This information or any part thereof may be withheld only if it is of such a nature that it

would tend to identify the adoptee or a biological relative of the adoptee. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor ~~adoptee~~ adoptee, a biological parent of the adoptee, or to any adoptee who has reached the age of 21 years upon written request by such person to the agency which has the information. ~~The nonidentifying information, if known, may include only the following:~~

~~(1) Date of the birth of the adoptee and his weight at birth;~~

~~(2) Age of biological parents in years, not dates of birth, at birth of the adoptee;~~

~~(3) Heritage of biological parents which shall consist of nationality, ethnic background, and race;~~

~~(4) Education, which shall be the number of years of school completed by the biological parents at the time of birth of the adoptee;~~

~~(5) General physical appearance of the biological parents at the time of birth of the adoptee in terms of height, weight, color of hair, eyes, skin.~~"

Sec. 2. This act is effective upon ratification.

Summary of Legislative Proposal II

This bill rewrites G.S. 48-25(d) to make the following two changes: (1) to make more nonidentifying information about an adoptee or his biological parents disclosable to the adoptee and his adoptive parents than is permitted under the present law; and (2) to make nonidentifying information about an adoptee disclosable to his biological parents.

G.S. 48-25(d) presently provides that certain nonidentifying information about an adoptee and his biological parents shall be given by the county department of social services or licensed child-placing agency that has the information to the adoptive parents no later than the date the adoption proceedings are finalized and to the adoptee upon his written request once he has reached the age of 21. The information may be withheld only if it is of such a nature that it would tend to identify a biological relative of the adoptee. This subsection further provides, however, that the nonidentifying information may include only the following:

(1) the date of birth of the adoptee and his weight at birth;

(2) the age of the biological parents at the time the adoptee was born;

(3) the nationality, ethnic background, and race of the biological parents;

(4) the number of years of school completed by the biological parents at the time the adoptee was born; and

(5) the height, weight, and color of hair, eyes, and skin of the biological parents when the adoptee was born.

In addition, G.S. 48-25(e) requires that a complete health history of the adoptee's biological parents and other relatives, to the extent it is available, be

provided to the adoptive parents no later than the date of finalization of the adoption proceedings and to the adoptee upon his written request.

Except for the health history referred to in G.S. 48-25(e) and the information specifically listed in G.S. 48-25(d), nonidentifying information about the adoptee or his biological parents may not be disclosed to the adoptee or his adoptive parents under the present law. In addition, there is no provision in the present law permitting nonidentifying information about the adoptee to be disclosed to the adoptee's biological parents. Despite the present law, nonidentifying information about adoptees and their biological parents not falling within the description of G.S. 48-25(d) or (e) is sometimes disclosed. Such information is frequently requested by adoptees, adoptive parents, and biological parents and those departments and agencies that abide by the law are frustrated by their inability to provide the requested information, particularly since it appears that no harm would result from the disclosure of the information because it is nonidentifying in nature.

Legislative Proposal II rewrites G.S. 48-25(d) to permit any nonidentifying information concerning an adoptee or his biological parents to be disclosed and to make that information available to the biological parents of the adoptee, as well as to the adoptee once he has reached the age of 21 and his adoptive parents. However, under this proposal, the law would continue to prohibit the disclosure of any information that would tend to identify the adoptee or a biological relative of the adoptee. The bill would become effective upon ratification.

APPENDIX F

AREAS OF CONCERN IN CHAPTER 48 OF THE GENERAL STATUTES

Statute	Concern
G.S. 48-3(b)	(1) This statute, enacted in 1987, was introduced with the good intent of protecting children from being placed in unsuitable independent adoptive placements. Through Committee revisions, the word "independent" was inadvertently omitted and, as it now reads, this statute fails to specify that it applies only to proposed independent, and not also to agency, placements. (2) G.S. 48-3(b) does not specify any remedy in cases of non-compliance, nor any procedure to protect the child if placement contrary to his welfare is made.
G.S. 48-4	(1) Questions arise with some frequency as to whether persons who are not U. S. citizens may adopt through the courts in North Carolina. We recommend that the statute specify that persons who are not U.S. citizens may adopt through N.C. courts. (2) The statute does not indicate that persons who consider North Carolina as their state of permanent residence, even though temporarily residing out of state for occupational, educational, or other purposes, have standing to file adoption petitions in North Carolina. We recommend that the statutes specify that they do have such standing.
G.S. 48-5, 48-7	These two statutes need to be looked at with the recommendation that their placement order be reversed, with the present G.S. 48-7 being moved and placed before G. S. 48-5.
G.S. 48-5, 48-6, 48-9	In these statutes there is confusion due to lack of consistency in regard to occasions in which appointment of a guardian ad litem to give or withhold consent is necessary. For example: G.S. 48-9(a)(2) states that a guardian ad litem shall be appointed when: (1) ". . . there is no person qualified to give consent; or (2) parental rights have been terminated under G.S. 48-5(d) and (e). However, the law does not require appointment of a guardian ad litem when: (1) parental rights have been terminated under the several situations other than those according to G.S. 48-5(d) and (e); or (2) an order under G.S. 48-6 has been entered to allow the adoption to proceed without the parent's consent. We recommend that the statute specify appointment of a guardian ad litem in all instances where need for parent's consent has been ruled out under G.S. 48-6 and where parental rights have been terminated under G.S. 7A-298.32, with the exception of those instances in which the statutes already provide that agency directors have authority to consent to adoption.

*Provided by Kodie Peacock, Program Manager for Adoption Services Department of Human Resources

Statute	Concern
G.S. 48-6	(1) In instances where a named father of a child born out of wedlock signs a denial of paternity, we recommend that the statute require termination of parental rights action against an unknown father.
	(2) RE: Non-Access: Currently, only if need for the legal father's consent is ruled out on basis of one year's separation is his consent not required. The law should also allow for instances in which - for any reason - a court of competent jurisdiction has determined that the legal father is not the biological father.
G.S. 48-9(d)	This section of the statute needs to be looked at and evaluated for relevancy in light of G.S. 7A-289.32(7). Perhaps the language could be modernized.
G.S. 48-12	We would like the Commission to look at this statute with a recommendation toward simplification or toward limiting venue to sites indicated in G.S. 48-12(a).
G.S. 48-13	The second paragraph of this statute would perhaps be better placed in one of the statutes dealing with consent (perhaps in G.S. 48-7).
G.S. 48-14	This statute could be clarified by reversing the two paragraphs, which would then emphasize that child's original name need not appear on the petition, interlocutory decree, and final order.
G.S. 48-17	(1) This statute specifies that the interlocutory decree "must be issued within six months of the filing of the petition . . . ." Some courts will not issue this order in less than six months. The statute could indicate that the interlocutory decree could be issued "at any time after the filing of the Report on Proposed Adoption (report required in G.S. 48-16) but no later than six months after the filing of the petition."
	(2) There are certain provisions in Chapter 48 in which the interlocutory decree may be waived. Currently, this issue is addressed only in G.S. 48-21, which discusses the final order of adoption. G.S. 48-17 should include the waiver provisions for clarification and consistency.

Statute	Concern
G.S. 48-25	We feel that changes are needed in this statute to remedy the problem of agencies not having legal sanction to share physical and mental health, etc. information about the child with prospective adoptive parents, actual adoptive parents, and adult adoptees. We know that the Commission will also look at this statute for other needed changes.
G.S. 48-28	The second sentence of this statute is of concern in indicating, first, that a proceeding may not be attacked by "anyone not injured by . . . defect." It then indicates that a proceeding may not be attacked by any person other than "a biological parent or guardian of the person of the child." We recommend that an adoptee be included as one who may attack a proceeding if the adoptee's consent to the adoption had not been obtained though he was of an age to have given it.
G.S. 48-36	There have been several adoptions of adults in which the adoptee has been older than the adoptive parent (in one case, almost forty years older). We recommend that this statute specify that the petitioner in the adoption be older than the person being adopted.

ISSUES OF CONCERN REGARDING CHAPTER 48 OF THE GENERAL STATUTES

From our years of close work with clerks of court, attorneys, and child-placing agencies, staff in the Adoption Services Unit has come to recognize certain issues that are not addressed in Chapter 48 of the General Statutes. We recommend that the Commission give thought to the following:

1. Whether the statute should specify that a consent to adoption may not be executed prior to the birth of a child;

2. Whether there should be revocation provisions similar to those of biological parents for children over 12 years of age who have executed consent for their adoptions;

3. Whether there should be specified provisions in Chapter 48 for court procedures to nullify parental releases when circumstances warrant this;

4. Whether, when a foreign court has granted an adoption and the adoptive parents file a petition for re-adoption of their child under Chapter 48, the statute should allow for waiver of the interlocutory decree.

Chapter 25

Surrogate mothers

BACKGROUND

A surrogate mother is a woman who is artificially inseminated with the sperm of a man who is not her husband; she carries the pregnancy and then turns the resulting child over to the man to rear. In almost all instances, the man has chosen to use a surrogate mother because his wife is infertile. After the birth, the wife will adopt the child.

Unlike surrogate gestational motherhood, which involves an embryo transfer after in vivo or in vitro fertilization (IVF), surrogate motherhood depends only on the technology of artificial insemination. The primary reason for the use of surrogate motherhood as a reproductive option is to produce a child with a genetic link to the husband.

The use of the term "surrogate" for the woman who is the genetic and gestational mother of the child appears a misnomer to some people, who argue that the adoptive mother is actually the "surrogate" for the biologic mother, who has given up the child. Nevertheless, a contrary position can be articulated, because the adoptive woman will be performing the major mothering role by rearing the child, with the biologic mother serving as a surrogate for her in providing the component for reproduction that she lacks. Although the term "surrogate mother" is, in any case, ambiguous and not a medical term, it has nevertheless received widespread public recognition and will be used in this report to mean a woman who conceives and gestates a child to be reared by the biologic father and his wife. The use of a surrogate mother, who provides the egg and the womb for the child, is currently much more common than the use of a surrogate gestational mother, who provides only the womb.

In comparison with the other reproductive technologies discussed in this report, surrogate motherhood has received scant attention in the medical literature. Although it has produced many more babies than have been born after cryopreservation of a preembryo or by preembryo donation after in vivo fertilization, there have been no medical articles published about the procedure, its success rate, or the mental or physical health of the children produced. There are only a few studies of the psychological ramifications of surrogate motherhood. These studies include speculation about the potential effects on the participants (Andrews, 1985b) and preliminary research on the selection of surrogate mothers and their responses to the pregnancy and subsequent relinquishment of the child (Franks, 1981; Parker, 1983).

One reason for the lack of scientific attention to the medical aspects of surrogate motherhood is that it has developed in an entrepreneurial setting, generally apart from medical institutions. Although the founders of some surrogate mother programs are physicians, the majority are lawyers, social workers, or persons with no professional training. However, most programs do use the services of a physician to perform a physical examination of the surrogate mother and to perform the artificial insemination. The extent to which these programs undertake an independent assessment of the infertility of the wife is unclear. Some couples who have infertility problems that could be helped by drugs, surgery, IVF, or other alternatives may be employing a surrogate at a substantial fee because they do not undergo medical screening as part of the surrogate program and thus do not realize that they have other options. Existing surrogate mother programs generally perform medical screening on the surrogate, and some perform a physical on the man who will provide the sperm (Andrews, 1985).

Some women serve as surrogate mothers for an infertile friend or relative and charge no fee. In other instances, the surrogate mother is a stranger who receives compensation for her services.

The demographic studies of surrogate mothers, which deal mainly with potential paid surrogates, have found that their average age is 25. Over one-half of the women are married, one-fifth divorced, and about one-fourth single. Over one-half (57%) are Protestant and 42% are Catholic

(Parker, 1983). Over one-half are high school graduates and over one-fourth have schooling beyond high school.

Polls show that the public is less favorably disposed toward surrogate motherhood as an infertility solution than it is toward IVF, artificial insemination—donor (AID), embryo donation, or adoption (Brodsky, 1983). However, surveys of the public and of child welfare professionals regarding how the law should handle surrogate motherhood indicate that most people feel that the procedure should not be banned but rather should be regulated (Child Welfare League, 1983).

INDICATIONS

When a woman is infertile, she and her husband may need the assistance of a surrogate mother to conceive and carry a child for her. Sperm from the husband of the infertile woman is used to inseminate the surrogate mother, who will carry the pregnancy and then turn the resulting child over to the couple.

The primary medical indication for use of a surrogate mother is the inability of a woman to provide either the genetic or the gestational component for childbearing, for example, a woman who has had a hysterectomy combined with removal of the ovaries. This is the only situation in which surrogate motherhood provides the sole medical solution. For other indications, other medical options are possible, although they may not be readily available.

A second indication for surrogate motherhood is the inability to provide the genetic component, for example, because of premature menopause or the desire not to risk passing on a genetic defect. Under these circumstances, the woman could alternatively have the genetic component provided through egg or embryo donation, but donors might be more difficult to find than surrogate mothers.

A third indication for the use of a surrogate mother is the inability to gestate. A woman with severe hypertension, a uterine malformation, or the absence of a uterus after hysterectomy may use the services of a surrogate mother. If that woman wanted to provide the genetic component for her child, she and her husband could create an embryo either in vitro or in vivo, then have it transferred to a surrogate gestational mother.

The use of a surrogate mother is also available as a secondary approach for women with any other type of infertility; essentially, it eliminates the need for the social mother to play any biologic role in reproduction.

RESERVATIONS ABOUT SURROGATE MOTHERHOOD

The reservations about surrogate motherhood, like reservations about other reproductive technologies, focus on the potential effects on the surrogate, the couple, the potential child, and society. Because of the dearth of research on the subject, most of the potential risks are highly speculative. There is concern that it is improper to ask a surrogate to put herself through the physical hazards of a pregnancy to benefit other persons. There is also concern that the surrogate might be psychologically harmed by giving up her genetic child. There are some surrogates who go through a period of grief and mourning after giving up the child (*Psychiatric News*, 1984).

There is also a risk that, because of the uncertain legal status of the procedure, the surrogate will be required to keep (or put up for general adoption) a child for whom she did not intend to have parental responsibility. This situation might occur if a paternity test revealed that the child was not the offspring of the man who contracted with the surrogate or if the child were born with a defect so that the couple refused to take custody of the child.

