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Melissa Cartine

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Surrogacy and Silence: Why State Legislatures Should Attempt to Regulate Surrogacy Contracts

Melissa A. Cartine

I. INTRODUCTION

In 2011, television personalities and married couple, Giuliana and Bill Rancic, revealed their struggle to have a child on their television show “Giuliana and Bill.”¹ The couple had struggled for several years to get pregnant through *in vitro* fertilization (“IVF”), which is one method of assisted reproductive technology (“ART”).² In 2012, Giuliana was diagnosed with breast cancer and although treatment was successful for her cancer, she would not be able to conceive on her own due to cancer treatments.³ As the couple desperately wanted to be parents, they opted for another form of ART, surrogacy.⁴ Genetically, Giuliana is the mother of the resulting child.⁵ Her eggs were combined with her husband’s sperm to form an embryo that was implanted into the surrogate.⁶ This type of surrogacy is called gestational surrogacy.⁷

The surrogacy process was successful for Giuliana and Bill as they now have a healthy, thriving baby boy.⁸ While the couple’s story appears inspiring, the process can be riddled with legal complexity due to a lack of statutory regulation. In the United States, a majority of state legislatures have remained silent as to the legality of surrogacy contracts and as to the question

¹ Natalie Finn, *Giuliana and Bill Rancic Welcome a Baby Boy*, <http://www.eonline.com/news/338760/giuliana-and-bill-rancic-welcome-a-baby-boy>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, 18 J.L. & Gender 199, 203 (2011).

⁸ Natalie Finn, *Giuliana and Bill Rancic Welcome a Baby Boy*, <http://www.eonline.com/news/338760/giuliana-and-bill-rancic-welcome-a-baby-boy>.

of parental rights when such contracts are signed.⁹ The failure of state legislatures to regulate in this area leaves parties without guidance and can ultimately harm well-meaning parents and innocent children.¹⁰

Several state courts have developed tests to determine parental rights when surrogacy contracts have been entered into because the state legislatures were silent on the issue. New Jersey state courts have banned surrogacy contracts as a matter of public policy.¹¹ California has consistently used an intent-based test, which considers the intending parents that initiated the surrogacy process, to be the legal the parents.¹² Alternatively, Ohio departed from an intent-based test and adopted a genetic-based test, which considers the genetic link between the parent and the child to be the dispositive factor in deciphering parental rights.¹³ A few states have attempted to regulate surrogacy contracts, either by banning them or taking a selective approach in regards to what types of surrogacy contracts the state will render enforceable.¹⁴

While the lack of regulation of surrogacy contracts does not pose a problem in unremarkable cases, such legislative silence can have devastating results for some families. If the surrogacy process goes awry, the parties that entered in to a surrogacy agreement could spend years litigating over whom the child's legal parents are.¹⁵ As evidenced by the various tests state courts have adopted, there is not much uniformity from state to state regarding surrogacy. The unpredictability of what a particular state court might decide makes surrogacy a precarious

⁹ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, 45 Colum. J.L. & Soc. Probs. 415, 421-22 (2012).

¹⁰ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 421-22.

¹¹ *In the Matter of Baby M*, 537 A.2d 1227 (New Jersey 1988).

¹² *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

¹³ *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio 1994).

¹⁴ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 421-22.

¹⁵ *Id.* at 422.

method of ART for those in states where no statutory guidance or case law is provided.¹⁶ To address this problem, this article will argue that state legislatures should regulate gestational surrogacy contracts, including third party gestational arrangements, due to the fact that this method has seen expansive growth over the last decade and because at least one intending parent is genetically-linked to the child. In addition to regulating gestational surrogacy contracts, this article will also advocate for legislation that promotes the integrity of the surrogacy process by drafting laws that allow for judicial and welfare agency intervention and laws that will protect the surrogate.

This analysis accomplishes this examination in four parts. Part I will serve as an introduction to the major legal pitfall of surrogacy contracts, which is a lack of statutory regulation of such contracts. Part II will provide an overview of gestational and traditional surrogacy. It will also describe the status quo of surrogacy among the states, which is defined as a hodgepodge of states that have no statutory regulation or case law at all, states with case law on point, and the minority of states that have attempted statutory regulation. Part III will discuss why comprehensive statutory guidance, particularly in regards to gestational surrogacy, will provide for more predictability in the surrogacy process. Then, it will highlight constitutional issues raised in surrogacy regulation and advocate for a balance between promoting integrity in the surrogacy process and protecting one's right to procreate. Part III will also acknowledge that some issues involving surrogacy are so legally complex that they may be better addressed through the court system. Finally, Part IV will restate the stance that state legislatures should regulate gestational surrogacy contracts so that parties entering in to such agreements can predict

¹⁶ *Id.*

their legal rights at the outset. It will also reiterate which types of regulations may help to promote integrity in the surrogacy process.

