

Washington Law Review

Volume 89
Number 4 *Symposium: Compensated
Surrogacy in the Age of Windsor*

12-1-2014

Foreword: Compensated Surrogacy in the Age of *Windsor*

Kellye Y. Testy
University of Washington School of Law

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Family Law Commons](#)

Recommended Citation

Kellye Y. Testy, Essay, *Foreword: Compensated Surrogacy in the Age of Windsor*, 89 Wash. L. Rev. 1069 (2014).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss4/2>

This Essay is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

FOREWORD: COMPENSATED SURROGACY IN THE AGE OF WINDSOR

Kellye Y. Testy*

*Having my baby, what a lovely way of saying how much you love me; Having my baby, what a lovely way of saying what you're thinking of me*¹

When Paul Anka sang those chart-topping words in 1974, the first sperm bank had recently opened in New York City,² and it would still be four years before Louise Brown, the first “test-tube” baby, was born in England³ and yet another eight years before the now-famous Baby M was born.⁴ In celebrating his wife’s traditional pregnancy, Anka’s song achieved a rare coup—topping both the Billboard Hot 100 and many lists of the worst songs ever.⁵ The song made people of many different viewpoints commonly uncomfortable. Feminists and other liberal thinkers criticized it as misogynistically claiming male dominance (“my,” not “our” baby) and seeming to value women only for their capacity to reproduce.⁶ At the same time, religious and conservative thinkers took exception to its cavalier approach to abortion (“[d]idn’t have to keep it . . . [y]ou could have swept it from your life”).⁷

The song’s controversy has not abated with time; rather, it continues

* Dean, University of Washington School of Law.

1. PAUL ANKA, (YOU’RE) HAVING MY BABY (Capitol Records 1974).

2. Ellen Frankfort, *Deposits & Withdrawals: The Finances of Sperm*, VILLAGE VOICE (Oct. 29, 1971), available at http://blogs.villagevoice.com/runninscared/2011/01/new_yorks_first.php.

3. *The World’s First Test Tube Baby*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-worlds-first/> (last visited Aug. 25, 2014).

4. *In re Baby M*, 537 A.2d 1227 (N.J. 1988), *aff’g in part rev’g in part*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

5. Chaz Kangas, *Paul Anka’s “Having My Baby”: Disgustingly Misogynist or Unfairly Maligned?*, VILLAGE VOICE (May 24, 2013), http://blogs.villagevoice.com/music/2013/05/paul_anka_having_my_baby.php.

6. *Id.*

7. *Id.* (quoting PAUL ANKA, *supra* note 1).

to stir debate.⁸ The raw and lasting nerves the song has touched are not unlike those set on edge by the topic of surrogacy, especially compensated surrogacy.⁹ The surrogacy debate begins with the issues of sex, gender, reproduction, children—already individually and intersectionally heavily laden with cultural contest—and adds issues of money and commerce. Compounding matters further, add the twenty-first century issues of fast-paced technological innovation and increasingly global markets that are affecting every area of life. There is no easy place to stand amid such a turbulent swirl.

Like Anka's song, compensated surrogacy also makes people of many different political and ideological persuasions commonly uncomfortable. For example, many feminist, critical race, and social justice theorists continue to raise concerns that compensated surrogacy subjugates women, especially women of color and poor women.¹⁰ At the same time, progressives are uncomfortable restricting the liberty of a woman to choose how to use her own body¹¹ or insisting that her labor be done only as charity.¹² Likewise, few progressives are comfortable restricting the availability of surrogacy when it is well known that it often supports the formation of nontraditional families, such as parenting by gay men.¹³ Surrogacy's disruption of the heteronormativity and essentialism of traditional parenting roles cannot be underestimated, although it reinforces a pervasive norm of genetic connection as most desirable for a parent-child relationship. Were the genetic connection to a child less privileged, adoption would be a readily available substitute for surrogacy for those persons wishing to parent but not willing or able to birth a child.¹⁴

Progressive thinkers are not the only ones searching for a foot-hold on this difficult issue. Ordinarily, conservative thinkers would be strong supporters of markets and little concerned with the commodification of

8. *Id.*

9. Surrogacy can be altruistic or commercial, although this distinction is less sharp when altruistic surrogates are paid their "reasonable and necessary" expenses. Some of those expenses can start to look very much like compensation.

10. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 *CARDOZO J.L. & GENDER* 391, 404, 405, 407 (2012).

11. *Id.* at 406.

12. *Id.*

13. Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, *ABA J.* (Mar. 1, 2011, 5:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

14. For a good example of adoption's wide availability and access, see THE DONALDSON ADOPTION INST., <http://adoptioninstitute.org> (last visited Nov. 16, 2014).

labor.¹⁵ To push the issue, what, for instance, is worse about paying a woman to have a child than paying a woman for sex work or to work in sweat-shop conditions sewing athletic wear? But for conservatives and other thinkers who want to draw a clear line against “selling babies,” is compensated surrogacy really all that far away? While surrogacy supporters are careful to distinguish surrogacy from “selling babies,”¹⁶ it is difficult to argue that the intended parents are paying for anything other than a baby. The benefit of the bargain is getting a baby and the only exchange that will complete the contract to the intended parents’ satisfaction.

The examples above are but the tip of the iceberg in exploring the challenging and interesting questions of law, ethics, and policy raised by compensated surrogacy. Those questions are further complicated by wide variation among individual states’ approaches to the regulation of compensated surrogacy.¹⁷ The authors in this timely symposium tackle the many and varied issues related to compensated surrogacy with sophisticated, diverse, and careful analysis. Moreover, they do so in the context of fast-paced legal and sociological change on issues of marriage and parenting, some of which was crystalized in the recent *United States v. Windsor*¹⁸ decision that spurred growing recognition of gay marriage and families across the nation.

Noting that compensated surrogacy has “implications for every area of feminist concern,”¹⁹ Ms. Sarah Ainsworth’s helpful contribution to the symposium details the process she and others went through to develop a feminist framework for addressing surrogacy.²⁰ Ms. Ainsworth notes that feminist viewpoints were largely missing when Washington State banned compensated surrogacy in 1989,²¹ and did not

15. See, e.g., Elizabeth Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990); *Republican Platform: Restoring the American Dream: Economy & Jobs*, GOP.COM <https://www.gop.com/platform/restoring-the-american-dream/>.

16. See, e.g., Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132, 133, 148–49 (1992) (“tentatively” arguing that “commercial surrogacy should be legally permissible” and clarifying that creating a market for surrogacy and adoption services is not “baby-selling”).

17. Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1239–45 (2014).

18. ___ U.S. ___, 133 S. Ct. 2675 (2013).

19. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1078 (2014).

20. *Id.* at 1079–80.

21. *Id.* at 1078–79.

enter the debate until a gay male legislator—and father of three children born to a surrogate mother—proposed lifting the ban in 2010.²² That effort failed, but it provided Ms. Ainsworth and her then-employer, Legal Voice, an opportunity to develop a thoughtful approach to the issue. Ms. Ainsworth cogently explains the framework Legal Voice adopted after two years of community engagement and careful study, one based on anti-essentialist analysis and pragmatic feminism.²³ She also urges feminist advocates toward greater leadership in surrogacy regulation and to seek reproductive justice in the growing field of assisted reproduction.²⁴

Professor Khiara M. Bridges tackles the effects of the *Windsor* decision on parenting, asking whether critical race theorists opposing surrogacy should reconsider their concerns in light of social and legal progress for gay and lesbian families who are often the beneficiaries of surrogacy contracts.²⁵ She notes that the Justices in *Windsor* expressed strong concern for the welfare of the children of same-sex marriage, which begs the question of how those children will come to be.²⁶ To the degree she sees *Windsor* as legitimating the children of same-sex couples, she asserts that it likewise de-legitimizes laws that frustrate the formation of same-sex families. Her essay focuses on laws that prohibit the enforceability of surrogacy contracts, and she provides insight into the probable racial effects of compensated surrogacy.²⁷

While being clear that white people are the primary consumers of advanced reproductive technologies, including surrogacy, Professor Bridges also notes that surrogates do not tend to be uneducated, poor, or racial minorities despite early fears that compensated surrogacy might lead to a breeder class of those women.²⁸ For Professor Bridges, this is cool relief, and in her view creates a “catch-22” in which the non-commissioning of women of color as surrogates may be at least as problematic.²⁹ While understanding concerns that compensated surrogacy may contribute to racial hierarchies, Professor Bridges does not think surrogacy bans are the answer. Rather she calls for a more transformational social justice project that supports a wide range of

22. *Id.* at 1079.