In addition to the potential harm to the surrogate, there is concern that the couple might be harmed by the procedure. The woman might be harmed by not having access to medical advice to help her resolve her infertility in other ways. The couple might be at risk of harassment from the surrogate in those rare instances in which she learns the couple's identities and seeks them out after relinquishing the child. Or, if the surrogate is a friend or relative, her continued involvement with the couple may cause tension in their marital relationship. Also, the couple are financially and emotionally at risk because of the uncertain legal status of the procedure. If the surrogate keeps the child, the contracting husband might nevertheless have to pay child support because he is the biologic father. The couple who pay a surrogate might be prosecuted under criminal law in those states that prohibit payment beyond certain enumerated medical and legal expenses of

a woman in connection with her giving up her child for adoption (Andrews, 1986).

The potential physical and psychological effects on the child are cause for concern as well. The child might be physically harmed if the surrogate mother passes on a genetic defect. This possibility is similar to the risk involved in using sperm donors, and it merits similar handling by appropriate screening. The surrogate mother has the responsibility not only of providing the gamete for conception but also of gestating. A surrogate mother who knows that she will not have the responsibility of rearing a child might not be sufficiently careful during the pregnancy. Moreover, the surrogate might be less likely than a woman planning to rear the child to give priority to the fetus in situations in which there is a conflict between maternal and fetal needs. For these reasons, screening of potential surrogate mothers is necessary to determine what gestational risks they present.

In addition, there are concerns about the psychological development of the child, who may feel a need for information about the surrogate mother or may want to learn her identity. If the surrogate mother is a friend or relative who maintains contact with the child, it is unclear what effect a connection with two mothers will have on the child's development or identity.

As with donation of sperm, eggs, or embryos, the use of a surrogate mother who provides an egg, as well as gestational services, raises questions about the ethics of donor involvement in procreation. There is concern that the involvement of a surrogate mother in childbearing will weaken the marital bond and undermine the integrity of the institution of the family. To some, third-party involvement in procreation is considered to be threatening to the sanctity of the marital relationship, whether or not there is provable physical or psychological harm to the participants in the process.

Some commentators have voiced the further concern that if surrogates are paid for their services, human reproduction will become commercialized, and children might come to be perceived as a "consumer item" (Hellegers, 1978).

A final reservation is that surrogate motherhood might be used for convenience when the potential rearing mother does not wish to undergo pregnancy. However, it is less likely that a woman would use a surrogate mother, rather than a surrogate gestational mother, for those purposes. With a surrogate mother, the woman gives up not only the gestational inconvenience but also the chance to be the genetic mother for the child.

RATIONALE FOR THE USE OF A SURROGATE MOTHER

For some couples, of whom the wife has no uterus or ovaries, the use of a surrogate mother is the only means to have a chld genetically related to one of them. In all of its applications, the use of a surrogate mother allows the infertile woman who wishes to rear a child the opportunity to adopt an infant more rapidly than by waiting several years for a traditional adoption. In addition, it allows her to rear her husband's genetic child.

For the husband of an infertile woman, the use of a surrogate may be the only way in which he can conceive and rear a child with a biologic tie to himself, short of divorcing his wife and remarrying only for that reason or of having an adulterous union. Certainly, the use of a surrogate mother under the auspices of a medical practitioner seems far less destructive of the institution of the family than the latter two options.

For the child, the use of a surrogate mother gives him or her an opportunity that would not otherwise be available: the opportunity to exist. Furthermore, the child would be reared by a couple who so wanted him or her that they were willing to participate in a novel process with potential legal and other risks.

The process offers potential benefits for the surrogates as well. As in the case of organ transplantation, it offers them the chance to be altruistic. In addition, some surrogate mothers enjoy being pregnant. Moreover, one preliminary study found that about one-third of surrogate mothers may be using the process to help themselves psychologically. These are women who in the past have voluntarily aborted or given up a child through adoption and have then become surrogate mothers in order to relive the experience of pregnancy in a psychologically satisfactory way (Parker, 1983). Those women who become surrogate mothers for a fee are benefited by having another income option. For example, some divorced women with young children have chosen to be surrogates in order to support their children and to remain at home to care for them.

Although there are potential risks to surrogacy, those risks can be understood by the prospective participants. Thus informed, they can engage in competent decision making about whether or not to pursue this reproductive option. Initial data indicate that the couples and surrogates can understand in advance how they will react to the procedure. "Preliminary evidence indicates that only a few surrogates and the parental couple felt surprised by their own psychological responses after the relinquishment or by the other party's response" (Parker, 1984).

COMMITTEE CONSIDERATIONS

Surrogate motherhood has received extensive media attention and has raised a panoply of emotional reactions and ethical concerns. Unlike AID, which was developed in a shroud of secrecy, surrogate motherhood was thrust before the public eye, often for the pragmatic reason of needing high visibility in order to recruit potential surrogates. The use of a surrogate mother has raised a range of issues about third-party involvement in procreation, such as whether that involvement is destructive to the marital bond or psychologically harmful to the third party and whether the child has a right to learn about the history or identity of the third party. Unfortunately, there is little precedent for answering these questions; the policy of secrecy surrounding sperm donation has served to limit studies in that context that might have served as a basis for understanding the psychological implications of using third parties in reproduction generally. Nevertheless, large segments of our society view as permissible the donation of sperm to compensate for a male infertility problem. The use of a surrogate mother to compensate for a female infertility problem could similarly be viewed as permissible, unless it can be demonstrated to be significantly more risky to the participants or to society than AID or other activities that our society condones.

The Committee's main concerns about surrogate motherhood are threefold. First, there appear to be potential risks to all participants that need to be considered. There is concern that a woman who becomes a surrogate mother may be subjecting herself to too many physical and psychological risks. There is some sentiment that it is improper to ask a woman to be a surrogate mother, because she will be facing the potential physical risks of pregnancy and childbirth without receiving what seems to be a commensurate benefit. There are further concerns that a woman who is a friend or relative of the couple may be coerced into being a surrogate or that a paid surrogate may be exploited.

The perceived degree of involvement (duration, intensity, and medical risks) of the surrogate mother leads the Committee to see this third-party involvement as different from AID or egg donation. However, the Committee is mindful that society allows competent adults to take risks (for example, trying an experimental medical procedure, donating a kidney, engaging in a risky sports activity or occupation, or joining the armed services). In the medical realm, people are allowed to make risky choices as long as they have given voluntary, informed consent. With respect to surrogate motherhood, then, it is of the utmost importance to ensure that the potential surrogate mother is appropriately informed and has not been coerced into serving as a surrogate. It may be useful for the physician to interview the potential surrogate separately to ensure that she has not been coerced into participation; this may be especially important when the surrogate is a friend or relative of the couple and may have been subjected to personal pressures regarding participation.

Although the couple are not at physical risk, they may be at emotional or financial risk because the surrogate might decide to keep the child, which would require them to seek a court order to gain custody. Again, however, if voluntary, informed consent is obtained from the couple, it may be excessively paternalistic to deny them their chosen option on the speculation that it could be harmful to them.

Naturally, a prime ethical concern regarding the participants is focused on the child. A realistic assessment needs to be made of the potential physical and psychological risks to the child. Although there exists a potential for surrogates to risk harm to the child by failing to disclose a genetic defect that would disqualify them for surrogacy or by engaging in harmful behavior during pregnancy, such risk could be minimized by proper medical and psychological screening of surrogates. As is true with AID, there is little follow-up data on the health of the children born to surrogates. But the high visibility of the surrogate arrangements, as well as the fact that news about unhealthy children has been extremely rare, suggests that the potential physical risks

have not frequently materialized under the current system.

As to potential psychological harm to the child, there is concern that the child's self-identity might be confused because of his or her blurred genealogy. The use of a surrogate mother does not have to have a "blurring" effect on the child's genealogy. Situations in which full disclosures are made to the child about the personal history of the surrogate (and perhaps even her identity) might provide clear knowledge of genealogy. However, it is true that any use of a third party may make the genealogy more complex and perhaps bothersome to the child. Even if there are psychological risks, most infertile couples who go through with a reproduction arrangement that involves a third party do so as a last resort. In some cases, their willingness to make sacrifices to have a child may testify to their worthiness as loving parents. A child conceived through surrogate motherhood may be born into a much healthier climate than a child whose birth was unplanned. For this reason, some of the risks caused by confused genealogy may be outweighed by possible benefits to the child of having parents who want him or her.

Concerns are also raised by payment to a surrogate. Some people may approve of voluntary surrogate motherhood but disapprove of surrogate motherhood for a fee. The ramifications of prohibiting payment are widespread, however, because there are not enough voluntary surrogates to meet the needs of infertile couples. Because a surrogate mother has a much greater involvement in reproduction than does a donor of sperm, eggs, or embryos, she usually requires remuneration. On the couple's side, spending money for childbearing does not in itself seem unethical. Even without the involvement of a surrogate, couples spend substantial sums to investigate and treat their infertility. This financial outlay does not seem to create unusually high expectations about the child that might lead to psychological problems for him or her.

Commercialization in connection with giving up a child for adoption has traditionally been banned on the grounds that it might force biologic mothers to give up children whom they do not wish to give up and that the mere willingness to pay for a child does not guarantee that the potential parent will treat the child well. Because the sperm donor is merely turning over a gamete, whereas the surrogate mother is turning over a child, the latter action may seem to fit more closely into traditional concerns about baby selling. Nevertheless, paying the surrogate a fee is readily distinguishable from paying an already pregnant women for her child. The payment to a surrogate is made in exchange for her help in creating a child, not in exchange for possession of the child. Because the decision is made before the pregnancy ensues and the arrangement is entered into with the specific intention of relinquishing the child, the woman is less likely than an already-pregnant woman to be coerced into giving up a child whom she wishes to keep. Because the child will be reared by the genetic father and his wife, it may be more likely that the rearing father will have a greater sense of responsibility for the child than if the child were turned over to a stranger. Because the surrogate's responsibilities are set out in a contract before the conception occurs, she is more likely to understand and abide by them and less likely later to harass the couple with a change of heart.

A psychiatrist who has interviewed over 500 potential surrogates and who has followed several dozen surrogates through their pregnancies and beyond has written about surrogates' financial motivation, "There is no evidence that such a motivating factor results in more adverse psychological, medical, or legal consequences" (P. J. Parker, unpublished essay, 1982).

More troublesome is the commercialization and potential for exploitation of the couples and surrogates by professionals acting as brokers. The Committee is concerned that professionals who attempt to serve both the couple and the surrogate or who receive finder's fees for surrogates may have a conflict of interest or may exploit the parties.

As a final reservation, the lack of laws protecting couples who use a surrogate leads to a reluctance on the part of practitioners to recommend it (chapter 7). This, of course, could be solved by the enactment of laws clarifying the points that the contracting couple are the legal parents and that the surrogate mother has no parental rights or responsibilities with respect to the child after birth. Such laws are already being proposed in some states. Laws that take the opposite approach and attempt to prohibit the use of surrogate mothers would likely be struck down as unconstitutional for violating the couple's right to privacy in making procreative decisions (chapter 6).

Until favorable laws are passed, the rights and duties among the parties will likely be handled by a contract that includes an agreement by the surrogate to turn the child over to the couple for adoption. Of particular importance will be the provisions for human leukocyte antigen typing of the man providing the sperm and of the child, for assurance that the surrogate did not inadvertently become pregnant by her own partner rather than through the artificial insemination procedure.

COMMITTEE RECOMMENDATIONS

The Committee finds that surrogate motherhood is a matter that requires intense scrutiny. The Committee does not recommend the use of a surrogate mother for a nonmedical reason, such as the convenience of the rearing mother, because nonmedical reasons seem inadequate to justify using a surrogate to undertake the risks of pregnancy and delivery. As for surrogate motherhood for medical reasons, the Committee is dismayed by the scarcity of empiric evidence about how the surrogacy process works and how it affects those involved. Nevertheless, this process offers promise as the only medical solution to infertility in a couple of whom the woman has no uterus and who does not produce eggs or does not want to risk passing on a genetic defect that she carries.

There may be individual practitioners or medical groups asked to aid a surrogate mother arrangement who find that the reservations about the procedure outweigh the benefits, i.e., that the procedure is not in the best interests of the persons integrally and adequately considered. In that circumstance, the practitioner or group could ethically decline to participate in the arrangement.

The Committee does not recommend widespread clinical application of surrogate motherhood at this time. Because of the legal risks, ethical concerns, and potential physical and psychological effects of surrogate motherhood, it would seem to be more problematic than most of the other reproductive technologies discussed in this report. The Committee believes that there are not adequate reasons to recommend legal prohibition of surrogate motherhood, but the Committee has serious ethical reservations about surrogacy that cannot be fully resolved until appropriate data are available for assessment of the risks and possible benefits of this alternative.

The Committee recommends that if surrogate motherhood is pursued, it should be pursued as a clinical experiment. Among the issues to be addressed in the research on surrogate mothers are the following:

a. the psychological effects of the procedure on the surrogates, the couples, and the resulting children
b. the effects, if any, of bonding between the surrogate and the fetus in utero
c. the appropriate screening of the surrogate and the man who provides the sperm
d. the likelihood that the surrogate will exercise appropriate care during the pregnancy
e. the effects of having the couple and the surrogate meet or not meet
f. the effects on the surrogate's own family of her participation in the process
g. the effects of disclosing or not disclosing the use of a surrogate mother or her identity to the child
h. other issues that shed light on the effects of surrogacy on the welfare of the various persons involved and on society.

In the course of the clinical experiments on surrogate motherhood, special attention should be paid to whether the surrogate and the couple have given voluntary, informed consent. Both the surrogate and the man providing the sperm should be screened for infectious diseases, and the surrogate should be screened for genetic defects (Appendices B and C).

So that potential conflicts of interest or exploitation by professionals can be avoided, the Committee recommends that professionals receive only their customary fees for services and receive no finder's fees for participation in surrogate motherhood. Although it would be preferable that surrogates not receive payment beyond compensation for expenses and their inconvenience, the Committee recognizes that in some cases payment will be necessary for surrogacy to occur.* If surrogate motherhood turns out to be useful, a change in the law would be appropriate for assurance that the couple who contract with a surrogate mother are viewed as the legal parents.

*It has been well established that the purchasing of organs (kidney, liver, gametes, etc.) is inappropriate because of the potential for abuse. Payment for surrogacy may be viewed as rent, i.e., allied to purchase. These Committee members believe that exploitation of surrogates would be diminished if

payments to surrogates were limited to compensation for expenses and inconvenience (HWJJr, C-RG).