II. THE STATUS QUO OF SURROGACY IN THE UNITED STATES

A. GESTATIONAL AND TRADITIONAL SURROGACY

Generally, those seeking to start a family unit have three options: natural conception, adoption, and surrogacy. Since natural conception may not be an option for many seeking to start a family, they must revert to the latter two options. Adoption is highly regulated by statute in all states.¹⁷ It is also a lengthy, expensive process and the demand of those wishing to start a family may be greater than the availability of children that could be adopted.¹⁸ Surrogacy, on the other hand, does not need to be a process much lengthier than natural reproduction.¹⁹ Even more enticing is the fact that if an individual or family opts for gestational surrogacy and utilizes its own gametes, it has a genetic link with the child, making it the closet option to natural conception.²⁰ Thus, it is easy to fathom why so many families place their faith in the surrogacy process despite its potential legal pitfalls due to lack of statutory regulation.

The term surrogacy usually refers to one of two methods: gestational and traditional. This is the method that the Rancic couple opted for and it usually creates a genetic link between the child and at least one intending parent contracting to have a surrogate carry their child. As described previously, a woman's egg is removed and combined with her partner's sperm before

¹⁷ Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. Mem. L. Rev. 349, 351-52.

¹⁸ Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, at 351-52.

¹⁹ <http://www.sharedconception.com/surrogate-mother-faq#q9>

²⁰ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 419-20.

being implanted into a third person, the surrogate.²¹ If only one or no intending parent can supply gametes, then third party donors could be used to supply the needed gametes.²² This would also be considered gestational surrogacy.²³ It may be referred to as donor surrogacy or as a third party gestational arrangement as well.²⁴ In both such arrangements, the surrogate carries the child to full-term but has no genetic link to the child since her gametes were not used.²⁵

Those that choose to can instead utilize the surrogate's eggs.²⁶ This is called traditional or partial surrogacy and creates a genetic link between the child and the surrogate.²⁷

According to the Society of Assisted Reproductive Technology ("SART"), gestational surrogacy is the method more frequently used today.²⁸ However, the Council for Responsible Genetics claims that accurate statistics are not available to deduce how many more people have utilized this method rather than traditional surrogacy.²⁹ Instead, the Council for Responsible Genetics found that studies that looked at IVF success rates demonstrate that the rate of gestational surrogacy has increased dramatically and will continue to do so over time.³⁰ The data from IVF success rates itself can be used to determine that gestational surrogacy arrangements have increased because in the gestational surrogacy process, the embryo of the intending parents

²¹ *Id.* at 419-20.

²² *Id.*

²³ *Id.*

²⁴ Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, at 351-52.

²⁵ Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, at 203.

²⁶ *Id.* at 203.

²⁷ *Id.*

²⁸ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DePaul L. Rev. 799, 809 (2012).

²⁹ <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>

³⁰ *Id.*

is then implanted via IVF into the surrogate's uterus.³¹ The CDC requires ART clinics, which perform IVF, to report the success rates of IVF cycles and to report when the patient is a gestational surrogate.³²

The Council for Responsible Genetics is hesitant to conclude that gestational surrogacy is more prevalent than traditional surrogacy because the metric used to determine success rates of IVF is the IVF cycle.³³ The measurement does not consider the individual, so there is no way to know how many women actually serve as surrogates because when an IVF procedure is not successful, it goes unreported.³⁴ It is also hesitant to conclude that gestational surrogacy is more prevalent because no reliable statistics exist to account for how many people utilize the traditional method of surrogacy.³⁵ As previously highlighted, the Council for Responsible Genetics did conclude that the rate utilization of gestational surrogacy has increased dramatically, doubling from 2004-2008.³⁶ It was also comfortable in predicting that the rapid growth of gestational surrogacy was not likely to slow in the future.³⁷

B. CURRENT CASE LAW AND THE POLICIES THAT INFLUENCED COURTS' DECISIONS

Silence is the majority approach in regards to surrogacy.³⁸ There are a few states that attempt to deal with the legal issues that arise in surrogacy via the court system and case law, and

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 421-22.

then, some states that provide legislative guidance in regards to surrogacy.³⁹ There are two seminal surrogacy cases that are cited extensively: *In Re Baby M* and *Johnson v. Calvert*.

