Approved **February 21, 1990**
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:00 a.m./~~XXX~~ on February 6, 1990 in room 514-S of the Capitol.

All members were present except: Senator Oleen who was excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Suzanne Hardin, Prairie Village
Robert C. Barnum, Commissioner of Youth Services,
Kansas Department of Social and Rehabilitation Services
Kent Vincent, Life Choice Ministries
Melissa Ness, Kansas CHildren's Service League
Bill Pitsenberger, Blue Cross and Blue Shield of Kansas
Sharon Huddle DeAngelo, National Coalition Against Surrogacy (by teleconference)
Charlotte Lee, National Coalition Against Surrogacy
Teresa A. Machicao, American Civil Liberties Union

The Chairman opened the meeting by welcoming Close-Up Kansas students from Lawrence and Eudora to the Committee's meeting.

The hearing for SB 431 was continued from the meeting on Monday, February 5.

SB 431 concerning adoption; enacting the Kansas adoption and relinquishment act; providing that certain health policies and contracts contain coverage with respect to adopted children.

Suzanne Hardin, Prairie Village, testified in support of SB 431. (ATTACHMENTS I & II)

Robert C. Barnum, Commissioner of Youth Services, Kansas Department of Social and Rehabilitation Services, testified in support of SB 431 with suggested amendment. (ATTACHMENTS III & IV)

Kent Vincent, Life Choice Ministries, testified in support of SB 431 with suggested amendments. (ATTACHMENT V) Mr. Vincent also presented the committee with copies of a letter from the Life Choice Ministries addressed to Chairman Winter. (ATTACHMENT VI)

Melissa Ness, Kansas Children's Service League, testified in support of SB 431, but with reservations. (ATTACHMENT VII)

Bill Pitsenberger, Blue Crose and Blue Shield of Kansas, testified in opposition of SB 431. (ATTACHMENT VIII)

This concluded the hearing for SB 431.

The hearing was opened for SB 190.

SB 190 - concerning surrogate mothers; rendering void and unenforceable agreements for srvices of a surrogate mother for consideration; rendering voidable agreements for services of surrogate mother without consideration; providing for penalty for promoting such agreements.

Sharon Huddle DeAngelo, Legal Counsel, National Coalition Against Surrogacy, testified by teleconference in support of SB 190. She shared their thoughts and concerns with "commercialization of women's bodies to breed and distribute babies as commodities". She added they may not by totally against surrogacy, but are against "having babies for money".

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 6, 1990.

Charlotte Lee, National Coalition Against Surrogacy, testified as a "mother-by-agreement" in support of SB 190. (ATTACHMENTS IX and X)

Teresa A. Machicao, American Civil Liberties Union, testified in opposition to SB 190. (ATTACHMENT XI)

As no other conferees appeared, this concluded the hearing for SB 190.

The meeting was adjourned.

GUEST LIST

COMM. EE: SENATE JUDICIARY COMMITTEE

DATE: FEBRUARY 6, 1.10 (1)

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Melissa Ness	Topeka	KCSL
Chris Lowe	Lawrence, KS	Close Up Kansas
Paul Davis	Lawrence, Ks.	" "
MARK CHESNIK	LAWRENCE, KS	CLOSE-UP KANSAS
Albert Lee	Clay Center	Family
Audrey Lee	Clay Center	Family
Charlotte Lee	Clay Center	Nat'l Coal Against Sum.
Jessica Lee	Clay Center	Family
Sdran Robinson	Olathe	Close-up Kansas
Melissa Boberjack	Olathe	Close-Up Kansas
Kathleen Barnes	Olathe	Close-Up Kansas
Kristen Caldi	Olathe	Close-up KS
Laura A. Hartman	Topeka	Ks. Bar Assn.
Christine Richardson	Eudora	Close-Up Kansas
Dan Prendiville	Eudora	Close-Up Kansas
Rebekah Freeland	Eudora	Close-Up Kansas
Jason Buckley	Eudora	Close Up Kansas
Paul Shelby	Topeka	OJA
Chad Bunsaker	Eudora	Close-up Kansas
Cherrie Ann Lawrence	Eudora	Close up Kansas
Amy Gordon	Eudora	close up
Esteban Freeland	Eudora	close up
Paul Struwe	Lawrence	close up
Jennifer Nitcher	Lawrence	Close up KS.
Clark Morton	Lawrence	Close up Kansas

GUEST LIST

COMM_ _EE: SENATE JUDICIARY COMMITTEE DATE: FEB. 6, 1990

(2)

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Ben Douglas	Lawrence	Close Up Kansas
JAE JUNG	LAWRENCE	CLOSE UP KANSAS
GEOFF DEMAN	LAWRENCE	CLOSE UP KANSAS
Helen A. Lee	Lawrence	Close Up Kansas
Edwin W Hutchinson	Dexter	close up/kansas
Cleta M. Renyer	Salretha	Right to Life of Ks
Sandy Cisbrow	Lebtmore	Right to Life
Jeffrey a. Mootz	Topeka	ACLU
Teresa A. Machicao	Topeka	ACLU

February 6, 1990

Testimony before the Senate Judiciary Committee
February 6, 1990
Presented by Suzanne Hardin, 8229 Nall, Prairie Village

Chairman Winter and members of the Senate judiciary Committee.

After listening to some of the testimony on SB 431 yesterday morning, I felt compelled to enter new testimony today. I would ask the committee to enter my February 5 written testimony into the records. I have distributed new written testimony this morning which I now will present as expediently as possible.

As many of us know, three years of thorough study was done on the Adoption Code by the Family Law Advisory Committee and then by the Special Committee on Judiciary this past summer. SB 431 was neither quickly designed nor quickly submitted. One judge on the Advisory Council commented that the committee has literally spent hundreds of hours studying every section of the present Adoption Code before drafting this bill.

SB 431 re-codifies the entire Kansas Adoption Code, placing the scattered laws on adoption into one section of the Probate Code. For instance, a section on adoption was found under the Kansas Parentage Act that had not been placed in the Adoption Code. That is repealed and amended into SB 431.

I'm certainly not an attorney, but I do have legal guardianship of two grandchildren through Probate Court and should I, at some point, wish to adopt my grandchildren, SB 431 would beyond any question, best serve this purpose.

I want to run through a scenario in an attempt to show some significant points in SB 431. Let's say the birth parents of a child are heavily involved in drugs, to the point of not being able to adequately see to the needs of their son. We can identify with this situation, can't we - what with the increased numbers of teen-agers and adults addicted to drugs, many of whom are parents. The child is in a very dysfunctional environment. He is emotionally and physically ignored. rejected, and neglected. He lacks security and continuity, the two basic ingredients for him to grow and develop optimally. He suffers from anxieties and depression, and is seriously behind academically and socially.

Now, the question - what do we do with this child? How can he be removed from his undesirable environment? Well, he won't qualify as a candidate for SRS - he will not fit under the Child in Need of Care Code. So how do we protect him, and the thousands like him? Well, healthy members of his extended family, or any healthy person can be granted custody with legal guardianship. Let's say that happens. He's placed with his guardian. Two years go by. His parents have not made a turn around; they have failed to assume their duties as parents to their son. The legal guardian, the child's therapist - these children do require extensive therapy - and the medical director of a reputable drug rehabilitation center agree that adoption is now the best alternative. The child needs a permanent and predictable environment he is to have a chance to develop into a productive member of society. Where will the petition for adoption be filed? Probate Court? Not as the current Adoption Code reads because at least one birth parent must give consent to the adoption. Neither of these parents are consenting. You know, one of the last things addicts give up is denial - they see themselves as functioning and responsible.

So, ironically, the petition must be filed under the Child in Need of Care Code. The Child in Need of Care couldn't handle this case originally, but now it's the only place where the petitioner can go because the birth parents will not consent to the adoption.

Now the request for adoption requires two complicated processes instead of one. This petitioner must now ask Juvenile Court to do a severance through SIC, which is the Child in Need of Care Code. SIC now is required to duplicate many processes that the Probate Court did in granting guardianship. If after the first hearing, the evidentury(ies), assessments of the parents and guardian, possible court ordered psychological testings, the adjudication and the dispositional, severance is finally granted, the guardian must return to Probate Court for additional hearings and the final disposition. The current adoption laws fail to serve an increasingly large segment of the public. The process creates additional stress, delays and most definitely additional costs. It is not unusual for those seeking guardianship or independent adoption of older children to have $10,000 initial legal fees.

What I have tried to point out is - the Child in Need of Care Code cannot serve everyone - that's impossible - the current Adoption Code can't either. SB 431 contains a provision for termination of the nonconsenting birth parents rights under various due process procedures. And by the way, this is the procedure that is current under 38-1129 in the Kansas Parentage Act but was never placed in the Adoption Code. SB 431 also allows parental rights to be terminated if eith parent or both parents have failed or refused to assume the duties of a parent for two consecutive years preceding the filing of the adoption petition.

In my opinion, SB 431 answers the needs of many children who are not presently served and protected anywhere else in the Kansas statutes.

Thank you.

Testimony before the Senate Judiciary Committee

February 5, 1990

Presented by Suzanne Hardin
8229 Nall, Prairie Village, Kansas 66208

Chairman Winter and members of the Senate Judiciary Committee. I appreciate being here as a mother and grandmother in support of SB 431. I am not a parent of an adopted child. However, I am legal guardian of two of my grandchildren. My grandson is twelve and my grandaughter is nine years old. They have lived with us for two years.

I believe my personal experiences and my experiences as an advocate for children have given me reason to hope that the Senate and the House will vote into law SB 431 as it now reads.

While SB 431 re-codifies the entire Kansas Adoption Code, I wish to address the significance of portions of the New Sections 17,18,and 25 that pertain to independent adoptions.

Section 17 allows the petitioner to state facts why it would not be necessary to obtain the consent of either or both parents. Section 18 addresses the various ways a consent shall be given even if parental rights have not been terminated. Section 25 includes a provision whereby the need for a birth parents consent or relinguishment can be determined and termination of parental rights can be achieved where appropriate. (This prodedure is current under 38-1129 in the Kansas Parentage Act but for some unknown reason was never placed in the Adoption Code). Also, Section 25 allows parental rights to be terminated if the parent or parents have failed or refused to assume the duties of a parent for two consecutive years preceding the filing of the adoption petition.

I believe these three New Sections will serve the best interests of children whose home environments are damaging, but the problems are not severe enough, by Kansas law, to find them Children in Need of Care. As a hypothetical example, my grand-

children would not have been designated as Children in Need of Care even though they lived in an extremely dysfunctional environment. Both parents were heavily involved in drugs, Our grandchildren had no structure in their lives, no stability, no continuity from one day to the next. They were basically emotionally and physically ingnored and neglected because their parents were unwilling and unable to meet their needs. Children in similar situations - and there are many - can benefit from Sections 17, 18 and 25 which allow the courts to determine adoption where appropriate, and witnin a two year time frame.

Our grandchildren would have been spared so much trauma had they been able to separate from their parents at earlier ages. The parents were not willing to consent even to a temporary alternative. People on drugs are usually into denial - everything is fine, their parenting skills are great. For older children who have had to remain within dysfunctional families, recovery can take years if not a lifetime. Flashbacks are common, deep anger over those dysfunctional years surface in the form of anxieties and depression. Emotional and behavioral problems must be worked through. These children deserve better protection and SB 431, in my opinion, is designed to give them an earlier second chance.

Did you know that one out of three families are dysfunctional? But not one out of three will qualify for SRS to step in.

Children must have two basic ingredients in their lives - a sense of belonging and a feeling of security. Bonding and continuity if we really want them to grow and develop optimally. To achieve this, we must reach these children early, placing them in a permanent and predictable environment and as expediently as possible. I truly believe SB 431 serves these deserving children where other existing laws cannot.

Thank you for your interest in this bill.

CC TIMES AUG 30, 1989

Unfixable families

A vast gap between the lofty, lovdy ideal and terrible reality

It's time to reconsider whether an intact family ought to be social service's top priority, at any price.

Every time another story about a child tortured and killed

Jean Haley

appears, that written and unwritten commandment leaps up to mock and taunt anyone who thinks the family is holy. A federal law requires keeping the family together whenever possible. State agencies and even private organizations assume preserving the family is the highest good they can strive for.

It really depends on the family. Contradiction sometimes lurks in the label, "family."

So it raised humankind from barbarism. It was our first best hope. It contains seeds of the finest nobility, love, creativity and kindness man and woman are capable of. It has perpetuated the species; it has nourished every important institution in this country from its system of laws to a system of education, from church to city hall. All that it has done, and is doing, and can do again.

But that's family in the abstract. That's the ideal. Blending theory and hope can take you quite a way in many areas but it can't unfry an egg. Some families don't fit even the dimmest outline of those concepts. They never did. Instead of safety, there's assault. Instead of growth, destruction. The sanctity of the home turns into the secrecy of the dungeon. Where the books assume there is love, instead torture and deceit take root.

Harried and overburdened state social workers "counseling" adults in such dwellings aren't going to change reality. Add the abuse of illegal drugs to some of those already dysfunctional outfits and it must be worse than the snakepits of old.

If society has any responsibility at all to nurture and protect the helpless and vulnerable, it ought to rescue kids caught in those homes that are not homes at all. Instead of bending over backwards six ways to keep children with their deranged parents, state officials ought to have more discretionary power to pluck them away to safety. Instead of foster home stays being draged out year after year, children should be adoptable sooner.

Processes and regulations would have to be chnged. Probably laws would needo be rewritten. But the first steis to change the thinking that thee is no value above the integrity ofhe family.

Using those word together in the context of child buse is scandalous.

Surely differentiaton could be made between permnently damaged or drug-besotte houses and troubled families.

Instead of benling over backwards six ways to keep children with their deranged parents, stateofficials ought to havemore discretionarypower to pluck themaway to safety.

Eleanor Mill/Mill NevsArt Syndicate

A few recent stories illustrate. These are not troubled families. They are enclaves of human viruses:

● Last week a Bronx couple was arrested and charged with assaulting, raping and sodomizing nine of their children. Police said the three-room apartment where they lived was filthy, had no refrigerator or electricity. The children were allowed outside only occasionally at night "to get some air."

● Bradley McGee was repeatedly stuck head first into a toilet bowl during potty training. The 2-year-old boy died last month. His parents are charged with murder in Florida. A state investigator said child care workers knew the child received "bizarre punishment" at home but didn't report it. They had recommended Bradley be returned to his parents.

