

# Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme

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*Individuals and couples are increasingly using surrogacy to reproduce, creating a need to resolve the lack of clarity surrounding surrogacy arrangements. When parties enter into a surrogacy agreement the current statutory regimes do not guarantee that the intended parents will ultimately be the legal parents of the child. This Note explores the regulation (or lack thereof) of surrogacy arrangements, the risks associated with the lack of a comprehensive regulatory scheme, and how an international market for surrogacy developed. Due to the variability and uncertainty of state laws, surrogacy arrangements can resemble commercial transactions. The uncertainty of domestic laws has encouraged some intended parents to turn to medical tourism firms to help them find foreign surrogates, which creates additional ethical and legal issues. This Note proposes that the use of an approval process prior to forming surrogacy arrangements could eliminate many of the ethical and legal issues associated with surrogacy.*

## I. INTRODUCTION

In modern times, the three main ways to become a parent are through natural conception, adoption and the use of reproductive technology for surrogacy.<sup>1</sup> No one conducts an ex ante review of the parents when a couple naturally conceives. Analysis of the fitness of the parents only occurs after the birth of the child and if

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1. In-vitro fertilization, sperm donation and egg donation are other types of reproductive technology that will not be considered in this Note.

abuse or neglect is suspected.<sup>2</sup> However, when prospective parents want to adopt they must rely on the natural parents to conceive a child, and the fitness of the prospective parents is highly scrutinized.<sup>3</sup> While most states have clear regulations for dealing with abusive and neglectful parents, and adoption, surrogacy arrangements lack a comprehensive regulatory scheme. Surrogacy falls between natural conception and adoption in the sense that the intended parent(s) create a new child, yet they must rely on a third party — a surrogate — in order to do this.<sup>4</sup> Surrogacy arrangements could be regulated using the rules already applied to natural conception, custody issues, or adoption, or the arrangements could be regulated in an alternative way given the variety of genetic relationships that can exist between the child and the intended parents. As individuals and couples continue to have children using surrogacy, there is a need to resolve the uncertainty and lack of clarity surrounding surrogacy arrangements in order to protect the welfare of all involved parties.

In the absence of clear and complete statutory regulation of surrogacy, courts have been perplexed when confronted with conflicts in surrogacy arrangements. The case *In re Baby M* illustrates this bewilderment.<sup>5</sup> In *Baby M*, Mary Beth Whitehead, the surrogate in the case, had responded to an advertisement placed by the Infertility Center of New York (ICNY), which introduced her to William and Elizabeth Stern.<sup>6</sup> The parties executed a pre-birth contract under which Whitehead agreed to be impregnated using William Stern's sperm for a fee of \$10,000.<sup>7</sup> Whitehead also agreed to voluntarily terminate her parental rights

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2. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS, 1127–39, 1181–96 (4th ed. 2004) [hereinafter ELLMAN ET AL.] (noting that a state may intervene in the parent-child relationship when there is corporal punishment, physical abuse, sexual abuse, emotional abuse and neglect, or a failure to supervise the child; the state may also intervene in instances in which the parent demonstrates an inability to parent).

3. *Id.* at 4.

4. A surrogate is a woman who carries and gives birth to a child for someone else. See JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 6 (2007), available at [http://www.americanprogress.org/issues/2007/12/pdf/arons\\_art.pdf](http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf) [hereinafter ARONS].

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

6. *Id.* at 1235.

7. *Id.* at 1236. The Sterns faced additional costs in this arrangement. They used the ICNY as an intermediary to help them find a surrogate and execute the contract, ultimately paying ICNY \$7,500 for its services. *Id.* at 1241. In total the Sterns spent \$17,500. *Id.*

upon the child's birth, so that Elizabeth Stern could adopt the baby, and the Sterns could become the child's legal parents.<sup>8</sup>

After the child's birth, however, Whitehead found it extremely difficult to part with the child (Melissa), and a custody battle ensued.<sup>9</sup> In this case, there was a disconnect between the biological parents (William Stern and Mary Beth Whitehead), and the intended parents (William and Elizabeth Stern). The court, unsure of how to deal with these unusual issues treated the case as a custody dispute between a biological father (William Stern) and biological mother (Whitehead).<sup>10</sup> Ultimately, the court found the surrogacy contract to be void and against public policy.<sup>11</sup> The Sterns were awarded custody of Melissa, with William Stern as the child's legal father.<sup>12</sup> However, the court allowed Whitehead to retain her legal parental rights, thus impeding Elizabeth Stern from adopting Melissa and becoming her legal mother.<sup>13</sup>

*Baby M* illustrates the potential for uncertainty surrounding surrogacy arrangements, particularly in a world lacking clear statutory directives. When the case first arose, not one state had a statutory provision addressing surrogacy.<sup>14</sup> This case prompted many states to enact statutes that deal with surrogacy arrangements;<sup>15</sup> however, other states continue to lack statutory directives and are thus unprepared to deal with surrogacy arrangements when they occur.<sup>16</sup> When considering any surrogacy policy, in addition to recognizing the uncertainty that the intended parents and surrogate face, the welfare of the surrogate children should be prioritized. Surrogacy arrangements are also often criticized for their commercial nature and are likened to baby

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8. *Id.*

9. *Id.* at 1236–37. The Sterns agreed to give Mrs. Whitehead a week to spend with the child, after which she was supposed to return the baby to the Sterns. *Id.* However, the Whiteheads fled to Florida with the baby and after three months were finally located. *Id.* at 1237. The baby was brought back to New Jersey and the Sterns were granted custody of the child pending final judgment. *Id.* Mrs. Whitehead was awarded limited visitation. *Id.*

10. *Baby M*, 537 A.2d at 1255–57.

11. *Id.* at 1240–51.

12. *Id.* at 1256–61.

13. *Id.* at 1251–53.

14. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 117 (2009).

15. See *id.* at 117–22; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 873 (2000).

16. See *infra* note 44 and accompanying text.

selling. In *Baby M*, the Sterns paid a total of \$17,500 to the agency and the surrogate.<sup>17</sup> During the case

[o]pponents claimed that surrogacy unfairly exploited poor women who unwillingly entered contracts that they would come to regret. Critics also claimed that surrogacy degraded children and women by treating children as commodities to be exchanged for profit and women's bodies as child-bearing factories; the arrangements also degraded the mother-child relationship by paying women not to bond with their children.<sup>18</sup>

Clearer domestic regulation of surrogacy could aid in reducing the uncertainty surrounding surrogacy, and ameliorate ethical concerns that surrogacy arrangements are just commercial transactions that involve the buying and selling of babies, masqueraded as an innovative reproductive option for adults who want to have children.

This Note examines the complexities of the surrogacy market in the United States,<sup>19</sup> and the host of problems created by the lack of clarity and certainty when surrogacy agreements are made. Part II discusses the types of surrogacy arrangements and the variety of genetic relationships that can exist between the child and the intended parents. Part III examines the approaches of different states to regulate surrogacy, and the uncertainty created by these various approaches. Part IV explores the effect of the legal ambiguity on specific surrogacy arrangements. Part V examines potential ways to resolve these issues and proposes a solution to improve the clarity and reduce the uncertainty when surrogacy arrangements are made.

## II. TYPES OF SURROGACY ARRANGEMENTS

When a couple or an individual decides to procreate using a surrogate, a multitude of biological relationships between the child and the involved parties can result. There are two main types of surrogacy arrangements: traditional surrogacy and ges-

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17. *Baby M*, 537 A.2d at 1235.

18. Scott, *supra* note 14, at 112 (internal citations omitted).

19. References to the "United States" in this Note include the District of Columbia.

tational surrogacy.<sup>20</sup> In a traditional surrogacy arrangement, the surrogate's egg is fertilized using artificial insemination, resulting in a genetic relationship between the carrier and the child.<sup>21</sup> Two different options for the male reproductive material exist: the intended father's sperm (as in *Baby M*) or donor sperm. If the intended father's sperm is used, the child will have a genetic connection with the carrier and intended father, but none with the intended mother. If donor sperm is used, the child will not have a genetic connection to either of the intended parents, but will still have a genetic connection with the surrogate.

In today's surrogacy market, gestational surrogacy is typically used.<sup>22</sup> Gestational surrogacy, which involves implanting the surrogate with an embryo via in vitro fertilization (IVF), eliminates the biological relationship between the surrogate and the child.<sup>23</sup> There are four different ways to create the embryo, resulting in different biological relationships. The first involves using the egg and the sperm of each of the intended parents.<sup>24</sup> The three other possibilities require using donor material.<sup>25</sup> These are arrangements that involve the use of donor eggs, donor sperm, or both donor sperm and donor eggs.<sup>26</sup> In the first two scenarios, the child has a genetic relationship with one of the intended parents, while in the third scenario the resulting child has no genetic connection with either of the intended parents.

In another arrangement used by lesbian couples, the child is carried by one partner and is implanted with an embryo composed of the egg of the other partner and donor sperm.<sup>27</sup> In the future, it might be possible for both lesbian partners to be the

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20. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 15 (2008), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/ART.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf).