23. *Id.* at 1104–12.

24. *Id.* at 1123.

25. Khiara M. Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1126 (2014).

26. *Id.* at 1128–30.

27. *Id.* at 1152–53.

28. *Id.* at 1139–41.

29. *Id.* at 1140.

families, one that creates richer and more accurate accounts of “good” families and that provides legal and social support for those families.³⁰

Professor Martha Field, who wrote the influential 1988 book, *Surrogate Motherhood*, revisits her original analysis in light of the vast changes in technology and family recognition that have taken place in the interim.³¹ Professor Field argues that *Windsor* does not and should not change the constitutional and federal landscape for compensated surrogacy. Rather, she argues that surrogacy laws and regulation will and should continue to evolve state-by-state.³² As the evolution proceeds, Professor Field continues to sound cautionary notes about the vulnerability of surrogates, especially in countries where the rule of law and women’s equality is weaker than in the United States.³³ That is not to say that she advocates banning surrogacy, as she rightly understands that surrogacy will not stop; rather, it will take place in either a regulated or a black market.³⁴ Further, unlike Professor Nicolas, she does not believe the law is likely to evolve toward providing any constitutional protections for a right to surrogacy.³⁵

Dean Anthony Infanti continues his exploration of the many ways that the federal taxation system exhibits a preference for heterosexual marriage and parenting.³⁶ Using the 2013 *Windsor* decision that the Defense of Marriage Act’s differential treatment of same-sex marriage for federal taxation regulations was unconstitutional as his point of departure, Dean Infanti details the Internal Revenue Service’s (IRS) responsive guidance to same-sex couples. Although the IRS’s response was broad and enthusiastic in seeking to put same-sex marriages on equal tax footing, Dean Infanti asserts that the regulations continue to be strongly heteronormative in their effects.³⁷

Dean Infanti then goes on to explore how that bias affects federal tax incentives for procreation as they apply to compensated surrogacy, often the only practical option for gay couples wishing to have children. He

30. *Id.* at 1152–53.

31. See MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988); Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155 (2014)

32. Field, *supra* note 31, at 1176–77.

33. *Id.* at 1174–76.

34. *Id.* at 1181–82.

35. *Id.* at 1177–81.

36. Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185, 1184–87 (2014).

37. *Id.* at 1210–26; see also Lily Kahng, *The Not-So-Merry Wives of Windsor* (work in progress) (draft on file with author) (arguing that *Windsor*’s effects on married same-sex female couples may be disadvantageous in many circumstances).

explores the primary tax incentives for family formation, including the deduction for medical expenses, the adoption credit, and the exclusion for employer-provided adoption assistance.³⁸ Providing an in-depth analysis of the operation of Section 213, Dean Infanti concludes that surrogacy-related expenses will not receive favorable tax treatment for many same-sex couples wishing to procreate.³⁹ Dean Infanti understands these exclusions as further reinforcing the medicalization of procreation in our tax laws and its continued bias in favor of heterosexual families.⁴⁰

Professor Peter Nicolas makes a unique and insightful contribution to the literature on compensated surrogacy by first narrating his own experience of compensated surrogacy when he and his partner contracted with a surrogate mother to gestate their child.⁴¹ Professor Nicolas' personal experience strongly reinforces both the complexity of navigating the current regulatory landscape and the proposition that the relationship between the surrogate mother and the intended parents is of critical importance for the success of the transaction. As a gay man, Professor Nicolas supports opportunities that compensated surrogacy provides to those couples unable or unwilling to conceive a child through their sexual relationship.⁴² As a constitutional scholar, he also argues forcefully that denying such opportunities to form a family may violate fundamental due process or equal protection rights to procreate and to have care and custody of one's children that our Constitution has recognized.⁴³

