

Michigan Law Revision Commission

THIRTIETH ANNUAL REPORT
1995

**MICHIGAN
LAW REVISION COMMISSION**

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Representatives:

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Ex Officio Member:

ELLIOTT SMITH
Director, Legislative Service Bureau
124 West Allegan, 4th Floor
P.O. Box 30036
Lansing, Michigan 48909-7536

Executive Secretary:

PROF. KEVIN C. KENNEDY
Detroit College of Law at Michigan State University
130 E. Elizabeth Street
Detroit, Michigan 48201

TABLE OF CONTENTS

| | |
|---|-----|
| Letter of Transmission from the Michigan Law Revision Commission to the Legislature..... | 1 |
| Recommendations to the Legislature: | |
| Revisions to the Michigan "Lemon Law" MCL §§ 257.1401-.1410..... | 7 |
| Report on the Uniform Adoption Act | 43 |
| Reproductive Technology: A Study Report of the Michigan Law Revision Commission..... | 45 |
| Prior Enactments Pursuant to Michigan Law Revision Commission Recommendations..... | 105 |
| Biographies of Commission Members and Staff..... | 115 |

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MICHIGAN LAW REVISION COMMISSION
Thirtieth Annual Report to the Legislature
for Calendar Year 1995

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its thirtieth annual report pursuant to section 403 of Act No. 268 of the Public Acts of 1986, MCL § 4.1403.

The Commission, created by section 401 of Act No. 268 of the Public Acts of 1986, MCL § 4.1401, consists of two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. The terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1995 were Senator Dave Honigman of West Bloomfield; Senator Gary Peters of Bloomfield Township; Representative Michael Nye of Litchfield; and Representative Ted Wallace of Detroit. As Director of the Legislative Service Bureau, Elliott Smith was the ex-officio Commission member. The appointed members of the Commission were Richard McLellan, Anthony Derezinski, Maura Corrigan, and George Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kevin Kennedy of the Detroit College of Law at Michigan State University served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1995 Commission members and staff are located at the end of this report.

The Commission's Work in 1995

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers, and the public generally as to defects and anachronisms in the law.

4. To recommend such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the civil and criminal law of this state into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees related to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States (e.g., California, New York, and Ontario). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission sometimes found that the subjects treated had been considered by the Michigan Legislature in recent legislation and, therefore, did not recommend further action. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

In 1995, the Commission studied the three topics listed below. The Commission recommends immediate legislative action on the first of the topics studied. On the second topic, the Commission recommends that no legislative action be taken. On the third topic, the Commission presents a study report.

The three topics are:

- (1) Revisions to the Michigan "Lemon" Law.
- (2) The Uniform Adoption Act.
- (3) Reproductive Technologies (study report).

Proposals for Legislative Consideration in 1996

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1995:

- (1) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13.
- (2) Consolidated Receivership Statute, 1988 Annual Report, page 72.
- (3) Condemnation Provisions Inconsistent with the Uniform Condemnation Procedures Act, 1989 Annual Report, page 15.
- (4) Proposed Administrative Procedures Act, 1989 Annual Report, page 27.
- (5) Judicial Review of Administrative Action, 1990 Annual Report, page 19.
- (6) Amendment of Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 141.
- (7) Amendment of the Uniform Contribution Among Tortfeasors Act, 1991 Annual Report, page 19.
- (8) International Commercial Arbitration, 1991 Annual Report, page 31.
- (9) Tortfeasor Contribution Under Michigan Compiled Laws §600.2925a(5), 1992 Annual Report, page 21.
- (10) Amendments to Michigan's Estate Tax Apportionment Act, 1992 Annual Report, page 29.
- (11) Uniform Trade Secrets Act, 1993 Annual Report, page 7.

- (12) Amendments to Michigan's Anatomical Gift Act, 1993 Annual Report, page 53.
- (13) Ownership of a Motorcycle for Purposes of Receiving No-Fault Insurance Benefits, 1993 Annual Report, page 131.
- (14) Repeal of UCC Article 6: Bulk Transfers, 1994 Annual Report, page 111.
- (15) The Uniform Putative and Unknown Fathers Act and Revisions to Michigan Laws Concerning Parental Rights of Unwed Fathers, 1994 Annual Report, page 117.
- (16) Arson as a Predicate Felony of the Michigan Felony Murder Statute, 1994 Annual Report, page 179.

Current Study Agenda

Topics on the current study agenda of the Commission are:

- (1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act.
- (2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal).
- (3) Health Care Consent for Minors.
- (4) Health Care Information, Access, and Privacy.
- (5) Public Officials -- Conflict of Interest and Misuse of Office.
- (6) Uniform Statutory Power of Attorney.
- (7) Uniform Custodial Trust Act.
- (8) Statutory Definitions of Gross Negligence.
- (9) Legislation Concerning Teleconference Participation in Public Meetings.
- (10) Michigan Legislation Concerning Native American Tribes.
- (11) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.
- (12) Government E-Mail.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the Detroit College of Law at Michigan State University, Detroit, Michigan 48201. The Executive Secretary of the Commission is Professor Kevin Kennedy, who was responsible for the publication of this report. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 70 Michigan statutes passed since 1967 upon the recommendation of the Commission.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
Maura Corrigan
George Ward
Senator Dave Honigman
Senator Gary Peters
Representative Michael Nye
Representative Ted Wallace
Elliott Smith

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REVISIONS TO THE MICHIGAN "LEMON LAW," MCL §§ 257.1401-.1410

The Michigan Lemon Law was enacted in 1986 to address the perception among purchasers of new motor vehicles that their only recourse in the event they purchased a defective vehicle was to pursue costly lawsuits in order to either recover the purchase price or obtain a replacement vehicle. See House Bill 4854, Senate Analysis, attached hereto as Appendix B. Given that perception, the Legislature concluded that such purchasers would elect to unload the "lemon" on an unsuspecting person, at a considerable loss. The Lemon Law was therefore enacted to correct this situation.

In brief, the Law requires manufacturers to replace a new motor vehicle or refund the purchase price if either of two events occur: (1) the manufacturer is unable to repair the vehicle after the same defect or condition has been subject to repair four times, or (2) the vehicle has been out of service due to repairs for 30 or more days during the first year following delivery. MCL § 257.1403. The Law further requires that all vehicle titles contain a statement advising purchasers of their rights under the Lemon Law. MCL § 257.1408.

Considering that ten years have intervened since its original enactment, the Commission examined the Lemon Law to determine whether it could or should be improved.

QUESTIONS PRESENTED

The report that follows was prepared by Helen Melia, Tracey Prosser, and Professor Kent Syverud, all of the University of Michigan Law School. They identified eight subjects for possible revision and posed the following questions:

1. Should the scope of coverage of the Lemon Law be expanded to include lease vehicles?
2. Should the scope of coverage of the Lemon Law be expanded to include used vehicles?
3. Should the scope of coverage of the Lemon Law be expanded to include commercial and recreational vehicles?

4. Should the scope of coverage of the Lemon Law be expanded to include dual-purpose (i.e., part-time personal, part-time business use) vehicles?
5. Should the scope of coverage of the Lemon Law be expanded to include dealer demonstration vehicles?
6. Should the Lemon Law be amended to make specific provision for reimbursement of taxes and fees incurred at the time of purchase?
7. Should the phrase "subject to repair," which serves as the trigger mechanism for invoking rights under the Lemon Law, be clarified?
8. Should the Lemon Law be amended to provide for effective notice to subsequent purchasers warning them that the vehicle is a "lemon"?

RECOMMENDATIONS

The Michigan Law Revision Commission makes the following recommendations:

1. In view of the recent explosion in lease plans as a method for acquiring a new motor vehicle, the Commission recommends that the Lemon Law be amended to include lease vehicles within the scope of Lemon Law coverage. The Commission endorses this proposal in principle with no specific recommendation for a statutory amendment.
2. With regard to including used vehicles within the scope of Lemon Law coverage, the Commission recommends that no change be made. Purchasers of used vehicles know that used vehicles are sold "as is," with all defects, absent express warranties by the seller to the contrary.
3. With regard to including commercial and certain recreational vehicles within the scope of Lemon Law coverage, the Commission recommends that no change be made to the Lemon Law in connection with commercial vehicles. All rights and remedies under the Uniform Commercial Code are available to purchasers of commercial vehicles, obviating the need for extending Lemon Law protection to such purchasers.

The Commission further recommends that no change be made to the Lemon Law in connection with recreational vehicles (e.g., motor homes, motorcycles, and mopeds). Nevertheless, the Legislature may want to examine whether coverage ought to be extended to motorcycles in view of their substantial purchase price and frequent use as a primary method of personal transportation.

4. With regard to amending the Lemon Law to specifically include coverage for dual-purpose vehicles (joint personal-business use), the Commission recommends that no change be made to the Law. Existing definitions of "consumer," "person," "motor vehicle," and "new motor vehicle" are adequate to cover this situation.

5. For the same reasons identified in item 4, the Commission recommends that no change be made to the Lemon Law to specifically cover dealer demonstration vehicles. Such vehicles typically are sold with a manufacturer's express warranty.

6. With regard to reimbursement of taxes and fees, the Commission recommends that no change be made to the Lemon Law, as this subject involves fiscal matters better left to the tax statutes.

7. With regard to clarifying the trigger mechanism "subject to repair," the Commission believes that current Lemon Law provisions are adequate and, therefore, recommends that no change be made to the Lemon Law.

8. With regard to amending the Lemon Law to require that disclosure be made to downstream purchasers of a vehicle found to be a "lemon," the Commission endorses this proposal in principle with no specific recommendation for a statutory amendment.

REVISING MICHIGAN'S LEMON LAW
A REPORT TO THE MICHIGAN LAW REVISION COMMISSION
SUBMITTED BY TRACEY PROSSER, HELEN MELIA, AND PROFESSOR
KENT SYVERUD, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

This report assesses possible modifications to Michigan's Lemon Law, which provides warranty protection for motor vehicle purchasers. Part I summarizes the current Michigan statute. Part II reviews proposed changes to the Michigan Lemon Law, catalogues methods by which other states have incorporated these changes into their own lemon laws, and evaluates the applicability of these provisions to the Michigan statute.

I. *Michigan Law*

A. The Legislative Intent

Prior to the 1986 enactment of the Michigan Lemon Law, MCL § 257.1401 et seq., MSA § 9.2705(1) et seq.,¹ the Michigan Legislature was concerned about the reluctance of dissatisfied motor vehicle purchasers to make use of statutory remedies or informal dispute resolution.² The Legislature found that this was due in part to mistaken beliefs on the part of consumers that the process of obtaining a refund or a replacement vehicle would be necessarily costly and time consuming. The Legislature further found that consumers were unaware of state and federal statutory remedies or of motor vehicle manufacturers' informal dispute resolution procedures. Moreover, those who were aware of and considered seeking statutory remedies under the Uniform Commercial Code (UCC) were reluctant to do so because of the UCC's uncertain standards.³ In addition, the Legislature cited the reluctance of consumers to surrender the vehicle during the dispute process. Consequently, owners of new defective vehicles declined to pursue remedies with the manufacturer and instead, unloaded their defective vehicles on other consumers, absorbing often substantial financial losses.⁴

1 See Appendix A for complete statutory text.

2 See Appendix B, which contains the Senate Analysis Section report on House Bill 4854 as well as the House Legislative Analysis Section report.

3 See the rationale behind MCL § 257.1401 in House Bill 4854, Senate Analysis: "Most people believe that, absent laws aimed specifically at defective autos, they must press arduous and costly lawsuits in order to entertain even a slim hope of recovering their money or of forcing the manufacturers to replace faulty vehicles."

4 See the Rationale behind § 257.1401 in House Bill 4854, Senate Analysis: "Typically a consumer, faced with the choice of either suing a manufacturer who has a large,

The Michigan Lemon Law attempts to educate consumers by assuring that they will be informed of their rights under the Lemon Law. The act mandates that a notice of rights under the Lemon Law accompany all new motor vehicle titles. Legislators believed that by specifying exact procedures and time limits to be used in repairing, replacing, or returning a defective motor vehicle, much of the uncertainty which existed under the UCC would be eliminated. Consequently, the Legislature anticipated that more consumers would prefer Lemon Law remedies over reselling their defective vehicles.⁵

B. The Statute

The Michigan Lemon Law limits the type of vehicles and vehicle purchasers covered by the act. The statute covers only consumers who actually purchase new motor vehicles.⁶ The statute does not protect lessees of new vehicles or purchasers of used vehicles.⁷ Within the scope of the act are automobiles, pick-up trucks, and vans; excluded are motor homes, buses, other trucks, motorcycles, and other vehicles with less than four wheels.⁸

The Michigan Lemon Law requires manufacturers to replace or refund the purchase price, including the cost of options or other charges from the manufacturer, if (a) the manufacturer is unable to repair the vehicle after the same defect or condition has been subject to repair four times, or (b) the vehicle is out of service because of repairs for 30 or more days during the first year after delivery.⁹ In addition, manufacturers must reimburse buyers for towing charges and rental vehicle costs that buyers incur as a result of the defective vehicle.¹⁰ It is not clear, however, whether a vehicle is "subject to repair" whenever work of any sort is performed on the vehicle or only when new parts are installed. Moreover, the manufacturer is not required to refund taxes, fees, or other collateral or incidental costs.¹¹

The statute does not require disclosure to future purchasers of the "lemon," i.e., that the vehicle was returned under the Lemon Law. Consequently,

experienced legal staff, or selling a defective vehicle, chooses to unload the lemon on someone else, probably at a considerable loss."

5 Id.

6 See Appendix A, MCL §§ 257.1401-.1402(a)(i).

7 See Appendix A, MCL § 257.1401.

8 Id.

9 See Appendix A, MCL § 257.1403.

10 See Appendix A, MCL § 257.1403, Sec. 3(1).

11 See Appendix A, MCL § 257.1403.

consumers who purchase a car that was returned as a "lemon" may encounter the same problems as the original purchaser, but have no statutory recourse under the Lemon Law.

C. Caselaw Development

Only one case involving the Lemon Law has reached the Michigan Court of Appeals since the statute was enacted in 1986.¹² However, at least one district court case has ruled on the meaning of the statutory phrase, "subject to repair."¹³ Several cases have invoked the alternative remedy of revocation of acceptance under UCC, MCL § 440.2101 et seq.; MSA § 19.2101 et seq.¹⁴

II. *A Review of Proposed Changes to the Michigan Lemon Law and a Look at Other States' Lemon Law Provisions*

Every state, including the District of Columbia and the U.S. Virgin Islands, provides some measure of protection to motor vehicle consumers through the use of statutes governing enforcement of motor vehicle warranties.¹⁵ Since its

12 In *Aver v. Ford Motor Co.*, 200 Mich. App. 337, 503 N.W.2d 767 (1993), the manufacturer violated the lemon law statute where the new motor vehicle was out of service because of repairs for 30 days during initial three months of ownership and failure to repair the pickup resulted from lack of repair parts. The Michigan Court of Appeals emphasized that there is a strong presumption that a reasonable number of repair attempts have been made and that this presumption is irrebuttable absent delay in repairs due to war, invasion, strike, fire, flood or other natural disaster, conditions which are explicitly provided in the statute. *Id.*

13 *DiRusso v. Issan*, Case No. GC92-9064, 46th District Court of Michigan, presided by Judge Brian H. Levy. In this case, an Oakland County jury deadlocked 3 to 3 on the meaning of "subject to repair."

14 See *Henderson v. Chrysler*, 191 Mich. App. 337, 477 N.W.2d 505 (1991), discussed infra at note 34.

15 Ala. Code § 8-20A-1 et seq. (1993); Alaska Stat. § 45.45.240 et seq. (1986); Ariz. Rev. Stat Ann. § 44-1261 et seq. (1994); Ark. Code Ann. § 4-90-401 et seq. (Michie 1993); Cal. Civ. Code § 1790 et seq. (Deering 1992); Colo. Rev. Stat. § 42-12-101 et seq. (1993); Conn. Gen. Stat. § 42-179 et seq. (1992); Del. Code Ann. tit. 6, § 5001 et seq. (1993); D.C. Code Ann. § 40-1301 et seq. (1993); Fla. Stat. § 681.10 et seq. (1992); Ga. Code Ann. § 10-1-780 et seq. (Michie 1993); Haw. Rev. Stat. § 4811-1 et seq. (1992); Idaho Code § 48-901 (1993); Ill. Rev. Stat. ch. 121 1/2, para. 1201 et seq. (1992); Ind. Code § 24-5-13-1 et seq. (1993); Iowa Code § 322G (1993); Kan. Stat. Ann. § 50-645 et seq. (1992); Ky. Rev. Stat. Ann. § 367.840 et seq. (Michie/Bobb's Merrill 1987); La. Rev. Stat. Ann. § 51:1941 et seq. (West 1993); Me. Rev. Stat. Ann. tit. 10, § 1161 et seq. (West 1993); Md. C.L. Code § 14-1501 et seq. (1990); Mass. Ann. Laws ch. 90, § 7N 1/2 (Law. Co-op. 1993); Mich. Comp. Laws § 257.1401 et seq. (1990);

enactment, questions have arisen of whether or not Michigan's Lemon Law could be more effective by further advancing the underlying legislative intent.¹⁶ These questions include whether the Michigan Lemon Law should cover leased vehicles and used vehicles; whether the definition of new vehicles should be broadened; whether the law needs a clearer statutory trigger clause; and whether the law needs a more effective disclosure provision.¹⁷ This section considers proposed changes to Michigan's Lemon Law, examines other jurisdictions' treatment of such proposed changes, and recommends a course of action with respect to each change.

1. Should the Michigan law extend statutory remedies to the acquisition of new motor vehicles under lease plans?

In recent years leases have become a popular method of acquiring new motor vehicles. As the acquisition costs of motor vehicles have risen, leases have become a popular alternative by reducing the financial commitment involved in a new car purchase. Many of the leases available today are leases with an option to buy, or lease-plan agreements. These lease plans typically involve a term of 1 to 2 years with an option to purchase the vehicle at the end of the lease term.¹⁸

Minn. Stat. § 325F.665 (1993); Miss. Code Ann. § 63-17151 et seq. (1989); Mo. Ann. Stat. § 407.560 et seq. (Vernon 1990); Mont. Code Ann. § 61-4-501 et seq. (1992); Neb. Rev. Stat. § 60-2701 et seq. (1988); Nev. Rev. Stat. § 597.600 et seq. (1991); N.H. Rev. Stat. § 357-D et seq. (1993); N.J. Stat. Ann. § 56:12-29 et seq. (West 1993); N.M. Stat. Ann. § 57-16A-1 et seq. (Michie 1987); N.Y. Gen. Bus. Law § 198-a et seq. (McKinney 1994); N.C. Gen. Stat. § 20-349 et seq. (1993); N.D. Cent. Code § 51-07-16 et seq. (1989); Ohio Rev. Code Ann. § 1345.71 et seq. (Baldwin 1994); Okla. Stat. tit. 15, § 901 et seq. (1993); Or. Rev. Stat. § 646.315 et seq. (1993); Pa. Stat. Ann. tit. 73, § 1951 et seq. (1993); R.I. Gen. Laws § 31-5.2-1 et seq. (1993); S.C. Code Ann. § 56-28-10 et seq. (Law. Co-op. 1991); S.D. Cod. Laws Ann. § 32-6D-1 et seq. (1993); Tenn. Code Ann. § 55-24-201 et seq. (1993); Tex. Rev. Civ. Stat. Ann. art. 4413(36) et seq. (West 1994); Utah Code Ann. § 13-20-1 et seq. (1992); Vt. Stat. Ann. tit. 9, § 4170 et seq. (1993); V.I. Code Ann. tit. 12A, § 180 et seq. (1993); Va. Code Ann. § 59.1-207.9 et seq. (Michie 1992); Wash. Rev. Code § 19.118.005 et seq. (1993); W. Va. Code § 46A-6A-1 et seq. (1993); Wis. Stat. § 218.015 (1994); Wyo. Stat. § 40-17-101 et seq. (1993).

¹⁶ See, e.g., 1991 House Bill 5392, 86th Legislature, which unsuccessfully attempted to amend the statute to include motorcycles.

¹⁷ See McBrien, "Representative Assembly Approve Dues Bifurcation," Michigan Lawyer's Weekly, May 3, 1993, page 1. In April, 1993 the Representative Assembly of the State Bar considered and rejected proposed amendments to the Michigan Lemon Law. The amendments would have expanded the statutory coverage to leased vehicles, other types of vehicles, and broadened consumer protection provisions.

¹⁸ These lease agreements are transferable only if the consumer finds someone to take over the lease. Otherwise the consumer must continue with the lease for the remaining period.

Lease plans are an attractive alternative to a purchase because they require a smaller down payment and allow the consumer to apply the lease payments against the end-of-term purchase price of the vehicle. The only statutory relief available to the consumer of a defective vehicle under a lease plan is under the UCC.

Another characteristic of new leased vehicles is that dealers often sell leased vehicles as used vehicles to other consumers after the lease expires. The subsequent used motor vehicle consumer, like the original new vehicle consumer under the lease plan, will not have the protection of the Lemon Law. Since leases are now a popular alternative to purchasing a new motor vehicle, many states have chosen to amend their lemon laws to address this issue.

a. Catalogue of the methods employed by other states to incorporate leased new motor vehicles into their lemon laws.

Thirty-one states¹⁹ provide some protection to lessees of new leased vehicles under their lemon laws. Many states include lessees in their definitions of consumers and/or motor vehicles.²⁰ Maryland has enacted a leased vehicle

Most plans do allow the consumer some form of release from the agreement, but only by paying a penalty fee to the lessor.

¹⁹ Ark. Code Ann. § 4-90-401 et seq.; Cal. Civ. Code § 1790 et seq.; Conn. Gen. Stat. § 42-179 et seq.; Del. Code Ann. tit. 6 § 5001 et seq.; D.C. Code Ann. § 40-1301 et seq.; Fla. Stat. § 681.10 et seq.; Ga. Code Ann. § 10-1-780 et seq.; Haw. Rev. Stat. § 481I-1 et seq.; Ind. Code § 24-5-13-1 et seq.; Iowa Code § 322G; La. Rev. Stat. Ann. § 51:1941 et seq.; Me. Rev. Stat. Ann. tit. 10, § 1161 et seq.; Md. C.L. Code § 14-1501 et seq.; Minn. Stat. § 325F.665; Miss. Code Ann. § 63-17-151 et seq.; N.H. Rev. Stat. § 357-D; N.J. Stat. Ann. §56:12-29 et seq.; N.Y. Gen. Bus. Law § 198-a; N.C. Gen. Stat. § 20-349 et seq.; Or. Rev. Stat. § 646.315 et seq.; Pa. Stat. Ann. tit. 73, § 1951 et seq.; R.I. Gen. Laws § 31-5.2-1 et seq.; S.C. Code Ann. §56-28-10 et seq.; Tenn. Code Ann. § 55-24-201 et seq.; Tex. Rev. Civ. Stat. Ann. art. 4413(36); Utah Code Ann. § 13-20-1 et seq.; Vt. Stat. Ann. tit. 9, § 4170 et seq.; Va. Code Ann. § 59.1-207.9 et seq.; Wash. Rev. Code § 19.118.005 et seq.; Wis. Stat. § 218.015.

²⁰ See, e.g., Minn. Stat. § 325F.665(1)(e), which defines "motor vehicle" as "(1) a passenger automobile as defined in sec. 168.011, subdivision 7, including pickup trucks and vans, and (2) the self-propelled motor vehicle chassis or van portion of recreational equipment as defined in sec. 168.011, subdivision 25, which is sold or leased to a consumer in this state."

Conn. Gen. Stat. § 42-179(a) defines "consumer" as "the purchaser, other than for purposes of resale, of a motor vehicle, a lessee of a motor vehicle, any person to whom such motor vehicle is transferred during the duration of an express warranty applicable to such motor

lemon law which is completely independent of the new motor vehicle lemon law.²¹

Some states include lessors as well as lessees in their definition of consumer.²² Connecticut allows a lessor to petition the court to become a party to the proceedings.²³ In addition, some states mandate a minimum term in a lease in order to come within the scope of their lemon laws.²⁴ Several states expressly

vehicle, and any person entitled by the terms of such warranty to enforce the obligations of the warranty."

21 Md. C.L. Code § 14-2001.

22 See, e.g., Ga. Code. Ann. § 10-1-782(3): "'Consumer' means any person who has entered into an agreement or contract for the transfer, lease, or purchase of a new motor vehicle primarily for personal, family, or household purposes, regardless of how the documents characterize the transaction. The term shall also mean and include any sole proprietorship, partnership, or corporation which is a commercial owner or lessee of no more than three new motor vehicles and which has ten or fewer employees and a net income after taxes of \$100,000.00 per annum or less for federal income tax purposes. For the limited purpose of enforcing the rights granted under this article, the term 'consumer' will also include any person or entity regularly engaged in the business of leasing new motor vehicles to consumers."

23 Conn. Gen. Stat. § 42-186: "In any action by a consumer who is a lessee against the manufacturer of a motor vehicle, or the manufacturer's agent or authorized dealer, based upon the alleged breach of an express or implied warranty made in connection with the lease of such motor vehicle pursuant to section 42-179, the lessee shall, at the time of the service of process upon such manufacturer, manufacturer's agent or authorized dealer, notify the lessor of such motor vehicle of such action by registered or certified mail, return receipt requested, and such lessor may petition the court to be made a party to the proceedings."

24 See, e.g., Fla. Stat. § 681.102 (10): "'Lessee' means any consumer who leases a motor vehicle for 1 year or more pursuant to a written lease agreement which provides that the lessee is responsible for repairs to such motor vehicle or any consumer who leases a motor vehicle pursuant to a lease-purchase agreement."

N.H. Rev. Stat. § 357-D:2(VII): "'Lessee' means any consumer who leases a motor vehicle pursuant to a written lease agreement for a term of 2 or more years."

Ind. Code § 4-5-13-3.4: "As used in this chapter, 'lease' means a contract in the form of a lease or bailment for the use of a motor vehicle by a person for more than four (4) months, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease."

require that the duty of making repairs to the leased vehicle are assumed by the lessee, or that the leased vehicle is under the manufacturer's warranty.²⁵

In the basic refund structure, the manufacturer generally pays the lessor the vehicle purchase price, collateral charges (such as freight and accessories added by the dealer), any fees paid to obtain the lease, insurance and other costs paid to benefit the lessee, sales taxes, and 5% of the purchase price.²⁶ Some states provide for reimbursement of taxes from a state agency to the manufacturer for any taxes refunded to the lessor.²⁷ Several states expressly provide that the lease terminates upon refund and that the lessor may not assess an early termination penalty.²⁸ In addition, New Hampshire requires the lessor to testify or provide other evidence for the lessee in arbitration proceedings.²⁹

The statutes usually specify how manufacturers must allocate refunds between the lessor and lessee. Most refund schemes provide that the manufacturer reimburse the lessee for his initial deposit, including allowances for any trade-in vehicles, plus the lease payments already made, less a reasonable allowance for the use of the vehicle while it was functioning properly.³⁰ Some states also adjust this amount to account for lessor expenditures that benefit the

25 See, e.g., Ark. Code Ann. § 4-90-403 (7): "'Lessee' means any consumer who leases a motor vehicle for one (1) year or more pursuant to a written lease agreement which provides that the lessee is responsible for repairs to such motor vehicle."