● Earlier this month, a Las Vegascouple was arrested on felony neglect charges after their 2-year-old son died in the cab of a pickup truck in 100-degree heat. They told police the boy was left "only a few minutes."

● In April, a 9-year-old St. Luis girl was shot five times in the head. Her mother was arrested in connection with her death. The child's grandmother had sought intervention through the state hot line. She said she was told by state workers that the child wasn't abused, that she had food and she had no scars.

There is a communal responsibility for the youngsters at the mercy of evil. Fifty years ago, even 25 years ago, there was good reason go to almost any length to return children home. Fixing families was within the realm of reason. But the words of law enforcement personnel who look violence in the face every day are fair warning. Some parents aren't fixable. It's insane to let them torture and kill their kids to prove it.

Police say "crack" cocaine has changed the equation. More tottering people acting more violently are a result. The extent of their dropping out, of illegal activities, the intensity of violence involves children as soon as, if not before, neighbors or casual passers-by. These homes are not like the homes of 50 years ago. They can't be treated as if they were.

Presented by Robert C. Barnum
Commissioner of Youth Services
(913) 296-3284

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Winston Barton, Secretary

Testimony in Support of S.B. 431

An Act concerning adoption, enacting the Kansas adoption and relinquishment act; providing that certain health policies and contracts contain coverage with respect to adopted children.

(Mr. Chairman), Members of the Committee, I appreciate the opportunity to appear before you today.

The Department of Social and Rehabilitation Services (SRS) supports Senate Bill 431 and believes it addresses a number of badly needed adoption reforms. These reforms benefit the child by assuring children are placed in safe and appropriate adoptive families.

We support the bill's initiatives which will assure that the relinquishing/consenting parents are making a more informed decision, which subsequently assures that the final decree of adoption remains unchallenged. One of these initiatives is the provision for independent legal counsel to minor parents at no cost to the parents prior to signing either a relinquishment or a direct consent.

This bill also establishes a 12-hour waiting period, after the birth of the baby, before parents can sign a relinquishment or direct consent. This again safeguards the wishes of the parents and thus the stability of the adoption for the child.

The adoptive home assessment prior to the placement of the child with a prospective adoptive family, and clearance through the child abuse registry, will do much to insure the protection of children. On more than one occasion SRS staff have been aware of situations where families with backgrounds of confirmed abuse have adopted children from private agencies or in non-agency

adoptions, yet the federal and state confidentiality laws prevent us from voluntarily providing the court this information.

We call your attention to a recent problem not addressed by SB 431. Situations have occurred in which courts have taken relinquishments from parents desiring to free themselves of responsibility for older youth. Most of these children are troubled teenagers and adoption is usually not a viable option. We do not believe the forced acceptance of all relinquishments is good child welfare practice and may serve to create "legal orphans" within the foster care system. This denies the right of extended family to these children through their lifetime.

In a 1987 appeal decision (see attached order of the Supreme Court of Kansas), the court stated "we do not believe that a knowing and voluntary relinquishment of parental rights done in open court, with all the surrounding safeguards guaranteed by the judicial process, should be subject to an arbitrary refusal by SRS to accept the relinquishment". Arguably an agency may refuse to accept a relinquishment if the refusal is not arbitrary.

We are concerned that this decision seriously confuses the issue of whether the agency can refuse a relinquishment and this confusion will result in the state guardianship of children with no realistic hope of adoptive placement.

We believe the ballooned clause strengthens new section 14 and clarifies that a relinquishment of one's child is not final or binding to the agency until formally accepted by the agency. In other words an agency should accept such a relinquishment only when the relinquishment is in the best interest of the child.

Winston Barton
Secretary
Department of Social &
Rehabilitation Services
(913) 296-3271

(d) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $5 nor more than $50. Each and every day that the person fails or refuses to comply shall be deemed a separate offense under the provisions of this section.

New Sec. 14. (a) Any parent or parents or person *in loco parentis* may relinquish a child to an agency, and if the agency accepts the relinquishment in writing, the agency shall stand *in loco parentis* to the child and shall have and possess over the child all rights of a parent or legal guardian, including the power to place the child for adoption and give consent thereto.

The relinquishment shall not be final or binding until formally accepted by the agency.

(b) All relinquishments to an agency under sections 1 through 32 shall be in writing, in substantial conformity with the form for relinquishment contained in the appendix of forms following section 32 and shall be executed by: (1) Both parents of the child; (2) one parent, if the other parent is deceased or the other parent's relinquishment is found unnecessary under section 25; or (3) a person *in loco parentis*.

(c) The relinquishment shall be in writing and shall be acknowledged before a judge of a court of record or before an officer authorized by law to take acknowledgments. If the relinquishment is acknowledged before a judge of a court of record, it shall be the duty of the court to advise the relinquishing person on the record of the consequences of the relinquishment.

(d) Except as otherwise provided, in all cases where a parent or person *in loco parentis* has relinquished a child to the agency pursuant to sections 1 through 32, all the rights of the parent or person *in loco parentis* shall be terminated, including the right to receive notice in a subsequent adoption proceeding involving the child. If a parent has relinquished a child to the agency pursuant to sections 1 through 32, based on a belief that the child's other parent would relinquish the child to the agency, and such other parent does not relinquish such child to the agency, the rights of such parent who has relinquished a child to the agency shall not be terminated.

New Sec. 15. In addition to those requirements, where applicable, as set out in the provisions of sections 1 through 14, sections 16 through 25 shall apply to adoptions of minor children.

New Sec. 16. (a) In an independent adoption venue shall be in the county in which the petitioner resides or in the county in which the child to be adopted resides.

(b) In an agency adoption venue shall be in the county in which the petitioner resides or in the county in which the child to be adopted resided prior to receipt of custody by the agency.

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Statement Regarding S.B. 431

1. Title

An Act concerning adoption, enacting the Kansas adoption and relinquishment act; providing that certain health policies and contracts contain coverage with respect to adopted children.

2. Purpose

One purpose of this bill is to amend, reorganize, and recodify current adoption law, which is presently scattered throughout the statute books. A second purpose is to make necessary improvements in current law to better meet the needs of each member of the adoption triad.

3. Background

This bill introduces a number of new initiatives which serve to protect all those involved in the adoption process, i.e., the child, the birth parents, and the adoptive family. In addition it seeks to better regulate independent adoptions.

Passage of the bill will be a major step in assuring that children are placed in appropriate adoptive families and are better protected; that the rights of relinquishing and consenting parents are addressed; and that adoptive parents have knowledge of the child's background, genetic and health history. In addition the possibility of an adoption being set aside when these procedures are followed is minimal.

The attached amendment to New Section 14 is strongly supported by SRS, as it clarifies an agency's right to not accept a relinquishment when such a plan is not in the best interest of the child.

In 1989, a court accepted a relinquishment and placed the child in SRS custody. The court did so in the belief that the above referenced court decision forces the agency and court to allow parents to "divorce" their child. In this case the youth was a teenager already in SRS custody and in foster care. The parents had been informed that they would be expected to remain financially responsible for the youth. Due to their relinquishment of their parental rights, the parents are no longer financially responsible. It is unlikely this teenager will be successfully placed with an adoptive parent or parents.

Failure to amend this bill as it relates to revisions in New Section 14 and respond to the appellate decision could result in many additional parents attempting to abdicate their parental responsibilities to the agency.

5. Recommendation

SRS recommends passage of this bill as amended.

Winston Barton
Secretary
Department of Social &
Rehabilitation Services
(913) 296-3271

all. A court-appointed guardian ad litem appeared on behalf of the minor child at all proceedings.

At the close of the proceedings on April 9, 1986, the court, *inter alia*, made the following order:

"[T]he relinquishment by [C.W.J., the child's natural mother] is approved. Upon acceptance of this relinquishment by the Department of Social and Rehabilitation Services, all legal and physical rights to the minor child herein shall be given to the Department of Social and Rehabilitation Services with authority to consent to adoption or appropriate placement."

At the September 5, 1986, proceedings the court again found the relinquishment was knowingly and voluntarily made and was a valid relinquishment of parental rights. The court ordered that the care, custody, and control of the child be placed with SRS for adoptive placement and ordered that SRS proceed with adoption procedures forthwith. The natural mother did not object to any of the proceedings and there is nothing in the record that would indicate she desired at any time to rescind her relinquishment of the child. The record does reflect that on May 19, 1986, she approved the journal entry of the April 9, 1986, proceeding.

It is the position of the district attorney that the Kansas code for care of children should be liberally construed to meet the best interests of the child as mandated by K.S.A. 38-1501. It is also asserted that the court, having jurisdiction of all interested parties, has the inherent power to accept a voluntary relinquishment from a parent when that is in the best interests of the child. The inherent power of the courts has been described as:

"The phrase 'inherent powers' is used to refer to powers included within the scope of the court's jurisdiction which a court possesses irrespective of specific grant by constitution or legislature. Such powers can neither be taken away nor abridged by the legislature." 20 Am. Jur. 2d, Courts § 78.

SRS, on the other hand, takes the position that because the mother's relinquishment was not made in strict compliance with statutory provisions, and because no finding of unfitness was made by the court nor a severance of her parental rights ordered as provided for in the Kansas code for care of children (K.S.A. 38-1501 *et seq.*), SRS does not consider the child legally available for adoption and, therefore, is unable to consent to the adoption of the child. It is contended the district court had no

authority to accept the mother's relinquishment when it had not been made in compliance with statutory procedures.

Statutes provide that parental rights may be terminated in two ways: (1) by relinquishment to a corporate children's home pursuant to K.S.A. 38-112 *et seq.* or by relinquishment to SRS pursuant to K.S.A. 38-125 *et seq.*; and (2) by severance of parental rights in a proceeding pursuant to the Kansas code for care of children as set forth in K.S.A. 38-1581 *et seq.* Relinquishment to a corporate children's home under K.S.A. 38-113 is not involved in the present appeal. The statutes applicable to a relinquishment to SRS are K.S.A. 38-125 through 38-129.

K.S.A. 38-125 provides:

"Any parent or parents or person *in loco parentis* of a child may relinquish and surrender such child to the department, and if the department shall accept said child in writing, the department shall thereupon stand *in loco parentis* to such child and shall have and possess over such child all the rights of a natural parent or legal guardian, including the power to place such child for adoption and give consent thereto. Minority of a parent shall not invalidate such parent's relinquishment and surrender of said child."

K.S.A. 38-126 requires the relinquishment to be in writing and specifies who must execute the relinquishment.

K.S.A. 38-127 provides:

"The relinquishment provided by this act shall be signed and acknowledged before the court by the person or persons by whom it is executed and shall sufficiently identify the child or children so relinquished. It shall be the duty of the court, in all such cases of relinquishment so executed, to advise the parent or parents or other person *in loco parentis* of such children of the consequences of the act of relinquishment."

K.S.A. 38-128 provides:

"In all cases where a parent or person *in loco parentis* has relinquished and surrendered his child to the department pursuant to this act, and the judge before whom the relinquishment was executed shall have stated on the relinquishment document that the parent or the person *in loco parentis* had been advised by him of his rights and that the act of the parent or person *in loco parentis* was voluntary, all the rights of the parent or person *in loco parentis* shall thereupon be terminated, including the right to receive notice in a subsequent adoption proceeding involving said child."

K.S.A. 38-129 grants the district court authority to grant visitation rights to the grandparents of the minor child. Thus it is clear that in the final analysis any relinquishment to SRS must be determined by the court after a full explanation of the parent's rights

No. 60,075

In the Interest of A.W., a Child Under the Age of Eighteen.

SYLLABUS BY THE COURT

PARENT AND CHILD—*Severance of Parental Rights—Relinquishment of Rights by Natural Mother in Lieu of Severance Hearing.* In an action to sever parental rights pursuant to K.S.A. 38-1581 *et seq.*, the record is examined and it is held that under the facts of this case the court did not err in accepting a relinquishment of parental rights by the natural mother in lieu of proceeding with the action.

Appeal from Shawnee district court, DANIEL L. MITCHELL, judge. Opinion filed July 17, 1987. Affirmed and remanded for further proceedings.

John H. House, staff counsel, argued the cause and *Roberta Sue McKenna*, staff counsel for youth services, was with him on the brief for appellant, Kansas Department of Social and Rehabilitation Services.

Larry D. Hendricks, guardian ad litem, of Topeka, argued the cause and *Robert T. Stephan*, attorney general, *Gene M. Olander*, district attorney, and *Amy A. McGowan*, assistant district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

HOLMES, J.: The Kansas Department of Social and Rehabilitation Services (SRS) appeals from an order of the district court, in a proceeding to sever parental rights, which accepted the natural mother's relinquishment of her rights to the minor child and a subsequent order directing SRS to proceed with adoption proceedings of the child.

The parties, pursuant to Supreme Court Rule 3.05 (235 Kan. lxiv), submitted the matter to this court on the following agreed statement of the case:

"CASE HISTORY:

"A petition alleging this child to be a dependent and neglected child (under present law referred to as a child-in-need-of-care) was filed on February 3, 1978. The child was adjudicated on January 10, 1979, upon the stipulation of the natural mother to the allegations of the petition. The child was placed in the custody of the Department of Social and Rehabilitation Services and has remained so ever since. A petition to sever the parents' rights was filed in February of 1980, but that matter was later dismissed by agreement of all parties. A second petition to sever the parents' rights was filed on July 2, 1982, (district court case no. 82-JN-566) and a trial on that issue was held on October 27, 28 and 29, 1982. The judgment of the court was that the natural father's legal rights should be severed and it was so ordered. The petition as to the natural mother was again dismissed by agreement of all the remaining parties. None of these matters are at issue in this appeal.

"CURRENT MATTERS:

"A motion to terminate the natural mother's parental rights was filed by the district attorney on February 7, 1986. It was scheduled for trial by the court on April 9, 1986. On that date the natural mother appeared in court and stated that she wished to relinquish her rights to the child. The natural mother appeared pro se. The court made inquiry into the voluntariness of the mother's action and her understanding of her rights. The court determined the mother understood her rights, voluntarily wished to waive them and instead enter a relinquishment to her child. The court then accepted her relinquishment and advised all parties present that upon the acceptance of this relinquishment by the Department of Social and Rehabilitation Services, the child would be placed with the Department for adoptive placement. The court did not hear evidence on the state's motion and did not enter any finding of unfitness on the part of the mother. The Department was not a party to this action and was not represented by counsel at this proceeding, although a social worker employee of the Department was present, having expected to be called as a witness at the trial of the state's severance motion.