Mr. Terry Price explores in depth the *Baby M*⁴⁴ case that first brought surrogacy to the public's attention in 1986, Washington State's 1989 decision to ban compensated surrogacy, and its subsequent 2011 flirtation with changing that prohibition.⁴⁵ Mr. Price, an astute legislative analyst, provides a rich description of Washington State's legislative history on surrogacy and explains why the state continues to make surrogacy a criminal act.⁴⁶ Noting that technology is outpacing legal reform on this issue, and that it has been almost a decade since other

38. Infanti, *supra* note 36, at 1215–20.

39. *Id.* at 1227–28.

40. *Id.*

41. Nicolas, *supra* note 17, at 1237–67.

42. *Id.*

43. *Id.* at 1279–1309.

44. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

45. Terry Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311, 1312–16 (2014).

46. *Id.* at 1318–43.

states have resolved the legal status of intended parents, Price is nonetheless not optimistic that Washington State will change its laws anytime soon.⁴⁷ Washingtonians, like Nicolas, will have to continue to travel to neighboring states in order to benefit from their less hostile and more reliable regulatory approaches to surrogacy.

Finally, Professor Julie Shapiro, with her characteristically astute insight into the questions that really matter, argues that laws regulating compensated surrogacy should not distinguish between traditional (egg is provided by the surrogate) and gestational (egg is provided by a second woman) surrogacy.⁴⁸ Professor Shapiro generally supports compensated surrogacy, and so seeks to make it available to a wider group of people and to protect the surrogate from ill effects of power imbalances.⁴⁹ With this goal, she is rightly concerned that the higher cost of gestational surrogacy reserves it for those of significant means and also creates an even more asymmetrical power imbalance between the surrogate and the wealthy intended parents. Drawing on the growing body of important empirical analysis of surrogacy,⁵⁰ Professor Shapiro also notes that the traditional surrogates' genetic connection to the child has not resulted in more custody disputes.⁵¹ Rather, as Shapiro and Nicolas both point out, the strongest determinants of successful surrogacy are the prior screening and counseling of the surrogate and the development of a positive relationship between the surrogate and the intended parents.⁵² As Anka sang, the surrogate's contractual performance may indeed be "a lovely way of saying what she's thinking of" the intended parents.

Professor Shapiro also makes a second and more controversial argument: that the surrogate should be recognized by law as a legal parent.⁵³ Noting that this is the legal structure for surrogacy in the United Kingdom, and that it has worked well, Professor Shapiro sees this change as having at least two key advantages.⁵⁴ One is that it reinforces her progressive vision of parenting as not being limited to just

47. *Id.* at 1336–43.

48. Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1347–63 (2014).

49. *See generally id.*

50. *Id.* at 1362.

51. *Id.* at 1360–63.

52. *See* Nicolas, *supra* note 17, at 1248, 1249–55, 1297; Shapiro, *supra* note 48, at 1366.

53. Shapiro, *supra* note 48, at 1365–66.

54. *Id.* at 1365.

one mom and one dad.⁵⁵ The second is that it accords a more appropriate recognition of the surrogate's status and increases her power vis-à-vis the intended parents in what is otherwise an often asymmetrical bargaining posture.⁵⁶ Professor Shapiro's position on this issue matches the one Professor Field advanced in her well-regarded 1988 book, and that she reinforces in her contribution to this symposium.⁵⁷

The symposium's authors have provided us with an outstanding assessment of the current state of compensated surrogacy. As with much social change, initial fears about compensated surrogacy seem to have been overstated if compared to the past two decades of experience. That said, the continued pace of technological change, globalization, and wealth inequality together require that we remain vigilant in analyzing how the next decade of experience will unfold. Moreover, just as we have seen with the continuing divergence of public opinion about Paul Anka's song, the public will continue to be highly invested in concern about who's having (or trying to have) babies with whom. As a result, the next stages of legal and policy development around reproductive issues are sure to continue to be contested and complex.

55. *Id.* at 1368–69.

56. *Id.* at 1367–68.

57. *See* FIELD, *supra* note 31; Field, *supra* note 31.