SURROGACY AND PARENTAL RIGHTS: A NEED FOR UNIFORMITY IN THE LAW

ABSTRACT

Surrogacy has been a feasible way for various individuals and couples to have children since the early 1980's. Thanks to the development of remarkable scientific technologies, surrogacy has been particularly beneficial for people who strive to build a family but struggle with infertility. By 2008, 1,400 babies were born to surrogates. Surrogacy is now commonplace in society with celebrities such as Elton John, Nicole Kidman, and Sarah Jessica Parker openly discussing their reliance on surrogates to have children. Nevertheless, and perhaps unsurprisingly, the law is not keeping up with these scientific and societal developments. Four states currently ban surrogacy agreements, fourteen states allow at least one form of surrogacy agreements, and the remainder of the states—including Iowa—do not clearly address surrogacy agreements.

This Note discusses how advancements in scientific technology have allowed otherwise infertile people to have children by contracting with surrogate mothers. It then outlines the hodgepodge of laws addressing surrogacy throughout the United States and highlights ways in which this inconsistency in the law affects the rights of the parties involved in surrogacy agreements. Finally, this Note proposes that advocates of surrogacy in each state—especially in states that have not clearly addressed the issue—should urge state legislators to adopt uniform legislation on surrogacy in order to alleviate confusion and increase judicial efficiency. An example of such uniform legislation is briefly discussed at the end of this Note.

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I. INTRODUCTION

"There are more laws in the United States governing the breeding of dogs, cats, fish, exotic animals, and wild game species than exist with respect to the use of surrogates and reproductive technologies to make people."[1] Unfortunately, this statement rings true. Modern society is increasingly using surrogacy as a solution to infertility,[2] yet the law has been unable to keep up with the advancements of science.[3] Many states either have no laws that specifically address surrogacy agreements or have laws that are unclear on the topic.[4]

This Note addresses modern society's increased use of assisted reproductive technology generally and surrogacy specifically in Part II. Part III discusses the various ways states currently address the legal aspects of surrogacy. Part IV highlights the need for a more uniform approach to surrogacy and parental rights. Finally, this Note proposes a recommendation for legislative change in Part V. In conclusion, a more uniform approach to surrogacy agreements would be beneficial to not only the parties involved, but also state courts and legislatures.

1. Arthur Caplan, *The Baby Market: Ethics and Fees*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 29, 2009, 5:24 PM), http://roomfordebate.blogs.nytimes.com/2009/12/29/the-baby-market.

2. *See infra* Part II.

3. *See infra* Part IV.C.

4. *See infra* Part III.

II. MODERN SOCIETY'S INCREASED USE OF ASSISTED REPRODUCTIVE TECHNOLOGY GENERALLY AND SURROGACY SPECIFICALLY

A. *Surrogacy as a Solution to Infertility*

While individuals may choose to seek surrogacy services for a variety of reasons, in the United States, a large number of people who seek surrogacy services do so because they struggle with infertility. In 2002, the percentage of U.S. women (of all marital statuses) between the ages of 15 and 44 who were not surgically sterile and had difficulty becoming pregnant or carrying a pregnancy to term was 11.8 percent.[5] This number increased to 12.1 percent in the period between 2011 and 2015.[6] Further, the number of married women within that same age range who were not surgically sterile and were unable to become pregnant, despite having unprotected sex for 12 consecutive months, was 6.7 percent in the period between 2011 and 2015.[7] Finally, 12 percent of women between the ages of 15 and 44 had received some type of fertility service in that same interval.[8]

In the United States today, approximately six percent of all couples are infertile;[9] this means that they are unable to produce a child after a year of regular, unprotected sex.[10] Before recent developments in scientific technology, infertile couples' only options were to accept their infertility or adopt another person's child.[11] Though adoption may be the better alternative to remaining childless, infertile couples might not consider it a desirable option due to the lengthy process, the decline in children available for adoption, and the fact that the adopted child has no genetic connection

5. *Key Statistics from the National Survey of Family Growth - I Listing*, CDC NAT'L CTR. FOR HEALTH STATS., http://www.cdc.gov/nchs/nsfg/key_statistics/i.htm#infertility (last updated June 20, 2017).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Infertility FAQs: Is Infertility a Common Problem?*, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last updated Apr. 18, 2018).

10. *Infertility FAQs: What Is Infertility?*, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last updated Apr. 18, 2018).

11. Colette Archer, Comment, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152, 152 (2002).

to the commissioning couple.[12] Fortunately, toward the end of the twentieth century, the advent of various reproductive technologies allowed for alternatives to adoption that were not previously available to infertile couples.[13]

B. *Scientific Advancements in Assisted Reproductive Technology and Surrogacy Availability*

1. *Evolution of Assisted Reproductive Technology*

In vitro fertilization (IVF)[14] began in the 1890s when embryo transplantation was attempted on rabbits in the United Kingdom.[15] By 1959, a Chinese reproductive investigator was able to achieve live birth "from a white rabbit by using eggs and sperm from black rabbits."[16] The year 1973 marked the first time a human was impregnated through IVF techniques; unfortunately, however, the pregnancy did not result in birth.[17] The first successful IVF birth was in 1978 when Louise Brown was born.[18] The first male IVF baby was born in 1979.[19]

In 1980, the first IVF clinic was opened in the United States, and by 1981, the first U.S. child was born using IVF techniques.[20] These scientific advancements helped lay the groundwork for a new option for infertile couples who desire to have children that share their genetics: surrogacy.[21] In fact, a child was first born to a surrogate through embryo transfer in California in the early 1980s.[22]

12. *See id.*

13. *See, e.g.*, Ashley Peyton Holmes, Note, *Baby Mama Drama: Parentage in the Era of Gestational Surrogacy*, 11 N.C. J.L. & TECH. ONLINE 233, 233–34 (2010).

14. In vitro fertilization is the fertilization of a woman's eggs by mixing the eggs with sperm in a test tube or dish outside of the body and subsequently implanting the fertilized egg into the woman's uterus. *In Vitro Fertilization*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/in%20vitro%20fertilization (last visited Mar. 25, 2018).

15. Remah Moustafa Kamel, *Assisted Reproductive Technology After the Birth of Louise Brown*, 14 J. REPROD. INFERTILITY 96, 97 (2013).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 97–98.

21. *See id.*; Archer, *supra* note 11, at 153.

22. Kamel, *supra* note 15, at 98.

2. *Types of Surrogacy Agreements Available*

Surrogacy is a process involving the surrogate and the intended or commissioning parent(s).[23] Whenever a couple chooses to utilize a surrogate mother in order to have a child, the rights of the parties are often governed by a surrogate parenting agreement.[24] In general, a surrogate parenting agreement is a contract whereby a surrogate agrees to bear a child for the intended parent(s) and in which the surrogate generally gives up any rights she[25] has to the child.[26] These surrogacy agreements bring to light several issues: (1) whether and to what extent they will be enforced; (2) who will be named on the child's birth certificate as his or her parents; (3) how parentage will be determined in the long run; and (4) who will have standing to seek custody of or adopt the child.[27]

Surrogate parenting agreements generally fall under one of two categories: traditional or gestational.[28] Under a traditional agreement, a commissioning parent and surrogate agree that the surrogate will be inseminated on the commissioning parent's behalf.[29] The surrogate uses her own egg and is therefore the genetic mother of the child to be born.[30] Traditional surrogacy is also commonly referred to as "partial surrogacy."[31]

Under a gestational surrogacy agreement, an embryo is created using IVF techniques; that embryo is then implanted into the surrogate's uterus, and the surrogate carries the child for the intended parent(s).[32] The IVF

23. Archer, *supra* note 11, at 153.

24. *Cf. What Is Surrogate Parenthood?*, FINDLAW, http://family.findlaw.com/surrogacy-artificial-conception/what-is-surrogate-parenthood.html (last visited Mar. 25, 2018) (stating that surrogacy agreements are crucial to preventing future legal issues).

