

SURROGACY AND THE NEW SCIENCE OF MOTHERHOOD

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A. Chapter Competencies

After studying chapter 16 the student should be able to:

1. define assisted reproductive technologies (ART).
2. define in vitro fertilization (IVF).
3. identify the methods of ART in addition to IVF.
4. state how different courts decide what to do with frozen embryos when the man and woman who produced them cannot agree.
5. state the two categories of surrogate mothers.
6. state the major arguments supporting surrogate contracts.
7. state the major arguments opposing surrogate contracts.
8. state how adoption laws affect surrogate agreements.
9. state how paternity laws affect surrogate agreements.
10. state how custody laws affect surrogate contracts.
11. summarize the major provisions of the Uniform Status of Children of Assisted Conception Act.
12. state how different courts determine the rights, if any, of a gestational mother regarding the child she gives birth to.

B. Genetically Unrelated “Twins”

Here is a story you should relate to the students sometime during your coverage of chapter 16:

A fertility doctor implants in a woman her own fertilized embryo and accidentally also implants the fertilized embryo of another couple. The result is the birth of genetically unrelated “twins”, one white and one black! “The woman ultimately (and very reluctantly) gave her ‘unrelated’ child back to its biological parents, after securing visitation rights.”

Dwight Garner, *Blurring the Lines*, New York Times Magazine (March 25, 2001) at 20.

C. Assignment 16.1 (frozen sperm)

George’s daughter should have no standing to ask the court to destroy the sperm. If a child was born from the sperm, the child would have a sibling with whom she might have to share some of their father George’s estate. This is hardly a reason to grant her request. There is no legal basis to destroy the sperm.

D. *Johnson v. Calvert*: Racism Charge

Anna Johnson, the birth mother, is black. Crispina Calvert, the gestational mother, is Filipino. Mark Calvert, the father, is white. The baby born from their surrogacy arrangement is white. When Anna Johnson lost the case, her attorney charged that the ruling amounted to racial and economic bias. The judge “wanted to give the white couple the white baby.”

Surrogacy Contract Enforced: California Nurse Denied Custody of Baby She Carried for Genetic Parents, 77 American Bar Association Journal 32 (1/91).

E. Assignment 16.3 (*Johnson v. Calvert*)

- a. There are three parents: the gestational father, the gestational mother, and the birth mother. A possible three parent solution would involve substantial visitation rights to the birth mother.
- c. As we saw in the Baby Richard case (*In re Petition of Doe*), the court does not want to inject the best interests standard into the case too early. Best interests of the child does not mean finding the best parents in the world for the child. The first question is: who has the legal rights of a parent in the child? Once this question is answered, *then* we inquire into the best interests of the child. If the court had determined that the gestational mother and the birth mother have equal rights to the child, *then* the best interests standard would enter the picture.
- d. If the Uniform Status of Children of Assisted Conception Act (USCACA) had been in effect, the birth mother would have won since the surrogacy agreement was not submitted to the court for approval pursuant to § 6.

Here is what the dissenting judge in the *Johnson* case said about the USCACA:

“The debate over whom the law should recognize as the legal mother of a child born of a gestational surrogacy arrangement prompted the National Conference of Commissioners on Uniform State Laws to propose the Uniform Status of Children of Assisted Conception Act. (9B West’s U. Laws Ann. (1992 Supp.) Uniform Status of Children of Assisted Conception Act (1988 Act) pp. 122–137 [hereafter also USCACA].) . . . The commissioners gave careful consideration to the competing interests of the various participants in assisted conception arrangements, and sought to accommodate those interests in the model legislation. Their overriding concern, however, was the well-being of children born of gestational surrogacy and other types of assisted conception. As the foreword to the model legislation notes, the extraordinary circumstances of these children’s births deprive them of parentage in the traditional sense. (9B West’s U. Laws Ann. (1992 Supp.) USCACA, supra, at p. 123.) Thus, the intent of the proposed legislation was to define with precision the legal status of these children as well as to codify the rights of the other participants in a surrogacy arrangement. The commissioners proposed alternative versions of the USCACA: one that would disallow gestational surrogacy and another that would permit it only under court supervision.

“In its key components, the proposed legislation provides that ‘a woman who gives birth to a child is the child’s mother’ (USCACA, § 2) unless a court has approved a surrogacy agreement before conception (USCACA, §§ 5, 6). In the absence of such court approval, any surrogacy agreement would be void. (USCACA, § 5, subd. (b).) If, however, the arrangement for gestational surrogacy has court approval, ‘the intended parents are the parents of the child.’ (USCACA, § 8, subd. (a) (1).)

“To obtain court approval, the parties to the surrogacy arrangement must file a petition. (USCACA, § 6, subd. (a).) The model legislation provides for the court to appoint a guardian ad litem for the intended child and legal counsel for the surrogate mother. (Ibid.) Before approving a surrogacy arrangement, the trial court must conduct a hearing and enter detailed findings, including the following: medical evidence shows the intended mother’s inability to bear a child or that for her to do so poses an unreasonable risk to the unborn child or to the physical or mental health of the intended mother; all parties to the surrogacy agreement (including the surrogate’s husband if she has one) meet the standards of fitness of adoptive parents; the agreement was voluntary and all parties understand its terms; the surrogate mother has undergone at least one successful pregnancy and medical evidence shows that another pregnancy will not endanger her physical or mental health or pose an unreasonable risk to the unborn child; and all parties have received professional mental health counseling pertaining to the effect of the surrogacy arrangement. (USCACA, § 6, subd. (b).) These provisions serve to minimize the potential for overreaching and to ensure that all parties to a surrogacy arrangement understand their respective roles and obligations.

“The USCACA offers predictability in delineating the parentage of children born of gestational surrogacy arrangements. Under the model legislation, if enacted, there would never be a question as to who has the legal responsibility for a child born of a gestational surrogacy arrangement: If the couple who initiated the surrogacy had complied with the provisions of the legislation, they would be the child’s legal parents. If they had not, the rights and responsibilities of parenthood would go to the woman who gave birth to the child and her spouse.

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“Because California Legislature has not enacted the Uniform Status of Children of Assisted Conception Act, its provisions were not followed in this case.”

F. Assignment 16.4(b) (lesbian couple)

- b. Beverly has the genetic link. Mary is the gestational host with no genetic link. Under the *Johnson* test, both Beverly and Mary had the intent to procreate and to raise the child. The test of the Ohio case, however (*Belsito v. Clark*) discussed in the chapter provides a clearer answer. In Ohio, genetics control. Under this test, the mother would be Beverly who provided the egg.

G. Ethics in Practice

The paralegal is engaging in insider trading. This is illegal and therefore is unethical. The paralegal could be prosecuted for a crime. The law firm where the paralegal works can be charged with an ethics violation committed by one of its employees.