"A certified copy of the Journal Entry from this hearing was delivered to the Department on May 29, 1986. The Department subsequently advised the court that, in the opinion of the Department, because the mother's relinquishment had not been made pursuant to statutory provisions, and because no finding of unfitness was made by the court nor a severance of her parental rights done as provided for in the Code for the Care of Children, that the Department did not consider the child legally available for adoption and, therefore, would be unable to consent to the adoption of the child.

"The court reviewed this matter on September 5, 1986, and determined that the court had the power to accept the mother's relinquishment, that the relinquishment accepted in this matter was valid, and that the child was legally available for adoption. The court further ordered the Department to proceed forthwith to place the child for adoption.

"The Journal Entry of the court's decision was filed with the Clerk of the District Court on September 23, 1986, and a certified copy was delivered to the Department on September 24, 1986. The Department filed notice of its appeal of the court's decision on October 3, 1986.

"ATTACHMENTS

(1) certified copy of Journal Entry from April 9, 1986, hearing
(2) certified copy of Journal Entry from September 5, 1956, hearing
(3) certified copy of Department's Notice of Appeal filed October 3, 1986."

It should also be noted that the court reviewed the proceedings on July 3, 1986, at which time the mother of the child appeared by counsel; on July 17, 1986, when the mother again appeared *pro se*; and on August 1, 1986, when the mother did not appear at

ATTACHMENT IV 2-6-90 page 1 of 4

and a finding by the court that the relinquishment is the voluntary act of the parent.

Severance of parental rights is authorized by K.S.A. 38-1583(a), which provides:

"When the child has been adjudicated to be a child in need of care, the court may terminate parental rights when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future."

In the present case the minor child had been the subject of child care proceedings since 1978 with custody placed in SRS. The motion to sever parental rights was filed by the district attorney presumably at the request of SRS. K.S.A. 38-1529(a). On the day scheduled for hearing that motion, the natural mother of the child appeared in open court and advised the court that she desired to relinquish her rights to the child to SRS. She was fully advised of her rights and the consequences of relinquishment by the court. She subsequently approved in writing the journal entry which recited the court's actions and approved her relinquishment. It is the position of SRS that the statutes controlling relinquishment of parental rights and severance of parental rights must be strictly complied with in order for SRS to be able to give a valid consent to a subsequent adoption. We agree that the termination of parental rights is an extremely serious matter and may only be accomplished in a manner which assures maximum protection to all of the rights of the natural parents and of the child involved. In *In re Cooper*, 230 Kan. 57, 631 P.2d 632 (1981), we stated:

"Virtually all jurisdictions including Kansas recognize the parents' right of custody and control of their children are liberty interests protected by the Fourteenth Amendment Due Process Clause." 230 Kan. at 64.

Appellant relies heavily upon our decision in *Wilson v. Kansas Children's Home*, 159 Kan. 325, 154 P.2d 137 (1944), which involved the relinquishment of a child to a children's home under G.S. 1935, 38-113, the predecessor to K.S.A. 38-113. In *Wilson* the formalities of the statute were not strictly followed and the court found the relinquishment document to be invalid. In doing so the court relied upon the Missouri case of *In re*

Penny, 194 Mo. App. 698, 189 S.W. 1192 (1916), and quoted from that opinion:

" 'Divesting a parent of his right to the custody of his child is always a serious matter, and any statute which authorizes such a proceeding must be strictly construed. When the statute requires the contract of the parent to be evidenced in a particular way, that way must be strictly followed and every prescribed step must be treated as pertaining to a right or to the divestiture of a right, rather than as directory for the mere purpose of imparting public notice of the deed.' " 159 Kan. at 329-30.

The statutes pertaining to adoption are likewise to be strictly construed to assure that the rights of the natural parents, the child, and the adoptive parents are fully protected. See 2 Am. Jur. 2d, Adoption §§ 5-7. There can be no greater emotional trauma and distress than that which results from an attack upon a defective adoption proceeding, perhaps years later, and which disrupts the lives of all of the participants.

SRS apparently takes the position that if there is a proceeding to sever parental rights pending, then the parent or parents can never agree to a voluntary relinquishment pursuant to K.S.A. 38-125 *et seq*. It relies upon a manual it has prepared for guidance of SRS employees involved in providing youth services (Kansas Manual of Youth Services). The subject of voluntary relinquishments is discussed in section 4521 of the manual, which states in part:

"If a CINC [child in need of care] petition has been filed and adjudication is pending, relinquishment is never an option. This is true whether the petition is for a CINC child or termination of parental rights. It is the agency opinion that parents facing the stress of the adjudicatory hearing could claim that they were under duress when they signed the relinquishment."

While the objectives of SRS in seeking to protect all parties is laudable, we feel application of the internal operating procedures to the facts in this case were counterproductive and worked to the detriment of the parties involved. The issue before this court is not whether the internal operating procedures of SRS were followed to its satisfaction, but whether the court, under the facts of this case, had the authority to accept the mother's relinquishment made in open court.

K.S.A. 38-127 requires that when a parent desires to relinquish a child to SRS, it must be done in writing and signed and acknowledged *before the court*. The statute further provides that

it shall be the duty of the court to advise the parent of his or her rights and the consequences of the act of relinquishment. K.S.A. 38-128 provides *the court must find that the parent has been fully advised and that the parent's actions are voluntary.* Obviously the court must refuse the relinquishment if it finds the parent has not been fully advised or that the relinquishment is not voluntary. The converse of that authority is that the court, having determined that the proposed relinquishment is voluntary and that the parent has been fully advised of all rights and consequences, has the power to approve the relinquishment. We do not agree with the procedural guidelines of SRS that the mere pending of a proceeding precludes any voluntary relinquishment. The court is in the unique position of being able to render an impartial determination of the parent's true intent and desire and to protect the parent's rights. We find no merit in the contention that judicial proceedings, per se, subject a parent to duress which might invalidate a voluntary relinquishment. Some might even speculate that the procedures of SRS could amount to duress in certain circumstances.

SRS had been familiar with the family here involved for years. It had the custody and control of the minor child and was thoroughly advised, as was the court, of the background and history of the family. It appears that if there had not been a motion pending to sever the mother's parental rights, a voluntary relinquishment following SRS procedures would have been acceptable. If SRS had brought its forms to court and had them executed by the parent, there would have been technical compliance with the statutes. We do not believe that a knowing and voluntary relinquishment of parental rights done in open court, with all the surrounding safeguards guaranteed by the judicial process, should be subject to an arbitrary refusal by SRS to accept the relinquishment. The court had jurisdiction of the parties and the subject matter and its orders do not exceed its power and authority. To force the mother in this case to a full hearing with evidence as to her inability and unfitness as a mother would have accomplished nothing more than the court did in this case. No statute, law, or common sense requires the to perform a useless act. *In re Adoption of Baby Boy L.*, 231 199, 209, 643 P.2d 168 (1982).

We hold that under the facts of this case, where all of the rights of the natural mother were fully protected by the trial court and all of the requirements of the statutes for the protection of the mother were fully met, the court had the inherent power to accept the relinquishment. We find no error in the court's acceptance and approval of the relinquishment. We also hold that, as SRS voluntarily became a party to the proceedings and was fully represented, the order directing SRS to proceed with adoption proceedings was valid.

The judgment is affirmed and the case remanded for further proceedings consistent with the views expressed herein.

AUSTIN K. VINCENT
ATTORNEY AT LAW

1108 BANK IV TOWER
TOPEKA, KANSAS 66603

TELEPHONE (913) 233-4122
TELEFAX (913) 233-4124

MANHATTAN / TELEPHONE
(913) 539-0201

SUGGESTED AMENDMENTS TO SB 431
THE KANSAS ADOPTION AND RELINQUISHMENT ACT

I. NEW SEC. 5: As an alternative to the expense of independent legal counsel, consent or relinquishment of a minor in front of a district court judge would provide essentially the same safeguards.

SUGGESTED WORDING: Pg 2, Line 34 ADD

> "In lieu of the advice and presence of independent legal counsel, a minor may execute a consent or relinquishment before a judge of a court of record as provided in New Section 4."

II. NEW SEC 13: Blanket prohibitions on advertising and certain offers to assist will inhibit legitimate organizations from providing needed services.

SUGGESTED WORDING PG. 4, LINE 41 ADD

> "however, 'person' shall not include any charitable, religious or non-profit organization."

III. NEW SEC. 11: While payments outside those listed in the section may be disapproved by the court if discovered, there is still no criminal penalty for selling a baby in Kansas.

SUGGESTED WORDING: PG. 4, AFTER LINE 15 ADD:

> "(c) Any person who gives or receives a payment in violation of paragraph (a) shall be guilty of a Class ____ felony."
>
> "(d) The knowing failure to list all consideration as required by paragraph (b) is a Class _____ misdemeanor."

IV. NEW SEC. 22: Often a natural parent does not wish to be informed of the legal proceedings and the location and identity of the adoptive family. Natural parents should always have the option to waive notice of the proceedings which, in accordance with K.S.A. 59-2209, must include a copy of the adoption petition.

SUGGESTED WORDING: PG. 9, LINE 17 AMEND AS FOLLOWS:

> "(b) In independent and stepparent adoptions, unless waived, notice of the hearing on the petition shall be given...."

Life Choice Ministries

1433 Anderson Avenue
Manhattan, Kansas 66502
(913) 776-9406

January 25,1990

Senator Wint Winter
Chairman, Judiciary Committee

Dear Senator Winter,

We have received a copy of Senate Bill 431 from our attorney, Kent Vincent, with attention directed to Section 13.

The section says that no person shall offer to adopt, find a home for, etc.,"as an inducement." Legitimate groups, without profit, must make their services known by pamphlets, advertising, and so forth, if we are to bring birth mothers and adopting families together.

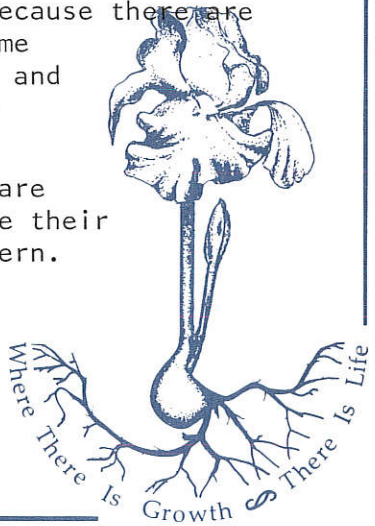
While we believe that any black market in babies should be stopped, we are concerned that this section may also stop the efforts of legitimate organizations such as Life Choice Ministries. We are incorporated under the laws of Kansas as a non-profit organization, operate with an elected board, and count volunteers from more than 18 churches on our roster.

Enclosed are copies of the materials we are presently using. They would seem to be in violation of Section 13 if passed.

We follow only approved methods for home study, selection of families, because we believe it is in the best interest of the birth mother and the adopting family.

We have not become a licensed child placement agency because there are already enough for those who wish to use them. The proper home study, care of the mother, attention of a qualified attorney, and court recognition of the process has been a most satisfactory system for our purposes.

Kansas has benefited from open adoption options. We are able to help and nurture young women, encourage them to change their lifestyles, and help them on the road to a non-repeating pattern.



Unfortunately, the record of public agencies seems to show a repeating pattern, extending into generations on welfare.

We believe that it is fair to the citizens of Kansas for alternatives to government agency, properly and openly conducted, to exist without handicap. Government agencies can barely handle what they have to do already.

We would like to ask whether Section 13 is intended to apply to non-profit organizations such as ours. If not, would it be possible to insert the phrase "for profit" in Sec. 13. (a) ,(1)?

Further, if in the future,Life Choice wished to operate a maternity home, we would need to be able to advertise to let young women know we are there to help. Such a blanket restriction on communication would be a serious handicap.

We would appreciate an opportunity to testify at the hearing if you feel it would be helpful in expressing our point of view, and making changes in the bill to prevent such restrictions on non-profit organizations.

Sincerely,

Dennis Glenn, Chairman of the Board
LIFE CHOICE MINISTRIES

Teresa Saueressig, Executive Director
LIFE CHOICE MINISTRIES

Before She Comes In. . .

Anxiously, she searches the face in her mirror. Does it show? Can she face her friends at school, her parents, if it is true?

Deep down, she knows the worst has happened. She checks her calendar once more and rips it angrily.

Who cares? Her boyfriend who "loved" her is dating someone new. Her Mom and Dad will be furious and ashamed of her. She can't tell *them*. Where *can* she go with no help and no money?

Who was that "Health" teacher at school who said you can always get a nice-safe-legal-abortion if your birth control fails. She practiced "safe sex". So, why is she pregnant anyway?

Will it be like her girl friend said, pain, humiliation, depression, nightmares, and finally, no more babies, ever? What went wrong? *Her* abortion was safe and legal. Why was *she* so sick?

Nobody cares. She feels used and scared. Where is that ad she saw for a free pregnancy test? Maybe it's so early that it's not really a baby. . .yet.

This is a typical case for LIFE CHOICE but some bring their boyfriends or husbands. Others have been abused or abandoned. Many grew up in Manhattan area churches, and many are our Christian daughters who need our love and comfort.

They all need to hear again and again that they are precious to the LORD and that they have great value now, and in the future, as women.

Life Choice Ministries

SERVICES

Friendship
Information
Guidance
Encouragement

Maternity Clothing
Baby Equipment
Pre-Natal Classes
Post-Abortion Help
Adoption

BOARD OF DIRECTORS

Dennis and Diane Glenn
Bob and Sandie Anderson
Fr. Norbert Dlabal
Nelda Hamilton

Sterling and Pat Hudgins
Larry and Elaine Limbocker
Rod and Billye Martin

Gayle and Randy McDonald
Jerry and Cathy Mowry
Rick and Sue Townsend
Mike and Karen Wyatt

Life Choice Ministries

offering friendship and help in Manhattan to women in crisis pregnancies

1433 Anderson
Anderson Village
16th and Anderson

Business or Volunteer Calls
776-9406
Referral of Clients
539-3338

When She Comes In. . .

A free pregnancy test is usually the reason for the first visit to our offices. Many girls are unaware they already carry a real baby by the time they suspect pregnancy.