25. For purposes of consistency, the Author of this Note has chosen to refer to surrogates with female identifiers. The author in no way intends for this to convey that only women may be surrogates.

26. *See, e.g.*, *Surrogate-Parenting Agreement Law and Legal Definition*, USLEGAL, INC., http://definitions.uslegal.com/s/surrogate-parenting-agreement/ (last visited Mar. 25, 2018).

27. ANN LAQUER ESTIN, DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH 423 (2013).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Cf.* Austin Caster, Notes & Comments, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 480 (2011).

32. ESTIN, *supra* note 27, at 423.

process involves fertilizing the intended mother's egg with the intended father's sperm outside of the womb and implanting it into the surrogate.[33] The surrogate therefore has no genetic relationship to the child under a gestational surrogacy agreement.[34] Gestational surrogacy is also commonly referred to as "full surrogacy."[35]

3. *Increased Use of Surrogates*

Surrogacy became open to the public in the United States towards the end of the 1970s.[36] The first traditional surrogacy agreement in the United States was arranged by a Michigan attorney named Noel Keane,[37] who is known as the "father of surrogate motherhood."[38] In traditional surrogacy, the intended father and the surrogate mother are equally biologically related to the child, which makes it difficult for a court to decide who the legal parents of the child should be.[39] Thus, after the development and perfection of IVF in the early 1980s, gestational surrogacy became another available option for those unable to conceive or who wish to forego traditional pregnancy.[40]

Gestational surrogacy arrangements often alleviate some of the difficulties courts face in deciding who the legal parents of the child will be because the surrogate mother has no genetic relationship to the child.[41] It is a more attractive option for women who are willing to provide eggs but do not want to endure pregnancy and for women who feel more comfortable carrying a child that is not genetically their own.[42] Nonetheless, many couples continue to prefer traditional surrogacy for various reasons.[43]

33. Caster, *supra* note 31, at 481.

34. *Id.*

35. *Id.*

36. Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 70 (2013).

37. *Id.*

38. Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. SUPPLEMENT 97, 98 (2010).

39. Caster, *supra* note 31, at 480.

40. Conklin, *supra* note 36, at 71.

41. *See* Caster, *supra* note 31, at 481.

42. Conklin, *supra* note 36, at 71.

43. Some reasons for choosing traditional surrogacy over gestational surrogacy include fewer medical risks for the surrogate mother and better odds that the egg will implant in the surrogate's uterus. Also, it may be the only option for intended mothers who are infertile and therefore cannot use their own eggs. Caster, *supra* note 31, at 481.

By 2004, there were approximately 738 children born to surrogate mothers; this number nearly doubled in 2008, when the number of children born to surrogates increased to almost 1,400.[44] This striking increase in the number of people utilizing surrogacy has forced the general public to become aware of surrogacy's existence.[45] Furthermore, surrogacy has become so commonplace in modern society that it has been depicted on television and in books, and celebrities such as Elton John, Nicole Kidman, and Sarah Jessica Parker have openly discussed their use of surrogates to have children.[46] Over time, this spotlight on surrogacy has led to a greater acceptance of it and cognizance of the issues accompanying the practice.[47] Nonetheless, state laws continue to vary greatly in terms of the respective rights of the parties involved in surrogacy agreements.[48]

III. VARIATION IN STATE LAWS

A. *States Prohibiting Surrogacy Agreements*

There are currently four states in which there are laws that explicitly ban one form of surrogacy agreement or the other: Michigan, Indiana, New Jersey, and New York.[49] Michigan prohibits all forms of surrogacy agreements in its Surrogate Parenting Act.[50] In *Doe v. Attorney General*, the Michigan Supreme Court considered the constitutionality of the Surrogate Parenting Act (and ultimately upheld it), and in doing so, it offered three

44. Kari Lydersen, *Make Room for Daddies: Surrogate Demand Grows*, CRAIN'S CHI. BUS. (Feb. 2, 2013), http://www.chicagobusiness.com/article/20130202/ISSUE03/302029981/make-room-for-daddies-surrogate-demand-grows.

45. *See, e.g.*, *id.*

46. Conklin, *supra* note 36, at 67 (quoting Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J., Mar. 2011, at 53, 54).

47. Makenzie B. Russo, The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States 13 (Spring 2016) (unpublished senior thesis, Trinity College) (on file with the Trinity College Digital Repository).

48. *See infra* Part III.

49. ALEX FINKELSTEIN, ET AL., SEXUALITY & GENDER LAW CLINIC, COLUMBIA LAW SCH., SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 9 (2016), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf.

50. Surrogate Parenting Act, MICH. COMP. LAWS ANN. § 722.855 (West 2018) (making all surrogate parenting agreements "void and unenforceable as contrary to public policy").

compelling state interests behind the Act's creation.[51]

The first interest the court articulated was the interest in ensuring children are not considered commodities or merchandise.[52] The second interest was in preserving the child's best interests; the court reasoned that because surrogacy agreements are made by and for the parents, the child's interests may not be considered.[53] Further, the court noted the long-term effects of such agreements are unknown and may in fact be detrimental to the child's well-being.[54] Finally, the court recognized an interest in protecting women from being exploited.[55] The court reasoned, "Surrogacy for-profit arrangements have the potential for demeaning women by reducing them to the status of 'breeding machines.'"[56] The court ultimately concluded these interests were compelling enough to warrant an invasion of the private right to procreate through the creation of the Surrogate Parenting Act.[57]

In Indiana, any surrogacy contract is unenforceable and against public policy if it includes provisions requiring a surrogate to do any of the following: (1) offer a gamete for the conception of a child; (2) become pregnant; (3) have or consent to having an abortion; (4) subject herself to medical or psychological care; (5) perform an activity or consume a substance under the demand of another; (6) waive rights or obligations to a child; (7) "[t]erminate care, custody, or control of a child[;]" or (8) give her consent for a stepparent adoption.[58] Similar to Michigan, Indiana legislators may have banned surrogacy agreements for a variety of reasons, including preventing the exploitation of poor women and health risks to the child, recognizing religious opposition from those who believe that procreation is an act of marriage, decreasing litigation over parental rights, and ensuring children are not treated as products for sale.[59]

New Jersey outlawed traditional surrogacy contracts in the famous *In*

51. Doe v. Att'y Gen., 487 N.W.2d 484, 486–88 (Mich. Ct. App. 1992).
52. *Id.* at 486–87.
53. *Id.* at 487.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 486.
58. *Compare* IND. CODE ANN. § 31-20-1-1 (West 2018), *with* Surrogate Parenting Act, MICH. COMP. LAWS ANN. § 722.855 (West 2018).
59. Alyssa James, Note, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 191–92, 193, 195–96 (2013).

re Baby M case.[60] In 1985, William Stern and Mary Beth Whitehead entered into a surrogacy agreement in which Mr. Stern's sperm would be used to impregnate Ms. Whitehead through artificial insemination.[61] Ms. Whitehead agreed to carry and give birth to the child and then release the child and any parental rights she may have to Mr. Stern and his wife.[62] The agreement also provided that Mr. Stern would pay Ms. Whitehead $10,000 after the child was delivered to him.[63]

Ms. Whitehead gave birth to the child and later refused to give the child to the Sterns because she had become emotionally attached to the child.[64] The Sterns attempted to enforce the surrogacy agreement and to retain custody of the child, and after a 32-day trial, the court held that the agreement was valid and gave Mr. Stern full custody of the child.[65] The case was brought to the Supreme Court of New Jersey after Ms. Whitehead appealed the trial court's decision.[66]