21. *Id.*

22. Scott, *supra* note 14, at 121 (“[G]estational surrogacy, in which a pre-embryo is implanted in the surrogate, has largely replaced traditional surrogacy, in which the pregnancy results from artificial insemination of the surrogate's own egg.”).

23. ARONS, *supra* note 4, at 6.

24. *See id.* at 21.

25. *See* AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 13 (2006), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/thirdparty.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf).

26. *See* ARONS, *supra* note 4, at 21.

27. *See id.* at 22 (discussing a case involving “a woman who had donated ova to her lesbian partner, who then carried the pregnancy and gave birth”).

genetic mothers of their child via ooplasmic transfer.<sup>28</sup> This involves taking the material outside the cell's nucleus from one partner's egg and injecting it into the other partner's egg.<sup>29</sup> The couple could then have either a surrogate or one of the partners carry the child. Currently, however, there is a moratorium on this procedure.<sup>30</sup>

These innovative uses of reproductive technologies constitute today's surrogacy market.<sup>31</sup> By definition, any market involves buyers and sellers who wish to exchange goods or services for money.<sup>32</sup> In the surrogacy market, the intended parents are the buyers, and the surrogates are the sellers, also known as the suppliers.<sup>33</sup> The sellers, or suppliers, in this market must be interested in and willing to endure childbearing, which involves conception, pregnancy and labor.<sup>34</sup> All three stages are invasive and can be risky and extremely uncomfortable. According to a variety of studies, women become surrogates "for a combination of three reasons: they like being pregnant, they want the money, and despite the fact of payment, they regard having a baby for a childless couple as a gift — a blessing — of the highest order."<sup>35</sup> For example, Jessie Cook, a married mother of two, served as a surrogate and became pregnant with twins.<sup>36</sup> As Cook explained, "My children are the best thing in the world to me . . . . I can't

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28. *Id.* at 21.

29. *Id.*

30. *Id.* "The FDA expressed concerns about this technique, citing its potential to alter the germline (cells carrying genetic material from generation to generation), the medical risks associated with mitochondrial heteroplasmy, the high incidence of Turner's syndrome . . . . A general consensus was reached . . . that more preclinical data would be necessary before the FDA would allow further clinical trials involving ooplasm transfer to proceed." EMILY GALPERN, CTR. FOR GENETICS AND SOC'Y, ASSISTED REPRODUCTIVE TECHNOLOGIES: OVERVIEW AND PERSPECTIVE USING A REPRODUCTIVE JUSTICE FRAMEWORK 11 (2007) available at <http://geneticsandsociety.org/downloads/ART.pdf>.

31. See, e.g., Carol Sanger, *Developing Markets in Baby Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 70–71 (2007) ("[C]ommercial surrogacy — conception as economic advantage — is now a big business worldwide.").

32. *Id.* at 70–71.

33. *Id.* at 72–75.

34. *Id.* at 75.

35. *Id.* at 76.

36. Jennifer Wolff Perrine, *Would You Risk Your Health for Money?*, SELF MAGAZINE, <http://www.self.com/health/2010/01/risking-health-for-money?printable=true> (last visited Feb. 11, 2012).

imagine not being able to have kids. Surrogacy is a kind of calling for me. [I did] this to change someone's life."<sup>37</sup>

Intended parents often find surrogates through an intermediary, who assists with the searching and matching process and with price setting.<sup>38</sup> This intermediary often takes the form of a surrogacy firm or broker.<sup>39</sup> The intended parents pay both the surrogacy firm and the prospective surrogate.<sup>40</sup> After screening prospective surrogates, the surrogacy firm lets the intended parents select from an array of candidates.<sup>41</sup> Quality control is another function that the surrogacy firm serves; meaning the intermediary screens prospective surrogates to ensure that they are responsible, healthy women who will take care of themselves during the pregnancy and fulfill their obligations.<sup>42</sup> The intended parents are not typically screened themselves.<sup>43</sup>

### III. THE STATE OF SURROGACY LAW IN THE UNITED STATES

The state laws discussed in this Part exemplify the types of regulation that exist across the United States. Most states in the United States do not have statutory provisions that specifically address surrogacy.<sup>44</sup> Some of these states have case law address-

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37. *Id.* Cook met the intended parents online and set her fee at \$18,000, which allowed her to not feel "like [she] was trying to sell their child back to them." *Id.* The intended parents also paid her "an extra \$5,000 for having twins [due to the increased health risks associated with multiple births], compensate[d] her for missed work and provide[d] \$500 in maternity clothes after [she] complete[d] her first trimester." *Id.*

38. Sanger, *supra* note 31, at 82.

39. *See id.* at 81–83, 94–95.

40. *See id.* at 85–90.

41. *See id.*

42. *Id.* at 88–89 ("In addition to searching, matching, and pricing services, there is another reason why parties turn to intermediaries and pay their fees. Brokers also provide parties with some level of assurance about the quality of the deal. . . . [W]hat assurances does a *surrogacy* broker provide? . . . [P]roviding an array of approved candidates from which couples themselves selected a trading partner . . .").

43. *See id.* at 85 ("If the psychologist determined that the woman was able to give informed consent . . . She was then eligible for selection by couples, themselves un-screened, seeking surrogates."). The intended parents use an intermediary for the same reasons that consumers purchase used cars from dealerships, and parents choose to find nannies through agencies — because doing so provides them with some quality assurance during the transaction. *Id.* at 88–89. With each transaction the firm is putting its reputation and business on the line, and thus has a strong interest in ensuring that it provides its clients with satisfactory nannies. *See id.*

44. *See ARONS, supra* note 4, at 26 ("The majority of states still lack any statutory guidance on surrogacy arrangements."); *see also State Laws and Legislation — Parenting,*



ing surrogacy related issues, but in others, surrogacy questions have not yet been presented to the courts.<sup>45</sup> Throughout the nation, the law on surrogacy is underdeveloped and unclear, not specifying who can be a surrogate, who can be an intended parent, or whether surrogacy contracts will be upheld and under what terms. The laws are also not consistently enforced.<sup>46</sup> This makes it incredibly difficult for intended parents, surrogates, surrogacy firms, attorneys and any other involved players to predict the outcome of a surrogacy arrangement, ultimately putting the children at risk.

#### A. CASE LAW STATES

The states discussed in this section exemplify how courts across the nation have addressed surrogacy related conflicts in which the intended parents have a genetic relationship with the child and those in which a genetic relationship is lacking. The courts in California and Connecticut had the opportunity to consider cases in which the intended parents were not genetically related to the baby, and relied on the intent of the parties to determine the child's legal parents.

California does not have a statute that directly addresses surrogacy arrangements; however, California courts have had the opportunity to rule on cases involving surrogacy.<sup>47</sup> In *Johnson v. Calvert*, the California Supreme Court held that the intended parents in a gestational surrogacy agreement should be recognized as the natural and legal parents.<sup>48</sup> In this case the intended mother provided her egg to the surrogate.<sup>49</sup> Five years later, the

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HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/state/c/parenting/> (last visited Feb. 18, 2012) [hereinafter HUMAN RIGHTS CAMPAIGN]. The detailed overview of state laws provided by the Human Rights Campaign illustrates how some states, such as New York, have statutes that directly address surrogacy. HUMAN RIGHTS CAMPAIGN, *supra*. In contrast, some states do not: for example, California “has no statute directly addressing surrogacy,” and instead “California’s courts have used the state’s Uniform Parentage Act to interpret several cases concerning surrogacy agreements.” *Id.* In other states, like Georgia, “there are no statutory provisions or published cases dealing with the issue of surrogacy.” *Id.*

45. *See supra* note 44.

46. *See infra* Part IV.C.

47. *See supra* note 44.

48. 851 P.2d 776 (Cal. 1993).

49. *Id.* at 778.



California court heard a case, *In re Marriage of Buzzanca*, in which neither the surrogate nor the intended parents were genetically related to the child.<sup>50</sup> Donor sperm and egg had been used to create the embryo.<sup>51</sup> Six individuals thus had a potential interest in the child (the egg donor, sperm donor, intended mother, intended father, surrogate and husband of the surrogate).<sup>52</sup> In its analysis, the court relied on the intent rather than the genetic connections of the parties when it found the intended parents to be the lawful parents of the child.<sup>53</sup>

Similarly, Connecticut has no statute addressing surrogacy, but when considering surrogacy arrangements its courts have found the intended parents to be the legal parents.<sup>54</sup> In *Doe v. Roe*, the surrogate mother argued that it was against public policy for a court to uphold an adoption agreement that included a surrogate mother's consent to termination of her parental rights.<sup>55</sup> The Connecticut Supreme Court found that a trial court had the jurisdiction to approve such an agreement, but explicitly stated that it was not ruling on the validity of surrogacy contracts.<sup>56</sup> In this case the Connecticut Supreme Court deflected the challenging policy issues surrounding the contract by focusing on the jurisdictional issue.<sup>57</sup>

A decade later, in *Cassidy v. Williams*, a case in which a same-sex couple contracted with a gestational surrogate, the Superior Court ordered: (1) "that the plaintiffs . . . be declared and adjudged the intended parents of both" unborn children; (2) "that the gestational carrier agreement . . . is found to be valid, enforceable, irrevocable and of full legal effect;" (3) "that [the surrogate] is declared not to be the mother of the unborn children;" (4) that the hospital place the surrogate's name on the birth certificates of the children; and (5) that the Department of Public Health prepare replacement birth certificates, replacing the sur-

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50. 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

51. *Id.*

52. *Id.*

53. *Id.* at 293.