We tell her all about her physical condition and the development of her baby. We also share information about abortion and what it would really mean to her body and her life.

We present ALL her options and alternatives because we believe she is entitled to make an informed decision. There is never any pressure or condemnation.

If she decides to carry her baby to birth, she will receive a "friendship helper" to walk alongside as she completes her pregnancy. . a trained volunteer who is also a mother, experienced in life, who will share love and encouragement.

During this time, in deciding whether to rear her baby or place for adoption, LIFE CHOICE again presents all sides of either course so she can make a fully informed decision based on the best for herself and her baby.

If she chooses to keep her baby, she is encouraged to finish her schooling. If she chooses adoption, she can read application information from Christian families and choose the best one for her baby.

The art of responsible decision-making is a LIFE CHOICE goal for each girl.

For the one who chooses abortion, LIFE CHOICE wants to be the friend to whom she can turn when she is having physical pain, nightmares, fears, temptation to suicide. . .whatever her situation. Many have returned, and many have referred their friends.

The message is the same. Jesus loves you and finds you precious and special. LIFE CHOICE is here to help you.

About Us. . .

LIFE CHOICE MINISTRIES was founded in 1987 by a group of Christian families. Our sole purpose is to offer practical help and encouragement to women trying to cope with unexpected pregnancies.

It is non-denominational and non-political, supported entirely by donations from supporters and churches in the Manhattan area who reflect the concern and commitment of the Christian community.

LIFE CHOICE is becoming a partner in ministry with area churches. At the present time, members of seventeen churches and fellowships work with us.

LIFE CHOICE is incorporated under the laws of Kansas, managed by an elected Board of Directors, with day-to-day supervision of a volunteer director and staff.

Supervisory staff is trained by Living Alternatives of Tyler, Texas. Volunteers are trained at seminars and on-the-job by community professionals in health, psychology, ministry, and education.

Our office space is donated by a Christian builder, utilities by Anderson Village merchants, interior decoration, including paint, wallpaper, furnishings, and labor have all been contributed by local volunteers.

You are welcome to visit us in Anderson Village, 16th & Anderson, entry facing west, behind Subs 'n Such. Hours are 9-5. You may call LIFE CHOICE for an appointment, or to discuss volunteer or business matters, at 776-9406. Referral of clients is received at the pregnancy testing number, 539-3338.

How You Can Help. . .

* Your Prayers that God will grant us great wisdom, compassion and discernment in ministering to those who come to us for help.

* Your Time LIFE CHOICE needs willing volunteers who can learn to answer the telephone, learn to meet with girls in the office, or be a friendship helper for a client.

  LIFE CHOICE needs volunteers who are ready for the special training required for this work: work with clients, office work, community liaison. We are also in need of professionals in health care and the social services to provide training and counsel.

* Your Money The expenses of LIFE CHOICE are being met solely by donation. One large garage sale each year is our o[n]e "fund-raiser". We will be able to grow and help [m]ore women as our budget grows. You are encouraged to [g]ive and to ask your church board to consider putting us in the budget.

ATTACHMENT VI page 4 of 4

KANSAS CHILDREN'S SERVICE LEAGUE

...to protect and promote the well-being of children ...to strengthen the quality of family life —since 1893

Wichita District & Central Office
1365 N. Custer
P.O. Box 517
Wichita, KS 67201
(316) 942-4261

Kansas City District Office
Gateway Center Tower II
Suite 212
4th & State Ave.
P.O. Box 17-1273
Kansas City, KS 66117
(913) 621-2016

Topeka District Office
2053 Kansas Ave.
P.O. Box 5314
Topeka, KS 66605
(913) 232-0543

Western Kansas District Office
705 Ballinger
Garden City, KS 67846
(316) 276-3232

Field Offices

Flint Hills
217 Southwind Place
Manhattan, KS 66502
(913) 539-3193

Emporia
417 Commercial
P.O. Box 724
Emporia, KS 66801
(316) 342-8429

United Way

SB 431. AN ACT CONCERNING ADOPTION
TESTIMONY BEFORE SENATE JUDICIARY

FEBRUARY 5, 1990

By Melissa Ness, Director of Advocacy/General Counsel
Kansas Children's Service League

Kansas Children's Service League is a statewide not for profit child welfare agency in Kansas. We are licensed as a child placing agency in Kansas and Missouri to provide adoption services. Although we provide a variety of services based on community need such as parent education, foster care, mediation, and pregnancy counseling, we are still closely identified as being one of the oldest adoption agencies in the state. In fact we have been involved in finding permanent homes for children since 1893. KCSL is a charter member of the Child Welfare League of America and accredited by the Council on Accreditation for Families and Children.

Our adoption program consists of coordinated services offered to the child, the child's biological parents and the adoptive parents. It is implemented in a way that the best interests and the welfare of the child are our primary concern. Placement of the child with an adoptive family having the same or similar cultural and racial background as the child is also a high priority. Our adoption services are delivered through our offices located in Emporia, Manhattan, Wichita and Garden City. In addition we have one of the few black adoption programs in the country located in Kansas City.

The numbers of children we have been placing for adoption has dropped. In 1988 we placed 42 children compared to around 60 in 1986. We provided post-placement services to 100 children in 1988, adoptive family development services to 216 families and adult adoptee searches for 56 adults. We emphasize and put energy in giving priority to placing children with special needs.

There are several provisions of the bill which we believe bring the rights and welfare of the various parties involved in the adoption process more in balance. They include:

*Validity of the consent. A consent is final when executed unless the consenting party...proves by clear and convincing evidence that [it] was not freely and voluntarily given. (Sec. 4 (a))

Member Child Welfare League of America
Accredited by The Council on Accreditation of Services for Families & Children

*...a minor parent shall have the advice of independent legal counsel as to the consequences of the consent or relinquishment prior to its execution. The attorney providing independent legal advice to the minor parent shall be present at the execution of the consent or relinquishment. (Sec. 5)

*Reasonable fees...(Sec. 11 (a) et seq.)

*The files and records of the court in adoption proceedings shall not be open to inspection or copy by persons other than the parties in interest..."parties in interest" shall not include genetic parents once a decree of adoption is entered. (Sec. 12)

*The addition of the penalty section of K.S.A. 65-509 regarding the advertising around adoption. (Sec. 13 (d))

Two sections of this bill will potentially change the way in which KCSL will handle adoptions.

One is the addition of the requirement of independent counsel in Section 5. Although not stated in specific language in the bill, the Judicial Council noted in its report on page 5 that as a practical matter "the petitioners for adoption or the child placing agency will be responsible for the costs of such independent counsel." As an agency we recognize the need to protect the rights of a minor in this situation and that we have an investment in seeing that a valid consent is executed. The majority of the population of mothers we serve in all likelihood will not be able to obtain consel because of economic constraints. If we must pick up the cost of independent counsel for the birth mother and potentially both birth parents, this would have a significant fiscal impact on our agency and would further jeopardize our ability to provide adoption services because of our increasingly rising costs.

The other change that will hinder our ability at KCSL to place a child as quickly as practically possible is in Section 16 which addresses venue. Section 16 (b) indicates in an..."agency adoption venue shall be in the county in which the petitioner resides or in the county in which the child to be adopted reside." Previously, the statute allowed the child-placing agency to initiate proceedings in the county in which the agency is located. See K.S.A. 59-2203.

Because of our work in the Metropolitan area of Kansas City we work to develop not only a pool of adoptive families on the Kansas side but also the Missouri side. We have many situations for example where we have a child relinquished to us whose residence is in Great Bend but have an adoptive family in Missouri. Using the office in Kansas City as our choice of venue allows greater ease and increases our ability to place a child quickly.

As an agency, we would prefer that the statute include a provision allowing the child-placing agency to use the agency location to bring adoption proceedings.

We also understand that the intent is to make compliance with the statute uniform and the potential concern of the ease in which an entity has the ability to become a child placing agency. If that is indeed the case we should be looking at the licensing standards for such agencies.

In summary, in order to give a child a sense of permanancy, protect the integrity of the adoptive family, as well as the rights of the birth parents we urge you to give serious consideration to the passage of SB 431.

above-described real estate is as the property of the said debtor, J. Gordon Baugh, and directed by said Order of Sale to be sold and will be sold without appraisement to satisfy said Order of Sale. Each property will be sold separately. This sale will be subject to the judgment debtor's one (1) year period of redemption and subject to all outstanding liens and encumbrances.

GROVER CRAIG
Sheriff of
Finney County, Kansas

Prepared by:
MANGAN, DALTON, TRENKLE, REBEIN & DOLL, CHARTERED
306 West Spruce
Dodge City, Kansas 67801
Telephone (316) 227-6126 (7560)

(Published in The Garden City Telegram, Saturday, September 30, 1989, October 7, 1989, and October 14, 1989)

STATE OF KANSAS, COUNTY OF FINNEY, ss:

In the Matter of the Estate of ELDON WAGNER, Deceased.

Case No. 87-P-7

NOTICE OF HEARING ON PETITION FOR FINAL SETTLEMENT

THE STATE OF KANSAS TO ALL PERSONS CONCERNED:

You are hereby notified that a Petition has been filed in captioned Court on the 29th day of September, 1989, by Robert Dean Wagner and Rodney Alan Wagner, personal representatives of the estate of Eldon Wagner, deceased, praying for a final settlement of such estate, approval of their acts, proceedings, and accounts as personal representatives, allowance of attorneys' fees and expenses, determination of the heirs, devisees, and legatees entitled to the estate, and assignment to them in accordance with the Will of Eldon Wagner, deceased. You are hereby required to file your written defenses thereto on or before the 23rd day of October, 1989, at 9:30 o'clock a.m., of said day, in said court, in the City of Garden City, Finney County, Kansas, at which time and place said Petition will be heard. Should you fail therein, judgment and decree will be entered in due course upon said Petition for Final Settlement.

ROBERT DEAN WAGNER,
RODNEY ALAN WAGNER,
Petitioners

JOHN D. OSBORN
CALIHAN, BROWN, OSBORN, BURGARDT & WURST
312 West Pine Street, P. O. Box 1016
Garden City, Kansas 67846
(316) 276-2381
Attorneys for Petitioners (7564)

	Garden No.1		
	Gess No.1		
	Hawk No.1		
37097	Hahn "B" No.1		
37099	Heiman No.1		
37103	Hicks "B" No.1		
37104	Hicks "C" No.1		
37105	Hicks "D" No.1		
37106	Hicks,C.O. No.1		
37107	Hicks,C.O. "B" No.1		
37401	Hicks "E" No.1		
45032	Jamison No.1		
45033	Jarmer No.1		
48052	Kisner No.1		
48062	Kelly "A" No.1		
48063	Kerfoot "A" No.1		
48064	Kisner No.1		
48065	Kisner "B" No.1		
51044	Lobmeyer No.1		
55099	McMillan No.1		
55100	Murphy No.1		
55101	Mercer No.1		
55121	Miller "H" No.1		
55122	Miller, Jo No.1		
55123	Mitchell No.1		
55124	Morris "B" No.1		
63824	Nusser "A" No.1		
65007	Oloman No.1		
71049	Reeve No.1		
71051	Russel "B" No.1		
71052	Russell "C" No.1		
71054	Russell "E" No.1		
71055	Russell "F" No.1		
71056	Russell "G" No.1		
71057	Russell "H" No.1		
76105	Smith No.1		
76106	Snodgrass No.1		
76107	Strackeljohn No.1		
76118	Salmans No.1		
76119	Schauf No.1		
76120	Schweer No.1		
76124	Shrimplin No.1		
76125	Sloan No.1		
76126	Smith "D" No.1		
76130	Strackeljohn No.1		
85011	Taggart N		
89009	Voth No.1		
89025	Ven John No.		
90088	Waller No.1		
90089	Waller "A"		
90108	Wood, Em		
90110	Wolf No.1		
90111	Wright No.1		

Finney County, Ks. Sec. 35 T26S R34W	71,888
Finney County, Ks. Sec. 25 T26S R34W	168,398
Finney County, Ks. Sec. 19 T26S R34W	341,887
Finney County, Ks. Sec. 13 T26S R33W	89,881
Finney County, Ks. Sec. 7 T26S R33W	113,081
Finney County, Ks. Sec. 4 T26S R33W	453,980
Finney County, Ks. Sec. 3 T26S R33W	61,037
Finney County, Ks. Sec. 10 T25S R33W	108,140
Finney County, Ks. Sec. 35 T24S R33W	83,676
Finney County, Ks. Sec. 3 T25S R32W	62,513
Finney County, Ks. Sec. 1 T25S R32W	44,598
Finney County, Ks. Sec. 12 T25S R32W	87,221
Finney County, Ks. Sec. 21 T24S R32W	51,360
Finney County, Ks. Sec. 28 T25S R32W	86,630
Finney County, Ks. Sec. 8 T26S R32W	268,241
Finney County, Ks. Sec. 14 T26S R33W	336,612
Finney County, Ks. Sec. 17 T25S R32W	16,081
Finney County, Ks. Sec. 20 T26S R33W	210,403
Finney County, Ks. Sec. 33 T26S R32W	657,191
Finney County, Ks. Sec. 33 T26S R32W	102,589
Finney County, Ks. Sec. 17 T26S R32W	197,234
Finney County, Ks. Sec. 25 T25S R33W	282,769
Finney County, Ks. Sec. 31 T25S R32W	263,130
Finney County, Ks. Sec. 26 T25S R32W	102,898
Finney County, Ks. Sec. 9 T26S R32W	212,131
Finney County, Ks. Sec. 6 T24S R33W	232,271
Finney County, Ks. Sec. 25 T24S R32W	82,051
Finney County, Ks. Sec. 27 T25S R32W	51,144
Finney County, Ks. Sec. 1 T26S R33W	168,527
Finney County, Ks. Sec. 11 T25S R33W	963,876
Finney County, Ks. Sec. 2 T26S R33W	594,669
Finney County, Ks. Sec. 11 T26S R33W	505,347
Finney County, Ks. Sec. 14 T24S R32W	111,449
Finney County, Ks. Sec. 35 T23S R32W	68,022
Finney County, Ks. Sec. 13 T24S R32W	67,170
Finney County, Ks. Sec. 1 T24S R32W	39,341
Finney County, Ks. Sec. 30 T25S R32W	68,457
Finney County, Ks. Sec. 31 T26S R32W	374,103
Finney County, Ks. Sec. 18 T26S R32W	209,217
Finney County, Ks. Sec. 21 T26S R32W	105,845
Finney County, Ks. Sec. 36 T26S R32W	435,069
Finney County, Ks. Sec. 30 T23S R32W	125,636
Finney County, Ks. Sec. 7 T24S R33W	159,383
Finney County, Ks. Sec. 8 T24S R32W	302,714
Finney County, Ks. Sec. 19 T24S R33W	142,265
Finney County, Ks. Sec. 6 T26S R32W	286,558
Finney County, Ks. Sec. 6 T24S R32W	73,721

Finney County, Ks.
Shall take notice of the foregoing and

11. Lost Found Strayed

LOST FEMALE Persian, multi-colored tan. If found call 276-6519 or 275-9730 afternoons, reward offered.