The primary issue addressed by the Supreme Court of New Jersey was the validity and enforceability of the surrogacy agreement.[67] The court ultimately held that the agreement was invalid because it conflicted with existing laws and was against the state's public policies.[68] The court nonetheless granted custody to the Sterns because their family life and personalities were better suited to serve the child's best interests.[69] The case was remanded to the trial court to determine Ms. Whitehead's visitation rights; specifically, the trial court would decide "what kind of visitation shall be granted to [Ms. Whitehead], with or without conditions, and when and under what circumstances [the visitation] should commence."[70]

Finally, New York has banned surrogacy by statute in section 122 of the New York Domestic Relations Law.[71] After the *Baby M* decision, New

60. *See In re* Baby M, 537 A.2d 1227, 1243 (N.J. 1988) ("[I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts.").
61. *Id.* at 1235.
62. *Id.*
63. *Id.*
64. *Id.* at 1236–37.
65. *Id.* at 1237–38.
66. *Id.* at 1238.
67. *Id.* at 1240.
68. *Id.*
69. *Id.* at 1258–59.
70. *Id.* at 1263.
71. N.Y. DOM. REL. LAW § 122 (McKinney 2018).

York courts struggled with the best way to address surrogacy agreements and came to conflicting conclusions on the issue.[72] The legislature took action to address this issue, which led to the enactment of section 122.[73] The law made it clear that surrogacy agreements were against public policy in New York and therefore void and unenforceable.[74]

B. *States Expressly Allowing Surrogacy*

As of 2016, 14 states had statutes that permitted and regulated at least one form of surrogacy.[75] However, even among the states expressly allowing surrogacy, there is inconsistency as to how the states approach issues such as compensation, who may be an intended parent, who may be a surrogate, which type of surrogacy is allowed, and how to establish parentage. For example, Colorado has a statute allowing and regulating partial surrogacy, but the statute does not address full surrogacy.[76] Illinois, on the other hand, comprehensively regulates surrogacy agreements, making both gestational mothers and intended parents meet specific requirements.[77] In yet another variation, North Dakota expressly allows full surrogacy[78] while banning partial surrogacy.[79]

C. *States that Do Not Clearly Address Surrogacy*

Finally, in the remaining states, surrogacy is not clearly addressed by either statute or case law.[80] The laws in these states vary considerably regarding whether and how surrogacy works.[81] For example, while Minnesota has no specific laws addressing surrogacy,[82] under the Minnesota

72. William J. Giacomo & Angela DiBiasi, *Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements*, 36 PACE L. REV. 251, 252–53 (2015).

73. *Id.*

74. *Id.* (quoting N.Y. DOM. REL. LAW § 122 (McKinney 2015)).

75. FINKELSTEIN, ET AL., *supra* note 49, at 9.

76. *See* Uniform Parentage Act, COLO. REV. STAT. ANN. § 19-4-106 (West 2018).

77. *See* Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/25 (West 2018).

78. *See* N.D. CENT. CODE ANN. § 14-18-08 (West 2018).

79. *See id.* § 14-18-05.

80. FINKELSTEIN, ET AL., *supra* note 49, at 10, 57–62.

81. *Id.*

82. *See, e.g.*, LEGISLATIVE COMM'N ON SURROGACY, SURROGACY COMMISSION JUNE 28, 2016 PRESENTATION NOTES: OVERVIEW OF COURT CASES AND LEGISLATIVE ACTIVITY IN MINNESOTA; KEY POLICY ISSUES 1 (2016), https://www.lcc.leg.mn/lcs/meetings/06282016/surrogacy_commission_pontius.pdf; *see also* Editorial, *Minnesota Needs Clarity on Surrogacy Laws*, STAR TRIB. (Feb. 13, 2017), http://www.startribune.com/minnesota-needs-clarity-on-surrogacy-laws/413648413/

Parentage Act, "[T]he donor of genetic material for assisted reproduction for the benefit of a recipient parent, whether sperm or ovum (egg), [may not] claim to be the child's biological or legal parent."[83] This law does not specifically address surrogacy, but it implies that a traditional surrogate may not claim to be a child's legal or biological parent.[84]

Further, Minnesota adoption laws do not address surrogacy.[85] Recognizing the lack of clarity in laws regarding surrogacy, the Minnesota legislature attempted to pass an assisted reproduction law in 2008, which included a legal framework for surrogacy.[86] However, despite being approved by the house and senate, the law never went into effect because it was vetoed by Minnesota's former governor for not adequately protecting the surrogate and child.[87]

Notably, Iowa is another state that does not clearly address surrogacy.[88] There is a law in Iowa prohibiting the sale or purchase of a human being, and that law specifically states that the prohibition against selling or purchasing a human being does not apply to surrogacy agreements.[89] The Iowa Department of Public Health has also provided administrative rules detailing the procedures required in establishing a birth certificate for a child born by a gestational surrogacy agreement.[90] The provisions detail different procedures depending upon whether the surrogacy is full or partial, who donated the sperm and egg, and whether or not the parties are married. [91] While these references to surrogacy imply that surrogacy is allowed in Iowa, Iowa has not directly addressed or regulated surrogacy in either case law or statute.[92]

(detailing a lack of a clear standard of the law and inconsistent interpretations by judges at the county level).

83. Parentage Act, MINN. STAT. ANN. § 257.62 (West 2017).

84. *See id.* A traditional surrogate, by definition, donates her egg for a "recipient parent" and would therefore be barred from claiming she is the child's parent under this section. *See id.*

85. There are no terms relating to surrogacy in the definition section of Minnesota's statutory code addressing adoption. *See* MINN. STAT. ANN. § 259.21 (West 2017).

86. LEGISLATIVE COMM'N ON SURROGACY, *supra* note 82, at 1–2.

87. *Id.*

88. FINKELSTEIN, ET AL., *supra* note 49, at 58.

89. IOWA CODE ANN. § 710.11 (West 2018).

90. *See* IOWA ADMIN. CODE r. 641-99.15 (2018).

91. *Id.*

92. *See, e.g.*, Kyle Munson, *Iowa Climate on Surrogacy Favorable*, DES MOINES REG. (Aug. 22, 2014), https://www.desmoinesregister.com/story/news/2014/08/12/iowa-climate-surrogacy-favorable/13986757.

However, the law surrounding surrogacy contracts in Iowa recently became at least somewhat clearer. A case involving a Cedar Rapids, Iowa couple and a Muscatine, Iowa surrogate made its way to the Iowa Supreme Court in late 2017.[93] In 2013, Paul and Chantele Montover decided to have a child together; however, they were both 50 years old at the time, and Mrs. Montover was no longer able to carry a child.[94] The Montovers thus resorted to posting a Craigslist ad in an effort to find a surrogate who would be willing to carry their child.[95] Their efforts were initially successful: a woman, referred to as T.B. in court documents, responded to the ad.[96]

A donor's eggs were fertilized with Mr. Montover's sperm using IVF techniques, and pursuant to a gestational surrogacy contract between the Montovers and T.B., the eggs were implanted into T.B.'s womb.[97] Under the surrogacy contract, the Montovers agreed to pay T.B. $13,000 once the child was born, and T.B. agreed to terminate her parental rights and voluntarily surrender the child to the Montovers.[98] An unusual aspect of this case is that T.B. apparently intended to use the money she would receive under the agreement with the Montovers in order to pay for her own IVF procedure that she could not otherwise afford.[99]

The Montovers were present at the first ultrasound appointment after the eggs were implanted, but that was the last time they saw T.B. or her husband.[100] T.B.'s husband videotaped the ultrasound appointment, claiming

93. Mike Kilen, *Who Is Baby H's Parent? Iowa Legal Battle Pits Surrogate Against Couple Who Hired Her*, DES MOINES REG. (Aug. 29, 2017), https://www.desmoinesregister.com/story/news/2017/08/29/who-baby-hs-parent-iowa-legal-battle-pits-surrogate-against-couple-who-hired-her/580737001.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; Ruling on Motion to Dismiss, Motions for Summary Judgment, and Request for Order Regarding Birth Certificates at 1, P.M. v. D.B. (Iowa Dist. Ct. Linn Cty. Feb. 21, 2017) (No. EQCV086415).