26 For an example of a typical refund provision tailored to leases, see N.C. Gen. Stat. § 20-351.3.

27 See, e.g., Fla. Stat. § 681.104(2)(b): "The Department of Revenue shall refund to the manufacturer any sales tax which the manufacturer refunded to the consumer, lienholder, or lessor under this section, if the manufacturer provides to the department a written request for a refund and evidence that the sales tax was paid when the vehicle was purchased and that the manufacturer refunded the sales tax to the consumer, lienholder, or lessor."

28 See, e.g., N.C. Gen. Stat. § 20-351.3(b): "In the case of a refund, the leased vehicle shall be returned to the manufacturer and the consumer's written lease shall be terminated by the lessor without any penalty to the consumer."

29 See generally N.H. Rev. Stat. § 357-D:3 IX(e): "The board shall give notice to the motor vehicle lessor of the lessee's filing of a request for arbitration under this chapter and shall notify the motor vehicle lessor of the date, time, and place scheduled for a hearing before the board. The motor vehicle lessor shall provide testimony and evidence necessary to the arbitration proceedings. Any decision of the board shall be binding upon the motor vehicle lessor."

30 See N.C. Gen. Stat. § 20-351.3 for an example of a complete lease refund provision.

lessee, for interest that would have been earned on the payments, and for incidental or consequential damages.³¹

b. Evaluation of including lease provisions in the Michigan statute.

If Michigan amends the Lemon Law to cover lessees and leased vehicles, the change would further the original purpose behind the law. At the time of enactment, leased vehicles were expressly excluded from the law because auto leasing was a relatively insignificant fraction of new car purchases. Today, in part due to changes in tax laws, leased vehicles are much more common among ordinary consumers. If no lemon law remedy is available for leased vehicles, the lessor (frequently a dealer) will certainly have a strong incentive to sell the defective vehicle at a loss to an unknowing buyer. The lessee (the consumer), moreover, will still experience considerable financial costs due to loss of use of the vehicle and the cost of alternate transportation. The lessee also will be less likely to enforce the uncertain remedies available under the UCC for the same reasons the Legislature found new motor vehicle buyers did not employ these remedies. Inclusion in the Lemon Law would provide lessees and lessors a defined procedure and fixed standards by which they could pursue remedies for defective motor vehicles, and therefore make it less likely that the vehicle will be sold by the lessor to an unsuspecting purchaser.

Any amendment for leases should be plain and unambiguous so as to provide guidance to the consumer. The Michigan law could be amended in the following ways to include leased motor vehicles within the scope of § 257.1401 remedies. First, Michigan could enact an entirely separate lemon law to govern leased vehicles, after the Maryland model.³² However, this route is not recommended since many aspects of the Michigan Lemon Law will overlap for consumers and lessees. A more desirable method for Michigan is to include provisions for leased vehicles in the Michigan Lemon Law that specify (1) which lease parties are covered, and (2) the reimbursement scheme for these parties. Michigan should adopt a provision similar to North Carolina's statute which clearly and concisely describes the refund scheme for leased vehicles.³³ Expanding the scope of the Lemon Law to cover leases is the best solution

31 See, e.g., N.Y. Gen. Bus. Law § 198-a(c)(2): "If applicable, refunds shall be made to the lessor and lessee as their interests may appear on the records of ownership kept by the department of motor vehicles as follows: the lessee shall receive the capitalized cost and the lessor shall receive the lease price less the aggregate deposit and rental payments previously paid to the lessor for the leased vehicle."

32 See Md. C.L. Code § 14-2001.

33 See N.C. Gen. Stat. § 20-351.3.

because it would avoid duplicating an entirely separate lemon law. It is further recommended that there be no time restriction on the lease. As long as the motor vehicle is leased "new" and meets the other statutory requirements, lemon law remedies should apply.

At a minimum, lease-plan agreements should be included in the statutory coverage, even if all leases are not included in an amended Lemon Law. Due to the rising cost of purchasing a new motor vehicle, many consumers find that lease plans are the only cost effective method to buy a car. Dealers often encourage consumers to lease, rather than purchase, because a lower down payment is required and lease plans involve a short-term commitment and flexibility. Lease plans should be included because lease-plan agreements often contain a 1-2 year term with an option to purchase at the end of the term. If the lessee is interested in purchasing the vehicle and has used the lease as an avenue for ultimate purchase, the lessee of a "lemon" will either have to purchase a defective vehicle, or decide not to exercise the option to buy and forfeit the payments made on the vehicle over the entire term of the lease. A lessee of a defective vehicle under a lease-plan agreement is committed to the agreement for an extended period and often only released from the agreement after paying penalty charges.

Caselaw reflects the inadequacy of the UCC to provide the "user friendly" remedies contained in the Lemon Law.³⁴ An amendment to Michigan's Lemon Law to include a section on leased vehicles will eliminate the need to resort to ambiguous UCC remedies by extending to the lease-plan purchaser the same lemon law protection afforded a new vehicle purchaser.

The refund arrangement should also be available to either the lessor (such as a dealer) or the lessee (the consumer),³⁵ since both parties have a financial interest in the defective motor vehicle. In this way neither lease party will have to rely on the other to assert refund rights. More importantly, the defective vehicle will more likely be returned to the manufacturer, and thus less likely to be sold to an unsuspecting consumer. This amendment to the Michigan Lemon Law will further one of the primary goals of the Michigan Legislature: to prevent the resale of a defective vehicle as a used vehicle to a consumer who will not have any lemon law protection.

34 In *Henderson v. Chrysler Corp.*, 191 Mich. App. 337, 477 N.W.2d 505 (1991), the plaintiff purchased a defective vehicle and tried to revoke acceptance under UCC § 2-608, MCL § 440.22608. The Michigan Court of Appeals held that the plaintiff was not in privity with the manufacturer because the plaintiff purchased the car from a dealership and therefore plaintiff had no recourse under UCC § 2-608.

35 See supra note 30.

In summary, by expanding the scope of lemon law coverage to more new motor vehicles, and thus reducing the possibility that defective vehicles will be sold at a loss as a used vehicle at the end of the lease agreement, these amendments will further the original legislative intent. Excluding leases from the existing lemon law remedies could potentially result in many defective vehicles being resold at a loss, contrary to the legislative intent behind the Michigan Lemon Law of discouraging the resale of defective vehicles.

2. Should the Michigan law include purchasers of used motor vehicles?

Currently, § 257.1401 covers "any other person entitled to enforce the provisions of an express warranty," in addition to the original purchaser. Therefore, all new vehicles that meet the statutory specifications seem to be covered for a given period of time, even if the vehicle is transferred during that period. However, § 257.1401 does not provide for lemon law coverage on vehicles sold as used which are sold after "1 year from the date of delivery of the new motor vehicle to the original consumer" or after "the term of the manufacturer's express warranty is in effect, whichever is earlier." Thus, Michigan's lemon law, unlike some other states, excludes the vast majority of used vehicles. The Legislature may wish to reconsider this exclusion. Providing lemon law coverage for vehicles resold after the current statutory period would be a valuable protection for used vehicle purchasers, but could be burdensome for manufacturers, particularly for vehicles that have been out of the control (and repair) of manufacturers for many years.

a. Catalogue of the methods employed by other states to incorporate coverage of used motor vehicles into their lemon laws.

Used car warranty statutes generally hold the used car dealer or private party seller liable for repairs, replacements and refunds of nonconforming vehicles.³⁶ Used car warranty statutes require sellers to provide specific warranties to a used vehicle purchaser. Some states list specific parts that a used car warranty must cover.³⁷ Massachusetts requires the owner to pay up to \$100 of any repair costs.³⁸ The warranty does not cover damage caused by abuse, negligence, theft, vandalism or fire.

36 See, e.g., Minn. Stat. § 325F.662 ("Sale of Used Motor Vehicles").

37 See, e.g., Minn. Stat. § 325F.662 Subd. 2(c).

38 See generally Mass. Ann. Laws ch. 90, § 7N 1/2.

The price of the car or the mileage at the time of purchase determines the warranty term.³⁹ Warranty terms are measured either in days (usually 30, 60 or 90) or mileage.⁴⁰ Generally, used car warranty statutes set a minimum price, a maximum mileage, or a maximum age for covered vehicles. Some statutes explicitly exempt dealers from having to provide warranties for special cars, such as classic, race, rare, or junked cars.⁴¹ The consumer may only waive the warranty if the waiver is written, conspicuous, and signed or initialed by the buyer and seller.⁴²

The consumer must notify the dealer within the warranty period of any defect substantially affecting the value of the vehicle.⁴³ If the dealer, or a repair facility it designates, attempts to repair the same defect three times and fails or if the vehicle is out of service for a certain time (usually 10, 15, or 45 days), the dealer must offer to buy back the vehicle.⁴⁴ If the dealer buys back the vehicle, it must pay the consumer the full purchase price plus other incidental costs, less a use allowance.⁴⁵ Furthermore, all states with used car warranty statutes allow resort to courts.⁴⁶

b. Evaluation of including used motor vehicles provisions in the Michigan statute.

The Michigan Legislature's concern about owners of defective motor vehicles passing those vehicles off on other purchasers would be addressed by a used motor vehicle lemon law applicable to commercial and private sellers. Such

39 See, e.g., Minn. Stat. § 325F.662 Subd. 2.: "Written Warranty Required. (a) Every used motor vehicle sold by a dealer is covered by an express warranty which the dealer should provide to the consumer. At a minimum, the express warranty applies for the following terms: (1) if the used motor vehicle has less than 36,000 miles the warranty must remain in effect for at least 60 days or 2,500 miles, whichever comes first; (2) if the used motor vehicle has 36,000 miles or more, but less than 75,000 miles, the warranty must remain in effect for at least 30 days or 1,000 miles whichever comes first."

40 Id.

41 For an example, see Minn. Stat. § 325F.662.

42 See, e.g., Minn. Stat. § 325F.662 Subd. 4.: "Waiver. When purchasing a used motor vehicle, a consumer may waive the express warranty for a covered part if: (1) the dealer discloses in a clear and conspicuous typed or printed statement on the front of the Buyer's Guide that the waived part contains a malfunction, defect, or repair problem; and (2) the consumer circles this typed or printed statement and signs the Buyer's Guide next to the circled statement."

43 See, e.g., Minn. Stat. § 325F.662.

44 Id.

45 Id.

46 See, e.g., Minn. Stat. § 325F.662.

a law would offer an incentive to owners of defective vehicles to seek redress directly from the vehicle manufacturer, rather than selling the vehicle at a loss and risking liability for future problems with the vehicle. In addition, purchasers of used motor vehicles would have a defined procedure and fixed remedies when pursuing the seller of the motor vehicle.

Manufacturers may claim that including used vehicles within the scope of lemon law remedies would be an undue burden because many things can happen to a used car between the time of manufacture and the time of resale over which the manufacturer has no control. Michigan could mitigate the impact of including used cars by including a provision similar to New Hampshire's,⁴⁷ which allows the manufacturer to claim misuse as an affirmative defense to the alleged nonconformity. One offsetting benefit of including used vehicles in the Lemon Law is that hopefully any defective motor vehicles that were not turned into the manufacturer as a new defective motor vehicle would ultimately be repaired as a used motor vehicle.

Another benefit of including used vehicles is to close a loophole that exists in lemon law statutes across the country. All laws provide that disclosure is required when a defective vehicle is resold in the state, but they do not discuss what happens if the vehicle is resold in another state. Thus, defective vehicles can be sold as used in another state without any disclosure. By covering used vehicles in its statute, Michigan could protect Michigan consumers who purchase a defective vehicle in Michigan that entered Michigan from another state.

This amendment would further the legislative intent behind the Michigan statute of encouraging purchasers to return used vehicles that are lemons and remove them from the stream of commerce, rather than sell them to someone else as a used vehicle. In this connection, if Michigan amends its lemon law, Minnesota's provision could be a model.⁴⁸ Providing for lemon law coverage like Minnesota's, coupled with an affirmative defense clause for manufacturers to claim intervening misuse like New Hampshire's, would reduce the burden on manufacturers and would be very beneficial to used car purchasers. Similarly, this amendment would be consistent with the legislative intent behind §257.1401 because it would encourage used car consumers to employ lemon law relief rather than sell the vehicle.

47 N.H. Rev. Stat. § 357-D:3 VI.: "It shall be an affirmative defense to any claim under this chapter that an alleged nonconformity does not substantially impair the use, market value, or safety or that the nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of a motor vehicle by a consumer."

48 Minn. Stat. § 325F.662, supra note 42.

Nevertheless, it must be acknowledged that the longer a vehicle has been in the hands of successive consumers, the harder it will be to prove whether it was the manufacturer or those who made repairs who are responsible for any defects. One alternative to amending the law to apply to used vehicles might be to include mandatory disclosure provisions concerning vehicles identified as lemons when they were new (see Part 7, below).

3. Should the Michigan law be extended to cover more types and sizes of new motor vehicles?

a. Catalogue of the methods employed by other states to incorporate coverage of various types and sizes of new motor vehicles into their lemon laws.

Many types of vehicles are excluded by Michigan and other state lemon law provisions. Twenty-eight states, including Michigan, exclude from coverage some type of vehicle with less than four wheels.⁴⁹ Twenty-seven states exclude vehicles in excess of a certain minimum weight which ranges from 6,000 lbs. to 19,000 lbs., 10,000 lbs. being the most common weight.⁵⁰ Kentucky excludes vehicles with more than two axles.⁵¹ Five states place a maximum passenger capacity on vehicles that receive lemon law coverage.⁵²

Some states have included coverage of vehicles that are easier to resell than the large vehicles described above. Some states include coverage for motorcycles or motorcycles and mopeds,⁵³ while others do not specify whether motorcycles, mopeds, or motorbikes are covered. Similarly, eleven states cover the chassis portion of a motor home, but exclude living areas.⁵⁴

49 Fla. Stat. Ann. § 681.102 (14): "'Motor Vehicle' . . . does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, the living facilities of recreational vehicles, motorcycles or mopeds."

50 See N.C. Gen. Stat. § 20-351.1(3): "'motor vehicle' . . . does not include any motor vehicle with a gross vehicle weight of 10,000 pounds or more."

51 Ky. Rev. Stat. § 367.840. The Kentucky weight and axle restrictions effectively exclude buses and large trucks in most cases.

52 See, e.g., Minn. Stat. § 325F.665.

53 See, e.g., Va. Code Ann. § 59.1-207.11: "'Motor Vehicle' . . . means only passenger cars, pickup or panel trucks, motorcycles, self-propelled motorized chassis of motor homes and mopeds."

54 Id.

b. Evaluation of adding these type and size provisions to the Michigan statute.

Given the original purpose of the Michigan Lemon Law to protect consumers, extending the Michigan Lemon Law remedies to more types and sizes of vehicles is unnecessary, in the case of commercial vehicles, such as buses and large trucks (other than pickups). The Legislature in 1987 may have assumed that purchasers of these other types of vehicles are more likely to be businesses and organizations who are more sophisticated about UCC remedies and thus more likely to invoke these remedies. This assumption still seems a valid one. The intent of the Michigan Lemon Law was to provide a user-friendly remedy for consumers who may be less knowledgeable and less likely to invoke UCC remedies due to their complexity or ambiguity.⁵⁵

These arguments are less convincing, however, in the case of vehicles such as motor home chassis and motorcycles. It can be argued that motor home chassis should be included because these vehicles traditionally are purchased for personal travel purposes by consumers with the same level of sophistication as those who purchase vehicles currently covered under the Michigan Lemon Law remedies.⁵⁶ The same argument applies to motorcycles, if the other statutory requirements are met (e.g., used for household purposes).⁵⁷

4. Should the scope of Michigan law be limited by the intended use of the new motor vehicle?

a. Catalogue of the methods employed by other states to include new motor vehicle purchases for "other than household use" into their lemon laws.

Seven states expressly limit coverage to vehicles used for personal, family, or household use.⁵⁸ Some states require some personal, family, or household use but allow other uses as well.⁵⁹ Thirty-two states require that covered vehicles be

55 See supra note 2.

56 Id.

57 Note that House Bill 5392, introduced in 1991, proposed covering motorcycles in the Lemon Law. This bill did not pass. See supra note 23.

58 See, e.g., Cal. Civ. Code § 1793.22(e)(2).

59 See, e.g., Haw. Rev. Stat. § 481I-2: "For purposes of this definition, a 'motor vehicle' also includes (1) an individually registered vehicle used for an individual's business purposes and for personal, family, or household purposes; and (2) a vehicle owned or leased by a sole proprietorship, corporation or partnership which has purchased or leased no more than one vehicle per year, used for household, individual, or personal use in addition to business use."

used primarily on public roads or specifically exclude tractors and other farm or construction machinery.⁶⁰ South Carolina does not cover vehicles used for compensation, except for those used for school or church activities.⁶¹ Many states cover dealer demonstrator vehicles.⁶² Six states cover all vehicles required to be registered in that state that meet other statutory requirements.⁶³

b. Evaluation of including these "other use" provisions in the Michigan statute.

Extending the scope of uses allowed under the Michigan Lemon Law seems unnecessary to a large extent. The Lemon Law is primarily designed to be a statute of convenience for consumers who might not employ complicated UCC remedies. It is important to remember that the UCC remedies are still available for vehicles used for other than "household purposes." However, there is some merit in expanding the "use" provision of the Michigan Lemon Law to include coverage of "gray area" vehicles not used solely for household purposes, but which are more alienable (and thus more likely to be resold if defective) than most commercial vehicles.⁶⁴

The strongest case exists for extending the Michigan Lemon Law to demonstration vehicles and multiple use vehicles. After vehicles are used as demonstration cars, dealers often sell them to consumers as used vehicles. The dealer may sell a defective demonstration car at a loss as a used demonstration car to an unknowing purchaser. Similarly, many people own dual-purpose vehicles for both personal and business use who may "cut their losses" and resell the vehicle, rather than invoke UCC remedies.

The best example of a lemon law covering multiple use vehicles and demonstration vehicles is Hawaii.⁶⁵ If the scope of uses is extended, the

60 See, e.g., Ind. Code Ann. § 24-5-13-5: "'motor vehicle' . . . means any self-propelled vehicle that . . . (3) is intended primarily for use and operation on public highways, (4) is required to be registered or licensed before use or operation. The term does not include conversion vans, motor home . . . [or] farm tractors."

61 S.C. Code Ann. § 56-28-10.

62 See, e.g., Haw. Rev. Stat. § 481I-1: "For purposes of this definition, a 'motor vehicle' also includes a 'demonstrator' which means a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model or type."

63 See *supra* note 68, Ind. Code § 24-5-13-5.

64 Vehicles in this "gray area" may include vehicles used for both business and household use and demonstration vehicles.

65 See Haw. Rev. Stat. § 481I-1 *et seq.*

Legislature should clearly state exactly which uses (or proportion of uses) are covered to avoid abuse -- and in particular to avoid swallowing up the current exception for commercial vehicles.

5. Should the Michigan law contain a reimbursement scheme for taxes and collateral fees incurred as part of the purchase of a defective motor vehicle?

The reimbursement of taxes and collateral fees is a necessary part of any effective remedy. Any lemon remedy that does not provide for the recovery of these expenses undercuts the goal of having a lemon law that provides a complete remedy. As described below, many states provide for reimbursement of taxes and other collateral fees specifically in their lemon laws. A lemon law that includes a clear method for reimbursement of taxes and fees incurred with the purchase of a defective motor vehicle will be more "user friendly." As a result, consumers will be more likely to utilize the lemon law remedy.

a. Catalogue of the methods employed by other states to incorporate into their lemon laws reimbursement schemes for all collateral fees associated with the purchase of a defective new motor vehicle.

Of the remedies offered to purchasers of defective vehicles, most states give the consumer the option of seeking a refund upon returning the vehicle to the manufacturer. The manufacturer, in turn, must refund to the consumer the full purchase price of the vehicle, plus collateral costs and incidental damages to varying degrees, depending on the state. Thirty-five states explicitly require that the manufacturer refund to the consumer any sales, use, or excise taxes, in addition to the purchase price, when the consumer returns the vehicle.⁶⁶

66 See, e.g., Ohio Rev. Code Ann. § 1345.71(F): "'Full Purchase Price' means the contract price for the motor vehicle, including charges for transportation, dealer-installed accessories, dealer services, dealer preparation and delivery and collateral charges; all finance, credit insurance, warranty and service contract charges incurred by the buyer; and all sales tax, license and registration fees, and other government charges and 1345.72(B). If the manufacturer, its agent, or its authorized dealer is unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition that substantially impairs the use, safety, or value of the motor vehicle to the consumer after a reasonable number of repair attempts, the manufacturer shall, at the consumer's option, and subject to division (D) of this section replace the motor vehicle with a new motor vehicle acceptable to the consumer or accept return of the vehicle from the consumer and refund each of the following: (1) The full purchase price including, but not limited to, charges for undercoating, transportation, and installed options; (2) All collateral charges, including but not limited to, sales tax, license and registration fees, and similar

In the event the consumer elects vehicle replacement, eleven states require that the manufacturer reimburse the consumer for any additional taxes or fees incurred in acquiring the new vehicle.⁶⁷ Five states authorize a consumer to seek a tax refund directly from a state agency.⁶⁸ Other states require manufacturer refunds of licensing, registration or title fees,⁶⁹ but do not provide a mechanism by which the consumer can recover fees directly from the state government.

In addition to taxes and fees, various states also allow refunds for the following collateral expenses: unrefundable portions of extended warranties and service contracts, value of trade-in vehicles, shipping to the repair facility or manufacturer, finance charges, foreseeable loss of income or use, personal injury resulting from the nonconformity, alternative transportation, towing costs, and storage fees.

b. Evaluation of including collateral reimbursement schemes in the Michigan statute.

Although the Michigan statute does allow for the reimbursement of some specific expenses associated with the purchase of a defective vehicle, it is far from complete.⁷⁰ The result is that the consumer still experiences a loss even after enforcing the lemon law. Preventing purchasers of defective vehicles from recovering all their losses may discourage purchasers from employing lemon law relief.

If Michigan's Lemon Law were to include reimbursement of taxes, fees and other costs, the law would reduce the financial loss of a consumer who purchases a defective vehicle. Michigan could either allow a consumer to request

government charges; (3) All finance charges incurred by the consumer; (4) All incidental damages, including any reasonable fees charged by the tender for making or cancelling the loan."

67 See, e.g., Cal. Civ. Code § 1793.2(d)(2)(A): "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding non-manufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

68 See *supra* note 35.

69 See, e.g., N.Y. Gen. Bus. Law § 198-a (requiring a manufacturer to give a consumer returning a vehicle an application for credit or refund of state and local sales taxes, and a notice explaining the availability of the refund).

70 See Appendix A, MCL § 257.1403(1).

tax and fee reimbursement directly from a state agency, or the law could provide that the manufacturer request reimbursement from the state. Either amendment to the Michigan Lemon Law will further the legislative intent of the original law by providing the consumer with complete relief for the purchase of a defective vehicle.

If such expenses are not compensable then consumers of defective vehicles may be encouraged to "cut their losses" by selling the vehicle as soon as the defect occurs, rather than incur additional collateral expenses when exercising their rights under the lemon law. The Michigan statute could include a clause similar to that employed in California.⁷¹

6. Should the Michigan Lemon Law provide a clearer explanation of which events trigger statutory relief?

Lemon laws create a statutory presumption of what constitutes a reasonable number of repairs before the consumer is permitted to demand a refund or a replacement vehicle. However, the statutes do not define "subject to repair." It is uncertain whether "subject to repair" includes replacing parts or whether performance of any kind of service, diagnostic or corrective, will suffice to meet the statutory standard. Since clarity is so important to the effective implementation of the lemon law remedies, having an unclear statutory trigger is undesirable.

a. Other jurisdictions provide a possible solution to the statutory ambiguity in Michigan's law.

Many lemon laws around the country employ the terminology "subject to repair." The reported case law focuses on the number of times a consumer brings a motor vehicle to a repair facility, rather than on the type of services performed. Several states have concluded that visits to a repair facility for wheel alignment, cleaning of parts, or unsuccessful attempts to diagnose a problem are instances of a motor vehicle being "subject to repair."⁷² In *Chmill v. Friendly*

71 See Cal. Civ. Code § 1790.

72 Use of the phrase has caused some disagreement which has been addressed by the courts in other jurisdictions. See, e.g., *Webb v. Polk Chevrolet, Inc.*, 509 So.2d 139 (La. App. 1987); *Chmill v. Friendly Ford-Mercury of Janesville, Inc.*, 424 N.W.2d 747 (Wis. App. 1988); *Canterbury v. Mercedes-Benz of North America, Inc.*, 928 F.2d 399 (4th Cir. 1991); *Baker v. Chrysler Corp.*, 1993 U.S. Dist. LEXIS 727 (E.D. Pa. 1993).

Ford-Mercury of Janesville, Inc.,⁷³ the Wisconsin Court of Appeals held that the presentation of a vehicle to a repair facility constitutes a repair attempt, even if the facility does not actually attempt a repair because it is unable to diagnose the defective condition.⁷⁴

b. Evaluation of including similar statutory clarification provisions in the Michigan statute.

Although on its face MCL § 257.1401 seems to clearly outline when statutory remedies are triggered, the phrase "subject to repair" needs clarification.⁷⁵ This statutory language is critical to the proper functioning of the lemon law since the number of times a vehicle is "subject to repair" may determine when the statutory remedy under MCL § 257.1401 is triggered. Clarifying language would eliminate any ambiguity regarding when statutory relief is available. The statutory trigger is one of the most important aspects of the lemon law. If it is not clear when a remedy is available, the law is not any easier for consumers to use than UCC relief, and the primary legislative purpose for the lemon law is thereby frustrated.

It would be desirable to amend the definitions section of the Lemon Law, MCL § 257.1401, to insert a definition of "subject to repair" as that term is used in MCL § 257.1403(3)(a). One clear definition, taken from the North Carolina statute, is "presented to the manufacturer or the new motor vehicle dealer for service, repair, or correction."⁷⁶

7. Should the Michigan law require disclosure of a defective motor vehicle to all subsequent purchasers?

a. Catalogue of the methods employed by other states to include disclosure provisions in their lemon laws.

73 The Court of Appeals noted that a contrary result would be unreasonable because it would leave the consumer without recourse for an acknowledged, but undiagnosed, nonconformity. 424 N.W.2d 747 (Wis. App. 1988).

74 Id.

75 See Appendix A, MCL § 257.1403(3). See also *supra* note 13, describing a case where an Oakland County jury deadlocked 3 to 3 on the meaning of "subject to repair."

76 N.C. Gen. Stat. § 20-351.3(a): "It is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties if: (1) The same nonconformity has been presented for repair to the manufacturer . . . four or more times but the same nonconformity continues to exist."