The traditional method of surrogacy was used by the Stern family in *In re Baby M*.⁴⁰ In this case, the Sterns entered into a surrogacy agreement whereby Mr. Stern's sperm was implanted into the surrogate.⁴¹ The Stern family opted to use the surrogate's eggs due to Mrs. Stern's fertility issues, although no court or legal commentary has expounded upon what those fertility issues were.⁴² Up until the child was born, the process had been successful for the Sterns.⁴³ Then, the surrogate, Mary Beth Whitehead, decided that she wanted to keep the child and the Sterns sued for parental rights.⁴⁴ The New Jersey Supreme Court was left to decide who the child's parents were as the state legislature provided no statutory guidance on the matter.⁴⁵ The court invalidated the surrogacy contract between the Sterns and the surrogate based on public policy implications that it felt stemmed from such agreements.⁴⁶ The court reasoned that surrogacy agreements exploited lower income individuals, who would be inclined to use their bodies for money.⁴⁷ The protectionist theory that the New Jersey Supreme Court incited in *Baby M* is the same theory that has influenced the ban on payments for organ donation.⁴⁸ Ultimately, the court used the best interests of the child analysis to determine placement of the child.⁴⁹ It

³⁹ *Id.* at 421-22.

⁴⁰ *In the Matter of Baby M*, 537 A.2d 1227 (New Jersey 1988).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 Suffolk U.L. Rev. 717, 729 (2003).

⁴⁹ *In the Matter of Baby M*, 537 at 1227.

reasoned that placing the child with the Sterns was the best outcome for the child.⁵⁰ The court did find the surrogate to be the child's legal mother, and thus, Mrs. Stern could not adopt Melissa until she became an adult.⁵¹

While protection from exploitation of lower income individuals was a guiding public policy concern for the New Jersey Supreme Court in *Baby M*, this is not the only theory that has been offered in response to the legal issues surrounding surrogacy.⁵² There is also the feminist approach, which advocates for the enforceability of surrogacy contracts, under the view that a woman should have autonomy of her body and the freedom to contract.⁵³

A California court appeared to adopt a more feminist approach, considering the freedom to contract in its analysis of a surrogacy agreement in *Johnson v. Calvert*.⁵⁴ In this case, the Calverts, seeking to start a family, used the gestational method of surrogacy.⁵⁵ The court used an intent-based analysis.⁵⁶ It reasoned that but-for the Calverts, who had the intent to bring the child into the world, the child would not exist and, therefore, they were the child's legal parents.⁵⁷

This case is clearly factually different than *In Re Baby M*, where the Sterns used the traditional method of surrogacy. The facts in *Johnson v. Calvert* probably made it more palatable for the court to find the Calverts to be the child's legal parents as they had a genetic link. But the court was unequivocal in regards to the parties' freedom to contract when it stated,

⁵⁰ *Id.*

⁵¹ Jennifer Weiss, *Now it's Melissa's Time*, http://www.reproductivelawyer.com/press_babym.cfm.

⁵² Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, at 723.

⁵³ *Id.* at 723.

⁵⁴ *Johnson v. Calvert*, 851 P.2d at 782.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

“[T]he parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna [the surrogate] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring.”⁵⁸ This part of the court’s analysis was less paternalistic than the approach the New Jersey Supreme took in *Baby M*, and thus, exemplified another policy that could shape a court’s decision in a surrogacy case.⁵⁹

Another case that is illustrative of how a court may decide when presented with a surrogacy agreement gone awry is *Belsito v. Clark*. In this case, the Clarks sought to start a family via the gestational surrogacy method.⁶⁰ The court did not use the intent-based test of *Johnson v. Calvert* but instead looked to the genetic link of the parents to the child.⁶¹ The Ohio court limited the legal parents in a surrogacy agreement to those with a genetic link to the child.⁶² Although the court’s decision made surrogacy contracts more predictable at the outset, it also expanded the amount of individuals that could not be deemed to be the legal parents of a child resulting from gestational surrogacy arrangements.

C. CURRENT STATUTORY REGULATION

1. States That Have Statutorily Banned Surrogacy

A few states and the federal district of Washington, D.C. have banned surrogacy agreements.⁶³ In Washington, D.C. all surrogacy contracts are unenforceable and the entrance

⁵⁸ *Id.*

⁵⁹ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, at 723.

⁶⁰ *Belsito v. Clark*, 644 N.E.2d at 762.

⁶¹ *Id.* at 762.

⁶² *Id.*

⁶³ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 421-22.

into such agreements may result in prison confinement, fines, or potentially both.⁶⁴ New York has also banned all surrogacy agreements.⁶⁵ In the state of New York, the heaviest penalties are for those who act as intermediaries, which could be anyone who tries to facilitate a surrogacy contract.⁶⁶ Michigan also bans surrogacy agreements; its statutory scheme closely resembles New York's approach.⁶⁷ Finally, Arizona, Nebraska, and Louisiana have also statutorily banned surrogacy contracts.⁶⁸

2. States with Varied Statutory Approaches

While statutory regulation of surrogacy is the exception rather than the norm in the United States, a few states have attempted to provide guidance to those seeking to start a family via surrogacy. Florida allows for gestational agreements but requires that the intending parents must be married.⁶⁹ Several other states such as Virginia, Texas, and Nevada have similar statutory frameworks to Florida regarding gestational agreements.⁷⁰ North Dakota bans traditional surrogacy contracts although it allows for gestational contracts.⁷¹ Finally, Illinois has some of the most comprehensive legislation regarding gestational surrogacy agreements.⁷²

Illinois enacted its Gestational Surrogacy Act to standardize various aspects of a gestational surrogacy agreement.⁷³ Those seeking to a start a family through this method of

⁶⁴ *Id.* at 421-22.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, at 809.