99. Kilen, *supra* note 93. This fact may be part of the reason why this particular surrogacy contract eventually took a turn for the worse. If the Montovers had used a surrogacy agency to find a gestational carrier, rather than post an ad on Craigslist, the Montovers could have been protected by screening procedures. *See id.* Those screening procedures would likely have resulted in T.B. being excluded from the agency's available gestational carriers because a surrogate who is unable to have her own children presents "a huge red flag" to such agencies. *Id.*

100. *Id.*

that they were simply documenting the surrogacy experience.[101] This action made the Montovers uncomfortable, and rightfully so. From that point on, the Montovers' relationship with T.B. and her husband soured, and T.B. refused to talk directly to the Montovers.[102] Instead, T.B. hired an attorney to handle communications with the Montovers and did not allow the Montovers to be present at the next ultrasound.[103]

The Montovers became so frustrated with being excluded by T.B. that they made derogatory comments to the family of T.B.'s husband, using racial slurs to describe him.[104] As a result of these tensions between T.B. and the Montovers, T.B. eventually gave birth to the child, Baby H, without the Montovers' knowledge.[105] The Montovers did not learn of the child's birth until approximately two months after she was born.[106]

In a statement released through T.B.'s attorney, T.B. expressed her concerns that the Montovers would not be good parents; she felt this way because of the "racially charged exchange" that took place between the Montovers and T.B.[107] She felt that if she allowed the Montovers to take Baby H despite her worries they would not be good parents, she would be "forced to face the reality . . . that [she was engaged in] the purchase of a child."[108] The Montovers denied being racist, regretted making the derogatory comments, and claimed T.B. truly was motivated by money—she threatened abortion or adoption if the Montovers would not pay her more money than was initially agreed upon.[109]

When Baby H was born, T.B.'s name was placed on the birth certificate, and T.B. remained in the hospital with Baby H for the next two months while Baby H underwent surgery and received other medical treatment.[110] When the Montovers finally learned of Baby H's birth, Paul Montover filed a temporary injunction to prevent T.B. from violating the

101. *Id.*
102. *Id.*
103. *See id.*
104. *Id.*
105. *Id.* There were actually two children born because T.B. was pregnant with twins; however, both children weighed only two pounds at birth, and unfortunately, one of the children passed away shortly after she was born. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

surrogacy contract.[111] A genetic test was ordered, and the test confirmed that Mr. Montover was Baby H's father and that T.B. was not genetically related to Baby H.[112]

In February of 2017, the Iowa District Court for Linn County found the Montovers' surrogacy contract with T.B. was enforceable, did not violate Iowa law or public policy, and did not violate T.B.'s or Baby H's constitutional rights.[113] As a result, the court awarded custody of Baby H to the Montovers.[114] At the time this Note was written, Baby H had recently turned one year old and, despite her premature birth, had outgrown most of her medical issues.[115] She is an "angel" who brings great joy to the Montovers.[116] However, this "happy ending" was just another beginning for the Montovers—the beginning of a legal battle before the Iowa Supreme Court.[117]

T.B. decided to appeal the district court's decision, and she filed documents with the Iowa Supreme Court in the summer of 2017.[118] T.B. was represented by Harold Cassidy, who is known for representing the surrogate in the famous *In re Baby M* case, which resulted in a decision that surrogacy contracts were unenforceable as violative of public policy in the state of New Jersey.[119] On appeal, T.B. argued the district court was wrong to conclude that she, as a gestational carrier, did not make any biological contributions to Baby H's procreation.[120] T.B. posited, by virtue of carrying Baby H in her womb, T.B. is Baby H's biological parent.[121]

On the other hand, the Montovers, who were represented by attorneys Philip De Koster and Kevin Rigdon, argued neither T.B. nor her husband

111. Ruling on Motion to Dismiss, Motions for Summary Judgment, and Request for Order Regarding Birth Certificates, *supra* note 98, at 4.

112. *Id.* at 6.

113. *Id.* at 10, 12, 14.

114. *Id.* at 28.

115. Kilen, *supra* note 93.

116. *Id.*

117. *See id.*

118. *Id.*

119. *Id.*; *see In re* Baby M, 537 A.2d 1227, 1243 (N.J. 1988) ("[I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts.").

120. Appellants' Final Brief at 24–25, P.M. v. D.B. (Iowa Sept. 7, 2017) (No. 17-0376).

121. *Id.* at 30.

are genetically related to Baby H.[122] Baby H is, however, biologically related to Paul Montover, and the Montovers specifically had the genetic material created so they could have a child of their own.[123] T.B. may have an emotional connection to Baby H, but such a connection is not enough to give her parental rights over Baby H.[124] In addition, Iowa courts have made it clear that a genetic connection is a primary consideration when determining parental rights.[125] The Iowa Supreme Court heard oral arguments in this case on December 13, 2017, and their final decision was filed on February 16, 2018.[126]

In its final decision, the Iowa Supreme Court held the agreement between T.B. and the Montovers was enforceable under Iowa law and thus affirmed the district court's rulings.[127] The court first reasoned the surrogacy agreement in the Montovers' case was consistent with existing statutory provisions in Iowa.[128] In fact, the court concluded neither gestational nor traditional surrogacy agreements are prohibited under Iowa Code § 710.11 (the provision that exempts surrogacy from a criminal prohibition on baby-selling).[129] Additionally, the court reasoned that the administrative provisions developed by Iowa's Department of Public Health specifically contemplate gestational surrogacy agreements through IVF, and that adoption statutes (which provide certain safeguards for individuals who release their children through the adoption process) are inapplicable in the surrogacy context.[130]

122. *See id.* at 23–24.

123. Kilen, *supra* note 93.

124. *Id.*; Appellees' Final Brief, *supra* note 120, at 40, 45.

125. Appellees' Final Brief, *supra* note 120, at 65–68; *see, e.g.*, *In re* Bruce, 522 N.W.2d 67, 72 (Iowa 1994) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 846 (1977) ("[There is a] constitutionally recognized liberty interest [deriving] from blood relationship . . . and basic human right.").

126. *Case No. 17-0376: P.M. and C.M. v. T.B. and D.B.*, IOWA JUDICIAL BRANCH, https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0376 (last visited Jan. 28, 2018).

127. Opinion at 29, 38, P.M. v. D.B. (Iowa Feb. 16, 2018) (No. 17-0376).

128. *Id.* at 25.

129. *Id.* at 21.