LOST WEDDING Set. Reward. Call 275-5963.

LOST IN vicinity of 3rd & Fair: [illegible] y Span- ing red vard.

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ATTACHMENT VII

SENATE BILL 431
Senate Judiciary Committee
February 5, 1990

Testimony of Blue Cross and Blue Shield of Kansas

Among the provisions of SB 431 is a requirement that health insurance policies provide benefits for "birth mothers" of adopted children.

This provision is the same as the provision of HB 2391 of the 1989 Legislature, on which hearings were held in the House Insurance Committee but on which no action was taken.

There are several serious problems with requiring coverage of "birth mothers" under health insurance policies which deserve your careful attention.

First, the provision would apply only to health insurance policies issued in Kansas. It would not effect persons with coverage under an insurance policy issued outside Kansas (including Kansas employees of national employers whose headquarters are outside Kansas), it would not effect persons covered by a health maintenance organization, and it would not effect, the many persons covered under self-insured plans. When the legislature seeks to fashion social policy by making benefits available to persons, it should do so as equitably as possible. This approach is highly uneven in its application, and would not be of benefit to hundreds of thousands of Kansans whose health coverage is not addressed by these provisions; it would, instead, saddle predominantly small and rural employers with extra health insurance expense.

Second, it is not clear how the provision would work in practical terms:

- If an insurer charges an additional premium for each person insured, may it do so when benefits are provided for the "birth mother"? If so, that premium would equal the delivery expense.

- Some insurance policies require that care be obtained from, or on referral by, a primary care physician. How do these limitations apply for the expenses of a birth mother.

°Some policies limit benefits depending on the hospital used. Where a "birth mother" is involved, even though the insured family probably had no choice about the delivery hospital, should these limits apply?

°Most insurance policies apply a waiting period from six months to a year from the beginning of coverage for each insured for pre-existing conditions. If these limitations are applied to "birth mothers", it is obvious no benefits are available.

°Must an insurance policy provide benefits if the adoption is the end result of a surrogate mother contract, where the costs of care may already have been addressed?

°If the birth mother has health insurance coverage, which policy pays first?

Insurance premiums today are predicated on benefits in existence today. Coverage of birth mothers is not in existence today. It is overly simplistic to argue that persons unable to have children are paying for a benefit they will never use -- all insureds are paying for some benefits they will never use. That is what the concept of insurance, of sharing risks, is all about.

These provisions, if enacted, would therefore have the following results:

°Uneven impact in terms of social policy.

°Difficulty in interpretation and application.

°Increased health insurance premiums.

We don't believe the costs of adoption should be included in health insurance premiums, especially in view of the other problems in the concept, and urge you to strike these provisions from the bill.

I am Charlotte Lee. I am a mother-by-agreement. On December 27, 1987, I gave birth to a baby girl -- a baby I would give to my half-sister and her husband, the baby's father, to raise.

The doubts the fears and the concerns I felt during the nine months of pregnancy were put down in a journal. So was the belief that all of us would lavish our love upon this child. I had believed this was to be something good for mankind. I had forgotten about the human factor. My baby now resides in the state of Missouri with her father and my half-sister. My dis-illusionment, despair, emotional turmoil and my grief are also in my journal. Some of what is here comes from that journal.

My half-sister had gone throught test after test, to the point of frustration, trying to find the reason for her inability to conceive a baby. I looked at this couple and thought that the love these two could and would give a child would have no bounds. I had felt very unloved as a child. I thought, "Imagine, this is the love I searched and longed for in my growing years. There won't be any restrictions to my seeing my baby and watch-ing her develop. I'm family." I have had the ability to watch my three children grow, to place their small hands in mine and to dream of their futures. I have known this joy so I thought I could provide a newborn life, my baby, and give my half-sister the experience of raising a child.

I speak freely of the human factor because I had no contract with a payment of ten thousand dollars or more as a dark cloud above my head. Nor was I programed by counseling therapist keeping my thought patterns on track in feeling pride, telling myself what I was doing, I would be rewarded with a sense of joy. My journals clearly sets to paper the bounding of mother/child a combination explaining my own grief.

I thought I had thought through all the ins and outs I would encounter by being a mother-by-agreement. I could never have forseen what has actually taken place! Sacrifices, disappoint-ments. I never realized the cross and the burden my family and

I would have to bear for the choice I had made. During the pregnancy, I had to repeatedly explain to people my reasons for relinquishing my baby. My children were verbally abused by others quick to prejudge, yet the stood steadfast in my defense, only to be left with lasting emotional scars We as people believe "WHAT WE WANT WE WILL GET NO MATTER THE COST", but the cost is too high. During my nine months of pregnancy my one daughter encountered serious problems coping, she began not coming home or being where she said she be. We were concerned for her but this made no difference, when our daughter was home she'd hide in her bedroom. At a church youth group meeting a disagreement with a friend and a exchange of words, the friend said "Why dosen't your mother give you away like she did her baby'. Yes, through out the nine months my daughter boldly and hatefully told me "but your're giving away your baby, my sister". I closed my ears, the turmoil continued. My other daughter was so proud of her baby sister she stood to the front of the class showing and passing the baby's pictures around for all her classmates to see. This same daughter had planned to spend the next summer at her Aunt's,baby sitting her half-sister, none of this happened.

Then the unthinkable happened. I almost lost my life while in the process of giving life. my hospital stay would last ten days. It was my family and friends who cared for me, not the recipients of my baby. I had heard their words -- I don't know how we'll ever be able to thank you enough or repay you -- as my baby lay on the hospital bed screaming at the top of her lungs. Tears were falling down my face as a lump came into my throat, making it difficult to swallow. I wanted to take my baby in my arms and hold her close - talk to her, as I'd done for the previous nine months, tell her all would be fine. None of this happened. I wasn't afforded a few precious moments to hold her. My half-sister took her away. The doctor had told them I would live so they took what they had come for and they left. I would survive and my body would heal, but the mental and emotional anguish, the hurting, the longing for the child, the endless nights of tossing and turning, of crying in the stillness, clinging to my rag doll, praying for the strenth to

live on, would continue. I still had to wake up in the mornings and be a wife, a mother, a worker and a survivor.

I found myself unable to keep my emotions in order as we were preparing to go to court to finalize the formal adoption in February of 1988. That morning I thought, "When my baby grows up and is told how special a baby she is, she'll think I gave her up because I didn't want her." How untrue! I lay on the couch, crying, in my mind saying, "I don't want to go to court." What I really wanted was to get up and tell my half-sister to leave, but I had made this choice. The adoption took place.

As time passed, my mind and my heart told me this must be how a mother feels when her child dies. At least, for me, I told myself, there would be pictures, letters, phone conversations and visits. Why couldn't someone just walk into the room and hand my baby to me so I could hold her for a few minutes. Instead, I reached for my rag doll, pulled her close, curled myself into the fetal position, gathered the covers about me and cried myself to sleep.

We had a family bar-be-que at my half-sister's home in May of 1988. I was trying desperately to make preparations for the day. Everyone was talking at the same time and suddenly, it hit me -- I wanted to be the one to hold my baby and show her off. I wanted everyone to be proud of me. Tears came to my eyes. My dad came over and hugged me, then asked, "How are you, sis? We love your." I replied, "Fine"' but I really wanted to drop my head on the countertop and cry my eyes out.

I have hidden my struggles from the world by keeping my journal. I was able to make myself accept the choice I had made -- until October, 1988. Then, during a conversation with my half-sister, when I was at my worst, I was unable, mentally and emotionally, to answer questions being asked. My children and I confronted them and were told that they felt we were butting into their lives and trying to run their household. They were so insensitive to our feelings and struggles. Comments such as, "Your mother

knew what she was getting into" and "She should have all the answers", were made to my children.

Two months later, they told me to apologize to them before I would be able to step foot in their home again to see my baby. The truth is -- not any one person has all the answers. The mother-by-agreement seemed to mean I would carry the burden for all those involved. I was so unprepared. The happy ending, in reality, is a fairy tale. I am stripped of an inner pride and feel guilty before a questioning, society. I scold myself. I have a physical scar on my body but the inner scar is there too. Who is going to know about that scar? I have been cheated!

In July of 1989, my nephew returned from a visit to my half-sister's home. He had taken a picture of my daughter for me. It shows a happy, healthy child. It is only me who suffers I keep asking myself,"If I stay silent for years and endure this pain, is this what 'good little girls do'? Am I to be the brave soldier -- stand tall and straight? Is it only in the still of the night that I can fall apart? What happens one day, during the daylight hours, when I am beyond return? Will they send fresh flowers or remember my birthday?

Since April, 1989, with legal counsel, I had been trying to converse with the family who has my daughter. I have been left out in the cold. Part of me wants to make their lives miserable and have them experience my pain and grief. I know how brainwashed we allow ourselves to be -- only to be used and tossed aside. I come to a conclusion -- there must be a weakness in my being that allowed me to surrender to others, to enhance them and cause such damage to myself.

Wake up world! How dare any of you think a mother can nurture the life that grows within her day and night while she struggles to meet the demands of those around her, and not have her emotionally bound to her baby.

I still do not understand the demand that is being placed at my feet! There was no payment required. I am family. They said

there would be no problem. We would visit back and forth. That was verbally stated by both parties in the courtroom in February of 1988, as visitation rights were being resolved. Yet, they treat us as common strangers.

My family and I gave so much of ourselves. What have my half-sister and her husband given? Shouldn't they have taken a few moments to weigh all we have been through? How dare they set all the rules and offer us no comfort! It was my family whom saw the turmoil as I wept, they stood steadfast in my support. We have our pictures and even a box of candy at christmas time. WE feel demoralized. My children want to see their baby sister and know how she's doing. They're aware their sister is alive. We were ALL a family, now we're a broken family and it's not because a parent has died, nor a divorce has taken place, or a child had been abandon. I the decision maker thought this was good for mankind. My half-sister and husband now make us aware of the rigided restrictions, because of their inability to conceive a child.

The word "surrogate" has been misused in our society. One taking the place of -- yes -- but my half-sister is the "surrogate" taking my place. I gave parental rights to her because I was led to believe there would be no restrictions. We were family, What more is expected? Do we suffer in silence? Bear our grief alone? We did--until the door was shut and communications ceased. That was when I, the mother, like an animal, felt trapped. I am still fighting to maintain physical and emotional stability for my self and for my husband and children. Couseling wouldn't have made any of my children not experience any of the feeling they've had, nor act another way. Not seeing, nor hearing about our baby-by-agreement, my daughter expressed in a letter her hate and it's only since I've stopped RELINQUISHING my baby my other children of the home are back to feeling safe. I quit telling them I was the care taker! I'm the mother of their sister I gave away, just as I'm their mother.

I see a need for legislation, I ask you to understand that any attempt to create a family by surrogacy will necessitate in break-

ing up another family, in taking away a family member. I have been told that I should forget the past because what is done is done and it cannot be changed. I am told I should look to the future. Well, I am a person who keeps bits and pieces of my ancestry alive, with stories, pictures, orginal belongings, so the past,as well as the future is of equal importance to me. You are the future and you will form your opinions that will be the deciding factors in the laws you make. Iask the Kansas Legislators to understand a law must be enacted to take the idea of "Enforceable Surrogate Motherhood", out of the market place! For if such agreements are unenforceable sisters and others will be warren that the "State of Kansas" has found forced surrogacy to be unacceptable and damaging to women and families. Rèmember please the life of the newborn, the life of mother and family as a unit.

Can licensed institutions honestly tell me as adults the taking from one family can truely be justified with a dollar amount, or because it "MADE A PERSON FEEL GOOD"? A child was given away to FIT the needs of others not the needs of a CHILD.I leave you with this my son refuses to discuss the matter, yet his head has fallen to his hands and wiped away tears.

Charlotte M Lee

SUMMARY OF

SURROGACY LAWS OF OTHER STATES

Florida - law provides penalties for violation of its provisions, making the violations a felony of the third degree with penalties of imprisonment of up to five years and/or a fine not to exceed $5,000.

law provides that contracts for surrogate parenthood arrangements involving compensation to any party are void and unenforceable.

Indiana - law declares any surrogacy agreement involving compensation to be unlawful.

law provides that if payment of fees are involved, then violation of the law is a Class D felony punishable by up to two years imprisonment and/or a fine of $10,000.

Kentucky - law makes contracts providing for compensation for surrogate mothers and surrogate brokers prohibited and unenforceable.

Louisiana - law declares surrogacy contracts null, void, unenforceable and contrary to public policy.

Michigan - law makes it a crime to enter into, or assist in the formation of a surrogate parentage contract for compensation.

law provides penalties for violations of up to five years imprisonment and a maximum $50,000 fine for persons acting as surrogate brokers.

Nebraska - law makes surrogate parenthood contracts void and unenforceable if compensation is involved.

Utah - law declares contracts or agreements entered into for profit or gain by any party to be null, void and unenforceable as contrary to public policy.

law provides that violation of the law is a Class A misdemeanor.

law provides that an agreement which is entered into, without consideration given, is unenforceable.

North Dakota - law makes any agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child conceived through assisted conception void.

Arizona - law declares that no person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.

Washington State - law declares that a surrogacy contract entered into for compensation be void and unenforceable, whether executed in Washington or in another jurisdiction. Such contracts are contrary to public policy.

law declares that no person, organization or agency shall enter into, induce, arrange, procure or otherwise assist in the formation of a contract, written or unwritten, for compensation.

law provides that those who intentionally violate this act shall be guilty of a gross misdemeanor.

law provides that in case of a dispute, the party having physical custody of the child retain custody until the superior court orders otherwise.

