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## Legislating Labors of Love: Revisiting Commercial Surrogacy in New York

DEBORAH MACHALOW\*

In 1978, Louise Brown, the first baby conceived through in vitro fertilization (IVF),<sup>1</sup> changed the world. Doctors first considered fertilization outside a woman's body in 1934,<sup>2</sup> and it has since become a medical mainstay.<sup>3</sup> Since 1978, around five million children worldwide have been born through assisted reproductive technology (ART).<sup>4</sup> In IVF, eggs are retrieved from a woman's ovaries and fertilized in a lab. The resulting embryos are transferred into the uterus of either the woman who produced the eggs or of another woman.<sup>5</sup> This procedure has had drastic implications on the law of surrogacy contracts.<sup>6</sup>

Surrogacy provides a pathway to genetic parenthood for people who cannot achieve a successful pregnancy on their own.<sup>7</sup> A surrogate

is a woman who, for financial and/or compassionate reasons, agrees to bear a child for another woman who is incapable or, less often, unwilling to do so herself . . . she is a substitute or tentative mother in that she conceives, gestates and delivers a baby on behalf of another woman who is subsequently seen as the real mother of the child.<sup>8</sup>

Intended parents, the surrogate, and sometimes the surrogate's husband enter a contract that dictates the parameters of the surrogacy.<sup>9</sup> Typical intended parents are

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1. SUSAN L. CROCKIN & HOWARD W. JONES, JR., *LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES* 1 (2010).

2. *Timeline: The History of In Vitro Fertilization*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/babies>.

3. *Id.*

4. Eliana Dockterman, *Reproductive Medicine's Gift: 5 Million Babies*, TIME (Oct. 16, 2013), <http://healthland.time.com/2013/10/16/reproductive-medicines-gift-5-million-babies/>. In fact, 2.5 million of these babies have been born in the past six years alone. *Id.*

5. See Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 481 (2011).

6. While surrogacy raises complex concerns, such as commercialization, commodification, and the right to procreate (to name a few), these issues have been thoroughly examined elsewhere. Devising overarching conclusions about surrogacy's societal impact is outside the purview of this Note.

7. Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132, 145 (1992). In many cases, the resulting children are only related to their intended father. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 257 n.30 (1994).

8. Anton van Niekerk & Liezl van Zyl, *The Ethics of Surrogacy: Women's Reproductive Labour*, 21 J. MED. ETHICS 345, 345 (1995) (internal quotations and parentheticals omitted).

9. See Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 22 (2005).

Caucasian, heterosexual, married, and financially secure.<sup>10</sup> They want a genetic connection to their children, so they pursue surrogacy.<sup>11</sup> Surrogates are often married mothers in their twenties or thirties who are white, Christian, and working class.<sup>12</sup> Surrogacy agencies often screen potential applicants to prevent exploitation.<sup>13</sup>

Prior to the widespread acceptance and use of IVF, ART became “more familiar and, with familiarity, . . . seemed less threatening” over time.<sup>14</sup> Originally, when parties entered a surrogacy contract, the intended surrogate would be inseminated by the intended father’s sperm. She would be the biological and birth mother of any resulting child. This is referred to as *traditional surrogacy*.<sup>15</sup> This genetic connection, as highlighted in the *Baby M* case,<sup>16</sup> prompted New York and other states to ban commercial surrogacy contracts, lest parent-child ties be coercively or hastily severed.<sup>17</sup>

In *gestational surrogacy*, the surrogate is the “oven” for another woman’s “bun,” so there is no genetic connection between the carrier and child.<sup>18</sup> The growing standardization and acceptance<sup>19</sup> of IVF allows the gestational carrier to be just that—the carrier.<sup>20</sup> Here, the intended mother is often the child’s<sup>21</sup> genetic

10. See *id.* at 35. It is not surprising that most intended parents are financially secure; in 2005, the average cost to intended parents for a surrogacy arrangement ranged from \$25,000 to \$100,000. *Id.* at 36.

11. *Id.* at 35.

12. *Id.* at 31. Surrogates used by the Center for Surrogate Parenting (one of the most respected surrogacy agencies) are typically middle class, married with two or three biological children, Christian, working class, often employed part-time, have some college education, but not a degree, and live in suburbs or small towns. Leslie Morgan Steiner, *Who Becomes a Surrogate?*, THE ATLANTIC (Nov. 25, 2013), <http://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/>. Nationally, they tend to have household incomes of less than \$60,000. *Id.*

13. *Id.*

14. Elizabeth S. Scott, *Show Me the Money: Making Markets in Forbidden Exchange: Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 137 (2009).

15. See, e.g., Brittney M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 361 (2011).

16. *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988)

17. McMahon, *supra* note 15, at 362.

18. McMahon, *supra* note 15 at 363. The use of donor eggs has increased over time. In 1996, 2000 IVF cycles used donated eggs; this figure increased to over 17,000 in 2000 in the United States. Susan Golombok, Jennifer Readings, Lucy Blake, Polly Casey, Alex Marks, & Vasanti Jadva, *Families Created Through Surrogacy: Mother-Child Relationships and Children’s Psychological Adjustment at Age 7*, 47(6) DEV. PSYCH. 1579 (2011). Further, the use of donor eggs has continued to increase. Lindsey Tanner, *Donor Egg Pregnancies on the Rise, US Study Finds*, YAHOO! NEWS (Oct. 17, 2013), [http://news.yahoo.com/donor-egg-pregnancies-rise-us-study-finds-135419857.html;\\_ylt=A2KJ3CS5.35SRDIAGfbQtDMD](http://news.yahoo.com/donor-egg-pregnancies-rise-us-study-finds-135419857.html;_ylt=A2KJ3CS5.35SRDIAGfbQtDMD).

19. Scott, *supra* note 14, at 137–38.

20. “[S]urrogate mothers do not generally indicate that the babies belong to them; rather, they feel they are providing a meaningful and valuable service for the intended parents.” Pamela Laufer-Ukeles, *Roundtable on Regulating Assisted Reproductive Technology 2012: Mothering for Money: Regulating Commercial Intimacy* 88 IND. L.J. 1223, 1230 (2013). This is particularly true with regards to gestational surrogates, who lack a genetic relationship to the children. *Id.* at 1231. Interestingly, there is no medical “evidence

mother, or, when an intended mother cannot produce ova, donor eggs can be used. Even though the surrogate gestates the fetus, the removal of this biological connection should sever the surrogate's legal parental rights.<sup>22</sup>