130. *Id.* at 21–25. The court's reasoning that adoption statutes are inapplicable in the surrogacy context at first glance seems to be limited to gestational surrogacy agreements, as the court specifically referred to the fact that T.B. is not Baby H's genetic mother. *See id.* at 23. However, later in the opinion, the court emphasized that Baby H would not have been born but for the acted-on intention of the Montovers in bringing about her birth through IVF. Additionally, the Montovers would not have entrusted T.B. with

The court further reasoned that the Montovers' surrogacy agreement was not against Iowa's public policy because it was a freely negotiated contract between consenting adults.[131] Additionally, the court rejected T.B.'s argument that surrogacy agreements violate Iowa's public policy favoring families by "destroying the surrogate mother-child relationship."[132] Instead, the court emphasized the fact that "gestational surrogacy agreements *promote* families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers."[133] The court's holding did, however, leave open the possibility that a surrogacy agreement in a different case may still be held invalid under the usual contract defenses of fraud, duress, and unconscionability.[134]

Unfortunately, the legal issues and rights of the parties presented in the case of T.B. and the Montovers are not unique. Although the Iowa Supreme Court's holding in the Montovers' case does indicate a positive move toward enforcing surrogacy agreements in Iowa, the lack of legislative guidance regarding how to create an enforceable surrogacy agreement still places future intended parents and surrogates in difficult situations. This issue and other similar issues are further discussed in Part IV below.

IV. THE NEED FOR A UNIFORM APPROACH TO SURROGACY AND PARENTAL RIGHTS

A. *The Effects Varying State Laws Have on the Rights of the Parties*

1. *Surrogate Mothers' Rights*

While there is no law directly addressing a surrogate mother's right to abort (or not abort) her pregnancy, an inquiry into the relevant law would suggest the surrogate has a constitutional right to abort (or not abort).[135] In *Roe v. Wade*, the U.S. Supreme Court held that a pregnant woman may decide, along with her physician, to abort a fetus before the fetus reaches

the fertilized embryo if they thought she would attempt to raise the child herself. Thus, the court at least impliedly holds that the adoption statutes would be inapplicable in a traditional surrogacy arrangement as well. *See id.* at 25.

131. *Id.*

132. *Id.* at 29.

133. *Id.* (emphasis in original).

134. *Id.* at 29–30.

135. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

viability.[136] However, the Court also held a state may regulate abortion in order to promote maternal health—and even proscribe abortion after viability—unless abortion is medically necessary to preserve the mother's life or health.[137] The Supreme Court further discussed (and refined) a woman's abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[138]

In *Planned Parenthood*, a plurality of the Court held that so long as a state does not impose substantial obstacles to a woman's right to choose and the regulations are intended to promote a woman's health or safety, the state may regulate abortion even before viability.[139] However, the Court did not go so far as to require a woman to obtain her husband's consent prior to seeking an abortion.[140] In fact, the Court stated, "The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. . . . A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."[141] If a wife is not required to obtain her husband's consent before seeking an abortion, it would only be logical that a surrogate should not be required to obtain consent from the intended parents before making the same choice.[142]

A separate but related constitutional right applicable to surrogate mothers is the right to medical self-determination. Surrogacy agreements often include provisions attempting to limit a surrogate's rights to make medical decisions—such as what medications she may take during pregnancy and whether she will choose natural or cesarean birth—and instead leave those decisions under the control of the intended parents.[143] Though these provisions may reflect the intent and expectations of the parties at the time the agreement is made, such provisions may not pass constitutional muster.[144]

136. *Roe*, 410 U.S. at 156, 163–64.

137. *Id.* at 164–65.

138. *Planned Parenthood of Se. Pa.*, 505 U.S. 833 *passim.*

139. *Id.* at 878.

140. *Id.* at 898.

141. *Id.*

142. DEBORAH H. WALD & KATHERINE BLACK, WALD & THORNDAL, P.C., SURROGACY AND A PREGNANT WOMAN'S CONSTITUTIONAL RIGHT TO MEDICAL AND PROCREATIVE CHOICE—A BRIEF SURVEY 3 (2011), http://www.waldlaw.net/assets/files/ABA%20surrogacy%20article.10.2011.pdf.

143. *Id.* at 4.

144. *Id.*

In *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, the Supreme Court held that implicit in the Fourteenth Amendment's guarantee—"no State shall 'deprive any person of life, liberty, or property, without due process of law'"—is a "constitutionally protected liberty interest in refusing unwanted medical treatment."[145] This right to refuse medical treatment has been recognized for pregnant women in several jurisdictions.[146] However, some states have ordered women to undergo unwanted medical treatment when the refusal clearly placed a viable fetus in severe risk.[147] Therefore, the rights of surrogate mothers and intended parents regarding medical decision-making will vary depending upon the laws of the deciding state.[148]

Consider the following true story as just one example of how varying state surrogacy laws might affect surrogacy agreements and the parties involved (and in particular, a surrogate's right to choose whether or not to have an abortion). Crystal Kelley, a woman who suffered from miscarriages in the past but was eventually able to have children of her own, decided to become a surrogate mother so she could help others with fertility problems.[149] She was also incentivized by the $22,000 fee she would receive in exchange for carrying and giving birth to the child; she was a single, unemployed mother with no permanent living arrangements.[150]

Through a fertility service, Ms. Kelley was connected with a couple in Connecticut who was interested in having her carry their child.[151] The couple already had three children, all of whom were conceived through the use of IVF. They yearned for a fourth child, but the mother was no longer able to conceive.[152] Ms. Kelley agreed to carry a child for the couple, and the parties signed a surrogacy agreement.[153] In October of 2011, two embryos were

145. Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

146. *See, e.g.*, *In re* A.C., 573 A.2d 1235, 1237 (D.C. Cir. 1990); *In re* Fetus Brown, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997); Taft v. Taft, 446 N.E.2d 395, 396–97 (Mass. 1983).

147. WALD & BLACK, *supra* note 142, at 4–5 (citing Crouse Irving Mem'l Hosp., Inc. v. Paddock, 485 N.Y.S.2d 443, 446 (Sup. Ct. 1985); Jefferson v. Griffin Spalding Cty. Hosp. Auth., 274 S.E.2d 457, 460–61 (Ga. 1981) (per curiam) (Hill, J., concurring)).

148. *See id.* at 5.

149. Elizabeth Cohen, *Surrogate Offered $10,000 to Abort Baby*, CNN (Mar. 6, 2013), http:// http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

implanted into Ms. Kelley's uterus.[154] Days later, it was verified that Ms. Kelley was indeed pregnant with the couple's child.[155]

Ms. Kelley and the intended parents were ecstatic, and the couple was very supportive during the early months of Ms. Kelley's pregnancy.[156] They even helped Ms. Kelley pay her rent when she was unable to do so by providing her monthly surrogate fee earlier than usual.[157] This happy story took an unfortunate turn in February of 2012 when Ms. Kelley had a routine ultrasound five months into her pregnancy to check the fetus's development.[158] The ultrasound revealed that "the baby had a cleft lip and palate, a cyst in her brain and serious heart defects. [The doctors] couldn't see a stomach or a spleen."[159] The baby had a good chance of surviving the pregnancy, but doctors explained that she would need several heart surgeries after birth; her chances of having a "normal life" were only about 25 percent.[160]

The couple's three children were all born prematurely, and two of them continued to need medical care; thus, one of the reasons they sought a surrogate to carry their fourth child was "to minimize the risk of pain and suffering for their baby."[161] The couple felt that, given the baby's dire medical condition and the extensive interventions needed in the future (and the overwhelming effects these interventions would have on an infant), it would be "a more humane option to consider pregnancy termination."[162] Ms. Kelley, on the other hand, had moral and religious objections to abortion and wanted to give the child a chance at life, so she refused to terminate the pregnancy.[163]

It was ultimately Ms. Kelley's choice whether she should abort the child, but she was told if she chose to have the child, the couple would no

