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KEEPING UP WITH GESTATIONAL CARRIER AGREEMENTS: CONSIDERATIONS REGARDING THE REGULATION OF SURROGACY

Courtney Crosby¹

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I. Introduction

On May 30, 2018, the New Jersey Legislature enacted the New Jersey Gestational Carrier Agreement Act.² New Jersey had previously held for thirty years that surrogacy was against the public policy of the state and was considered “baby-selling.” The New Jersey Supreme Court has now recognized the challenges of those who are situationally and medically infertile, as well as the promising nature of reproductive biotechnological advances, and found that it is within the public policy of this State to provide new legal options for those who are seeking reproductive assistance in the form of gestational surrogacy.³ Advances in reproductive biotechnology over the last three decades have provided families facing reproductive challenges with many more options for having children.⁴ Further, society’s acceptance and awareness of the unique reproductive challenges of LGBTQIA+ individuals and couples has heavily influenced the New Jersey Legislature.⁵

This note argues that surrogacy should be legal in all 50 states, and that states should enact gestational surrogacy laws following New Jersey’s example. In Part I, I explain the legislative history of the New Jersey Gestational Carrier Agreement Act, as well as the basics of surrogacy. Namely, I explain the differences between traditional and gestational surrogacy, as well as altruistic and commercial surrogacy. Further, this note explains what draws people into entering surrogacy

² N.J. STAT. ANN. § 9:17-60.

³ Tracy Julian, *Gestational Surrogacy Contracts Enforceable in NJ 30 Years After ‘Baby M’*, NEW JERSEY LAW JOURNAL (July 23, 2018), <https://www.law.com/njlawjournal/2018/07/18/gestational-surrogacy-contracts-enforceable-in-nj-30-years-after-baby-m/>.

⁴ *Id.*

⁵ *Id.*

agreements. Part II traces the long and bumpy path from New Jersey's *Baby M.* decision to the New Jersey Gestational Carrier Agreement Act. In Part III, there is a discussion regarding the evolution of surrogacy laws throughout the United States and how feminist theorists have had a direct effect on legislation. In Part IV, the need for states to enact surrogacy statutes by way of New Jersey's example is discussed. This note analyzes who is affected by the lack of statutory guidance and New Jersey's progressive step in regulating gestational surrogacy agreements. This note will ultimately conclude in Part V and restate the pressing need for states to acknowledge the advances in reproductive biotechnology, the bodily integrity of women, and the reproductive challenges that families face.

A. Legislative History

Under the prior administration of Governor Chris Christie, the New Jersey Gestational Carrier Act was twice approved but subsequently vetoed.⁶ In 2012, Christie first vetoed a bill that would have permitted gestational surrogacy agreements to be legal and enforceable in New Jersey.⁷ In Christie's statement explaining his reasoning for the veto, he detailed that:

Permitting adults to contract with others regarding a child in such a manner unquestionably raises serious and significant issues . . . in contrast to traditional surrogacy,

⁶ Deb Guston, *New Jersey Delivers Gestational Carrier Agreement Law and LGBT Friendly Amendments to Artificial Insemination Law*, THE LGBT BAR (June 15, 2018),

<https://lgbtbar.org/bar-news/new-jersey-delivers-gestational-carrier-agreement-law-and-lgbt-friendly-amendments-to-artificial-insemination-law/>.

⁷ Susan K. Livio, *Christie Vetoes Bill that Would Have Eased Tough Rules for Gestational Surrogates*, NJ.COM, https://www.nj.com/politics/2012/08/christie_vetoes_bill_that_woul.html (last updated May 30, 2019).

a gestational surrogate birth does not use the egg of the carrier. In this scenario, the gestational carrier lacks any genetic connection to the baby, and in some cases, it is feasible that neither parent is genetically related to the child. Instead, children born to gestational surrogates are linked to their parents by contract. While some all applaud the freedom to explore these new, and sometimes necessary, arranged births, others will note the profound change in the traditional beginnings of the family that this bill will enact. I am not satisfied that these questions have been sufficiently studied by the Legislature at this time.⁸

Attorney Donald C. Cofsky, representing the New Jersey couple in *In re T.J.S.*⁹ who inspired the case for this bill, believes the Governor “missed the point.”¹⁰ “Gestational carrier agreements have been taking place in New Jersey for well over a decade, and are, and will remain legal . . . the bill was designed to regulate this practice, set responsibilities, and protect the rights of all parties – most importantly, the rights of children.”¹¹ Other sponsors of the bill were “profoundly disappointed” by Christie’s veto as well, including Senator Joseph Vitale.¹² Senator Vitale dedicated over one year discussing the bill with various groups and individuals in order to get it passed.¹³ He said that “many parents

⁸ *Id.*

⁹ See *In re T.J.S.*, 419 N.J. Super. 46 (N.J. Super. Ct. App. Div. 2011) (holding that an infertile wife was not recognized as the legal mother of her husband’s biological child born to a gestational carrier).

¹⁰ Livio, *supra* note 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

and women who cannot otherwise have their own children have used this procedure for many years. It is a major setback for parents who wish to create a life and give a baby a loving home.”¹⁴

Christie emphatically disagreed, “permitting adults to contract with others regarding a child in such a manner unquestionably raises serious and significant issues . . . [the legislation could result in] change in the traditional beginnings of a family.”¹⁵ In learning of Christie’s veto of a proposed gestational carrier bill, the Director of Government Affairs for the New Jersey Family Policy Council, Gregory Quinlan, commented, “this is excellent news. This bill to me is class warfare . . . rent a womb, is really what it is. This is exploitation of women, it’s anti-child and it’s anti-family.”¹⁶ The National Organization for Women (“NOW”) also opposed the legislation.¹⁷ Kathleen Sloan, a member of the board of directors of NOW and the International Coalition for Reproductive Justice, penned an op-ed that ran in the *Star Ledger*, siding with Christie’s veto.¹⁸ Sloan stated that if the bill had passed, it would have allowed for commercial surrogacy, women renting their bodies to carry and deliver a pregnancy, with no protections for women who serve as surrogates and no regulation of the fertility industry.¹⁹

Three years later, the New Jersey State Assembly panel again approved legislation to aid people who struggle with situational and

¹⁴ *Id.*

¹⁵ Anthony Vecchione, *Christie Veto of Gestational Carrier Bill Unlikely to Affect Surrogate Parents*, NJ SPOTLIGHT (Aug. 13, 2012), <https://www.njspotlight.com/stories/12/0812/2210/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

medical infertility by authorizing gestational carrier agreements.²⁰ Assemblywoman Valerie Vainieri Huttie, a sponsor of the bill, stated that, “without this legislation, intended parents and gestational surrogates will continue having children through these agreements but without legal protections or they will be forced to move to other states that afford them more security.”²¹ Opponents of the bill, including Marie Tasy, Executive Director for New Jersey Right to Life, found that the bill “exploits carriers . . . treating children as a product and turning the miracle of pregnancy and birth into just another commercial transaction.”²² Christie ultimately described this bill as being essentially the same bill from 2012 that he had already vetoed; he believed the proponents of the bill had not worked with interested parties to address concerns raised during the initial debate.²³

As the old saying goes, third time’s the charm—in May 2018, the current New Jersey Governor, Phil Murphy, signed into law the New Jersey Gestational Carrier Agreement Act.²⁴ Debra E. Guston, Esq., of the American Society for Reproductive Medicine, stated:

Written by a working group of ART attorneys, with the assistance of legislative drafters, the law effectively brings gestational surrogacy in New Jersey out from under the shadow of *Baby M*, the 1988 New Jersey Supreme Court traditional surrogacy case that, while not

²⁰ Susan K. Livio, *Surrogate Parenting Expansion Approved by N.J. Assembly Panel*, NJ.COM (last updated Mar. 29, 2019), https://www.nj.com/politics/2015/03/expanded_definition_of_surrogate_parenting_approve.htm.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Guston, *supra* note 6.

outlawing surrogacy in New Jersey, had rendered the practice unenforceable.²⁵

In enacting the New Jersey Gestational Carrier Agreement Act, the Legislature detailed that:

[i]t is the intent and purpose of the Legislature to:

- (1) Establish consistent standards and procedural safeguards to promote the best interests of the children who will be born as result of gestational carrier agreements executed pursuant to [the act];
- (2) Protect all parties involved in gestational carrier agreements executed pursuant to [the act]; and
- (3) Recognize the technological advances in assisted reproductive medicine in ways that allow the use of these advances by intended parents and gestational carriers according to the public policy of New Jersey.²⁶

Under the New Jersey Gestational Carrier Agreement Act, the New Jersey legislature requires that to be eligible as a gestational carrier, a woman must (1) be at least 21 years old, (2) have given birth to at least one child, (3) have completed a medical and psychological evaluation approving her suitability to serve as a gestational carrier, and (4) have retained an attorney, independent of the intended parent(s), but for those services the intended parent may pay, who has consulted with her about the terms of the gestational carrier agreement and the potential legal consequences of being a gestational carrier under the terms of the

²⁵ *Id.* (“ART” stands for artificial reproductive technology).