Infertile couples' reliance on surrogacy has increased over time,<sup>23</sup> yet the law has not kept up with technology and parental desires.<sup>24</sup> As reliance increases, variations on the basic surrogacy model become more complex.<sup>25</sup> Parties may increasingly swap their genetic material out for gametes from persons outside the surrogacy agreement. For example, a surrogacy arrangement could involve five "parents": genetic mother (egg donor), surrogate, intended mother, genetic father (sperm donor), and intended father.<sup>26</sup> Many states, including New York, take an outdated approach to surrogacy contracts and thus create ineffective protections for intended parents and surrogates.<sup>27</sup> Surrogacy is at the center of legislative and policy debates; the time is ripe for reexamination of state surrogacy law in light of changes to technology and desire for access to these developments.<sup>28</sup> Other states

of a biological basis for bonding" during gestation. STEINBOCK, *supra* note 1, at 209. In fact, the gestational surrogates themselves "heavily emphasize genetics." Laufer-Ukeles, *supra* at 1231. *Contra* Radhika Rao, *Hierarchies of Discrimination in Baby Making?: A Response to Professor Carroll*, 88 Ind. L.J. 1217, 1221 (2013) (decrying "unthinking stereotypes and prejudices that endow genes with greater significance than other biological connections and envision a gestational surrogate as a mere 'carrier' and not the real mother.").

21. For the ease of communication in this Note, the singular "child" generally denotes the plural "children."

22. *See Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (where no biological link between carrier and fetus, there is no bond and no parental rights should attach); McMahon, *supra* note 15, at 636.

23. Golombok, *supra* note 18, at 1579. By the middle of 1992, approximately 4000 children had been born through surrogacy agreements across the United States. Kevin Sack, *New York Is Urged to Outlaw Surrogate Parenting for Pay*, N.Y. TIMES, May 13, 1992, at B5. At least 1600 children were born through the use of a gestational surrogate between 1991 and 1999. Ciccarella & Beckman, *supra* note 9, at 23. The CDC began requiring reporting on the success of IVF cycles in 1992, but did not require separate reporting for gestational surrogacy until 2003, so it is likely more children were born through gestational surrogacy than this number reflects. *Id.* In the United States, between 2004 and 2008, the number of babies born through gestational surrogacy increased eighty-nine percent. MAGDALINA GUGUCHEVA, CENTER FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), available at <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>. Between 2007 and 2012, the use of gestational surrogates increased by twenty-eight percent. Susan K. Livio, *Christie Vetoes Bill that Would Have Eased Tough Rules for Gestational Surrogates*, NJ.COM (Aug. 8, 2012), [http://www.nj.com/politics/index.ssf/2012/08/christie\\_vetoes\\_bill\\_that\\_woul.html](http://www.nj.com/politics/index.ssf/2012/08/christie_vetoes_bill_that_woul.html).

24. *See* CROCKIN & JONES, *supra* note 1, at 374, 384.

25. *Id.* at 384.

26. *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 99 (1995). In most cases, the egg and sperm donors have waived their rights at gamete retrieval. *See, e.g.*, FLA. STAT. ANN. § 742.14 (West 2013) (requiring gamete or embryo donor relinquish parental rights to resulting children unless partaking in an adoption or surrogacy arrangement). *Contra* N.Y. TASK FORCE ON LIFE AND THE LAW, EXECUTIVE SUMMARY OF ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (2011) [hereinafter TASK FORCE], available at [http://www.health.ny.gov/regulations/task\\_force/reports\\_publications/execsum.htm](http://www.health.ny.gov/regulations/task_force/reports_publications/execsum.htm).

27. *See* TASK FORCE, *supra* note 26.

28. *See* Judy Callman, *Surrogacy – A Case for Normalization*, 14 HUM. REPROD. 277

have seized this opportunity to amend their regulatory regimes; it is time for New York to follow suit and do the same.

This Note will place recent New York proposals to reform the prohibitory surrogacy law regime in larger contexts, both nationally and state-specifically.<sup>29</sup> Part I provides an overview of the surrogacy regimes across the United States and examines a few recent proposals. Part II provides a historical discussion of New York's prohibitions. Part III describes the proposals to liberalize the state's surrogacy regime. Part IV recommends improvements to these and future legislative proposals.<sup>30</sup> Approval of reform legislation would acknowledge developments in ART and bring law into alignment with intended parents' desires.

### I. AMERICAN REGULATION OF SURROGACY

The beauty of federalism is that states can take different approaches to a single issue. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>31</sup>

This is clear regarding surrogacy regulations: the different approaches form a continuum—from absolute prohibition, to moderate regulation, to approval. Even within this continuum, approaches vary. There are also some states that eschew legislation, relying solely on common law.

States that permit surrogacy have adopted diverse regulatory mechanisms. Some states distinguish between traditional and gestational surrogacy;<sup>32</sup> some distinguish between commercial and altruistic surrogacy;<sup>33</sup> some provide surrogacy as an option only for married couples;<sup>34</sup> some permit surrogacy only where it is medically indicated.<sup>35</sup>

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(1999). In the past two years Arizona, Delaware, the District of Columbia, Louisiana, Maryland, New Jersey, and South Dakota, in addition to New York, have all considered revisions to their surrogacy law regimes. *See* H.B. 2081, 51st Leg., 1st Reg. Sess. (Ariz. 2013); 79 Del. Laws 88 (2013); B2-0032, 2013–2014 Council, 20th Period (D.C. 2013); H.B. 433, 2013 Reg. Sess. (La. 2013); H.B. 1099, 2013 Reg. Sess. (Md. 2013); S.B. 1599, 215th Leg., Reg. Sess. (N.J. 2012); S.B. 2032, 215th Leg., Reg. Sess. § 1(b) (N.J. 2013); H.B. 1218, 86th Leg., Reg. Sess. (S.D. 2011); H.B. 1255, 87th Leg., Reg. Sess. (S.D. 2012); H.B. 1094, 88th Leg., Reg. Sess. (S.D. 2013).

29. Seeing as this is the *Indiana Law Journal Supplement*, I'd be remiss to not address Indiana specifically. In 1997, Indiana's legislature added Sections 31-20-1-1 and -2 declaring that surrogacy agreements were against public policy and that those entered after March 14, 1988 are void. Recently, Indiana has not attempted to change its policy on surrogacy. New York provides a more interesting case study.

30. Since drafts of the legislation are substantively the same, this evaluation will be done together.

31. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

32. For example, Illinois only permits gestational surrogacy contracts to be enforceable. *See* 750 ILL. COMP. STAT. 47/15 (2006).

33. For example, Washington only prohibits commercial surrogacy; it is the compensation to which the state objects as violative of public policy. WASH. REV. CODE. §26-26-240 (2013). Similarly, Nebraska, while proclaiming surrogacy contracts "void and unenforceable," only prohibits commercial surrogacy, as it defines "surrogate parenthood contracts" as contracts "by which a woman is to be compensated for bearing a child of a man who is not her husband." NEB. REV. STAT. § 25-21, 200 (2013).

