



Written Testimony of Mr. Jason Adkins, Esq., Executive Director

Senate Judiciary Committee

March 21, 2013

Surrogacy Contracts: S.F. 370

Madame Chair and Members of the Committee:

The Minnesota Catholic Conference (MCC), the public policy voice of the Catholic Church in Minnesota. MCC wishes to express its strong opposition to S.F. 370 (Newman) because it essentially codifies the legitimacy of surrogacy agreements.

Many people presume that surrogacy contracts are valid contracts because they are not expressly prohibited and there is no enforcement mechanism for such a prohibition, other than what a judge may decide. But that is not the case, and this law would communicate, in an indirect way, that such agreements are, as a matter of state public policy, perfectly legitimate contracts.

According to MCC's research, there are no published, precedential cases in Minnesota establishing that surrogacy agreements are enforceable contracts that do not contradict Minnesota public policy; nor is there statutory authority for such a rule. In fact, at common law, there was no such procedure for terminating parental rights, and such procedures are purely the creation of statute. See Austin Caster, "Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality By Emulating the British Surrogacy Law Regime," 10 Conn. Pub. Int. L. J. 477, 489 (2011) (identifying Minnesota as one of "twenty-eight states that . . . fail to address surrogacy contracts through legislation at all, leaving unclear whether a court will later rule such contracts unconstitutional or against public policy based on other persuasive family law statutes").

There are many reasons why the state should expressly prohibit surrogacy contracts, particularly because they turn women and children into commodities, and deny a child's right to know and be cared for by his or her biological parents, a right, for example, that our current marriage laws uphold. Further, the statutory protections present for children in the adoption context are not currently present in surrogacy arrangements.ⁱ

The New Jersey Supreme Court expressly rejected that these contracts were enforceable in the famous *Baby M* case,ⁱⁱ which spurred the creation of a significant report on surrogacy agreements from the New Jersey Bio-ethics Commission. New Jersey Gov. Chris Christie recently vetoed a bill that would have relaxed restrictions on such agreements, based, in part, on the state bio-ethics commission report.

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The surrogacy debate should be heard more fully in some judicial or legislative forum, and the practice should be expressly prohibited. In this context, you should know, however, that H.F. 291 does, in fact, speak to the validity and enforceability of these contracts by stating the Legislature's wish that they be used as admissible evidence in a contested-custody proceeding. How could our state courts come to the conclusion that surrogacy agreements are not enforceable based on this statute?

The Minnesota State Bar Association, a proponent of the bill, claims: "The bill does not expressly permit hiring surrogates or encourage or discourage any alternative reproductive techniques." That is correct only in a narrow, legalistic sense. This statute, however, will be used to further establish the validity and widespread usage of these arrangements.

Non-genetic parents will now have standing to contest custody. This speaks directly to a surrogacy contract's validity and enforceability. If it can be used as evidence in a custody proceeding, it can, essentially, be enforced.

The MSBA says that this bill is needed because, currently, non-genetic parents have no standing to contest custody. But that is a good thing and is as it should be. The birth mother's and the child's natural rights are protected. Proponents of the bill then ask, "What happens if the birth mother is not "fit" to be a parent?" This question, of course, actually undermines the proponent's position. If the birth mother is not "fit" to be a parent, then who is she? A poor woman, being exploited for her womb? That is exactly the problem. We are not, typically, talking about the altruistic sister who gestates a child for a sibling and his or her spouse/partner, as was shown in a recent story from CNN profiling one surrogacy arrangement gone very bad.ⁱⁱⁱ

It is almost always in the best interest of the child to be connected to his or her biological parents, particularly the mother. And if we encounter a surrogacy situation in which it is not, we need to think really hard about the exploitative situation that led to the arrangement. State public policy should focus on protecting the rights and well-being of women and children, and not brush these concerns aside inconsequential to this important discussion.

We understand and can sympathize with the interest of adults in raising children. It is a beautiful desire and a gift that is sometimes taken for granted by many parents. And we can certainly understand a legislator's desire to help such people when these arrangements are frustrated. But surrogacy arrangements do not serve the best interests of the child, and can plainly lead to the exploitation of women.

This committee should reject S.F. 370, which, though modeled as a technical bill, has the potential to transform Minnesota public policy in the very controversial area of surrogacy agreements. Prudence dictates that this matter should be studied in more detail before such steps are taken.

Thank you.

ⁱ See Minnesota Statutes, ch. 259 (prescribing adoption procedures and requirements, particularly Minn. Stat. §§ 259.29; 259.53; 259.83, none of which are present in the surrogacy context).

ⁱⁱ Harold Cassidy, "The Surrogate Uterus: *Baby M* and the Bio-ethics Commission Report," ThePublicDiscourse.com, Sept. 6, 2012, available at <http://www.thepublicdiscourse.com/2012/09/6211/>.

ⁱⁱⁱ Elizabeth Cohen, "Surrogate offered \$10,000 to abort her baby," CNN.com, March 6, 2013, available at http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html?hpt=hp_c1.