²⁶ N.J. STAT. ANN. § 9:17-61(b).

agreement.²⁷ Intended parent(s) must complete a psychological evaluation and be deemed suitable to participate in a gestational carrier agreement and retain an attorney to consult with the intended parent(s) about the terms and potential legal consequences of the gestational carrier agreement.²⁸

The Act includes requirements such as a gestational carrier agreement shall be in writing and executed by the gestational carrier, her spouse or partner in a civil union or partnership, if any, and each intended parent.²⁹ Further, the gestational carrier agreement can only be executed after the required medical and psychological screenings of the gestational carrier and the psychological screenings of the intended parent(s), but prior to the commencement of any other necessary medical procedures in furtherance of the implantation of the pre-embryo.³⁰ Lastly, the statute reiterates that all parties to the gestational carrier agreement must be represented by separate attorneys in all matters relating to the gestational carrier agreement and each attorney must provide an affidavit of such representation.³¹

The agreement must include express terms that the gestational carrier will undergo pre-embryo transfer and attempt to carry and give birth to the child, as well as surrender custody of the child to the intended parent(s) immediately upon the child's birth.³² Additionally, the

²⁷ N.J. STAT. ANN. § 9:17-64.

²⁸ *Id.*

²⁹ N.J. STAT. ANN. § 9:17-65(a)(1).

³⁰ N.J. STAT. ANN. § 9:17-65(a)(2).

³¹ N.J. STAT. ANN. § 9:17-65(a)(3).

³² N.J. STAT. ANN. § 9:17-65(b)(1).

agreement must include that the gestational carrier will have the right to medical care for her pregnancy, labor, delivery, and post-partum recovery provided by a physician, physician assistant, advance practice nurse, or certified nurse midwife of her choice, after she notifies, in writing, the intended parent of her choice.³³ The agreement must expressly include that the intended parent shall (a) accept custody of the child immediately upon the child's birth; and (b) assume sole responsibility for the support of the child immediately upon the child's birth.³⁴ Lastly, there must be an express term that, if the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child's birth.³⁵

New Jersey's Uniform Parentage Act has also adopted inclusionary language in determining what constitutes a parent under the act. Section 9:17-41 of the Uniform Parentage Act details that an intended parent can be established by proof of an order of parentage related to a gestational carrier agreement.³⁶ Further, under § 9:17-51(f), a gestational carrier agreement executed in accordance with the provisions of the Act creates evidence in relation to paternity.³⁷

B. The Basics of Surrogacy

There are two main types of surrogacy: traditional surrogacy and gestational surrogacy. In traditional surrogacy, a surrogate's eggs are

³³ N.J. STAT. ANN. § 9:17-65(b)(1).

³⁴ N.J. STAT. ANN. § 9:17-65(b)(3).

³⁵ N.J. STAT. ANN. § 9:17-65(b)(2).

³⁶ N.J. STAT. ANN. § 9:17-41.

³⁷ *Id.*

used, making her the genetic mother of the child she carries.³⁸ In gestational surrogacy, the surrogate has no genetic link to the child she carries.³⁹ While many gestational carrier agreements involve two intended parents who are using their own gametes to create a pregnancy, that is not true for all such agreements. For instance, when two gay men have an agreement, the egg must come from somewhere else. In other instances, as well, the intended parents might be using an embryo that they have adopted or that has been donated to them. Intended parents who do not or cannot use their own gametes for procreation also find salvation with gestational carrier agreements.

The use of donor gametes, either in the form of donor sperm or donor oocytes, is a common practice in assisted reproductive technology.⁴⁰ In gestational surrogacy, an egg donor may be used to create the embryo the surrogate carries.⁴¹ Same-sex couples, single men, opposite-sex couples, and women who cannot produce healthy eggs commonly require the assistance of an egg donor in gestational surrogacy.⁴²

³⁸ *Traditional vs. Gestational Surrogacy*, WORLDWIDE SURROGACY SPECIALISTS, LLC, <https://www.fertilitysourcecompanies.com/what-is-a-surrogate-mother-or-a-gestational-carrier/> (last visited Feb. 17, 2019).

³⁹ *Id.*

⁴⁰ Paul R. Brezina & Yulian Zhao, *The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies*, OBSTETRICS AND GYNECOLOGY INT'L, 7 (2012).

⁴¹ *Gestational Surrogacy*, USC FERTILITY, <https://uscfertility.org/donor-options/gestational-surrogacy/> (last visited Feb. 17, 2019).

⁴² Andrea Rodrigo & Mark P. Trolice, *What's Gestational Surrogacy with Egg Donation – Cost & Success*, INVITRA (last updated Jan. 19, 2017), <https://www.invitra.com/egg-donation-and-surrogacy/#intended-parent-profiles>.

Egg donation is not required in traditional surrogacy because the surrogate uses her own eggs. This distinction has been found to be essential when considering what kind of surrogacy arrangements are or are not against the public policy of New Jersey, even to this day.⁴³ “Infertility specialists believe that gestational surrogacy is legally safer and less complicated than traditional surrogacy. This concerns stems from the increased likelihood that the traditional surrogate will have an emotional attachment to the genetically linked child and, thus, may refuse to give the baby to the intended parents.”⁴⁴

Both types of surrogacy can be “altruistic” (or “uncompensated”) or “commercial” (or “compensated”).⁴⁵ With altruistic surrogacy, the surrogate only receives compensation to cover the necessary expenses associated with the pregnancy and birth.⁴⁶ Typically, altruistic surrogacy involves a close-friend or family member serving as the

⁴³ Despite being costly, gestational surrogacy is the only type of surrogacy contract legally enforceable in New Jersey, as it has been found that gestational surrogacy has numerous benefits traditional surrogacy does not have. With gestational surrogacy, there is the ability to use the intended mother’s eggs or a donor’s eggs, there is less legal ambiguity because the child is not related to the surrogate mother, and there is less emotional ambiguity as child is not genetically related to the mother so there is a presumption of a lessened emotional connection to the child. *See About Surrogacy – Traditional vs Gestational – What’s Best for my Family?*, SURROGATE.COM, (last visited Mar. 27, 2020), <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/>.

⁴⁴ Brianne Richards, Note, “*Can I Take the Normal One?*” *Unregulated Commercial Surrogacy and Child Abandonment*, 44 HOFSTRA L. REV. 201, 207-08 (2015).

⁴⁵ 1 LexisNexis Practice Guide: Washington Family Law § 11.04 (2018).

⁴⁶ *Id.*

gestational carrier.⁴⁷ Alternatively, a commercial surrogate receives a fee for serving as a surrogate in addition to payment for the necessary expenses associated with pregnancy and birth.⁴⁸ Commercial surrogacy usually involves a person that the intended parents meet solely for the purpose of arranging a surrogate birth.⁴⁹ Depending on state law, compensation may be considered “baby-selling,” and prohibited.⁵⁰

Though it is costly, many people who wish to have children choose surrogacy for a variety of reasons. For some women, health concerns lead to the choice to use a surrogate.⁵¹ Gestational surrogacy has become a widely noted solution to preeclampsia and other hypertensive disorders.⁵² Celebrity Kim Kardashian West openly shared with the world her experiences with a gestational carrier who carried her baby, Chicago West.⁵³ Due to medical complications with two previous

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Peter Nicholas, Symposium: *Compensated Surrogacy in the Age of Windsor: Symposium Essay: Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1238 (2014).

⁵⁰ See *Surrogacy Laws*, THE SURROGACY EXPERIENCE, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (last visited Mar. 27, 2020).