†The subject of surrogacy receives more relative attention in this report than may be its due. The matter has attracted wide public interest, presumably because of its challenge to traditional thinking about motherhood. However, its frequency to date has been quite low and provides only minimal experience on which to base judgment. It appears likely that, barring heavy-handed commercialization, frequency will remain low. Moreover, the issue relates not so much to the morality of an innovative reproductive technology as to the possible exploitation of women—certainly an important issue in its own right (CG).

‡The issue of surrogacy is highly controversial, but this Committee member believes that the risk/benefit ratio of the surrogacy procedures does not justify their support. The probability of abuse is real, e.g., financial enticement, psychological intimidation by family members or others. When the maternal morbidity and mortality rate, albeit small, is added on, these risks outweigh the benefit to the small number of couples who will be candidates for the surrogacy procedures. Finally, given the small number of couples involved, it is unlikely that significant research will be performed (CAP).

APPENDIX H

OUTLINE OF TESTIMONY: LEGAL CONSIDERATIONS IN SURROGATE PARENTING CONTRACTS

TO: Adoptions/Surrogate Parenthood Study Commission for the North Carolina General Assembly

FROM: Professor Katharine T. Bartlett, Duke Law School*

DATE: February 2, 1988

RECOMMENDATIONS: I recommend that the North Carolina General Assembly clarify or amend North Carolina law relating to surrogate parenting arrangements as follows:

(1) New sections should be added to chapter 48 (Adoptions) clarifying (a) that a parent's consent to the relinquishment of his or her parental rights to a child not yet born is invalid and unenforceable, and (b) that a surrogate parenting contract shall not be enforceable in an adoption action;

(2) N.C.G.S. § 48-11(a) should be clarified to provide that the consent to adoption given by a natural mother pursuant to a surrogacy contract may be revoked within the statutory periods. (For private adoptions this is now 90 days; I recommend the statute be amended to provide for a shorter period, such as 10 days.)

(3) A new section should be added to chapter 50 (Custody) clarifying that a surrogate parenting contract shall not bind a court as to the custody of a child born as part of a surrogacy arrangement;

(4) N.C.G.S. § 7A-289.32 should be amended to provide that the rights of a parent whose child (a) was born pursuant to a surrogacy arrangement and (b) was placed by judicial order in custody of the other parent whose spouse seeks to adopt the child, may be terminated. § 7A-289.32 should also be amended to clarify that parental rights may not be terminated solely on the basis of a surrogate parenting contract;

(5) N.C.G.S. § 48-37 should be amended to clarify whether its provisions prohibiting payment for the adoption of a child are applicable to parties to surrogate parenting contracts; such application would be constitutional, but I do not recommend use of the criminal law to address problems raised by surrogacy contracts. Unless surrogacy arrangements are criminalized, I also recommend a new law to provide that monies paid under

*Some of the legal research for this testimony was provided by Amy Kincaid and Margaret Force, third-year law students at Duke Law School.

surrogate contracts may be recovered from the surrogate mother if she decides not to perform under the contract.

(6) N.C.G.S. § 49A-1 should be clarified to permit the spouse of a surrogate mother to consent to the insemination of his wife even after the birth of the child.

DISCUSSION

Recommendations 1-3 and 6 represent clarifications rather than alterations of current North Carolina law. Recommendations 4 and 5 represent changes in the law. In this testimony, I will address these recommendations through a discussion of the following areas: (1) those provisions of North Carolina law that may have some relevance to surrogate parenting contracts; (2) constitutional considerations in regulating surrogate parenting contracts; (3) policy considerations; and (4)legislative activity in other states.

I. CURRENT NORTH CAROLINA LAW RELEVANT TO SURROGATE CONTRACTS.

A. Adoption Statutes

1. Surrogacy contracts are not enforceable in this state because North Carolina law does not permit a parent to consent to place a child for adoption before the birth of the child.

a. N.C.G.S. § 48-11(a) gives 3 months for a parent to revoke consent to adoption; the period is shortened to 30 days in the case consent to adoption is given to a director of social services.

b. N.C.G.S. § 48-1(2) provides as a secondary purpose to chapter 48 "to protect the biological parents from hurried decisions, made under strain and anxiety, to give up a child. . "

c. N.C.G.S. §§ 48-5. 48-6, 48-7 & 48-9, specifying who must consent to an adoption, does not make exception for a parent who consented to the adoption before the birth of the child.

2. Surrogate contracts, even if enforceable, would be subject to provisions designed to protect natural mothers from decisions made before and immediately upon the birth of the child, which may not have been made with a full appreciation of the impact of relinquishing one's parental rights. In the only court case I have found to have directly considered a statute like N.C.G.S. § 48-11(a), the Kentucky Supreme Court held that a statute allowing a mother 5 days following the birth of her child to revoke her consent to adoption takes precedence over any contractual commitments the parents have made. The court, which

held that surrogate parenting contracts were otherwise enforceable, stated: "The policy of the voluntary termination statute and the consent to adoption statute is to preserve to the mother her right of choice regardless of decisions made before the birth of the child." Surrogate Parenting Associates, Inc., v. Armstrong, 704 S.W.2d 209 (1986). I recommend that N.C.G.S. § 48.11(a) be clarified to insure that it receives the same intepretation as that given by the Kentucky court to its statute (Recommendation 2).

3. Only one state, Wyoming, appears to allow pre-birth relinquishment of a child for adoption. See Wyo. State. §1-22-109(c)(Supp. 1987), interpreted in In re Adoption of B.G.D. II, 719 P.2d 1373 (Wyo. 1986). Several states (not including North Carolina) specifically prohibit the giving of parental consent for adoption before the child is born. See, e.g., Fla. Stat. Ann. § 63.082(4)(West 1985)(consent shall be executed only after birth of child); Ohio Rev. Code Ann. § 3107.08 (Page 1980)(consent may be executed only 72 hours following child's birth); Ky. Rev. State. § 199.601 (1985)(voluntary termination of parental rights may not be filed prior to five days after birth of child); Ill. Ann. State. ch. 40 § 1511 (Smith-Hurd 1980(father may consent to adoption before child is born but may revoke consent within the first 72 hours after child's birth; mother may not consent within the first 72 hours). I recommend that North Carolina join this group of states that prohibit consent for adoption before the birth of the child (Recommendation 1).

4. The New Jersey trial court in the celebrated case of In re Baby M. concluded, on the basis of the fact that surrogacy was not a viable procreation alternative when the laws of adoption were passed, that adoption laws in New Jersey do not apply to surrogacy contracts. 525 A.2d 1128, 1157 (1987). I believe that this aspect of the court's holding will be reversed on appeal; while adoption laws may not have contemplated surrogacy arrangements, until the legislature provides more specific legislation, they provide the best legislative direction on this subject. Recommendation 1 would help to avert the approach taken in New Jersey by the Baby M. court.

B. Termination of Parental Rights Statutes

1. None of grounds for terminating parental rights (§7A-289.32) would warrant termination based upon a pre-birth agreement by the natural mother. Further clarification on this point, however, would be desirable (see Recomendation 4).

2. The Kentucky Supreme Court in Surrogate Parenting Associates, Inc., v. Armstrong, 704 S.W.2d 209 (Ky. 1986), held that a contract could not override the application of Kentucky's termination of parental rights statutes. A different view was taken by the Supreme Court of Michigan, which held that the Michigan paternity statutes were an appropriate vehicle for establishing the paternity of the biological father in a

surrogacy arrangement, even prior to the birth of the child. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985).

3. Current North Carolina termination of parental rights statutes would not allow the involuntary termination of parental rights of one of the natural parents to a surrogacy contract, absent abandonment, unfitness, lack of support, or the like. Recommendation 4 would change this result to allow for the termination of parental rights of the child's parent in a surrogacy situation who does not receive custody of the child.

C. Custody Law

1. N.C.G.S. § 50-13.2: Between mother and father, neither parent is presumed to better promote the interest and welfare of the child.

2. **Agreements between the parties are not binding as to the custody of children.** See, e.g., Wolfe v. Wolfe, 307 S.E.2d 400, 64 N.C.App. 249 (1983)(parents cannot override court's custody order by agreement); Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964)(court not bound by terms of agreement reached by parents on child support). Further clarification on this point with respect to surrogacy contracts, however, would be desirable. (See Recommendations 1-3.)

D. Criminal Baby-Selling Prohibition.

1. N.C.G.S. § 48-37 makes a disdemeanor "to offer of give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption."

2. A North Carolina Attorney General Opinion of August 5, 1975, concludes that anti-baby-selling statute applies to prospective adoptive parents offering or giving compensation to an expectant mother pursuant to an anticipated adoption. 25 N.C.A.G. 24 (1975).

3. Courts in 2 states, New York and Kentucky, have found that anti-baby-selling statutes (comparable to the North Carolina statute) do not criminalize surrogate arrangements, because these arrangements are made before rather than after conception of a child. Surrogate Parenting Associates, Inc., v. Armstrong, 704 S.W.2d 209 (Ky. 1986); Adoption of Baby Girl L.J., 132 Misc.2d 972, 505 N.Y.S.2d 813 (Surrogate's Court, Nassau County 1986). In the New York case, which was an adoption case not contested by any of the parties, the court specifically held that absent further legislation, the court would not prohibit payment to a surrogate mother under a surrogate contract (contract provided for $10,000 payment). Adoption of Baby Girl L.J., supra. The New Jersey trial court in In re Baby M., 525 A.2d 1128 (1987), while it did not directly address the

application of a criminal anti-baby-selling statute, found adoptions statutes generally to be inapplicable to surrogate contracts, in part because the arrangement is for the performance of services rather than the purchase of a baby.

4. The cases cited in the previous paragraph demonstrate the reluctance of courts to apply criminal statutes contemplating black market adoptions to surrogacy arrangements. The reasoning used, however, does not seem persuasive. While the natural mother's placement of a child with the natural father might not be considered placement "for adoption", **adoption in surrogacy situations is ordinarily contemplated by the father's spouse.** Insofar as adoption is so contemplated, consideration paid for surrogacy arrangements would still seem within the purview of the statute. Further, the argument that payment under surrogacy contracts is payment for "services" rather than for adoption seems a perversion of a statute clearly intended to reach the broad range of activities associated with the transfer of babies. Recommendation 5 urges clarification of this issue. While I do not offer a firm recommendation on this point, in general I do not favor use of the criminal law to discourage surrogacy arrangements.

E. Artificial Insemination Statute.

1. N.C.G.S. § 49A-1 provides: "Any child. . . born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child **of the husband and wife requesting and consenting in writing to the use of such technique."**

2. The provision making treatment of the child as the legitimate child of the mother and her husband subject to the husband's consent in writing, would appear to be for the protection of the husband, and thus waivable by him at the birth of the child. The law does not currently seem to contemplate that a husband might consent to the insemination after the birth of child. Clarification on this point allowing such consent would facilitate determination of the legal status of the child if the natural mother in a surrogacy arrangement becomes the child's custodial parent (see Recommendation 6).

II. CONSTITUTIONAL CONSIDERATIONS

A. Criminal Statutes Banning Surrogacy Arrangements. It has been argued that state prohibitions on the right of parties to enter surrogacy arrangements are unconstitutional. The most elaborate statement of this argument is made by Professor John Robertson in an article "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction," 59 So. Cal. L. Rev. 939 (1986), which he bases on a long line of Supreme Court cases establishing a right of family privacy and procreative liberty. See, e.g., Skinner v. Oklahoma, 316 U.S.

535 (1942)(striking down Oklahoma statute permitting sterilization of certain criminals); Stanley v. Illinois, 405 U.S. 645 (1972)(unmarried father with established relationship to children may not deprived of their custody without a hearing); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1973)(pregnant woman's decision to bear children cannot be burdened by unreasonable employment restrictions); Griswold v. Connecticut, 381 U.S. 479 (1965)(right of married couple to use birth control); Eisenstadt v. Baird, 405 U.S. 438 (1972)(right of unmarried persons to contraceptives). Robertson applies his argument not only to criminal statutes prohibiting participation in surrogacy arrangements but also to the right of couples to have surrogacy contracts enforced in state court custody actions.

There are a number of distinctions between the privacy cases upon which this argument relies and the surrogacy arrangements to which the argument is sought to be applied. The cases establishing a constitutional right to privacy center on "procreative choices" relating to sexual activities, not access to third party procreation. Further, the cases relating to the importance of the opportunity to raise a child pertain to the custody of one's child and the childrearing process, not the process by which one acquires a child. Nevertheless, the constitutional argument may have some force with respect to the criminalization of the activities of all parties to surrogacy arrangements. While the state is not obligated to facilitate or provide the means to reproduce, criminalization of surrogacy arrangements could be said to interfere with reproductive choices made by freely consenting persons in the private sector. The state interest in prohibiting these voluntary arrangements, many of which may be "successful" for all parties, may not be sufficiently strong to support state interference with such private procreative choices.

2. Criminal Prohibition of Compensation Aspects of Surrogacy. Even if the state may not prohibit surrogacy altogether, however, it may certainly ban the payment for performance under a surrogacy contract. The commercialization of surrogacy gives rise to state interests not implicated by arrangements that do not involve the transfer of money. Indeed, the reasons for banning the payment of money in surrogacy situations--to eliminate commercialization of basis and expolitation of women "baby-makers"--seem identical to those underlying prohibitions on the payment of compensation in other adoption situations.

A prohibition against the transfer of money in adoptions already exists, of course, in N.C.G.S. § 48-37. If applied to surrogacy activities, it is at most an indirect rather than a direct burden on whatever constitutional interests might be at stake. The distinction between direct and indirect burdens on constitutional rights in the privacy area is a familiar one. Compare, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978)(state may

not prohibit father with outstanding child support obligations from marrying) with Califano v. Jobst, 434 U.S. 47 (1978)(upholding Social Security Act provision terminating dependency benefits of child when parent remarries).