54. See HUMAN RIGHTS CAMPAIGN, *supra* note 44 ("Surrogacy law in Connecticut is uncertain, but favorable. The statutes are silent with regard to surrogacy agreements, but various cases have looked favorably on such agreements . . .").

55. 717 A.2d 706, 708 (Conn. 1998).

56. *Id.* at 713.

57. *Id.*

rogate's name with the names of the intended parents.<sup>58</sup> The court upheld the validity of the surrogacy contract, but still required the hospital to place the name of the woman giving birth on the original birth certificate.<sup>59</sup>

## B. STATUTORY STATES

The states that have legislation relating to surrogacy do not all regulate surrogacy in the same way. Some states prohibit surrogacy arrangements altogether, while others permit them under certain conditions.

### 1. *Bans, Nullifications and Penalties*

Some states have an outright ban on surrogacy contracts. As illustrated by the following state statutes, the statutes in different states use distinct language to refer to surrogacy contracts and define the contracts in different ways. The statutes discussed are representative of the various approaches that different states have taken when prohibiting surrogacy arrangements. Some of the statutes only address agreements involving compensation, while others also mention uncompensated agreements. Some only directly refer to traditional surrogacy arrangements, leaving open questions regarding gestational arrangements, and arrangements where neither of the intended parents has a genetic connection to the child.

For example, in Washington, D.C., all surrogacy agreements — both traditional and gestational surrogacy contracts — are prohibited by law.<sup>60</sup> Violation of the statute is punishable by up to one year in jail, a fine of up to \$10,000 or both.<sup>61</sup> New York law also finds surrogacy contracts contrary to public policy, and therefore void and unenforceable.<sup>62</sup> However, New York's statutes on this issue are more explicit than D.C.'s in defining exactly what is prohibited, better reflecting the reasoning behind the

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58. 45 Conn. L. Rptr. 816, 816 (Conn. Super. Ct. 2008).

59. *Id.*

60. D.C. CODE §§ 16-401, 402 (2001).

61. *Id.* § 402.

62. N.Y. DOM. REL. LAW § 122 (McKinney 2010). The statute defines "birth mother," "genetic father," "genetic mother," and "surrogate parenting contract," deeming the last contrary to public policy, void and unenforceable. *Id.* §§ 121, 122.

prohibition. New York's statute defines the involved parties and penalizes intermediaries, surrogates, and the intended parents differently.<sup>63</sup> New York imposes a harsher penalty on the intermediary than on the surrogate and the intended parents, reflecting discomfort with the commercial and business-like aspects of the surrogacy process.<sup>64</sup> The statute therefore contains a provision focusing on the judicial proceedings that can arise when a surrogacy arrangement does not turn out as planned; in any dispute between the various parties, the court cannot consider the surrogate's involvement in the illegal surrogacy contract in a negative light when determining parental rights and obligations.<sup>65</sup>

Michigan law also prohibits surrogacy arrangements. The statute contains definitions of the various parties and types of arrangements, and the law addresses both traditional and gestational surrogacy arrangements.<sup>66</sup> A "surrogate parentage contract" is one in which a surrogate carrier or mother agrees to implantation or insemination and to voluntarily relinquish her custodial or parental rights.<sup>67</sup> The statute finds all such contracts to be void, unenforceable and contrary to public policy.<sup>68</sup> The statute differentiates between the involved parties in meting out penalties.<sup>69</sup> Like New York,<sup>70</sup> Michigan punishes any type of intermediary, including doctors and lawyers, with a significantly harsher

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63. *Id.* §§ 121, 123.

64. *Id.* § 123. This provision focuses on the intermediary in the arrangement and holds that any person or entity that "induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee" is subject to a civil penalty of up to \$10,000 and must forfeit the fee to the State. *Id.* A second violation is a felony. *Id.* The intended parents, the surrogate and the surrogate's husband are subject to a penalty of up to \$500. *Id.*

65. *Id.* § 124.

66. "Surrogate gestation" is defined as the process of implanting a "surrogate carrier" with an embryo not genetically related to the carrier. MICH. COMP. LAWS § 722.853(g) (2012). A "surrogate mother" is defined as a female who is artificially or naturally inseminated and carries a child pursuant to a "surrogate parentage contract." *Id.* § 722.853(h). "Participating parties" include a biological mother, biological father, surrogate carrier, or the spouse of a biological mother, father or surrogate carrier. *Id.* § 722.853(e).

67. *Id.* § 722.853(i).

68. *Id.* § 722.855.

69. Michigan's statute excludes un-emancipated minors, mentally retarded females, and individuals with mental illness or developmental disabilities from penalties. *Id.* § 722.857.

70. *See supra* note 65 and accompanying text.

penalty than the intended parents or the surrogate; intermediaries or surrogacy firms are guilty of a felony, while the other parties to the agreement are guilty of a misdemeanor.<sup>71</sup> The lawmakers in Michigan, too, realized that the statutory ban would not deter all parties, and the statute includes provisions relating to court proceedings.<sup>72</sup> Given that the contracts are unenforceable, this leaves intended parents in Michigan with great uncertainty as to whether they will have the opportunity to be the parents of the child they so desperately desired. The statute instructs courts on physical custody and directs courts to determine legal custody based on the best interests of the child.<sup>73</sup>

Some states nullify surrogacy contracts without penalizing the involved parties. Indiana law declares that all surrogacy contracts are against public policy and thus unenforceable.<sup>74</sup> Similarly, in Nebraska, surrogacy agreements are void and unenforceable.<sup>75</sup> The Nebraska law defines such a contract as one in which a woman is paid for carrying the child of a man who is not her husband.<sup>76</sup> Despite its refusal to recognize surrogacy agreements, Nebraska law states that the biological father of a child born through a surrogacy arrangement “shall have all the rights and obligations imposed by law with respect to such child.”<sup>77</sup> Contracts involving compensation for the surrogate are the only types of arrangements specifically addressed, thus leaving open the question of how the law would address uncompensated agreements.<sup>78</sup> The Nebraska statute is distinct in that despite holding contracts involving compensation void, it provides some

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71. MICH. COMP. LAWS § 722.859. The penalty for an intermediary is a fine no greater than \$50,000 or up to five years in prison or both. *Id.* § 722.859(3). The penalty for the participating parties is a fine no greater than \$10,000 or up to one year in prison or both. *Id.* § 722.859(2).

72. *Id.* § 722.861.

73. *Id.* (“[T]he party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child.”). Presumably the party that is awarded legal custody of the child will not be penalized with a jail sentence, as they would then be unable to care for the child.

74. IND. CODE ANN. §§ 31-9-2-126, 31-9-2-127, 31-20-1-1 (2008).

75. NEB. REV. STAT. § 25-21,200(1) (2011).

76. *Id.* § 25-21,200(2).

77. *Id.* § 25-21,200(1).

78. *Id.* § 25-21,200(2).

degree of certainty to the biological father regarding his parental rights.<sup>79</sup>

In Louisiana, surrogacy contracts are also contrary to public policy, void and unenforceable.<sup>80</sup> The Louisiana statute defines a “contract for surrogate motherhood” as an agreement involving “valuable consideration,” where a woman unmarried to the sperm contributor agrees to be inseminated, carries the resulting fetus to term, and then surrenders all rights and obligations regarding the child to the sperm contributor.<sup>81</sup> This statute only addresses traditional surrogacy arrangements, in which the surrogate mother also provides the egg — it does not consider gestational surrogacy or uncompensated agreements.<sup>82</sup>

As explained in this section, the fact that a state has a statutory ban on surrogacy contracts does not mean that parties abide by the statutory bans; some parties still rely on surrogacy arrangements to reproduce. Instead, the significance of the ban is simply that once the child is born, the court cannot use a surrogacy contract as the sole factor in its determination of the best interests of the child in the custody and adoption proceedings.<sup>83</sup>

## 2. *Permitted, but Regulated*

The law in North Dakota addresses both traditional and gestational surrogacy arrangements, permitting gestational arrangements but forbidding traditional ones.<sup>84</sup> The statute contains separate definitions for parties involved in traditional and gestational arrangements.<sup>85</sup> All traditional surrogacy contracts are void and by law the surrogate is the mother of the resulting

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79. See *supra* notes 77–78 and accompanying text.

80. LA. REV. STAT. ANN. § 9:2713(A) (2005).

81. *Id.* § 9:2713(B).