34. For example, Nevada, while providing that the intended parents "be treated in law as

An absolute prohibition on surrogacy contracts outlaws the creation and prevents enforcement of traditional and gestational surrogacy contracts. There are presently five states that completely ban surrogacy: New York, North Dakota, Michigan, Indiana, and Arizona.<sup>36</sup> These states proclaim that surrogacy contracts violate public policy.<sup>37</sup>

Below is a brief description of some recent attempts to change state surrogacy regimes.

### A. Recent Proposals

New York was not the only state whose legislature recently considered proposals attempting to repeal or revise surrogacy prohibitions. New Jersey, Maryland, and South Dakota are some of the jurisdictions that recently considered revisions to their surrogacy laws, while Delaware successfully amended its surrogacy regime.<sup>38</sup>

#### 1. New Jersey

In 2012, the New Jersey legislature considered two bills regarding surrogacy contracts. The first recognized and enforced gestational surrogacy agreements because they were “in accord with the public policy of [the] State.”<sup>39</sup> In response, opponents introduced another bill, asserting that surrogacy contracts were “in direct conflict with numerous public policies of the State.”<sup>40</sup> This bill included criminal penalties for those involved in the arrangement or execution of a surrogacy contract, including doctors and brokers, as well as to those who sought or offered to pay a surrogate.<sup>41</sup> Intended parents who entered noncommercial surrogacy contracts could receive severe civil penalties.<sup>42</sup> The surrogate herself would be subject to civil penalties, unless she showed a “genuine willingness” to accept the resulting child and she “repudiate[d] the agreement in writing within 120 days” of the child’s birth.<sup>43</sup> The birthmother would have a presumption of primary

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. . . natural parent[s] under all circumstances,” NEV. REV. STAT. ANN. § 126.045(2) (2013), limits who may enter into a valid surrogacy contract; Nevada limits the intended parents to persons “whose marriage is valid” in Nevada and who provide the “egg and sperm” for the “assisted conception.” *Id.* § 126.045(1), (4).

35. For example, Illinois requires at least one of the intended parents “have a medical need for the gestational surrogacy as evidenced by a qualified physician’s affidavit.” 750 ILL. COMP. STAT. 47/20 (2006); *see also* FLA. STAT. ANN. § 742.15 (2013) (requiring an intended mother be unable to safely carry a pregnancy to term); VA. CODE ANN. § 20-160(B)(8) (2010) (requiring that the intended mother be unable to bear a child).

36. ARIZ. REV. STAT. ANN. § 25-218 (2013); IND. CODE ANN. § 31-20-1-1 (2013); MICH. COMP. LAWS §§ 722.853, 722.855, 722.857 (2013); N.Y. DOM. REL. LAW §§ 122, 123, 124 (2013); N.D. CENT. CODE § 14-18-05 (2013).

37. *See* IND. CODE. § 31-20-1-1 (2010); MICH. COMP. LAWS ANN. § 722.855 (2013).

38. *See supra* note 28.

39. S.B. 1599, 215th Leg., Reg. Sess. § 2(a) (N.J. 2012).

40. S.B. 2032, 215th Leg., Reg. Sess. § 1(b) (N.J. 2013).

41. *Id.* §§ 3, 4.

42. The penalty for a first offense would range from \$30,000 to \$50,000; those penalties would jump to between \$50,000 and \$80,000 for a second offense. *Id.* § 4.

43. The penalties range from \$10,000 to \$70,000, depending on how many times she

permanent custody (barring risk of harm to the child) with the intended parents possibly receiving “parenting time.”<sup>44</sup>

Ultimately, although the legislature had approved liberalization of the surrogacy laws that would have given custody to the intended parents at birth, eliminated the three-day wait period between birth and the intended parents being listed on the birth certificate,<sup>45</sup> and provided a comprehensive scheme of enforcement,<sup>46</sup> Governor Christie vetoed the bill. He explained that allowing surrogacy contracts “unquestionably raises serious and significant issues” and the legislature had not examined the effect on the traditional family extensively enough.<sup>47</sup> After the veto, the proposal was abandoned, leaving New Jersey’s strict surrogacy regime intact.<sup>48</sup>

## 2. Maryland

Maryland’s Collaborative Reproduction Act<sup>49</sup> was introduced to standardize the state’s surrogacy laws and to provide protections for intended parents and surrogates. It would permit enforcement of surrogacy contracts that conformed to its required standards.<sup>50</sup>

The Act set out eligibility requirements for surrogates and intended parents. The most notable requirements for surrogates are that they must have been approved by a mental health professional and a reproductive endocrinologist<sup>51</sup> and they must have had at least one live child.<sup>52</sup> Similarly, intended parents would need prior approval after medical and psychological evaluation<sup>53</sup> and “have guaranteed payment” of all expenses to be able to participate in a surrogacy arrangement.<sup>54</sup>

The Act also set out procedural<sup>55</sup> and substantive requirements for the contract. The gestational carrier and her partner must agree to follow medical advice,<sup>56</sup> surrender custody of the child at birth,<sup>57</sup> aid the intended parents in getting custody,<sup>58</sup> comply with other negotiated terms in the contract,<sup>59</sup> and disclaim legal

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had committed the offense. *Id.* § 5.

44. *Id.* §§ 6, 7.

45. *Id.*

46. N.J. S.B. 1599.

47. *Id.*

48. Livio, *supra*, note 23.

49. H.B. 1099, 2013 Reg. Sess. (Md. 2013).

50. *Id.* § 5-905.

51. *Id.* § 5-906(A)(1)(III)–(IV).

52. *Id.* § 5-906(A)(1)(II). Otherwise, surrogates must be at least twenty-one, *id.* § 5-906(A)(1)(I); and be independently represented, *id.* § 5-906(A)(1)(V). The Act would permit intended parents to pay legal fees. *Id.* § 5-906(A)(2).

53. *Id.* § 5-906(B)(2)–(3).

54. *Id.* § 5-906(B)(5). The Act would permit a variety of ways of paying expenses. *Id.* Further, the proposal would require allocation of expenses if the contract or pregnancy was terminated. *Id.* Intended parents also must be independently represented. *Id.* § 5-906(B)(4).

55. The contract must be in writing, notarized, and signed before embryo transfer. *Id.* § 5-907(A)(1). If not notarized, the signatures must be otherwise verified. *Id.* The surrogate, her husband and the intended parents all must sign. *Id.*

56. *Id.* § 5-907(B)(1)(I).

57. *Id.* § 5-907(B)(1)(III).

58. *Id.* § 5-907(B)(1)(IV).