Other jurisdictions employ a number of different disclosure provisions to curb deception perpetrated against both the consumer and the seller of a defective motor vehicle. At least thirty-one states require some kind of warning to future purchasers that a vehicle has been returned under a lemon law.⁷⁷ North Carolina's statute contains a typical disclosure provision.⁷⁸

Jurisdictions vary on the manner of disclosure. Twenty-five states require that the disclosure be written.⁷⁹ Minnesota requires oral disclosure during the sales presentation as well.⁸⁰ Some states only require disclosure that the motor vehicle was returned to the manufacturer because of a nonconformity.⁸¹ In Indiana, manufacturers must also disclose all repair attempts.⁸² Connecticut does not require direct disclosure by the seller to the subsequent purchaser but instead brands the title of the vehicle with a legend indicating the car's return under the lemon law.⁸³

Eleven states require a manufacturer to report to a state agency the return of a motor vehicle under a lemon law.⁸⁴ Texas publishes an annual report of such vehicles and provides a toll free telephone number (which the seller must give to the consumer) that prospective purchasers can call for more information about specific returned vehicles.⁸⁵ Minnesota allows the Attorney General to examine and publicize the results of informal dispute settlements.⁸⁶

In many states, branding the certificate of title of vehicles returned under lemon laws effectively discloses the motor vehicle's history to any future

77 See, e.g., N.C. Gen. Stat. § 20-351.3.

78 Id.

79 See supra note 47, Minn. Stat. § 325F.665.

80 Id.

81 Id.

82 See, e.g., Ind. Code § 24-5-13.5-10 (3): "The manufacturer provides the dealer a separate document with a written statement identifying the vehicle conditions that formed the basis for the previous owner's or lessee's dissatisfaction and the steps taken to deal with that dissatisfaction in 10-point all capital type."

83 Conn. Gen. Stat. § 42-179.

84 Id.

85 Tex. Rev. Civ. Stat. Ann. art. 4413(36) Sec. 6.07(j)(1). The disclosure statement must include a toll-free telephone number of the Commission that will enable a purchaser of a repurchased or replaced vehicle to obtain information about the condition or defect that was the basis of the order for repurchase or replacement.

86 See Minn. Stat. § 325F.665.

purchasers by putting that person on inquiry notice.⁸⁷ The statement imprinted on the title usually warns that the vehicle has been returned to the manufacturer due to the manufacturer's failure to remedy a nonconformity. Other jurisdictions place certain time restrictions on disclosure.⁸⁸ North Carolina, however, applies the disclosure provision to all subsequent sellers.⁸⁹

Another route taken by some states is to require the seller to provide a warranty on the defective vehicle in order to resell it. In that way buyers of the defective vehicle will have warranty protection even though they are purchasing the vehicle used, rather than new. In some states the warranty must be the same warranty that the manufacturer originally issued to the new car purchaser.⁹⁰ Others mandate full coverage of the nonconformity for which the motor vehicle was returned.⁹¹ Most of these states require a warranty for 12 months or 12,000 miles, whichever occurs first.⁹²

Another important factor that is often overlooked with disclosure provisions is enforcement. A statutory provision requiring disclosure will be less effective if it does not provide for meaningful enforcement and punishment of violations. Some states have provisions that impose fines for a manufacturer's violation of resale disclosure provisions.⁹³ North Dakota has criminalized lemon law violations as misdemeanors.⁹⁴

b. Evaluation of including similar disclosure provisions in the Michigan statute.

The current Michigan Lemon Law contains no provision mandating disclosure that a vehicle was returned under the Law. This lacuna undercuts one of the main purposes behind the Michigan law of removing defectively manufactured vehicles from the stream of commerce.

87 See, e.g., Conn. Gen. Stat. § 42-179(g)(2): "manufacturer shall stamp the words 'manufacturer's buyback' clearly and conspicuously on the face of the original title in letters at least one-quarter inch high."

88 See, e.g., Tex. Rev. Civ. Stat. Ann. art. 4413 (36) Sec. 6.07(j)(1): "The disclosure statement must accompany the vehicle through the first retail purchase."

89 N.C. Gen. Stat. § 20-351.3.

90 Minn. Stat. § 325F.665.

91 See, e.g., Fla. Stat. § 681.114: "the manufacturer warrants to correct such nonconformity for a term of 1 year or 12,000 miles, whichever occurs first."

92 Id.

93 See generally N.Y. Gen. Bus. Law § 198-a.

94 N.D. Cent. Code § 51-07-22: "Violation of [full disclosure of the reasons the vehicle was returned] is a Class B misdemeanor."

An amendment to the Michigan Lemon Law requiring disclosure to future consumers is consistent with the current Lemon Law's emphasis on consumer education and empowerment. In addition, while a disclosure requirement causes greater financial loss to the seller of a defective vehicle, it would prevent sellers from unloading defective vehicles on unknowing consumers. There are good reasons for Michigan to adopt the disclosure provision of North Carolina⁹⁵ and the agency notification provision of Texas.⁹⁶ By branding the title and also allowing the consumer to call a neutral agency to get information on the nature of the defect, Michigan law would contain a very effective means of protecting subsequent purchasers of defective motor vehicles.

Two objectives would be achieved with a branding provision. First, the need for enforcing disclosure provisions would be lessened because the brand would be a permanent part of the title.⁹⁷ Second, there would be less of a need to amend the law to include used vehicles if a mandatory disclosure provision was included. A branded title will warn used vehicle purchasers that the vehicle has or has had problems,⁹⁸ thereby furthering the consumer protection goal of the Michigan Lemon Law.

III. *Conclusion*

Other jurisdictions have found the need to update and amend their lemon laws regularly to meet with the ever changing environment of motor vehicle acquisitions.⁹⁹ Changes in the marketing and sale of motor vehicles have made revision of the Michigan Lemon Law overdue.

95 See N.C. Gen. Stat. § 20-349.

96 See Tex. Rev. Civ. Stat. Ann. art 4413(36).

97 The neutral agency could be incorporated into a section of the Department of Motor Vehicles or another state agency. This agency would have a complete record of the defective motor vehicle, including the current status of the vehicle. If the non-conformity is fixed, the agency would relay this information, however, the brand would remain as a warning to all future consumers of the vehicle.

98 Note, however, that this would not catch the defective vehicles which are not discovered before the end of the lemon law's statutory period for relief. These vehicles would never be branded and, therefore, there would be no disclosure to the subsequent purchaser. The statutory intent behind preventing resale of defective vehicles would not be entirely achieved.

99 See, e.g., Conn. Gen. Stat. § 42-179, originally enacted in 1984, and amended in 1985, 1987, and 1988.

APPENDIX A

MICHIGAN LEMON LAW Act 87 of 1986

AN ACT regarding warranties on new motor vehicles; to require certain repairs thereto; and to provide remedies for the failure to repair such vehicles.

The People of the State of Michigan enact:

257.1401 Definitions.

Sec. 1. As used in this act:

(a) "Consumer" means any of the following, but does not include a lessee of a new motor vehicle:

(i) A person who purchases a new motor vehicle for personal, family, or household use and not for the purpose of selling or leasing the new motor vehicle to another person.

(ii) A person who purchases less than 10 new motor vehicles a year.

(iii) A person who purchases 10 or more new motor vehicles a year only if the vehicles are purchased for personal, family, or household use.

(iv) Any other person entitled to enforce the provisions of an express warranty pursuant to the terms of that warranty.

(b) "Manufacturer" means any person who manufactures, assembles, or is a distributor of new motor vehicles and includes an agent of a manufacturer but does not include a new motor vehicle dealer.

(c) "Manufacturer's express warranty" means an express warranty as determined under the uniform commercial code, Act No. 174 of the Public Acts of 1962, being sections 440.1101 to 440.11102 of the Michigan Compiled Laws, offered by the manufacturer on a new motor vehicle.

(d) "Motor vehicle" means a motor vehicle as defined in section 33 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.33 of the Michigan Compiled Laws, that is designed as a passenger vehicle, but does not include a motor home, bus, truck other than a pickup truck or van, or any vehicle designed to travel on less than 4 wheels.

(e) "New motor vehicle" means a motor vehicle that is purchased in this state or purchased by a resident of this state and is covered by a manufacturer's express warranty at the time of purchase.

(f) "New motor vehicle dealer" means a person who holds a dealer agreement for the sale of new motor vehicles, who is engaged in the business of purchasing, selling, exchanging, or dealing in new motor vehicles, and who has an established place of business in this state; and an agent thereof.

(g) "Person" means a natural person, or a sole proprietorship, partnership, corporation, association, unit or agency of government, trust, estate, or other legal entity.

(h) "Resident of this state" means as follows:

(i) For an individual, that the individual is a legal resident of this state.

(ii) For a sole proprietorship or partnership, that the sole proprietorship or partnership was created pursuant to the laws of this state and its main office is located in this state.

(iii) For a corporation, that the corporation is considered to be a domestic corporation and was created under the laws of this state.

(iv) For an association, that the association was created pursuant to the laws of this state and its main office is located in this state.

(v) For a unit or agency of government, that the unit or agency is located in this state.

(vi) For a trust, estate, or other legal entity, that the trust, estate, or other legal entity was created pursuant to the laws of this state and is located in this state.

257.1402 Repair of defect or condition; report.

Sec. 2. If a new motor vehicle has any defect or condition that impairs the use or value of the new motor vehicle to the consumer or which prevents the new motor vehicle from conforming to the manufacturer's express warranty, the manufacturer or a new motor vehicle dealer of that type of motor vehicle shall repair the defect or condition as required under section 3 if the consumer initially reported the defect or condition to the manufacturer or the new motor vehicle dealer within 1 of the following time periods, whichever is earlier:

(a) During the term the manufacturer's express warranty is in effect.

b) Not later than 1 year from the date of delivery of the new motor vehicle to the original consumer.

257.1403 Replacement of motor vehicle or refund; allowance for use; reimbursement for towing costs and costs for rental vehicle; consent to replacement of security interest; presumption; performing repairs after expiration of warranty; extension of time for repair services.

Sec. 3. (1) If a defect or condition which was reported to the manufacturer or new motor vehicle dealer pursuant to section 2 continues to exist and the new motor vehicle has been subject to a reasonable number of repairs as determined under subsection (3), the manufacturer shall within 30 days have the option to either replace the new motor vehicle with a comparable replacement motor vehicle currently in production and acceptable to the consumer or accept return of the vehicle and refund to the consumer the full purchase price including the cost of any options or other modifications installed or made by or for the manufacturer, and the amount of all other charges made by or for the manufacturer, less a reasonable allowance for the consumer's use of the vehicle not exceeding 10 cents per mile driven at the time of the initial report of the same defect or conditions or 10% of the purchase price of the vehicle, whichever is less, and less an amount equal to any appraised damage that is not attributable to normal use or to the defect or condition. A reasonable allowance for use is that amount directly attributable to use by the consumer and any previous consumer prior to his or her first report of a defect or condition that impairs the use or value of the new motor vehicle to the manufacturer, its agents, or the new motor vehicle dealer. Whenever a vehicle is replaced or refunded under the provisions of this section, in those instances in which towing services and rental vehicles were not made available without cost to the consumer, the manufacturer shall also reimburse the consumer for those towing costs and reasonable costs for a comparable rental vehicle that were incurred as a direct result of the defect or condition.

(2) The provisions of this act shall not affect the obligations of a consumer under a loan or sales contract or the secured interest of any secured party. The secured party shall consent to the replacement of the security interest with a corresponding security interest on a replacement motor vehicle which is accepted by the consumer in exchange for the motor vehicle having a defect or condition pursuant to subsection (1), if the replacement motor vehicle is comparable in value to the original motor vehicle. If for any reason the security interest in the new motor vehicle having a defect or condition pursuant to subsection (1) is not able to be replaced with a corresponding security interest on a new motor vehicle accepted by the consumer, the consumer shall accept a refund. Refunds required under this subsection or subsection (1) shall be made to the consumer and the secured party, if any, as their interests exist at the time the refund is to be made.

(3) It shall be presumed that a reasonable number of attempts have been undertaken to repair any defect or condition if 1 of the following occurs:

(a) The same defect or condition that substantially impairs the use or value of the new motor vehicle to the consumer has been subject to repair a total of 4 or

more times by the manufacturer or new motor vehicle dealer and the defect or condition continues to exist. Any repair performed on the same defect made pursuant to subsection (4) shall be included in calculating the number of repairs under this section. The consumer or his or her representative, prior to availing himself or herself of a remedy provided under subsection (1), and any time after the third attempt to repair the same defect or condition, shall give written notification, by return receipt service, to the manufacturer of the need for repair of the defect or condition in order to allow the manufacturer an opportunity to cure the defect or condition. The manufacturer shall notify the consumer as soon as reasonably possible of a reasonably accessible repair facility. After delivery of the vehicle to the designated repair facility, the manufacturer shall have 5 business days to repair the defect or condition.

(b) The new motor vehicle is out of service because of repairs for a total of 30 or more days or parts of days during the term of the manufacturer's express warranty, or within 1 year from the date of delivery to the original consumer, whichever is earlier. It shall be the responsibility of the consumer, or his or her representative, prior to availing himself or herself of a remedy provided under subsection (1), and after the vehicle has been out of service for at least 25 days in a repair facility, to give written notification by return receipt service to the manufacturer of the need for repair of the defect or condition in order to allow the manufacturer an opportunity to cure the defect or condition. The manufacturer shall notify the consumer as soon as reasonably possible of a reasonably accessible repair facility. After delivery of the vehicle to the designated repair facility, the manufacturer shall have 5 business days to repair the defect or condition.

(4) Any repairs required to be made under this act shall be made even if the repairs cannot be performed until after the expiration of the manufacturer's express warranty.

(5) The term of an express warranty, and the 1-year, 30-day, and 5-day periods of time provided for in this section shall be extended because repair services were not available to the consumer because of war; invasion; strike; or fire, flood, or other natural disaster.

257.1404 Other legal remedies not limited or prohibited.

Sec. 4. Nothing in this act shall be construed to limit or prohibit any other legal remedy of a consumer regarding a breach of a manufacturer's express warranty or an implied warranty for a new motor vehicle.

257.1405 Informal dispute settlement procedure.

Sec. 5. If a manufacturer has established or participates in an informal dispute settlement procedure, the provisions of this act shall not apply to any consumer who has not first resorted to such procedure, if such procedure does all of the following:

(a) Complies with the Magnuson-Moss warranty--federal trade commission improvement act, Public Law 93-637, 88 Stat. 2183, and 16 C.F.R. 703 (1975). An informal dispute settlement procedure which the federal trade commission rules does not comply with 16 C.F.R. 703 (1975) shall be considered as not meeting the requirements of this subdivision.

(b) Requires that the manufacturer is bound by any decision reached if the consumer agrees to it.

(c) Provides that the consumer is not obligated to accept the decision and may pursue the remedies provided for under this act.

(d) Requires the manufacturer to initiate the process necessary to implement any final settlement not more than 30 days after the settlement has been reached.

257.1406 Defects or conditions to which act inapplicable.

Sec. 6. This act does not apply to any defect or condition that is the result of either of the following:

(a) Any modification or modifications not installed or made by or for the manufacturer.

(b) Abuse or neglect of the new motor vehicle or damage due to an accident which occurred after the new motor vehicle was purchased by the consumer.

257.1407 Waiver of rights and remedies prohibited; recovery of costs, expenses, and attorneys' fees.

Sec. 7. (1) Any rights and remedies provided a consumer under this act may not be waived.

(2) A consumer who prevails in any action brought under this act may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses, including attorneys' fees based on actual time expended by the attorney, determined by the court to have been reasonably incurred by the consumer for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

257.1408 Written statement to be included with title; type size; form.

Sec. 8. The secretary of state shall include with any title for a new motor vehicle a written statement, in 10-point boldface type, in substantially the following form: "IMPORTANT: IF THIS VEHICLE IS DEFECTIVE YOU MAY

BE ENTITLED UNDER STATE LAW TO REPLACEMENT OF IT OR A REFUND OF ITS PURCHASE PRICE. TO OBTAIN REPLACEMENT OR A REFUND YOU MUST FIRST REPORT THE DEFECT IN WRITING TO THE MANUFACTURER AND YOU MAY BE REQUIRED TO FIRST ARBITRATE THE DISPUTE. IN ORDER TO PROTECT YOUR RIGHTS UNDER THIS LAW, YOU SHOULD:

1. KEEP COPIES OF ALL CORRESPONDENCE TO AND FROM THE MANUFACTURER AND THE DEALER.

2. KEEP COPIES OF ALL WORK ORDERS FOR REPAIRS ON THE VEHICLE INCLUDING THE DATE(S) THE WORK WAS PERFORMED AND THE MILEAGE ON THE VEHICLE AT THE TIME OF REPAIR.

3. FOLLOW ALL REQUIREMENTS OF THE WARRANTY, INCLUDING ANY REQUIREMENT THAT THE REPAIRS MUST BE DONE BY AN AUTHORIZED DEALER SPECIFIED BY THE MANUFACTURER. IF YOU HAVE ANY QUESTIONS REGARDING YOUR RIGHTS UNDER THIS LAW, CONSULT AN ATTORNEY OR OTHER QUALIFIED INDIVIDUAL."

257.1409 Applicability of act.

Sec. 9. This act shall apply to all new motor vehicles that are sold to the original consumer on or after the effective date of this act.

257.1410 Effective date.

Sec. 10. This act shall take effect 60 days after its enactment.

APPENDIX B

H.B. 4854 (S-1): FIRST ANALYSIS
(4-7-86)

"LEMON" VEHICLES: REFUND OR REPLACE

SAS



SENATE ANALYSIS SECTION

Lansing, Michigan 48909

HOUSE BILL 4854 (Substitute S-1)

Sponsor: Representative Burton Leland

House Committee: Consumers

Senate Committee: Commerce

RATIONALE

Each year, according to one group representing consumers, anywhere from 300 to 400 residents of Michigan find out that they own lemons: new passenger vehicles so fault-ridden that they fail to function as basic, dependable transportation, even after several attempts to correct defects. Consumers faced with these difficulties generally do not know that both the state and the federal government provide limited remedies under law, and that manufacturers themselves have adopted informal procedures for settling disputes over the performance of repairs under requirements of warranties. Most people believe that, absent laws aimed specifically at defective autos, they must press arduous and costly lawsuits in order to entertain even the slim hope of recovering their money or of forcing manufacturers to replace faulty vehicles. Typically, a consumer, faced with the choice of either suing a manufacturer who has a large, experienced legal staff or of selling a defective vehicle, chooses to unload the lemon on someone else, probably at a considerable loss.

Even those knowledgeable few who sue under the Uniform Commercial Code (UCC) to revoke their acceptance of a vehicle they believe to be defective find that the law provides no standards upon which they can build a case for having allowed a manufacturer a reasonable opportunity for making repairs. Thus, a customer has no way of knowing how many attempts to repair and how much time without use of a defective car will convince the courts that a cause is just. Moreover, courts often reject attempts to revoke acceptance if consumers do not supply formal written notice to manufacturers, even though the UCC requires notification only, without specifying format. The UCC dictates only "a reasonable time" after discovering a defect as the limit of opportunity for revoking acceptance of an automobile, but courts usually rule that the reasonable time expires with the warranty. Finally, many courts insist that a buyer, when seeking redress under the UCC, must relinquish control over the vehicle during the entire dispute, which makes consumers quite reluctant to seek refunds or replacement through the UCC.

In order to solve these problems, 20 states have recently enacted laws that attempt to provide consumers with clear definitions of major defects, time limits for ascertaining them and performance of repairs, and procedures for obtaining refunds or replacement of defective vehicles. In response to complaints from consumers in Michigan, similar legislation has been proposed for this state.

CONTENT

The bill would give the manufacturer of a defective car, van, or pickup truck used as a passenger vehicle the option of either replacing the vehicle with one acceptable to the consumer or of refunding its full purchase price no

later than 30 days after failing in a reasonable number of attempts to repair the defect, subject to certain conditions. (The bill would limit protection to people who buy any number of new cars each year for personal, family or household use, and to owners of small commercial fleets who buy fewer than ten new vehicles a year.)

- First, the defect would have to impair the use or value of the vehicle, or prevent its conforming to the manufacturer's warranty. The manufacturer of a defective vehicle or a seller of the brand in question would have to repair the defect if the consumer reported it to either the manufacturer or a dealer before the earlier of either the end of the manufacturer's warranty or no later than a year after accepting delivery, but any repair required by the bill would have to be made even if it could not be made until after the expiration of the manufacturer's warranty.
- Second, the consumer, before claiming a refund or replacement, would have to allow the manufacturer or dealer a "reasonable number of attempts" to repair a vehicle. It would be presumed that a "reasonable number of attempts" had been undertaken if either (a) the same defect or condition that substantially impaired the vehicle's use had been subject to repair four or more times by the manufacturer or dealer and yet continued to exist, or (b) the vehicle was out of service and in a repair facility for 30 or more days during the shorter of the warranty period or one year from delivery. The consumer would have to give written notice to the manufacturer of the need for repair at any time after either the third failure, or after the vehicle had been out of service and in a repair facility for more than 25 days. In either event, the manufacturer would have five business days to make a final attempt to repair the vehicle after it was delivered to an acceptable shop.
- Third, the consumer would have to make use of a manufacturer's informal dispute settlement procedure, if available. The settlement procedure would have to comply with the federal Magnusson-Moss warranty improvement act; require that the manufacturer be bound by any decision to which the consumer agrees, declare that the customer does not have to accept the decision and has the right to pursue the remedies proposed in the bill, and require the manufacturer to begin implementing a final settlement within no more than 30 days.
- The bill would require a judge to consider the granting of attorney's fees as part of the judgment awarded to a consumer who won an action for recovery or replacement. A replacement would have to be a comparable new vehicle currently in production. A consumer could also return the defective car and accept a refund of the full purchase price, including the cost of options installed by or for the manufacturer, but less a reasonable deduction to allow for the consumer's use of the vehicle (not to exceed

OVER

the lesser of ten cents a mile at the time the defect was reported or ten percent of the purchase price), and an amount to account for damage not attributable to normal use or the defect giving rise to the suit. A consumer would remain liable for obligations of a loan or sales contract. Finally, the bill would also require the secretary of state to include, with titles to new vehicles, a notice revealing that a buyer has the right to replacement of a defective vehicle or a refund if the customer reports the defect in writing to the manufacturer, and that the buyer might also have to undergo arbitration. The statement would also advise the consumer to keep copies of correspondence with manufacturers and dealers and of work orders for repairs, to note the dates of repairs and mileage, to follow all requirements of warranties, and if necessary, to seek the advice of an attorney.

SENATE COMMITTEE ACTION

The Senate Commerce Committee adopted several clarifying amendments which were incorporated into Substitute S-1. Among these is a requirement that a vehicle be in a repair facility during the number of days it is considered to be out of service because of repairs.

FISCAL INFORMATION

The Senate Fiscal Agency estimates the cost of sending out the notices required by the bill at \$11,000. The Department of State mails approximately 3 million titles each year. (4-1-86)

ARGUMENTS

Supporting Argument

The bill would provide consumers with a clearly defined prescription in law for the pressing of claims against manufacturers of defective vehicles. This prescription, which specifies time limits and actions required of both buyer and maker, would spare consumers the nasty surprises that reportedly all too often spring up when one presses a claim under the Uniform Commercial Code.

Supporting Argument

The bill would give manufacturers reasonable time and opportunity to repair defective vehicles without placing onerous burdens upon them. In order to enforce a claim for a refund or replacement of a defective vehicle, a consumer would have to provide its manufacturer with written notice, so that one more attempt to make repairs could be made. Moreover, the consumer would have to make use of a manufacturer's arbitration proceeding.

Supporting Argument

Because it would require the secretary of state to inform buyers of their rights when sending out titles to vehicles, the bill would encourage consumers to take advantage of legal remedies instead of giving up in disgust. Informed consumers would realize that they do not have to sell defective vehicles at a loss or face unpredictable, arduous lawsuits.

Opposing Argument

The bill places the entire burden of repairing or replacing defective vehicles upon manufacturers, and thus fails to hold dealers responsible for their actions. Dealers have been known, through the work of bungling mechanics, to have turned minor defects into major ones. Also, some dealers receive money for warranty repairs in advance, and then, after making clumsy and disastrous attempts to remedy minor defects, pass the blame for their ineptitude on to manufacturers, who have to endure the wrath of

consumers. The bill ought to state explicitly that, if a dealer's mechanics are found responsible for making an automobile unsafe or impossible to drive, then the seller, not the builder, must offer the buyer the choice of a new car or a refund.

Response: While one might sympathize with either aggrieved party in a dispute between manufacturer and dealer, there exists ample legal redress in contract law and Public Act 118 of 1981, which was enacted to regulate builderdealer relationships, and specifically allows manufacturers to audit repairs made under warranty. Moreover, if a consumer discovered that a dealer had made an inept repair, he or she could press a claim under the Mechanics Licensing Act.

Opposing Argument

The bill should mandate that a consumer successful in pressing a claim for refund or replacement of a defective vehicle is entitled to attorney's fees, instead of leaving the award to the judge's discretion. Failure to award the fees would substantially reduce the amount won by a consumer, who would have to pay them out of his or her own pocket, while a manufacturer's attorney would continue to receive a substantial salary, win or lose.

Response: Allowing a judge to decide whether to award attorney's fees would bring the size of the fees under careful scrutiny, and prevent the gouging of the losing party.

Opposing Argument

Although the bill would require a manufacturer to make four attempts to repair a substantial defect, any or all of which could take place after the warranty on a vehicle had expired (as long as the consumer had notified the manufacturer of the defect during the period of warranty), it does not specify who must pay for those repairs after the period of warranty.

Opposing Argument

The bill would require consumers to make use of manufacturers' arbitration before demanding refunds or replacement of defective vehicles, and thus waste everyone's time. These informal dispute settlement procedures are structured to result in compromise, which of course works to the disadvantage of consumers, who, if they meet the requirements of the bill, need not compromise at all. The bill ought to allow a consumer to demand refund or replacement immediately after a manufacturer has failed to make repairs on the fourth attempt.

POSITIONS

The AFL-CIO supports the bill. (10-2-85)

Aid for Lemon Owners supports the bill. (10-1-85)

The Michigan Association of Auto Dealers supports the bill. (10-1-85)

The Michigan Consumers Council supports the bill. (9-26-85)

The United Auto Workers support the bill. (10-1-85)

Chrysler Corporation does not oppose the bill. (10-1-85)

General Motors Corporation believes the bill is unnecessary, but does not oppose it (10-2-85)

The Motor Vehicle Manufacturers Association believes the bill is unnecessary. (9-26-85)

The Secretary of State takes no position. (9-30-85)



650 Roosevelt Building
Phone: 517/373-6466

HOUSE BILL 4854 as passed by the House
Second Analysis (10-3-85)

Sponsor: Rep. Burton Leland
Committee: Consumers

THE APPARENT PROBLEM:

Each year, according to one group representing consumers, anywhere from 300 to 400 residents of Michigan find out that they own lemons: new passenger vehicles so fault-ridden that they fail to function as basic, dependable transportation, even after several attempts to correct defects. Consumers faced with these difficulties generally do not know that both the state and the federal government provide limited remedies under law, and that manufacturers themselves have adopted informal procedures for settling disputes over the performance of repairs under requirements of warranties. Most people believe that, absent laws aimed specifically at defective autos, they must press arduous and costly lawsuits in order to entertain even the slim hope of recovering their money or of forcing manufacturers to replace faulty vehicles. Typically, a consumer, faced with the choice of either suing a manufacturer who has a large, experienced legal staff or of selling a defective vehicle, chooses to unload the lemon on someone else, probably at a considerable loss.

Even those knowledgeable few who sue under the Uniform Commercial Code (UCC) to revoke their acceptance of a vehicle they believe to be defective find that the law provides no standards upon which they can build a case for having allowed a manufacturer a reasonable opportunity for making repairs. Thus, a customer has no way of knowing how many attempts to repair and how much time without use of a defective car will convince the courts that a cause is just. Moreover, courts often reject attempts to revoke acceptance if consumers do not supply formal written notice to manufacturers, even though the UCC requires notification only, without specifying format. The UCC dictates only "a reasonable time" after discovering a defect as the limit of opportunity for revoking acceptance of an automobile. Courts, however, usually rule that the reasonable time expires with the warranty. Finally, many courts insist that a buyer, when seeking redress under the UCC, must relinquish control over the vehicle during the entire dispute, which makes consumers quite reluctant to seek refunds or replacement through the UCC.