⁶⁹ *Id.* at 809.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, at 373.

⁷³ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, at 809.

surrogacy must be doing so out of medical necessity.⁷⁴ What exactly the Illinois legislature meant by “medical need” is unclear but since the GSA has been viewed as a more liberal body of law, it is likely that this term is not meant to be very limiting.⁷⁵ Illinois is not the only state to allow for surrogacy only in instances of medical necessity; states such as Florida and Virginia also use the ambiguous term as a requirement for enforceability of the contract.⁷⁶ The GSA is limiting in that it requires that one intending parent supply reproductive cells to be implanted in the surrogate.⁷⁷

There has been some criticism of Illinois’s approach, which provides guidance for only intending parents who can supply gametes.⁷⁸ It is understandable that some individuals feel this is unfair, as the intending parents who use only donor gametes are not protected by Illinois’s GSA.

Another feature of the GSA is that it does have some paternalistic aspects because it attempts to protect the surrogate via certain eligibility requirements:

(a) A gestational surrogate shall be deemed to have satisfied the requirements of this Act if she has met the following requirements at the time the gestational surrogacy contract is executed

- (1) she is at least 21 years of age;
- (2) she has given birth to at least one child;
- (3) she has completed a medical evaluation;
- (4) she has completed a mental health evaluation;

750 ILCS §47/20(a)(1)-(4).⁷⁹ A surrogate must be, at a minimum, 21 years of age. The statute also mandates health evaluations and requires that the surrogate have previously bore a child.⁸⁰

⁷⁴ *Id.* at 809.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 810.

⁷⁸ *Id.*

⁷⁹ 750 ILL. COMP. STAT. 47/20 (2005).

⁸⁰ *Id.* at 47/20(a)(1)-(4).

The GSA includes a clause that states that any payment to the surrogate must be placed in an escrow account before performance.⁸¹ Such regulations may assuage public policy concerns about a woman exploiting her body and are intended to ensure that a woman does not feel coerced into entering such a contract.

D. A MODEL ACT: ARTICLE 8 OF THE UNIFORM PARENTAGE ACT

Article 8 of the Uniform Parentage Act (“UPA”) is a model act, which demonstrates how states may regulate gestational surrogacy contracts.⁸² First, Article 8 requires judicial intervention from the beginning of the surrogacy process:

- (a) If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the of the agreement.
- (b) The court may issue an order under subsection (a) only on finding that:
 - (1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];
 - (2) medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child;
 - (3) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of fitness applicable to adoptive parents.

Unif. Parentage Act § 803 (amended 2002).⁸³ The agreement between intending parents and a surrogate will only be enforceable if certain requirements are met.⁸⁴ The language of § 801 allows only a man and woman to be intending parents and both must be privy to the gestational surrogacy contract.⁸⁵ Section 803 also has a residency requirement, which is that the mother or

⁸¹ *Id.* at 47/25(a)(4).

⁸² Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreement*, at 813.

⁸³ Unif. Parentage Act § 803 (amended 2002).

⁸⁴ Unif. Parentage Act § 801(b) (amended 2002).

⁸⁵ Unif. Parentage Act § 803 (amended 2002).

intending parents of the child must have resided where the surrogacy agreement is to be declared valid for a minimum of 90 days.⁸⁶

One of the highly criticized sections of Article 8 is the requirement of a home study, which is to be conducted by a child welfare agency, of the intended parents.⁸⁷ Such criticism is misplaced because, first, the language of § 803 indicates that the court could waive such an investigation.⁸⁸ Second, it is important that legislatures err on the side of comprehensive legislation that protects the best interests of children brought into this world via surrogacy despite any infringement that might have one's right to procreate. An example of why home study is necessary is *In re: the Adoption of Infants H.*; the case was about a man who was 57-years-old when he approached an Indiana surrogacy agency to aid him in becoming a parent.⁸⁹ Not only were his age and single-person status reasons for concern, but his mental health status as well.