⁵¹ Lauren Valenti, *Kim Kardashian West Explains Why a Gestational Surrogate Is Not the “Easy Way Out”*, VOGUE, <https://www.vogue.com/article/kim-kardashian-gestational-surrogate-third-child-preeclampsia-kanye-west> (last visited Feb. 17, 2019).

⁵² *Id.*

⁵³ *Id.*

pregnancies, Kardashian West's doctor advised her against trying to carry another child, as she has high-risk preeclampsia and placenta accrete conditions.⁵⁴

Hypertensive disorders of pregnancy, including preeclampsia, complicate up to 10% of pregnancies worldwide.⁵⁵ The rate of preeclampsia in the United States has increased 25% in the last two decades and is a leading cause of maternal and infant illness and death.⁵⁶ The United States has the worst rate of maternal deaths in the developed world.⁵⁷

Gestational surrogacy has also provided a solution for same sex couples who are looking to procreate. As a gestational surrogacy arrangement can range from \$30,000 to \$100,000 per pregnancy, Arlene Istar Lev⁵⁸ was curious to see what motivated men in same-sex

⁵⁴ *Id.* (stating that preeclampsia and placenta accrete disorders cause high blood pressure and kidney damage).

⁵⁵ *Preeclampsia and Hypertension in Pregnancy: Resource Overview*, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, <https://www.acog.org/Womens-Health/Preeclampsia-and-Hypertension-in-Pregnancy> (last visited Feb. 17, 2019).

⁵⁶ *Id.*

⁵⁷ Nina Martin, *Lost Mothers: Maternal Mortality in the U.S.: U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NATIONAL PUBLIC RADIO, INC. (MAY 12, 2017), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world_

⁵⁸ See Arlene (Ari) Istar Lev, LCSW-R, CASAC, CHOICES, COUNSELING & CONSULTING, <http://choicesconsulting.com/choices-associates/arlene-istar-lev/> (last visited Mar. 27, 2020). ("Arlene (Ari) Istar Lev LCSW-R, CASAC, is a social worker, family therapist, educator, and writer whose work addresses the unique therapeutic needs of lesbian, gay, bisexual, and transgender people. She is the Founder and Clinical Director of Choices Counseling and Consulting providing individual and family therapy and the Training Director

relationships to choose gestational surrogacy over adoption.⁵⁹ Lev noted that the number one reason why gay dads chose surrogacy over adoption was to have a biological connection to their child.⁶⁰ Randy H, a man who became a father through surrogacy stated, “we had one child biologically linked to my partner from a previous marriage and I wanted to father a child biologically as well. Plus, we had more control over the process and the medical history of the mother than with adoption.”⁶¹ Lev also found that in some of the families that used a gestational carrier, the surrogate and the intended parents became so close that the surrogate was named the godmother to the child.⁶²

For women born without uteruses, gestational surrogacy makes it possible for these women to have their own children.⁶³ Natalie Smith, a woman born without a uterus, had ovaries that worked normally.⁶⁴ With the help of in vitro fertilization and a gestational surrogate, Smith and her husband were able to have children genetically related to both

of *TIGRIS—The Training Institute for Gender, Relationships, Identity, and Sexuality*, a post-graduate training and consultation program housed in Albany, New York.”).

⁵⁹ Arlene Istar Lev, Commentary, *Gay Dads: Choosing Surrogacy*, 7 LESBIAN & GAY PSYCHOL. REV. 72 (2006), http://tigrisinstitute.com/wp-content/uploads/2014/10/Gay_Dads-Choosing_Surrogacy1.pdf.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *As Demand for Surrogacy Soars, More Countries are Trying to Ban it*, THE ECONOMIST (MAY 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it>.

⁶⁴ *Id.*

of them.⁶⁵ For women who have had a hysterectomy due to chronic pain conditions as well as certain types of cancers and infections, a gestational carrier makes it possible for them as well to have a child they are biologically linked to.⁶⁶

C. The United States Becoming a Hub for Surrogacy

Cross border reproductive care (CBRC) is an increasingly common occurrence and solution for those who live in countries that have banned surrogacy.⁶⁷ Patients cross borders for a variety of reasons; their desired service is not available in their home country, a patient does not meet the age, marital, or other sexual orientation requirement to qualify for the service, care is more expensive in their home country, the waiting list is too long, the quality of care is perceived to be higher outside of their home country, and the patient's desire for confidentiality in receiving service is better protected outside of their home country.⁶⁸

India is proposing a ban on commercial surrogacy, which has been a lucrative business for the country.⁶⁹ In the past decade, India has emerged as one of the top destinations for childless couples from around

⁶⁵ *Id.*

⁶⁶ Godwin I. Meniru & Ian L. Craft, *Experience with Gestational Surrogacy as a Treatment for Sterility Resulting from Hysterectomy*, HUMAN REPRODUCTION (1997), <https://doi.org/10.1093/humrep/12.1.51>.

⁶⁷ *ARC Fertility and Cross Border Reproductive Care for All Countries, including Europe*, ARC FERTILITY, <https://www.arcfertility.com/patient-resources/cross-border-ivf/> (last visited Feb. 17, 2019).

⁶⁸ *Id.*

⁶⁹ Rama Lakshmi, *India to Propose a Ban on Commercial Surrogacy, Ending a Lucrative Business*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/world/rent-a-womb-industry-in-india-may-be-shut-down/2016/08/24/39684d60-79e3-42c9-893d-9ff5998ce179_story.html.

the world who pay women to give birth to have their children.⁷⁰ For people from countries that have banned surrogacy all together, the availability of surrogacy in the United States gives them an option for having children that they do not have in their home country.

This is exhibited in Portugal, where surrogacy is prohibited.⁷¹ Gay couple Paulo and João of Lisbon, Portugal hired a surrogate in Pennsylvania to carry their child.⁷²

Together, domestic and international couples will have more than 2,000 babies through gestational surrogacy in the United States this year, almost three times as many as a decade ago. Ads galore seek egg donors, would-be parents, would-be surrogates. Many surrogates and intended parents find each other on the Internet and make their agreements independently, sometimes without a lawyer or formal contract.⁷³

II. The Bumpy Road from *In re Baby M.* to New Jersey Gestational Carrier Agreement Act

Like various parts of the world, surrogacy agreements in New Jersey have previously been held unenforceable. In 1985, the story of Mary Beth Whitehead and the Sterns made national headlines when they went to court to battle over custody of a child born pursuant to a

⁷⁰ *Id.* at 2.

⁷¹ Tamar Lewin, *Coming to the U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>.

⁷² *Id.* at 7. (The couple only agreed to speak with New York Times on the condition that neither of their last names be used, since what they are doing would be considered a crime in Portugal).

⁷³ *Id.* at 2.

surrogacy agreement.⁷⁴ The biological and intended father, William Stern, entered into an agreement with the surrogate, Mary Beth Whitehead.⁷⁵ The terms of the surrogacy contract detailed that Whitehead would become artificially inseminated with William Stern's sperm and she then would relinquish custody of the child to the Sterns upon birth.⁷⁶ However, Whitehead realized almost from the moment of birth, that she could not part with this child.⁷⁷ She had felt a bond even during pregnancy and the attachment was conveyed to the Sterns at the hospital when they told Whitehead what they were going to name the baby.⁷⁸ She broke down into tears and indicated that she did not know if she could give up the child.⁷⁹ Despite her powerful desire to keep the baby, Whitehead turned the baby over to the Sterns at her home.⁸⁰

However, Whitehead continued to express to the Sterns that she could not live without the baby and pleaded with them to let her have the baby for just a week.⁸¹ Concerned that Whitehead might actually commit suicide, the Sterns let Whitehead have the baby for a week.⁸² As Whitehead had ultimately relinquished custody of the baby the first

⁷⁴ *In re Baby M.*, 109 N.J. 396 (1988).

⁷⁵ *Id.* at 412.

⁷⁶ *Id.*

⁷⁷ *Id.* at 414.

⁷⁸ *Id.*

⁷⁹ *In re Baby M.*, 109 N.J. at 414.

⁸⁰ *Id.* at 414-15.

⁸¹ *Id.* at 415.