In order to solve these problems, 20 states have recently enacted laws that attempt to provide consumers with clear definitions of major defects, time limits for ascertaining them and performance of repairs, and procedures for obtaining refunds or replacement of defective vehicles. In response to complaints from consumers in Michigan, House Bill 4854 proposes a similar solution.

THE CONTENT OF THE BILL:

The bill would give the manufacturer of a defective car, van, or pickup truck used as a passenger vehicle the option of either replacing the vehicle with one acceptable to the consumer or of refunding its full purchase price no later than 30 days after failing in a reasonable number of attempts to repair the defect, but under certain conditions.

First, the defect would have to impair the use or value of the vehicle, or prevent its conforming to the manufacturer's warranty. (The bill would limit protection to people who buy any number of new cars each year for personal, family or household use, and to owners of small commercial fleets who buy fewer than ten new vehicles a year.) The manufacturer of a defective vehicle or a seller of the brand in question would have to repair the defect if the consumer reported it to either the manufacturer or a dealer before the earlier of either the end of the manufacturer's warranty or no later than a year after accepting delivery.

Second, the consumer, before claiming a refund or replacement, would have to allow the manufacturer or dealer a reasonable number of attempts to repair a vehicle. The bill would define a reasonable number of attempts as either four single tries to repair a substantial defect or the keeping of the vehicle out of service because of any defect (i.e., not necessarily substantial) for 30 days during the shorter of the warranty period or one year from delivery. (Although the bill does not explicitly say so, its sponsors say they intend that none of the four attempts to repair a substantial defect need occur during the period of warranty; however, the consumer must report the defect during that time.) The consumer would have to give written notice to the manufacturer of the need for repair at any time after either the third failure, or after the vehicle had been out of service because of repairs for more than 25 days. In either event, the manufacturer would have five business days to make a final attempt to repair the vehicle after it was delivered to an acceptable shop.

Third, the consumer would have to make use of a manufacturer's informal dispute settlement procedure, if available. However, the settlement procedure would have to comply with the federal Magnusson-Moss warranty improvement act, require that the manufacturer be bound by any decision to which the consumer agrees, declare that the customer does not have to accept the decision and has the right to pursue the remedies proposed in the bill, and require the manufacturer to begin implementing a final settlement within no more than 30 days.

The bill would require a judge to consider the granting of attorney's fees as part of the judgment awarded to a consumer who won an action for recovery or replacement. A replacement would have to be a comparable new vehicle currently in production. A consumer could also return the defective car and accept a refund of the full purchase price, including the cost of options installed by or for the manufacturer, but less a reasonable deduction to allow for the consumer's use of the vehicle (not to exceed the lesser of ten cents a mile at the time the defect was reported or ten percent of the purchase price), and an amount to account for damage not attributable to normal use or the defect giving rise to the suit. A consumer would remain liable for obligations of a loan or sales contract.

H.B. 4854 (10-3-85)

Finally the bill would also require the secretary of state to include, with titles to new vehicles, a notice revealing that a buyer has the right to replacement of a defective vehicle or a refund if the customer reports the defect in writing to the manufacturer, and that the buyer might also have to undergo arbitration. The statement would also advise the consumer to keep copies of correspondence with manufacturers and dealers and of work orders for repairs, to note the dates of repairs and mileage, to follow all requirements of warranties, and if necessary, to seek the advice of an attorney.

FISCAL IMPLICATIONS:

The secretary of state estimates the cost of sending out the notices required by the bill at \$11,000. The department mails approximately three million titles each year.

ARGUMENTS:

For:

The bill would provide consumers with a clearly defined prescription in law for the pressing of claims against manufacturers of defective vehicles. This prescription, which specifies time limits and actions required of both buyer and maker, would spare consumers the nasty surprises that all too often spring up when one presses a claim under the Uniform Commercial Code, whose lack of specificity makes each case depend upon the whims of its judge.

For:

The bill would give manufacturers reasonable time and opportunity to repair defective vehicles without placing onerous burdens upon them. In order to enforce a claim for a refund or replacement of a defective vehicle, a consumer would have to provide its manufacturer with written notice, so that one more attempt to make repairs could be made. Moreover, the consumer would have to make use of a manufacturer's arbitration proceeding.

For:

Because it would require the secretary of state to inform buyers of their rights when sending out titles to vehicles, the bill would encourage consumers to take advantage of legal remedies instead of giving up in disgust. Informed consumers would realize that they do not have to sell defective vehicles at a loss or face unpredictable, arduous lawsuits.

Against:

The bill places the entire burden of repairing or replacing defective vehicles upon manufacturers, and thus fails to hold dealers responsible for their actions. Everyone knows that dealers often turn minor defects into major ones because they make inept repairs. The bill ought to state explicitly that, if a dealer's mechanics are found responsible for making an automobile unsafe or impossible to drive, then the seller, not the builder, must offer the buyer the choice of a new car or a refund. Besides, many dealers receive money for warranty repairs in advance, and then, after making clumsy and disastrous attempts to remedy minor defects, pass the blame for their ineptitude on to manufacturers, who have to endure the wrath of consumers.

For:

While one might sympathize with either aggrieved party in a dispute between manufacturer and dealer, there exists ample legal redress in contract law and Public Act 118 of 1981, which was enacted to regulate builder-dealer relationships, and specifically allows manufacturers to audit repairs made under warranty. Moreover, if a consumer discovered that a dealer had made an inept repair, he or she could press a claim under the Mechanics Licensing Act.

Against:

The bill should mandate that a consumer successful in pressing a claim for refund or replacement of a defective vehicle is entitled to attorney's fees, instead of leaving the award up to each judge. Failure to award the fees would substantially reduce the amount won by a consumer, who would have to pay them out of his or her own pocket, while a manufacturer's attorney would continue to receive a substantial salary, win or lose.

For:

Allowing a judge to decide whether to award attorney's fees would bring the size of the fees under careful scrutiny, and prevent the gouging of the losing party.

Against:

Although the bill would require a manufacturer to make four attempts to repair a substantial defect, any or all of which could take place after the warranty on a vehicle had expired (as long as the consumer had notified the manufacturer of the defect during the period of warranty), it does not specify who must pay for those repairs after the period of warranty.

Against:

The bill would require consumers to make use of manufacturers' arbitration before demanding refunds or replacement of defective vehicles, and thus waste everyone's time. These informal dispute settlement procedures are structured to result in compromise, which of course works to the disadvantage of consumers, who, if they meet the requirements of the bill, need not compromise at all. The bill ought to allow a consumer to demand refund or replacement immediately after a manufacturer has failed to make repairs on the fourth attempt.

POSITIONS:

The Secretary of State takes no position. (9-30-85)

Michigan Association of Auto Dealers supports the bill (10-1-85)

The United Auto Workers support the bill. (10-1-85)

The AFL-CIO supports the bill. (10-1-85)

The General Motors Corp. believes the bill is unnecessary, but does not oppose it. (10-2-85)

The Michigan Consumers Council supports the bill. (9-26-85)

Chrysler Corporation does not oppose the bill. (10-1-85)

The Motor Vehicle Manufacturers Association believes the bill is unnecessary. (9-26-85)

Aid for Lemon Owners supports the bill. (10-1-85)

REPORT ON THE UNIFORM ADOPTION ACT

Part of the mandate of the Commission is to study and make recommendations to the Legislature on legislative proposals advanced by the National Conference of Commissioners on Uniform State Laws. One of the most significant recent proposals to come from that body is the Uniform Adoption Act (1994), 9 Uniform Laws Ann. 5 *et seq.* (1995 Supp.). The Act supersedes the revised Uniform Adoption Act of 1969.

The Uniform Adoption Act is a sweeping new state adoption code, which is intended to be comprehensive. The Uniform Act examines and revises virtually every aspect of adoption practice. Its provisions would revise many existing state laws in response to federal constitutional and statutory law, delineate the legal consequences of several different kinds of adoptions, regulate and enforce choices of parties with respect to privacy or openness in adoptions, and promote the welfare of children by facilitating the placement of minor children who cannot be raised by their original parents. The Act is largely the work product of Professor Joan Heifetz Hollinger, who is also the principal author and editor of **ADOPTION LAW AND PRACTICE** (1988). The Act has not yet been adopted in any state, although it is reported to be under consideration in several state legislatures.

Michigan's adoption laws, which are found in the Michigan Adoption Code, the Paternity Act, the juvenile chapter of the Probate Code, the Child Custody Act of 1970, and Michigan Court Rules, have never been modelled on any version of the Uniform Adoption Act, although they address many of the concerns raised by that legislation in ways made unique by the structure of Michigan law and courts. After a great deal of process and consideration, the Michigan Legislature made extensive revisions to the Michigan adoption laws and procedures in 1994. Many of these revisions were responsive to the same changes in decisional law that prompted the drafting of the Uniform Adoption Act in 1994. The changes were carefully crafted to reflect adoption practice in Michigan.

Because the Legislature has so recently and carefully addressed these issues, and because the Uniform Adoption Act has yet to be tested in the legislative process or in practice in any state, the Commission recommends that the Legislature defer consideration of the Uniform Adoption Act (1994) at this time. Once Michigan has more experience with its own revisions, and other states have experience with the new Uniform Act, the Commission and the Legislature may have better information on which to revisit these important issues.

REPRODUCTIVE TECHNOLOGY: A STUDY REPORT OF THE MICHIGAN LAW REVISION COMMISSION

This study report¹ furnishes background information and legislative developments in the area of reproductive technology. This report does not purport to cover all areas of the law where legislative action may be needed; but rather suggests to the Legislature the range of issues for consideration. The Michigan Law Revision Commission makes no recommendations in connection with this study report, but submits it to inform the Legislature and the citizens of Michigan on Michigan law dealing with this highly dynamic and complex field.

Part I contains a brief description of the various techniques and procedures encompassed by the phrase "reproductive technology." Part II lists and briefly describes the current and proposed legislation in Michigan and other states.

I. TECHNOLOGIES

Basic Terminology

The phrase "reproductive technology" commonly is used to cover all practices that deal with artificial or "assisted" conception.² A helpful definition indicating the scope of these techniques is found in the Uniform Status of Children of Assisted Conception Act (SCACA). The SCACA was adopted by the National Conference of Commissioners on Uniform State Laws in 1988 and is reproduced in Appendix A to this report. As stated in its prefatory note, SCACA was drafted to "augment and clarify the rights of children born under the new [reproductive] technology as well as the rights of the parties to these arrangements ... [and] is not a surrogacy regulatory act." To date, Alternative B³ of the SCACA has only been adopted by North Dakota (see N.D. Cent. Code §§ 14-18-01--14-18-07), and Alternative A⁴ became effective in Virginia on July 1, 1993 (see Va. Code, art.

¹ This report was prepared by Andrea Crowe, and revised by Professor Jerry Israel, of the University of Michigan Law School.

² See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); Janet L. Dolgin, *The Law Debates the Family: Reproductive Information*, 7 YALE J. L. & FEMINISM 37 (1995).

³ Alternative B of the SCACA is designed for those jurisdictions that wish to provide that "[a]n 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 is void." See Appendix A *infra*.

⁴ Alternative A allows for surrogacy contracts which meet conditions outlined in the Act.

150, §§ 20-156--20-165). The SCACA, in § 1(1), defines "assisted conception" as:

[A] pregnancy resulting from any intervening medical technology, other than the pregnancy of a woman resulting from the insemination of her ovum using her husband's sperm, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as non-coital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

This provision basically defines "reproductive technology."⁵ For those not familiar with the various terms used, a brief introduction follows.

"*Gametes*" are the male and female reproductive cells, the sperm and the egg. The egg has different stages prior to fertilization, but for our purposes, the term "egg" can be used to include all stages of the female gamete prior to fertilization.⁶

"*Fallopian tubes*" are the tubes that carry the egg from the ovaries to the uterus. The "*uterus*" is the place where the egg, in a "natural" or coital reproductive process, is fertilized by the sperm and where the embryo and fetus develops.

"*Pre-embryo*" is the term commonly used to describe the fertilized egg until its implantation in the wall of the uterus, which occurs within the first fourteen days after fertilization. "*Embryo*" is the common designation used from the time of implantation until approximately eight weeks thereafter. This report uses the "embryo" designation for all stages up until 8 weeks after fertilization, except where the laws of the individual states distinguish the pre-embryo stage.

⁵ Although some of the literature distinguishes the terms "reproductive technology" and "advanced reproductive technology," this report will use the former as a general designation. See Jean Macciaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework For The Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 629 n. 6 (1991) (where the author adopts the term "advanced reproductive technology" as defined by the American Fertility Society, encompassing those treatments which include the laboratory handling of human oocytes (eggs) and/or embryos. Treatments such as artificial insemination would not be deemed "advanced" under this definition, as there is no laboratory handling of eggs or embryos.).

⁶ Terms used for the various stages of the egg prior to fertilization such as oocyte (an egg that has not yet undergone maturation) and ovum (a mature egg) will not be used.

After the eight weeks pass, up until birth, "*fetus*" becomes the appropriate terminology. See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE, *supra* note 1.

A. Artificial Insemination

Artificial insemination is perhaps the most common and well-known of the reproductive technologies. It is defined in Ohio Code § 3111.30(A) of the Ohio Parentage Act⁷ as "the introduction of semen into the vagina, cervical canal, or uterus through instruments or other artificial means." This can be achieved by using sperm donated by a third-party donor (AID)⁸ or by the husband/mate of the mother (AIH).⁹

Artificial insemination might be used when the husband/mate's sperm count is exceptionally low or there is a genetically transmittable disease on the male's side of the family. It can be combined with "cryopreservation," a process by which sperm donated for insemination can be frozen for later use. One advantage of cryopreservation is that it allows the artificial insemination to be timed in accordance with the onset of ovulation. Another advantage of cryopreservation is that the donor can be retested at a later date to see if he is infected by the AIDS virus since false positive tests for AIDS are common in the first few months after infection.¹⁰

B. In Vitro Fertilization

Unlike artificial insemination, in vitro fertilization (IVF) is a procedure which occurs outside the woman's body. IVF might be used when both the female and the male have infertility problems whereby a surplus embryo produced from gametes from two donors may be used. Or it may be used if the woman is unable to become pregnant through normal coital reproduction due to damage in her fallopian tubes. The eggs of a donor might be used if the woman has a genetically transmittable disease. Here too, cryopreservation can be used on the donated eggs so that a test for AIDS may be given to the donor after the recommended period of time.

7 The Ohio Parentage Act is adopted from the Uniform Parentage Act, which has so far been adopted by 18 states, but not in Michigan. See 9B ULA 287.

8 AID is the acronym for artificial insemination by donor.

9 Acronym for artificial insemination by husband.

10 Legislation on cryopreservation of sperm will be discussed in Part II.

To begin the IVF process, the ovaries of the biological mother/donor are stimulated artificially to release their eggs, which are then extracted from the woman's body by a process called laparoscopy, and fertilized by the sperm in a laboratory. The resulting embryos¹¹ are then transferred to the uterus of the "mother"¹² after a 2- or 3-day period. IVF may result in excess or "surplus" embryos being produced. These surplus embryos can be frozen by the cryopreservation process and thawed out at a later time if a "clinical pregnancy" fails to occur on the first transfer. The benefits of cryopreservation include reducing any risks that may occur by another laparoscopy. In addition, a couple may decide to donate the surplus embryos to another couple who is unable to produce the gametes necessary to initiate the process.

C. Gamete Intrafallopian Transfer

Gamete intrafallopian transfer (GIFT) is similar to IVF except that the eggs are fertilized inside the woman's body, or "in vivo." Following their removal from the ovaries, and during the same procedure, the eggs are combined with the sperm in a catheter and placed in the fallopian tubes for fertilization to occur.¹³ This process is usually used by a couple when it is certain that there are no problems with the woman's fallopian tubes.

D. Zygote Intrafallopian Transfer

In zygote intrafallopian transfer (ZIFT) the egg is fertilized outside the body and is transferred directly into the fallopian tubes. This differs from IVF, as there the embryo is transferred into the uterus.

11 More than one embryo is transferred into the uterus to increase the chances of a "clinical pregnancy." A clinical pregnancy is "[a] pregnancy confirmed by an increasing level of HCGT and the presence of a gestational sac detected by ultrasound." American Fertility Society, IVF & GIFT: A Patient's Guide To Assisted Reproductive Technology 15.

12 "Mother" is used in this report to denote the expected "legal" mother after birth, either biological or adopted. "Gestational carrier" will be used to denote the female, not necessarily the biological mother, carrying the embryo/fetus up to birth. This will be discussed further in the next subsection.

13 One important issue which will not be covered in this report is the controversy surrounding the question of just when fertilization or conception actually occurs.

E. Uterine Lavage and Embryo Transfer

In this procedure the donated egg or the donated egg and sperm undergo fertilization within the donor's body and then, after "five or six days following insemination ... uterine lavage is performed ... to obtain the embryo for transfer into the body of the infertile woman."¹⁴

F. Surrogacy and Gestational Carriers

"Gestational mother" means the woman who gives birth to a child, but has no genetic relationship to that child -- i.e., the eggs used are not those of the woman.

"Surrogate" is defined by the SCACA in § 1(4) as "an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents." A "traditional" surrogacy situation usually involves an infertile wife whose husband's sperm is artificially inseminated into a surrogate who has agreed to carry the fetus to term. The wife then adopts the child and the surrogate gives up all legal rights to that child.¹⁵ Occasionally, the husband is also incapable of providing a gamete for fertilization and an anonymous sperm donor is used for the artificial insemination process.

II. LEGISLATION

The range of legal issues that are raised by the different reproductive technologies are constantly expanding as the scientific techniques and technologies change and develop. Part II provides an overview of the legislation or proposed legislation currently in existence in the United States, although Appendix B contains a reprint of the Victorian Infertility (Medical Procedures) Act of 1984 and the Infertility (Medical Services) Amendment Act of 1987. Considering the rapid changes occurring in the scientific field, these laws could become obsolete in a very short time.

14 Jean Macciaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework For The Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 629 at 642 (1991).

15 Dorean M. Koenig, *The Regulation of Modern Biomedical Techniques*, 38 DEPAUL L. REV. 1013, 1036 (1989).

A. Artificial Insemination

Many states have legislation concerning the rights and duties of the anonymous sperm donor and the paternity/maternity of the child born as a result of artificial insemination. Others have laws relating to testing of anonymous sperm for HIV virus. Both subjects are discussed here. Issues relating to health insurance coverage and to issues involving the Rules Against Perpetuities (affected by children who were "conceived-after-death" by frozen sperm or embryos) will be discussed in subsection B in connection with In Vitro Fertilization.

Paternity/Maternity Provisions

MCL § 333.2824(6), which addresses the issue of paternity and is found under the chapter on the Public Health Code, provides:

A child born to a married woman as a result of artificial insemination, with consent of her husband, is considered to be the legitimate child of the husband and wife.

Similarly, MCL § 700.111(2), which discusses legitimacy of children for probate purposes, states:

If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for all purposes of intestate succession. A child conceived following artificial insemination of a married woman with the consent of her husband shall be considered as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage is void, the child is considered to be their child for all purposes of intestate succession.

The Michigan statutes are silent in three significant aspects: (1) they do not insist upon written consent by the husband, but assume consent, requiring clear and convincing evidence to override that presumption; (2) they make no mention of the situation in which the woman being artificially inseminated is not married; and (3) they make no mention of the rights or duties of the sperm donor. Other states have dealt with these issues in a somewhat different manner.

Arkansas Code § 9-10-201, under its chapter on paternity and subchapter on artificial insemination, has a special provision on the unmarried woman, which states:

(c)(1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married; or

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

Unlike Michigan (see Part II.C. below), Arkansas accepts surrogacy as legal. Whether a provision as to the unmarried woman is needed in a state that prohibits surrogacy is debatable. The child born to a woman would be her child, both by reference to genetics and the birth itself, even though conceived through artificial insemination. The Michigan provisions apparently deal only with the married woman because only the status of paternity is deemed to be questionable without a statute.

The Arkansas statute's provision on paternity in the marriage situation also differs somewhat from the Michigan provision. It first provides that the husband will be deemed the father if he consented *in writing*. However, it then provides that the child shall be presumed to be the child of the woman giving birth and her husband, except in the case of a surrogate mother. How these provisions are reconciled is unclear. Arguably, Arkansas prefers that the consent be in writing, but then creates a presumption even if not in writing.

New Jersey Stat. Ann. § 9:17-44, found under its chapter on "bastardy proceedings," also provides for consent in writing as a standard procedure, but may be more rigorous in insisting on a writing:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent shall be in writing and signed by him and his wife. The

physician shall certify their signatures and the date of the insemination, upon forms provided by the Department of Health, and file the husband's consent with the State Department of Health, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so shall not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for compelling reasons, clearly and convincingly shown.

New Jersey Stat. Ann. § 9:17-44 also deals with the rights and duties of the non-spousal sperm donor. Subsection (b) provides:

(b) Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.

New Hampshire Rev. Stat. § 168-B:11, found in the chapter on surrogacy and artificial insemination, is another provision that speaks to the non-spousal sperm donor's duties. It states:

A sperm donor may be liable for support only if he signs an agreement with the other parties to that effect.

Texas Family Code § 12.03, located under the chapter on the parent-child relationship, also denies the paternity of the donor unless he is the woman's husband. It further requires that the husband give a written and acknowledged consent in order to establish the paternity. That section provides:

(a) If a husband consents to the artificial insemination of his wife, any resulting child is the child of both of them. The consent must be in writing and must be acknowledged.

(b) If a woman is artificially inseminated, the resulting child is not the child of the donor unless he is the husband.

Ohio, in its revised code on parentage and non-spousal artificial insemination,¹⁶ also discusses both the paternity rights of the husband and the non-spousal sperm donor in § 3111.37. That section provides:

(A) If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband. A presumption that arises under division (A)(1) or (2) of § 3111.03 of the Revised Code is conclusive with respect to this father and child relationship, and no action under §§ 3111.01-3111.19 of the Revised Code shall affect the relationship.

(B) If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action under §§ 3111.01-3111.19 of the Revised Code shall affect these consequences.

Subsection (A) of the Ohio provision requires no particular form of consent by the husband to establish parentage. However, the provision on artificial insemination requires that both the husband and the wife must consent, in writing, to non-spousal artificial insemination.

Section 3111.34 states:

The non-spousal artificial insemination of a married woman may occur only if both she and her husband sign a written consent to the artificial insemination as described in § 3111.35 of the Revised Code.

The above statutes suggest several possibilities for amendment of the Michigan statutes. These include some form of provision that encourages the husband's consent to be in writing, and a provision on the duties and rights of the non-spousal sperm donor.

¹⁶ This chapter clearly states, in § 3111.31, that it only "deal[s] with non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child. These sections do not deal with the artificial insemination of a wife with the semen of her husband or with surrogate motherhood."

Testing for HIV and Other Medical Conditions

MCL § 333.16273, found in the Public Health Code, addresses the problem of testing for HIV when sperm is donated for artificial insemination purposes. That section provides, in part:

(1) A licensee, except a veterinarian licensed under this article, who provides artificial insemination services on an anonymous basis shall use only frozen sperm, and shall test each potential sperm donor for the presence in the donor of MV or an antibody to HIV. The donated sperm shall be frozen, stored, and quarantined for not less than 6 months. Before frozen sperm is used for artificial insemination, and not less than 6 months after the date of the donation, the licensee shall take a second blood sample from the donor and have that blood sample tested for HIV or an antibody to HIV. If at any time the test results are positive, the licensee shall not use the sperm of the donor for artificial insemination purposes.

MCL § 333.20179(1) similarly states, in part:

A health facility or agency licensed under this article that provides artificial insemination services on an anonymous basis shall use only frozen sperm, and shall test each potential sperm donor for the presence in the donor of HIV or an antibody to HIV.

Various states have similar provisions. However, they are not as extensive as Michigan's in requiring a six-month waiting period and a second test. See, e.g., Maryland Code § 18-334(e); Del. Code § 2801(b).

In addition to testing for HIV, some states require that the frozen sperm of a non-spousal donor can only be used if additional tests, including those for genetically transmitted diseases, are performed on the donor. Ohio Code § 3111.33 is illustrative. It provides:

(A) In a non-spousal artificial insemination, fresh or frozen semen may be used, provided that the requirements of division (B) of this section are satisfied.

(B)(1) A physician or person under the supervision and control of a physician may use fresh semen for purposes of a non-spousal artificial insemination, only if within one year prior to the supplying of the semen, a complete medical history of the donor, including, but not limited to, any available genetic history of the donor, was obtained by a

physician, the donor had a physical examination by a physician, and the donor was tested for blood type and RH [h] factor.

(2) A physician or person under the supervision and control of a physician may use frozen semen for purposes of a non-spousal artificial insemination only if all the following apply:

(a) The requirements set forth in division (B)(1) of this section are satisfied;

(b) In conjunction with the supplying of the semen, the semen or blood of the donor was the subject of laboratory studies that the physician involved in the nonspousal artificial insemination considers appropriate. The laboratory studies may include, but are not limited to, venereal disease research laboratories, karotyping, GC culture, cytomegalo, hepatitis, kemzyme, Tay Sachs, sickle-cell, ureaplasma, HLTV-III, and chlamydia.

(C) The physician involved in the non-spousal artificial insemination determines that the results of the laboratory studies are acceptable results.

Tort Liability

Caselaw developments in the area of tort liability for artificial insemination have not been rapid. One reported decision from the 6th Circuit, *Striver v. Parker*, 975 F.2d 261 (1992), held that medical personnel who performed an artificial insemination as part of a surrogacy contract were liable for negligent donor screening. In this connection, see Megan D. McIntyre, *The Potential for Products Liability Actions When Artificial Insemination by An Anonymous Donor Produces Children with Genetic Defects*, 98 DICKINSON L. REV. 519 (1994).

Property Claims

In 1993 the California court of appeals held that a decedent who had had his sperm frozen could bequeath it to his girlfriend as part of his will, over the objections of his children. *Hecht v. Superior Court*, 20 Cal. Rptr. 275 (Cal. App. 1993). See Jennifer L. Collins, *Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material*, 33 UNIV. LOUISVILLE J. FAM. L. 661 (1995).

B. In Vitro Fertilization

Since IVF is a much more far-reaching procedure than artificial insemination, it tends to present more issues. In its second report on Artificial Conception, the New South Wales Law Reform Commission, LRC 58 (1988) at 19 states:

It is not an established medical practice whose regulation is being updated. It is an entirely new treatment whose first success was recorded barely ten years ago. The law as it stands is barely equipped to deal with the issues it raises. IVF brings about human reproduction, and the attitudes of many people to it are influenced by strongly held moral, ethical and religious views concerning sexual behavior, family formation and the bearing and raising of children.

Insurance

One area of legislation concerning IVF is health insurance coverage for the procedure itself. There is no current legislation in Michigan involving health insurance coverage for IVF or artificial insemination, but proposed House Bills 4708, 4709 and 4710, introduced in 1991 by Representative Bender, would require HMOs, health insurance companies, and Blue Cross/Blue Shield of Michigan to provide coverage.