82. *Id.*

83. New York law is an example of this. See *supra* note 65 and accompanying text. In the provision explaining the judicial proceedings for resolving disputes between surrogates and intended parents, New York law simply provides that a court cannot consider a surrogate’s participation in an illegal surrogacy contract in a negative light when deciding parental rights and obligations, and that a court can award legal fees. N.Y. DOM. REL. LAW § 124 (McKinney 2010). This suggests that the determinations are to be made based on a number of factors.

84. N.D. CENT. CODE §§ 14-18-01, 14-18-05, 14-18-08 (West 2011).

85. *Id.* § 14-18-01.

child.<sup>86</sup> If the surrogate's husband is a party to the contract then he is the child's legal father.<sup>87</sup> If the surrogate's husband is not party to the agreement, or the surrogate is unmarried, paternity is determined via court proceedings.<sup>88</sup> Gestational surrogacy is permitted; however, only arrangements that involve genetic material from the intended parents are addressed by the law.<sup>89</sup> The law clearly provides that a child born through a gestational arrangement is the child of the intended parents, and not the child of the gestational carrier or her husband.<sup>90</sup> One advantage of North Dakota's law is that it is very clear as to what types of agreements will be upheld, which ones will be void and who the legal parents are under each scenario. The law does not, however, consider third party surrogacy arrangements in which donor sperm or eggs are used.

Florida law also distinguishes between surrogacy arrangements. In Florida, surrogacy arrangements are referred to as pre-planned adoptions.<sup>91</sup> Florida requires at least one of the intended parents to be genetically related to the child in a gestational surrogacy.<sup>92</sup> Traditional surrogacy is also permitted.<sup>93</sup> These arrangements require drafting an agreement in advance, which can be terminated at any time by any party, and which gives the child bearer the right to change her mind within forty-eight hours of the child's birth.<sup>94</sup>

Gestational surrogacy is not a reproductive option for single adults or same-sex couples because Florida requires the intended parents to be married.<sup>95</sup> The law only permits gestational arrangements if the health of the intended mother prohibits her

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86. *Id.* § 14-18-05.

87. *Id.*

88. *Id.*

89. *Id.* § 14-18-08. A gestational carrier is a woman who agrees to implantation of an embryo comprised of the egg and sperm of the intended parents. *Id.* § 14-18-01.

90. *Id.* § 14-18-08.

91. FLA. STAT. §§ 63.212, 63.213 (West 2011).

92. *Id.* § 742.13(2) (“‘Commissioning couple’ means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.”).

93. *Id.* §§ 63.212, 63.213.

94. *Id.* § 63.213(1)(b).

95. *Id.* § 742.15(1).

from carrying a child.<sup>96</sup> The statute lists specific terms that must be contained in the contract, including provisions regarding medical decision-making throughout the pregnancy and relinquishment of parental rights upon the child's birth.<sup>97</sup>

The Florida statute also explains the legal process available for an expedited determination of parentage after a child is born through a gestational surrogacy arrangement.<sup>98</sup> Within three days, the intended parents must petition the court for an expedited affirmation of parental status, and the court must then schedule a hearing.<sup>99</sup> The court must enter an order stating that the intended parents are the legal parents of the child and will be presumed to be the child's natural parents; regardless of the health of the child upon birth, the intended parents must agree to accept custody, full parental rights and obligations for the child.<sup>100</sup> However, if tests reveal that neither of the intended parents are the genetic parents of the child, the gestational surrogate assumes all parental rights and obligations.<sup>101</sup> Moreover, Florida law limits the compensation that the intended parents may pay the gestational surrogate.<sup>102</sup>

Illinois' Gestational Surrogacy Act, passed in 2004, addresses only gestational arrangements in which at least one of the intended parents has a genetic relationship with the child.<sup>103</sup> The Act includes procedural and substantive requirements that the surrogacy contract must meet.<sup>104</sup> The substantive elements in-

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96. *Id.* § 742.15(2). The intended mother must have a condition that makes pregnancy dangerous to her health, makes her unable to carry a child to term, or would be harmful to the fetus. *Id.*

97. *Id.* § 742.15(3). The contract must state that the gestational surrogate will make all decisions regarding the pregnancy and must agree to reasonable medical evaluation, treatment and prenatal instructions. *Id.*

98. *See id.* § 742.16.

99. *Id.* § 742.16(1).

100. *Id.* § 742.16(6).

101. *See id.* § 742.15(3)(e).

102. *Id.* § 742.15(4) ("As part of the contract, the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.")

103. The Illinois statute defines "gestational surrogacy" as "the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution." 750 ILL. COMP. STAT. 47/10 (2005).

104. The Illinois statute requires that the parties must consult with independent legal counsel regarding the terms and legal consequences of the gestational surrogacy. *Id.* at



clude eligibility guidelines about who can be a surrogate and an intended parent.<sup>105</sup> Both the surrogate and intended parents are obliged to undergo mental health evaluations and the intended parents must have a medical need for the gestational surrogacy.<sup>106</sup> The gestational surrogate must agree to undergo pre-embryo transfer, carry, give birth, and give custody of the child to the intended parents immediately upon the child's birth.<sup>107</sup> An additionally required substantive provision must provide the gestational surrogate with the right to choose her own physician after consulting with the intended parents.<sup>108</sup> Moreover, in the written contract the intended parents must agree to accept sole custody and responsibility for the child immediately upon the child's birth.<sup>109</sup> Optional provisions may also be included in the contract. For example, the gestational surrogate may agree to undergo all medical treatments recommended by the physician and refrain from engaging in activities deemed by the doctor or the intended parents to be harmful to the pregnancy or future health of the child.<sup>110</sup> The contract may also contain provisions regarding reasonable compensation and reimbursement of expenses.<sup>111</sup>

If the contract satisfies all of the procedural and substantive requirements, the intended parents are the legal parents of the child immediately upon birth.<sup>112</sup> If the requirements are not met, the court determines the parentage of the child based on the in-

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47/25. The contract must be in writing and be witnessed by two adults. *Id.* It must be executed by the gestational surrogate (and her husband, if married) and the intended parent(s) (if married, both the husband and wife must execute the contract), prior to beginning any medical procedures in furtherance of the gestational surrogacy (excluding the mental health and medical evaluations). *Id.* The gestational surrogate and intended parents must sign a document acknowledging that they received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the agreement. *Id.* If the contract includes a provision about compensation, the compensation must be placed in escrow with an independent escrow agent prior to any medical procedures. *Id.*

105. *Id.* at 47/20.

106. *Id.* The surrogate must also: (1) be at least 21; (2) have given birth to at least one child; (3) have completed a medical evaluation; and (3) have a health insurance policy that covers major medical procedures and hospitalization. *Id.* at 47/20(a).

107. *Id.* at 47/25(c)(1).

108. *Id.* at 47/25(c)(3).

109. *Id.* at 47/25(c)(4).

110. *Id.* at 47/25(d).

111. *Id.* at 47/25(d)(3).

112. *Id.* at 47/15.

tent of the parties.<sup>113</sup> Finally, the Act addresses the scenario in which the child is not genetically related to either of the intended parents due to laboratory error.<sup>114</sup> The Act provides that the intended parents will still be the parents of the child, unless the court determines otherwise.<sup>115</sup>

The statutes in these three states demonstrate some of the ways that states have attempted to permit and regulate surrogacy arrangements. Some statutes explain how the intended parents become the legal parents upon the birth of the child. Two of the states address the scenario in which the child is mistakenly not related to either of the intended parents.<sup>116</sup> North Dakota<sup>117</sup> requires both intended parents to be genetically related to the child, Illinois<sup>118</sup> requires one, while Florida<sup>119</sup> requires at least one intended parent to be genetically related to the child in gestational surrogacy arrangements, and neither to be related in the context of traditional surrogacy. As a result, in North Dakota and Illinois intended parents who both have fertility problems cannot utilize gestational surrogacy to have a child. Some of the statutes are more specific than others when indicating what must be included in the contract. For example, some include provisions about medical decision-making and the role of intermediaries. In all of the states discussed, provided that the contracts are executed properly, the intended parents are the legal parents of the child. As evidenced by the statutory examples discussed, some provisions on surrogacy are much more comprehensive than others.

#### IV. LACK OF CLARITY: THE CONSEQUENCES

The problem with piecemeal legislation is that it does not provide the involved parties with certainty as to the outcome of surrogacy arrangements, whether contracts will be upheld, and who

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113. *Id.* at 47/25(e).

114. *Id.* at 47/15(c).

115. *Id.*

116. This can occur due to laboratory error by implanting the wrong embryo, sperm or egg. It can also occur if the surrogate continues to engage in sexual relations while undergoing insemination or embryo implantation.

117. *Supra* notes 89–90 and accompanying text.

118. *Supra* note 103 and accompanying text.