III. A CALL FOR STATE LEGISLATURES TO CHANGE THE STATUS QUO

A. REGULATION OF GESTATIONAL SURROGACY AGREEMENTS

As discussed previously, SART has concluded that gestational surrogacy is the more prevalent type of surrogacy, while the Council of Responsible genetics has concluded that the method of gestational surrogacy has seen rapid growth and has predicted that this trend is not likely to slow down.⁹⁰ Since the trend demonstrates rapid growth in the utilization of gestational surrogacy, pragmatism would suggest that state legislatures should begin to regulate this method

⁸⁶ Unif. Parentage Act § 801(b) (amended 2002).

⁸⁷ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreement*, at 814-815.

⁸⁸ Unif. Parentage Act § 803 (amended 2002).

⁸⁹ Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 433-434.

⁹⁰ <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>.

of surrogacy.⁹¹ Another reason gestational surrogacy should be regulated is that courts seem to grapple less with gestational surrogacy agreements than with traditional surrogacy agreements.⁹² The genetic link that usually exists between at least one of the intending parents and the child is likely a predominating factor in why courts find it less daunting to determine parental rights in these cases.⁹³

Despite the fact that courts do not seem to struggle as much with the legal outcomes in gestational surrogacy cases, comprehensive regulation is still necessary. This is because it would be less of a burden on court systems and intending parents in states that do not have case law on point regarding legal outcomes of gestational surrogacy agreements.⁹⁴ Statutory regulation that predicts the parental rights of the intending parties and gestational surrogate at the outset of a gestational surrogacy agreement could keep the court's involvement relatively limited. In fact, the *Johnson* court pleaded for the California legislature to do just that.⁹⁵

From a humanistic standpoint, those seeking to start a family utilizing surrogacy likely have infertility issues or an alternative family unit and have endured enough emotional hardships as a result. The predictability of parental rights stemming from surrogacy contracts will prevent more families from experiencing more emotional hardships such as being dragged through years of litigation to assume parental rights over a child.

⁹¹ Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, at 381.

⁹² *Id.* at 359-60.

⁹³ *Id.* at 358.

⁹⁴ *Id.* at 358-359.

⁹⁵ *Johnson v. Calvert*, 851 P.2d at 782.

No stance is taken regarding the regulation of traditional surrogacy as other commentary has.⁹⁶ A ban on traditional surrogacy would have serious implications for couples where both partners are infertile and those who cannot afford gestational surrogacy but wish to start a family. At this point, when such arrangements do not work out, it is important to note that the court system would be best apt to deal with the challenges presented by such scenarios.

B. BALANCING THE INTEGRITY OF THE SURROGACY PROCESS AND CONSTITUTIONAL RIGHTS

State legislatures may be wary of regulating surrogacy agreements due to the fundamental rights of the parties involved.⁹⁷ In the Supreme Court case, *Eisenstadt v. Baird*, Justice Brennan stated, “[I]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁹⁸ The infringement of one’s right to privacy and right to procreate is an argument that may be raised against statutory regulation of surrogacy.⁹⁹

Regulations from both Illinois’s GSA and Article 8 of the UPA could potentially raise constitutional issues. As touched upon earlier, Illinois’s GSA, which requires at least one of the intending parents to provide gametes for the surrogacy agreement to be declared valid, provides no statutory protection for those who cannot provide gametes.¹⁰⁰ To deal with the countervailing

⁹⁶ Laura Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 Cath. Law 241, 252-254 (1999).

⁹⁷ Laura Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, at 252-254.

⁹⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁹⁹ Laura Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, at 254.

¹⁰⁰ 750 ILL. COMP. STAT. 47/20 (2005).

issue of infringing on one's right to procreate, the argument has been presented that in the situation where the intending parents cannot supply gametes, adoption, instead of procreation, is an available option.¹⁰¹

This argument is not convincing. Intending parents that enter into an agreement with a gestational surrogate but utilizing donor gametes should be entitled to protection of state laws because the intending parents are simply partaking in a variation of gestational surrogacy.¹⁰² Furthermore, courts should address the legal challenges that arise from surrogacy arrangements that are not gestational in nature instead of banning entire classes of people from protection of state laws.

The requirement of § 801 of the UPA may prevent some groups, whether those groups are non-married couples, homosexual couples, or individuals from entering surrogacy agreements depending on a state's interpretation of the model provision.¹⁰³ Section 801 states that "[t]he man and the woman who are the intended parents must both be the parties to the gestational agreement."¹⁰⁴ This provision is an amendment from the UPA's provision proposed in 2000, which was that the intending parents needed to be married.¹⁰⁵ While the amendment seems to eliminate the marriage requirement, the provision has been interpreted to mean that only a man and a woman can be intending parents privy to the gestational agreement.¹⁰⁶

¹⁰¹ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, at 809.

¹⁰² Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, at 203.

¹⁰³ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, at 809.

¹⁰⁴ Unif. Parentage Act § 801(b) (amended 2002).