The trial court in In re Baby M., 525 A.2d 1128 (N.J.Super.Ch. 1987) stated in dictum that the state could not constitutionally ban payment of fees under surrogacy contracts. The Michigan Court of Appeals in Doe v. Kelley, 307 N.W.2d 438 (1981), on the other hand, held that while there is a fundamental right to decide whether to bear or beget a child, that right does not preclude a state prohibition on the exchange of money under surrogacy contracts. In other words, while couples may have a constitutional right to enter into surrogacy arrangements, the state may regulate the terms upon which those arrangements may take place, including whether compensation shall be allowed. A New York court in Adoption of Baby Girl L.J., 132 Misc.2d 972, 505 N.Y.S.2d 813 (Surrogate's Court, Nassau County 1986), while finding that the New York statute did not bar payment of fees in surrogacy contracts, stated that a ban on payments if it existed would be constitutional. In my view, the approach of the Michigan and New York cases is constitutionally sound. The issue remains, however, whether criminalizing the payment of compensation in surrogacy arrangements is good policy; I do not recommend it (see recommendation 5 and discussion below).

3. State Refusal To Enforce Surrogacy Contracts. There is no constitutional right by parties to a surrogacy contract to have that contract enforced in state courts. In disputes between parents, it has always been the law that the state has a parens patriae power to protect the best interests of the child. While there is much constitutional authority protecting parents against the exercise of power by the state with respect to their children (see, e.g., Santosky v. Kramer, 455 U.S. 745 (1982)), there is no Supreme Court authority of which I am aware that limits the state's ability to retain power over custody disputes between parents. And the law in every state, including North Carolina, has long been that courts in making custody decisions are not bound by the agreements of parties. If divorced parents cannot make binding agreements with respect to the custody of their children, surely the state has no constitutional obligation to enforce the agreement of "strangers" to surrogacy contracts made before the child is born.

In In re Baby M, 525 A.2d 1128 (N.J.Super.Ch. 1987), a New Jersey trial court held that if there is a constitutional right of coital reproduction so there must also be a constitutional right to non-coital reproduction which requires that surrogate contracts between private parties be enforced. 525 A.2d at 1164. Although the court in this case recognized that a state should and must regulate the circumstances under which parties enter into reproductive contracts, it held that it could not ban or refuse to enforce such transactions altogether. Id. For the reasons stated above, it is my view that this decision is

incorrect as a matter of constitutional law.

Any provision in a surrogate parenting contract requiring the mother to abort the child under certain circumstances or forbidding her from aborting in circumstances, is questionable under Supreme Court cases defining the woman's right to choose abortion as a highly protected one. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The question raised by this issue, which the Supreme Court has never addressed, is whether the woman's right to make the abortion decision may be waived.

4. Termination of Rights of Non-Custodial Parent. With respect to my proposal to terminate the rights of the natural parent who is not given custody (Recommendation 4), a constitutional argument may be raised that this would violate the rights of the parent whose rights are terminated. As noted above, the parent-child relationship is strongly protected under the United States Constitution. However the Supreme Court has recognized that the needs of a child for a stable family may allow for the compromise of the parent's constitutional interests in some situations. This has been the case particularly where the parent is unwed and has not developed an actual relationship with the child. Thus in Lehr v. Robertson, 463 U.S. 248 (1983), the Court held that the parental rights of an unwed father who had attempted to develop a relationship to his child but who was prohibited from doing so by the child's mother, may constitutionally be terminated in order to allow the child to be adopted. (In this case, the father had failed to register his name in the state's putative father registry, which would have protected his right at least to a pre-adoption hearing.) This case establishes that the mere fact of biological paternity, without an actual relationship to the child, does not give rise to a constitutional interest strong enough to overcome the state's interest in protecting the best interests of the child.

Because the mother of the child has established a relationship to the child through pregnancy and delivery, the constitutional arguments are stronger on the part of the mother. There are inferences in some Supreme Court opinions that the mother's constitutional interests in her newborn are stronger than those of the father. See, e.g., Lehr v Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380, 389 (1979). Even here, however, the peculiar circumstances surrounding surrogacy arrangements (the contract, even if unenforceable, stands as evidence of the mother's compromised commitment to the child) might justify the termination of the rights of a mother in those cases where the father is determined to be the more appropriate custodian of the child. Such a result would require a change in the law (Recommendation 4).

III. POLICY CONSIDERATIONS.

While there are some aspects of surrogacy arrangements that differ from the usual circumstances in adoption cases, in my judgment these differences are often highly exaggerated. In both types of situations, there is the potential for the commercialization of babies, for pressure on low-income women to "make babies for money," and for women to give up" their children without sufficient appreciation of what they are doing.

In some cases, surrogacy arrangements will be made that meet the desperate longing of a childless couple for a baby and satisfy the desires of a fertile woman to assist such a couple. Where no conflict ever develops between the respective parents and their spouses, there may be no sufficient reason for the state to stand in the way of such arrangements. For this reason, I do not favor the criminalization of surrogacy arrangements. The question of whether to ban payment pursuant to surrogacy arrangements is a closer call. On the one hand, prohibition of compensation will effectively cut off the opportunity for many childless couples to obtain a baby in this way; on the other hand, it is the compensation aspect that creates such dangers for commercialization, exploitation and undue pressure. I do not offer a firm recommendation on this issue, although I slightly favor the elimination of a ban on compensation in surrogacy arrangements (see Recommendation 5).

In any event, surrogacy contracts should not be enforceable as to the custody of a child. Just as a mother in and adoption situation is given time to change her mind, so a mother in a surrogacy situation, who may not have anticipated how strong a bond would develop in utero between her and her child, should have the opportunity to change her mind. Under the circumstances, I think 10 days is a sufficient period of time, although my recommendation tracks the statutory periods given in the current N.C.G.S. § 48-11(a) (see Recommendation 2). Other states have provisions allowing a period of time for revocation of consent shorter than the 30 days (or 90 days in the case of private adoptions) allowed by North Carolina. See, e.g., Minn. Stat. Ann. § 259.24 (West 1982)(10 working days).

It is argued that a period of time for the mother to change her mind puts the prospective adoptive parents in an impossible limbo, where they will be uncertain as to their legal status. Of course this is the situation which now exists with respect to ordinary adoptions; indeed, mothers have 90 days to revoke their consent in private adoptions in this state. If prospective adoptive parents know that the adoption will not be final until after such a waiting period, they can decide in advance whether they want to take the risk of disappointment, and adjust their expectations accordingly.

Even where the mother revokes her consent, of course, the custody question must still be resolved. North Carolina law as noted above gives the natural parents an equal legal right to custody. Ordinarily, the mother at birth has the closer

relationship to the child and thus has a stronger claim to custody. If the child is placed with the father and his spouse, however, even for a short time, the advantage may switch to his favor. The father may also be favored if his spouse is willing to adopt the child and the mother's spouse is not. Whoever obtains custody, the adoption and termination of parental rights statutes should provide that once a custody decision is made in a surrogacy situation, the parental rights of the parent who does not obtain custody should be terminated (Recommendation 5). Because the child is still an infant and has not developed a parent-child relationship with the non-custodial parent, and where the child has the opportunity to have a two-parent family, this option is far better for the child than being the continuing object of custodial squabbling between the natural parents. Termination, of course, would not preclude the development of a relationship with both sets of parents under such terms as are allowed by the child and her legal parents.

Where money has been paid pursant to a surrogacy contract, and the mother decides not to perform under that contract, equity may require that the money paid be returned. The Kentucky Supreme Court in Surrogate Parenting Associates v. Armstrong, 704 S.W.2d 209 (1986), stated in dictum that if the mother does change her mind, she forfeits whatever benefits, such as fees, she has been paid under the contract. Alternatively, if compensation is determined to be an illegal act, or if surrogacy contracts are declared to be null and void, courts may refuse to return monies paid because payment was made pursuant to an illegal contract. The legislature may want to give further direction in this area (see Recommendation 5).

IV. LEGISLATIVE ACTIVITY IN OTHER STATES

A. Statutes Adopted.

1. Only Louisiana has adopted a statute that specifically addresses the legality of surrogate mother contracts, and it declares them "absolutely null . . . and void and unenforceable as contrary to public policy." La. Rev. Stat. Ann. 9:2713 (enacted 1987).

2. One state, Arkansas, appears indirectly to endorse surrogate contracts by providing in its statutes on artificial insemination that while a woman giving birth shall be listed as the natural mother on the child's birth certificate, a substituted certificate may be issued in cases of surrogate mothers, by court order. Ark. State. Ann. § 9-10-201 (enacted 1985). The state of the law in Arkansas remains uncertain, however, in that legislation that would have provided more specifically for the enforcement of surrogacy contracts was recently vetoed by the governor.

B. Statutes Under Consideration.

1. Numerous pieces of legislation are now in various stages of consideration in well over half the states. Other than the legislation described above, the only bills that have passed are for the establishment of study commissions (Indiana, Louisiana, Rhode Island and Texas). While a complete study of bills now under consideration remains to be done, legislation introduced in the 6-month period from January to June 1987 can be summarized as follows (from 13 Family Law Reporter 1442 (1987)):

a. Bills in 13 states would render surrogacy contracts enforceable; 2 of these would limit allowable compensation to expenses.

b. Bills in 16 states would render surrogacy contracts unenforceable.

c. Bills in 6 states (Iowa, Maryland, Michigan, New Jersey, Oregon, and Pennsylvania) would criminalize surrogacy contracts. (This list includes some overlap; at least 7 states (Illinois, Massachusetts, Michigan, Minnesota, New York, Oregon, and Pennsylvania) are considering both legislation that would render surrogacy contracts unenforceable and legislation that would render them enforceable.)

d. Bills introduced in 3 states that would allow surrogate contracts, would give the surrogate mother some period of time in which to change her mind: Pennsylvania (20 days), New York (20 days), and South Carolina (not specified).

MEMORANDUM

TO: Legislative Subcommittee on Surrogate Parent Contracts

FROM: Arlene J. Diosegy
Faison, Brown, Fletcher & Brough
Durham, North Carolina

RE: Summary of Testimony - Surrogate Parent Contracts

DATE: February 2, 1988

RECOMMENDATION: I favor the establishment of a regulatory scheme to enforce surrogate parent contracts, with the final custody determination of the child to be monitored, approved and subject to court approval.

I. The following North Carolina General Statutes should be reviewed carefully in considering the legislative proposal of surrogate parent contracts.

A. North Carolina General Statute Section 48-37, Compensation for Placing or Arranging Placement of Child for Adoption Prohibited.

B. North Carolina General Statute Section 48-38, Advertisement, Soliciting Children for Adoption Prohibited.

C. North Carolina General Statute Section 108A-49 and 108A-50, State Benefits for Certain Adoptive Children.

II. THE BABY M CASE.

The Baby M case asked the question whether a unique arrangement between a man and a woman, unmarried to each other, creates a contract. If so, is the contract enforceable and by what criteria, means and matter? If not, what are the rights and duties of the party with regard to custody, visitation and support? The court concluded that the surrogate contract was enforceable, based upon the best interests of the child.

A. The court reviewed the constitutional rights that attached to the contracting parties, and found that the right to make surrogate contracts is protected by the fundamental right to procreate. The right to procreation is found in the individual's constitutional right to privacy, secured and protected by the Fourteenth Amendment of the United States Constitution. The rationale used by the court to support the constitutional right to procreate is the following:

1. "An individual in this country has the constitutional right to marry, establish a home and bring up children." Mayer v. Nebraska, 262 U.S. 390, 399 (1923).

2. The right to procreate was among "the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

3. This "right is deemed by the court to be a right far more precious. . .than property rights." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

4. "The freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1973).

5. Individuals have a right of privacy that is entitled to constitutional protection. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

6. "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or get a child." Eisenstadt v. Beard, 405 U.S. 438 (1972).

7. The Baby M court holds that if one has the right to procreate coitally, then one has the right to reproduce non-coitally. Reasoning that reproduction is to be protected, then the means of reproduction are also protected.

"This court holds that the protected means extends to the use of surrogates. The contract cannot fail because of the use of a third party. It is reasoned that the donor or surrogate aids the childless couple by contributing a factor of conception and for gestation that the couple lacks. The third party is essential if the couple is to bear a genetically-related child. While the state could regulate, indeed, should and must regulate, the circumstances under which the parties enter into reproduction contracts, it cannot ban or refuse to enforce such transactions altogether without compelling reasons. It might even be argued that refusal to enforce these contracts and prohibition of money payments would constitutionally interfere with procreative liberty since it would prevent childless couples from obtaining the means with which to have families."

8. The court stated that the surrogate relationship and the people involved in this relationship must be treated in a reasonable, not arbitrary fashion. The court stated:

". . . [m]ales may sell their sperm. The "surrogate father" sperm donor is legally recognized in all states. The surrogate mother is not. If a man may offer the means for procreation, then a woman may equally be allowed to do so. To rule otherwise would not offer equal protection of the law to the childless couple, the surrogate, whether male or female, and the unborn child."

III. PROVISIONS TO BE CONSIDERED IN LEGISLATION REGULATING SURROGATE PARENT CONTRACTS

A. Should surrogates should be paid?

1. If so, should the compensation be "fair", "just" or "reasonable"? Should a maximum amount be set?

2. Should the compensation be approved by the court prior to insemination?

B. What type(s) of screening should the surrogate undergo?

1. Medical, psychological.

2. Should only surrogates be permitted who have other children?

C. What safeguards are necessary to insure that participants have given voluntary informed consent?

D. Should the husband and wife who are the intended parents be recognized as the legal parents? Should the surrogate's parental rights be terminated?

E. Should surrogates have a certain time after birth in which to assert parental rights?

F. May the resulting child later in life be able to obtain medical information about the surrogate or his or her identity?

G. If we regulate surrogate relationships, we should exempt surrogate relationships from the ban of baby selling.

H. Should we require the intended rearing couple to accept the child at birth?

I. Who can contract with the surrogate? Some states state that the intended parents be married.

J. Should surrogacy only be permitted for medical reasons? That is, only where the threat to the life or health of the intended mother or child are obvious.

K. How should the intended parents be screened to see if they have any medical conditions or any other conditions, including psychological problems, which would interfere with their capabilities as parents? Some states agree that all the participants in the surrogate parental contract should be screened for sexually-transmitted diseases.

L. Should a home study be done on the intended parents much the same as in an adoption situation?

M. How do you define a surrogate's qualifications, including psychological and medical qualifications?

N. Should there be a "cooling off" period so that prior to insemination but after execution of the surrogate contract, that 30 days pass between those points? Additionally, should legal counsel be provided to all parties? Some of the proposed state statutes require court approval of the contract prior to insemination.