119. *Supra* notes 92–94 and accompanying text.

will ultimately have legal custody of the child. As the following examples illustrate, this lack of clarity creates confusion about carrier and intended parents' eligibility, permissible genetic relationships, medical decision-making, reimbursement and compensation, foreign surrogacy, and parentage and custody. The proper role for the potential gatekeepers to surrogacy arrangements, including attorneys, physicians and surrogacy firms is also unclear. When controversies arise, the lack of comprehensive regulation leaves courts without much guidance on how to handle these issues.

#### A. SURROGACY VIEWED AS A COMMERCIAL TRANSACTION

When couples first turned to surrogacy as a reproductive option, there were no laws in place to regulate the use of this reproductive option. The law frequently struggles to catch up with new technologies, and surrogacy was not an exception. In the case of surrogacy, couples using surrogacy as a reproductive option were often criticized. Surrogacy was framed as baby-selling, reflecting the commodification of children.<sup>120</sup> In the realm of adoption, baby-buying is explicitly prohibited, but in the absence of equally clear and comprehensive regulation of surrogacy, surrogacy arrangements begin to resemble commercial transactions, eroding this long-standing prohibition of baby-buying.<sup>121</sup>

Due to the lack of clear guidelines on who can become a parent via surrogacy, as compared with the scrutiny in the adoption context, surrogacy arrangements provide an opportunity to have a baby using a commercial-like transaction. For example, one important criterion considered by agencies in evaluating prospective adoptive parents is the age of the parents. Criteria for infant adoptions are frequently the most restrictive and place age limits on the prospective adoptive parents because as people age it is more challenging for them to keep up with young children.<sup>122</sup>

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120. Scott, *supra* note 14, at 109–10.

121. *Id.*

122. *ACF Questions and Answers Support*, DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, [http://faq.acf.hhs.gov/app/answers/detail/a\\_id/1416](http://faq.acf.hhs.gov/app/answers/detail/a_id/1416) (last visited Mar. 31, 2012) ("In the United States, agency criteria for prospective adoptive parents are often more restrictive for infant adoptions than for adoptions of older children . . . . Many agencies set age limits for prospective adoptive parents in infant adoptions,

There are a variety of reasons cited as to why the advanced age of a prospective adoptive parent may be a problem, including whether the adoptive parent will be able to raise the child until the child reaches the age of majority.<sup>123</sup> Courts often grant the adoption petition of older individuals when they have a pre-existing relationship with the child, as opposed to stranger adoptions.<sup>124</sup>

In the context of surrogacy statutes, age is not a criterion addressed in many states' surrogacy laws.<sup>125</sup> By excluding age restrictions from surrogacy regulation, when the intended parents have sufficient financial resources, single or married adults of any age can have a child through third-party gestational surrogacy. For example, a single man in his late fifties who would likely never be approved to adopt a newborn child can arrange to have a surrogate carry a child for him, thus enabling him to be the single parent of a newborn child.

At the age of fifty-seven, Stephen Melinger, a single elementary school teacher living in New Jersey, decided that he wanted to be a parent.<sup>126</sup> He contacted an agency in Indiana called Surrogate Mothers to help him coordinate a surrogacy arrangement to fulfill his wishes.<sup>127</sup> The surrogate selected was from South Carolina.<sup>128</sup> She carried twin girls, who were born in Indianapolis nine

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and birth parents may choose to place their babies with younger parents in independent adoptions arranged without agency involvement.”).

123. See David B. Harrison, *Age of Prospective Adoptive Parent as Factor in Adoption Proceedings*, 84 A.L.R.3d 665 (2011), at § 2[a]. Harrison lists the following reasons:

(1) . . . [T]he likelihood that the child will suffer the loss of the parent during a period of the child's growth, (2) . . . the ability of the adoptive parent to supply the material needs of the child, (3) the problem that a child might be under a psychological burden in having an adoptive parent old enough to be a grandparent, (4) the circumstance that as people grow old they tend to become more fixed and inflexible in their mental attitudes, (5) the consideration that advanced age limits the ability of the adoptive parent to participate in various social and school activities with the child, and (6) the problem that an older adoptive parent may find it more difficult to muster the physical effort required to control a young child.

*Id.* (internal citations omitted).

124. *Id.*

125. See *supra* Part III.B. None of the state statutes discussed in Part III.B. include provisions regarding the age of the intended parents in a surrogacy agreement.

126. Stephanie Saul, *21st Century Babies — Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009 at A1.

127. *Id.*

128. *Id.*

weeks premature.<sup>129</sup> After their birth, the attorney who operated Surrogate Mothers filed an adoption petition on behalf of Melinger.<sup>130</sup> The surrogate listed Melinger as the father on the birth certificate, and the parties thought the adoption would proceed according to plan.<sup>131</sup> But shortly thereafter hospital employees contacted Indiana's child welfare agency.<sup>132</sup> Some of Melinger's behaviors at the hospital were of grave concern to the staff: on one occasion he showed up at the neonatal intensive care unit with his pet bird, and during another visit he entered with bird feces on his clothing.<sup>133</sup>

Melinger's attorney became concerned that the adoption would not be approved, so he filed another motion.<sup>134</sup> The motion contained false arguments trying to divert attention from Melinger's characteristics.<sup>135</sup> Instead, the attorney attempted to focus the petition on the surrogate mother, the children and the adoption itself.<sup>136</sup> In the motion he referred to the children as "hard to place," arguing that they were biracial since the surrogate was African American.<sup>137</sup> It is easier for out-of-state residents to adopt children categorized as "hard to place."<sup>138</sup>

However, these arguments lacked truth. This was a third party gestational surrogacy arrangement; not the case of a woman with an unwanted pregnancy hoping to give her children up for adoption. The gestational carrier bore no genetic relationship to the twins.<sup>139</sup> The implanted embryos were comprised of eggs and sperm from Caucasian donors, so the children were not biracial.<sup>140</sup> Melinger also initially represented himself as the sperm donor, but he actually bore no genetic relationship to the girls.<sup>141</sup> As the adoption battle continued, the girls were placed in foster care.<sup>142</sup>

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

Melinger's adoption petition was finally granted in 2006.<sup>143</sup> He returned to New Jersey with the children while the Indiana Department of Child Services appealed the adoption.<sup>144</sup>

In New Jersey, a woman who had seen the girls playing in the park notified the police that the girls were dirty and not dressed warmly enough for the winter weather.<sup>145</sup> The New Jersey Department of Youth and Family services sent a caseworker to Melinger's home: the caseworker "noticed a strong smell of urine" and thought that the home was "particularly dirty."<sup>146</sup> The girls were temporarily removed from Melinger's custody, but were later returned after a hearing.<sup>147</sup> Meanwhile, the Indiana court ruled that the adoption of the twins (now four years old) was invalid and all of the adoption procedures had to be repeated, but allowed the girls to remain in Melinger's custody while the adoption process proceeded.<sup>148</sup>

Melinger will be seventy-five years old when the girls graduate from high school.<sup>149</sup> Given the limited availability of Caucasian infants, it would likely be extremely difficult for a single older male like Melinger to adopt a healthy baby girl.<sup>150</sup> His erratic behavior would also not make him a top candidate to serve as an adoptive parent. In fact, rather than turning to adoption, he contacted a surrogacy firm to "create" his daughters. He purchased eggs and sperm and paid a surrogacy firm and a surrogate in order to have his children. Melinger's surrogacy contract can be likened to a commercial transaction and he managed to circumvent Indiana's surrogacy laws and manipulate the adoption laws in order to gain custody of the twin girls. While he ultimately became the legal parent of the children, there was a period of time when due to the absence of clear regulation, it was as if Melinger was waiting to see if he had the qualifications to be approved for a commercial loan.

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See supra* notes 122–24 and accompanying text (discussing that age of the adoptive parents is considered in the adoption context and that older adults typically have a difficult time adopting infants).

## B. CUSTODY AND PARENTAGE ISSUES

Custody issues may arise when the surrogate decides that she wants to keep the baby, despite having signed a contract. As discussed in Part III, states such as California are willing to recognize the intended parents as the legal parents, even if neither is genetically related to the child.<sup>151</sup> However, not all states rely on the intentions of the parties, nor do all states provide sufficient guidance to their courts on how to resolve custody disputes if they arise.<sup>152</sup>

After years of infertility, the Kehoes, Michigan residents, decided to pursue surrogacy in order to have a child.<sup>153</sup> Using various websites they found an egg donor, sperm donor and a woman to serve as their surrogate.<sup>154</sup> They then hired a fertility clinic, IVF Michigan, to create and implant the embryo.<sup>155</sup> The chosen surrogate, Laschell Baker, also a Michigan resident, advertised her services on a website, specifying that she would carry a baby for a Christian couple.<sup>156</sup> The surrogate gave birth to twins and the Kehoes took them home.<sup>157</sup>

After learning that Amy Kehoe, the intended mother, was being treated for a mental illness, Baker obtained a court order to have the twins returned to her from their intended parents, saying that she was concerned about Kehoe relapsing and being unable to care for the children.<sup>158</sup> Baker argued that the clinic should have required psychological screening of prospective parents and that if she had known about Amy Kehoe's condition, she might not have agreed to the arrangement.<sup>159</sup> The twins were taken from the Kehoes' home about a month after their birth.<sup>160</sup> The egg donor, the sperm donor, Baker, the Kehoes, two middlemen who brokered the egg and sperm, and the IVF clinic were all

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151. See *supra* notes 50–53 and accompanying text; see also *supra* Part III.B.