101ST CONGRESS
1ST SESSION

H. R. 1188

To establish certain provisions with respect to the discouragement of commercialized childbearing.

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 1989

Mrs. BOXER (for herself, Mr. HYDE, Ms. KAPTUR, Ms. PELOSI, Mr. FAUNTROY, Mr. ATKINS, Mr. LAFALCE, Mr. THOMAS A. LUKEN, Mr. HENRY, Mr. HERTEL, Mr. MCGRATH, Mr. BEREUTER, Mr. DEFAZIO, and Mr. PAXON) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To establish certain provisions with respect to the discouragement of commercialized childbearing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Commercialized Childbearing Prevention Act of 1989".

SEC. 2. ESTABLISHMENT OF CIVIL AND CRIMINAL PROVISIONS WITH RESPECT TO DISCOURAGEMENT OF COMMERCIALIZED CHILDBEARING.

(a) UNENFORCEABILITY OF AGREEMENTS.—

(1) IN GENERAL.—Any agreement described in paragraph (2) may not be enforced in the courts of the United States or in the courts of any State.

(2) DESCRIPTION OF AGREEMENT.—An agreement referred to in paragraph (1) is an agreement under which—

(A) a woman agrees, in exchange for a benefit—

(i) to become pregnant;

(ii) to give birth to the infant or infants involved; and

(iii) to provide, directly or indirectly, for the relinquishment of any parental rights and obligations of the woman with respect to the infant or infants, which relinquishment is made to an individual not the husband of the woman; and

(B) a person agrees, in exchange for any such relinquishment, to provide, directly or indirectly, a benefit to the woman making the agreement described in subparagraph (A).

(b) PROHIBITION AGAINST BROKERING OF AGREEMENTS.—

(1) IN GENERAL.—A person may not agree, in exchange for a benefit—

(A) to seek, on behalf of a person willing to enter into an agreement described in subsection (a)(2), any other person willing to enter into an agreement described in such subsection; or

(B) to knowingly otherwise facilitate the formation of an agreement described in such subsection.

(2) CRIMINAL PENALTY FOR VIOLATION.—Any person who violates a prohibition established in paragraph (1) shall be fined in accordance with title 18, United States Code, or imprisoned for not more than 6 years, or both.

SEC. 3. EFFECTIVE DATE.

This Act shall take effect upon the expiration of the 60-day period beginning on the date of the enactment of this Act.

○

SURROGATE MOTHER ARRANGEMENTS FROM THE PERSPECTIVE OF THE CHILD*

Herbert T. Krimmel

A dozen or so years from now, when the children already born from surrogate mother arrangements start to ask questions about the way in which they were brought into this world, what will we tell them? What can we expect their feelings to be?[1]

They will learn that they were different from other babies; that they were the product of what some call "collaborative reproduction."[2] They will discover that what this means in their cases is that their biological mothers decided to conceive them, not because their biological mothers wanted to raise, know, and love them, but for some other reasons. That, for these other reasons, their biological mothers entered into contracts to transfer custody of them to their biological fathers and their biological fathers' wives,[3] in order to fulfill a need that those couples had: the desire to experience the joys of having a baby.

If the emotional experiences of adopted children are a guide,[4] the children born under surrogate mother arrangements will want to know why their mothers gave them up. How will these children feel about the various reasons surrogate mothers[5] are giving today for why they enter into surrogate mother arrangements? And, if the experiences of adopted children are a guide, the children born under surrogate mother arrangements will want to know more than just the why of it. They will also want to know *how* it was possible for their biological mothers to have given them up. Will these children find complete solace for the fact that their mothers were able to part with them in the love of the parents who raised them?

And how will these children feel about the parents who raised them? What will they think about their parents' arranging for their existence with contracts, terms, conditions, and warranties? How will they feel that they had to meet specifications before their intended parents had to accept them?[6]

How will these children feel about the language that surrogate mothers use to describe themselves and them?

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* This article is an amplified version of my written statement (of the same title) prepared for the California Senate Committee on Health and Human Services and presented as part of my testimony before that committee at its hearing on surrogate parenting, held in Los Angeles, December 11, 1987.

I wish to thank Martin J. Foley, Joan Thureson, and my colleagues Professors Susan [illegible]tin, Robert Pugsley, Bruce Johnson, Karen Smith, and James Fischer for their many [illegible]ul comments and suggestions.

LOGOS: Philosophic Issues in Christian Perspective, Volume 9, 1988.

The purpose of this article is to address the practice of surrogate parenting from the perspective of the children who will be born under these arrangements; in order, I hope, to convince you that surrogate mother arrangements are both unethical and inimical to the interests of children and of society.

The Ethical Problem with Surrogate Mother Arrangements

What is fundamentally unethical about surrogate mother arrangements is that they, of necessity, treat the creation of a person as the means to the gratification of the interests of others, rather than respect the child as an end in himself.[7] They treat a person (the child) as though he were a thing, a commodity.

Essential and indispensible to the operation of each and every surrogate mother arrangement is the shared and common intention of the parties to transfer the baby at birth from his biological mother to his adopting parents.[8] But surrogate mother arrangements are more than just contracts about the custody of children vis-à-vis their biological parents. They are also contracts for the creation of children;[9] the irreducible core of which is that the surrogate mother must be willing to create a child with the premeditated intention to transfer him at birth. By the very nature of the transaction, the surrogate mother cannot desire to keep the child. Nor can she make a pretense to valuing the child in and for himself, since she would not otherwise be creating the child but for the monetary and other emotional consideration she receives under the surrogate mother contract.[10] Indeed, the very purpose and design of the surrogate mother arrangement is to separate in the mind of the surrogate mother her decision to create the child from the decision to have and raise that child. Her desire to create the child must necessarily be the result of some motive other than the desire to be a parent. The child is conceived, not because he is wanted by his biological mother, but because he can be useful to her and others. He is conceived in order to be given away.

The Motivations of Surrogate Mothers

Why do the women who sign up to be surrogate mothers enter into surrogate mother arrangements? According to the reasons thus far advanced by surrogate mothers themselves and those who have studied them:[11]

1. Most do it for the money. Ninety percent of surrogate mothers say they would not be surrogates if they were only reimbursed for their expenses.[12]
2. Many do it in order to deal with some past emotional trauma. About one-third of the surrogate mothers in the Parker study[13] say that an important

reason for them is to work through guilt, or other negative feelings, associated with a past abortion or with the giving up of a child for adoption.

3. Some of them do it, at least in part, because they enjoy being pregnant. These women cite as reasons both enjoyment of the physical sensations of being pregnant and of receiving the cultural deference and attention accorded pregnant women.[14]
4. Many cite the so-called "altruistic" motive. They want to do something nice for someone else, often expressed as wanting to give an infertile couple "the gift of life."[15]
5. The vast majority normally give some combination of the above as their motivation.

What is clearly absent from this list of reasons for procreating a child, and what *must* be absent for surrogate mother arrangements to work, is the motive of wanting the child. For, if the desire to have and raise the child were more important to surrogate mothers than the motives listed above, they could never enter into a surrogate mother arrangement.

However one may feel about the relative merits of the surrogate mothers' various motives, common to them all is the use of the child as a means to the surrogate mother's happiness. Each of the motives given above clearly indicates that the child is being *valued* by the surrogate mother, primarily, if not exclusively, for his utility as a means to her economic or psychological well-being. The child is a source of income, therapy, self-esteem, or good feelings. That, is his raison d'être. Implicitly, if not explicitly, the child has a price.

Even the so-called "altruistic" motive is not altruistic at all when viewed from the perspective of the child. Children should not be given away as elegant gifts to make others happy for the same reason one does not give one's spouse to a lonely friend. To do so is to treat them as things and not as persons. Moreover, it quite clearly communicates to the person being given away that he is of lesser importance to you than the happiness of the third party.

Regarding the Motives of Parents in Natural Procreation

But, it has been asked,[16] How are the motives of surrogate mothers really all that different from those of parents who use natural means of procreation? Professor Robertson argues that with natural parents "ends and means intertwine. Children are instruments for parental meaning and satisfaction, at the same time that they are loved for themselves."[17] He goes on to argue that "[p]ersons making this charge [that surrogate mother arrangements are ethically wrong because they use children as a means] usually overlook how traditional reproductive practices could

also be condemned on this basis."[18] Professor Robertson's comparison is erroneous for two reasons: first, because one evil does not justify another; and second, because it overlooks a very important distinction.

For any parent to treat his child, however conceived or acquired, solely as a means,[19] seems to me to be a pretty good theoretical definition of child abuse. We readily perceive and condemn this type of behavior in the case of overly ambitious parents; for example, those more interested in having a famous child actress, Olympian, pianist, and so on, than they are in their child's welfare. Surrogate mother arrangements, however, are not justified because parents using natural means of procreation *could* commit equal evils.[20] They are condemned because they cannot, by their very nature, rise to an ethical treatment of children that is possible for natural parents. Which, leads to the second fallacy in Professor Robertson's comparison.

Interestingly enough though, Professor Robertson has unwittingly suggested the answer to his own argument. The distinction that he fails to recognize is that for the surrogate mother the ends and means *cannot* intertwine. She cannot treat the child as an end valued for himself alone if she is going to enter into a surrogate mother contract;[21] while, conversely, with natural procreation it is *possible*[22] for the parents to treat their child as an end.

Furthermore, that natural parents commonly do have mixed motives for having children, valuing them for themselves, while at the same time expecting to derive pleasure from them, is not ethically impermissible, so long as the latter does not preclude the former. To use Kantian ideology, the pursuit of one's happiness and the performance of one's moral duty (to treat persons as ends) may coincide.[23] For example, one may enter into a marriage expecting to enjoy conjugal relations, but to value one's husband solely as a means of sexual gratification is to turn him, in your mind, into a prostitute. One may enter into marriage expecting to receive financial support, aid, and succor; but to view one's wife solely as a means of support is to treat her, in your mind, as though she were a slave.

What is this treatment of the child as an end, that natural parents are capable of, but surrogate mothers cannot attain and still be surrogate mothers? It is to love the child simply for who he is, selflessly and unconditionally. It is not possible for the surrogate mother even to make a pretense of loving the child in this manner[24] when she would not have created him but for the dual assurances that someone else would take him off her hands at birth *and* make it worth her while.

Why Surrogate Mother Arrangements and Adoption Are Different

If this is true, how is it possible for adoption to be ethical?[25] How is it possible to voluntarily part with someone you truly love? You cannot, by definition,[26] if it is in

hange for something else; no, not even for good feelings.[27] You can only do so if it is solely for the good of the one you love. In other words, only if it is a selfless act. The distinction between surrogate mother arrangements and adoption is that the latter can be a selfless act of love, while the former cannot be.[27a]

The typical situations that give rise to the placement of a child for adoption are (1) the child was unintentionally conceived and his mother decides to bring him to term, or (2) the parents desired to have a child, but because of some serious and unfortunate circumstances arising after conception decide that they cannot keep him. What is important for our discussion, however, is what does not happen in adoption. There, the child's mother does not conceive him for the purpose of giving him up. Adoption is an emergency: What will we do with the baby if the mother cannot keep him? Surrogate mother arrangements, on the other hand, are premeditated.

This results in a distinction of ethical importance. In adoption, the mother can make her decision on whether to keep the child or to place him for adoption on the basis of what is in the best interests of the child, regardless of her own preferences. What she cannot legally do is sell the child.[28] The surrogate mother, on the other hand, does not, and cannot, decide the question of the child's custody on the basis of what is in the child's best interests. That is what is expressly precluded by the very idea of surrogate parenting. She must have decided this issue on the basis of contract even before the child was conceived, and for reasons that suited her purposes.[28a]

Why the Love of the Adopting Parents Is Not Enough

But, it might be asked, why should it matter what the motivation of the surrogate mother is, when according to the surrogate mother arrangement it has been prearranged that the child will be taken by an adopting couple? Why isn't the love of the adopting couple a complete and adequate substitute for that of the surrogate mother?[29]

Parental love is not fungible. One wouldn't expect a child who is unloved by his father to find complete solace in his mother's devotion. To demur to a child's question of why his mother didn't love him enough to keep him, by saying that he needn't trouble himself seeking an answer to that question because someone else loves him, is not an emotionally adequate answer. If anything, our experience with adopted children should have taught us this: that children suffer terribly about the question why they were given away.[30] (And we are starting to see a similar manifestation of this phenomenon with children conceived through artificial insemination by donor.[31]) Parental love is not fungible any more than romantic love is. One does not comfort a person who has just lost his spouse with the thought the "woods are full" of eligible persons of the opposite gender.

An adopted child deeply appreciates the love of his adopting family, but he feels the loss of his biological parents nevertheless.[32] At least the adopted child—although still feeling the loss—can perhaps find some consolation in the explanation, if true, that his parents loved him but couldn't keep him.[33] This explanation cannot be used to comfort the child conceived through a surrogate mother arrangement for the simple reason that the surrogate mother never wanted the child for herself.[34]

In surrogate mother arrangements it is only a deflection, not an answer, to tell a child that because some other people love him, it is unimportant that his mother did not love him enough to keep him. Such a response willfully misses the emotional point of the child's question. This inquiry is made all the more poignant because the surrogate mother's giving up of her baby was not unavoidable, which the child might otherwise eventually come to understand and forgive. Rather, it was the very essence of the deal, without which the child would never have been conceived. The child will come to learn that it was *only because* his mother had the assurance of a binding contract that she could give him up for the money for which she conceived him in the first place. That is, this child came into existence on order, as a custom-made commodity for a guaranteed purchaser. Can any child be expected to understand, much less forgive, that?

The Motivations of Adopting Parents

Why do the adopting parents enter into surrogate mother arrangements? Typically,[35] those who are currently[36] seeking to utilize surrogate mother arrangements are, for the most part, infertile couples. They generally have gone to great lengths to remedy their infertility, and when that proved to be of no avail, they sought to adopt infants. Their attempts to adopt children proved unsatisfactory or frustrating to them either because they were turned down, or they were able to adopt children but were discouraged by the long wait (for white infants), or they were dissatisfied with the type of children available for immediate adoption (that is, older, "wrong race," handicapped, retarded).[37] A few couples utilizing surrogate mother arrangements never sought to adopt. They are particularly attracted to the surrogate mother arrangement because it results in a child with a biological link to one of the adopting parents, which they find to be a highly desirable advantage in comparison with adoption.[38] These couples would choose surrogate mother arrangements in preference to adoption.