154. *Id.* The embryos were previously frozen by the couple. *Id.* They were composed of the intended father's sperm and, unbeknownst to Ms. Kelley at this time, a donor's egg. *Id.* The fact that the embryos were partly composed of a donor egg created further complications later when custody came in dispute, but this was ultimately unimportant because the parties came to their own agreement regarding custody. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

longer agree to be the legal parents.[164] Ms. Kelley was thus initially faced with the choice of ending a life or raising the child on her own—neither being a choice she wanted to make. In an effort to further persuade Ms. Kelley to terminate the pregnancy, the couple offered her $10,000 to abort.[165] Though this was initially a tempting offer due to her financial situation, Ms. Kelley again refused to terminate the pregnancy.[166] Finally, the couple retained an attorney.[167]

The couple's attorney reminded Ms. Kelley of the surrogacy agreement she previously signed.[168] In the agreement was a clause whereby Ms. Kelley agreed to "abortion in case of severe fetus abnormality," but nowhere in the agreement was "severe fetus abnormality" defined.[169] The couple's attorney told Ms. Kelley she was obligated to have an abortion based on this agreement, and she must do so as soon possible—while abortion was still a legal option.[170] The attorney also told Ms. Kelley, because she was in breach of the agreement, she would have to pay the couple all of the previously received surrogacy fees (nearly $8,000), medical expenses, and any legal fees if she did not abort.[171]

At that point, Ms. Kelley retained her own attorney who took her case for free.[172] Ms. Kelley's attorney corresponded with the couple's attorney; he reiterated the fact that Ms. Kelley would not seek an abortion but was open to negotiating other solutions.[173] In yet another turn of events, the couple's attorney notified Ms. Kelley that the couple now intended to take legal custody of the child, and immediately after the child was born, they would relinquish their custody rights, making the child a ward of the state of Connecticut.[174]

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* Surprisingly, it appears the couple could do this legally. *See, e.g.*, Raftopol v. Ramey, 12 A.3d 783, 787 (Conn. 2011). If the agreement were found to be valid, the intended parents would likely be the legal parents of the child under Connecticut law. *See, e.g.*, *id.* (affirming the trial court's decision to grant parental rights to the intended parent of a valid surrogacy agreement). In addition, Connecticut's Safe Haven Law would allow the couple to bring the child (under 30 days old) to an emergency room and

Ms. Kelley's attorney warned her she would likely lose a custody battle in Connecticut because "genetic parents" are presumed parents under the state's laws, and he suggested Ms. Kelley relocate to a state that would recognize her—not the couple—as the child's legal parent.[175] In April of 2012, Ms. Kelley, then seven months pregnant, decided to move to Michigan—a state that does not recognize surrogacy agreements and would therefore give her legal custody of the child.[176] Also influencing Ms. Kelley's decision to move to Michigan was the state having a hospital with an excellent pediatric heart program.[177]

Although Ms. Kelley wanted the child to live, she knew she was not the best person to care for the child, so she decided that she would give the child up for adoption after she was born.[178] Ms. Kelley was able to find a couple with experience in caring for children with special needs who agreed to adopt the baby.[179] Eventually, the intended parents came to an agreement with Ms. Kelley that they would give up any rights to the child so long as they could maintain contact with the adoptive parents and be informed regarding the child's health.[180]

Fortunately, this dispute was resolved between the parties, outside of a courtroom. However, what would have happened if this case went to trial? The answer is: it depends. If the case were brought before a court in Michigan, where Ms. Kelley strategically chose to relocate, she would likely be given parental rights despite having no biological relation to the child.[181] The surrogacy agreement would not be recognized, and the intended parents would have no parental rights.[182]

On the other hand, if the case was brought before a court in Connecticut, where the intended parents lived, the couple would likely be given parental rights, and Ms. Kelley would have no such rights to the

voluntarily give up custody. *See* CONN. GEN. STAT. ANN. § 17a-58 (West 2018) (describing the procedure emergency-room staff should follow when a parent voluntarily relinquishes custody of a child younger than 30 days old).

175. Cohen, *supra* note 149.

176. *Id.*; *cf.* Doe v. Att'y Gen., 487 N.W.2d 484, 487 (Mich. Ct. App. 1992) (holding that the Surrogate Parenting Act, which made surrogacy agreements invalid in Michigan, was constitutional).

177. Cohen, *supra* note 149.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See Doe*, 487 N.W.2d at 488; Cohen, *supra* note 149.

182. *See Doe*, 487 N.W.2d at 488; Cohen, *supra* note 149.

child.[183] This story was told from the perspective of Ms. Kelley, but what about the intended parents? What, if any, rights did they have to the child? How were those rights affected by Ms. Kelley's decisions throughout the pregnancy? Such questions are addressed below.

2. Intended Parents' Rights

The Supreme Court has recognized procreation as a protected decision linked to the right to privacy.[184] In *Carey v. Population Services International*, the Court noted that one of the fundamental liberties protected by the Fourteenth Amendment is the right to privacy.[185] The Court further noted the right to privacy encompasses the personal decision to procreate.[186] A person is therefore protected under the Constitution to make decisions relating to procreation, and those decisions may be made without the government unjustifiably interfering.[187]

Similarly, in *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court stated, "Marriage and procreation are fundamental to the very existence and survival of the race."[188] It further characterized the ability to have children as a basic civil right.[189] Finally, in *Stanley v. Illinois*, the Supreme Court acknowledged the ability to have and maintain a relationship with one's child is an interest deserving protection and utmost respect in the courts.[190] Couples and individuals who make the decision to utilize surrogacy as a way to procreate therefore have rights that are, and should be, protected by the Constitution—without undue interference by the government.[191]

How do these constitutional rights relate to surrogacy agreements?

183. *See* Raftopol v. Ramey, 12 A.3d 783, 787 (Conn. 2011) (affirming the trial court's decision to grant parental rights to the intended parent of a valid surrogacy agreement).

184. *Accord* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1972); *see* Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977).

185. *Carey*, 431 U.S. at 684.

186. *Id.* at 685.

187. *Id.*

188. *Skinner*, 316 U.S. at 541.

189. *Id.*

190. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1945) (Frankfurter, J., concurring)).

191. *See* Michelle Elizabeth Holland, Note, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, U.C. DAVIS J. JUV. L. & POL'Y, Summer 2013, at 1, 12–14 (arguing Arizona's surrogacy statute limits a couple's right to procreate without substantial justification).

Have states recognized these intended parents' rights? Once again, the answer depends upon which state addresses the surrogacy dispute. For example, the Court of Appeals of Ohio addressed a surrogate mother's breach of a surrogacy agreement in *S.N. v. M.B.*[192] In this particular arrangement, neither the intended mother nor the surrogate mother were biologically related to the child; the embryos implanted into the surrogate were composed of donor eggs and sperm.[193] With no laws in Ohio that directly addressed such an arrangement, the court analyzed the breach under the state's contract and parentage laws.[194]

In the surrogacy agreement, the surrogate mother agreed to relinquish any and all rights and responsibilities to any children born pursuant to the surrogacy arrangement.[195] Importantly, she further agreed: "[A]ny child or children born to Surrogate as a result of this Agreement will be the Intended Mother's child or children."[196] The surrogate breached this agreement upon the birth of a child she was carrying for the intended mother and attempted to be adjudicated the child's parent under Ohio law.[197]

Under Ohio parentage laws, the surrogate would normally be presumed the mother simply because she gave birth to the child.[198] However, here, the intended mother was able to rebut that presumption by presenting the surrogacy agreement to the court.[199] The court stated, "In this case, the surrogacy agreement, which sets forth [the intended mother's] clear intention to cause the birth of the child and raise it on her own, manifests [the intended mother's] voluntary acknowledgement of maternity."[200] After considering the agreement's terms and the surrounding circumstances, the court found the agreement enforceable and thus held the intended mother was "the child's legal and natural mother."[201] The court recognized the intended mother's constitutionally protected choice to have and raise a child of her own.[202]