152. See *supra* Part III.B.

153. Saul, *supra* note 126.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*



involved in the creation of the twins.<sup>161</sup> However, none of the parties involved in the resulting litigation had a genetic relationship with the children, so the court could not rely on genetics to determine the legal parents of the children and had to adopt a different approach instead.

A history of mental illness does not automatically preclude a party from adopting.<sup>162</sup> Indeed, Amy Kehoe's psychiatrist wrote a letter stating that her disease had been fully controlled for eight years, that she had no current symptoms, and that she would be a fit mother.<sup>163</sup> Even with the psychiatrist's support, because Michigan law holds surrogacy contracts to be void and unenforceable, the court was not required — and was ultimately unwilling — to use the intent of the parties as the controlling factor.<sup>164</sup>

When a woman gets pregnant through sexual intercourse there is no *ex ante* determination of whether she is fit to be a parent. Judgment of her parenting ability will only arise if someone reports her to children's services for abuse or neglect, or in the context of a custody battle during a divorce proceeding.<sup>165</sup> In this case, had Amy Kehoe naturally conceived the twins with her husband and continued to receive treatment for her mental illness, it is unlikely that they would have been taken away from her. The Kehoes, frustrated by the Michigan laws and the potential for lengthy litigation, made the difficult decision to stop trying to get their children back.<sup>166</sup>

### C. LACK OF CONSISTENT ENFORCEMENT

States do not consistently enforce their surrogacy laws, making it challenging to predict the outcome of surrogacy arrangements. This lack of constant enforcement, particularly in states where surrogacy contracts are void, contributes to the uncertainty surrounding surrogacy arrangements and may lead to expectations that are disrupted. The Kehoes and Baker resided in a

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161. *Id.*

162. *See id.* ("Adoption experts said that mental illness was not a bar to adoption if the illness was under control and the patient went to doctor's appointments and took medications.")

163. *Id.*

164. *See supra* notes 66–73 and accompanying text; *see also* Saul, *supra* note 126.

165. ELLMAN ET AL., *supra* note 2, at 1127–30, 1134–39.

166. Saul, *supra* note 126.

state in which surrogacy agreements are technically considered void and unenforceable.<sup>167</sup> Prior to this arrangement, Baker had served as a surrogate two other times without any legal complications.<sup>168</sup> The same doctor, who had been involved with her previous surrogacy arrangements, provided the medical services for this one.<sup>169</sup> Given that surrogacy is illegal in the state of Michigan, and intermediaries, such as doctors, physicians, and surrogacy agencies are subject to felony prosecution,<sup>170</sup> the fact that the doctor and firm involved in the Kehoe/Baker arrangement had previously orchestrated two of Baker's other surrogacy arrangements is clear evidence that Michigan's law is not consistently enforced. The past history of successful surrogacy arrangements involving Baker and the physician sets an expectation that the intended parents will end up with their child, when that is clearly not the case.

The lack of enforcement of the Michigan law in the absence of conflict between the parties limits its effectiveness as a deterrent. If a state does not support the use of surrogacy, it should enforce its laws, even in the absence of conflict between specific parties, to provide residents with clarity and to avoid custody battles like the one between the Kehoes and the Bakers. Intermediary firms should be shut down and physicians who perform such arrangements should risk losing their medical license to practice in that state. Based on the history of Mrs. Baker's experience with the surrogacy process, the Kehoes had little reason to suspect that there would be any issue with their arrangement, despite the fact that they lived in Michigan. If, on the other hand, the law had been consistently enforced, the invalid nature of surrogacy contracts would have been clear, and the Kehoes would not have had any reason to expect that a contract in Michigan would be upheld.

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167. See *supra* notes 66–73 and accompanying text (describing the law on surrogacy in Michigan).

168. Saul, *supra* note 126.

169. *Id.*

170. See *supra* notes 66–73 and accompanying text.

#### D. FOREIGN SURROGACY: TAKING ADVANTAGE OF THE SURROGATE

One troubling issue that is also a consequence of the uncertainty of the law in the United States is the growth of the foreign surrogacy industry. A popular destination for foreign surrogacy is India.<sup>171</sup> While the United States has ambiguous surrogacy laws, India legalized commercial surrogacy in 2002.<sup>172</sup> In fact, the Indian government advertises India as a medical tourism destination.<sup>173</sup> Medical tourism in general has the potential to generate over \$2 billion per year of revenue in India by 2012.<sup>174</sup> In the United States, private medical tourism firms are also reaping the benefits of this developing industry. Firms such as Med Journeys and PlanetHospital offer potential intended parents all-inclusive medical tourism packages that include arrangements for the desired medical procedure and visits to exotic locations.<sup>175</sup> These firms provide the services of a travel agent, while also arranging for medical procedures.<sup>176</sup>

The main incentives for American parents in pursuing surrogacy abroad are the lower cost and the lack of legal uncertainty. The cost of surrogacy in India is approximately \$25,000.<sup>177</sup> This includes the airfare and accommodations for two trips to India, the medical costs, and the surrogate's payment.<sup>178</sup> In the United States, surrogacy costs about three times as much.<sup>179</sup> Another advantage of traveling to India to find a surrogate is that "the system . . . avoids the legal red tape and ill-defined surrogacy laws women face in the U.S."<sup>180</sup> In India, surrogates can receive

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171. Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A10.

172. *Id.*

173. *Id.*

174. Philip Mirrer-Singer, Note, *Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism*, 70 LAW & CONTEMP. PROBS. 211, 211–12 (2007).

175. *Id.* at 212 & n.5, 215 (discussing medical tourism firms).

176. *Id.* at 215.

177. Gentleman, *supra* note 171.

178. *Id.*

179. *Id.*

180. Abigail Haworth, *Surrogate Mothers: Wombs for Rent*, MARIE CLAIRE, July, 29, 2007, available at <http://www.marieclaire.com/world-reports/news/international/surrogate-mothers-india>.

\$5,000 to \$7,000 for their services.<sup>181</sup> Women chosen to be surrogates in India are primarily involved for the money and grateful for the opportunity.<sup>182</sup> This emphasizes the commodification aspect of surrogacy arrangements, especially since Indian surrogates are typically not nearly as wealthy as the commissioning parents.<sup>183</sup> However, in contrast to the situation in India, American surrogates are typically not the poorest members of society.<sup>184</sup> Some American women who serve as surrogates are women who might otherwise earn no income because they want to stay at home to raise their children.<sup>185</sup> Surrogacy allows them to do both at once, and some evidence suggests that surrogates view themselves as providing a social benefit.<sup>186</sup>

In India, surrogates sign contracts giving away their rights to the child, the terms of which are determined by guidelines issued by the Indian Council of Medical Research.<sup>187</sup> Some surrogates

181. *Id.*

182. *Id.* As one Indian surrogate expressed, “I couldn’t wait to get here . . . I’ve been so excited since [the doctor] chose me to be a surrogate that I haven’t been able to sleep.” *Id.*

183. *Id.* One Indian woman, Mondal, became a surrogate for “purely economic” reasons. *Id.* The intended mother Karen called every week from the States to hear news of her growing child. On top of the surrogacy fee, Karen paid for a spacious two-bedroom apartment in Anand [where the surrogacy clinic is located] for Mondal’s family, hired a cleaner, and sent care packages containing cotton pajamas and panties for Mondal and toys for her two sons.

*Id.*

Another American intended mother, Jessica, explained that [a]s excited as she is about the prospect of [the surrogate]’s pregnancy, [Jessica] isn’t sure she can stick around for the embryo transfer — [the doctor] has scheduled it for the following week. “I really want to stay to be with [the surrogate],” she says, “but I need to get home because I’ve arranged to have my basement renovated.” She quickly realizes how that sounds and adds a qualifier. “Well, you know, good workmen are very hard to find. And the renovations are for the baby.”

*Id.*

184. See Scott, *supra* note 14, at 138 & n.174.

185. See Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, available at <http://www.thedailybeast.com/newsweek/2008/03/29/the-curious-lives-of-surrogates.html>.