What motivates the adopting parents is, for the most part, the desire to raise a child. So, what can be wrong with this desire? And, what can be wrong with the desire to procreate and raise a child of one's own blood in preference to adopting a child? Isn't that what almost all of us desire? Nothing is wrong with these desires per se. What is wrong is what is being done in utilizing surrogate mother

arrangements in order to satisfy these desires. Surrogate mother arrangements are wrong because you should not purchase[39] people;[40] because a child should not be an item of manufacture, which you create to specifications as you would a car; and because persons do not *exist* for your pleasure or in order to fulfill your needs. And yet, this is precisely the type of thinking that surrogate mother arrangements necessarily encourage and inevitably entail.[41] The evil that surrogate mother arrangements do is to deprive the child of the dignity to which he is entitled as a person, by treating him as a means. It matters not that the adopting parents' objective is worthy if their method of obtaining it is corrupt.[42]

Commodification: The Result of Treating and Perceiving the Child as a Means Rather Than as an End

It is when children are thought of as existing in order to fulfill needs that they become, in our minds, commodities. Surrogate mother arrangements entail and embody this type of thinking in two related ways: first, simply by virtue of the fact that they are, in essence, contracts for the creation and custody of children; second, because they encourage and tempt the adopting parents to view children as items of manufacture.

The surrogate mother and the adopting couple enter into the surrogate mother contract for the same reason that any person contracts: because the subject matter of the contract is more highly valued by one party than its quid pro quo, and vice versa. A contract is thereby designed to maximize the satisfaction of the contracting parties, and the subject matter of the contract is seen as a means to this end. The interests of the thing traded (if such a notion has any meaning at all) is unimportant.[43]

One hundred years ago, if an expecting couple were asked whether they wanted a boy or a girl, it was largely an idle question. They took what they got. If they had a preference, which they very well might, there was very little they could do about it. It was not a preference about which they expected to be able to exercise control. Today, with the techniques of amniocentesis, ultrasound, and sperm centrifuge, one can choose the sex of one's children.[44] And, as our knowledge of genetics, and equally important, our ability to manipulate and engineer results, increases, the proponents of collaborative reproduction invite us in earnest to consider what type of baby we would like—even arguing that the parents have a "right" to so decide.[45] What they do not seem to consider is that what is being invited is also a change in our attitude toward children. Their viewpoint would move us away from a simple, loving, and grateful acceptance of the child we in fact receive, and toward a critical consumerism of the "perfect" child we're entitled to, can afford, and therefore must have.[46]

The proffered *ability* to pick and choose builds expectations. It does with

products. It will, and already has, with children.[47] Why does one buy a product? Because it fulfills a real or perceived need. How does one value a product? By how well it performs in fulfilling one's expectations. Defective and inferior products are those that disappoint us. What implications does this have for the child? If the parents have a right to a perfect baby of their own design, who has the correlative duty? Does it not become the baby's duty to please his parents and to meet their expectations?[48] Is it any surprise that a recent study of 8,000 abortions performed at clinics in Bombay, India, reveals that 7,997 of them were of female fetuses?[49]

That surrogate mother arrangements do encourage and tempt the adopting parents to think of the child born through that process as a means to their happiness is quite evident from the not so subtle language used by them and the proponents of surrogate mothering.[50] One magazine article quotes an adopting couple as referring to their "right to have a normal newborn infant."[51] To speak as though your need and desire to have a child give rise to a "right" to a child is wrong for the same reason it would be wrong to argue that your loneliness entitles you to a spouse. It is neither your needs nor your desires that provide the justification for another's existence. It is wrong to act and talk as though another person's reason for being were to satisfy your needs, to be the means to your happiness.[52]

Does the Child Have Grounds to Complain?

Professor Robertson has argued that "[e]ven if there is a higher degree of confusion, unhappiness, or maladjustment in donor-assisted reproduction, a child would seem better off under this collaborative structure than not to exist at all."[53] Be that as it may, one may agree that no human life is without value and still find the practice of surrogate parenting to be unethical. By analogy, although it might be both objectively true, and subjectively felt, that a life without the use of one's legs is preferable to no life at all, that does not mean that a person would not be wronged by someone intentionally setting forth to manufacture him without legs in order to serve another's purposes.[54] By Professor Robertson's logic, no black American could object that his ancestors were brought to this country as slaves, since otherwise he most probably would not be living here today. That an evil act may have good consequences as well as bad ones does not justify the act, allow the actor to take credit for them, or erase the stain of their origin.[55]

The fundamental mistake underlying Professor Robertson's argument is that he addresses the wrong question. Even if the children born under surrogate mother arrangements are objectively "better off" in comparison with non-existence, and even if we presume hypothetically that subjectively they would prefer life with these impairments in preference to no life at all, this does not mean that they were not wronged. The ethical issue is not resolved simply by knowing that the impairments imposed by surrogate parenting have not succeeded in depriving the

's life of all value, or even by knowing whether the child would have consented if presented with the limited choice of having either an impaired existence or no existence at all. Rather, we must also address the question of why, in the first place, the parents should have a right to premeditatedly create a child with planned and intended impairments.[56]

Viewed from this perspective the answer becomes clear. It is unethical for parents to treat their children as things even if such acts do not succeed in depriving their children's lives of all meaning. And, furthermore, it is not right to treat persons as means, and not as ends, even if they grudgingly[57] consent to being so treated. For example, I suppose one could also say that sweatshop laborers are objectively "better off" than having no jobs at all, but this would not make taking advantage of their plight by paying them less than a fair wage ethically justifiable. Neither are blackmail nor armed robbery justified because the victim chooses the subjectively less loathsome alternative presented to him. Indeed, we do not even hold the consent of the victim to be valid in such instances, and not because it didn't reflect the victim's true preference on the occasion of his choice, but rather, because we don't consider the person who forced the choice upon him as entitled to make the victim choose from such a limited menu. Simply stated, one is not entitled to purposely stack the deck with Hobson's choices and then plead consent as a justification for one's evil act.

Professor Robertson has discovered that children are largely at the mercy of their parents. This, however, should be a cause for heightened responsibility, not for exploitation. People do not have an obligation to create children. The choice is theirs; but that choice does not encompass the right to abuse them.[58]

Conclusion

Surrogate mother arrangements are unethical. They preclude the surrogate mother from treating the child as an end in himself, and they strongly encourage and tempt the adopting couple to do the same. What is at stake here, however, is more than some persnickety concern over moral tidiness. The children born from these surrogate mother arrangements are going to hurt for the same reasons you and I would hurt. The ethical concerns I have raised in this article are those born of a concern for their feelings.[59]

Coda

It is reported that following the birth of a baby girl in April 1986, twenty-three-year-old Shannon Boff of Redford Township, Michigan, having twice been a ...rogate mother, announced her retirement with these words: "Any more babies ...ing from me are going to be keepers."[60] The fundamental question the

advocates of surrogate mother arrangements must answer is why any child should have to grow up with the knowledge that he was created in order to be "given" away, that *he* was not a keeper.

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Notes

1. Many perhaps will dismiss this questioning as hypothetical and speculative. After all, who can know how anyone will feel in the future, and can't we expect that there will be a broad range of feelings on the part of these children? Generalization? Certainly. It is the general case that we want to inquire about: What will the typical child born of these surrogate mother arrangements feel? Yes, we can expect that different persons might exhibit a range of reactions to being orphaned, for example, but no one doubts that for the average orphan it must be a thoroughly miserable feeling—a feeling that anyone who was once three years old and "lost" his mommy in the department store can relate to. (But see note 54, *infra*.) Speculation? Perhaps. But if so, it is one for which there is a strong basis in fact arising from the known experiences of adopted children, a schooled speculation based on what we have learned from past analogous experiences. The same rule that teaches me that if I wouldn't like something done to me that probably you won't like it done to you either. Perhaps we are engaging in speculation, but if so, it is what we had better do for the sake of these children.

2. J. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. Cal. L. Rev. 939, 1001 (1986) [hereinafter cited as Robertson (1986)].

3. For simplicity, I will refer hereafter in this article to the biological father and his wife as the "adopting parents."

4. See generally, A. Sorosky, et al., *The Adoption Triangle* (1978); and see Testimony of Suzanne Rubin before the California Assembly Committee on Judiciary, Surrogate Parenting Contracts, Assembly Publication No. 962, pp. 72-75 (Nov. 19, 1982) (hereinafter cited as Rubin); C. Gorney, *For Love and Money*, California Magazine p. 88, at 151 (Oct. 1983) (hereinafter cited as Gorney).

5. Although I am in complete accord with Katha Pollitt's point that we should refer to the surrogate mother simply as the mother, since the term mother "describes the relationship of a woman to a child, not to the father of that child and his wife" (K. Pollitt, *The Strange Case of Baby M*, 244 The Nation 667, at 682-83 (May 23, 1987) (hereinafter cited as Pollitt)); nevertheless, the term "surrogate mother" unfortunately has caught hold, and I have decided to continue to use it for the sake of clarity. But see *In re Baby M.*, 537 A. 2d 1227, 1234 (N.J., 1988) (hereinafter cited as *In re Baby M.*—Sup. Ct. Opn.).

6. See, e.g., B. Kantrowitz, et al., *Who Keeps Baby M?* Newsweek p. 44, at 47, 49 (Jan. 19, 1987) (hereinafter cited as Kantrowitz); Gorney, *supra* note 4, at 90 (box); *In re Baby M.*—Sup. Ct. Opn., *supra* note 5, at 1268 (Appendix A).

7. See I. Kant, *Metaphysical Foundations of Morals* (1785) in C. Fredrich (ed.), The Philosophy of Kant, 176-78 (1949) (hereinafter cited as Kant).

8. See *supra* note 3.

9. There has been a lot of loose talk that surrogate mother arrangements are not baby bartering because the adopting parents are merely renting the services of the surrogate mother. See, e.g., *In re Baby M.*, 525 A. 2d 1128, 1160 (N.J. Super. Ch., 1987), *rev'd*, 537 A. 2d 1227 (N.J., 1988) (hereinafter cited as *In re Baby M.*—Ch. Ct. Opn.). The argument is a red herring. Surrogate mother arrangements are about procuring babies. The adopting couple want the end product, and would dearly love to dispense with the services of the surrogate if they could. In general they have tried, having only come to surrogacy after attempting to acquire a baby by adoption. As has been pointed out by Professor Capron (L.A. Times, April 7, 1987, Sec. II, p. 5, col. 7), and others, most surrogate mother contracts only provide for compensation to the surrogate mother on delivery of a baby, no payment being made if the surrogate miscarries (i.e., renders the service but fails to deliver the product). But even the more sophisticated contracts currently being drafted, which provide for some compensation to the surrogate mother if she miscarries, do not change what these contracts are about. Surrogate mother contracts are not pure, or even primarily, service contracts. They are mixed contracts for both services and a product. If anything, the service portion is incidental to the expectations, and in the minds, of the adopting parents. For example, if I contract to have a masseur give me a back rub, it is to the service alone that my expectations lie. But if I contract to have my portrait painted, I am not satisfied that the artist performs all the necessary services well. The essence of the contract was that I wanted a picture of myself. Until that is delivered I am not satisfied. So it is with the adopting couple in surrogate mother arrangements. If the surrogate mother miscarries, through no fault of her own—i.e., she performs the service—the adopting parents will be disappointed, and their disappointment will not relate to the service, but to the failure to get the product. See, e.g., Gorney, *supra* note 4, at 150. An example of a mixed contract where the sale of a product is incidental to the service would be where you employ a doctor to sew up a wound that entails the sale of the stitches. Quite a different case. And see *In re Baby M.*—Sup. Ct. Opn., *supra* note 5, at 1240-41, 1248.

10. In point of fact, surrogate mothers do not create these children merely for the sake of bringing them into existence. Were we to find such a person, however, would her actions be ethical? No, for the same reason that it is not ethical for the proverbial sailor, acting solely of course in the interest of adding to human existence, to cheerfully bestow the "gift of life" on all naive females he can talk into it. To desire something to exist requires one to desire all those things that are necessary for its existence, and all those things that are essential elements of it or are inseparably connected with it. To desire a child is to desire the responsibilities that come with a child, for that is what a child is, a package. Separating the decision to procreate a child from the desire to have and raise that child fails to respect that child as an end in himself because that act is incompatible with loving him. See notes 21-34 and accompanying text *infra*.

11. See, e.g., P. Parker, *Motivations of Surrogate Mothers: Initial Findings*, 140 Am. J. Psych. p. 117-18 (Jan. 1983); Kantrowitz, *supra* note 6, at 47; M. Gladwell, *Surrogate Parenting Industry Goes into Legal Labor Pains*, Insight p. 20, at 21 (Sept. 22, 1986) (hereinafter cited as Gladwell); Gorney, *supra* note 4.

12. *Id.* and see, e.g., *Womb for Rent*, Los Angeles Herald Examiner, Sept. 21, 1981, A3, col. 1; S. Lewis, *Baby Bartering?* Los Angeles Daily Journal, April 20, 1981; B. Krier, *The Moral and Legal Problems of Surrogate Parenting*, L.A. Times, Nov. 10, 1981, Sec. V, p. 1, col. 1; E. Markoutsas, *Women Who Have Babies for Other Women*, Good Housekeeping p. 96, at 99 (Apr. 1981).

13. See Kantrowitz, *supra* note 6, at-47; Gladwell, *supra* note 11, at 21; P. Avery, *Surrogate Mothers: Center of a New Storm*, U.S. News & World Report p. 76 (June 6, 1983).

14. See, e.g., Gorney, *supra* note 4, at 94-95.

15. See, e.g., *In re Baby M.*—Sup. Ct. Opn., *supra* note 5, at 1236; Kantrowitz, *supra* note 6, at 44, 47; Gorney, *supra* note 4, at 95.

16. Robertson (1986), *supra* note 2, at 1025.

17. *Id.*

18. *Id.* at 1025 n. 296.

19. A mere means, to use Kantian parlance. Kant, *supra* note 7, at 176-78.

20. See L.A. Times, April 17, 1979, Sec. I, p. 2, col. 1, reporting the case of parents who conceived a child for the purpose of having him serve as a bone marrow donor for his sister.