59. *Id.* § 5-907(B)(V).

custody of the child.<sup>60</sup> The intended parents must agree to accept the child at birth regardless of its condition.<sup>61</sup> The Act would require reimbursement of “reasonable medical and ancillary expenses,” but prohibit other payments.<sup>62</sup> Like other legislative proposals, in case of dispute, Maryland’s would prohibit specific performance if it would require impregnating the surrogate.<sup>63</sup>

The proposal would permit petitions for parentage to be filed at any time after pregnancy is achieved.<sup>64</sup> If the petition is sufficient, the court would establish parentage<sup>65</sup> and require a birth certificate to reflect the child’s legal parentage.<sup>66</sup> Unlike most other regulations of surrogacy, Maryland’s proposal would only seal the proceedings at the request of the intended parents.<sup>67</sup> At the end of the legislative session, the Collaborative Reproduction Act remained stalled in a Maryland House Committee.<sup>68</sup>

### 3. South Dakota

South Dakota’s recent history with surrogacy is one of contradictory attempts but no success. In 2011 and 2012, legislation was proposed to prevent enforcement of surrogacy contracts.<sup>69</sup> In 2013, competing legislation was proposed to enforce certain surrogacy contracts.<sup>70</sup> To date, none of the bills have been approved.

The 2011 bill defined surrogacy broadly<sup>71</sup> and declared it violative of public policies. It proposed severe penalties for surrogacy participants.<sup>72</sup> Further, the

60. *Id.* § 5-907(B)(II).

61. *Id.* § 5-907(B)(2). This would include “paying for any funeral expenses if there is a stillbirth, preterm birth, or any other birth issue that results in the child’s death.” *Id.* § 5-907(B)(2)(II).

62. *Id.* § 5-901(P). The ancillary expenses could include “expenses for maternity clothes, legal and counseling expenses, actual lost wages, child care expenses, housekeeping expenses, intangible expenses associated with risk, inconvenience, forbearance, or restriction from usual activities, postpartum recover expenses, and travel expenses” related to the agreement. *Id.* § 5-907(C)(1). Expenses are presumed to be reasonable if specified in the contract and the contract was negotiated by attorneys. *Id.* § 5-907(C)(2)–(3).

63. *Id.* § 5-910(C)(1). However, the proposal would permit specific performance if the surrogate refused to relinquish the child, if the intended parents failed to take custody or if a party failed to cooperate in proceedings to establish legal parentage of the intended parents. *Id.* § 5-910(C)(2).

64. *Id.* § 5-911(A). A court has jurisdiction if an intended parent or a surrogate has been a resident of the state for at least 90 days, the resulting child is expected to be born in the state, or the embryo transfer is performed in the state. *Id.* § 5-911(B). The petition itself must include affidavits from the petitioner’s attorney, the reproductive endocrinologist, and the attorneys representing all parties to ensure compliance with the proposed legislation and a copy of the agreement. *Id.* § 5-911(C).

65. *Id.* § 5-911(D).

66. *Id.* § 5-911(F).

67. *Id.* § 5-911(G).

68. *Status of all House Legislation Introduced 2013 Session*, MD. LEGISLATURE (June 12, 2013), <http://mgaleg.maryland.gov/Pubs-Current/Current-House-Status-Report.pdf>.

69. H.B. 1218, 86th Leg., Reg. Sess. (S.D. 2011); H.B. 1255, 87th Leg., Reg. Sess. (S.D. 2012).

70. H.B. 1094, 88th Leg., Reg. Sess. (S.D. 2013).

71. House Bill 1218 Section 2(1) provides:

surrogate would be granted primary physical custody of the resulting child unless evidence showed she was unfit or would pose a serious risk to the child's well-being.<sup>73</sup> Intended parents would presumptively be granted visitation or parenting time unless such arrangement would not be in the child's best interests.<sup>74</sup> Regardless of custody or visitation, the intended parents would be responsible for supporting the child and for paying for both the surrogate's medical expenses and the child's medical expenses following birth.<sup>75</sup>

The 2012 proposal was in some ways stricter and in some ways more lenient than the 2011 proposal. The 2012 proposal would only prohibit commercial surrogacy agreements, yet it also proclaimed "[n]o surrogacy agreement is enforceable."<sup>76</sup> While it increased the sanctions against physicians who helped execute surrogacy agreements,<sup>77</sup> it decreased the punishments for other participants.<sup>78</sup> Otherwise, its provisions were substantially similar to the 2011 proposal.<sup>79</sup>

The 2013 proposal sought to permit enforcement of gestational surrogacy contracts by mandating that children born to gestational carriers are the children "of the intended parents for all purposes and [are] not [children] of the gestational carrier" or her husband.<sup>80</sup> However, enforcement would be limited to contracts meeting specified requirements.<sup>81</sup> The proposal also had eligibility requirements for

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[A]n arrangement, whether or not embodied in a contract, written or oral, entered into by two or more persons, including the mother, sometimes referred to as the 'surrogate' or 'gestational carrier' or 'surrogate uterus', [sic] and an intended rearing parent or parents, who agree, prior to insemination, or in the case of an implanted embryo, prior to embryo transfer or embryo implantation, to participate in the creation of a child, with the intention that the child will be reared as the child of one or more of the intended parents, other than the mother.

72. *Id.* §§ 3–6, 10 (subjecting participants to felonies, fines ranging from \$30,000 to \$80,000, and reports to the Board of Medical and Osteopathic Examiners).

73. *Id.* § 8. Even if the child is not presently in her possession, if the surrogate seeks custody, it will be granted to her after notifying the people in whose custody the child is. Concerns about the surrogate's fitness cannot be raised until the child has been turned over to her. *Id.* Further, when the custody arrangement is being finalized, the presumption that the surrogate should maintain custody can only be overcome by proving, by clear and convincing evidence, that "the mother fails to meet minimal parenting standards necessary to satisfy the basic needs and welfare of the child." *Id.* § 9. However, that determination cannot "be based on consideration of economic or social class." *Id.*

74. *Id.* § 11.

75. *Id.* §§ 11, 12.

76. S.D. H.B. 1255 § 4.

77. House Bill 1255 would presume that any licensed professional who "induces, arranges, procures, or otherwise assists in the formation of a commercial surrogacy arrangement" and who either pays or is paid for such services committed an act of "unprofessional conduct." *Id.* §§ 5, 6.

78. The proposal decreased the classifications for first- and second-time offenses for brokers and their staff from felonies to misdemeanors. S.D. H.B. 1255. Further, this proposal did not include punishments for intended parents or surrogates.

79. *Cf.* S.D. H.B. 1218, *with* S.D. H.B. 1255.