186. See *id.* One surrogate said this about her experience: “Being a surrogate is like giving an organ transplant to someone . . . only before you die, and you actually get to see their joy.” *Id.* Another surrogate said, “I thought I do not want to go through life meaning nothing, and I want to do something substantial for someone else. I want to make a difference.” *Id.*

187. Gentleman, *supra* note 171.

are illiterate and sign the contracts using their thumbprint.<sup>188</sup> While American society has become more comfortable with surrogacy, Indian communities shun the surrogates' families if they know of the arrangements, which is why some temporarily relocate for the duration of the surrogacy.<sup>189</sup> Since money is the primary motivation for Indian women, the lack of regulation in an expanding industry raises concerns that these arrangements exploit Indian women.<sup>190</sup> These arrangements highlight the discrepancy between Western wealth and Indian poverty, and underscore the commercial nature of this reproductive technology. If it was easier to determine parentage and custody domestically, one of the incentives to travel abroad to have a child would be eliminated, thus reducing the potential for exploitation of surrogates abroad.<sup>191</sup>

## V. PRE-BIRTH PARENTAGE ORDERS AS A SOLUTION

Currently, none of the states' laws on surrogacy comprehensively regulate these complicated surrogacy arrangements. Even in those states that find surrogacy agreements to be void, including those that penalize entering into such arrangements, a judge still must determine who has parental rights and obligations when a child is born through such an arrangement — and must do so without clear guidance. The best interest of the child standard employed by judges in other types of custody arrangements is not always appropriate to determine who should raise a child born in a surrogacy arrangement; particularly if both of the intended parents are genetically related to the child because the children born out of those arrangements most similarly reflect those born through natural conception. Whether a state would like to prohibit or allow surrogacy, all states are in need of a comprehensive scheme to avoid multi-year litigation and provide

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188. *See id.*

189. *See* Haworth, *supra* note 180.

190. *Id.* However, not all women believe that these arrangements are exploitative. One Indian surrogate feels as though serving as a surrogate is providing her with opportunities she never would have had: she believes it will “give [her] children a future.” *Id.* “She plans to divide her surrogacy windfall three ways: buying a brick house, investing in her husband’s business, and paying for her children’s education. ‘My daughter wants to be a teacher,’ she says. ‘I’ll do anything to give her that opportunity.’” *Id.*

191. *See supra* notes 177–86 and accompanying text.

clarity to parties who enter into such agreements. This Note proposes a pre-approval process as a way to increase certainty for parties entering surrogacy agreements.

#### A. PRE-BIRTH VS. POST-BIRTH PARENTAGE DETERMINATIONS

Some states currently believe that pre-birth parentage orders are inappropriate when the intended mother bears no genetic relationship to the child; some forbid pre-birth determinations for any type of surrogacy arrangement, while others permit pre-birth determinations. To reduce the uncertainty surrounding surrogacy arrangements it is preferable to allow parties to create enforceable pre-birth surrogacy contracts.

Pre-birth parentage orders provide the most clarity and the least amount of uncertainty for all involved parties. These orders declare that the intended parents are the legal parents of the child prior to the child's birth.<sup>192</sup> There are two primary ways to construct a statutory scheme that provides for pre-birth parentage determination. One model, suggested by the ABA, includes judicial involvement. The involved parties enter into a contract and, after reviewing the agreement, a court issues an order confirming the intended parents as the yet-to-be-born child's legal parents.<sup>193</sup>

The second possibility does not involve the courts at the outset. Under the second model, which resembles the approach in Illinois, if the parties have a contract in place that includes all of the provisions specified by the state's guidelines, then the intended parents are the legal parents of the child.<sup>194</sup> Such required contractual provisions would likely relate to medical decision-making and compensation, but may include any other terms specified by the individual state. This provides the intended parents with immediate control over the medical care of the child upon birth and allows the hospital to write the names of the intended parents on the original birth record, avoiding the extra step of amending and sealing the original birth certificate. In the ab-

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192. MODEL ACT GOVERNING ASSISTED REPROD. TECH., § 703 [Alternative A] (2008) [hereinafter MODEL ACT], available at <http://www.abanet.org/family/committees/artmode-lact.pdf>.

193. *Id.* at § 707.

194. See *supra* notes 103–15 and accompanying text.

sence of a pre-birth parentage determination, the surrogate would be the legal parent at birth and her name would have to be written on the birth certificate. In addition, this model allows the child to leave the hospital with the intended parents rather than the surrogate, providing psychological comfort and security.

In its post-birth model, the ABA suggests that prior to or within twenty-four hours of the child's birth, the parent-child relationship can be established if the attorneys representing each party certify that the parties intended to create an agreement that satisfies all of the required provisions.<sup>195</sup> After the certification, hospital employees and the appropriate agency must fill out all relevant birth records and birth certificates to reflect that the intended parents are the parents.<sup>196</sup> However, these *ex post* determinations leave room for problems to arise that may instead be resolved with the use of a pre-birth order. For example, one problem is health insurance coverage for the child; under the post-birth model, at the moment of birth, the baby cannot immediately be covered by the intended parents' insurance. Further, if the child is born with a disability and neither the intended parents nor the surrogate wants the child, it is unclear who is legally responsible for the baby. With a pre-birth order, it would be clear that the intended parents are the child's legal parents and should they desire, they can place the child up for adoption. Further, at birth, a baby could require medical procedure that could produce a positive outcome, but could also put the infant's life at risk. If there is no pre-birth parentage order, and the surrogate is opposed to the procedure, and the post-birth certification has not yet occurred, the doctors will not know which party to consult for consent. In an emergency situation, there might not be enough time to go to court to make a post-birth parentage determination.<sup>197</sup>

#### B. THE PROVISIONS OF A PRE-BIRTH PARENTAGE ORDER

All states and their citizens would benefit from clearer regulation of surrogacy arrangements. It is unlikely that all states

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195. MODEL ACT, *supra* note 192, at § 705 [Alternative B].

196. *Id.*

197. See Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633 (2005).



would adopt the same method, since each state typically determines family-related legal issues independently. A method that allows parentage to be determined prior to the beginning of the surrogacy process provides the least uncertainty for all parties involved. In order for the pre-birth contract to alleviate the potential uncertainty when surrogacy arrangements are made, the contract should include provisions specifying how each of the following issues should be addressed.

### 1. *Intended Parents' Eligibility*

In their statutory regimes, state laws should indicate who is permitted to use surrogacy as a reproductive tool. Some believe that the intended parents should be required to demonstrate a medical need for surrogacy rather than natural birth. The ABA Model Act advises that at least one of the intended parents must have a medical need requiring the gestational carrier arrangement, evidenced by a physician's affidavit.<sup>198</sup> While defining "medical need" can be challenging, requiring at least one of the intended parents to have a medical need lessens the commercial nature of the transaction because the transaction would be driven by medical necessity. However, imposing a medical need requirement would also place limits on the ability of both partners in a female same sex relationship from participating in the creation of the child and would prevent single or same-sex male couples from using surrogates. While medicine is a science, and science is often relied on for clear and concrete answers, there are an infinite number of ways to define "medical need." An individual's medical reason for needing to use a surrogate arrangement to conceive could be based on one medical condition, or on a combination of medical factors, including the patient's medical history and potential genetic conditions.

Another topic to address is whether there should be an age limit on who can be an intended parent. This is an area in which states could look to their adoption regulations and the reasoning behind them, and apply them to their surrogacy laws. Adoption criteria for infant adoptions are frequently the most restrictive

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198. MODEL ACT, *supra* note 192, at § 702 [Alternative B].

and include age limits on the prospective adoptive parents.<sup>199</sup> The same reasoning could be applied to surrogacy arrangements to ensure that the children have parents who will be able to care for them until they reach the age of majority and to prevent situations like Melinger's where, in large part, due to his age, his surrogacy arrangement resembled a commercial transaction.<sup>200</sup> When considering an adoption petition, the courts emphasize the future when considering the age of the prospective adoptive parent.<sup>201</sup> Courts consider whether the adoptive parents are expected to live long enough to raise the child until he/she reaches the age of eighteen or graduates from college.<sup>202</sup> The fitness of prospective adoptive parents is highly scrutinized before they are allowed to adopt a child and the adoption process usually involves a comprehensive application, letters of recommendation, proof of income and pre-adoption counseling.<sup>203</sup> The same reasoning could be applied to surrogacy arrangements to ensure that the children have parents who will be able to properly care for them until they reach the age of majority.

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199. See *supra* notes 122–24 and accompanying text.

200. See *supra* Part IV.A.

201. See *supra* notes 122–24 and accompanying text.

202. See *supra* notes 122–24 and accompanying text.

203. See ELLMAN ET AL., *supra* note 2, at 1254–55 (“Adoption agencies perform many critical discretionary functions in the selection and placement of children with adoptive parents. Agencies not only select the adoptive parents, they also typically certify their suitability in the judicial process that confirms the adoption.”); see also ADOPTION: WHERE DO I START?, CHILD WELFARE INFO. GATEWAY 3–4 (2010) [hereinafter ADOPTION], available at [http://www.childwelfare.gov/pubs/f\\_start.pdf](http://www.childwelfare.gov/pubs/f_start.pdf) (“No matter which type of adoption you choose to pursue, all prospective adoptive parents must have a home study or family study. A home study involves education, preparation, and gathering information about the prospective adoptive parents. This process can take from [two] to [ten] months to complete, depending on agency waiting lists and training requirements.”). As for proceedings in court, this adoption factsheet further notes that:

All domestic adoptions need to be finalized in court. The process varies from State to State. Generally a child must have lived with the adoptive family for at least 6 months before the adoption can be legally finalized. During this time, a social worker may visit several times to ensure the child is well cared for and to write up the required court reports. After this period, the agency (or attorney in an independent adoption) will submit a written recommendation of approval of the adoption to the court.