⁸² *Id.* at 415.

time, they believed she would stick to her word again this time.⁸³ Contrary to what the Sterns had expected, it was not until four months later, after a series of attempts to regain possession of the baby, that the Sterns finally got the baby back.⁸⁴ The baby had to be forcibly removed from the Whitehead's home.⁸⁵

As Mary Beth Whitehead would not give up Baby Melissa, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract.⁸⁶ Mr. Stern accurately alleged to the court that Mrs. Whitehead had not only refused to comply with the surrogacy contract, but fled from New Jersey with the child in order to avoid the possibility of his obtaining custody.⁸⁷ The Superior Court ruled in favor of the Sterns and enforced the surrogacy agreement.⁸⁸ Mary Beth Whitehead appealed, and the Supreme Court of New Jersey refused to enforce the surrogacy agreement.⁸⁹

The Court invalidated the contract because it directly conflicted with the law and public policy of the State of New Jersey.⁹⁰ The Court recognized "the depth of the yearning of infertile couples to have their own children, but found the payment of money to a 'surrogate' mother

⁸³ *Id.*

⁸⁴ *In re Baby M.*, 109 N.J. at 415.

⁸⁵ *Id.*

⁸⁶ *Id.* at 415.

⁸⁷ *Id.*

⁸⁸ *Id.* at 415.

⁸⁹ *In re Baby M.*, 109 N.J. at 419.

⁹⁰ *Id.* at 411.

illegal, perhaps criminal, and potentially degrading to women.”⁹¹ The Court reiterated that New Jersey public policy was that, to the extent possible, children should remain with and be brought up by both of their birth parents.⁹² Thus, a surrogacy contract would directly conflict with the objectives of New Jersey law; “it guarantees separation of a child from its mother, it looks to adoption regardless of suitability, it totally ignores the child, it takes the child from the mother regardless of her wishes and her maternal fitness, and it does all of this through the use of money.”⁹³ Ultimately, despite invalidating the surrogacy contract, the court applied a ‘best interests’ approach to the custody dispute and granted Mr. Stern custody of the child and unsupervised, liberal visitation with Whitehead.⁹⁴ This case alerted the nation to some of the legal and ethical dilemmas entrenched in surrogacy agreements. Even today, this case is edifying, as it demonstrates both the nature of the arrangement between the intended parents and the surrogate, and also some of the inherent risks involved with surrogacy. Traditional surrogacy contracts, like that in *In re Baby M.*, remain unenforceable in New Jersey.

Despite the Supreme Court’s decision to void the surrogacy contract in *Baby M.*, people continued to contract for surrogacy services in New Jersey and bring disputes to court when those arrangements went awry. In 2000, in *A.H.W. v. G.H.B.*, a couple was unable to conceive a child on their own, and thus entered into an uncompensated gestational surrogacy contract with the intended mother’s sister.⁹⁵ An embryo

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *In re Baby M.*, 109 N.J. at 411.

⁹⁵ See generally *A.H.W. v. G.H.B.*, 339 N.J. Super. 495 (Super. Ct. 2000).

created from the intended mother's egg and intended father's sperm was implanted in the intended mother's sister.⁹⁶ The intended parents wanted to have a pre-birth order issued that would allow for them to be listed on the child's birth certificate as the biological parents.⁹⁷ The Bergen County Superior Court of New Jersey held that a gestational carrier still had to follow adoption proceedings to legally relinquish parental rights in favor of the intended (and genetically-related) parents because the contract was unenforceable from the start and could not confer parental rights.⁹⁸ Although this was not a traditional surrogacy case, the Bergen County Superior Court of New Jersey cited *Baby M.* and the principles surrounding public policy considerations that were established twelve years prior in making its decision.⁹⁹ "The Attorney General's Office opposes the request of the biological parents for a pre-birth order, claiming that the relief is contrary to the law prohibiting surrender of a birth mother's rights until seventy-two hours after birth, and the public policy of the State of New Jersey, as expressed by the New Jersey Supreme Court in *In re Baby M.*"¹⁰⁰

Nine years after *A.H.W. v. G.H.B.*, the Hudson County Superior Court of New Jersey in *A.G.R. v. D.R.H.* recognized a gestational carrier as the legal mother of twins who were born to her using a donated egg and the semen of her brother's same sex partner.¹⁰¹ The brother and his

⁹⁶ *Id.* at 497.

⁹⁷ *Id.*

⁹⁸ *Id.* at 506.

⁹⁹ *Id.*

¹⁰⁰ See generally *A.H.W.*, 339 N.J. Super. at 496.

¹⁰¹ See generally *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. LEXIS 3250 (N.J. Super. Dec. 23, 2009).

same sex partner were legally married under California law and had registered their domestic partnership in New Jersey, pursuant to the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1.¹⁰² It was unclear as to whether or not the brother and his partner had paid his sister in connection with her gestational carrier services, but the court nonetheless found that that issue need not be resolved as the answer to that would not have affected their overall legal decision.¹⁰³ Again, a New Jersey court affirmed that the principles detailed in *In re Baby M.* guided its ruling and that gestational surrogacy did not pose fundamentally different questions of public policy than traditional surrogacy.¹⁰⁴ Using language we have heard before, Judge Francis B. Schultz stated that “the surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness . . . would it really make any difference if the word ‘gestational’ was substituted for the word ‘surrogacy’ in the above quotation? I think not.”¹⁰⁵ Therefore, both gestational surrogacy and traditional surrogacy were considered to have been against the public policy of the State of New Jersey.

In 2012, the New Jersey Superior Court, Appellate Division in *In re T.J.S.* did not recognize an infertile wife as the legal mother of her husband’s biological child, born to a gestational carrier.¹⁰⁶ As in *A.H.W.*, the intended parents had established a pre-birth order from the

¹⁰² *Id.*

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *Id.* at 12; *see also In re Baby M.*, 109 N.J. at 441, 442.

¹⁰⁶ *In re T.J.S.*, 419 N.J. Super. at 66.

New Jersey Superior Court, that stated their names on the child's birth certificate as the child's legal parents, conditioned on that the gestational carrier renounced her legal rights.¹⁰⁷ The surrogacy arrangement continued according to plan and the gestational carrier relinquished all parental rights seventy-two hours after the baby's birth.¹⁰⁸ However, the Department of Health and Human Services, Bureau of Vital Statistics filed a motion for the court to vacate the pre-birth order, which would remove the infertile wife as the child's mother.¹⁰⁹ Like in *A.H.W.*, pre-birth orders listing the intended parents as the biological parents were not permissible.¹¹⁰ The New Jersey Parentage Act, N.J.S.A., "had been created to ensure that children born out of wedlock are treated the same as those born to married parents and to provide a procedure to establish parentage in disputed cases."¹¹¹ Further, under New Jersey Parentage Act, there are several ways to establish a parental relationship: (1) genetic contribution, (2) gestational primacy, or (3) adoption.¹¹² The Court found that the Act did not violate the right to equal protection under Article 1, paragraph 1 of the New Jersey Constitution because the distinctions drawn between an infertile husband and an infertile wife are grounded in actual reproductive and biological differences, which the Legislature may consider in defining alternative means of creating parenthood.¹¹³ "The plain language of the Act

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *In re T.J.S.*, 419 N.J. Super. at 66; *see also* N.J. STAT. ANN. § 9:17-38.

¹¹² N.J. STAT. ANN. § 9-17:38.

¹¹³ *Id.*

provides for a declaration of maternity only to a biologically or gestationally-related female and requires adoption to render A.L.S. the mother of T.D.S.”¹¹⁴

“By failing to enforce gestational surrogacy agreements, the New Jersey Supreme Court halted the progress of infertility technology and limited New Jersey residents’ options for how to become parents. New Jersey could have followed California’s lead after *Johnson* and upheld surrogacy agreements by distinguishing gestational surrogacy cases from *Baby M.*”¹¹⁵ The legislature left New Jersey residents crossing state lines to establish their surrogacy arrangements, as well as entering into contracts that would not be legally enforceable in a New Jersey court. In the years after *Baby M.*, other states, California in particular, acted to protect the women and intended parents who signed surrogacy contracts.¹¹⁶ By judicial decision, the California Supreme Court created an intent test to determine the enforceability of a gestational surrogacy contract in the case of *Johnson v. Calvert*.¹¹⁷ In *Johnson*, a gestational carrier entered into a contract with the genetic parents of the zygote she would be gestating.¹¹⁸ The gestational carrier refused to give up the child.¹¹⁹ The intended parents filed a declaratory judgment action

¹¹⁴ *Id.* at 56.