¹⁰⁵ Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, at 216-217.

¹⁰⁶ *Id.* at 216-217.

When perceived in this regard, the requirement is invasive and an infringement on an individual's right to procreate. It is important to maintain integrity in the surrogacy process with laws that are geared towards promoting a stable, healthy family unit and protecting the surrogate. It is not worthwhile to prevent individuals and non-married or homosexual couples from participating in surrogacy agreements as a means of maintaining integrity in the surrogacy process.

The argument has also been raised that a regulation such as a home study requirement, which is when a welfare agency would investigate the intending parents prior to approval of the surrogacy agreement, may also conflict with one's right to procreate.¹⁰⁷ Such an argument is most convincing in the situation where a committed, younger to middle aged, healthy couple wants to start a family but must endure the more invasive requirement of a home study investigation. In this scenario, violations of the right of privacy and the right to procreate will likely occur. Only an infertile couple, or perhaps a homosexual couple, must undergo approval by an outside agency before being able to procreate. This critique seems well founded. Yet, this argument fails to consider the actual, disturbing cases that have occurred due to a lack of statutory safeguards such as a UPA's home study requirement.

As mentioned previously, *In re: the Adoption of Infants H* involved a 57-year-old man named Stephen Melinger, who wanted to become a father.¹⁰⁸ He contacted a surrogacy agency in Indiana, which facilitated a surrogacy arrangement between he and a woman from South Carolina.¹⁰⁹ The surrogate became pregnant with twin girls, which were born prematurely in

¹⁰⁷ Laura Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 Cath. Law 241, 254 (1999).

¹⁰⁸ http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0

¹⁰⁹ *Id.*

Indiana.¹¹⁰ Genetically, the twins were not Melinger's, nor the surrogate's; the contract was third party gestational surrogacy arrangement.¹¹¹ Hospital staff contacted the state welfare agency due to the disturbing behavior that Melinger displayed when visiting the twins in the neonatal intensive care unit.¹¹² Melinger brought his pet bird to the unit in one instance.¹¹³ In another, he came to the hospital with his clothes covered in bird feces.¹¹⁴

Melinger was supposed to adopt the twins after their birth but due to concerns of his mental health, the children were placed in foster care.¹¹⁵ Eventually, the twins were placed in his custody by a lower court in Indiana.¹¹⁶ Melinger returned to New Jersey with the children while Indiana's welfare agency appealed the decision.¹¹⁷ In New Jersey, an onlooker reported Melinger because the children looked dirty and were dressed inappropriately for cold weather.¹¹⁸ When the state welfare agency investigated, they found Melinger's home to be unsanitary and to smell strongly of urine.¹¹⁹ The twins were removed from Melinger's custody.¹²⁰ Indiana's appellate court nullified Melinger's adoption of the twins and ordered that the adoption be redone.¹²¹ Around the same time, a New Jersey court held that its own welfare agency had not proved Melinger was found to be a harm to the girls and that they were to be returned to him.¹²²

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

In another disturbing case, Amy and Scott Kehoe also entered into a third party gestational arrangement.¹²³ Since Mrs. Kehoe was infertile, she could not supply gametes to create a genetic link between herself and a potential child.¹²⁴ The couple selected a third party donor female to provide eggs, and instead of using Mr. Kehoe's gametes, chose a third party donor male to provide sperm.¹²⁵ The arrangement went awry when the surrogate, Laschell Baker, learned that Mrs. Kehoe was treated for mental illness.¹²⁶ It appears that Mrs. Kehoe suffered from psychotic disorder not otherwise specified (NOS).¹²⁷ At this point, twins had been bore by Mrs. Baker.¹²⁸ The surrogate, who already had four children with her husband, filed an order with a Michigan court seeking custody of the children.¹²⁹ Despite the fact that Mrs. Kehoe's psychiatrist testified that she would be a fit mother, the motion was granted.¹³⁰

Today, the children reside with the Baker couple.¹³¹ The Kehoes had originally named the children Ethan and Bridget, but the Bakers decided to change their names to Peyton and Dani.¹³² As of 2009, when the story of the arrangement that deteriorated between the Kehoes and Mrs. Baker was published in the *New York Times*, the Baker couple did not yet have the money to legally change the names of the children.¹³³

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0

¹²⁸ Erin Y. Hisano, *Gestational Surrogacy Disputes: Refocusing on the Child*, 15 Lewis & Clark L. Rev. 517, 521 (2011).