Some states have already enacted laws regulating insurance coverage for IVF and other forms of infertility treatments. Arkansas Code Ann. § 23-85-137(a), found in the chapter on disability insurance regulations, provides that "[a]ll disability insurance companies doing business in this state shall include, as a covered expense, in vitro fertilization." Other states have similar insurance coverage provisions requiring coverage for IVF (Conn. Gen. Stat. Ann. § 38a-536; Haw. Rev. Stat. § 432:1-604; Ill. Ann. Stat. ch. 73, para. 968m; Md. Ins. Code Ann. art. 48A, § 47OW; and Tex. Ins. Code Ann. art. 3.51-6).

The California Health and Safety Code, § 1374.55, distinguishes IVF. It provides:

- (a) On and after January 1, 1990, every health care service plan contract which is issued, amended, or renewed that covers hospital, medical, or surgical expenses on a group basis, where the plan is not a health maintenance organization as defined in § 1373.10, shall offer coverage for the treatment of infertility, *except in vitro fertilization*, under those terms and conditions as may be agreed upon between the group subscriber and the plan. Every plan shall communicate the

availability of that coverage to all group contract holders and to all prospective group contract holders with whom they are negotiating.

(b) For purposes of this section, "infertility" means either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception. "Treatment for infertility" means procedures consistent with established medical practices in the treatment of infertility by licensed physicians and surgeons including, but not limited to, diagnosis, diagnostic tests, medication, surgery, and gamete intrafallopian transfer. "In vitro fertilization" means the laboratory medical procedures involving the actual in vitro fertilization process.

Consumer Protection Regulation

Another area for potential regulation concerns misleading claims that IVF clinics and doctors may make about their success rates with the procedure. Jean Eggen, in her article on reproductive technology (see footnote 13 *supra*), argues that although "the success of IVF worldwide could be characterized optimistically as in the range of twenty percent," some clinics, who themselves may have low success rates, "have adopted the worldwide figure in their promotional efforts." 25 Ga. L. Rev. at 649. She adds that patients who resort to IVF are those that are "particularly vulnerable to statistical manipulation" and that the highly technical nature of the procedure makes them more susceptible to being misled. *Id.* at 650.

Some would apparently go so far as to ban the procedure, though no state has done so. The New South Wales Law Reform Commission, in part 2 of its Artificial Conception Report, LRC 58 (July 1988) page 24, notes opponents who argue against the process as "built on the destruction of human life," "threatening the traditional family." They also note others who "criticize the process as one which makes women objects of scientific curiosity and subjects of scientific experimentation." *Id.* (citing M. O'Brien, "The Politics of Reproduction" (1984); R. Koval, "Women, Birth, and Power," 4 Australian Society 6 (1985)). Constitutional rights of privacy and the right of patients to have autonomy over their own medical care are issues that would necessarily be raised by prohibition, but not by full disclosure requirements.

Cryopreservation and Disposition of Embryos

A major issue presented by cryopreservation as it relates to IVF is what controls should be placed on the disposition of the unused frozen embryos that are not going to be transferred into a recipient immediately, or perhaps not at all. Christi D. Ahnen, the author of *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?*, 24 CREIGHTON L. REV. 1299, 1302 (1990), states:

Two divergent views exist regarding disposition of frozen embryos. Persons who believe that life begins at conception view the embryo as human, with the rights of personhood, and "believe that all viable embryos must be transferred to a uterus and given the opportunity to gestate. . . ." The more liberal view is that embryos should be transferred to a uterus whenever reasonably possible, but the discard of embryos and embryo research should be permitted in acceptable circumstances.

Some of the questions surrounding surplus embryos include: How are they to be disposed of? Are they "lives in being" for purposes of the Rule Against Perpetuities? Can they be used for research purposes, and who gets "control" of them in the event of a divorce or death of both gamete donors? These and other questions have been addressed by various laws in different states.

Research and Frozen Embryos

There are no Michigan laws concerning frozen embryos. However, Michigan laws do not allow research on live human embryos if it would jeopardize the life of the embryo. MCL § 333.2685(1), in the Public Health Code, provides:

A person shall not use a live human embryo, fetus, or neonate for nontherapeutic research if, in the best judgment of the person conducting the research, based upon the available knowledge or information at the approximate time of the research, the research substantially jeopardizes the life or health of the embryo, fetus, or neonate. Nontherapeutic research shall not in any case be performed on an embryo or fetus known by the person conducting the research to be the subject of a planned abortion being performed for any purpose other than to protect the life of the mother.

As noted by Gail D. Sillman, author of *In Vitro Fertilization and Cryopreservation*, 67 MICH. B.J. 601 (1988), Michigan laws fail to "specifically

define the term embryo or fetus" and therefore this statute is "inadequate in its application to IVF." One question asked is whether a frozen embryo would be deemed "a live" embryo or just one having the potential for life, as many frozen embryos may not be viable and do not result in "clinical" pregnancies upon transfer to the gestational carrier. The critical provision on this issue, MCL. § 333.2687, states:

An embryo, fetus, or neonate is a live embryo, fetus, or neonate for purposes of §§ 2685 to 2691 if, in the best medical judgment of a physician, it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously aborted embryo or fetus at approximately the same stage of gestational development.

Another issue is what is meant by the term "embryo"? The standard applied here is beyond the expertise of the authors of this memo. Sillman notes that Dorland's Medical Dictionary defines an embryo as a "developing organism ... from about two weeks after fertilization to the end of the seventh or eighth week, and a fetus as "the unborn offspring ... from seven or eight weeks after fertilization until birth." Frozen embryos are pre-embryos. Thus, Sillman concludes:

A scientist could, therefore, conduct an experiment on any fertilized egg (up to two weeks after fertilization) for any reason whatsoever -- which could include genetic manipulation . . . and not technically violate the Michigan statute. . . . A literal reading of the statute would also permit an IVF clinic to sell, transfer, distribute and give away a living, developing organism that has not yet reached the embryonic stage. The embryo research statute was clearly intended not only to preclude scientists from performing nontherapeutic research on any living human organism, but also to eliminate IVF clinics, practitioners or donors from selling, transferring, distributing or giving away frozen fertilized eggs. Accordingly, the statute needs to be revised to apply to the IVF context. It also needs to be further revised to differentiate between IVF as a treatment for infertility and IVF as a tool for research.

Should the statute apply to the frozen embryos, Sillman also sees problems. Initially, she notes that the statute does draw a worthwhile distinction:

The statute defines nontherapeutic research as "scientific or laboratory research, or other kind of experimentation or investigation not designed to improve the health of the research subject." Diagnostic, assessment, or treatment procedures which "determine the life or status or improve

the health of the embryo, fetus, or neonate involved or the mother involved" are not prohibited by the statute. According to the above definitions an argument can be made that the clinical practice of IVF is not excluded by the statute because it is aimed at improving the health of both the infertile couple as well as the fertilized egg

However, she feels that the statute here does not go far enough:

While the statute may exempt IVF in a clinical context, certain research performed on frozen fertilized eggs would appear to be prohibited by the statute. For example, if a researcher were seeking a cure for a hereditary disease such as Huntington's or Tay Sachs, it would be permissible under the statute for the scientist to manipulate genes to effect a cure only if he or she thought it would not substantially jeopardize the life or health of the fertilized egg.

She also sees difficulty in allowing the researcher to make the final determination as to substantially jeopardizing the life or health of the fertilized egg. She suggests that there is need "for impartial and external restraints which are noticeably absent in the Michigan statute." She recommends that:

The embryo research statute authorize the creation of a state or local advisory research board, consisting of, for example, researchers, physicians, lawyers, ethicists and lay persons, who would be charged with the responsibility of reviewing and approving or rejecting all experiments involving research on fertilized eggs produced by IVF.

Cryopreservation simply was not a focus of the Michigan legislature when enacting the laws against research on live human embryos in 1978. Its major purpose apparently was to prevent abortions being done to harvest embryos for research. MCL § 333.2689 provides:

A person shall not perform or offer to perform an abortion where part or all of the consideration for the performance is that the embryo, or fetus, whether alive or dead, may be used for research or study.

MCL §333.2688(1) further states:

Research may not knowingly be performed upon a dead embryo, fetus, or neonate unless the consent of the mother has first been obtained.

Whether or not one would desire to follow the approach suggested by Sillman, she points to the need to focus on the special characteristics of the IVF process.

Louisiana legislation does deal directly with frozen embryos. It clearly bars development for research and, perhaps, also bars testing for genetic engineering purposes. Initially, it deems the frozen embryo to be a "human life," as La. Civ. Code § 123, found in the chapter on human embryos, provides:

An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.

La. Civ. Code § 122 includes the basic prohibition against research:

The use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation. No in vitro fertilized human ovum will be farmed or cultured solely for research purposes or any other purposes. The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.

New Hampshire, on the other hand, clearly does allow research on frozen embryos with consent. N.H. Rev. Stat. § 168-B:15, found in the chapter on in vitro fertilization and pre-embryo transfer, provides:

- I. No pre-embryo shall be maintained ex utero in the noncryopreserved state beyond 14 days post-fertilization development.
- II. No pre-embryo that has been donated for use in research shall be transferred to a uterine cavity.

Other states have legislation restricting research on embryos and fetuses but, like Michigan, these statutes are not specifically geared toward cryopreserved embryos or else they are expressly enacted to prevent research on intentionally aborted fetuses. See, e.g., Mass. Ann. Laws ch. 112 § 12J; Mo. Rev. Stat. § 188.037; N.M. Stat. Ann. § 24-9A-1; Ark. Code Ann. § 20-17-802.

Federal regulations do not allow federal funding to be "expended for research involving human subjects," 45 C.F.R. § 46.122, and this includes "viable fetuses." A viable fetus is defined in that regulation as a fetus "being able, after either spontaneous or induced delivery, to survive (given the benefit of available

medical therapy) to the point of independently maintaining heartbeat and respiration." 45 C.F.R. § 46.203(d). This would not include a frozen embryo.

Death or Divorce of the Parents/Owners of Frozen Embryos

Davis v. Davis, 1992 Tenn. Lexis 400 (Tenn. S. Ct. June 1, 1992), is the only case to date in the United States which concerns the disposition of the embryos upon a divorce of the two potential parents. This case involved a divorced woman who, along with her then ex-husband, had previously undergone IVF which resulted in surplus frozen embryos. She wanted control of the surplus embryos to implant them in her uterus in an attempt to become pregnant. The ex-husband objected. The Tennessee Supreme Court affirmed the Court of Appeals decision which stated that the embryos were not "persons" or "property" under the law but fell somewhere in between. Therefore, they do not enjoy protection as persons under federal or state law, but were entitled to "special respect because of their potential for human life." The court held that the contract made before undergoing the IVF was enforceable and therefore gave the decisionmaking authority as to the disposition of the embryos to both parties. Accordingly, a lower court decision, which had declared the embryos to be human beings and had held the contract unenforceable due to a "best interests of the child" determination, was reversed.

The Tennessee court noted that there was nothing in the contract before it that specified what should be done with unused embryos following cryopreservation, and that there was no current legislation in Tennessee governing the situation. Michigan also has no legislation on the subject. Thus, if it followed the *Davis* analysis, the contract would control (assuming that, in light of *Davis*, an effort will be made to include a disposition provision in future contracts relating to IVF). Of course, if the lower court position is followed, the "best interests," as determined by the court, would prevail. Presumably those best interests would be the path most likely to result in a successful implantation.

Louisiana does have legislation dealing with the disposition of cryopreserved embryos as a result of IVF. That state considers the frozen embryos to be "human beings," prohibits their destruction while frozen, and awards them the "best interest of the child" determination in disputes over disposition.

La. Civ. Code § 129 initially states:

A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An in vitro fertilized

human ovum that fails to develop further over a thirty-six hour period *except when the embryo is in a state of cryopreservation*, is considered non-viable and is not considered a juridical person.

La. Civ. Code § 131 then adds:

In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.

Taken to its logical extreme, the Louisiana provisions produce the following results. The prospective parents have no legal responsibility to arrange for the implantation of the frozen embryo. However, even if that is their decision, the frozen embryo remains protected as long as it is viable, i.e., capable of successful implantation. Moreover, they must be made available for implanting to any others who want them, as that would be in their best interest (as in the case of an abandoned child). See also *York v. Jones*, 717 F. Supp. 421 (E.D. Pa. 1989) (married couple had property interest in frozen embryo sufficient to order its delivery from Virginia to California for in vitro fertilization procedure).

Frozen Embryos and the Rule Against Perpetuities

Article IX, Part 1, § 901 of the Uniform Act on Intestacy, Wills, and Donative Transfers, covers the Statutory Rule Against Perpetuities. This Act was adopted in Michigan in 1988. See MCL. § 554.71-77, subsection (d). MCL. § 554.72(4) provides:

[Possibility of Post-death Child Disregarded.] In determining whether a non-vested property interest or a power of appointment is valid under subsection (1)(a), (2)(a), or (3)(a), the possibility that a child will be born to an individual after the individual's death is disregarded.

The commentary to that section states that when, for example, a party leaves sperm in a sperm bank and his wife, or another, uses it to become pregnant after his death, "[a]s to the legal status of conceived-after-death children, that question has not yet been resolved." The commentary goes on to note that "[w]ithout trying to predict how that question will be resolved in the future, the best way to handle the problem from the perpetuity perspective is the rule in subsection (d) requiring the possibility of post-death children to be disregarded." Although not explicitly stated, this would appear to apply to frozen surplus embryos also.

Frozen Embryos and Inheritance and Maternity/Paternity

As mentioned earlier in Part II(A) of this report, MCL § 700.111(2) states:

If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for all purposes of intestate succession. A child conceived following artificial insemination of a married woman with the consent of her husband shall be considered as their child for all purposes of intestate succession.

This provision raises a series of questions as to gestational mothers and even a mother implanted with her own eggs fertilized through the IVF process. Under the first sentence, where the mother is married and the child is born during the marriage, the child is that of the mother and her husband. This would present difficulties were surrogates allowed, but Michigan rejects the surrogate contract, as discussed *infra*. Where the mother is single and the egg is hers, the situation should not differ from that of the artificially inseminated single mother. See the discussion in Part II.A. above. Where the mother is a gestational mother only, the reference to "birth" in the Michigan provision would suggest that this should be the controlling factor, not genetic link.

The issue becomes more complicated as to paternity in the case where there was a marriage, but the child was born after the marriage was terminated. There would be no "conception" by implanting, but arguably implanting would be similar to artificial insemination, so that the husband's consent would be sufficient. What if the husband should be deceased before the implant takes place? Could the fertilization by the IVF process with the intent of a later implantation be considered the parallel of artificial insemination so that consent at that point would be enough? Surely here consent should not be presumed, as § 700.111(2) also provides. See Part II.A. above.¹⁷

Following its other regulations on cryopreservation, La. Civ. Code § 133 seeks to deal with another issue not considered in Michigan: the status of persons who are the source of gametes. The issue here is similar to that discussed with respect to artificial insemination. The Louisiana provision states:

¹⁷ See generally Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55 (1994).

As a juridical person, the embryo or child born as a result of in vitro fertilization and in vitro fertilized ovum donation to another couple does not retain its inheritance rights from the in vitro fertilization parents.

C. Surrogacy

Contracts

MCL § 722.853(i) of the Surrogate Parenting Act provides:

"Surrogate parentage contract" means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.

Such contracts for surrogacy are illegal in Michigan, as provided in MCL § 722.855: "A surrogate parentage contract is void and unenforceable as contrary to public policy." In adopting this provision, the Michigan legislature rejected the intermediate position of only disallowing contracts for gain or profit. See, e.g., Utah Code Ann. § 76-7-204; Wash. Rev. Code Ann. § 26.26.240. As previously noted in Part I, the SCACA Alternative B more closely resembles the Michigan law. It provides in § 5 for the illegality of the agreement. It also states that the surrogate is the mother of the child. See Appendix A.

Tort Liability

Another potential area for legislation is the possibility of a tort action against a gestational surrogate mother for injuries to the fetus. In her article, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, Karen A. Bussel discusses some of the liability situations that could arise whether or not surrogate contracts are legal. To illustrate, she discusses the possibility that a gestational surrogate mother (who has no genetic relationship to the fetus) may take medication during the pregnancy that causes harm to the child. She also discusses a scenario where a cesarean section is needed for the health of the child but it would put the gestational surrogate mother's life at risk.

Although there is no case law on these particular situations yet, the author cites a case which involved a natural mother who took doctor prescribed tetracycline during her pregnancy. This resulted in her child developing discolored teeth. *Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980). The court concluded that the child did have a cause of action for damages against her mother and reversed a lower court's previous dismissal.

APPENDIX A

STATUS OF CHILDREN OF ASSISTED CONCEPTION

§ 1

UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

Section 1. Definitions. In this [Act]:

(1) "Assisted conception" means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.

(2) "Donor" means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

[(3) "Intended parents" means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.]

(4) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

COMMENT

The definition of "assisted conception" establishes the scope of coverage of this Act. It is intended to be a broad definition. Section 1(1)(i) includes both "traditional" artificial insemination with fertilization occurring inside the woman's body and *in vitro* fertilization in which the joinder of sperm and egg takes place outside the body. Section 1(1)(ii) is designed to include within the definition the situation in which fertilization takes place through sexual intercourse and the resulting embryo is transplanted to the womb of another woman.

The final clause of Section 1(1) purposefully excludes husband-wife procreation from the definition of assisted conception. There are two reasons for this exclusion. First, as a policy matter, the rules pertaining to husband-wife procreation ought to be the same regardless of the means utilized for procreation. Thus, if a husband and wife choose to procreate through *in vitro* fertilization or more traditional artificial insemination, the status of the resulting child should be determined by existing laws, such as the Uniform Parentage Act, which govern the status of children produced by sexual intercourse. Second, the rules of this Act designating parentage and status of children are not always appropriate to husband-wife procreation. For example, a husband ought not be permitted, through the use of artificial insemination, to claim the status of a nonparent donor under Section 4(a) of this Act. As a result of the exclusion in Section 1(1), he will not be permitted to claim that status.

It should be noted that while this Act is intended to govern the status of children of assisted conception, it is *not* intended to establish a regulatory scheme establishing the appropriate methods for the performance of such assisted conception. A jurisdiction may, *e.g.*, choose to enact separate reg-

ulations requiring genetic screening when assisted conception is undertaken, requiring that assisted conception be conducted only under certain conditions, etc.

While it may be suggested that the word "donor" ought properly to be limited to those who merely offer genetic material without compensation, Section 1(2) defines the term to include those who receive compensation for their genetic material. The term donor is regularly used to describe those who sell sperm to sperm banks. *See, e.g.*, Curie-Cohen, et. al, *Current Practice of Artificial Insemination by Donor*, 300 N. Eng. J. Med. 585 (1979). Also, those who sell their blood to blood banks are usually referred to as blood donors. *See, e.g.*, *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 (1985).

The bracketed language in Section 1(2) should be enacted only if the adopting jurisdiction selects Alternative A, *infra*, concerning surrogacy. The exception clause at the end of Section 1(2) makes it clear that a woman whose egg is fertilized through assisted conception and who bears the resulting child is not considered a donor. Under Section 2 of the Act she will be the mother of that child, unless a surrogacy arrangement has been approved under Alternative A.

The bracketed language which appears as Section 1(3) should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

It should be emphasized that regardless of which alternative treatment of surrogacy agreements is chosen by a particular jurisdiction, Section 1(4) should be enacted. This subsection defines a surrogate. Regardless of what force, if any, an enacting jurisdiction chooses to give to surrogacy agreements, it is necessary to define what is meant by a surrogate.

Section 2. Maternity. [Except as provided in Sections 5 through 9,] a woman who gives birth to a child is the child's mother.

COMMENT

The unbracketed language in this section codifies existing law concerning maternity and is made necessary only because of the existence and growing use of technology enabling a woman to give birth to a child to which she is not genetically related. This provision makes it clear that unless the enacting jurisdiction has adopted Alternative A,

which in some circumstances designates someone other than the woman who gives birth as the mother, the woman who bears a child is the mother of that child. The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy.

Section 3. Assisted Conception by Married Woman. [Except as provided in Sections 5 through 9,] the husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.

COMMENT

The presumptive paternity of the husband of a married woman who bears a child through assisted conception reflects a concern for the best interests of the children of assisted conception. Any uncertainty concerning the identity of the father of such a child ought to be shouldered by the married woman's husband rather than the child. Thus, the husband (not someone acting on his behalf such as a guardian, administrator or executor) has the obligation to file an action aimed at denying paternity through lack of consent to the assisted conception rather than the child or mother having an obligation to prove the husband's paternity.

It should be noted, however, that if the non-paternity action is timely filed and the husband's lack of consent is demonstrated, the child will be without a legally-recognized father because the sperm donor is not the father under Section 4(a) of the Act. Also, because the filing of such a nonpaternity action is permitted within two years of the husband's learning of the child's birth, the

period of uncertainty concerning the identity of the child's father will be longer than two years in the relatively rare case where the husband is not immediately made aware of the child's birth.

By designating the husband of a woman who bears a child through assisted conception as the father, it is intended that he will be considered the father for purposes of any cause of action which arises before the birth of the child. Thus, for example, he would be the father under any state law authorizing a wrongful death action for the death of an unborn child during pregnancy.

The bracketed language in this section should be enacted only if the adopting jurisdiction selects Alternative A concerning surrogacy. Under that alternative, under certain circumstances the husband of the woman bearing the child will not be the father of the child. Instead, the man whose sperm was used in the creation of the child usually will be the father in such cases.

Section 4. Parental Status of Donors and Deceased Individuals. [Except as otherwise provided in Sections 5 through 9:]

(a) A donor is not a parent of a child conceived through assisted conception.

(b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child.

COMMENT

Present statutory law is split concerning the parental status of sperm donors. Fifteen states have statutes, patterned after Section 5(b) of the Uniform Parentage Act, specifying that a donor will not be considered the father of a child born of artificial

insemination if the semen was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. Fifteen other statutes do not explicitly limit nonparenthood to situations where the semen is provided to a

physician. Instead, they shield donors from parenthood in all situations where a married woman is artificially inseminated with her husband's consent.

Subsection 4(a), when read in light of Section 3, opts for the broader protection of donors provided by the latter group of statutes. That is, if a married woman bears a child of assisted conception through the use of a donor's sperm, the donor will not be the father and her husband will be the father unless and until his lack of consent to the assisted conception is proven within two years of his learning of the birth. This provides certainty for prospective donors. It should be noted, however, that under Section 4(a) nonparenthood is also provided for those donors who provide sperm for assisted conception by unmarried women. In that relatively rare situation, the child would have no legally recognized father. It should also be noted that Section 4(a) does not adopt the UPA's requirement that the donor provide the semen to a licensed physician. This is not realistic in light of present practices in the field of artificial insemination.

In providing nonparenthood for "donors," Section 4(a) includes by reference the definition of donor in Section 1(2) which covers those who provide sperm or eggs for assisted conception. Thus, if a woman provided an egg for assisted conception which resulted in another woman bearing the child, the egg donor would not be the child's mother. This would provide no burden on the child in light of Section 2's general rule declaring that the woman who gives birth to a child is that child's mother.

Subsection 4(b) is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential par-

enthood of the deceased. The latter situation, in which cryopreservation is utilized to "freeze" an embryo which has been created *in vitro*, is already in existence and gave rise to much controversy in Australia in the early 1980's.

A married couple died after having created an embryo through *in vitro* fertilization. Among the many questions raised after their simultaneous death in a plane crash was whether posthumous implantation of the embryo would result in children who would be those of the deceased couple. Under Section 4(b), it would be clear that implantation after the death of any genetic parent would not result in that genetic parent being the legally recognized parent. Clearly, under Section 2 of the Act, the woman who bears the child will be the mother. The paternity of such child would presumptively be that of the mother's husband, if she is married, under Section 3 of the Act. For a discussion of recent Australian legislation in the area, see Corns, *Legal Regulation of In Vitro Fertilisation in Victoria*, 58 L. Inst. J. 838 (1984); Note, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 Syr. L. Rev. 1021, 1029 n. 49 (1985).

Section 4(b) is the only provision of the Act which would deal with procreation by those who are married to each other. It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.

The bracketed language at the beginning of this section should be adopted only by those jurisdictions enacting Alternative A concerning surrogacy. Under that provision, certain persons who would otherwise be considered donors will be parents.

ALTERNATIVE A COMMENT

A state that chooses Alternative A should also consider Section 1(3) and the bracketed language in Sections 1(2), 2, 3, and 4.

[Section 5. Surrogacy Agreement.

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

COMMENT

Because of the significant controversy concerning the appropriateness of arrangements under which a woman agrees to bear a child on behalf of another woman, this Act proposes two alternatives. Under Alternative A, in Sections 5 through 9, the adopting state is offered a framework under which such agreements are given effect under limited and prescribed circumstances. This alternative also outlines the parent-child relationships which are established when such agreements are approved by a court.

Alternative B, consisting of alternative Section 5, declares such agreements to be void and describes the parent-child relationships between any child born pursuant to such agreements and the other parties. The strong desire of some childless couples for a biologically-related child together with the technological capacity to utilize the sperm of a husband in impregnating a woman not his wife and the willingness of others to aid such couples in satisfying those desires creates a strong likelihood that such agreements will continue to be written. Therefore, it is crucially important that a state enacting the Act adopt either Alternative A or Alternative B.

Under Section 5(a) of Alternative A, together with the definition of "intended parents" under Sec-

tion 1(3), a valid surrogacy agreement requires the participation of two intended parents who are married to each other and a surrogate, who is defined by Section 1(4) as an *adult* woman who agrees to bear a child through assisted conception for the intended parents. If the surrogate is married, her husband must also be a party to the surrogacy agreement. Additional requirements for a surrogate and the intended parents are imposed by Section 6 of Alternative A. It should be noted that Section 5(a) simply authorizes such agreements. It does not give them effect in terms of designating parenthood, etc. In order to become effective in such matters, the agreement must be approved by the appropriate court under Section 6.

Section 5(b) makes clear that agreements which are not approved under Section 6 are void. Nonapproved agreements in a jurisdiction which has adopted Alternative A of the Act have the same effect as all surrogacy agreements under Alternative B. That is, the surrogate is the mother of any child of assisted conception born pursuant to such agreements. Her husband, if he is a party to such agreement, shall be the father. If the surrogate's husband is not a party to such agreement or if she is unmarried, paternity of the child will be left to existing law.

Section 6. Petition and Hearing for Approval of Surrogacy Agreement.

(a) The intended parents and the surrogate may file a petition in the [appropriate court] to approve a surrogacy agreement if one of them is a resident of this State. The surrogate's husband, if she is married, must join in the petition. A copy of the agreement must be attached to the petition. The court shall name a [guardian ad litem] to represent the interests of a child to be conceived by the surrogate through assisted conception and [shall] [may] appoint counsel to represent the surrogate.

(b) The court shall hold a hearing on the petition and shall enter an order approving the surrogacy agreement, authorizing assisted conception for a period of 12 months after the date of the order, declaring the intended parents to be the parents of a child to be conceived through assisted conception pursuant to the agreement and discharging the guardian ad litem and attorney for the surrogate, upon finding that:

(1) the court has jurisdiction and all parties have submitted to its jurisdiction under subsection (e) and have agreed that the law of this State governs all matters arising under this [Act] and the agreement;

(2) the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;

(3) the [relevant child-welfare agency] has made a home study of the intended parents and the surrogate and a copy of the report of the home study has been filed with the court;

(4) the intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State;

(5) all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding;

(6) the surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence;

(7) all parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court;

(8) a report of the results of any medical or psychological examination or genetic screening agreed to by the parties or required by law has been filed with the court and made available to the parties;

(9) adequate provision has been made for all reasonable health-care costs associated with the surrogacy until the child's birth including responsibility for those costs if the agreement is terminated pursuant to Section 7; and

(10) the agreement will not be substantially detrimental to the interest of any of the affected individuals.