¹¹⁵ Melissa Ruth, Note, *What to Expect When Someone is Expecting For You: New Jersey Needs to Protect Parties to Gestational Surrogacy Agreements Following In Re T.J.S.*, 60 VILL. L. REV. 383 (2015).

¹¹⁶ See generally *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 87.

¹¹⁹ *Id.*

seeking a determination that they were the legal parents of the child.¹²⁰ The trial court determined the intended parents were the legal parents of the child and the appellate court affirmed the trial court's holding.¹²¹ Further, the court held that the contract was enforceable and not against the public policy of the state.¹²² Although California's Uniform Parentage Act recognized both genetic consanguinity and giving birth as means of establishing a mother and child relationship, the court found "when the two means did not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother under California law."¹²³ The court determined that this decision did not violate the gestational carrier's constitutional rights because she was not exercising her right to make procreative choices, but was fulfilling the service she had agreed to without any expectation that the child would legally be hers.¹²⁴ Although both of the women were able to prove maternity under the California statute, i.e. through giving birth to the child or by having a genetic relation to the child, the court looked to intent to essentially 'break the tie' between the two women.¹²⁵

Today, the California legislature essentially codified the court's decision in *Johnson*, under California statutory law. The legislature defined the intended parent as "an individual, married or unmarried, who

¹²⁰ *Id.*

¹²¹ *See generally Johnson*, 5 Cal. 4th at 88.

¹²² *Id.* at 87.

¹²³ *Johnson*, 5 Cal. 4th at 93; *see also*, CAL. CIV. CODE §§ 7000-721 (repealed in 1994).

¹²⁴ *Id.* at 94.

¹²⁵ *Id.*

manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.”¹²⁶ It is clear that the legislature wrote their surrogacy statutes with the *Johnson* decision in mind, as California’s statutory law outlines detailed requirements for an assisted reproduction agreement, with focus on the relinquishment of the child from the gestational carrier to the intended parents.¹²⁷

Attempting to follow in California’s footsteps, the New Jersey Legislature made various attempts to create a statute that would allow for the enforcement of gestational surrogacy contracts in New Jersey like the contracts in *T.J.S.*, *A.W.H.* and *A.G.R.* The efforts failed until the recent shift in governor from Chris Christie to Phil Murphy.¹²⁸

III. The Evolution of Surrogacy Laws in the U.S.

Technological advances always precede the law, and although some states have laws permitting surrogacy, other states have completely outlawed it. The majority of states still have vastly differing and murky rules governing surrogacy arrangements.¹²⁹ The difference of

¹²⁶ Cal. Fam. Code § 7960 (Deering, Lexis Advance through all 1016 chapters of the 2018 Regular Session and the November 6, 2018 Ballot Measures).

¹²⁷ Cal. Fam. Code § 7962 (Deering, Lexis Advance through all 1016 chapters of the 2018 Regular Session and the November 6, 2018 Ballot Measures).

¹²⁸ Susan K. Livio, *Here’s What N.J.’s New Surrogacy Law Means for Couples and Women Willing to Give Birth to their Child*, N.J.COM, https://www.nj.com/healthfit/index.ssf/2018/05/bill_expanding_surrogate_parenting_now_law_in_nj.html (last visited Feb. 17, 2019).; see discussion *supra* Part I(a), “Legislative History.”

¹²⁹ See generally *Gestational Surrogacy Law Across the United States*, CREATIVE FAM. CONNECTIONS, INC., <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Mar. 31, 2020) (featuring a

traveling across a bridge between states could be the difference between criminal ramifications following an executed gestational carrier agreement, or it being entirely permissible. Many lawmakers in the late 1980s began taking up the same ethical position as feminists and considered surrogacy the commodification of women and babies.¹³⁰ The feminist critique of surrogacy has had a direct effect on the shaping of surrogacy laws; predominate feminist theorists and scholars in the political arena have argued that surrogacy arrangements should be outright prohibited or, in the alternative, women should not be bound to these contracts.¹³¹

A. Feminist Ideas Regarding Surrogacy and the Effect on Legislation

There are competing arguments regarding the regulation of surrogacy, especially commercial surrogacy.¹³² Many feminists have viewed surrogacy transactions as inherently degrading to women, that women are coerced by demanding circumstances, and that women cannot anticipate the adverse consequence of their choices.¹³³ Theorist

state-by-state interactive map for compensated surrogacy for both married same-sex couples and married same-sex couples).

¹³⁰ See generally Elizabeth S. Scott, Note, *Show Me the Money: Making Markets in Forbidden Exchange: Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROB. 109 (2009).

¹³¹ *Id.*

¹³² For general commodification debates see Elizabeth S. Anderson, *Is Women's Labor a Commodity?* 19 PHIL & PUB. AFF. 71 (1990); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2334 (1995) (concluding that the analogy to baby-selling "only strengthens the conclusion that surrogacy transactions should be legal").

¹³³ Scott, *supra* note 130.

Michael Sandel finds that the surrogacy market preys on people with particular vulnerabilities, such as those educationally or economically disadvantaged.¹³⁴ If a payment to a surrogate is considered high, a woman may feel pressured into entering the agreement for the economic benefit. Elizabeth S. Anderson theorizes that when surrogacy is considered a commodity, commercial surrogacy constitutes an unconscionable commodification of children and of women's reproductive capacities.¹³⁵ Commercial surrogacy substitutes market norms for some of the norms of parental love. Most importantly, it requires us to understand parental rights no longer as trusts but as things more like property rights—that is, rights of use and disposal over the things owned. For in this practice the natural mother deliberately conceives a child with the intention of giving it up for material advantage. Her renunciation of parental responsibilities is not done for the child's sake, for the sake of fulfilling an interest she shares with the child, but typically for her own sake (and possibly, if “altruism” is a motive, for the intended parents' sake). She and the couple who pay her give up her parental rights over her child thus treat her rights as kind of property right. They thereby treat the child itself as a kind of commodity, which may be properly bought and sold.¹³⁶

In the 1980s, there was an ethical feminist resistance to surrogacy due to the idea that many feminists found that surrogacy may perpetuate male dominance over and objectification of women.¹³⁷ The

¹³⁴ See generally *id.*

¹³⁵ Anderson, *supra* note 132 at 76.

¹³⁶ *Id.*

¹³⁷ Noa Ben Asher, Note, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1911 (2009).

practice of surrogacy embodied, for some feminists, a “capitalist baby industry” which could lead society to associate a dollar value on a child.¹³⁸ In 1987, Professor Margaret Jane Radin of the University of Southern California Law Center proposed that paid surrogacy involves a potential “double bind.”¹³⁹ Radin found that the availability of surrogacy could pressure poor women into becoming a surrogate when they ordinarily would not have been willing to.¹⁴⁰ Radin theorized that in the worst case scenario, rich women, who might not even be infertile, would employ poor women to bear their children for them.¹⁴¹ Radin continued that “it might be degrading for the surrogate to commodify her gestational services or her baby, but she might find this preferable to her other choices in life.”¹⁴² Although surrogates have not tended to be rich women, nor middle-class career women, neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind.”¹⁴³ In turning the womb into a commodity, many feminists fear that women will primarily be valued for their reproductive capabilities.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ Margaret Jane Radin, Article, *Market-Inalienability*, 100 HARV. L. REV. 1849, 183 (1987).

¹⁴⁰ *Id.* at 188-89.

¹⁴¹ *Id.* at 189.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205 (1992).

The court in *In re Baby M.* doubted that infertile couples in the low-income bracket will find upper-income level surrogates.¹⁴⁵ Further, the court continued that “it is clear to us that it is unlikely that surrogate mothers will be proportionately numerous among those women in the top twenty percent income bracket.”¹⁴⁶ The court cited a concern that under a paid surrogacy contract, “the natural mother is irrevocably committed before she knows the strength of her bond with her child and any decision after signing the agreement is compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment; the mother’s interests are of little concern to those who control a transaction of this capacity.”¹⁴⁷

Alternatively, although some feminist theorists and lawmakers may find the view that a women’s labor being commodified and commercialized preys on vulnerable women, it is important to not infantilize these women. Despite the preconceived notion that American gestational carriers are financially disadvantaged, most gestational carriers are not as wealthy as the intended parents, but very few are poor.¹⁴⁸ Many gestational carriers report that they use the money they receive for their service to enhance the welfare of their families.¹⁴⁹ Gestational carriers value the ability to earn money while they stay home with their own children, and few gestational carriers report a reluctance to

¹⁴⁵ *In re Baby M.*, 109 N.J. at 440.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK (MAR. 29, 2008), <https://www.newsweek.com/curious-lives-surrogates-84469>.