192. S.N. v. M.B., 935 N.E.2d 463 *passim* (Ohio Ct. App. 2010).
193. *Id.* at 465.
194. *Id.* at 469–72.
195. *Id.* at 465.
196. *Id.*
197. *Id.* at 465–66.
198. *Id.* at 470 (citing OHIO REV. CODE ANN. § 3111.02(A) (West 2010)).
199. *Id.*
200. *Id.*
201. *Id.* at 473.
202. *Id.* at 470 (finding the intended mother's acknowledgement of maternity was evidenced by her decisions to cause a child to be born from the surrogate and to raise

Unfortunately, an intended mother's constitutionally protected choices to have and raise her own children are not as easily recognized in Arizona. Claudia Arévalo was diagnosed with stage two breast cancer in 2004; concerned that the chemotherapy would affect her ability to have children, Ms. Arévalo chose to freeze some of her eggs which were fertilized with her husband's sperm using IVF techniques.[203] Ten years later, Ms. Arévalo, then cancer-free, was ready to have a child.[204] However, she was unable to carry one herself, so she entered into a surrogacy agreement with a close friend who was willing and able to carry the child for her.[205]

Pursuant to the agreement, one of Ms. Arévalo's previously frozen, fertilized eggs was implanted into her friend's uterus.[206] A few months before the baby was due, Ms. Arévalo requested a prebirth order to present at the hospital upon the child's birth; the order would legally recognize Ms. Arévalo's genetic and legal connection to her child.[207] Without such an order, the surrogate would be the legal mother under Arizona law.[208] The order was denied, however, because gestational surrogacy agreements (such as the one entered into by Ms. Arévalo and her friend) were invalid in Arizona.[209]

As a result, when Ms. Arévalo's child was born, he was issued a birth certificate with no name and with Ms. Arévalo's friend, the surrogate, listed as his mother.[210] Additionally, the hospital staff insisted the child go home with Ms. Arévalo's friend—and not her—because her friend was the legal mother.[211] The staff threatened to call child protective services (CPS) if Ms. Arévalo attempted to take her child to her own home.[212] Luckily, Ms. Arévalo's friend was willing to move in with her so that she could take her child home.[213]

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the child on her own).

203. María Inés Taracena, *Surrogate Sanctions: How One Tucson Mother's Dream to Have a Child Turned into a Legal Nightmare*, TUCSON WKLY. (Jan. 29, 2015), http://www.tucsonweekly.com/tucson/surrogate-sanctions/Content?oid=4910825. Ms. Arévalo and her husband eventually divorced, and he gave up his rights to the fertilized eggs (and any children that may be born from them in the future). *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

Ms. Arévalo would have to pretend she was babysitting her own child if CPS showed up to her home.[214] Describing this absurd and difficult situation, Ms. Arévalo stated:

> [My friend] was always there with me, supporting me. But another woman, who may not have that type of close relationship with the gestational carrier, she would have to wait until she gets legal custody of her genetic child to bring him or her home because of this law [making the surrogate the legal mother in Arizona].[215]

Ms. Arévalo fought for four months to prove to an Arizona court that she was the child's genetic mother.[216] She was finally able to prove this thanks to a DNA test that was performed two months after the child was born.[217]

After the DNA test proved Ms. Arévalo was indeed the child's mother, the court finally ordered a new birth certificate be issued with the child's name on it and with Ms. Arévalo correctly named as his mother.[218] Ms. Arévalo is now living happily with her baby.[219] She hopes to one day have more children so that her baby may have siblings; in the event she does decide to have another child, she will make sure to enter into a surrogacy agreement in a state where such agreements are legal.[220]

Ms. Arévalo's story demonstrates the emotional turmoil intended parents face when surrogacy agreements are not legally recognized.[221] She said so herself: "I have the same rights as any other mother. Just because I couldn't have my own child because I am a cancer survivor, that doesn't mean I shouldn't have the same rights. *These laws have to change, because we suffer. It's a lot of emotional pain.*"[222] Her story also demonstrates the policy rationales underlying laws in states such as Arizona that prohibit surrogacy are essentially moot when citizens can simply cross a state border to exercise their rights to have children like Ms. Arévalo said she would do in the future.[223]

214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *See id.*
222. *Id.* (emphasis added).
223. *Id.*

B. *State Policies*

Early sources of apprehension surrounding surrogacy agreements included concerns that surrogacy was essentially baby selling and that the surrogate mothers were being exploited or demeaned.[224] Later, the use of IVF techniques led to uncertainty—forcing courts to consider whether or not a child may have two biological mothers.[225] Courts have also treated married and unmarried couples differently regarding surrogacy.[226] For example, with married couples, some states recognize a marital presumption; this is the idea that a person's spouse is presumed to be the legal parent of the child even if the spouse in fact has no genetic connection.[227] While some states apply this presumption to children born using assisted reproductive technology, other states do not.[228] Additionally, the presumption may be overcome with enough evidence to disprove it.[229]

While there is often a presumption of parentage for married couples, courts have had difficulty determining parental rights of unmarried couples who have utilized assisted reproductive technology.[230] For example, in *Steven S. v. Deborah D.*, a California court held that a man in a relationship with the mother had no parental rights to a child conceived via artificial insemination rather than sexual intercourse, even though his sperm was used for the insemination.[231] On the other hand, in *In re Parentage of J.M.K.*, a Washington court held a statute terminating a sperm donor's parental rights did not apply to a man donating sperm to his significant other for IVF.[232] This variation in state laws undoubtedly makes it difficult for parties involved in surrogacy agreements to know what their rights will be in relation to the other parties, especially in states which have not yet fully considered this issue.

224. ESTIN, *supra* note 27, at 433.

225. *Id.* at 434.

226. Tiffany Palmer, *Misconceptions About Marriage and Parentage in Assisted Reproduction*, JERNER & PALMER, P.C.: OUR BLOG (Mar. 20, 2016), http://www.jplaw.com/misconceptions-about-marriage-and-parentage-in-assisted-reproduction.

227. *Id.*

228. *Id.*

229. *Id.*

230. ESTIN, *supra* note 27, at 435.

231. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Ct. App. 2005).

232. *In re* Parentage of J.M.K., 119 P.3d 840, 848–49 (Wash. 2005).

C. Cries for Help from State Courts

There are three possible ways in which Congress could potentially gain jurisdiction over surrogacy despite family law generally being an area of state authority: (1) if surrogacy were considered a constitutional right; (2) by exercising its Commerce Clause power if surrogacy affects interstate commerce; or (3) through the broad treaty power of the federal government.[233] First, surrogacy may be considered a constitutional right if linked to the right to procreate.[234] Second, Congress could use its Commerce Clause powers to regulate surrogacy if surrogacy affects interstate commerce through fertility center payments or surrogacy's general impact on public health.[235]

Congress has the power under Article I, Section 8 of the U.S. Constitution to regulate commerce among the states.[236] A gestational surrogacy can cost anywhere from $60,000 to $80,000, not including the costs of the IVF procedure and general pregnancy costs.[237] The costs included in these figures are payments to the surrogate, legal fees, surrogate background checks, and health insurance for the surrogate.[238] Interstate commerce is substantially affected by surrogacy agreements because intended parents often cross state borders in order to work with agencies and surrogates in other states and pay for services at IVF centers located in various states.[239]

Finally, through the broad treaty power of the federal government, Congress could regulate surrogacy—despite it traditionally being a matter of state concern—under the Senate's advice and consent power.[240] The process would involve the President ratifying an international convention and Congress passing legislation to implement that legislation.[241] Three international treaties may provide guidelines for addressing surrogacy: "1) The International Covenant on Economic, Social and Cultural Rights; 2)

233. A. Paige Miller, Note, *The Silence Surrounding Surrogacy: A Call for Reform in Alabama*, 65 ALA. L. REV. 1375, 1384 (2014).

