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BILL ANALYSIS

Senate Fiscal Agency

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(517) 373-5383

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Senate Bill 100 (as passed by the Senate)
Sponsor: Senator Connie Binsfeld
Committee: Health Policy

Date Completed: 3-17-89

RATIONALE

In June 1988, the Legislature enacted the Surrogate Parenting Act to make it a crime to enter into or assist in the formation of a surrogate parentage contract for compensation or a surrogate parentage contract in which the surrogate mother is an unemancipated minor or mentally disabled. Soon after its enactment, the American Civil Liberties Union filed suit in Wayne County Circuit Court challenging the constitutionality of the new law. Although the parties stipulated in September that the Act is constitutional, and the Court upheld the law in a November decision, there is disagreement over what the decision actually means, and the case has been appealed to the Michigan Court of Appeals. According to the Circuit Court,

... the Michigan legislature intended to prohibit all surrogate arrangements where the surrogate mother is compensated (other than actual medical expenses as a result of the pregnancy) and agrees to voluntarily relinquish her parental rights to the child. It is important to note that individuals may still legally enter into surrogate arrangements where there is no compensation paid to the mother (other than actual medical expenses). All other situations must be decided on a case-by-case basis. (emphasis

in original) (Case No. 88-819032
CZ, 11-9-88)

Reportedly, some people believe that this ruling leaves open the possibility of surrogate contracts under which the surrogate mother does not relinquish her parental rights; that is, a woman could be compensated for carrying a child through gestation as long as she retains the option of keeping the child once it is born. While others disagree with this interpretation, they believe that the law should be amended to close this potential loophole.

CONTENT

The bill would amend the Surrogate Parenting Act to specify that, "It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child." The bill also would amend the definition of "surrogate parentage contract" to refer to a contract in which a female agrees to relinquish her parental or custodial rights; under the current definition, "surrogate parentage contract" means a contract, agreement, or arrangement in which a female

agrees to conceive a child through natural or artificial insemination, or agrees to surrogate gestation, and voluntarily to relinquish her parental rights to the child.

MCL 722.853

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

By creating a presumption that surrogate parentage contracts include a provision that the surrogate mother will relinquish her parental or custodial rights to the child, the bill would ensure that would-be parties to such a contract did not circumvent the law by giving the surrogate mother the option of keeping the child. In addition to imposing criminal sanctions on those who enter into or arrange surrogate parentage contracts, the law makes it clear that these agreements are contrary to the public policy of this State. Individuals should not be allowed to subvert that policy by compensating a woman for gestating a child while claiming that she retains the choice of keeping the child or giving it up. Whether or not the Wayne County Circuit Court decision is, in fact, ambiguous, the bill would make it perfectly clear in statute that surrogacy-for-pay is against the law in Michigan.

Supporting Argument

Like the original Act, the bill would not prohibit all surrogacy arrangements, only those performed for profit. Willing individuals who wished to participate in surrogate parenting could still do so as long as nothing was paid to the surrogate mother to compensate her for gestating the child.

Response: It is unrealistic to think that the bill would not outlaw nearly all surrogacy arrangements: reportedly, nine out of 10 surrogate parenting contracts involve the payment of a fee to the surrogate mother. Most childless couples for whom adoption was almost out of the question would be left out in the cold.

Opposing Argument

While the proposed presumption might be appropriate in the case of surrogate motherhood, it should not be extended to cases in which the surrogate is merely the carrier of the child. In such instances, the woman simply is implanted with an already fertilized ovum: she contributes no genetic material and is not biologically related to the child. In fact, both the ovum and the sperm could come from the married couple who contract with the surrogate carrier, if the wife is not infertile but cannot carry a baby. Clearly, if even one of the contracting parties is the child's natural parent, that person's parental and custodial rights should take precedence over the rights of a surrogate carrier who has no genetic ties to the child.

Legislative Analyst: S. Margules

Fiscal Analyst: P. Graham

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