¹⁴⁹ *Id.*

relinquish the child.¹⁵⁰ Politicians and feminists alike have argued that surrogacy degrades motherhood and pregnancy, but on the contrary, evidence suggests that gestational carriers view themselves as performing a service of great social value for the benefit of others.¹⁵¹

Feminist theorist Nadine Taub suggests that attacks on paid surrogacy stem from a fear that the women's traditional virtue as a mother is something that will be compromised.¹⁵² "There is something suspicious about a society's sudden and vociferous concern with payment now that women proposed to take compensation. The concern stems not to be that payment necessarily precludes dignity, but perhaps that a woman's special quality depends on her role as a gestator and nurturer."¹⁵³ We must ask ourselves, does a woman being middle class or even low-income automatically translate into an inability to bargain or not have any bargaining power? What theorists like Radin fail to acknowledge is that women are able to resist power.

A bill in Kansas was proposed that would make gestational carriers and anyone who assists them liable for up to a \$10,000 fine or

¹⁵⁰ *Id.*

¹⁵¹ See generally Scott, *supra* note 130; Hazel Basilington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002) (study of attitudes toward relinquishment); Janice C. Ciccarrelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21 (2005) (reviewing studies of surrogacy).

¹⁵² Nadine Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285, 294 (1989-1990).

¹⁵³ *Id.*

imprisonment of one year.¹⁵⁴ In response to this, Erin Matson of Rewire.News stated “the assault on surrogacy, as well as fertility treatments in general, is yet another piece of the right’s battle against reproductive self-determination.”¹⁵⁵ Essentially, by limiting a women’s right to enter into a paid surrogacy contract, the proposed bill mirrors the anti-choice rhetoric circulating abortion by using harsh punitive measures to attempt to limit a woman’s right to enter in a paid surrogacy agreement. Matson compares those who are against surrogacy to anti-choice advocates who claim that women must be protected from their own reproductive decision-making, so as not to be “used” by men or others.¹⁵⁶ However, Matson finds that the argument “falls flat.”¹⁵⁷ “You can’t claim that freedom comes from restricting freedom. In particular, freedom for a less privileged group will not be increased by having the state impose more restrictions upon them. Family is what you make it. That’s a beautiful thing, and that’s feminist.”¹⁵⁸

B. Surrogacy Laws in the U.S. Today

Five states still have an outright ban on surrogacy and view surrogacy in the way feminist theorists and lawmakers did in the late 1980s.¹⁵⁹ For example, in New York, surrogate parenting contracts are

¹⁵⁴ Erin Matson, *Is Preventing Surrogacy Feminist? No, It’s Anti-Choice*, REWIRE.NEWS (APR. 11, 2014), <https://rewire.news/article/2014/04/11/preventing-surrogacy-feminist-anti-choice/>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ In 2016, Washington D.C. ended its surrogacy ban, but Indiana, Arizona, Nebraska, New York, and Michigan continue to ban compensated surrogacy

declared contrary to the public policy of the state and are void and enforceable.¹⁶⁰ This is similar to how New Jersey had always considered surrogacy arrangements in the past. Further, under New York law, one can face civil or criminal punishment for entering into a surrogacy arrangement.¹⁶¹ Although “altruistic” surrogacy, in which the surrogate receives no payment, remains legal in New York, any contract to

agreements. *See* IND. CODE ANN. § 31-20-1-1 (LexisNexis current through P.L. 1-2020 of the Second Regular Session of the 121st General Assembly); ARIZ. REV. STAT. ANN § 25-218 (current with all legislation adopted by the 54th Legislature (2019)); NEB. REV. STAT. ANN § 25-21, 200 (LexisNexis, current through the 2019 regular session of the 106th Legislature First Session (end)); N.Y. DOM. REL. Law § 123 (Consol. current through 2019 released Chapters 1-754); MICH. COMP. LAWS SERV. § 722.855 (LexisNexis, current through Public Act 178 and ERO 2019- 3 from the 2019 Legislative Session).

¹⁶⁰ N.Y. DOM. REL. LAW §122 (2018).

¹⁶¹ Pursuant to N.Y. DOM. REL. Law § 123 (2)(a) a birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars. Under subsection (b), any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seven thousand two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

formalize the arrangement, including designating parentage, is unenforceable.¹⁶² However, New York Governor Andrew Cuomo's administration has been pressing for these reforms for some time.¹⁶³ It is expected that with New York Governor Andrew Cuomo's support, New York will legalize compensated surrogacy agreements sometime in 2020, after being under pressure for years to pass a law allowing for the enforcement of gestational agreements.¹⁶⁴

In one of New Jersey's other neighboring states, Delaware, surrogacy contracts are permissible, as long as the contract satisfies the requirements in the law.¹⁶⁵ Delaware is one of the safer states in the United States to help reach parties' surrogacy goals.¹⁶⁶ A Delaware gestational carrier agreement must be in writing and executed before any embryos are transferred to initiate a pregnancy in the gestational carrier.¹⁶⁷ Both sides in the agreement must have independent counsel and everyone must acknowledge in writing the receipt of "information about the legal, financial, and contractual rights, expectations, penalties, and

¹⁶² Rich Vaughn, *New York Surrogacy Agreement Ban May End in 2019*, INTERNATIONAL FERTILITY LAW GROUP, <https://www.iflg.net/new-york-surrogacy-agreement-ban/> (last visited Feb. 17, 2019).

¹⁶³ Rich Vaughn, *New York Continues Push to End Surrogacy Ban as New States Enact Them*, INTERNATIONAL FERTILITY LAW GROUP, <https://www.iflg.net/new-york-surrogacy-ban-update2020/> (last visited Mar. 31, 2020).

¹⁶⁴ *Id.*

¹⁶⁵ DEL. CODE ANN. tit. 13, § 8-807 (2020).

¹⁶⁶ *What You Need to Know About Surrogacy in Delaware*, AMERICAN SURROGACY, <https://www.americansurrogacy.com/surrogacy/delaware-surrogacy-laws> (last visited Feb. 17, 2019).

¹⁶⁷ DEL. CODE ANN. tit. 13, § 8-806(a) (2020).

obligations of the gestational carrier agreement.”¹⁶⁸ Further, a gestational carrier agreement may provide for the payment of compensation to the gestational carrier.¹⁶⁹ This compensation shall be placed in escrow with an independent escrow agent pursuant to an escrow agreement prior to the gestational carrier’s commencement of any medical procedure, other than medical or mental health evaluations necessary to determine the gestational carrier’s eligibility.¹⁷⁰ Lastly, the agreement shall be witnessed by two disinterested and competent adults.¹⁷¹

Although Pennsylvania does not have statutory law addressing surrogacy, Pennsylvania courts have enforced gestational carrier agreements.¹⁷² Attorney Lawrence A. Kalikow finds that Pennsylvania is still viewed as a “good state” for carefully structured surrogacy agreements, especially gestational surrogacy arrangements.¹⁷³ In September 1995, Vital Records of the Pennsylvania Department of Health created a procedure, allowing for originally issued birth certificates to identify intended parents as the child’s legal parents.¹⁷⁴ This change in procedure

¹⁶⁸ *Id.*

¹⁶⁹ DEL. CODE ANN. tit. 13, § 8-806(b)(5) (2020).

¹⁷⁰ *Id.*

¹⁷¹ DEL. CODE ANN. tit. 13, § 8-807(b)(6) (2020).

¹⁷² *See generally J.F.*, 897 A.2d at 1261; *In re S.S.*, 128 A.3d 296 (2015).

¹⁷³ Lawrence A. Kalikow, Esq., *Surrogacy and the Law of Pennsylvania*, http://www.pasurrogacy.com/Surrogacy_and_the_Law.html (last visited Feb. 17, 2019).