O. Should the surrogate's behavior during her pregnancy be regulated? If it should be regulated, must the surrogate be required to follow the dictates of her inseminating physician? Should the surrogate have a right to abort or not to abort according to her own wishes? If the surrogate does not adhere to reasonable medical instructions, could the father declare the contract null and void?

P. How do you define parental rights? Should the intended rearing parents have a duty to take the child upon birth and rear it no matter what the child's condition? If the child suffers from a disease or defect caused by the surrogate in violation of the contract, should the couple be required to take the child?

Q. Should a court determine the custody arrangement is in the best interests of the child and supervise the custody provision of the surrogate contract?

U. Should the surrogate be provided with all types of medical and life insurance during the term of the pregnancy? Should there be a mandatory record keeping system in state for all surrogate relationships?

V. Should there be a mandatory record keeping system in the state for all surrogate relationship?

This list is not exhaustive of all the points to be considered, but I am hopeful that my comments will assist the subcommittee in its deliberations. If the subcommittee undertakes to draft proposed legislation concerning the regulation of surrogate contracts, I would be pleased to assist the subcommittee in any way that I can. Please feel free to contact me if you have any questions.

AJD:mme
Firm.2.77.30

ADOPTIONS/SURROGATE PARENTHOOD STUDY COMMISSION

Recommendations of the Subcommittee on Adoptions

The Subcommittee on Adoptions makes the following recommendations to the Adoptions/Surrogate Parenthood Study Commission:

(1) That additional funds need to be obtained from the 1988 Session of the General Assembly to enable the Adoptions/Surrogate Parenthood Study Commission to complete the study mandated by Part XXVI of Chapter 873 of the 1987 Session Laws.

(2) That a complete rewrite of our adoption laws contained in Chapter 48 of the General Statutes be undertaken by an appropriate body.

(3) That the Commission further study whether a mutual consent voluntary adoption registry of some sort, or a health registry, should be established in North Carolina.

(4) That the Commission at some point study independent adoptions and that the Commission make sure that any recommendations made by it regarding surrogate parenthood are consistent with its recommendations, if any, on independent adoptions.

(5) That no further action be taken at this time by the Commission regarding Senate Bill 838 ("A BILL TO BE ENTITLED AN ACT TO PERMIT DISCLOSURE OF INFORMATION CONCERNING ADOPTEES AND THEIR BIOLOGICAL RELATIVES").

Submitted on behalf of the Subcommittee on Adoptions on the 5th day of April, 1988.

Sen. Anthony E. Rand, Cochairman

Rep. Sharon Thompson, Cochairman

ADOPTIONS/SURROGATE PARENTHOOD STUDY COMMISSION

Recommendations of the Subcommittee on Surrogate Parenthood

The Subcommittee on Surrogate Parenthood makes the following recommendations to the Adoptions/Surrogate Parenthood Study Commission:

(1) That additional funds need to be obtained from the 1988 Session of the General Assembly to enable the Adoptions/Surrogate Parenthood Study Commission to complete the study mandated by Part XXVI of Chapter 873 of the 1987 Session Laws.

(2) That the Commission further study the subject of surrogate parenthood but that it focus on a regulatory approach, rather than a prohibitory or wait-and-see approach, to this subject. Attached as Appendix A is a memorandum dated February 29, 1988, prepared by Commission Counsel describing the three options for legislative response to the practice of surrogate parenting. As described in that memorandum, those three options are to take: (a) a prohibitory approach, (b) a regulatory approach, or (c) a wait-and-see approach, to this activity.

Included as a part of the February 29, 1988, memorandum is a listing of the issues to be addressed in considering the prohibitory and regulatory approaches. The Subcommittee on Surrogate Parenthood recommends not only that the Commission focus on a regulatory approach to this subject but also that the Commission address the issues listed on Appendix A regarding the regulatory approach in considering that approach as well as any other issues concerning that approach that may arise.

Submitted on behalf of the Subcommittee on Surrogate Parenthood on the 5th day of April, 1988.

Sen. Ralph A. Hunt, Cochairman

Rep. R. Samuel Hunt, III, Cochairman

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February 29, 1988

MEMORANDUM

TO: Members of the Surrogate Parenthood Subcommittee

FROM: Leslie H. Davis, Commission Counsel

RE: Options for legislative response to the practice of surrogate parenting

In response to the practice of surrogate parenting, the North Carolina General Assembly can take one of the following three approaches: (1) a prohibitory approach, (2) a regulatory approach, or (3) a wait-and-see approach.

Under the prohibitory approach, there are basically two options available. One option is to declare the activity surrounding surrogacy arrangements to be unlawful, i.e., criminalize the conduct. The other option is to declare that surrogate contracts are void and unenforceable. With the latter option, the General Assembly could also declare that surrogacy arrangements are against the public policy of the State.

Under the regulatory approach, the General Assembly would regulate surrogate contracts to the extent believed necessary and could establish minimum standards for surrogacy arrangements or require that certain provisions be contained in surrogate contracts.

Under the wait-and-see approach, the General Assembly would not enact specific legislation at this time dealing with surrogacy arrangements but would instead allow surrogacy law to develop on a case law basis in the courts. In considering this approach, the General Assembly may also wish to consider whether

any modification of our present laws, particularly our laws on adoption, is necessary to clarify whether they are applicable to surrogacy arrangements. Specifically, the General Assembly may wish to consider amending G.S. 48-37, our anti-baby selling statute, to clarify whether it applies to surrogate arrangements under which money is exchanged.

Attached are handouts on the prohibitory and regulatory approaches on which I have listed some of the issues the General Assembly, and this Subcommittee, may wish to address in considering these approaches. Also included on each handout is a brief summary of the position taken by the medical and legal experts at the last meeting of this Subcommitttee on these approaches. You will recall that those experts were Dr. James Holman, speaking on behalf of the American Fertility Society; Ms. Katharine Bartlett, a professor at Duke Law School; and Ms. Arlene Diosegy, an attorney in private practice. I have not prepared a handout on the wait-and-see approach as it is fairly self-explanatory and none of the experts at the last meeting commented specifically on that approach.

Prohibitory Approach

Options under this approach

(1) criminalize the conduct surrounding surrogacy arrangements

(2) declare surrogate contracts to be void and unenforceable
   (a) could also declare that surrogacy arrangements are against the State's public policy

Issues to be addressed

Constitutionality-
Would such prohibition be constitutional?

Public Policy -
If constitutional, should this activity be prohibited for public policy reasons?

Legal Parenthood -
If prohibit this conduct, what provisions, if any, should there be in the law regarding legal parenthood to cover those cases where surrogacy is undertaken in violation of the law?
If declare surrogate contracts unenforceable, what provisions, if any, should there be in the law regarding legal parenthood to cover those cases where surrogate contracts are entered into and the surrogate mother declines to give up the child born of the contract?

Penalty
If criminalize this conduct, what should be the penalty? (misdemeanor or felony? maximum term of imprisonment, fine?)
Should there be a greater penalty under certain circumstances (ex., where surrogate mother is a minor) or for certain activity (ex., applicable to a person or entity that accepts money for arranging surrogacy)?

Views of the experts

Holman - are not sufficient reasons to recommend legal prohibition of surrogacy arrangements at this time; need more data; if surrogacy is pursued, however, it should be pursued as a clinical experiment or under strict regulation

Bartlett - believes it may be unconstitutional to prohibit surrogacy entirely but that it would not be unconstitutional to prohibit the exchange of money under such arrangements - does not favor criminalization of this activity and believes it would be bad policy to do this - does not believe the parties to a surrogate contract have a constitutional right to have that contract enforced in state courts (i.e., would be constitutional to declare such contracts void and unenforceable)

Diosegy - does not favor this approach (either criminalizing the conduct or declaring the contracts unenforceable)

Regulatory Approach

Issues to be addressed

Constitutionality

Would this approach be constitutional? (i.e., Is there a compelling state interest that necessitates such regulation?)

Eligibility

Should the State restrict who may enter into surrogacy arrangements? If so, who should be permitted to enter into such arrangements? (i.e., Should use of surrogacy be limited to couples where the wife is infertile or where such arrangement is "medically necessary" in order for the couple to have a child genetically related to one of them?)

Should the State restrict who may be a surrogate mother? If so, who should be permitted to be a surrogate mother? (age requirements? only women who have borne children before? Should there be a limit on how many times a woman may be a surrogate?)

Medical/Psychological Screening

What type of screening, if any, should participants in surrogacy arrangements have to undergo?

Specifically, should there be a provision for health screening of the surrogate mother and the intended parents particularly for genetically and sexually transmitted diseases?

Should the participants be required to undergo mental health screening and counseling before entering into the arrangement?

Written Contract

Should the participants be required to put their agreement into writing?

Court Involvement/Approval

Should judicial approval of the agreement prior to insemination be required?

Should the courts have continuing jurisdiction over the matter until the surrogacy process is completed?

Should any compensation paid under the arrangement be subject to court approval?

Should it be required that a court determine that the custody arrangement agreed to by the parties is in the best interests of the child?

Legal Counsel/Informed Consent

Should the surrogate mother and the intended parents be required to have independent legal counsel? Should the surrogate mother be permitted to waive her right to an attorney?

Are any other safeguards necessary to ensure that the participants have given voluntary informed consent to the agreement?

Establishment of Paternity

Should it be required that medical tests be done on the child to establish the paternity of the assumed biological father prior to the adoption? If it is established that someone

other than the intended father is the biological father of the child, should the surrogate mother be required to keep the child?

Birth Defects

Should the intended parents be required to assume all parental rights and responsibilities relating to the child regardless of whether the child is born with any physical or mental impairment? Should the parties be free to contract otherwise? What if the impairment resulted from the surrogate mother's failure to abide by a condition of the agreement?

Compensation

What compensation, if any, may be paid to surrogate mothers as a part of the agreement? (Compensation for medical and maternity expenses? attorney's fees? lost income? any payments in excess of actual expenses?)

Should payments to a third party agency, individual, corporation, or other entity for fees in connection with surrogate contracts be permitted?

Revocation of Consent

Should the surrogate mother be permitted to revoke her consent to relinquish her parental rights within a certain period of time after the child is born? If so, what should that period of time be?

Legal Parenthood

Should the husband and wife who are the intended parents be recognized as the legal parents of the child upon the birth of the child? Should the surrogate mother's parental rights be terminated?

Health Care Decisions During Pregnancy

Should the surrogate mother have the right to make all health care decisions relating to her pregnancy including whether or not to abort?

If the surrogate mother does not abide by reasonable medical instructions, may the intended parents declare the contract null and void?

Insurance

Should any or all of the participants be required to purchase health and/or life insurance policies for an agreed to period of time and amount?

Remedies

Should surrender of the child be enforceable through the remedy of specific performance?

Penalties

Should there be penalties for violating the surrogacy law? If so, what should that penalty be?

Disclosure of Information to Child

Should the child born of the surrogacy arrangement be permitted access at any point to any information about his biological mother or the arrangement under which he was born?

Record Keeping

Should there be a mandatory record keeping system in the State for all surrogate arrangements?

Views of the experts

Holman - indicated he believes strict regulation is appropriate

Bartlett - believes it would certainly be constitutional for the State to regulate the terms under which these arrangements take place, including whether compensation should be allowed - also said it would be constitutional to make surrogate contracts enforceable but that a lot of law would have to be changed to do this - believes surrogate contracts should not be enforceable as to custody of the child and that the surrogate mother should be allowed a certain period of time after the birth of the child in which to revoke her consent to relinquish her parental rights

Diosegy - favors this approach - advocates a regulatory scheme to enforce surrogate contracts with the final custody determination to be monitored by and subject to the approval of the courts - said that these contracts should be permitted but only under the supervision and control of the courts

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REPLY TO: DURHAM

TO: Adoptions/Surrogate Parenthood Study Commission

FROM: Arlene J. Diosegy
Faison & Brown
Durham, North Carolina 27705

DATE: April 5, 1988

Good morning! I have been asked to prepare an overview of the legal issues in surrogate parenthood contracts. Specifically, I will address the Baby M case, current North Carolina statutes, and proposed approaches to this issue, including a brief summary of constitutional concerns.

I. The Baby M Case

A. Court's Conclusions:

1. The surrogate contract was invalidated because it violated the current law and public policy in New Jersey.

2. Payment of money to the surrogate mother was illegal, and perhaps criminal.

3. Custody of the child was awarded to the natural father (Mr. Stern).

4. The termination of the surrogate mother's parental rights (Mrs. Mary Beth Whitehead-Gould) granted by the trial court was reversed.

5. The adoption of the child by the wife/step-parent (Mrs. Stern) ordered by the trial court was reversed.

6. There is no offense to present laws when a woman voluntarily and without payment agrees to act as a surrogate mother, provided she is not subject to a binding agreement to surrender her child.

7. The court acknowledged that the legislature could alter the present statutory scheme, within constitutional limits, to permit surrogate contracts.

B. Court's Reasoning

1. Surrogate contract conflicts with statutory provisions of:

   a. Laws prohibiting the use of money in connection with adoption;

   b. Laws providing proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted;

   c. Laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

2. Public policy considerations

   a. Basic premise of surrogate contract - that is, that the natural parents can decide in advance of a child's birth which one is to have custody of the child - does not comport with the current laws in New Jersey.

   b. Current policy in New Jersey is that to the extent possible, children remain with and be brought up by both of the natural parents. This policy is violated when one of the natural parents is more equal than the other concerning custody of the child.

3. The contract's development

   a. The court was concerned that Mrs. Whitehead-Gould was not properly counseled regarding her legal rights or the impact of the contract on her legal rights.

b. Neither was Mrs. Whitehead-Gould psychologically evaluated to determine whether or not she would change her mind about giving up the child after birth.

c. Thus, because of a. and b. above, the court concluded that Mrs. Whitehead-Gould never made a voluntary and informal decision prior to the baby's birth about giving up the baby. [Query: If she had made a voluntary and informal decision, would this have had any impact on the court's decision?]

d. The court also discussed that the Sterns were not properly evaluated as the proper subjects for custodial parents.

4. Constitutional issues

a. Both parties argued that the same constitutional issues: the right to privacy, the right to procreate, the right to the companionship of one's child - all flowing from the 14th Amendment, or by its incorporation of the Bill of Rights, or from the 9th Amendment, or through the penumbra surrounding the Bill of Rights.

b. Because the court voided the contract on statutory grounds, it did not reach, or rule on, any constitutional issue.