¹²⁹ http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

Robinson v. Hollingsworth, another surrogacy case litigated in New Jersey, involved a gestational arrangement as well.¹³⁴ Sean and Donald Hollingsworth, a married, homosexual couple, hoped to start a family.¹³⁵ Eventually they were able to when Donald's sister, Angelia Robinson, agreed to be a gestational surrogate for the couple.¹³⁶ The arrangement was gestational because an anonymous donor's egg and Sean's sperm were used to create the embryo that was implanted into Ms. Robinson.¹³⁷ Thus, Ms. Robinson had no genetic link to the twins she eventually bore.¹³⁸

The childbirth was a traumatic process for Ms. Robinson, who had to have an emergency caesarean section, and almost died.¹³⁹ Soon there after, Ms. Robinson sued for custody of the twins despite the fact that she had signed a contract prior to implantation that gave Donald Hollingsworth adoptive of rights of the children that she bore.¹⁴⁰ As elicited from *Baby M*, surrogacy contracts like the one that the Hollingsworth couple and Ms. Robinson signed, are void in New Jersey due to public policy concerns.¹⁴¹ Therefore, the Superior Court of New Jersey voided the agreement and awarded parental rights to Sean Hollingsworth, who had a genetic link with the children, and Angelia Robinson, who had no genetic link to the children at all.¹⁴²

¹³⁴ Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, at 199-200.

¹³⁵ *Id.* at 199-200.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *In the Matter of Baby M*, 537 A.2d at 1227.

¹⁴² Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parent in Surrogacy Custody Disputes*, at 199-200.

It appears that sometime after the children were born and the Hollingsworth couple took custody, tensions began to grow between Ms. Robinson and the couple.¹⁴³ Ms. Robinson was apparently dependent upon her brother and lived with him while he helped her get a job.¹⁴⁴ It was also apparent that she shared some anti-homosexual sentiments, which the court noted when doing its best interests of the child analysis to determine custody.¹⁴⁵ The court found that the Hollingsworth couple provided a more stable home life for the children, and granted Mr. Sean Hollingsworth full custody.¹⁴⁶ Despite Ms. Robinson's lack of a genetic link to the children and her anti-gay views, she was still deemed the children's legal mother and awarded visitation rights.¹⁴⁷

The previous cases mentioned demonstrate potential variations of gestational surrogacy arrangements. Stephen Melinger had a third party gestational arrangement with two donors, as did the Kehoes, while the Hollingsworth couple utilized a donor's eggs and Sean Hollingsworth's sperm.¹⁴⁸ As stated previously, an intending parent or parents using the gestational surrogacy method should be deemed the legal parent or parents of the resulting child. Under such a regulation, Stephen Melinger would be deemed the legal parent of the twin girls, the Kehoes would be deemed the legal parents of the twins bore by Ms. Baker, and the Hollingsworth couple would be deemed the legal parents of the twins bore by Ms. Robinson. Yet, this regulation only allows a party to predict his or her legal rights and cannot alone ensure integrity of the surrogacy process.

¹⁴³ http://www.nj.com/news/index.ssf/2011/12/nj_gay_couple_fight_for_custod.html.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*; http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0.

One mechanism state legislatures should adopt to promote the integrity of the surrogacy process is a home study requirement similar to § 803 of the UPA.¹⁴⁹ As described previously, § 803 contains a waiver clause whereby a court could waive a home study investigation.¹⁵⁰ In order to decrease the invasiveness of the home study requirement, the waiver clause should be the norm instead of the exception. In addition, states should adopt laws that protect the surrogate, which would also aid in maintaining integrity in the surrogacy process. Illinois's GSA includes comprehensive regulation to protect the gestational surrogate by requiring her to submit to physical and mental examinations, along with mandating that she is 21 years of age and has previously bore a child.¹⁵¹ If such requirements are not met, the gestational surrogacy agreement is unenforceable.¹⁵²

In each of the presented cases, there appeared to be at least one somewhat unstable individual partaking in the surrogacy arrangement. Although Amy Kehoe was the only one known to have documented mental illness, the facts of the other cases suggest that something was not copacetic regarding Mr. Melinger or Ms. Robinson.¹⁵³ Mr. Melinger was an older, single man who wore clothing covered in bird feces and brought his pet bird to a neo-natal intensive care unit.¹⁵⁴ Ms. Robinson appeared to be financially dependent upon her brother, Donald Hollingsworth. It was also discovered that she harbored anti-gay sentiments despite the fact that she agreed to be a gestational surrogate for her brother and his husband.¹⁵⁵

¹⁴⁹ Unif. Parentage Act § 803 (amended 2002).

¹⁵⁰ *Id.*

¹⁵¹ 750 ILL. COMP. STAT. 47/20 (2005).

¹⁵² *Id.*

¹⁵³ http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0.

¹⁵⁴ *Id.*

¹⁵⁵ http://www.nj.com/news/index.ssf/2011/12/nj_gay_couple_fight_for_custod.html.