80. S.D. H.B. 1094 § 5.

81. The gestational carrier and the intended parents must be independently represented, *id.* § 9(3), the contract must be executed before the start of the IVF cycle, *id.* § 9(2), and the

surrogates<sup>82</sup> and for intended parents.<sup>83</sup> In case of breach, the courts would determine rights and obligations but could not order specific performance where it would impregnate the gestational carrier.<sup>84</sup> Further, this proposal would not enforce traditional surrogacy arrangements.<sup>85</sup> At the time of writing this Note, this proposal is tabled by the Judiciary Committee.<sup>86</sup>

#### 4. Delaware

In 2013, Delaware passed the Gestational Carrier Agreement Act to enforce surrogacy contracts and to protect their parties' interests.<sup>87</sup> The legislation authorizes an agreement between a woman and another person, an unmarried couple, or a married couple in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the person or married or unmarried couple become the parents of the child.<sup>88</sup>

Further, the Act permits a judgment of parentage prior to birth by filing a petition that meets specified requirements.<sup>89</sup> Delaware's law mandates eligibility requirements for surrogates<sup>90</sup> and intended parents.<sup>91</sup> The contract must meet its

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contract must be written and signed before two witnesses, *id.* §§ 9(1), 9(6). Further, the contract must be accompanied by written acknowledgements from the intended parents and the gestational carrier that they received information about their rights and obligations under the contract. *Id.* § 9(4). If the gestational carrier is married, her husband must agree to the contract. *Id.* § 10(2). Notably, an agreement that includes provisions limiting the gestational carrier's actions, requiring the gestational carrier undergo medical procedures, compensating the carrier, or offering to reimburse the carrier is still enforceable. *Id.* § 11.

82. The gestational carrier must be over twenty-one, *id.* § 7(1); have delivered a child previously, *id.* § 7(2); have undergone medical and psychological evaluations, *id.* § 7(3), (4); and possess health insurance until eight weeks postpartum, *id.* § 7(6).

83. The intended parents must complete a psychological evaluation, *id.* § 8(3); have a medical need for a gestational carrier, *id.* § 8(2); and at least one of the intended parents must be genetically related to the embryo, *id.* § 8(1). It appears that the statute's wording only permits an individual to be an intended parent if there is a genetic relationship, which would not confer intended parent status to individuals who use donor gametes.

84. *Id.* §§ 15, 16.

85. "Any agreement in which a woman agrees to become a surrogate and to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is unenforceable." *Id.* § 3. "Surrogate" is defined as "an adult woman who enters into an agreement to bear a child conceived through assisted conception, using her own egg, for intended parents." *Id.* § 1(4).

86. S.D. LEGISLATURE, H.B. 1094 BILL HISTORY, available at [http://legis.sd.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=1094&Session=2013](http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=1094&Session=2013).

87. 79 Del. Laws 88 (2013).

88. *Id.* § 8-103(d).

89. The petition must clearly identify the parties and be accompanied by affidavits detailing that the pregnancy was achieved through ART, verifying the intended parents' intent, verifying the surrogate and her spouse's lack of parentage, and asserting that the agreement complied with the statute. *Id.* § 8-611(b).

90. A surrogate must be at least twenty-one, *id.* § 8-806(a)(1); have delivered at least one child, *id.* § 8-806(a)(2); have completed mental and medical evaluations, *id.* § 8-806(a)(2)-(3); obtain health insurance for the duration of the pregnancy and eight weeks postpartum, *id.* § 8-806(a)(6); and be independently represented, *id.* § 8-806(a)(5). Her legal costs can be paid by the intended parents. *Id.*

own set of procedural requirements.<sup>92</sup> Further, the contract must expressly detail the parties' duties<sup>93</sup> and that the surrogate selects her medical providers.<sup>94</sup> Clauses restricting the surrogate's activities, requiring medical procedures, and compensating her do not nullify the contract.<sup>95</sup> All remedies at law or equity are available, but specific performance cannot be ordered to impregnate the surrogate.<sup>96</sup> Intended parents must support the resulting child, even if they breach the contract.<sup>97</sup> The governor signed this legislation on July 3, 2013.

## II. HISTORICAL NEW YORK REGULATION OF SURROGACY

The New Jersey Supreme Court decision in *Matter of Baby M*<sup>98</sup> sparked a legislative maelstrom in New York regarding the legality and enforceability of commercial surrogacy agreements. This turbulence culminated in the passage of New York's existing prohibitions. Nearly twenty years later, during the 2011–2012 and 2013–2014 legislative sessions, New York had four legislative proposals to reform its surrogacy laws.

In the late 1980s and early 1990s, the American public's ire was drawn by the infamous *Baby M* case,<sup>99</sup> in which a traditional surrogate decided she did not want to give the resulting child to the intended parents.<sup>100</sup> The ensuing legal battle captured the nation's attention<sup>101</sup>—shaping the discussion of surrogacy and leading to public concern and resistance.<sup>102</sup> This was clearly seen in New Jersey's sister

91. An intended parent must be independently represented, *id.* § 8-806(b)(2), and have completed a mental health exam, *id.* § 8-806(b)(1).

92. The contract must be written and signed by the parties and their spouses, *id.* § 8-807(b)(1)–(2); executed before transfer, *id.* § 8-807(b)(2); accompanied by written confirmations that the parties were informed, *id.* § 8-807(b)(4) (acknowledging they “received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational carrier agreement.”); and be witnessed by two disinterested adults, *id.* § 8-807(b)(6).

93. *Id.* § 8-807(c)(1), (4). If the surrogate is married, her spouse must agree to the contract. *Id.* § 8-806(c)(2).

94. *Id.* § 8-807(c)(3).

95. *Id.* § 8-807(d).

96. *Id.* § 8-810.

97. *Id.* § 8-804(b). Interestingly, *planning* on a genetic link to the child is sufficient for a predetermination of parentage. For example, intended parents who plan to have a genetic link to the child but are foiled by a laboratory mix-up resulting in a non-genetic embryo being transferred are still the legal parents—unless a genetic parent sues within sixty days of the child's birth. *Id.* § 8-804(c).

98. 537 A.2d 1227 (N.J. 1988).

99. Scott, *supra* note 14, at 117–20; *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988).

100. *Baby M.*, 537 A.2d at 1236.

101. See Lisa Belkin, *Surrogate Law vs. Last Hope of the Childless*, N.Y. TIMES, Jul. 28, 1992, at B1; Caster, *supra* note 5, at 497.

102. See Emily Gelmann, “I’m Just the Oven, It’s Totally Their Bun”: *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN’S RTS. L. REP. 159, 163 (2011). Interestingly, some feminists and social conservatives found themselves in agreement on surrogacy. While some feminists saw surrogacy as an exercise of a woman’s right to contract, others saw it as an opportunity for the commodification of women. This latter group opposed surrogacy on that principle. Meanwhile, social conservatives opposed surrogacy because they feared it would lead to the breakdown of the traditional nuclear

state New York, whose attempts at surrogacy regulation were as chaotic and mixed as the nation's views on surrogacy itself.