(c) Unless otherwise provided in the surrogacy agreement, all court costs, attorney's fees, and other costs and expenses associated with the proceeding must be assessed against the intended parents.

(d) Notwithstanding any other law concerning judicial proceedings or vital statistics, the court shall conduct all hearings and proceedings under this section in camera. The court shall keep all records of the proceedings confidential and subject to inspection under the same standards applicable to adoptions. At the request of any party, the court shall take steps necessary to ensure that the identities of the parties are not disclosed.

(e) The court conducting the proceedings has exclusive and continuing jurisdiction of all matters arising out of the surrogacy until a child born after entry of an order under this section is 180 days old.

COMMENT

Section 6, along with Section 8 which deals with parentage under an approved surrogacy, is the core of Alternative A. It provides for state involvement, through supervision by a court, in the surrogacy process before the assisted conception. The purpose of this early involvement is to insure that the parties are appropriate for a surrogacy arrangement, that they understand the consequences of what they are about to do and that the best interests of any child(ren) born of the surrogacy arrangement are considered before the arrangement is authorized.

The forum for state involvement is a petition brought by *all* the parties to the arrangement (including the surrogate's husband if she is married) in which the parties seek a judicial order authorizing the assisted conception contemplated by their agreement. The agreement itself must be submitted to the court. The court must hold a hearing on the petition and, under Section 6(b), must make ten separate findings before the surrogacy arrangement will be allowed to proceed. It should be noted that Section 6(b)(10) requires a finding that the arrangement would not be "substantially detrimental to the interest of any of the affected individuals." This insures the court will retain a measure of discretion to consider and utilize all relevant information.

This pre-conception authorization process is roughly analogous to adoption procedures currently in place in most jurisdictions. Just as adoption contemplates the transfer of parentage of a child from the natural to the adoptive parents, surrogacy involves the transfer from the surrogate to the intended parents. Section 6 is designed to protect the interests of the child(ren) to be born under the surrogacy arrangement as well as the surrogate and the intended parents. It should be noted that under Section 1(3) at least one of the intended parents will be genetically related to the child(ren) born of the arrangement.

Section 6 seeks to protect the interests of the child(ren) in several ways. The major protection of the interests of the child provided by the Act is the authorization procedure itself. By providing for the court order authorizing the assisted conception and the surrogacy arrangement, the Act establishes closely supervised surrogacy as one of the methods to guarantee the security and well being of the child. Under Section 6(a), a guardian ad litem must be appointed to represent the interests of any child conceived through the surrogacy arrangement. An enacting jurisdiction may choose either mandatory or optional independent representation for the surrogate. Under Section 6(b)(3), the court will be informed of the results of a home study of both the

intended parents and the surrogate. A study of the surrogate is required because of the possibility of termination of the agreement under Section 7 in which case the surrogate will be the legally recognized mother.

Further protection of the child is provided by the finding required by Section 6(b)(4) that both intended parents and surrogate (and her husband, if any) satisfy the standards of fitness required of adoptive parents. Under Section 6(b)(6), the court must assure itself, on the basis of medical evidence, that the pregnancy will not be dangerous to the child. While Section 6(b)(8) does not require any medical or genetic screening, it does mandate that if such testing is required by the agreement (or other law) the results will be available to the court and all parties. Section 6(b)(9) requires assurance that health-care costs during pregnancy have been provided. The provisions in Section 6(b)(1) and Section 6(e) dealing with exclusive jurisdiction is designed to minimize the possibility of parallel litigation in different states and the consequent risk of child-napping for strategic purposes.

The interests of the surrogate are also protected by Section 6. The bracketed version of Section 6(a) would require appointed counsel to represent her interests and, at the least, counsel will be permitted for her. The findings required by Section 6(b)(5) and Section 6(b)(7) will protect the surrogate against the possibility of overreaching or fraud. Under Section 6(b)(6), the court must find that the surrogate has had at least one previous pregnancy and delivery. Presumably such a finding helps insure that the surrogate fully understands the nature and experience of pregnancy. The court must also find the contemplated pregnancy and delivery would not pose unreasonable physical or mental health risks to her. The requirement of assurance of provision for health-care costs until birth imposed by Section 6(b)(9) protects the surrogate. Section 6(c) requires that all costs associated with the hearing be borne by the intended parents, unless otherwise provided in the agreement. If the agreement imposed such costs on the surrogate, the court could find, under Section 6(b)(10), that the agreement was not in the surrogate's interest and refuse to authorize it.

While most surrogacy arrangements apparently involve intended parents and surrogates who have

met each other, if the surrogate does not want her identity revealed to the intended parents, she may request (under Section 6(d)) that the court take all steps to insure that anonymity. At any event, Section 6(d) requires all proceedings to be held in camera with sealed records to insure confidentiality. It should be noted that in addition to the protections offered the surrogate by Section 6 at the hearing, she is given the right under Section 7 to terminate the agreement, even after it has been approved.

The intended parents (who are by definition *unable* to procreate through traditional means, Section 6(b)(2)) also have their interests protected through this section. In addition to the very existence of the court authorization procedure which gives effect to the surrogacy arrangement. Sections 6(b)(5), (6), and (7) help provide assurance to them that the surrogate is capable and is knowingly entering the arrangement. The interest of producing a healthy child is promoted through Section 6(b)(6)'s required finding that a pregnancy by the surrogate will not be unreasonably risky to the child.

Section 6, while constructing a detailed set of requirements for the petition and the findings which must be made before an authorizing order can be issued, nowhere states the consequences of violations of the rules. Because of the variety of types of violations which could possibly occur, it was felt that a brightline rule concerning the effect of such violations was inappropriate. The question of the consequences of a failure to abide by the rules of Section 6 is left to a case-by-case determination. A court should be guided in making such a determination by the narrow purpose of Alternative A to permit surrogacy arrangements and the equities of a particular situation. Note that Section 7 provides a period for termination of the agreement and vacating of the order. The discovery of a failure to abide by the rules of Section 6 would certainly provide the occasion for terminating the agreement. On the other hand, if a failure to abide by the rules of Section 6 is discovered by a party during a time when Section 7 termination would be permissible, failure to terminate might be an appropriate reason to estop the party from later seeking to overturn or ignore the Section 6 order.

Section 7. Termination of Surrogacy Agreement.

(a) After entry of an order under Section 6, but before the surrogate becomes pregnant through assisted conception, the court for cause, or the surrogate, her husband, or the intended parents may terminate the surrogacy agreement by giving written notice of termination to all other parties and filing notice of the termination with the court. Thereupon, the court shall vacate the order entered under Section 6.

(b) A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by filing written notice with the

court within 180 days after the last insemination pursuant to the agreement. Upon finding, after notice to the parties to the agreement and hearing, that the surrogate has voluntarily terminated the agreement and understands the nature, meaning, and effect of the termination, the court shall vacate the order entered under Section 6.

(c) The surrogate is not liable to the intended parents for terminating the agreement pursuant to this section.

COMMENT

Subsections (a) and (b) provide for termination of the surrogacy arrangement after the authorization order in two situations. Under subsection (a), any party or the court for cause may cancel the arrangement before the pregnancy has been established. This provides for a period of cancellation during a time when the interests of the parties would not be unduly prejudiced by such termination. By definition, the procreation process has not begun and, therefore, there is no interest to be asserted on behalf of the child. The intended parents certainly have an expectation interest during this time, but the nature of this interest is little different from that which they would have while they were attempting to create a pregnancy through traditional means.

Subsection (b) gives a surrogate who has provided the egg for the assisted conception 180 days after the last insemination to recant and decide to keep the child as her own. Under most current surrogacy arrangements, the surrogate will have provided the egg. The subsection requires that all parties to the agreement be given notice and that a hearing be held on a filing of an intent to terminate by the surrogate. Such notice, of course, must be provided in a constitutionally acceptable manner. If the court determines that the surrogate's termination is voluntary and she is aware of the consequences of such a termination (see Section 8(b)), it must vacate the authorization order.

This 180-day recantation period can, at one level, be described as a compromise between two polar positions concerning recantation. On one extreme, some argue that once the agreement has been presented to a court which has made the requisite findings under Section 6(b), no recantation should be permitted. After all, the surrogate has entered into an agreement to bear a child for the intended parents and the court has found that she acted knowingly and voluntarily and that she was an appropriate person to fulfill the role of surrogate. It would be argued that the expectation interests of the intended parents ought not be frustrated by the surrogate's unilateral action.

On the other hand, some argue that the surrogate ought to be able to renounce her agreement at any time until after the birth of the child. This position would assimilate the surrogate's rights to those of a birth mother who gives consent to the adoption of her child. Most current adoption statutes provide

that valid consent can be given only after birth.

The selection of the 180-day recantation period, however, can be viewed as more than a mere mechanical compromise between the two positions. Instead, this recantation period can be explained by pointing out that the surrogacy arrangement is simply different from both the ordinary contract situation and the ordinary adoption situation and, therefore, ought to be treated differently. Surrogacy is not an ordinary contract because it contemplates the creation of a human being whose interests must be taken into account. It can be argued that the child's interests in a parent-child relationship with his or her biological mother are protected by giving her an extra 180 days to decide if she really wants to give up the child to the intended mother.

On the other hand, surrogacy is different from an adoption and the post-birth consent requirement of adoption is not appropriate for the surrogacy situation. The requirement of post-birth consent in adoption is based on the reality that many birth mothers are young, unmarried women who arrange *during pregnancy* to give their child up for adoption. It is felt that decisions made under such circumstances are often the result of emotional stress created by young women in the midst of an often unwanted pregnancy and, therefore, are pressured in inappropriate ways. Therefore, "pregnant women are irrebuttably presumed incapable of protecting their own interests." Ellman, Kurtz & Stanton, *Family Law: Cases, Text, Problems* 1238 (Michie 1986).

The surrogacy arrangement authorized under this Act is very different. Most importantly, the original decision to give up the child is made *before* the pregnancy by an adult woman who has already experienced a previous pregnancy. It is an arrangement which has been examined and approved by a court under Section 6, with all the protections of the surrogate provided under that section. Any undue pressure which may have been brought to bear on the surrogate to become a surrogate will have been examined at the Section 6 hearing.

Having rejected the contract and adoption analogies, the question of an appropriate time period for recantation remains. Section 7(b)'s 180-day recantation period roughly coincides with the time during which the surrogate has a constitutionally-protected right to terminate the pregnancy. Because the surrogate has this right to choose to

abort, there is a certain logic in giving the same period in which to decide to *bear* the child and honor her pre-conception agreement. This recantation provision recognizes the right of the surrogate to change her mind well into the pregnancy as well as the interests of the intended parents in the finality of the decision-making process before birth. Note that because the 180-day period begins on the date of the last insemination pursuant to the agreement (a point chosen because of its certainty), it is possible that the recantation period will extend longer than 180 days into pregnancy, if the pregnancy was actually created by an earlier insemination.

A jurisdiction which finds the 180-day period too

short can choose not to enact Alternative A at all and opt for Alternative B which provides for no enforcement of surrogacy agreements.

Section 7(c) insures that a recanting surrogate will not be held liable in damages for her recantation, either under subsection (a) or (b). It is intended that no such liability for the surrogate for her recantation can be imposed by the agreement. By creating this immunity for the surrogate, this provision is not intended to *impose* any liability for costs associated with the surrogacy on any other parties to the arrangement. Such obligations, however, may be imposed by the agreement itself, see Section 6(b)(9).

Section 8. Parentage Under Approved Surrogacy Agreement.

(a) The following rules of parentage apply to surrogacy agreements approved under Section 6:

(1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).

(2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b) the surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

(b) Upon birth of the child, the intended parents shall file a written notice with the court that a child has been born to the surrogate within 300 days after assisted conception. Thereupon, the court shall enter an order directing the [Department of Vital Statistics] to issue a new birth certificate naming the intended parents as parents and to seal the original birth certificate in the records of the [Department of Vital Statistics].

COMMENT

Under Section 8(a), parentage of the child born pursuant to an approved surrogacy is vested in the intended parents where the order under Section 6 is still in effect. Notice of the birth of the child must be filed by the intended parents and the court, upon receipt of the notice, shall direct the issuance of a birth certificate naming the intended parents as parents. It should be noted that a birth certificate issued under this subsection might later be replaced by a birth certificate naming other individuals as parents of the child if an action to dispute the parentage of the intended parents filed under Section 9(d) is successful.

Section 8(b) deals with parentage where the surrogate has exercised her Section 7(b) right of recantation. It makes clear that the surrogate and her husband, if a party to the agreement, are the parents of the child in such a situation. Where the surrogate is unmarried or her husband was not a party to the agreement, paternity is left to the

otherwise relevant state law. It should be noted, however, that if the surrogate has married or remarried since the order authorizing the surrogacy, her husband is not the father of the child. See Section 9(c).

Because under the Act (Section 1(3)) at least one intended parent must be genetically related to the child and Section 7(b) recantation is limited to those surrogates who have provided the egg, in all cases arising under Section 8(b) the intended father will be the genetic father. Thus, the interaction of Section 8(b) and the law of paternity may result in the legally recognized father (the intended father) and the legally recognized mother (the surrogate) being in different households. This situation, while regrettable, is not unique in family law and may precipitate litigation over custody. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988) and the trial court order on remand, 14 Fam. L. Rep. 1276 (1988).

Section 9. Surrogacy: Miscellaneous Provisions.

(a) A surrogacy agreement that is the basis of an order under Section 6 may provide for the payment of consideration.

(b) A surrogacy agreement may not limit the right of the surrogate to make decisions regarding her health care or that of the embryo or fetus.

(c) After the entry of an order under Section 6, marriage of the surrogate does not affect the validity of the order, and her husband's consent to the surrogacy agreement is not required, nor is he the father of a resulting child.

(d) A child born to a surrogate within 300 days after assisted conception pursuant to an order under Section 6 is presumed to result from the assisted conception. The presumption is conclusive as to all persons who have notice of the birth and who do not commence within 180 days after notice, an action to assert the contrary in which the child and the parties to the agreement are named as parties. The action must be commenced in the court that issued the order under Section 6.

(e) A health-care provider is not liable for recognizing the surrogate as the mother before receipt of a copy of the order entered under Section 6 or for recognizing the intended parents as parents after receipt of an order entered under Section 6.]

COMMENT

Subsection 9(a) is intended to shield surrogacy agreements which include payment of the surrogate from attack under "baby-selling" statutes which prohibit payment of money to the natural mother in adoptions.

Section 9(b) is intended to acknowledge that the surrogate, as a pregnant woman, has a constitutionally-recognized right to provide for her health care and that of the unborn child.

Section 9(c) makes it clear that a man who marries the surrogate after the surrogacy authorization has been issued is neither a party to the original action nor the father of a resulting child, even if the surrogate exercises her recantation right under Section 7(b). It is felt that since he was not a party to the surrogacy agreement, he ought not be burdened with the status of parent. In the case of a recanting surrogate who has married since the original Section 6 order, she will be the mother and the intended father may be the legally recognized father under the jurisdiction's ordinary paternity laws.

Subsection 9(d) should be read in connection with the parentage provision of Section 8(a). The presumption created by Section 9(d) is intended to provide a starting point for the determination of whether a child born to the surrogate was actually the product of the assisted conception performed pursuant to the agreement. For example, a surrogate may assert that the child was created by the union of her egg and her husband's sperm. She and all other persons who have notice of the birth are given 180 days to commence an action to assert that the child was not the product of the assisted conception. It is intended that the substantive and procedural law governing such actions will be governed by the otherwise relevant state statutes concerning disputed parentage of a child.

Subsection 9(e) is designed to provide an incentive to the parties to the surrogacy to make hospital personnel aware of the existence of the arrangement and to protect the health care providers in case such notification has not been made.

*[END OF ALTERNATIVE A]***ALTERNATIVE B****COMMENT**

A state that chooses Alternative B shall consider Sections 6, 7, 8, 9, 10, 11, and 12, respectively 10, 11, 12, 13, 14, 15, and 16, renumbered

[Section 5. Surrogate Agreements.

An agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void. However, she is the mother of a resulting child, and her husband, if a party to the agreement, is the father

of the child. If her husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].]

COMMENT

This section should be utilized by a jurisdiction which chooses not to give any efficacy to surrogacy arrangements. It recognizes, however, that some such agreements will continue to be achieved even though they are not enforceable at law. Therefore, it makes provision for the maternity and paternity of children who are born pursuant to such agreements. Note that Alternative B's Section 5 substitutes for Alternative A's Sections 5-9.

[END OF ALTERNATIVE B]

Section 10. Parent and Child Relationship; Status of Child.

(a) A child whose status as a child is declared or negated by this [Act] is the child only of his or her parents as determined under this [Act].

(b) Unless superseded by later events forming or terminating a parent and child relationship, the status of parent and child declared or negated by this [Act] as to a given individual and a child born alive controls for purposes of:

- (1) intestate succession;
- (2) probate law exemptions, allowances, or other protections for children in a parent's estate; and
- (3) determining eligibility of the child or its descendants to share in a donative transfer from any person as a member of a class determined by reference to the relationship.

COMMENT

This provision is parallel to those provisions in adoption statutes which provide that once an adoption creates or negates a parent-child relationship, that relationship or negation of a relationship applies in all circumstances.

While strictly speaking subsection (b) may be redundant in light of subsection (a), it is included because of the importance of the situations listed herein. The introductory clause primarily is designed to deal with situations where a parent-child relationship established under this Act is later severed through the placement of a child for adoption or, conversely, situations where a parent-child relationship is negated by the Act but is later established by an adoption.

Section 11. Uniformity of Application and Construction. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Section 12. Short Title. This [Act] may be cited as the Uniform Status of Children of Assisted Conception Act.

Section 13. Severability. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 14. Effective Date. This [Act] shall take effect on _____ . Its provisions are to be applied prospectively.

Section 15. Repeals. Acts or parts of acts inconsistent with this [Act] are repealed to the extent of the inconsistency.

Section 16. Application to Existing Relationships. This [Act] applies to surrogacy agreements entered into after its effective date.

APPENDIX B

Infertility (Medical Procedures) Act 1984

No. 10163

TABLE OF PROVISIONS

PART I.—PRELIMINARY

Section

1. Short title.
2. Commencement.
3. Interpretation.
4. Application of Act.

PART II.—REGULATION OF PROCEDURES

5. Procedure not to be carried out except in accordance with this Act.
6. Prohibition of certain procedures.
7. Approval of hospitals.
8. Designated officer.
9. Approval of counsellors.
10. Procedure of *in vitro* fertilization—no donors.
11. Procedure of *in vitro* fertilization—male donors.
12. Procedure of *in vitro* fertilization—female donors.
13. Procedure of *in vitro* fertilization—male and female donors.
14. Authority for use of embryo in alternative relevant procedure.
15. Withdrawal of consent to use of gametes.
16. Use of gametes of identified donors.
17. Artificial insemination.
18. Artificial insemination—counselling.

PART III.—RECORDS

19. Records to be kept by approved hospitals.
20. Disclosure of non-identifying information to donors and patients.
21. Records of artificial insemination not carried out in approved hospital.
22. Health Commission to keep central register.
23. Information not to be disclosed.

PART IV.—GENERAL

24. Conscientious objection to participation in treatment.
25. Gametes of person under eighteen not to be used in procedures.
26. Prohibition of certain procedures.
27. False or misleading statements.
28. Offences.
29. Standing Review and Advisory Committee.

PART V.—SURROGATE MOTHERHOOD

30. Provisions relating to surrogate mothers.

PART VI.—APPLICATION FOR REVIEW

31. Review of decision by Administrative Appeals Tribunal.

PART VII.—REGULATIONS

32. Regulations.

PART VIII.—CONSEQUENTIAL AMENDMENTS

33. Sale of gametes prohibited.
34. Health Commission register exempt from *Freedom of Information Act 1982*.



ANNO TRICESIMO TERTIO
ELIZABETHAE SECUNDAE REGINAE
VICTORIA

Infertility (Medical Procedures) Act 1984

No. 10163

An Act relating to the regulation of certain procedures for the alleviation of infertility or to assist conception, to amend the *Human Tissue Act 1982* and the *Freedom of Information Act 1982*, to prohibit agreements relating to surrogate motherhood and for other purposes.

[Assented to 20 November 1984]

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

PART I.—PRELIMINARY

Short title.

1. This Act may be cited as the *Infertility (Medical Procedures) Act 1984*.

Commencement.

2. The several provisions of this Act shall come into operation on a day, or on the respective days, to be fixed by proclamation, or successive proclamations, of the Governor in Council published in the *Government Gazette*.

Interpretation.

3. (1) In this Act unless the contrary intention appears—

"Approved counsellor" means approved counsellor within the meaning of section 9 (4).

"Approved hospital" means a scheduled hospital or a private hospital that is for the time being approved under section 7 as a place at which one or more relevant procedures or the procedure of artificial insemination may be carried out.

"Committee" in relation to a scheduled hospital means the committee of management or board of directors or governing body of the scheduled hospital.

"Designated officer" in relation to a hospital means—

(a) a person for the time being appointed under section 8 to be a designated officer for that hospital; or

(b) where at any time, in relation to a hospital, there is no such person, the medical superintendent or, if there is no medical superintendent, the principal executive officer of the hospital or, while the medical superintendent or principal executive officer, as the case may be, is absent from or not on duty at the hospital, a person acting in the place of the medical superintendent or principal executive officer.

"Fertilization procedure" means—

(a) a relevant procedure; or

(b) any other procedure (other than the procedure of artificial insemination) for implanting in the body of a woman—

(i) an ovum produced by that woman or by another woman, whether or not it is fertilized outside the body of the first-mentioned woman; or

(ii) an embryo derived from an ovum produced by that woman or by another woman whether or not it is fertilized outside the body of the first-mentioned woman.

"Prescribed" means prescribed by this Act or the regulations.

"Private hospital" means a hospital registered under Division 3 of Part X. of the *Health Act* 1958 and classed by the Health Commission as a hospital.

"Proprietor" in relation to a private hospital includes the owner, the occupier or any person having the management or control of the private hospital.

"Relevant procedure" means a procedure to which section 10, 11, 12 or 13 applies.

"Scheduled hospital" has the same meaning as in the *Hospitals and Charities Act* 1958.

(2) In this Act—

(a) a reference to a married woman includes a reference to a woman—

(i) who, at the commencement of this section, is living with a man as his wife on a *bona fide* domestic basis although not married to him; and

(ii) who, before the commencement of this section, had undergone examination or treatment with a view to the carrying out by a medical practitioner of a procedure that, if carried out after that commencement, would be a relevant procedure; and

(b) a reference to the husband of a woman includes, in relation to a woman to whom paragraph (a) applies, a reference to the man with whom the woman is, at the commencement of this section, living as his wife on a *bona fide* domestic basis but does not include a reference to the man (if any) to whom the woman is, at that time, actually married.

Application of Act.

4. A provision of section 10, 11, 12 or 13 does not apply to or in respect of anything done or suffered before the date on which the provision came into operation and, in relation to a relevant procedure carried out within six months after that date, a reference in those sections to twelve months shall be construed as a reference to six months.

PART II.—REGULATION OF PROCEDURES

Procedure not to be carried out except in accordance with this Act.

5. (1) Subject to sub-section (2), a person shall not carry out a fertilization procedure.

Penalty: 100 penalty units or imprisonment for four years.

(2) Sub-section (1) does not apply to a person who carries out a relevant procedure in accordance with this Act.

Prohibition of certain procedures.

6. (1) A person shall not carry out a prohibited procedure.

Penalty: 100 penalty units or imprisonment for four years.

(2) In sub-section (1), “prohibited procedure” means—

(a) cloning; or

(b) a procedure under which the gametes of a man or a woman are fertilized by the gametes of an animal.

(3) A person shall not carry out an experimental procedure other than an experimental procedure approved by the Standing Review and Advisory Committee.

Penalty: 100 penalty units or imprisonment for four years.

(4) In sub-section (3), “experimental procedure” means a procedure that involves carrying out research on an embryo of a kind that would cause damage to the embryo, would make the embryo unfit for implantation or would reduce the prospects of a pregnancy resulting from the implantation of the embryo.

(5) Where ova are removed from the body of a woman, a person shall not cause or permit those ova to be fertilized outside the body of the woman except for the purposes of the implantation of embryos derived from those ova in the womb of that woman or another woman in a relevant procedure in accordance with this Act.

Penalty: 100 penalty units or imprisonment for four years.

(6) A person shall not carry out a procedure that involves freezing an embryo.

Penalty: 100 penalty units or imprisonment for four years.

(7) Sub-section (6) does not apply to a procedure carried out in an approved hospital that involves freezing an embryo if that procedure is carried out for the purposes of enabling the embryo to be implanted in the womb of a woman at a later date.

(8) Nothing in this Act prevents or inhibits the carrying out in an approved hospital of research on, and the development of techniques for, freezing or otherwise storing ova removed from the body of a woman.

Approval of hospitals.

7. (1) The Committee of a scheduled hospital or the proprietor of a private hospital may make application to the Minister for approval of the hospital as a place at which relevant procedures of the class specified in the application may be carried out.

(2) An application under sub-section (1) shall be made in the form prescribed for relevant procedures to which section 10, 11, 12 or 13 applies or for the procedure of artificial insemination, whichever is applicable.

(3) The Minister may, if he is satisfied that the scheduled hospital or the private hospital has facilities appropriate for the carrying out of relevant procedures of the class specified in the application, by instrument in writing approve the hospital as a place at which procedures of that class may be carried out, subject to such terms and conditions as are specified in the instrument.

(4) The Minister may, at any time by notice in writing given to the Committee of a scheduled hospital or the proprietor of a private hospital vary the terms and conditions to which an approval of that hospital as a place at which relevant procedures of the class specified in the notice may be carried out is subject.

(5) Where the Minister is satisfied that—

- (a) a scheduled hospital;
- (b) the Committee or designated officer of a scheduled hospital;
- (c) a private hospital; or
- (d) the proprietor or designated officer of a private hospital—

has committed an offence against this Act or the regulations or has failed to comply with a term or condition to which the approval of that hospital under this section is subject, the Minister may, by notice in writing given to the Committee of the scheduled hospital or proprietor of the private hospital, cancel the approval of the hospital as a place at which relevant procedures of the class specified in the notice may be carried out.

(6) Where the approval of a scheduled hospital or a private hospital is cancelled under this section, the Minister may give such directions as he determines in relation to the control and management of the hospital, the continuation of treatment of patients, use of gametes held by the hospital for relevant procedures (including directions for transfer of gametes to an approved hospital), keeping of records and other relevant matters.

(7) In this section, a reference to a relevant procedure includes a reference to the procedure of artificial insemination.

Designated officer.

8. (1) The Committee of a scheduled hospital, being an approved hospital, or the proprietor of a private hospital, being an approved hospital, may, by instrument in writing, appoint such persons, being medical practitioners or other persons, as the Committee or proprietor considers appropriate to be, for the purposes of this Act, designated officers for the hospital.

(2) The power under this section to appoint a person as a designated officer includes the power, by instrument in writing, to remove a person so appointed.

Approval of counsellors.