In cases that seem somewhat suspect, perhaps where an elderly individual seeks to start a family, the benefits of the home study requirement, which would be to promote the integrity of the surrogacy process by ensuring that a healthy, stable environment exists for children, could outweigh the potential infringement on an individual's right to procreate. When used only in what seem to be exceptional cases, the proposed home study requirement may not prevent a situation like that which occurred between the Kehoes and Mrs. Baker, since the Kehoes may have seemed unexceptional until Mrs. Baker discovered that Mrs. Kehoe suffered from psychotic disorder not otherwise specified. Despite this, it is necessary to maintain the balance between the welfare of a child and one's right to procreate, and a home study requirement that is too invasive would shift that balance in a way that would infringe upon one's right to procreate.

Regulations akin to those found in Illinois's GSA, which set forth certain requirements the gestational surrogate must meet for a surrogacy contract to be enforceable, would also help to maintain the balance between providing a healthy, stable home environment and one's right to procreate. Such regulations would also protect the surrogate, which would further promote the integrity of the surrogacy process. In the case of *Robinson v. Hollingsworth*, a mental examination might have revealed Ms. Robinson's anti-gay predilections, which may have made the Hollingsworth couple reconsider entering into a surrogacy contract with her.

The requirement that a surrogate has previously bore a child is also an important legislative consideration. This is because a woman who has not experienced pregnancy and childbirth may not be fully aware of the mental and emotional, even physical feelings that may arise in the childbearing process. These requirements, if met, would render the contract between the intending parents and the gestational surrogate enforceable.

The intending parents right to procreate would be infringed to the point that they could not necessarily contract with any gestational surrogate of their choice but such requirements could prevent potential litigation from a gestational surrogate who was mentally unstable or grew too attached to the child during the pregnancy and birth. The absence of litigation over parental rights, which can sometimes extend many years beyond the birth of the child, would likely promote a healthy, stable home environment.¹⁵⁶ An environment inundated with litigation regarding parental rights would not likely promote a healthy, stable environment for a child. Therefore, along with protecting the surrogate, this regulation would also strike a balance between promoting the child's best interests and one's right to procreate.

IV. CONCLUSION

The breadth of commentary calling for state legislatures to regulate surrogacy contracts is seemingly vast.¹⁵⁷ In particular, gestational surrogacy is one area that should be statutorily regulated, so that parties who enter into such agreements will be able to predict their legal rights at the outset of process. Gestational surrogacy arrangements are extremely popular and their use will not likely decrease moving forward.¹⁵⁸ Courts have appeared to be more comfortable deciding the legal outcome of gestational surrogacy arrangements, especially where there is a genetic link between an intending parent and the child.¹⁵⁹ In addition, Illinois's Gestational

¹⁵⁷ Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, at 809; Christen Blackburn, *Family Law – Who Is A Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, at 381; Laura Brill, *When Will the Law Catch Up with Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, at 254; Leora I. Gabryal, *Procreating Without Pregnancy: Surrogacy and the Need For a Comprehensive Regulatory Scheme*, at 419.

¹⁵⁸ <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>

¹⁵⁹ *Belsito v. Clark*, 644 N.E.2d at 762; *Johnson v. Calvert*, 851 P.2d at 782.

Surrogacy Act comprehensively regulates gestational surrogacy arrangements.¹⁶⁰ The intending parent or parents, whether they used their own gametes or donor gametes, should be deemed the legal parents of the child resulting from the gestational surrogacy arrangement.

Besides regulating gestational surrogacy contracts so that parties may be certain of their legal rights, state legislatures should attempt to draft laws that would promote the integrity of the surrogacy process. Legislatures should enact a home study requirement that would permit judicial and welfare agency intervention in the gestational surrogacy process. It is recommended that this requirement be an exception rather than the norm and that it be waived in more cases than it is used. It would be a safeguard for cases that seem suspect and allow for a balance between ensuring that a stable, healthy environment exists for a child and one's constitutional right to procreate.

Another way to maintain integrity in the surrogacy process is by creating eligibility requirements for who can become a gestational surrogate. Legislatures should require that the potential gestational surrogate submit to a physical and mental examination. The gestational surrogate should be of at least twenty-one years of age and have previously bore a child for the gestational surrogacy contract to be enforceable. Such regulations would protect the gestational surrogate, the intending parents, and of course, the child's best interests.

In 1986, the world's first known gestational surrogacy agreement came to fruition.¹⁶¹ A gestational surrogate gave birth to a child that was not genetically linked to her.¹⁶² Almost thirty years later, gestational surrogacy agreements remain relatively untouched by state legislatures. It

¹⁶¹ http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all&_r=0

¹⁶² *Id.*

is time for the law to recognize the existence of gestational surrogacy and to confront the prevailing issues stemming from gestational surrogacy agreements.