Back then, the surrogacy market was booming in New York; estimates suggested forty percent of the 4000 surrogate births in the United States occurred there.<sup>103</sup> The surrogacy market involved for-profit brokers who, for a fee of around \$16,000, would match intended parents to willing surrogates.<sup>104</sup> The typical contract would provide the surrogate with compensation between \$10,000 and \$20,000 for a live birth, plus out-of-pocket medical expenses.<sup>105</sup> Some contracts required the surrogate to abort if the fetus was abnormal.<sup>106</sup> Others detailed a prorated compensation schedule if the pregnancy did not result in a live birth.<sup>107</sup> After birth, the surrogate would relinquish the child to its biological father, whose wife would legally adopt the baby.<sup>108</sup> Courts were willing to enforce these commercial surrogacy contracts into the mid-1980s.<sup>109</sup>

Popular responses to surrogacy in general—and commercial surrogacy in particular—varied greatly. Some were supportive of the idea conceptually, but concerned about it in practice and especially wary of commercialization.<sup>110</sup> For example, N.Y. State Senator John J. Marchi pronounced, “We find this an affront to human decency to continue the practice of commercial parenting.”<sup>111</sup> Many viewed surrogacy as equivalent to prostitution.<sup>112</sup> Others deemed commercial surrogacy a form of “baby selling” that “demeans and threatens women.”<sup>113</sup>

Prior to this outpouring of rage, the New York State Legislature saw a flurry of legislative proposals regarding surrogacy. Between 1984 and 1992, twenty-one bills on the subject were introduced by ten legislators.<sup>114</sup> A series of public hearings was conducted to solicit constituents' opinions.<sup>115</sup> The first hearing, cosponsored by the Assembly and Senate Judiciary Committees, was held in October 1986 to determine whether regulation was necessary.<sup>116</sup> The Senate Judiciary Committee then recommended enforcement of surrogacy contracts as the best way to safeguard children's interests and that regulation was the appropriate avenue.<sup>117</sup> This grounded the most high-profile legislation of the period—a proposal in each

family. *See* Scott, *supra* note 14, at 111–17.

103. Belkin, *supra* note 101, at B1, B3.

104. *Id.* at B3.

105. *Id.*

106. Of course, enforcement of such provisions would be questionable under *Roe v. Wade*, 410 U.S. 113, 153 (1973) (the right to privacy ensures a woman the right to terminate her pregnancy); *accord* BLANK & MERRICK, *supra* note 26, at 117.

107. Belkin, *supra* note 101, at B3.

108. *Id.*

109. *See, e.g.*, *In re Baby Girl L.J.*, 505 N.Y.S.2d 813 (Nassau Co. Sup. Ct. 1986). The surrogate agreed to be artificially inseminated with intended father's sperm and to relinquish the resulting child for a fee. The court upheld the adoption of the child. *Id.* at 817–18.

110. Sack, *supra* note 23, at B5.

111. *Id.*

112. Van Niekerk & van Zyl, *supra* note 8, at 345.

113. *See* Ciccarelli & Beckman, *supra* note 9, at 22.

114. SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 39 (2007).

115. *Id.*

116. *Id.*

117. *Id.*

legislative house to “regulate surrogate parenthood,”<sup>118</sup> proposed by Senators Dunne and Goodhue.<sup>119</sup>

The proposed legislation required parties be independently represented and undergo psychological counseling, mandated medical exams and health insurance for the biological father and surrogate,<sup>120</sup> and required prior court approval of the surrogacy contract, including surrogate compensation.<sup>121</sup> In April and May of 1987 the N.Y. Senate Committee on Child Care held public hearings to discuss the bill,<sup>122</sup> where a majority supported surrogacy.<sup>123</sup> At the time of the first meeting, according to a public poll, sixty-nine percent of people believed surrogate parenting contracts should bind surrogates.<sup>124</sup>

Despite this overwhelming support, “a coalition of religious groups, adoption and child-welfare advocates, and women’s groups” halted the legislators’ efforts,<sup>125</sup> and the legislation died in committee.<sup>126</sup> In 1987, two bills were introduced to make all surrogacy contracts unenforceable or to ban commercial surrogacy; the following year, four additional bills were introduced.<sup>127</sup>

At that point, Governor Mario Cuomo stepped into the developing quagmire and directed a task force to examine surrogacy and make legislative recommendations.<sup>128</sup> The Task Force on Life and the Law recommended, in no uncertain terms, that all surrogacy be discouraged and that surrogacy contracts be unenforceable.<sup>129</sup> The recommendation was to prohibit commercial surrogacy and its brokerage while discouraging noncommercial surrogacy.<sup>130</sup> Governor Cuomo accepted the Task Force’s recommendations, with legislators in both houses proposing legislation to effectuate this recommendation in 1988.<sup>131</sup> A fourth public hearing was held in December 1988,<sup>132</sup> resulting in nearly forty people presenting a total of seven hours’ worth of testimony.<sup>133</sup> But this legislative proposal, too, failed to survive the committee process.<sup>134</sup>

The 1989–1990 legislative session showed surrogacy was still a hot issue,<sup>135</sup> five more proposals were introduced, all of which “declared surrogacy contracts

118. James Feron, *Testimony is Given on Surrogate Bill*, N.Y. TIMES, Apr. 12, 1987, at A39; MARKENS, *supra* note 114, at 40.

119. MARKENS, *supra* note 114, at 39.

120. *Id.* at 40.

121. *Id.*

122. *Id.* at 39.

123. *Id.* at 40; Feron, *supra* note 118.

124. *See* Feron, *supra* note 118.

125. Scott, *supra* note 14, at 118.

126. MARKENS, *supra* note 114, at 40.

127. *Id.*

128. McMahon, *supra* note 15, at 365.

129. *See id.*

130. MARKENS, *supra* note 114, at 40.

131. *Id.* at 40–41.

132. *Id.* at 41.

133. *Id.*

134. *Id.* Of the nine proposals in 1987–1988, a grand total of none survived the legislative process; none escaped committee. *Id.*

135. The continuing legislative fascination can partially be attributed to the fact that two of the nation’s twenty-nine “surrogate parenting centers” were located in New York,

void and unenforceable.”<sup>136</sup> Included in these proposals was a reiteration of Cuomo’s legislation that included criminal penalties for surrogate contract brokerage.<sup>137</sup> Again, none became law.