ADOPTION, *supra*, at 5.

## 2. Medical Decision-Making Throughout the Pregnancy

Prior to entering into an agreement, intended parents and prospective surrogates should also discuss their views on procedures such as ultrasounds, amniocentesis, abortion, and the setting and medical procedures used during the birth of the child. Every surrogacy contract should also include provisions addressing who will make medical decisions throughout the pregnancy.<sup>204</sup> The three main types of medical decisions that can arise are those that primarily affect the health of the surrogate, those that primarily affect the health of the fetus, and those that affect both.

The intended parents and the surrogate could have divergent views about whether one should knowingly bring unhealthy children into the world and different beliefs about abortion. This is why it is important for all of the involved parties to discuss these procedures, and include their conclusions in their surrogacy contract for a judge to pre-approve. For example, an amniocentesis is a procedure useful for determining whether a child will be born with a disease or disability.<sup>205</sup> It is generally considered a safe procedure, but like most medical procedures, it carries risks.<sup>206</sup> Despite the information that it can provide, an amniocentesis can be controversial because there are medical risks to both the surrogate and the fetus.<sup>207</sup> The procedure is performed by inserting a needle into the amniotic sac; it can cause a miscarriage and it is possible for the needle to touch the baby if the baby

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204. The ABA Model Act suggests that in every surrogacy contract, there should be a provision relating to medical decision-making. MODEL ACT, *supra* note 192, at § 703 [Alternative B]. The American College of Obstetricians and Gynecologists advises that “[t]he obstetrician-gynecologist should urge the intended parents to discuss preconditions and possible contingencies with the surrogate mother or her representative and to agree in advance on the response to them.” AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION, SURROGATE MOTHERHOOD 4 (2008), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co397.pdf?dmc=1&ts=20120212T1444311911>. In addition, the American College of Obstetricians and Gynecologists recommends that “[a]greements the surrogate mother has made with the intended parents regarding her care and behavior during pregnancy and delivery should not affect the physician’s care of the patient.” *Id.* at 6.

205. *Amniocentesis*, MAYO CLINIC, <http://www.mayoclinic.com/health/amniocentesis/MY00155> (last modified May 15, 2010) [hereinafter MAYO CLINIC].

206. *Amniocentesis*, AM. PREGNANCY ASSOC., <http://www.americanpregnancy.org/prenataltesting/amniocentesis.html> (last visited Feb. 18, 2012).

207. See MAYO CLINIC, *supra* note 205.

moves around during the procedure.<sup>208</sup> The primary risks and side effects for the surrogate include sharp pain when the needle enters the skin, irritation around the insertion site, cramping, and a uterine infection, and she may not want to subject herself to these risks.<sup>209</sup>

Amniocentesis provides the intended parents with the opportunity to plan for a child with special needs, pursue any potential interventions, and to consider terminating the pregnancy.<sup>210</sup> Should the intended parents wish to terminate the pregnancy, a dispute over an abortion could arise. Another context in which a similar disagreement can occur is if the fertility procedure leads to multiple fetuses and the doctor recommends selective abortion because it is in the best interest of both the health of the carrier and the health of the fetuses. To avoid conflict and litigation during the pregnancy, the parties should discuss these issues in advance and include provisions about them in the surrogacy contract.

### 3. *Compensating Surrogates*

While intermediaries such as surrogacy firms are trying to run a profitable business, the primary motivation of many women who decide to serve as surrogates is not the money.<sup>211</sup> The threshold question for regulators is whether surrogates should be compensated for their services, or whether intended parents should only reimburse medical expenses. It seems unlikely that women would voluntarily carry children for strangers without some type of financial arrangement that covers more than just medical expenses; however, in order prevent the commercialization and commodification of women who serve as surrogates, regulators should consider the ethical implications of allowing intended parents to pay surrogates. Once allowing compensation, regulators can either provide guidelines for how to determine the compensation, or they can leave it to the parties themselves. The ABA Model Act permits compensation as long as it is “reasonable and negotiated in good faith between the parties,” and is not con-

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208. *Id.*

209. *Id.*

210. *Id.*

211. *See supra* notes 35–37 and accompanying text.

ditioned on any characteristic of the resulting child.<sup>212</sup> If any issue were to arise regarding the negotiation process or the reasonableness of the compensation, judicial involvement would be required to resolve the controversy.

However, such an ambiguous guideline will not ameliorate the uncertainty surrounding compensation. Regulators should consider the economic implications of allowing compensated surrogacy arrangements because this will create the most basic conditions that exist in any marketplace. Allowing limitless compensation could incentivize women to serve as a surrogate solely for the financial compensation, which would shift the reasons currently driving surrogates.<sup>213</sup> In addition to altering the motivation of surrogates, it is also likely to increase the number of available surrogates. As it becomes easier for intended parents to find a surrogate, surrogates lose bargaining power, which could lead to intended parents taking advantage of their surrogate. In order to prevent this from occurring, it is necessary for there to be a greater number of intended parents seeking surrogates, than the number of surrogates available. Regulators should prohibit a level of compensation that would lead to these conditions. They must also create guidelines that allow some level of flexibility in determining compensation, so that it can be tailored to the particular surrogate's circumstances for a judge to consider in the pre-approval process. Further, it is important for the parties' agreement to contain a provision that allows them to alter the level of compensation should unforeseen circumstances arise. For example, if the surrogate develops a complication and is put on bed rest or needs to be hospitalized for an extended period of time, and incurs additional personal expenses, such as childcare for her own children, the parties need to be able to modify their agreement in order for surrogacy arrangements to remain as equitable as possible.

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212. MODEL ACT, *supra* note 192, at § 802.

213. *See supra* notes 35–37 and accompanying text.

#### 4. *Method by Which Judges Should Resolve Custody Issues if They Arise*

To avoid adding another level of complexity to what is already an intricate arrangement, this Note advocates for a prohibition of traditional surrogacy arrangements.<sup>214</sup> Today ninety-five percent of surrogacy arrangements are gestational; thus only permitting gestational arrangements should not have a significant impact on surrogacy.<sup>215</sup>

Issues involving parentage and custody can arise in cases where there is reason to suspect that the child was not actually conceived through IVF, but rather the surrogate carrier engaged in sexual relations around the time of the IVF procedure.<sup>216</sup> A surrogate should be advised in advance by the treating physician as to when she must stop having intercourse in order to ensure that this does not happen. If the surrogate does not abide by this recommendation and the agreement includes compensation and reimbursement of medical expenses, the intended parents should not be required to reimburse the surrogate for all expenses. They should only be required to reimburse the surrogate for the medical procedures associated with examinations and tests conducted prior to the IVF and those directly related to the IVF procedure.

The more common context in which custody issues arise is when surrogacy agreements are arranged, something goes awry, such as the surrogate wanting to keep the baby, and a dispute ensues.<sup>217</sup> While states that ban surrogacy will not use pre-approval process as a regulatory tool, they should still adopt regulations to provide guidance on how to resolve custody disputes. In order to ameliorate the uncertainty as to when these disputes

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214. Israel is a country where there is an outright ban on traditional surrogacy, unlike the current status of the law in the United States. Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 296 (2009).

215. Scott, *supra* note 14, at 139.

216. See MODEL ACT, *supra* note 192, at § 707 [Alternative A]. Under this provision of the Model Act, a court should determine parentage by genetic testing “[i]f the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction . . . .” *Id.*

217. One way to avoid this from happening is to have screening requirements determining surrogate eligibility, as in Israel, where “[t]he Law requires an initial medical and psychological suitability assessment of potential candidates by an independent professional.” Lee, *supra* note 214, at 296–97.

might arise and how a court might resolve them, surrogacy regulations should provide guidance. Those instituting the regulations should consider the most common situation when a custody dispute arises, which is when the surrogate decides that she wants to keep the child, and articulate a standard to determine custody. Using the pre-approval surrogacy process advocated, the contract should include a provision stating that the intended parents will be the legal parents of the child, and that if a dispute arises it should be resolved in favor of the intended parents. If this contract is approved, and thus enforceable, if the surrogate disappears with the baby after its birth, the law should penalize her actions.

## VI. CONCLUSION

Uncertain regulatory regimes can lead to legal controversies relating to parentage and custody. These legal uncertainties are also one reason why the international surrogacy market is attractive to American parents. In countries such as India, where surrogacy arrangements are valid, many of the problems of the domestic surrogate market do not exist. However, this does not eliminate the need for clearer regulation of surrogacy at home. International surrogacy arrangements provide little or no protection for the surrogates and can provoke significant ethical concerns. Applying more stringent standards, such as terms regulating the eligibility of surrogate and intended parents, through a pre-approval process would make the arrangements appear less commercial in nature and prevent intended parents from taking advantage of surrogates. Clear state regulation of surrogacy is necessary to protect surrogates, intended parents and children.