21. See text accompanying notes 7-16 *supra*.

22. Kant did not say that it was easy to be good or to be free, only that it was possible. Kant, *supra* note 7, at 199.

23. Kant, *supra* note 7, at 144-45.

24. I am not speaking here of love in the sense of an emotion (i.e., affection: *philia*), but rather in the sense of an act of will (*agapē*). And see Kant, *supra* note 7, at 147. For example, an antebellum slave owner might have had affection for some of his slaves, but his actions prove that he did not love them in the sense in which I am using the word.

25. I am not implying that all offerings of children for adoption are necessarily ethical. In order to be so they must be done in the best interests of the child. See H. Krimmel, *The Case Against Surrogate Parenting*, 13 Hastings Center Report 35, at 36 (Oct. 1983) (hereinafter cited as Krimmel).

26. See *supra* note 24. The fact remains that man is incapable of giving a non-religious justification for his existence and essential worth. It is precisely for this reason that a secular society must treat persons as ends in themselves. No man is required to justify his existence, because no man can. To violate this "taboo" and challenge another's right to exist is to challenge one's own. To require a reason for a person's being is to treat him as a means, which makes his worth to depend both upon his ability to satisfy some end, and also upon the value of that end itself, and *that* is a pit from which no man can escape.

27. See Kant, *supra* note 7, at 145.

27a. Surrogate mother arrangements and adoption also differ in their essential purposes and functions. The purpose of adoption is to provide good homes for existing children who need them. The purpose of surrogate mother arrangements is to create "desirable" children for people who want to be parents.

28. See, e.g., Cal. Penal Code Sec. 273; L. Andrews, *The Stork Market*, 70 A.B.A.J. 50, at 54-55 (Aug. 1984).

28a. See *In re Baby M.*—Sup. Ct. Opn., *supra* note 5, at 1238, 1242, 1246, 1248.

29. Using the term "surrogate mother" here, rather than mother, especially brings home the truth of Katha Pollitt's point to which I have previously alluded. See *supra* note 5.

30. See *supra* note 4; and see, e.g., Gorney, *supra* note 4, at 151; B. Lifton, *Twice Born: Memoirs of an Adopted Daughter* (1975).

31. See Rubin, *supra* note 4, at 72–75; L. Dusky, *Brave New Babies?* Newsweek p. 30 (Dec. 6, 1982); J. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 J. L. Reform 865, at 922–23 (1985).

32. See Rubin, *supra* note 4, at 72–75.

33. See, e.g., E. Keerdoja, et al., *Adoption: New Frustration, New Hope*, Newsweek p. 80, at 83 (Feb. 13, 1984).

34. Katha Pollitt's discussion of this point in her critique of the trial court's opinion in the *Baby M* case compels quotation:

> To be sure, there are worse ways of coming into the world, but not many, and none that are elaborately prearranged by sane people. Much is made of the so- called trauma of adoption, but adoption is a piece of cake compared with contracting. Adoptive parents can tell their child, Your mother loved you so much she gave you up, even though it made her sad, because that was best for you. What can the father and adoptive mother of a contract baby say? Your mother needed $10,000? Your mother wanted to do something nice for us, so she made you? (Pollitt, *supra* note 5, at 688.)

35. See, e.g., D. Gelman and D. Shapiro, *Infertility: Babies by Contract*, Newsweek p. 74 (Nov. 4, 1985) (hereinafter cited as Gelman and Shapiro); Gorney, *supra* note 4.

36. There is nothing, however, inherent in the technology of surrogate parenting that limits its use to infertile couples. See Krimmel, *supra* note 25, at 35. It has been suggested that surrogate parenting might be used by single men, by homosexual couples, by career women too busy to be pregnant, and even by models who want a baby but no stretch marks. See, e.g., Gorney, *supra* note 4, at 92, 94 (box); B. Beyette, *Bar's Family Law 'Think Tank' Tackles Surrogate Motherhood Issue*, L.A. Times, Jan. 21, 1987, Sec. V, p. 2, col. 3; J. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 Vir. L. Rev. 405, at 430 n. 68 (1983) [hereinafter cited as Robertson (1983)].

37. See, e.g., "Adoption in America," *Hearing before the Subcommittee on Aging, Family and Human Services of the Senate Committee on Labor and Human Resources*, 97th Congress, 1st session (1981), p. 3 (comments of Sen. Denton) and pp. 16–17 (statement of Warren Master, Acting Commissioner of Administration for Children, Youth and Families, HHS); Gorney, *supra* note 4, at 91.

38. See, e.g., Gelman and Shapiro, *supra* note 35, at 77; cf. Gorney, *supra* note 4, at 150.

39. No one doubts that the adopting parents truly want a child. But in surrogate mother arrangements, as with the more traditional forms of baby bartering, paying for the child corrupts their good intentions. In this sense surrogate mother arrangements are like the sin of simony: attempting to purchase, and thereby corrupting, that which is given as a matter of grace.

40. See *supra* note 9. In the Baby M case, the trial court judge, Harvey Sorkow, made quite a point of arguing that surrogate mother arrangements couldn't be baby buying because a father couldn't buy what was already his. *In re Baby M.*—Ch. Ct. Opn., *supra* note 9, at 1157. I believe that Judge Sorkow made a factual error, which led him into making one. First, what is it that makes a baby yours? If it is the biological link, the surrogate

mother's claim is equal, if not superior, to the father's. See Pollitt, *supra* note 5, at 686. And indeed, if you are only claiming what is yours already, what is the need of paying anyone anything? What the adopting parents are paying for is the termination of the biological mother's custody rights in the child, and that is no different than paying off the co-owner of a piece of land because you want undisputed ownership of the whole. Second, parental agreements concerning custody rights are subject to court approval. See 15 S. Williston, *A Treatise on the Law of Contracts* Sec. 1744A (3rd ed. 1972). If, in a divorce case, one spouse attempted to trade custody rights in children as a pawn in the marital property settlement, one wonders how Judge Sorkow would react, and how he would distinguish that from what happens in surrogate mother agreements. And, while we are on the subject, how would we expect a child to feel when he finds out his mother traded him for the house?

41. See, e.g., Robertson (1983), *supra* note 36, esp. at 408–09, 412, 424, 429–430.

42. See *supra* note 39.

43. Cf. E. Landes and R. Posner, *The Economics of the Baby Shortage*, 7 J. L. Stud. 323 (1978); J. Prichard, *A Market for Babies?* 34 Toronto L. J. 341 (1984).

44. See M. Shapiro and R. Spece, *Bioethics and Law* 448 (1981).

45. See Robertson (1983), *supra* note 36, at 429–30.

46. The following exchange of letters in the Hastings Center Report is illustrative of the point:

> [I]f the happiness of the infertile couple is genuine, what good reason is there to suppose that the child will not benefit by being loved, cared for, and provided with suitable surroundings for growth and happiness? [M. Goodman, *Correspondence*, 14 Hastings Center Report at 43 (June 1984).]

> Goodman . . . asks rhetorically what good reason there would be to suppose that a couple made happy by the newborn would not reciprocate. There would be many, if the analysis begins, as does Goodman's, with the implicit assumption that it is somehow the infant's duty to make the *parents* happy, or even that there is some sort of mutual or equal measure of responsibility and expectations on that score. And yet, as Goodman unconsciously suggests to us, in the surrogate arrangement, there certainly will be. Those parents have contracted, at substantial fee, for that infant. Who among us willingly purchases damaged goods? Will a child with birth defects be as willingly and lovingly received from the surrogate as a "perfect" child? Will it? [Krimmel, *Correspondence*, 14 Hastings Center Report at 44 (June 1984).]

47. See, e.g., *No Other Hope for Having a Baby*, Newsweek p. 50 (Jan. 19, 1987); Gorney, *supra* note 4, at 94; cf. K. Lowry, *The Designer Babies Are Growing Up*, L.A. Times (Magazine) p. 7 (Nov. 1, 1987); Robertson (1983), *supra* note 36, at 429–30, 430 n. 66.

48. See *supra* note 46; cf. F. Pizzulli, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. Cal. L. Rev. 476, esp. 507–544 (1974) (hereinafter cited as Pizzulli).

49. C. Campbell, *A Homeric Constraint on Sex Selection*, 17 Hastings Center Report 2 (Oct. 1987); and see also, M. Stenchever, *An Abuse of Prenatal Diagnosis*, 221 J.A.M.A.

(1972); C. Westoff and R. Rindfus, *Sex Preselection in the United States: Some Implications*, 184 Science 633, 636 (1974).

50. See, e.g., Robertson (1983), *supra* note 36, esp. at 408-10, 412, 424, 429–436.

51. Gorney, *supra* note 4, at 155.

52. See *supra* notes 20 and 46.

53. Robertson (1986), *supra* note 2, at 1000; and see *Surrogate Parenthood*, A.B.A.J. p. 39 (June 1, 1987).

54. See Pizzulli, *supra* note 48, at 520. Professor Robertson apparently would agree that his proposed right of procreational autonomy would not extend to "harming" the child. Robertson (1983), *supra* note 36, at 432. He believes, however, that "fabrication or manipulation alone is not harmful, or at least not harmful enough." *Id.* at 432 n. 76. Elsewhere (Robertson (1986), *supra* note 2, at 995-97) he suggests that posthumous conception of children even "fifty or one hundred years after the genetic source's death, would not necessarily subject offspring to a life worse than death." *Id.* at 996. And to ban such a practice "might . . . interfere with the procreative liberty of the deceased person, who contemplated posthumous reproduction." *Id.* at 997. If planning an orphan doesn't count as harm, one must wonder how Professor Robertson defines the word.

55. See A. Lincoln, Second Inaugural Address, reprinted in II *The Collected Works of Abraham Lincoln 1848-1858*, at 333 (Brasler, ed., 1953).

56. It is precisely at this point that surrogate mother arrangements are distinguished from the problem posed by "wrongful life" cases such as *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967). Although both surrogate mother arrangements and "wrongful life" cases involve the situation where the cause that results in a person's existence is inseparably connected to that cause that results in an injury to the person as well; they differ due to the dissimilar characters of their causal elements; i.e., the reasons why existence and damage are inseparably connected. Stated otherwise, "wrongful life" cases and surrogate mother arrangements are similar in that, in both, existence and injury *are* inseparably connected, but they differ from one another in *why* this is so. In a majority of jurisdictions, in "wrongful life" cases the child has not been allowed to sue for being born deformed because his deformity and existence are inseparably connected, and the courts, for the most part, are unwilling to say that there is such a thing as a life without value. Hence, the large majority of courts have concluded, the child was not wronged by being born deformed because he could not otherwise have been. See G. Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 Israel L. Rev. 513 (1966). In "wrongful life" cases the injured child could not have been other than he was and still be. In this respect "wrongful life" cases and surrogate mother arrangements are indistinguishable. However, when we inquire in each of these situations into the *reason* for why there is a connection between existence and damage we see the distinction. In the case of "wrongful life," the reason for the connection between the child's existence and his deformity is not due to any choice his parents made, but rather, is the result of some natural or accidental cause beyond human control. In surrogate parenting, however, the parents are only willing to create the child if he has the impairment (of being born under a surrogate mother arrangement). It is the parents' choice that forges the link between existence and impairment. The connection between these elements is due not to nature, but to human will. The child still is not damaged by being brought into existence, per se, but the premeditated planning of his parents to give him a substandard or limited existence is evil.

57. I am not implying that a freely given consent would alleviate the ethical difficulty

here. For, neither is one entitled to treat one's self as a means, and not as an end. See Kant, *supra* note 7, at 178. The criminal law provides an interesting illustration of this point. Both the common law and modern authorities concur in the principle that consent is not a defense to the crime of mayhem. See *Wright's Case*, Co. Lit. 127a (1604) (defendant complying with a beggar's request, cut off the beggar's hand in order to give him more "colour to begge."); *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961) (defendant assisted in his accomplice's scheme to cut off the latter's fingers in order to obtain insurance money).

58. Furthermore, Professor Robertson's argument proves too much. The implications of his logic go far beyond the situation posed by surrogate parenting. For if a child has no ethical complaint about the manner of his conception or the specifications of his manufacture, so long as these do not make his life "worthless," why couldn't parents using traditional methods of procreation strike similar deals? What, for example, would prevent them from saying: "We will conceive a child only on the condition that he serve as a serf on our farm until he reaches the age of 35"? Or, once the technology of cloning becomes available to humans, how could it then be ethically objectionable to clone a replicant only on the condition that he serve as your organ donor if needed. (Cf. *supra* note 20.) When it comes time to take the replicant's kidneys, might one say to him: "You didn't get such a bad deal. You got to live up until now, and besides, had I not wanted an organ donor, I never would have made you"? This argument, when coupled with the belief that human existence is of incomparable worth, becomes a variation on the theme: I created you; therefore, I own you, and you owe me everything. Under such a view, child abuse would be a theoretical impossibility.

59. See *supra* note 1.

60. N. Blodgett, *Who is Mother?* 72 A.B.A.J. p. 18 (June 1, 1986).

TESTIMONY OF ACLU REFERENCE SB 190

TERESA A. MACHICAO

February 6, 1990

The intent of this statute is not apparent due to its vague wording. Is it the desire of the state to prohibit all surrogate agreements or merely those where the birth mother contracts away all of her rights in the child?

It is the position of the ACLU that an agreement between the parties that provides that the biological father will pay the prenatal care and birth expenses while the birth mother retains the right to decide after the birth whether or not to relinquish parental rights is no different than an adoption as recognized by the state of Kansas at this time. Therefore, this type of agreement is not against state policy. Any disputes arising under these agreements involving custody rights of the parents would be determined by the court based on the best interest of the child, just as subsection (c) of this bill directs.

It must be stressed that the compensation in these agreements is for the gestational services provided by the woman. These services include: conception, gestation, and the birth of the child. We feel that to condition the payment on the mother giving up parental rights is tantamount to selling children, and therefore these agreements should be void.

It is the position of the ACLU that section (d) which makes arranging void surrogacy agreements a class B misdemeanor serves no useful purpose. Accepting compensation to draft an agreement that the drafter knows to be void and against public policy is already included in the Kansas statutes concerning fraud, making this section unnecessary unless there is a large number people who arrange surrogate agreements free of charge.

Finally, the ACLU does not support SB 190 because its intent is unclear and the imposition of criminal sanctions into the realm of surrogacy.