The 1991–1992 session saw five surrogacy-related bills, four in opposition to surrogacy contracts.<sup>138</sup> The odd-bill-out was introduced at the end of the legislative session by two fervent surrogacy proponents, Assemblymen Koppell and Balboni.<sup>139</sup>

In 1992, the legislature enacted a bill declaring surrogacy contracts “contrary to the public policy of [New York],” as well as “void and unenforceable.”<sup>140</sup> The legislature created civil penalties for those who “knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration.”<sup>141</sup> The surrogate, her husband, and the intended parents could receive monetary penalties of up to \$500.<sup>142</sup> For brokers, the monetary penalty is up to \$10,000 plus the fee charged for arranging the contract.<sup>143</sup> These penalties do not apply when payments result from an otherwise-approved adoption or from medical costs of a mother, which are “incurred in connection with the birth of the child.”<sup>144</sup> Ultimately, the bill was approved 59–0 in the Senate and 104–39 in the Assembly.<sup>145</sup> This made New York the eighteenth state to limit surrogacy.<sup>146</sup>

Thus, as it stands, New York does not penalize the formation of *noncommercial* surrogacy contracts but will not enforce any surrogacy contracts. These contracts can be for either traditional or gestational surrogacy.<sup>147</sup> The law does not provide a way to resolve disputes between a genetic mother and a surrogate.<sup>148</sup> Thus, a gestational surrogate can be given parental rights to a nongenetic child, who would not exist but for the surrogacy agreement.<sup>149</sup> However, trial courts can determine maternity and paternity without adoption proceedings.<sup>150</sup>

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including the one that arranged the contract resulting in *Baby M.* Sack, *supra* note 23, at B5.

136. MARKENS, *supra* note 117, at 43.

137. *Id.* at 43–44.

138. *Id.* at 44. Interestingly, one of these antisurrogacy bills went much further, stating that “all in vitro pregnancies” were contrary to public policy and thus unenforceable. CROCKIN & JONES, *supra* note 1, at 229–30.

139. MARKENS, *supra* note 114, at 44.

140. N.Y. DOM. REL. LAW § 122 (McKinney 2013). By definition, all surrogacy contracts, meaning both commercial and noncommercial, are unenforceable under § 122; however, § 123 actually penalizes only parties to *commercial* surrogacy agreements.

141. *Id.* § 123-1.

142. *Id.* § 123-2(a).

143. *Id.* § 123-2(b). Anyone caught coordinating a surrogacy contract a subsequent time is “guilty of a felony.” *Id.*

144. *See id.* (exempting altruistic surrogacy from the enumerated penalties).

145. MARKENS, *supra* note 114, at 45.

146. Belkin, *supra* note 101, at B1. At the time, New York joined Washington, Virginia, Utah, Oregon, Oklahoma, North Dakota, New Jersey, New Hampshire, Nevada, Nebraska, Michigan, Louisiana, Kentucky, Indiana, Florida, Arizona, and Arkansas. *Id.*

147. TASK FORCE, *supra* note 15.

148. *Id.*

149. *See id.* New York has determined, as a matter of law, that the biological mother of a

## III. PRESENT PROPOSALS TO REFORM NEW YORK SURROGACY LAW

In the over twenty years since the enactment of the surrogacy prohibitions, four bills have been introduced to the New York State Legislature to lift the ban on commercial surrogacy contracts.

New York Senate Bill No. 2547 (“S.B. 2547”), initially introduced on January 18, 2013 by Senator Hoylman, would allow “loving and committed couples [to] have every opportunity to raise and nurture their own genetically linked children—including the utilization of . . . gestational surrogate parenting contracts.”<sup>151</sup> The legislation, however, would simply repeal Article Eight of the Domestic Relations Law,<sup>152</sup> and does not provide any regulatory language for commercial surrogacy contracts,<sup>153</sup> and would thus permit contracts in any form.<sup>154</sup> In April 2013, Senator Hoylman also introduced the far more specific New York Senate Bill No. 4617 (“S.B. 4617”), twin to New York Assembly Bill 6701 (“Assem. B. 6701.”).<sup>155</sup>

Assem. B. 6701, introduced in April 2013 by nineteen assembly members, would improve couples’ access to surrogacy by allowing the creation of enforceable commercial surrogacy agreements,<sup>156</sup> permitting preemptive judgment of parentage,<sup>157</sup> and creating guidelines for the termination of surrogacy contracts.<sup>158</sup> When intended parents pay their surrogates consideration beyond reasonable expenses, Assem. B. 6701 requires them to escrow the funds before the start of the cycle.<sup>159</sup> This compensation must be “reasonable,” established through good-faith negotiation, and based on the service provided, expenses incurred, time used, and inconvenience encountered.<sup>160</sup> It cannot be used to “purchase gametes or embryos” nor “for the relinquishment of a parental interest in a child.”<sup>161</sup>

The legislation also specifies who may enter into a surrogacy agreement.<sup>162</sup> A surrogate must be at least twenty-one years old,<sup>163</sup> have had a medical evaluation

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child conceived through use of a donor egg is the birth mother. *Id.*

150. *T.V. v. N.Y. State Dep’t of Health*, 929 N.Y.S.2d 139, 144 (2011); *see Doe v. N.Y. City Bd. of Health*, 782 N.Y.S.2d 180, 184 (Sup. Ct. 2004). *Contra Feigenbaum v. N.Y. State Dept. of Health*, No. 2009-019430 slip op at 4 (Suffolk Co. Sup. Ct. Oct. 22, 2010).

151. BRAD HOYLMAN, SPONSOR MEMORANDUM 2013 NY S.B. 2547, at 1 (Jan. 23, 2013) [hereinafter SPONSOR MEMO].

152. S.B. 2547, 236th Leg., Reg. Sess. (N.Y. 2013).

153. *See id.*

154. *See infra* Part IV for recommended changes to the proposals. Similarly, the Sponsor Memo refers to its legislation as “the first step” towards allowing intended parents to pursue genetically related children through medical technology and protecting their rights upon entering valid commercial surrogacy contracts. SPONSOR MEMO, *supra* note 151, at 2.

155. S.B. 4617, 236th Leg., Reg. Sess. (N.Y. 2013). Because of the substantive similarities, the two proposals will be discussed in tandem. The afore-referenced 2012 proposal was this legislation’s predecessor, however it was significantly altered prior to reintroduction in 2013. As such, it will not be separately addressed.

156. Assem. B. 6701, 236th Leg., Reg. Sess. § 581-401 (N.Y. 2013).

157. *Id.* § 581-203.

158. *Id.* § 581-406.

159. *Id.* § 581-405(a)(6). The payments must conclude within eight weeks of the end of pregnancy. *Id.* § 581-502(b).

160. *Id.* § 581-502(a)–(b).

161. *Id.*

162. *Id.* § 581-404.

163. *Id.* § 581-404(a)(1).