III. North Carolina Statutory Issues

A. Regulatory Approach

1. Chapter 48 (Adoptions)

a. Clarify that surrogate contracts will or will not automatically control the relinquishment of parental rights.

b. That surrogate parenting contracts will be (or not be) enforceable in an adoption action.

2. N.C.G.S. Section 48-11(a)

a. Consent to adoption by the natural mother can be revoked within a prescribed period, or cannot be revoked.

3. Chapter 50 (Custody)

a. A new section would be added to require a court approve the custody of a child born of a surrogacy arrangement, and that the surrogate contract was not binding on the court. You could decide to give the surrogate contract a presumption of validity, however.

4. N.C.G.S. Section 7A-289.32

a. This statute would need to be amended to permit the rights of the surrogate's spouse to be terminated.

b. Issue - Can the rights be terminated solely on the basis of the surrogate contract, or would there be some other showing required?

5. N.C.G.S. Section Section 48-37

a. This section would need revision to clarify that its provisions, prohibiting payment for the adoption of a child, are not applicable to surrogate parenting contracts.

b. Also, if you choose the regulatory approach, you may permit monies paid pursuant to the surrogate contract to be recoverable from the surrogate, if she agrees not to perform the contract.

6. N.C.G.S. Section 49A-1

a. This will need to be amended to permit the spouse of the surrogate to consent to insemination of his wife even after the birth of the child.

B. Prohibitory Approach

1. You can choose to criminalize any participation in surrogate parenting contracts. This is not a favored approach, and may not pass constitutional muster.

2. You can choose to void and deem unlawful surrogate arrangements, and specifically prohibit their enforcement. It is arguable (and reasonable minds may differ) that prohibition of surrogate contracts where

there is no exchange of money violates any law or constitutional right. In fact, where there is an exchange of money, legal arguments exist that these arrangements can be lawful.

Please feel free to contact me if you have any questions.

AJD/lmy
firm.02.77.67

APPENDIX L

North Carolina Department of Human Resources
Division of Social Services
325 North Salisbury Street • Raleigh, North Carolina 27611

James G. Martin, Governor
David T. Flaherty, Secretary

Mary K. Deyampert, Director
(919) 733-3055

MEMORANDUM

TO: Senator Mary P. Seymour and Representative Edith Lutz
Co-Chairmen
Adoptions/Surrogate Parenthood Study Commission

THROUGH: Glenn Cobb, Director
Office of Boards, Commissions and Legislative Affairs
Department of Human Resources

FROM: Mary K. Deyampert, Director
Division of Social Services

You have asked that the Department of Human Resources, Division of Social Services, respond to several issues being deliberated by the Study Commission. I am attaching the Division's input on these issues and forwarding to you as requested.

SG:md

Attachment

RESPONSE BY DSS/DHR TO POSSIBLE ISSUES TO ADDRESS IN CONSIDERING THE ESTABLISHMENT OF A MUTUAL CONSENT VOLUNTARY ADOPTION REGISTRY

(1a) Should the registry be an active (search and consent type) or a passive one?

We recommend that the registry be an "active" one, with provisions for a search to be made if an inquiry is received and consent for contact is not on file in the registry.

(1b) If active: Who should actually do the searching on behalf of the entity operating the registry?

Staff attached to the registry should be authorized to conduct the search.

(1c) Should there be a time limit within which the search is to be conducted? If so, what should that time limit be?

There should be a time limit within which the search is to be conducted. We recommend that the Commission review time limits established by states having active mutual consent registries and make its decision based on the experiences of some of those states.

(1d) Should identifying information be disclosed only if the express consent of both the adoptee and his biological parent (or parents) is obtained, or may the information be disclosed if the entity conducting the search can't locate or gets no response from the party to the adoption it is trying to locate?

We think that identifying information should be disclosed only if the consent of both the adoptee and his biological parent is obtained; such information should not be disclosed if the entity conducting the search cannot locate or gets no response from the person it is trying to locate, and there is no consent on file.

(2) What entity or entities should operate the registry? DHR? DHR and licensed child-placing agencies? a non-profit corporation especially created to operate the registry?

We recommend that the DHR and licensed private child-placing agencies operate the registry, with the DHR being the central point of intake for all inquiries. For adoptees placed by licensed private agencies, the inquiries would be referred to the placing agencies for actual search to be undertaken. If consents were obtained, the private agency would contact the inquirer and offer additional assistance. If consents were not obtained, the private agency would notify the DHR registry which, in turn, would notify the inquirer.

(3) At what age should adoptees be permitted access to identifying information through the registry?

We think that adoptees should be permitted access to identifying information through the registry at at least eighteen years of age.

(4) **Should the adoptee's siblings be permitted to use the registry? If so, what limitations, if any, should be put on their use of the registry? (for ex., age limitation)**

Yes, we think that siblings should be permitted to use the registry. Both the sibling(s) wanting information and the sibling(s) being sought should be at least 18 years of age. Consents would need to be obtained before identifying information could be divulged.

(5) **Should the involvement or consent of the adoptive parents be required before identifying information is disclosed?**

No

(6) **Should the parties to the adoption be required to undergo counseling as a condition to the release of identifying information? Or should counseling simply be recommended for the parties? How much counseling should be recommended or required? Who should do the counseling?**

We think that counseling should be available, but not required. We think that counseling should be provided by DHR registry staff or licensed private child-placing agency staff, depending on when need for counseling is identified.

(7) **Should the consent of the adoptee's biological father be required before identifying information is disclosed? May the biological father also use the registry to obtain identifying information? If so, should his use be contingent on his past acknowledgment of his paternity?**

We think that, for the adoptee to obtain identifying information about the biological father, his paternity must have been firmly established and his consent obtained. If the biological father's paternity has been firmly established, he should be able to use the registry to obtain identifying information; otherwise, this should not be available to him.

(8) **Should user fees be charged to help cover the costs of operating the registry? If so, any idea as to how much the user fee should be?**

We think that there should be user fees to help cover the costs of operating the registry. We suggest that the Commission look to other states that have provisions for "user" fees to determine an appropriate amount for North Carolina.

(9) **If DHR operates the registry, how much funding and additional staff would the Department need to carry out this function?**

For the DHR to operate the registry, we think that initially, two Program Consultant II positions and one clerical position would be needed. A broad estimate for first year's operating expenses would be between $100,000 - $125,000.

(10) May identifying information still be disclosed through the registry even if one or more of the parties to the adoption is deceased?

Yes, we think that identifying information should be disclosed through the registry if the person inquired about is deceased.

(11) What provision should be included in the law establishing the registry regarding revocation of consent?

We think the law should provide for revocation of consent at any time.

(12) Who should do the re-write of Chapter 48 of the General Statutes?

We think that an independent group, perhaps one appointed by the General Assembly or this Study Commission, should conduct the re-write of Chapter 48. We, the Division of Social Services, would want to have input but not to be the creator of the re-write committee or to have the committee under the jurisdiction of the DHR. Legislative recommendations of the committee should be introduced independent of the DHR.

THE NATIONAL CONFERENCE OF STATE LEGISLATURES
1050 17TH STREET
DENVER, COLORADO 80265

July 19, 1988

CONTACT: MARILYN ADAMS
303/623-7800

BILL INTRODUCTIONS IN 1988 LEGISLATIVE SESSIONS RELATING TO SURROGACY CONTRACTS

During the 1987 legislative sessions, approximately 72 surrogacy bills were introduced in 26 states and the District of Columbia. The bills fall generally into three separate categories: (1) bills that would regulate surrogate contracts, establish standards or make specific provisions for these contracts; (2) bills that would prohibit surrogacy contracts or declare such contracts unenforceable or to be contrary to public policy and null and void; and (3) bills which would establish a task force, interim study committee, joint legislative committee, or commission to study the issue of surrogate parenthood. Several states introduced legislation in more than one category.

In the 1987 sessions, 13 states and the District of Columbia introduced 26 bills that would regulate surrogacy contracts, and 17 states introduced 25 bills that would prohibit surrogacy contracts or declare such contracts null, void and contrary to public policy. Fifteen states also introduced 21 bills to set up study commissions or task forces to study the issues surrounding surrogate motherhood.

During the 1987 sessions, no legislation was enacted to regulate surrogacy contracts. Although Arkansas' bill passed both house of the Assembly, the Governor vetoed the legislation because it did not provide for a court hearing on the contract. Nevada also passed legislation to amend its adoption statutes. This legislation does not specifically address the issue of regulation of surrogacy contracts or make provisions for those contracts, but it does include a reference to "lawful surrogate contracts," and some analysts have interpreted this statute as permitting surrogacy arrangements. Louisiana passed a law which declares surrogacy contracts null, void, unenforceable, and contrary to public policy. This law, however, does not provide for penalties for violation. In addition, Delaware, Indiana, Louisiana, North Carolina, Rhode Island, and Texas established special commissions to study surrogate motherhood.

Again in 1988, surrogate parenting bills have been introduced in a number of state legislatures throughout the country. As of July 8, 16 states have introduced 22 bills to regulate surrogacy; 18 states have introduced, or carried forward from 1987, 30 bills to prohibit these contracts; and eight states would establish study committees. Of these legislative initiatives, none has passed which would regulate surrogacy contracts.

During the 1988 legislative sessions, several states have passed legislation that provides that surrogacy contracts are contrary to public policy and void.

Following the "Baby M" decision by the New Jersey Supreme Court, the legislation passed during the 1988 sessions focuses on the issue of compensation to the surrogate mothers and to third party surrogate brokers, to make such compensation unlawful.

Florida's new preplanned adoption law provides penalties for violation of its provisions, making the violations a felony of the third degree with penalities of imprisonment of up to five years and/or a fine not to exceed $5,000. The Florida bill does not completely prohibit informal surrogacy arrangements, but it does provide that contracts for surrogate parenthood arrangements involving compensation to any party (over and above actual costs and fees for adoption) for the purchase, sale, or transfer of custody or parental rights in connection with any child, or in connection with any fetus yet unborn, are void and unenforceable; however, if a a preplanned adoption arrangement is entered into, it must be based upon an agreement containing certain minimum terms. While the contract is not enforceable, the agreement will provide evidence of the parties' intent. Under Florida's new law, surrogate arrangements are defined as "pre-planned adoption arrangements" and the rights of the parties are to be decided pursuant to the Florida Adoption code.

In March of this year, Indiana passed a law declaring any surrogacy agreement involving compensation to be unlawful, including verbal and unwritten agreements. Any existing surrogacy contract involving compensation over and above actual medical expenses of the surrogate mother is now unenforceable in any court in Indiana. If payment of fees are involved, then violation of the new surrogacy law is a Class D felony punishable by up to two years imprisonment and/or a $10,000 fine. Penalties for violations are set under the child selling statutes. In Indiana, preplanned adoptions are also unlawful and adoption agreements may only be made after the birth of the child. The surrogacy law does not prohibit surrogacy itself but makes contracts involving compensation void and unenforceable in the Indiana courts.

Kentucky also enacted a law making contracts providing for compensation for surrogate mothers and surrogate brokers prohibited and unenforceable. However, according to a spokesperson in the legislative office, if there is no compensation to any party, and no written contract, but simply a verbal agreement, then the surrogacy arrangement would seem to be permitted. Kentucky's surrogacy statute amends KRS 199.590, but penalties for violation are provided in KRS 199.990 under the child selling statutes. Penalties for violations are set at not less than a $500, or more than a $2,000, fine and/or six months imprisonment, or both.

Michigan's surrogacy bill was signed into law on June 27, 1988. This new law makes it a crime to enter into, or assist in the formation of, a surrogate parentage contract for compensation. The law provides penalties for violations of up to five years imprisonment and a maximum $50,000 fine for persons acting as surrogate brokers. It also provides for misdemeanor penalties of a fine of not more than $10,000 or imprisonment for not more than one year, or both, for anyone who engages in a surrogacy contract involving any compensation over and above the actual medical expenses of a surrogate mother or surrogate carrier.

Nebraska's surrogacy law enacted in February of this year, makes surrogate parenthood contracts void and unenforceable if compensation is involved. Surrogate parenthood contracts are defined as those contracts whereby a woman is compensated for bearing a child of a man who is not her husband. However,

the bill does not provide for penalties for violation, and the law does not prohibit surrogacy contracts that do not involve compensation. It does, however, act as a barrier to court enforcement of the provisions of contracts involving compensation should a dispute arise among the parties to the contract. The law does not prohibit the practice of surrogacy itself, and does not provide for a penalty for entering into a surrogacy contract if there is no compensation to any of the parties involved.

In the following summary, bills that have been signed into law, and study resolutions adopted, are indicated by an asterisk (*). The status indicated is based on the latest information available from the bill tracking service (State Net) as of July 8, 1988.

(1) Bills that would regulate contracts:

AZ S-1378 Brewer. (602/255-4136) Includes in articles on adoption various definitions relating to surrogate-parent agreements, and laws on central adoption registry, petition for custody by spouse of natural parent and money paid in connection with adoption. 2/9/88: To Senate Committee on Health and Welfare, then to Committee on Judiciary. 4/14/88: From Joint Committee on Judiciary: Reported favorably.

CT H-6109 Committee on Judiciary. Concerns surrogate parenthood. 3/15/88: Introduced. To Joint Committee on Judiciary.

FL S-29 Frank. (904-487-5075) Creates Surrogate Parenthood Act. Prohibits contracting, procuring, inducing or agreeing to surrogate parenthood arrangement, except as specified. Requires written contract and specifies contract provisions, including provisions for establishing parental rights and responsibility for child support. Restricts certain intestate inheritance. Declares certain contracts void. Prohibits certain implantations of human egg. Provides criminal penalties. 4/5/88: Introduced. To Senate Committee on Judiciary-Civil, then to Senate Committee on Judiciary-Criminal. Died in committee. (See S-9 in section on prohibiting surrogacy contracts.)

GA S-493 Barnes. (404/656-5040) Relates to the parent and child relationship generally, so as to regulate surrogate parenting and the rights, responsibilities, and agreements relating thereto. 1/25/88: Introduced. To Senate Committee on Children and Youth. 2/12/88: Failed to pass Senate.

IA H-2052 Teaford. (515/281-3221) Regulates the practice of surrogate parenting. 1/18/88: Introduced. To House Committee on Human Resources.

IA H-2279 Hammond. (515/281-3221) Regulates the practice of surrogate parenting. 2/19/88: Introduced. To House Committee on Human Resources.