¹⁷⁴ *Id.* (“This procedure requires: 1) the completion and submission of a “Supplemental Report of Assisted Conception” (a Vital Records form); and, 2) the issuance of a court order, by a judge of competent jurisdiction, directing that any certified copies of the birth record of the child(ren) shall reflect the parentage of the intended parents. Procedurally, in order to obtain the required

signaled the possibility that an intended mother, who is not the genetic mother of a child, could be deemed a legal parent without the need for adoption proceedings.¹⁷⁵

Similar to *In re Baby M.* in New Jersey, Pennsylvania had a case involving a disputed claim of parental rights out of a surrogacy arrangement in *J.F. v. D.B.*¹⁷⁶ However, it is important to distinguish that *In re Baby M.* was a case involving traditional surrogacy and *J.F. v. D.B.* was a case involving gestational surrogacy. A father entered into a gestational surrogacy agreement with a gestational carrier who agreed that she would not attempt to form a parent-child relationship with any children she was to bear and that she would voluntarily relinquish any parental rights.¹⁷⁷ The gestational carrier gave birth to triplets; the gestational carrier changed her mind about how she wanted the matter to proceed and wished to keep the children.¹⁷⁸ As Pennsylvania had not addressed surrogacy agreements in the past, the Erie County Common Pleas Court considered the law and public policy established in other states.¹⁷⁹ The Erie County Common Pleas Court determined that the

court order, a detailed petition must be filed with the court (usually the Orphans' Court division in the Pennsylvania county where the birth occurs).”).

¹⁷⁵ *Id.*

¹⁷⁶ *J.F. v. D.B.*, 897 A.2d 1261 (Pa. 2006).

¹⁷⁷ *Id.* at 1266.

¹⁷⁸ *Id.* at 1280.

¹⁷⁹ *J.F. v. D.V.*, No. 15061-2003 2004 Pa.D. & C.4th 1 LEXIS 246 (C.P. Apr. 2, 2004) (stating that “since this is a case of first impression in Pennsylvania, the court must look to the decisions rendered in sister states. In general, thirty-one states have either some type of surrogacy statute or case law setting forth the legality or illegality of surrogate parenting agreements. Nineteen states,

gestational carrier did have standing to establish custody; the father immediately appealed.¹⁸⁰ Ultimately, the Pennsylvania Superior Court held that the lower court improperly invalidated the surrogacy contract and thus awarded the father full physical and legal custody of the triplets.¹⁸¹ Although the court did not formally express the validity of surrogacy contracts generally, as they found that to be the responsibility of the legislature of Pennsylvania, this decision was an important development in gestational surrogacy law.

Fast forward eleven years, a judge in the Pennsylvania Appeals Court ruled that television personality and actress, Sherri Shepherd, was the legal mother of her child born via a surrogate in Pennsylvania.¹⁸² Shepherd and her husband were in the process of divorcing, after they had already entered into a gestational carrier agreement with a surrogate.¹⁸³ Shepherd had paid more than \$100,000.00 for a suburban Philadelphia surrogate to carry the child conceived from Shepherd's husband's sperm and a donor egg.¹⁸⁴ However, due to her failing marriage, Shepherd had a change of heart during the baby's second trimester and fought to have the gestational surrogacy agreement void.¹⁸⁵

including Pennsylvania, are generally silent about surrogacy or do not have surrogacy laws or cases yet.”).

¹⁸⁰ *J.F.*, 897 A.2d at 1280.

¹⁸¹ *Id.* at 1281.

¹⁸² AP, *Court: Sherri Shepherd Can't Get Out of Surrogacy Contract*, CBS NEWS (Nov. 25, 2015, 12:46 PM), <https://www.cbsnews.com/news/court-sherri-shepherd-cant-get-out-of-surrogacy-contract/>; see also *In re S.S.*, 128 A.3d at 296.

¹⁸³ See *S.S.*, 128 A.3d at 298-299.

¹⁸⁴ *Id.* at 300.

¹⁸⁵ *Id.* at 300-301.

Nevertheless, the Pennsylvania Appeals court enforced the surrogacy agreement, labeling Shepherd as the legal mother of the child.¹⁸⁶ Attorney for Shepherd's husband, Tiffany Palmer,¹⁸⁷ told E! News "justice was served, the court found that the baby has two legal parents and those people are the two people who conceived him, Lamar Sally and Sherri Shepherd. The court upheld what we believe is and should be the law in Pennsylvania; if you set out to conceive a child through assisted reproduction and enter into a contract to do so, you cannot just walk away from your legal parental responsibility because you changed your mind."¹⁸⁸

Depending on what state you are in and what type of marriage you are in, namely a heterosexual marriage or same-sex marriage, the legality of your surrogacy arrangement varies greatly as well.¹⁸⁹ It is

¹⁸⁶ *Id.* at 307.

¹⁸⁷ The Honorable Tiffany L. Palmer, Esq. is a former partner and founding member of Jerner & Palmer, P.C. whose practice is focused on family formation through adoption and assisted reproduction law as well as litigation involving legal parentage issues and complex family law dissolution cases. Judge Palmer has received national recognition for her work in assisted reproduction law and is a Rutgers Law School alumna. *See generally* Tiffany Palmer, <http://www.phillyjudges.com/component/jsn/tpalmer?Itemid=#questionnaire> (last visited Mar. 31, 2020).

¹⁸⁸ Natalie Finn, *Sherri Shepherd Ruled Legal Mother of Baby Born to Her and Ex Lamar Sally via Surrogate*, E! NEWS (APR. 21, 2015, 2:09 PM) <https://www.eonline.com/news/648766/sherri-shepherd-ruled-legal-mother-of-baby-born-to-her-and-ex-lamar-sally-via-surrogate>.

¹⁸⁹ *Gestational Surrogacy Law Across the United States*, *supra* note 129. (featuring a state-by-state interactive map for compensated surrogacy for both married same-sex couples and married same-sex couples). Creative Family Connections, Inc. compiled what is the first ever summary of state-by-state

prudent that intended parents research the ever-changing laws of not only the state they live in, but the state their surrogate resides too.¹⁹⁰

For states which do not address gestational surrogacy either through statutes or case law, courts look to other jurisdictions to see how it has decided on the issue, like the lower court did in *J.F. v. D.B.* Although persuasive authority from other jurisdictions is not binding, a court may choose to rely on that authority in order to come to a legal decision. For attorneys attempting to wrestle novel issues in state courts, they direct the court's attention to a consensus of cases of persuasive authority from other states.

Fragmented policies and legal positions on surrogacy in each state has caused intended parents and surrogates alike to circumvent and cross state lines to utilize laws of the most supportive jurisdiction. Further, due to the inconsistency of surrogacy agreement laws among the states, simply crossing states lines can subject a family to a parental rights challenge.¹⁹¹ For example, if a child is born pursuant to a surrogacy agreement in one state, the family relocating to a state that does not recognize surrogacy agreements could result in their parental rights could being questioned.¹⁹²

surrogacy law as actually practiced in the 50 states and the District of Columbia. *Id.*

¹⁹⁰ Lev, *supra* note 59, at 75.

¹⁹¹ See generally Amanda Mechell Holliday, Comment, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1126 (2003) (asserting that children born through surrogacy are at risk because of uncertain rights and lengthy litigation to determine the legal parents).

¹⁹² *Id.*

IV. The Need for States to Enact Surrogacy Statutes following New Jersey's Example

It is clear that the surrogacy market lacks any clear and consistent regulatory framework. Before moving directly towards urging states to follow New Jersey's lead, we must consider why there should be any regulation in the first place. In a libertarian's view, a surrogacy arrangement agreed upon by consenting adults is a matter of personal choice or an act of "free will," meaning that the government should pay a minimal role in regulating the transaction.¹⁹³ As long as the woman is not hurting anyone, she should be permitted to do as she wishes without intervention from the state or federal government. However, even a brief view into the history of surrogacy shows that without statutory guidance and regulation, all parties to a surrogacy agreement can be left in a position they had not intended, expected, or would have ever wanted to have happened. Further, an expansive view of the constitutional right to procreation justifies states regulating surrogacy, as to make it accessible.

A. A Lack of Statutory Guidance? Who is Affected?

The New Jersey Gestational Carrier Agreement Act requires that women who serve as gestational carriers have legal protection, pursuant to the promulgated procedural safeguards.¹⁹⁴ In considering and protecting the interests of women who enter into gestational carrier agreements, the Legislature required that a gestational carrier must complete a medical and psychological evaluation before approving her suitability

¹⁹³ Wanaporn Techagaisiyavanit, *Reproductive Justice Dilemma Under the New Thai Law: Children Born out of Assisted Reproductive Technology Protection Act B.E. 2558*, EXPRESSO (2015) (unpublished paper), http://works.bepress.com/wanaporn_techagaisiyavanit/1/.