234. *See, e.g.*, Holland, *supra* note 191, at 27; *supra* Part IV.A.2.

235. Miller, *supra* note 233, at 1384; *see also* U.S. CONST. art. I, § 8, cl. 3.

236. U.S. CONST. art. I, § 8, cl. 3.

237. Conklin, *supra* note 36, at 87. For a more detailed look at prices for various aspects of surrogacy, see also *Surrogate Mother Costs*, WEST COAST SURROGACY, INC., https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost (last visited Apr. 7, 2018).

238. Conklin, *supra* note 36, at 87.

239. *Id.* at 90.

240. Miller, *supra* note 233, at 1384; *see also* U.S. CONST. art. II, § 2.

241. Conklin, *supra* note 36, at 90.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and 3) The Convention on the Rights of the Child (CRC)."[242] The treaties provide a list of human rights that should be protected in the surrogacy context, even if they do not address surrogacy directly.[243] Despite these various sources of federal authority, the federal government has primarily left surrogacy to be regulated by the states.[244]

Leaving surrogacy to be regulated by states—often in the courts and not by the legislature—not only affects the intended parents and surrogate mothers, but even state courts have recognized the problems associated with a lack of clear legislative guidance.[245] For example, the Supreme Court of Connecticut in *Raftopol v. Ramey* emphasized that the various issues accompanying surrogacy agreements—including whether compensation is allowed, who may enter into such agreements, and what safeguards should be put in place to protect the persons involved—are better dealt with by the legislature.[246] It encouraged the state legislature to make the relevant policy determinations and specify the requirements that need to be met in order for a surrogacy agreement to be valid.[247] A mere recognition that an agreement may be valid is not enough without defining what an agreement needs to include to be valid.[248]

In *In re Amadi A.*, a Texas court similarly discussed the problems associated with a lack of legislative guidance: "There can be no denying that the ability to create children using assisted reproductive technology has far outdistanced the legislative responses to the myriad of legal questions that surrogacy raises."[249] The court noted because there is a lack of legislative guidance in the area of surrogacy, the courts are not adequately equipped to

242. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 371–72 (2012) (citations omitted).

243. *Id.* at 372.

244. Miller, *supra* note 233, at 1383.

245. *See, e.g.*, *In re* Amadi A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247, at *10 (Tenn. Ct. App. Apr. 24, 2015) (quoting *In re* Baby, 447 S.W.3d 807, 841 (Tenn. 2014)) (discussing the struggle courts go through when there is a lack of legislative guidance for determining surrogacy issues); Raftopol v. Ramey, 12 A.3d 783, 804 (Conn. 2011) (requesting that the legislature act to make policy determinations relating to surrogacy).

246. *Raftopol*, 12 A.3d at 803–04.

247. *Id.* at 804.

248. *Id.*

249. *In re Amadi A.*, 2015 WL 1956247, at *10 (citations and internal quotations omitted).

handle the numerous issues that surrogacy agreements bring to light.[250] As a result, court decisions among the states vary, and the law governing surrogacy is both unpredictable and unreliable.[251] This unpredictability and unreliability can have devastating effects on the parties involved in surrogacy arrangements.[252]

An ideal solution to the myriad of laws governing surrogacy across the nation would be to have surrogacy regulated at the federal level.[253] However, this is unlikely to occur given the controversial nature of the topic and because family law is an area generally left to the states.[254] Rather, a more realistic alternative is for advocates in each state to urge legislators to enact uniform legislation on surrogacy.[255] One example of such uniform legislation is discussed below in Part V.

V. A RECOMMENDATION FOR LEGISLATIVE CHANGE: THE 2017 UPA

The Uniform Parentage Act (UPA) was originally created in 1973 to provide presumptions in determining the parentage of a child.[256] It was later amended in 2002; among other changes, the 2002 UPA notably provided an article which authorized surrogacy agreements.[257] However, only 11 states adopted the 2002 UPA; and of those states, only 2 adopted Article 8, which is the article that authorizes surrogacy agreements.[258] Further, 5 of the 11 states that adopted the 2002 UPA now have surrogacy legislation that is not at all premised on Article 8 of the 2002 UPA.[259]

Because there is only a small number of states that have adopted the 2002 UPA, the drafting committee for the National Conference of Commissioners on Uniform State Laws drafted yet another amendment to the UPA (2017 UPA).[260] This amendment was approved in September of

250. *Id.*
251. *Id.* at *10 (citations and internal quotations omitted).
252. *See supra* Part IV.A.
253. *See supra* Part IV.B.
254. *See, e.g.*, Conklin, *supra* note 36, at 68–69.
255. *See id.*
256. UNIF. PARENTAGE ACT prefatory note at 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, 2017), http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf.
257. *Id.*
258. *Id.*
259. *Id.* at 2–3.
260. *Id.*

2017 and is now recommended for enactment in all states.[261] It provides for a uniform approach to surrogacy that reflects the current practices many states already have in place regarding surrogacy.[262] Like the 2002 UPA, the 2017 UPA allows and regulates both traditional and gestational surrogacy agreements; however, the 2017 UPA regulates surrogacy agreements differently than the 2002 UPA.[263]

The 2002 UPA included one set of requirements for both traditional and gestational surrogacy agreements.[264] In contrast, the 2017 UPA has two sets of requirements—one for each type of surrogacy agreement—and indicates additional safeguards that should be in place for traditional surrogacy agreements.[265] For example, while the 2017 UPA makes gestational surrogacy agreements binding "once the successful transfer has occurred," in a traditional surrogacy arrangement, the surrogate may withdraw her consent up to 72 hours after the child is born.[266] The reasons behind the additional safeguards for traditional surrogacy include (1) recognizing the fact that the two types of surrogacy are factually different and (2) reflecting the current views of policymakers (who in most states only allow gestational surrogacy agreements).[267]

While additional safeguards are provided in the context of traditional surrogacy arrangements, the 2017 UPA is simultaneously less restrictive in the context of gestational surrogacy agreements—again reflecting current law and practice.[268] For instance, the 2002 UPA had a requirement that made parties to a gestational surrogacy agreement seek court approval for any arrangements relating to medical procedures.[269] There is no such similar requirement for gestational surrogacy agreements under the 2017 UPA.[270] If these changes in the 2017 UPA achieve their desired goals of fixing the

261. *Id.* at 2.
262. *Id.*
263. *Id.* art. 8 cmt. at 72.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* For example, the 72-hour period for withdrawing consent reflects existing laws in states that allow (and regulate) traditional surrogacy but permit the surrogate to withdraw consent within a set period of time. *See, e.g.*, D.C. CODE ANN. § 16-411(4) (West 2018) (allowing consent to be withdrawn within 48 hours after birth); FLA. STAT. ANN. § 63.213(2)(a) (West 2018) (same).
268. UNIF. PARENTAGE ACT art. 8 cmt. at 72.
269. *Id.*
270. *Id.*

problems that prevented states from adopting the 2002 UPA and encouraging states to adopt the amended version, then there is hope for a more uniform approach to surrogacy.

VI. CONCLUSION

In conclusion, advocates should urge state legislators to enact a uniform law governing surrogacy, such as the 2017 UPA.[271] This is crucial given the fact that current laws are not adequate in addressing the rights of the parties in surrogacy agreements.[272] In addition, the adoption of a more uniform law governing surrogacy would make for clear and consistent laws, thus increasing judicial efficiency. [273]

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271. *See supra* Part IV.
272. *See supra* Parts III and IV.
273. *See supra* Part IV.

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