IA SCR-120 Committee on Human Resources. Relates to new reproduction technologies. 3/3/88: Introduced.

IN H-1140 Bayliff. (317/232-9600) Regulates aided conception and reproductive service agreements. Provides for criminal penalties for noncompliance with statutory requirements. Changes references to natural parent, biological parent, and adoptive parent to parent. 1/6/88: Introduced. To House Committee on Judiciary.

MA S-717 Bertanazzi. (617/722-1420) Relates to surrogate motherhood. 1/6/88: Introduced. To Joint Committee on the Judiciary. 5/16/88: Failed to pass Senate.

MD H-649 Athey. (301/858-3469) Sanctions surrogate mother agreements under specified circumstances. Exempts surrogate mother agreements from designated legal presumptions of paternity. Prohibits agreements that do not comply with the Act. Requires agreements to include specified provisions. Establishes parental obligations of a surrogate, a birth father and the spouse of a birth father. Requires the surrogate's written consent relinquishing parental rights. Requires the agreement to be filed with the birth certificate. 1/29/88: Introduced. To House Committee on Judiciary. 3/21/88: From House Committee on Judiciary: Reported unfavorably.

MD S-436 Hoffman. (301/858-3648) Relates to surrogate motherhood; permits an interested party in an adoption matter to pay reasonable expenses associated with the pregnancy of a natural mother if authorized by the court for good cause shown; and requires that the expenses be certified. 3/4/88: To House. To House Committee on Judiciary.

MI H-5725 Honigman. (517/373-1799) Eliminates adoption consent in certain circumstances if paternity has been acknowledged. 6/2/88: Introduced. To House Committee on Judiciary.

MO H-1561 Shear. (314/751-4163) Enacts the "Surrogate Parenting Act." 1/26/88: To House Committee on Judiciary.

NH H-1108 M. Jones. (603/271-2548) Requires probate court approval of surrogate parenting arrangements. 1/6/88: Introduced. To House Committee on Judiciary. 2/17/88: To Interim Study.

NH H-1139 Price. (603/271-2548) Relates to surrogate parenting agreements. 1/6/88: Introduced. To House Committee on Judiciary.

NJ A-593 Haytaian. (609/292-4840) Amends various fees charged by surrogates. 2/1/88: From Assembly Committee on County Governing and Regional Authorities.

NJ A-956 Kern. (609/292-4840) Provides requirements for surrogate parenthood contracts. 1/12/88: Introduced. To Assembly Committee on Judiciary.

NJ S-2468 Costa. (609/292-4840) Provides requirements for surrogate gestation contracts. 5/2/88: Introduced. To Senate Committee on Judiciary.

NY A-5529 Schmidt. (518/455-5668) Prohibits any consideration for a surrogate parenting agreement but permits payments by the intended parents of all reasonable, actual and necessary expenses of the surrogate mother rendered in connection with the birth of the child or incurred as a result of her pregnancy. 1/20/88: Amended on Assembly floor. Recommitted to Assembly Committee on Judiciary.

VT H-549 Fortna. (802/828-2247) Relates to surrogate parenting. 1/5/88: Introduced. To House Committee on Judiciary.

WA H-1529 Braddock. (206-786-7980) Relates to becoming parents. 1/20/88: Introduced. To House Committee on Health Care.

WI A-827 Magnuson. (608/266-5342) Establishes laws on surrogate parenting. 1/14/88: Introduced. To Assembly Committee on Children and Human Services.

(2) Bills that would prohibit surrogacy contracts:

AL H-172 McKee. (205/261-7707) Provides that a contract for surrogate motherhood shall be absolutely null, void, and unenforceable as contrary to public policy. 3/22/88: From Senate Committee on Health: Reported favorably.

AL S-664 Sanders. (205/261-7800) Provides that a contract for surrogate motherhood shall be absolutely null, void, and unenforceable as contrary to public policy. 4/11/88: Introduced. To Senate Committee on Judiciary.

CA A-2403 Longshore. (916/445-7333) Specifies that a biological parent may not voluntarily relinquish the custody and control of his or her child except pursuant to specified procedures for adoption or for the establishment of a guardianship or conservatorship. 1/30/88: From Assembly Committee on Judiciary: Filed with Chief Clerk pursuant to Joint Rule 56. Died.

CA A-2404 Longshore. (916/445-7333) Relates to certain contracts which are contrary to public policy and are void. Includes among those categories of contracts those whereby a woman receives consideration for an agreement to undergo specified prenatal diagnostic testing or procedures for other than stated purposes and those whereby a woman receives consideration for an agreement to abort, or consent to the abortion of, her child. 1/30/88: From Assembly Committee on Judiciary: Filed with Chief Clerk pursuant to Joint Rule 56. Died.

CA A-3200 Mojonnier. (916/445-2112) Provides for criminal sanctions for specified actions relating to contracts to bear a child. Fiscal impact. 2/18/88: To Assembly Committee on Judiciary. 5/12/88: In Assembly. Read third time and amended. Returned to third reading. 6/2/88: To Senate Committee on Judiciary. 6/30/88: From Senate Committee on Judiciary with author's amendments. Read second time and amended. Rereferred to committee. 6/30/88: In Senate Judiciary Committee.

CA S-2635 Watson. (916/445-5965) Expresses the intent of the Legislature with regards to providing certainty of the parent and child relationship; provides that it is a misdemeanor for any person or agency to offer to pay money or anything of value for a woman to conceive a child for a husband and wife, thereby imposing a new crime. Fiscal impact. 4/4/88: From Senate Committee on Judiciary with author's amendments. Read second time and amended. Re-referred to Committee. 4/14/88: In Senate. Joint Rule 61(b)(5) suspended.

FL H-747 Canady. (904/488-9890) Defines the term "mother" for purposes of the Florida Adoption Act; prohibits contracts for the transfer of parental rights in connection with any child, in return for consideration. 4/5/88: Introduced. To House Committee on Judiciary.

FL H-1633 Committee on Judiciary. Relates to preplanned adoption arrangements. Provides that contracts for the purchase, sale, or transfer of custody or parental rights in connection with a child intended to be born of a proposed pregnancy is unlawful. Provides penalties. Provides that parties may enter into a preplanned adoption arrangement and that the arrangement

shall be based upon a nonbinding preplanned adoption agreement which shall contain certain terms. 5/6/88 Introduced.

FL S-9* Same as H-1633. (See also S-29 in previous section.) Relates to preplanned adoption arrangements. Provides that contracts for the purchase, sale, or transfer of custody or parental rights in connection with a child intended to be born of a proposed pregnancy is unlawful. Provides penalties. Provides that parties may enter into a preplanned adoption arrangement and that the arrangement shall be based upon a nonbinding preplanned adoption agreement which shall contain certain terms. 7/1/88: Signed by Governor.

GA S-421 Kidd. (404/656-5040) Relates to unlawful advertisements and inducements with respect to adoptions, so as to authorize the payment of lost wages or living expenses of an expectant mother during a certain period of pregnancy. 1/29/88: To House. To House Committee on Judiciary.

IN S-98* Johnson. (317/232-9400) Establishes a moratorium on the civil enforcement of various provisions of a surrogate agreement. Provides that evidence of a surrogate agreement may not be considered by a court to decide an issue concerning child custody, child visitation, child support, or other related issues absent fraud, duress, or misrepresentation, urges the legislative council to establish a study committee to study aided conception. 1/29/88 To House. To House Committee on Judiciary. 3/5/88: To Governor. Signed by Governor. Title 31, Article 8.

KS S-620 Winter. (913/296-7364) Renders void and unenforceable agreements for services of a surrogate mother for consideration; renders void agreements for services of surrogate mother without consideration. 3/3/88: Re-referred to Senate Committee on Judiciary.

KY BR-219 S-4* Travis. (502/564-8100) Prohibits contracts which would compensate a women for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination; makes void any contracts entered into in violation of such provisions. 3/18/87: Prefiled for 1988. 1/5/88: Introduced. To Senate Committee on Judiciary-Civil. 3/11/88: Signed by Governor. Acts. Chapter 52.

MD H-1479 Kreamer. (301/858-3289) Establishes that a surrogate mother agreement requiring exchange of consideration is void and against public policy; prohibits a person from procuring, acting as agent for, facilitating or assisting in the carrying out of such an agreement for consideration; authorizes the sister-in-law of a birth father to act as a surrogate mother and accept reasonable compensation for expenses; prohibits court enforcement of oral or written surrogate mother agreements. 3/21/88: From House Committee on Judiciary: Reported unfavorably.

MD S-795 Stone. (301/858-3587) Prohibits a person from being a party to an agreement in which a woman agrees to conceive a child through artificial insemination and agrees voluntarily to relinquish her parental rights; provides a misdemeanor penalty of a fine or up to $10,000, imprisonment of up to one year or both. 3/25/88: To House Committee on Judiciary.

MI S-228* Binsfeld (517/373-2413) Establishes surrogate parentage contracts as contrary to public policy and void; prohibits surrogate parentage contracts for compensation; provides for children conceived, gestated, and born pursuant

to a surrogate parentage contract; sets penalties; provides that surrogate and husband are legal parents. 6/9/88: Passed House. 6/9/88: To Governor for signature. 6/27/88: Signed by Governor. Public Act 199 of 1988.

MN H-1701 Rest. (612/296-4176) Makes surrogate mother agreements void and unenforceable as contrary to public policy. Prohibits advertising for persons to act as surrogate mothers and procuring or inducing formation of surrogate mother agreements. 10/12/87: Prefiled. 3/14/88: From House Committee on Judiciary: Do pass as amended.

MN S-1660 Brandl. (612/296-4837) Prohibits surrogate mother contracts and related activities. 2/11/88: Introduced. To Senate Committee on Judiciary.

MS S-2157 Miller. (601/359-3770) Provides that contracts for surrogate motherhood shall be absolutely null, void and unenforceable as contrary to public policy, and to define contracts for surrogate motherhood. 1/19/88: Introduced. To Senate Committee on Judiciary. 3/21/88: To House Committee on Judiciary A. 4/13/88: Rereferred to House Committee on Judiciary A.

NE LB-674* Chambers. (402/471-2612) Relates to surrogate parenthood contracts; to declare such contracts void and to provide rights and obligations; and to define a term. 1/22/88: Amended on Legislative floor. 2/10/88: Signed by Governor. LB-674.

NH S-281 Hounsell. (603/271-3420) Prohibits surrogate parenting. 1/26/88: From Senate Committee on Judiciary: Refer to Interim Study. To Interim Study.

NJ A-13 Kavanaugh. (602/292-4840) Prohibits surrogate parenting agreements for consideration as a crime of the third degree. 1/13/88: Introduced. To Assembly Committee on Judiciary.

NY A-10851 Weinstein. (518/455-5462) Declares surrogate parenting contracts void and unenforceable. Prohitits compensation in connection with such contracts except for certain medcical and legal fees. Provides for certain rights of birth mothers in legal proceedingts. 5/14/88: Introduced. To Assembly Committee on Judiciary.

NY A-8852 Proud. (518/455-4527) Prohibits the practice of surrogate motherhood, whether accomplished by artificial insemination or in vitro fertilization wherein the surrogate mother agrees to surrender the child, regardless of consideration or the lack of it. 1/28/88: Introduced. To Assembly Committee on Judiciary.

NY A-9882 Faso. (518/455-5314) Declares surrogate parenting to be against public policy and makes any agreement or contract providing therefore void and unenforceable. 3/16/88: Introduced. To Assembly Committee on Judiciary.

NY A-11607 Committee on Rules. Defines "surrogate parenting contract" and prohibits its formation. Penalizes violations for arranging or assisting in the formation of such contracts. Makes such contracts void as contrary to public policy. 5/26/88: Introduced. To Assembly Committee on Judiciary.

NY S-6891 Marchi. (518/455-3215) Prohibits the practice of surrogate motherhood, whether accomplished by artifical insemination or in vitro

fertilization wherein the surrogate mother agrees to surrender the child. 2/2/88: Introduced. To Senate Committee on Judiciary.

UT H-201 Atkinson. (801/533-5801) Relates to surrogate parenthood; provides that specified contracts for surrogate parenthood arrangements are null and void; provides a criminal penalty for violation. 1/22/88: Introduced. 2/16/88: Amended on House floor. Failed to pass House.

VA H-237 Melvin. (804/786-6888) Makes contracts for surrogate motherhood unenforceable. 1/21/88: From House Committee on Health, Welfare and Institutions: Reported favorably. To House Committee on Courts of Justice. 3/18/88: Carried over to 1989. In House Committee on Courts of Justice.

WA H-2030 Padden. (206/786-7984) Prohibits surrogate parenting. Nullifies and voids surrogate parenting contracts, written or unwritten and as defined, whether with or without valuable consideration. 2/8/88: Introduced. To House Committee on Health Care.

(3) Bills that would establish a study commission or task force:

MA H-2712 Bartley. (717/722-2356) Provides for an investigation and study by a special commission relative to the need to regulate contracting for surrogate parenthood. 2/2/88: Introduced. To Joint Committee on Judiciary. 5/12/88: From Joint Committee on Judiciary with S-1706.

MA H-1146 Clapprood. (617/722-2356) Provides for an investigation and study by a special commission relative to the need to regulate contracting for surrogate parenthood. 1/22/88: Introduced. To Joint Committee on Judiciary. 5/12/88: From Joint Committee on Judiciary with S-1706.

NC S-1583 Rand. Extends the life of the adoptions and surrogate parenthood study commission and to make an additional appropriation therfor. 6/8/88: Introduced. To Senate Committee on Appropriations

NH H-751 Green. (603/271-2548) Relates to surrogate parenting contracts. 2/17/88: To Interim Study.

NH H-1098* McGovern. (603/271-2548) Establishes a committee to study surrogate parenting. 1/6/88: Introduced. To House Committee on Judiciary. 2/18/88: To Senate Committee on Public Institutions, Health and Human Services. 4/27/88 Became law without Governor's signature.

NJ AJR-5 Felice. (609/292-4840)Creates a commission to study the subject of surrogate parenthood. 1/13/88: Introduced. To Assembly Committee on Judiciary.

NJ S-1242 Feldman. (609/292-4840) Creates the New Jersey Commission on Surrogate Parenthood and appropriates $90,000. 1/12/88: Introduced.

RI S-2413* Carlin. (401/277-6655) (Joint Resolution) Extends the reporting date of the special legislative commission on surrogate mother contracts. 2/24/88: To House Committee on Judiciary. 5/25/88: Became law without Governor's signature.