9. (1) A person may make application to the Minister for approval as a counsellor for the purposes of this Act.

(2) An application under sub-section (1) shall be in the prescribed form and shall specify—

- (a) each approved hospital where the relevant procedures in relation to which the applicant proposes to give counsel may be carried out; and
- (b) whether the applicant seeks approval in relation to giving counsel—
 - (i) to a woman in relation to whom a relevant procedure specified in the approval may be, or has been, carried out;
 - (ii) to the husband of such a woman;
 - (iii) to a person who may give gametes for use in a relevant procedure;
 - (iv) to the spouse of such a person; or
 - (v) to two or more of the classes of person specified in sub-paragraphs (i) to (iv).

(3) The Minister may by instrument in writing approve an applicant under this section as a counsellor for the purposes of this Act in relation to giving counsel to the classes of person specified in the instrument and may, by instrument in writing, vary or cancel that approval.

(4) Where the Minister approves a person as a counsellor under this section or varies or cancels that approval, he shall give notice in writing to each approved hospital of that approval, variation or cancellation.

(5) A reference in this Act to an approved counsellor in relation to giving counsel to a particular person means a person approved for the time being under this section as a counsellor for the purposes of this Act in relation to giving counsel to persons of the same class as that particular person.

(6) The Minister shall from time to time and at least once in each year cause to be published in the *Government Gazette* the names of persons approved for the time being under this Act as counsellors for the purpose of giving counsel to specified classes of persons.

Procedure of *in vitro* fertilization—no donors.

10. (1) This section applies to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her and fertilized outside her body by semen produced by her husband.

(2) A procedure to which this section applies shall not be carried out at a place other than a hospital that is approved by the Minister as a place at which such procedures may be carried out.

(3) A procedure to which this section applies shall not be carried out unless—

- (a) the woman in relation to whom the procedure is carried out is a married woman;
- (b) the woman and her husband each consents in writing to the carrying out of the procedure;
- (c) not less than twelve months before the carrying out of the procedure, the woman and her husband had begun to undergo, or have undergone, such examination or treatment by a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) as might reasonably be expected to establish whether or not a procedure other than a fertilization procedure might cause the woman to become pregnant;
- (d) as a result of that examination or treatment, a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) is satisfied that it is reasonably established that the woman is unlikely to become pregnant as the result of a procedure other than a fertilization procedure; and
- (e) the medical practitioner by whom the procedure is to be carried out is satisfied—
 - (i) that the woman and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor;
 - (ii) that an approved counsellor will be available to give further counsel to the woman and her husband after the procedure is carried out.

Procedure of *in vitro* fertilization—male donors.

11. (1) This section applies to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her and fertilized outside her body by semen produced by a man other than her husband.

(2) A procedure to which this section applies shall not be carried out at a place other than a hospital that is approved by the Minister as a place at which such procedures may be carried out.

(3) A procedure to which this section applies shall not be carried out unless—

- (a) the woman in relation to whom the procedure is carried out is a married woman;
- (b) the woman and her husband have each consented in writing to the carrying out of a procedure to which this section applies and neither the woman nor her husband has withdrawn that consent;
- (c) not less than twelve months before the carrying out of the procedure, the woman and her husband had begun to undergo, and have undergone, such examination or treatment by a medical practitioner other than the medical practitioner by whom the procedure is to be carried out as might reasonably be expected to establish whether or not a procedure other than a fertilization procedure might cause the woman to become pregnant;
- (d) as a result of that examination or treatment, a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) is satisfied that it is reasonably established—
 - (i) that the woman is unlikely to become pregnant as the result of a procedure other than a fertilization procedure; or
 - (ii) that if the woman were to become pregnant as a result of the fertilization of an ovum produced by her by semen produced by her husband an undesirable hereditary disorder may be transmitted to a child born as the result of the pregnancy;
- (e) the medical practitioner by whom the procedure is to be carried out is satisfied—
 - (i) that the woman and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor; and
 - (ii) that an approved counsellor will be available to give further counsel to the woman and her husband after the procedure is carried out.

(4) Where a consent is given under paragraph (b) of sub-section (3)—

- (a) the document in which the consent is given shall be kept by the hospital in which the procedure to which this section applies is carried out;
- (b) a copy shall be given to the woman in relation to whom the procedure is to be carried out; and
- (c) a copy shall be given to the husband of the woman.

(5) A person shall not use semen produced by a man (in this section called "the donor") for the purposes of a procedure to which this section applies unless—

- (a) the donor has consented in writing to the use of the semen in such a procedure and has not withdrawn that consent;
- (b) where there is a spouse of the donor, the spouse has consented in writing to the use of the semen in such a procedure and has not withdrawn that consent; and
- (c) the donor and the spouse (if any) of the donor have received counselling from an approved counsellor.

Penalty: 25 penalty units or imprisonment for one year.

(6) A man who gives semen that is or may be used in a procedure to which this section applies shall not receive, and another person shall

not make or give any payment or other amount for or in respect of the giving of the semen other than—

- (a) an amount, not exceeding an amount calculated at a prescribed rate, in respect of expenses incurred by that man in travelling to and attending at the place at which the semen is given; or
- (b) an amount in reimbursement of medical expenses incurred by that man in connexion with the giving of the semen.

Penalty applying to this sub-section: 25 penalty units or imprisonment for one year.

Procedure of *in vitro* fertilization—female donors.

12. (1) This section applies to the procedure of implanting in the womb of a woman (in this section called "the patient") an embryo derived from an ovum produced by another woman (in this section called "the donor") and fertilized outside the body of the patient and outside the body of the donor by semen produced by the husband of the patient.

(2) A procedure to which this section applies shall not be carried out at a place other than a hospital that is approved by the Minister as a place at which such procedures may be carried out.

(3) A procedure to which this section applies shall not be carried out unless—

- (a) the patient is a married woman;
- (b) the patient and her husband each consented in writing to the carrying out of the procedure and neither the patient nor her husband has withdrawn that consent;
- (c) not less than twelve months before the carrying out of the procedure, the patient and her husband had begun to undergo, and have undergone, such examination or treatment by a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) as might reasonably be expected to establish whether or not a procedure other than a fertilization procedure might cause the patient to become pregnant;
- (d) as a result of that examination or treatment, a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) is satisfied that it is reasonably established—
 - (i) that the patient is unlikely to become pregnant as the result of a procedure other than a fertilization procedure; or
 - (ii) that if the patient were to become pregnant as a result of the fertilization of an ovum produced by her, an undesirable hereditary disorder may be transmitted to a child born as a result of the pregnancy; and
- (e) the medical practitioner by whom the procedure is to be carried out is satisfied—
 - (i) that the patient and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor; and
 - (ii) that an approved counsellor will be available to give further counsel to the patient and her husband after the procedure is carried out.

(4) Where a consent is given under paragraph (b) of sub-section (3)—

- (a) the document in which the consent is given shall be kept by the hospital in which the procedure to which this section applies is carried out;
- (b) a copy shall be given to the patient; and
- (c) a copy shall be given to the husband of the patient.

(5) A person shall not in a procedure to which this section applies, use an ovum removed from a woman (in this sub-section called "the donor") unless, before the ovum was removed—

- (a) the donor consented in writing to the use of the ovum in a procedure to which this section applies, being a procedure to be carried out in relation to another woman, and has not withdrawn that consent;
- (b) the husband (if any) of the donor consented in writing to the use of the ovum in such a procedure and has not withdrawn that consent; and
- (c) the donor and her husband (if any) received counselling from an approved counsellor.

Penalty: 25 penalty units or imprisonment for one year.

(6) A woman who gives an ovum that is or may be used in a procedure to which this section applies shall not receive, and another person shall not make or give any payment or other amount for or in respect of the giving of the ovum other than—

- (a) an amount, not exceeding an amount calculated at a prescribed rate, in respect of expenses incurred by that woman in travelling to and attending at the place at which the ovum is given; or
- (b) an amount in reimbursement of medical expenses incurred by that woman in connexion with the giving of the ovum.

Penalty applying to this sub-section: 25 penalty units or imprisonment for one year.

Procedure of *in vitro* fertilization—male and female donors.

13. (1) This section applies to the procedure of implanting in the womb of a woman (in this section called "the patient") an embryo derived from an ovum produced by another woman (in this section called "the donor") and fertilized outside the body of the patient and outside the body of the donor by semen produced by a man other than the husband of the patient.

(2) A procedure to which this section applies shall not be carried out at a place other than a hospital that is approved by the Minister as a place at which such procedures may be carried out.

(3) A procedure to which this section applies shall not be carried out unless—

- (a) the patient is a married woman;
- (b) the patient and her husband each consented in writing to the carrying out of the procedure and neither the patient nor the husband has withdrawn that consent;

- (c) not less than twelve months before the carrying out of the procedure, the patient and her husband had begun to undergo, and have undergone, such examination or treatment by a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) as might reasonably be expected to establish whether or not a procedure other than a fertilization procedure might cause the patient to become pregnant;
 - (d) as a result of that examination or treatment, a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) is satisfied that it is reasonably established—
 - (i) that the patient is unlikely to become pregnant as the result of a procedure other than a procedure to which this section applies; or
 - (ii) that if the patient were to become pregnant as a result of the fertilization of an ovum produced by her or if semen produced by her husband were used to fertilize an ovum as a result of which a woman becomes pregnant, an undesirable hereditary disorder may be transmitted to a child born as the result of the pregnancy;
 - (e) where more than one embryo is used in the procedure, the gametes from which each embryo was derived, were produced by the same two persons; and
 - (f) the medical practitioner by whom the procedure is to be carried out is satisfied—
 - (i) that the patient and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor; and
 - (ii) that an approved counsellor will be available to give further counsel to the patient and her husband after the procedure is carried out.
- (4) Where a consent is given under paragraph (b) of sub-section (3)—
- (a) the document in which the consent is given shall be kept by the hospital in which the procedure to which this section applies is carried out;
 - (b) a copy shall be given to the patient; and
 - (c) a copy shall be given to the husband of the patient.
- (5) A person shall not use semen produced by a man (in this sub-section called "the donor") for the purposes of a procedure to which this section applies unless—
- (a) the donor has consented in writing to the use of the semen in such a procedure and has not withdrawn that consent;
 - (b) where there is a spouse of the donor, the spouse has consented to the use of the semen in such a procedure and has not withdrawn that consent; and
 - (c) the donor and the spouse (if any) of the donor have received counselling from an approved counsellor.

Penalty: 50 penalty units or imprisonment for two years.

(6) A person shall not, in a procedure to which this section applies, use an ovum removed from a woman (in this sub-section called "the donor") unless, before the ovum was removed—

- (a) the donor consented in writing to the use of the ovum in a procedure to which this section applies, being a procedure to be carried out in relation to another woman, and has not withdrawn that consent;
- (b) the husband (if any) of the donor consented in writing to the use of the ovum in such a procedure and has not withdrawn that consent; and
- (c) the donor and her husband (if any) received counselling from an approved counsellor.

Penalty: 50 penalty units or imprisonment for two years.

(7) A person who gives gametes that are or may be used in a procedure to which this section applies shall not receive, and another person shall not make or give, any payment or other amount for or in respect of the giving of the gametes other than—

- (a) an amount, not exceeding an amount calculated at a prescribed rate, in respect of expenses incurred by that person in travelling to and attending at the place at which the gametes are given; or
- (b) an amount in reimbursement of medical expenses incurred by that person in connexion with the giving of the gametes.

Penalty: 50 penalty units or imprisonment for two years.

(8) Where, for the purposes of a relevant procedure, an embryo has been derived from gametes produced by a married woman and her husband and is not required for the purposes of a relevant procedure carried out in relation to that married woman, the embryo may, subject to and in accordance with this section, be used in a procedure to which this section applies to be carried out in relation to another married woman where—

- (a) before the embryo was derived from the gametes produced by the first-mentioned married woman and her husband each consented in writing to the use of such an embryo for a procedure carried out in relation to another married woman and neither the first-mentioned married woman nor her husband had withdrawn that consent; and
- (b) the first-mentioned married woman and her husband had received counselling from an approved counsellor in relation to that consent.

(9) A married woman and her husband who give an embryo that is or may be used in a procedure to which this section applies shall not receive, and another person shall not make or give, any payment or other amount for or in respect of the giving of the embryo.

Penalty applying to this sub-section: 75 penalty units or imprisonment for three years.

Authority for use of embryo in alternative relevant procedure.

14. (1) Where, after an embryo has been derived from an ovum produced by a woman and fertilized outside her body for the purposes of a relevant procedure to be carried out in relation to her or another woman, the embryo cannot be implanted in the body of that woman whether by reason of her death or an accident or injury causing her to be incapable of receiving the implantation or otherwise—

- (a) the embryo shall be made available, in accordance with the consent of the persons who produced the gametes from which the embryo was derived, for use in a relevant procedure carried out in relation to another woman; or

- (b) where those consents cannot be obtained because the persons are dead or cannot be found, the Minister shall direct the designated officer of the approved hospital where the embryo is stored to ensure that the embryo is made available for use in a relevant procedure.

(2) Where the Minister gives a direction to a designated officer under sub-section (1) in relation to the use of an embryo in a relevant procedure—

- (a) the designated officer shall comply with the directions; and
- (b) the provisions of section 13 (other than sub-sections (5), (6) and (8)) apply to the relevant procedure.

Withdrawal of consent to use of gametes.

15. (1) Where—

- (a) a person who has given gametes for use in a specified relevant procedure; or
- (b) the spouse of such a person—

withdraws consent to the use of the gametes in that procedure by notice in writing given to the designated officer of the approved hospital at which the gametes were given, the designated officer shall—

- (c) unless the person or spouse has consented to the use of the gametes in any other relevant procedure; or
- (d) the gametes have been used in a relevant procedure—

forthwith on receiving the notice, destroy the gametes or cause them to be destroyed.

(2) A person shall not incur any civil or criminal liability by reason only of the use in a relevant procedure of gametes given by a person who withdraws consent to the use unless where consent was withdrawn before that use the person knew or ought reasonably to have known of the withdrawal of the consent.

Use of gametes of identified donors.

16. Where, for the purposes of a relevant procedure to be carried out in relation to a married woman, the married woman and her husband request in writing that gametes to be given by a specified person (in this section called "the donor") be used, nothing in this Act prevents the use of those gametes in a relevant procedure carried out in accordance with this Act if the designated officer of the approved hospital where the procedure is to be carried out has certified in writing—

- (a) that the same criteria have been applied to the examination of the suitability of the gametes for use in that procedure as would be applied to the selection of any other gametes for use in such a procedure; and
- (b) that the married woman, her husband and the donor have received counselling (in addition to any other counselling required under this Act) in respect of the use of the gametes of the donor in the procedure.

Artificial insemination.

17. (1) A person, who is not a medical practitioner shall not carry out a procedure of artificial insemination.

Penalty: 25 penalty units or imprisonment for one year.

(2) Sub-section (1) does not apply to a person who carries out a procedure of artificial insemination in an approved hospital.

Artificial insemination—counselling.

18. A person shall not carry out a procedure of artificial insemination unless the woman in relation to whom the procedure is carried out and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor.

Penalty: 10 penalty units.

PART III.—RECORDS

Records to be kept by approved hospitals.

19. (1) The Committee of a scheduled hospital, being an approved hospital and the proprietor of a private hospital, being an approved hospital, shall maintain or cause to be maintained a register for the purposes of this Part.

(2) The designated officer of an approved hospital shall, in respect of things done or that may be done in that hospital relating to relevant procedures (whether or not carried out in that hospital) enter in the register maintained by the Committee or proprietor of that hospital under sub-section (1)—

- (a) the prescribed particulars of each person who gives gametes that are or may be used in a relevant procedure;
- (b) the prescribed particulars of consents given by persons for the purposes of relevant procedures;
- (c) the prescribed particulars of amounts paid to each person who gives gametes that are or may be used in a relevant procedure in respect of expenses incurred in connexion with the giving of the gametes;
- (d) where gametes are destroyed, the prescribed particulars of the destruction;
- (e) where an embryo is derived from the fertilization of an ovum, the prescribed particulars relating to that embryo;
- (f) where an embryo is disposed of (otherwise than by implantation in the womb of a woman), the prescribed particulars of that disposal;
- (g) the prescribed particulars of the use of gametes in relevant procedures; and
- (h) where a child is born as a result of a pregnancy occurring as a result of a relevant procedure carried out in the hospital, the prescribed particulars, so far as they are or ought reasonably to be known to the designated officer, of the birth of the child including particulars of any physical abnormalities identified at or about the time of the birth and of the parents of the child and of donors of gametes used in the procedure.

(3) Where a child is born as a result of a pregnancy occurring as a result of a relevant procedure carried out in an approved hospital, the designated officer of the approved hospital shall send or cause to be sent to the Health Commission a copy of—

- (a) the particulars entered in the register under paragraph (a) of sub-section (2) of each person who gave gametes that were used in the procedure; and
- (b) the particulars entered in the register under paragraph (h) of sub-section (2) relating to that birth.

(4) Where a relevant procedure is carried out in an approved hospital and gametes used in the procedure were given in another approved hospital—

- (a) the designated officer of the approved hospital in which the gametes were given shall give to the designated officer of the other approved hospital a copy of the prescribed particulars relating to the gametes, and of consents relating to those gametes, required to be entered in a register under this section; and
- (b) the designated officer of the approved hospital in which the relevant procedure is carried out shall enter those prescribed particulars in the register maintained under this section by the Committee or proprietor of that approved hospital.

(5) In this section, a reference to a relevant procedure includes a reference to a procedure of artificial insemination.

Penalty: 5 penalty units.

Disclosure of non-identifying information to donors and patients.

20. (1) Before a relevant procedure is carried out in relation to a married woman, the designated officer of the approved hospital in which the procedure is to be carried out shall give in writing to the married woman particulars of each person (other than particulars by which that person may be identified) who gives gametes that may be used in the procedure.

(2) The designated officer of an approved hospital shall offer or cause to be offered in writing to each person who gives gametes that may be used in a relevant procedure to give particulars of each married woman in relation to whom the procedure may be carried out (other than particulars by which the married woman or her husband may be identified) and, where the person asks in writing to be given those particulars, the designated officer shall give the person those particulars or, where the gametes have been given to another approved hospital, inform the person of the name of the hospital from which those particulars may be obtained.

(3) A person who gives gametes that may be used in a relevant procedure may in writing ask the designated officer of the approved hospital where the gametes may be or have been used to give the person particulars of each child born as the result of a pregnancy occurring as the result of the use of the gametes (other than particulars by which the child may be identified).

Records of artificial insemination not carried out in approved hospital.

21. Where a procedure of artificial insemination is carried out by a medical practitioner, the medical practitioner shall keep a written record of—

- (a) the prescribed particulars of the man who gave the semen used in the procedure; and
- (b) where a child is born as the result of a pregnancy occurring as a result, or as a possible result, of the procedure, the prescribed particulars of the birth of the child—

and, where a child is so born, shall send to the Health Commission a copy of that written record.

Health Commission to keep central register.

22. (1) The Health Commission shall maintain or cause to be maintained a register containing the particulars copies of which are sent to the Health Commission under section 19 or 21.

(2) The regulations—

- (a) may prescribe the classes of persons who may be given access to specified parts of the register maintained under this section and to specified information contained in that register and the circumstances in which and conditions subject to which persons included in those classes of persons may have that access; or
- (b) may provide that the Minister or the Secretary of the Health Commission may, subject to sub-section (3), permit specified persons or specified classes of persons to have access to specified parts of that register and to specified information contained in that register under such circumstances and subject to such conditions as the Minister or the Secretary determines.

(3) The Minister or the Secretary of the Health Commission shall not under regulations made under this section permit a person to have access to information that identifies another person or from which another person may be identified unless that other person, or a person acting on behalf of that other person, has consented in writing to the permitting of access to that information.

(4) The Health Commission shall, before 30 September in each year after the year in which this section comes into operation, submit to the Minister of Health a report—

- (a) on proposals for regulations to be made under sub-section (2); and
- (b) where regulations have been made under sub-section (2), the manner of the operation of those regulations.

(5) The Minister of Health shall cause a report made to him under sub-section (4) to be laid before both Houses of Parliament within three weeks after it is received or, if Parliament is not then sitting, within three weeks after the next assembling of Parliament.

Information not to be disclosed.

23. (1) Except as provided in this Act and subject to this section, a person shall not, except in the performance of a duty or function under this Act, disclose to another person any particulars required to be entered in a register maintained under section 19 or 22, being particulars known to that person in the capacity as a designated officer of an approved hospital, an approved counsellor, a medical practitioner or person employed or engaged in an approved hospital or a person employed in the Health Commission.

Penalty: 50 penalty units.

(2) A person born as the result of a pregnancy occurring as the result of the carrying out of a relevant procedure may make application to the Health Commission for information about the donor of gametes from which the embryo used in the relevant procedure was derived.

(3) Where the Health Commission receives an application under sub-section (2), the Health Commission shall give or cause to be given to the applicant such information (other than information from which a donor of gametes may be identified) as the Health Commission has in its possession or under its control.

PART IV.—GENERAL

Conscientious objection to participation in treatment.

24. (1) Subject to sub-section (2), a person shall not be under any duty, whether by contract or by any statutory or other legal requirement, to participate in a relevant procedure to which the person has a conscientious objection.

(2) Nothing in sub-section (1) affects a duty to participate in treatment that is necessary to save the life of a woman in relation to whom a procedure referred to in that sub-section is being or has been carried out.

(3) In any legal proceedings, the onus of proving a conscientious objection referred to in sub-section (1) rests on the person claiming to rely on it.

Gametes of person under eighteen not to be used in procedures.

25. (1) It is not lawful to use in a relevant procedure gametes produced by a child.

Penalty: 50 penalty units or imprisonment for two years.

- (2) In sub-section (1), "child" means a person who—
- (a) has not attained the age of eighteen years; and
 - (b) is not married.

Prohibition of certain procedures.

26. A person shall not carry out a procedure of artificial insemination of a woman or a relevant procedure where the semen used for the artificial insemination or relevant procedure was produced by more than one man.

Penalty: 50 penalty units or imprisonment for two years.

False or misleading statements.

27. (1) A person who gives gametes that may be used in a relevant procedure or in a procedure of artificial insemination carried out in an approved hospital shall not, in connexion with providing medical or other particulars in relation to the giving of the gametes, make a statement that is false or misleading by reason of the inclusion in the statement of false or misleading matter or of the omission from the statement of any material matter.

Penalty: 10 penalty units.

(2) It is a defence to a prosecution of a person for an offence under sub-section (1), that when the statement was made, the person believed on reasonable grounds that the false matter was true, the misleading matter was not misleading or, in the case of an omission, that no material matter had been omitted.

Offences.

28. (1) Where a person commits an offence against this Act in an approved hospital, the hospital is guilty of an offence.

Penalty: 100 penalty units.

(2) Where a person commits an offence against this Act in an approved hospital, the designated officer of the hospital is guilty of an offence.

Penalty: 100 penalty units or imprisonment for four years.

Standing Review and Advisory Committee.

29. (1) There shall be a Standing Review and Advisory Committee consisting of—

- (a) a person holding a qualification in the study of philosophy;
- (b) two medical practitioners;
- (c) two persons representing religious bodies;
- (d) a person qualified in social work;
- (e) a legal practitioner; and
- (f) a person qualified as a teacher with an interest in community affairs—

appointed by the Minister, one of whom shall be appointed as chairman.

(2) A member of the Committee shall hold office for such period as is specified in the instrument of appointment and shall be eligible for re-appointment.

(3) A member of the Committee may be removed from office at any time by the Minister.

(4) A member of the Committee is not, by reason only of being a member, subject to the *Public Service Act 1974*.

(5) Subject to this section, the Committee may regulate its proceedings in such manner as it thinks fit.

(6) The functions of the Committee are—

- (a) to advise the Minister in relation to infertility and procedures for alleviating infertility;
- (b) to consider requests for approval of and, if it sees fit, to approve, experimental procedures for the purposes of section 6 (3); and
- (c) to advise and report to the Minister on any matters relating to infertility and procedures for alleviating infertility and any other associated matters referred to it by the Minister.

(7) In the exercise of its functions, the Committee—

- (a) shall have regard to the principle that childless couples should be assisted in fulfilling their desire to have children;
- (b) shall ensure that the highest regard is given to the principle that human life shall be preserved and protected at all times; and
- (c) shall have regard to the spirit and intent of the several provisions of this Act.

(8) Where the Committee approves an experimental procedure for the purposes of section 6 (3), the Committee shall forthwith report the approval to the Minister.

(9) The Committee shall make an annual report to the Minister on—

- (a) programmes in Victoria under which relevant procedures were carried out in approved hospitals during the year to which the report relates; and
- (b) particulars of each programme carried out in each approved hospital in that year including the number of relevant procedures carried out and the number of participants in each programme.

(10) The Committee may from time to time make such recommendations to the Minister on its activities and on its own operation and composition as it sees fit.

(11) The Committee may collate such information relating to and keep such records of, programmes and procedures to which this Act relates as it sees fit and may collate information relating to, and keep records of, similar programmes and procedures carried out in another State or in a Territory.

(12) The Minister shall cause—

- (a) each report made by the Committee under sub-section (8); and
- (b) each annual report made by the Committee under sub-section (9)—

to be laid before each House of Parliament within 14 sitting days after the Minister receives the report or, if a House of Parliament is not then sitting, within 14 days after the next meeting of that House.

PART V.—SURROGATE MOTHERHOOD

Provisions relating to surrogate mothers.

30. (1) In this section, a reference to a woman who acts, or agrees with another person or other persons to act, as a surrogate mother is a reference to a woman who has entered into, or enters into, a contract, agreement or arrangement with that other person or those other persons, whether formal or informal, and whether or not for payment or reward under which the woman agrees—

- (a) to become pregnant, or to seek or attempt to become pregnant, with the intention that a child born as the result of the pregnancy become and be treated, whether by adoption, agreement or otherwise, as the child of that other person or of those other persons; or
- (b) being pregnant, that a child born as the result of the pregnancy become and be treated, whether by adoption, agreement or otherwise, as the child of that other person or those other persons.

(2) A person shall not—

- (a) publish, or cause to be published, a statement or an advertisement, notice or other document that—
 - (i) is intended or likely to induce a person to agree to act as a surrogate mother;
 - (ii) seeks or purports to seek a woman who is willing to agree to act as a surrogate mother; or
 - (iii) states or implies that a woman is willing to agree to act as a surrogate mother.
- (b) make, give or receive, or agree to make, give or receive, a payment or reward for or in consideration of the making of a contract, agreement or arrangement under which a woman agrees to act as a surrogate mother; or
- (c) receive or agree to receive a payment or reward in consideration for acting, or agreeing to act, as a surrogate mother.

Penalty: 50 penalty units or imprisonment for two years.

(3) A contract or agreement (whether made before or after the commencement of this section) under which a woman agrees with another person or other persons to act as a surrogate mother is void.

PART VI.—APPLICATION FOR REVIEW

Review of decision by Administrative Appeals Tribunal.

31. (1) An application may be made to the Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1984* for a review of a decision of the Minister under this Act.

(2) In this Act, a reference to a decision is a reference to a decision within the meaning of the *Administrative Appeals Tribunal Act 1984* made on or after the commencement of this section.

PART VII.—REGULATIONS

Regulations.