¹⁹⁴ N.J. STAT. ANN. § 9:17-61.

to serve as a gestational carrier.¹⁹⁵ Further, a gestational carrier must retain an attorney independent of the intended parents, but for whose services the intended parents may pay.¹⁹⁶ By having independent counsel, the attorney is to consult the gestational carrier about the terms of the agreement and the potential legal consequences of the agreement.¹⁹⁷ Further, the Act provides that an enforceable gestational carrier agreement shall include a provision detailing the financial responsibilities of the parties, including that the intended parents are responsible for the gestational carrier's "reasonable expenses."¹⁹⁸ Without these provisions, women could enter into gestational carrier agreements without counsel, medical and psychological evaluations, or a clear-cut provision detailing the financial responsibilities of all parties involved.

The women who serve as surrogates are certainly not the only ones who are affected by a lack of legal protection and legislative guidance. As stated in the New Jersey Gestational Carrier Agreement Act, it was the intent and purpose of the Legislature to "establish consistent standards and procedural safeguards to promote the best interests of the children born as a result of gestational carrier agreements [and] to *protect all parties* involved in gestational carrier agreements."¹⁹⁹ Without consistent standards and procedural safeguards, parties involved in a gestational surrogacy agreement are left in uncharted territory, which could result in unintended consequences. Before the enactment of the New Jersey Gestational Carrier Agreement Act, parties were entering into surrogacy agreements that were completely unenforceable.

¹⁹⁵ N.J. STAT. ANN. § 9:17-64(a)(3).

¹⁹⁶ N.J. STAT. ANN. § 9:17-64(a)(5).

¹⁹⁷ *Id.*

¹⁹⁸ N.J. STAT. ANN. § 9:17-65(c).

¹⁹⁹ *Id.* (emphasis added).

Intended parents are directly affected by a lack of consistent standards and procedural safeguards, as gestational surrogacy arrangements can and have resulted in custody disputes when the law is ambiguous or unclear. Without a clear understanding of how to establish parentage pursuant to a surrogacy agreement, intended parents' legal rights are on the line. When a state does not have a clear regulatory framework, intended parents may try a myriad of ways to establish parentage such as through pre-birth orders, unenforceable contracts, and adoption pursuant to their state's established adoption laws. These ways of establishing parentage have been challenged time and time again throughout state courts across the country.²⁰⁰ When parties enter into a surrogacy agreement in a regime that does not have statutory regulation or binding case law as precedent, the intended parents are not guaranteed to become the legal parents of the child.²⁰¹

Additionally, intended parents' constitutional right to procreate is affected by a state's decision to criminalize or not enforce surrogacy arrangements. The fundamental right to procreate should extend to a right to use assisted reproductive technology and surrogacy, although the Supreme Court has never explicitly ruled this. In *Skinner v. Oklahoma*, forced sterilization of habitual criminals was ruled a violation of the equal protection clause of the Fourteenth Amendment.²⁰² The right to procreate, as protected by the Constitution, had been ruled on and upheld directly.²⁰³ In 1965, the Supreme Court held, in *Griswold v. Connecticut*, that the privacy of a married couple is protected by the Constitution. The Court detailed that the Due Process Clause protects

²⁰⁰ See discussion *supra* Part III(b), "Surrogacy Laws in the U.S. Today."

²⁰¹ *Id.*

²⁰² *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

²⁰³ *Id.*

various personal decisions concerning intimate relationships, sex, and reproduction.²⁰⁴ Seven years later, the Court in *Stanley v. Illinois* held that the right to conceive and to raise one's children was an "essential" and "basic civil right of man."²⁰⁵

Arguments against expanding the right to procreate to allow for the use of surrogacy cite that as surrogacy agreements do not involve a right that has traditionally been protected, it is unclear what level of scrutiny would apply.²⁰⁶ Further, the right to procreate is typically "associated and most powerful when it involves invasions of bodily integrity, as opposed to interfering with private decision making."²⁰⁷ "For example, a woman's right to obtain an abortion is grounded in a serious concern that, if this were denied, a woman would be forced to carry a child to term against her will. In contracts, most ART decisions are made before the pre-embryo is ever implanted into a women's uterus."²⁰⁸

However, as a fundamental right, a classification restricting procreation must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.²⁰⁹ By restricting an infertile couple's right to procreate when other options are available, states are infringing on their

²⁰⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁰⁵ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted).

²⁰⁶ Jennifer L. Rosato, Article, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57 (2004).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Soos v. Arizona*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994).

constitutional rights. As the medical field progresses, it is necessary that the law adapts to include that the new ways people can procreate are constitutionally protected.

“An even more troubling dilemma is posed for children when no legislative or judicial mechanism for enforcement of an agreement exists. Some children born as a result of gestational carrier agreements have been left without legal parents when courts have refused to grant order of parentage to the intended parents, or health departments have refused to put the intended parents on their children’s birth certificates.”²¹⁰ The New Jersey Gestational Carrier Agreement Act has created a clear cut and concise mechanism for establishing parentage before the birth of the child.²¹¹ This is consistent with the legislature’s commitment to serve the “best interest of the child.”²¹² Further, the Act establishes that a gestational carrier agreement must include express terms that the intended parents shall “accept custody of the child immediately upon the child’s birth [and] assume sole responsibility for the support of the child immediately upon the child’s birth.”²¹³

V. Conclusion

In New Jersey, we have come extremely far from *In re Baby M.* to the New Jersey Gestational Carrier Agreement Act. *In re Baby M.*

²¹⁰ Robin Fleischner, *The CON: Why N.J. Erred in Veto of Gestational Surrogacy Bill*, N.J.COM (Aug. 12, 2012), http://blog.nj.com/njv_guest_blog/2012/08/the_con_while_nj_erred_in_veto.html.

²¹¹ N.J. STAT. ANN § 9:17-63.

²¹² N.J. STAT. ANN § 9:17-61 (b)(1).

²¹³ N.J. STAT. ANN § 9:17-65 (b)(3).

made “surrogacy” a household term across the country.²¹⁴ Though *In re Baby M.* concerned a legal battle between a surrogate mother and the child’s intended parents in New Jersey, the way surrogacy was framed as an “illegitimate commodification” spread like wildfire across the country. This led to several states having a knee jerk reaction passing laws prohibiting or severely restricting surrogacy agreements, often with criminal penalties.²¹⁵ As discussed previously, there are still states that have not moved to acknowledge the advances in reproductive biotechnology nor accept and consider the unique reproductive challenges of medically infertile and social or situationally infertile people.

Those who are against surrogacy have predominantly cited to serving and protecting woman’s interests, but supporters better serve a woman’s interest by regulating surrogacy rather than banning it outright. If you are a low-income woman, lots of decisions are impacted and limited by your financial disadvantage. However, financial issues constrain many of the decisions people make every day and lead people to do things that they would not normally opt to do. With altruistic surrogacy, a woman can feel pressure in more ways than just being coerced into carrying a baby for money; money is not the only thing that gets women into a market they wouldn’t be in normally. Imagine a situation in which a woman’s brother is gay and is unable to have a child with his partner, unless he has a gestational carrier. That pressure that the woman might feel could greatly outweigh pressure from money.

It must be reiterated that the women entering into these kinds of contracts are adults. “Control over women’s bodies and particularly

²¹⁴ Susan Frelich Appelon, Note, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255 (2011).

²¹⁵ Sara Perle, Transcript, *What to Expect: Legal Developments and Challenges in Reproductive Justice*, 15 CARDOZO J.L. & GENDER 503 (2009).

over their reproductive capacities has been largely in the hands of men. Many feminists contend that once women gain control of their reproductive capacities, women will have made an essential first step in gaining the much-needed control over their bodies and thus their destiny.”²¹⁶

With the vast advancements in reproductive biotechnology over the last three decades, it is time for state legislatures to catch up and provide new options for families who face reproductive challenges. Whether a person is situationally infertile or medically infertile, gestational surrogacy provides a solution that had not always been possible. New Jersey essentially led the forefront of all legal surrogacy considerations in the late 1980s, so why don’t states follow our lead now?

²¹⁶ Lieber, *supra* note 144.