UT H-17* Protzman. (801/533-5801) Relates to state affairs in general. Establishes a committee to study and recommend legislation regarding surrogate

parenthood. 1/28/88: From House Committee on Health: Reported favorably. 3/14/88: To Governor. Signed by Governor. Chapter 94.

VA HJR-11 Keating. (804/786-7294) Creates a joint subcommittee to study the legal issues involved in the use of procreative technology. 1/18/88: Introduced. To House Committee on Rules.

VA HJR-65 Cohen. (804/786-7253) Establishes a joint subcommittee to study surrogate parenting. 1/25/88: Introduced. To House Committee on Rules.

VA HJR-106 Maxwell. (804/786-7192) Establishes a joint subcommittee to study surrogate motherhood. 1/26/88: Introduced. To House Committee on Rules.

VA HJR-118 Callahan. (804/786-6991) Establishes a joint subcommittee to study surrogate parenting. 1/26/88: Introduced. To House Committee on Rules. 3/3/88: House concurred with Senate amendments.

VA SJR-3 Michie. (804/786-6887) Requests a study of surrogate mothering. 1/13/88: Introduced. To Senate Committee on Rules. 3/12/88: Senate concurred in House amendments.

WI AJR-71 Tesmer. (608/266-8588) Provides for Legislative Council study of surrogate motherhood. 3/23/88: Amended on Senate floor. Passed Senate. 4/21/88: To Assembly for concurrence. Assembly concurred in Senate amendments.

Sources: State Net, A Service of IPA, Inc.
1900 - 14th Street
Sacramento, CA 95814
Updated through July 8, 1988

1987 The National Directory of State Agencies
Bethesda, Maryland 20816

APPENDIX N

TESTIMONY OF ELIJAH PETERSON
BEFORE THE NORTH CAROLINA GENERAL ASSEMBLY
ADOPTIONS/SURROGATE PARENTHOOD STUDY COMMISSION
DECEMBER 29, 1988, RALEIGH, NORTH CAROLINA

MADAM CO-CHAIRMAN AND MEMBERS OF THIS STUDY COMMISSION, I WANT TO THANK YOU FOR GIVING ME THE OPPORTUNITY TO ADDRESS YOU TODAY.

MY NAME IS ELIJAH PETERSON, I HAVE BEEN PRINCIPAL OF CAMERON MORRISON STATE TRAINING SCHOOL AND SAMARKAND MANOR STATE TRAINING SCHOOL FOR SIX YEARS. I AM CURRENTLY PRINCIPAL OF THE CORDOVA SCHOOL IN RICHMOND COUNTY. I HAVE BEEN A MEMBER OF THE GOVERNOR'S ADVOCACY COUNCIL ON CHILDREN AND YOUTH SINCE 1976. I HAVE BEEN AUTHORIZED BY THE COUNCIL TO TESTIFY BEFORE YOU TODAY.

FOR THOSE OF YOU UNFAMILIAR WITH THE GOVERNOR'S ADVOCACY COUNCIL ON CHILDREN AND YOUTH (GACCY), WE ARE A 17-MEMBER COUNCIL ESTABLISHED IN 1971, APPOINTED BY THE GOVERNOR, THE LT. GOVERNOR, AND THE SPEAKER OF THE HOUSE TO, AMONG OTHER THINGS, ACT AS AN ADVOCATE OF CHILDREN AND YOUTH IN STATE AND LOCAL GOVERNMENTS, AND RECOMMEND IMPROVEMENTS IN EXISTING PROGRAMS (SEE BROCHURE).

THE IMPETUS FOR MY TESTIMONY TODAY COMES FROM A LETTER WE RECEIVED FROM CINDY LOVALD, A MINNESOTA FOSTER MOTHER WHO CURRENTLY HAS A SIBLING GROUP OF FIVE SPECIAL NEEDS FOSTER CHILDREN FROM NORTH CAROLINA IN ADOPTIVE PLACEMENT. I BELIEVE YOU ALSO RECEIVED A LETTER FROM MS. LOVALD BACK IN APRIL OF THIS YEAR.

LADIES AND GENTLEMEN, THE COUNCIL WISHES TO MAKE THREE RECOMMENDATIONS TO YOU TODAY:

1) WE MUST RAISE THE FOSTER CARE BOARD PAYMENT RATES PAID TO OUR FOSTER PARENTS.
2) WE MUST GRADUATE OUR FOSTER CARE BOARD PAYMENTS TO REFLECT THE RISING COST OF KEEPING AN OLDER CHILD.
3) WE MUST EQUALIZE OUR ADOPTION SUBSIDY RATE WITH OUR FOSTER CARE BOARD PAYMENT RATE AND EXTEND OUR COVERAGE FROM AGE 18 TO AGE 21.

LOW FOSTER CARE PAYMENT RATE

REGARDING OUR FIRST RECOMMENDATION, NORTH CAROLINA'S CURRENT BASIC FOSTER CARE REIMBURSEMENT RATE IS $215 PER MONTH. ACCORDING TO NATIONAL FIGURES COMPILED IN JULY, 1987 (SEE ATTACHMENT A), THIS WAS THE 11TH LOWEST IN THE NATION. THE NATIONAL AVERAGE THEN WAS $268 PER MONTH. LADIES AND GENTLEMEN, IN ORDER TO REDUCE TURNOVER IN FOSTER PARENTS AND TO LOWER THE SUBSIDY FOSTER PARENTS MUST PAY FROM THEIR OWN FUNDS TO KEEP FOSTER CHILDREN (MANY OF WHOM ARE INCREASINGLY MORE HANDICAPPED AND/OR EMOTIONALLY DISTURBED DUE TO CHILD ABUSE AND NEGLECT) THE BOARD PAYMENT SHOULD BE INCREASED TO $270 PER MONTH. THIS WOULD HELP ALLEVIATE A SITUATION WHERE FOSTER PARENTS ARE ACTUALLY SUBSIDIZING THE STATE BY PROVIDING OUT-OF-POCKET CONTRIBUTIONS FOR THE CARE FOR THE STATE'S FOSTER CHILDREN.

GRADUATED FOSTER PAYMENT RATES

OUR SECOND RECOMMENDATION IS NOT A NEW ONE. BECAUSE OF THE COSTS OF KEEPING A FOSTER CHILD VARIES GREATLY, DEPENDING ON A FOSTER CHILD'S AGE, BOARD PAYMENTS SHOULD BE GRADUATED TO REFLECT THE RISING COST OF KEEPING AN OLDER CHILD. CURRENTLY, ONLY NORTH CAROLINA, GEORGIA, AND NEBRASKA DO NOT HAVE GRADUATED PAYMENT RATES (SEE ATTACHMENT B). THIS RECOMMENDATION WAS MADE IN THE LANDMARK GACCY 1978 REPORT ON FOSTER CARE AND ADOPTION IN NORTH CAROLINA ENTITLED WHY CAN'T I HAVE A HOME? AND AGAIN IN THE 1983 GACCY FOLLOW-UP REPORT PROMISES TO KEEP. LADIES AND GENTLEMEN, IT'S TIME WE RECOGNIZE WHAT 47 OF THE 50 STATES RECOGNIZE, THAT IT COSTS MORE TO SUPPORT AN OLDER CHILD IN FOSTER CARE THAN IT DOES AN INFANT.

EQUALIZE ADOPTION SUBSIDY RATE

MY THIRD AND FINAL RECOMMENDATION IS THAT WE EQUALIZE OUR ADOPTION SUBSIDY RATE WITH OUR FOSTER CARE BOARD PAYMENT RATE AND EXTEND OUR COVERAGE FROM AGE 18 TO AGE 21. OUR CURRENT ADOPTION ASSISTANCE RATE PAID TO PEOPLE WHO ADOPT SPECIAL NEEDS CHILDREN VARIES FROM $100 TO $150 PER MONTH WITH AN AVERAGE OF $140.17 STATEWIDE. THIS IS THE LOWEST AVERAGE IN THE SOUTHEASTERN UNITED STATES (SEE ATTACHMENT C).

THIS ALSO SETS UP A SITUATION THAT MS. LOVALD IS IN, WHERE FOSTER PARENTS WHO WANT TO ADOPT SPECIAL NEEDS CHILDREN CANNOT AFFORD TO BECAUSE THIS REDUCES THE SERVICES PROVIDED TO THE CHILD. THIS IS CLEARLY A DISINCENTIVE TO ADOPT BY OUR STATE. WE SHOULD BE PROVIDING EVERY INCENTIVE POSSIBLE TO PROSPECTIVE ADOPTIVE PARENTS.

FURTHERMORE, ACCORDING TO INFORMATION FROM MS. LOVALD AND OTHER NATIONAL ADOPTION ADVOCATES, SOME FAMILIES IN OTHER STATES WILL NOT CONSIDER ADOPTING SPECIAL NEEDS FOSTER CHILDREN FROM OUR STATE BECAUSE OF OUR LOW SUBSIDY RATE.

FURTHERMORE, OUR STATE CURRENTLY ONLY PAYS ADOPTION ASSISTANCE TO AGE 18. WE COULD PAY TO AGE 21. OTHER STATES DO. MANY OF THE KIDS ARE BEHIND AND STAY IN HIGH SCHOOL OVER AGE 18. <u>WE RECOMMEND PAYING THE ADOPTION ASSISTANCE SUBSIDY TO AGE 21</u>.

COMMISSION MEMBERS, ACCORDING TO OUR STATE'S LATEST FIGURES (OCTOBER, 1988), 1,332 CHILDREN RECEIVED ADOPTION ASSISTANCE PAYMENTS. THERE ALSO 395 CHILDREN LEGALLY CLEARED FOR ADOPTION. OF THESE, 283 ARE SPECIAL NEEDS CHILDREN (SUBSIDY ELIGIBLE).

I BELIEVE, AS I'M SURE YOU DO, THAT EVERY CHILD HAS A RIGHT TO A PERMANENT HOME AND A QUALITY OF LIFE AND A FAMILY'S LOVE WHILE THEY ARE ON THIS EARTH.

LET'S REMOVE THE BARRIERS TO THAT PERMANENT HOME.

Attachment A

Basic Foster Care Reimbursement Rates

State Ranks--July 1987

1) Pennsylvania-558

2) Alaska-490

3) Massachusetts-386

4) New York-403/374

5) Ohio-180/360
Oklahoma-360

6) California-349

7) Michigan-342

8) Minnesota-315

9) Wyoming-310

10) Dist. of Col.-308

11) Connecticut-307
Montana-307

12) Georgia-300

13) Nevada-293

14) Delaware-291
Maryland-291
North Dakota-291

15) Colorado-273

16) Kentucky-270

17) New Hampshire-268

18) Maine-262

19) Illinois-258

20) Florida-253
Texas-253

21) Oregon-250
Indiana-250

22) Virginia-249

23) New Mexico-247

24) Arizona-243
Hawaii-243

25) Vermont-242

26) Rhode Island-240

27) Kansas-237

28) Louisiana-232

29) South Dakota-231

30) Guam-228

31) Washington-226

32) Wiscousin-224
New Jersey-224

33) Iowa-215
North Carolina-215

34) Nebraska-210

35) Utah-207

36) Missouri-206

37) West Virginia-202

38) Arkansas-195

39) Alabama-185

40) Tennessee-184

41) Idaho-169

42) South Carolina-168

43) Mississippi-147

United States average=$268 per month

Source - American Public Welfare Association, Washington, D.C.

Attachment B

Basic Foster Care Reimbursement Rates
State Comparisons--July 1987

STATE	Age of Child 2yr.	9yr.	16yr.
ALABAMA	$ 168	$ 188	$ 198
ALASKA	428	478	565
ARIZONA	223	223	282
ARKANSAS	175	190	220
CALIFORNIA	294	340	412
COLORADO	235	266	318
CONNECTICUT	268	302	350
DELAWARE	284	286	342
DIST. OF COL.	304	304	317
FLORIDA	233	233	293
*GEORGIA	300	300	300
GUAM	204	204	276
HAWAII	194	233	301
IDAHO	138	165	204
ILLINOIS	233	259	282
*INDIANA	226	245	280
IOWA	159	201	285
*KANSAS	187	245	280
*KENTUCKY	248	263	300
LOUISIANA	199	232	265
MAINE	244	250	291
MARYLAND	285	285	303
*MASSACHUSETTS	362	362	433
*MICHIGAN	315	315	386
MINNESOTA	285	285	375
MISSISSIPPI	130	150	160
MISSOURI	174	212	232
*MONTANA	283	283	354
NEBRASKA	210	210	210
NEVADA	275	275	330
NEW HAMPSHIRE	200	251	354
NEW JERSEY	203	215	253
NEW MEXICO	236	247	259
***NEW YORK	342/312	403/375	465/434
NORTH CAROLINA	215	215	215
NORTH DAKOTA	240	287	345
**OHIO	180/300	180/360	180/420
OKLAHOMA	300	360	420
OREGON	200	234	316
****PENNSYLVANIA	558	558	558
*RHODE ISLAND	223	223	275
SOUTH CAROLINA	138	156	208
*SOUTH DAKOTA	188	230	276
TENNESSEE	139	190	224
TEXAS	243	243	274
*UTAH	198	198	225
VERMONT	210	249	298
VIRGINIA	193	244	309
WASHINGTON	184	227	288
WEST VIRGINIA	161	202	242
WISCONSIN	163	224	284
WYOMING	300	300	330

*States establishing daily rates, daily rate was multiplied by 30 days.
**Establishes a minimum/maximum.
***First figure, for New York City only; maximum rate is shown for both figures.
****For Philadelphia only. Statewide average is estimated to be lower.

For information, contact Karen Bonner, APWA, (202) 293-7550.

Attachment C

1989 Southeastern United States

Adoption Assistance Monthly Payment Rates

1.	Kentucky	$251 - $411	Depending on Age
2.	Tennessee	$233 - $321	Depending on Age and Special Need ($1 Less Than Foster Care Board Rate)
3.	Florida	$233 - $320	Depending on Age and Special Need
4.	Mississippi	$145 - $250	Depending on Age and Special Need
5.	Georgia	$228	(75% of Foster Care Rate)
6.	South Carolina	$138 - $208	Depending on Age
	Alabama	$176 - $208	Depending on Age
7.	North Carolina	$100 - $150	

Source: North Carolina Division of Social Services