32. (1) The Governor in Council may make regulations for or with respect to prescribing any matter or thing authorized or required to be prescribed for the purposes of this Act and in particular for or with respect to—

- (a) prescribing the particulars to be recorded in a register maintained by an approved hospital including particulars of the previous medical and social history of a person who gives gametes for use in a relevant procedure; and
- (b) prescribing matters in relation to which counselling is required before a relevant procedure of a specified class is carried out.

(2) The regulations shall be subject to disallowance by Parliament.

PART VIII.—CONSEQUENTIAL AMENDMENTS

Sale of gametes prohibited.

33. In section 39 (2) of the *Human Tissue Act* 1982, after the word "tissue" (where twice occurring) there shall be inserted the words "(other than spermatozoa or ova)".

No. 9880.

Health Commission register exempt from *Freedom of Information Act* 1982.

34. After section 33 (7) of the *Freedom of Information Act* 1982, there shall be inserted the following sub-section:

No. 9858 as amended by Nos. 10048 and 10087.

"(8) Nothing in this section shall be construed so as to affect the procedures for access to information contained in the register maintained by the Health Commission under the *Infertility (Medical Procedures) Act* 1984."



Victoria

ACTS OF THE PARLIAMENT

1987

Volume 2

41339/87



Victoria

No. 86 of 1987

**Infertility (Medical Procedures)
(Amendment) Act 1987**

[Assented to 1 December 1987]

The Parliament of Victoria enacts as follows:

Purpose.

1. The purpose of this Act is to make provision for the regulation of certain procedures involving human gametes.

Commencement.

2. This Act comes into operation on a day to be proclaimed.

Principal Act.

3. In this Act, the *Infertility (Medical Procedures) Act 1984* is called the Principal Act.

No. 10183 as
amended by
No. 10262.

Amendment of Principal Act.

4. (1) In section 6 of the Principal Act, for sub-section (5) substitute—

“(5) Where ova are removed from the body of a woman, a person shall not cause or permit fertilisation of any of those ova to commence outside the body of the woman except—

- (a) for the purposes of the implantation of embryos derived from those ova in the womb of that woman or another woman in a relevant procedure in accordance with this Act; or
- (b) for the purposes of a procedure to which section 9A applies that is approved and carried out in accordance with that section.

Penalty: 100 penalty units or imprisonment for four years.”.

(2) After section 9 of the Principal Act insert—

Research on process of fertilisation before syngamy.

“9A. (1) A procedure to which this section applies is an experimental procedure involving the fertilisation of a human ovum from the point of sperm penetration prior to but not including the point of syngamy.

(2) A procedure to which this section applies—

- (a) must be approved by the Standing Review and Advisory Committee before it is commenced; and
- (b) must not be carried out unless—
 - (i) the ova used in the procedure are the ova of a married woman; and
 - (ii) the woman and her husband are undergoing, in relation to the carrying out of a fertilisation procedure, examination or treatment of a kind referred to in section 10, 11, 12, 13 or 13A; and
 - (iii) the woman and her husband have each consented in writing to the use of the woman's ova in a specific approved experimental procedure; and
 - (iv) a medical practitioner by whom or on whose behalf the procedure is to be carried out is satisfied that the woman and her husband have received counselling in relation to the procedure, including counselling in relation to prescribed matters, from an approved counsellor; and
 - (v) a medical practitioner by whom or on whose behalf the procedure is to be carried out is satisfied that the carrying out of the procedure is reasonably likely to produce information or establish knowledge indicating procedures (including fertilisation procedures) that might be carried out for the purpose of enabling a woman who has undergone examination or treatment of a kind referred to in section 10, 11, 12, 13 or 13A to become pregnant.

(3) A person must not use semen produced by a man (in this sub-section called “the donor”) for the purposes of a procedure to which this section applies unless—

- (a) the donor and his spouse are undergoing, in relation to the carrying out of a fertilisation procedure, examination or treatment of a kind referred to in section 10, 11, 12, 13 or 13A; and

- (b) the donor and (unless he no longer has a spouse) his spouse have each consented in writing to the use of the semen in a specific approved experimental procedure; and
- (c) a medical practitioner by whom or on whose behalf the procedure is to be carried out is satisfied that the donor and the spouse (if any) have received counselling in relation to the procedure including counselling in relation to prescribed matters from an approved counsellor; and
- (d) a medical practitioner by whom or on whose behalf the procedure is to be carried out is satisfied that the carrying out of the procedure is reasonably likely to produce information or establish knowledge indicating procedures (including fertilisation procedures) that might be carried out for the purpose of enabling a woman who has undergone examination or treatment of a kind referred to in section 10, 11, 12, 13 or 13A to become pregnant.

Penalty: 25 penalty units or imprisonment for one year."

(3) After section 13 of the Principal Act insert—

Gamete intra-fallopian transfer and related procedures.

'13A. (1) This section applies to any procedure of implanting in the body of a woman (in this section called "the patient") an ovum, whether produced by that woman or by another woman, and whether or not it has been fertilised outside the body of the patient.

(2) A procedure to which this section applies shall not be carried out at a place other than a hospital that is approved by the Minister as a place at which such procedures may be carried out.

(3) A procedure to which this section applies shall not be carried out unless—

- (a) the patient is a married woman;
- (b) the patient and her husband have each consented in writing to the carrying out of the procedure and neither the patient nor her husband has withdrawn that consent;
- (c) not less than twelve months before the carrying out of the procedure, the patient and her husband had begun to undergo, and have undergone, such examination or treatment by a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) as might reasonably be expected to establish whether or not a procedure other than a fertilisation procedure might cause the woman to become pregnant;
- (d) as a result of that examination or treatment, a medical practitioner (other than the medical practitioner by whom the procedure is to be carried out) is satisfied that it is reasonably established—
 - (i) that the patient is unlikely to become pregnant as a result of a procedure other than a procedure to which this section applies; or
 - (ii) that if the patient were to become pregnant as a result of the fertilisation of an ovum produced by her by semen produced by her husband an undesirable hereditary disorder may be transmitted to a child born as a result of the pregnancy; and
- (e) the medical practitioner by whom the procedure is to be carried out is satisfied—

- (i) that the patient and her husband have received counselling, including counselling in relation to prescribed matters, from an approved counsellor; and
 - (ii) that an approved counsellor will be available to give further counsel to the patient and her husband after the procedure is carried out.
- (4) Where a consent is given under sub-section (3) (b)—
- (a) the document in which the consent is given shall be kept by the hospital in which the procedure to which this section applies is carried out;
 - (b) a copy shall be given to the patient; and
 - (c) a copy shall be given to the husband of the patient.
- (5) A person shall not use ovum or semen provided by any person (in this section called "the donor") for the purposes of a procedure to which this section applies unless—
- (a) the donor has consented in writing to the use of the ovum or semen in such a procedure and has not withdrawn that consent;
 - (b) where there is a spouse of the donor, the spouse has consented in writing to the use of the ovum or semen in such a procedure and has not withdrawn that consent; and
 - (c) the donor and the spouse (if any) of the donor have received counselling from an approved counsellor.

Penalty: 25 penalty units or imprisonment for one year.

- (6) A person who gives an ovum or semen that is or may be used in a procedure to which this section applies shall not receive, and another person shall not make or give, any payment or other amount for or in respect of the giving of the ovum or semen other than—
- (a) an amount, not exceeding an amount calculated at a prescribed rate, in respect of expenses incurred by that person in travelling to and attending at the place at which the ovum or semen is given; or
 - (b) an amount in reimbursement of medical expenses incurred by that person in connection with the giving of the ovum or semen.

Penalty applying to this sub-section: 25 penalty units or imprisonment for one year.

(4) The Principal Act is amended as follows:

- (a) In section 3 (1), after the definition of "Approved counsellor" insert—
 - "Approved experimental procedure" means an experimental procedure directly related to the alleviation of infertility and approved by the Standing Review and Advisory Committee in accordance with sections 6 (3) and 29 (6) (b) and (ba).";
- (b) In section 3 (1), in the definition of "Fertilisation procedure" for paragraph (a) substitute—
 - "(a) a procedure to which section 10, 11, 12, 13 or 13A applies; or";
- (c) In section 3 (1), in the definition of "Relevant procedure" for "10, 11, 12 or 13" substitute "9A, 10, 11, 12, 13 or 13A";
- (d) In section 3 (1), after the definition of "Relevant procedure" insert—

“Syngamy” means the alignment on the mitotic spindle of the chromosomes derived from the pronuclei;

- (e) In section 4, for “10, 11, 12 or 13” substitute “9A, 10, 11, 12, 13 or 13A”;
 - (f) In section 7 (2), for “10, 11, 12 or 13” substitute “9A, 10, 11, 12, 13 or 13A”;
 - (g) In section 19 (3) for “Health Commission” substitute “Chief General Manager”;
 - (h) In section 23 (1) for “Chief General Manager” substitute “Department of Health”.
- (5) In section 29 of the Principal Act—
- (a) after sub-section (6) (b) insert—
“(ba) to consider requests for approval of and, if it sees fit, to approve a procedure to which section 9A applies; and”;
and
 - (b) in sub-section (8), after “section 6 (3)” insert “or a procedure to which section 9A applies”.
- (6) In section 34 of the Principal Act, for “Health Commission” substitute “Chief General Manager of the Department of Health”.

NOTES

1. *Minister's second reading speech—*
Legislative Council: 13 October 1987
Legislative Assembly: 13 October 1987
2. The long title for the Bill for this Act was “A Bill to amend the *Infertility (Medical Procedures) Act 1984* and for other purposes.”.

**Prior Enactments Pursuant to Michigan Law Revision Commission
Recommendations**

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Original Jurisdiction of Court of Appeals | 1966, p. 43 | 65 |
| Corporation Use of Assumed Names | 1966, p. 36 | 138 |
| Interstate and International Judicial Procedures | 1966, p. 25 | 178 |
| Stockholder Action Without Meetings | 1966, p. 41 | 201 |
| Powers of Appointment | 1966, p. 11 | 224 |
| Dead Man's Statute | 1966, p. 29 | 263 |

1968 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Possibilities of Reverter and Right of Entry | 1966, p. 22 | 13 |
| Stockholder Approval of Mortgage of Corporate Assets | 1966, p. 39 | 287 |
| Corporations as Partners | 1966, p. 34 | 288 |
| Guardians Ad Litem | 1967, p. 53 | 292 |
| Emancipation of Minors | 1967, p. 50 | 293 |
| Jury Selection | 1967, p. 23 | 326 |

1969 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Access to Adjoining Property | 1968, p. 19 | 55 |
| Recognition of Acknowledgments | 1968, p. 64 | 57 |
| Dead Man's Statute Amendment | 1966, p. 29 | 63 |
| Notice of Change in Tax Assessments | 1968, p. 30 | 115 |
| Antenuptial and Marital Agreements | 1968, p. 27 | 139 |
| Anatomical Gifts | 1968, p. 39 | 189 |
| Administrative Procedures Act | 1967, p. 11 | 306 |
| Venue for Civil Actions | 1968, p. 17 | 333 |

1970 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Land Contract Foreclosures | 1967, p. 55 | 86 |
| Artist-Art Dealer Relationships | 1969, p. 41 | 90 |
| Minor Students' Capacity to Borrow Act | 1969, p. 46 | 107 |
| Warranties in Sales of Art | 1969, p. 43 | 121 |
| Appeals from Probate Court | 1968, p. 32 | 143 |
| Circuit Court Commissioner Powers of Magistrates | 1969, p. 57 | 238 |

1971 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Revision of Grounds for Divorce | 1970, p. 7 | 75 |
| Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts | 1970, p. 40 | 158 |

| | | |
|---|-------------|-----|
| Amendment of Uniform Anatomical Gift Act | 1970, p. 45 | 186 |
|---|-------------|-----|

1972 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Summary Proceeding for Possession of Premises | 1970, p. 16 | 120 |
| Interest on Judgments | 1969, p. 59 | 135 |
| Business Corporations | 1970, Supp. | 284 |
| Constitutional Amendment re Juries of 12 | 1969, p. 60 | HJR "M" |

1973 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Execution and Levy in Proceedings Supplementary to Judgment | 1970, p. 51 | 96 |
| Technical Amendments to Business Corporation Act | 1973, p. 8 | 98 |

1974 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Venue in Civil Actions Against Non-Resident Corporations | 1971, p. 63 | 52 |
| Choice of Forum | 1972, p. 60 | 88 |
| Extension of Personal Jurisdiction in Domestic Relations Cases | 1972, p. 53 | 90 |

| | | |
|---|-------------|-----|
| Technical Amendments to the Michigan General Corporations Act | 1973, p. 37 | 140 |
| Technical Amendments to the Revised Judicature Act | 1971, p. 7 | 297 |
| Technical Amendments to the Business Corporation Act | 1974, p. 30 | 303 |
| Amendment to Dead Man's Statute | 1972, p. 70 | 305 |
| Attachment and Collection Fees | 1968, p. 22 | 306 |
| Contribution Among Joint Tortfeasors | 1967, p. 57 | 318 |
| District Court Venue in Civil Actions | 1970, p. 42 | 319 |
| Due Process in Seizure of a Debtor's Property (Elimination of Pre-judgment Garnishment) | 1972, p. 7 | 371 |

1975 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Hit-Run Offenses | 1973, p. 54 | 170 |
| Equalization of Income Rights of Husband and Wife in Entirety Property | 1974, p. 12 | 288 |
| Disposition of Community Property Rights at Death | 1973, p. 50 | 289 |
| Insurance Policy in Lieu of Bond | 1969, p. 54 | 290 |
| Child Custody Jurisdiction | 1969, p. 23 | 297 |

1976 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Due Process in Seizure of a Debtor's Property (Replevin Actions) | 1972, p. 7 | 79 |
| Qualifications of Fiduciaries | 1966, p. 32 | 262 |
| Revision of Revised Judicature Act Venue Provisions | 1975, p. 20 | 375 |
| Durable Family Power of Attorney | 1975, p. 18 | 376 |

1978 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Juvenile Obscenity | 1975, p. 133 | 33 |
| Multiple Party Deposits | 1966, p. 18 | 53 |
| Amendment of Telephone and Messenger Service Company Act | 1973, p. 48 | 63 |
| Elimination of References to Abolished Courts: | | |
| a. Township By-Laws | 1976, p. 74 | 103 |
| b. Public Recreation Hall Licenses | 1976, p. 74 | 138 |
| c. Village Ordinances | 1976, p. 74 | 189 |
| d. Home Rule Village Ordinances | 1976, p. 74 | 190 |
| e. Home Rule Cities | 1976, p. 74 | 191 |
| f. Preservation of Property Act | 1976, p. 74 | 237 |
| g. Bureau of Criminal Identification | 1976, p. 74 | 538 |
| h. Fourth Class Cities | 1976, p. 74 | 539 |
| i. Election Law Amendments | 1976, p. 74 | 540 |
| j. Charter Townships | 1976, p. 74 | 553 |
| Plats | 1976, p. 58 | 367 |

| | | |
|---|-------------|-----|
| Amendments to Article 9 of the Uniform Commercial Code | 1975, Supp. | 369 |
|---|-------------|-----|

1980 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Condemnation Procedures | 1968, p. 8 | 87 |
| Technical Revision of the Code of Criminal Procedure | 1978, p. 37 | 506 |

1981 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Elimination of Reference to the Justice of the Peace: Sheriff's Service of Process | 1976, p. 74 | 148 |
| Court of Appeals Jurisdiction | 1980, p. 34 | 206 |

1982 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Limited Partnerships | 1980, p. 40 | 213 |
| Technical Amendments to the Business Corporation Act | 1980, p. 8 | 407 |
| Interest on Probate Code Judgments | 1980, p. 37 | 412 |

1983 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Elimination of References to Abolished Courts: Police Courts and County Board of Auditors | 1979, p. 9 | 87 |
| Federal Lien Registration | 1979, p. 26 | 102 |

1984 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Legislative Privilege: a. Immunity in Civil Actions | 1983, p. 14 | 27 |
| b. Limits of Immunity in Contested Cases | 1983, p. 14 | 28 |
| c. Amendments to R.J.A. for Legislative Immunity | 1983, p. 14 | 29 |
| Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege | 1978, p. 28 | 362 |

1986 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|---|--------------------------|----------------|
| Amendments to the Uniform Limited Partnership Act | 1983, p. 9 | 100 |

1987 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Amendments to Article 8 of the Uniform Commercial Code | 1984, p. 97 | 16 |
| Disclosure in the Sale of Visual Art Objects Produced in Multiples | 1981, p. 57 | 40, 53, 54 |

1988 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--------------------------|----------------|
| Repeal of M.C.L. §764.9 | 1982, p. 9 | 113 |
| Statutory Rule Against Perpetuities | 1986, p. 10 | 417, 418 |
| Transboundary Pollution Reciprocal Access to Courts | 1984, p. 71 | 517 |

1990 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|----------------------------|----------------|
| Elimination of Reference to Abolished Courts: | | |
| a. Procedures of Justice Courts and Municipal Courts | 1985, p. 12; 1986, p. 125 | 217 |
| b. Noxious Weeds | 1986, p. 128; 1988, p. 154 | 218 |
| c. Criminal Procedure | 1975, p. 24 | 219 |
| d. Presumption Concerning Married Women | 1988, p. 157 | 220 |
| e. Mackinac Island State Park | 1986, p. 138; 1988, p. 154 | 221 |
| f. Relief and Support of the Poor | 1986, p. 139; 1988, p. 154 | 222 |
| g. Legal Work Day | 1988, p. 154 | 223 |

h. Damage to Property by
Floating Lumber

1988, p. 155

224

1991 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|--|--|----------------|
| Elimination of Reference to Abolished Courts: | | |
| a. Land Contracts | 1988, p. 157 | 140 |
| b. Insurance | 1988, p. 156 | 141 |
| c. Animals | 1988, p. 155 | 142 |
| d. Trains | 1986, pp. 153, 155; 1987, p. 80; 1988, p. 152 | 143 |
| e. Appeals | 1985, p. 12 | 144 |
| f. Crimes | 1988, p. 153 | 145 |
| g. Library Corporations | 1988, p. 155 | 146 |
| h. Oaths | 1988, p. 156 | 147 |
| i. Agricultural Products | 1986, p. 134; 1988, p. 151 | 148 |
| j. Deeds | 1988, p. 156 | 149 |
| k. Corporations | 1989, p. 4; 1990, p. 4 | 150 |
| l. Summer Resort Corporations | 1986, p. 154; 1988, p. 155 | 151 |
| m. Association Land | 1986, p. 154; 1988, p. 155 | 152 |
| n. Burial Grounds | 1988, p. 156 | 153 |
| o. Posters, Signs, and Placecards | 1988, p. 157 | 154 |
| p. Railroad Construction | 1988, p. 157; 1988, p. 156 | 155 |
| q. Work Farms | 1988, p. 157 | 156 |
| r. Recording Duties | 1988, p. 154 | 157 |
| s. Liens | 1986, pp. 141, 151, 158; 1988, p. 152 | 159 |

1992 Legislative Session

| <u>Subject</u> | <u>Commission Report</u> | <u>Act No.</u> |
|----------------------------|--------------------------|----------------|
| Determination of Death Act | 1987, p. 13 | 90 |

BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

RICHARD D. McLELLAN

Richard D. McLellan, is the head of the Government Policy and Practice Group of Dykema Gossett PLLC, a Michigan-based law firm. He is responsible for the firm's public policy, administrative law and lobbying practices in Lansing and Washington, D.C.

As a business and community leader, Mr. McLellan is a former Chairman of the Board of Directors of the Michigan Chamber of Commerce and President of the Library of Michigan Foundation. He is presently the President of the Michigan/Japan Foundation.

In 1990, Mr. McLellan was appointed by President George Bush as a Presidential Observer to the elections in the People's Republic of Bulgaria. The elections were the first free elections in the country following 45 years of Communist rule.

Following the 1990 elections, Mr. McLellan was named Transition Director to then Governor-elect John Engler. In that capacity, he assisted in the formation of Governor Engler's Administration.

By appointment of Governor John Engler, he is a member and secretary of the Michigan International Trade Authority, a member of the Michigan Jobs Commission, and a member of the Library of Michigan Board.

In addition, Mr. McLellan formerly served as Chairman of the Michigan Corrections Commission. He is a member of the Board of Directors of the Detroit College of Law at Michigan State University, the Chief Okemos Council of the Boy Scouts of America, the Mackinac Center for Public Policy, the Oxford Foundation and the Cornerstone Foundation. He is a member of the Board of Governors of the Cranbrook Institute of Science.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School. He has served as an adjunct professor of international studies at Michigan State University.

Mr. McLellan is a member of the Board of Directors of the Mercantile & General Life Reassurance Company of America and a Trustee of JNL Trust established by the Jackson National Life Insurance Company. He is Chairman of the Michigan Competitive Telecommunications Providers Association.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski practices law with the firm of Cooper, Walinski & Cramer, in Ann Arbor, Michigan.

He is a graduate of Muskegon Catholic Central High School, Marquette University, the University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and resides in Ann Arbor, Michigan.

Mr. Derezsinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University, and also of the Board of the Michigan Theater Foundation.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezsinski Post No. 7729, the International Association of Defense Counsel, the National Health Lawyers' Association, and the National Association of College and University Attorneys.

MAURA D. CORRIGAN

Judge Corrigan is a public member of the Michigan Law Revision Commission and has served since her appointment in November 1991.

Judge Corrigan is a judge on the Michigan Court of Appeals.

She is a graduate of St. Joseph Academy, Cleveland, Ohio; Marygrove College; and the University of Detroit Law School. She is married and has two children.

Prior to her appointment to the Court of Appeals, Judge Corrigan was a shareholder in the law firm of Plunkett & Cooney, P.C. She earlier served as First Assistant United States Attorney for the Eastern District of Michigan, Chief of Appeals in the United States Attorney's Office, Assistant Wayne County Prosecutor, and a law clerk on the Michigan Court of Appeals. She was selected Outstanding Practitioner of Criminal Law by the Federal Bar Association as well as awarded the Director's Award for superior performance as an Assistant United States Attorney by the United States Department of Justice. She has served on numerous professional committees and lectured extensively on law-related matters.

GEORGE E. WARD

Mr. Ward is a member of the Michigan Law Revision Commission and has served since his appointment in August 1994.

Mr. Ward has been the Chief Assistant Prosecuting Attorney in Wayne County since January 1986. Prior to this, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for twenty years in the City of Detroit.

He is a graduate of Sts. Peter and Paul High School, Saginaw, the University of Detroit, and the University of Michigan Law School. He is married and the father of five children.

Mr. Ward has been an Adjunct Professor of Contracts and State and Local Government at the Detroit College of Law since 1970, and is a member and past chair of the Board of

Control of Saginaw Valley State University; an elected member from Wayne County to the Michigan State Bar Board of Commissioners; a director of Michigan Center for Charter Schools; former commissioner and president of the Wayne County Home Rule Charter Commission; former Executive Director of the City of Detroit Charter Revision Commission; and a member of the President's Club of the University of Michigan and President's Cabinet of the University of Detroit.

DAVID M. HONIGMAN

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Senator representing the 15th Senatorial District. He was first elected to the Michigan House in November 1984 and served in that body until his election to the Senate in November 1990. He is currently Chairman of the Senate Committee on Local, Urban and State Affairs, and Vice-Chairman of the Human Resources, Labor and Veterans Affairs.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985 and 1988.

Mr. Honigman is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

GARY PETERS

Gary Peters is a legislative member of the Michigan Law Revision Commission and has served on the Commission since June 1995.

Mr. Peters was elected to his first term in the Michigan State Senate on November 8, 1994. He represents the 14th State Senate District. His committee assignments include Education; Judiciary; Families, Mental Health and Human Services; and Finance where he serves as Vice Chair.

Prior to being in the legislature, Mr. Peters was Vice President - Investments and Branch Manager in PaineWebber's Rochester, Michigan office. While providing investment advice to client portfolios worth in excess of seventy million dollars, he was admitted into the Portfolio Management Program - an honor achieved by less than two percent of the firm's five thousand Investment Executives.

In addition to working in the private sector, Mr. Peters has taught Strategic Management and Business Policy at Oakland University in Rochester, and was an instructor in the Finance and Business Economics Department at Wayne State University in Detroit. Mr. Peters own educational credentials include a B.A. degree from Alma College (Magna Cum

Laude, Phi Beta Kappa), an M.B.A. in finance from the University of Detroit, and a J.D. from Wayne State University Law School.

Senator Peters is also a commissioned officer in the United States Naval Reserve and is currently assigned to the Atlantic Fleet's Combat Logistics Group Two based in Norfolk, Virginia.

MICHAEL E. NYE

Mr. Nye is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1991.

Mr. Nye is a Republican State Representative representing the 58th House District. He was first elected to the Michigan House in November 1982. He is Chairman of the House Judiciary and serves on the House Oversight & Ethics Committee.

He is a graduate of Purdue University and University of Detroit Law School. He is married and has two children.

Mr. Nye was named the 1991 Legislator of the Year by the Michigan Association of Chiefs of Police and the 1990 Michigan Environmental Legislator of the Year by the Michigan Environmental Defense Association.

Mr. Nye has been a leader against Drunk Driving and has received the GLADD award (Government Leader Against Drunk Driving) from the Mothers Against Drunk Drivers.

TED WALLACE

Representative Ted Wallace is a legislative member of the Michigan Law Revision Commission and has served on the Commission since April 1993. Representative Wallace is a Democrat from Detroit and has represented the 5th House District since November 1988.

Representative Wallace served in the U.S. Navy during the Vietnam war and is an in-active member of the Michigan National Guard.

He holds a Bachelor of Science Degree in Accounting from Wright State University and a law degree from the University of Michigan Law School. He also took post-graduate classes at the University of Michigan Institute of Public Policy, and post-legal classes at Wayne State Law School.

Representative Wallace is a practicing attorney in the Detroit area and was previously an adjunct professor at Wayne State University and an assembler for the Chrysler Corporation. Representative Wallace has been a tax analyst for the General Motors Corporation and a tax accountant for Arthur Anderson and Company.

He is affiliated with the Michigan Democratic Party, Urban League, T.U.L.C., University of Michigan Alumni Association, and other various legal organizations. He is also a life member of the N.A.A.C.P. and a member of the issues committee of the Michigan State

N.A.A.C.P. His past history has included tenure as President of the Democratic Voters League; Vice-President, Young Democrats; Member, Board of Governors Young Democrats; Chairman, Upper Neighborhood City Council; Delegate to the 1972 Black National Convention; and Vice-President, Government Affairs, Greater Dayton Jay-Cees.

Representative Wallace is the immediate-past Chairman of the Michigan Legislative Black Caucus. He is a member of the Michigan Sentencing Guidelines Commission, and serves in the House as an Assistant Floor Leader. He is also the Democratic Vice-Chair of the House Judiciary and Civil Rights Committee and a member of the House Tax Policy Committee.

Rep. Wallace is married to the former Bernice Jones, and has three children.

ELLIOTT SMITH

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

KEVIN C. KENNEDY

Mr. Kennedy is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since December 1995.

Mr. Kennedy joined the faculty of the Detroit College of Law at Michigan State University in 1987 and has taught courses in civil procedure, conflict of laws, international trade, and international litigation.

He is a graduate of the University of Michigan, Wayne State University, and Harvard University. He was a law clerk at the U.S. Court of International Trade, was a private practitioner in Hawaii, and served as a trial attorney for the U.S. Department of Justice. He is married.

Mr. Kennedy is the author of more than thirty law review articles concerning international law, international trade, and civil procedure.

GARY GULLIVER

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has four children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.