“relating to the anticipated pregnancy,”<sup>164</sup> consult with independent legal counsel about the contract’s expectations and obligations,<sup>165</sup> and either have or obtain health insurance before the cycle that will cover “major medical treatments and hospitalizations” throughout the pregnancy and for eight weeks postpartum.<sup>166</sup> The intended parents<sup>167</sup> must have consulted with independent legal counsel about the expectations and obligations of the surrogacy contract.<sup>168</sup> An intended married parent must be not be legally separated from his or her spouse.<sup>169</sup>

In order for a surrogacy agreement to be enforceable, it must be in writing and signed by the intended parent and the surrogate<sup>170</sup> prior to the start of the cycle.<sup>171</sup> The surrogate retains the right to choose her medical providers throughout the pregnancy.<sup>172</sup> By signing, the surrogate agrees “to undergo embryo transfer and attempt to carry and give birth to the child” and to give the child’s custody to the intended parents at birth.<sup>173</sup> The intended parents must agree to “accept custody of all resulting children immediately upon birth regardless of number, gender, or mental or physical condition” and to be solely responsible for their upkeep, care, and maintenance.<sup>174</sup>

The legislation would allow a “judgment of parentage” prior to the birth of a child resulting from a surrogacy contract.<sup>175</sup> The petition may be filed any time after the contract’s execution.<sup>176</sup> It must meet procedural requirements.<sup>177</sup> The court

164. *Id.* § 581-404(a)(2).

165. *Id.* § 581-404(a)(3).

166. *Id.* § 581-404(a)(4). The intended parents could provide insurance as part of the surrogacy contract. *Id.*

167. New York would permit individuals and unmarried couples to enter into surrogacy agreements as intended parents. *Id.* § 581-404(b)(1), (2). For the ease of communication, throughout the remainder of the Note, “intended parents” generally refers to single and coupled intended parents.

168. Assem. B. 6701 § 581-404(b)(1) (N.Y. 2013).

169. *Id.* § 581-404(b)(2). However, if the intended parent has been separated from his or her spouse for over three years before the formation of the agreement, then the spouse does not have to be involved in the contract and is unable to receive parental rights through the surrogacy contract. *Id.* § 581-404(b)(2)(ii).

170. *Id.* § 581-405(a)(1). If the surrogate is married prior to execution of the contract, her spouse must be a party to the contract, *id.*, and the parties must meet the eligibility requirements discussed above. *Id.* §§ 581-404, 405(a)(3), 405(a)(4). If the surrogate gets married between contract’s execution and its completion, the new spouse does not have to sign the contract and is not presumed to be a parent of the child. *Id.* § 581-407.

171. *Id.* § 581-405(a)(2). This does not include the required medical examination.

172. *Id.* § 581-405(a)(7)(i)(C). She is to consult with the intended parents, but they otherwise have no say in which the surrogate chooses. *Id.*

173. *Id.* §§ 581-405(a)(7)(i)(A)–(B).

174. *Id.* §§ 581-405(a)(7)(ii)(A)–(B). The statute also requires the intended parents acknowledge that these rights and responsibilities “are not assignable.” *Id.* § 581-405(a)(7)(ii)(C).

175. *Id.* § 581-201(c)(ii), 203.

176. *Id.* § 581-203(a).

177. The petition must include a statement that the intended parents or the surrogate had resided in N.Y. for over 90 days, *id.* § 581-203(b)(1); an attorney certification that the parties are eligible and that the contract meets the statutory requirements, *id.* § 581-203(b)(2); and a statement that the parties entered the agreement “knowingly and

then predetermines parentage, awarding legal parenthood to the intended parents at birth<sup>178</sup> and records the decision.<sup>179</sup> The “proceedings, records, and identities” of the parties are sealed unless the parties petition.<sup>180</sup> The intended parents’ willingness to pay the surrogate “reasonable compensation” more than “reasonable medical and ancillary costs” of pregnancy will not bar parentage judgments.<sup>181</sup> If intended parents do not pursue and obtain a judgment of parentage, legal parentage is assigned based on “the best interests of the child.”<sup>182</sup> The original court with jurisdiction over the matter maintains exclusive jurisdiction until the child is 180 days old.<sup>183</sup>

Finally, Assem. B. 6701 provides for mechanisms to terminate an executed surrogacy agreement.<sup>184</sup> The intended parents can terminate the contract after judgment of parentage, but before the surrogate is pregnant, simply by providing written notice to the other parties and filing with the court to vacate the judgment of parentage.<sup>185</sup> Unless otherwise detailed in the contract, “all remedies available at law or equity” can be sought and granted except for specific performance to impregnate the surrogate.<sup>186</sup> The trial court is responsible for resolving disputes arising from the contract and determining “the respective rights and obligations of the parties.”<sup>187</sup>

#### IV. EVALUATION OF THE PROPOSALS

The present prohibitory surrogacy regime in New York has failed to keep up with developments in ART. This is unsurprising considering the legislature approved the statute in 1993—a mere seven years after the first baby from a gestational surrogacy arrangement in the United States was born.<sup>188</sup> Gestational surrogacy was developed after traditional surrogacy because gestational surrogacy requires more advanced technology than artificial insemination.<sup>189</sup> At the time of passage, traditional surrogacy was the norm;<sup>190</sup> however, gestational surrogacy is now far more common.<sup>191</sup> Notably, the current legislation draws no distinction between the two.

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voluntarily,” *id.* § 581-203(b)(3).

178. *Id.* § 581-203(c).

179. *Id.* § 581-203(c)(5).

180. *Id.* § 581-410.

181. *Id.* § 581-203(d).

182. *Id.* § 581-408. When the court is making this determination, the statute specifically provides it should consider “genetics and the intent of the parties.” *Id.*

183. *Id.* § 581-411.

184. *Id.* § 581-406.

185. *Id.* § 581-406(a)–(b).

186. *Id.* § 581-409(b)–(c).

187. *Id.* § 581-409(a).

188. Denise E. Lascarides, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1226 (1997).

189. LYNDY BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY 215 (1998).

190. *Id.*

191. See Ethics Committee of the American Society for Reproductive Medicine, *Consideration of the Gestational Carrier: A Committee Opinion*, 99 FERTILITY & STERILITY 1838, 1838 (June 2013) [hereinafter ASRM Opinion] (clinics reluctant to perform traditional

The interests of all potential parties to surrogacy contracts should be considered when drafting laws to govern surrogacy. New York's law fails to keep up with the desires of intended parents. Many couples discover they are infertile when they try to start families in their thirties.<sup>192</sup> They often find that adoption is not a viable option, as there are fewer children than intended parents on the adoption market, and the parents may be deemed too old by adoption agencies.<sup>193</sup> Also, adoption does not provide a genetic link between child and parents. Surrogacy solves both issues by providing the possibility of a genetic link between parent and child and by facilitating the creation and placement of children. Further, unlike other aspects of ART, which are covered by medical insurance in a few states,<sup>194</sup> surrogacy is paid almost entirely out-of-pocket. Despite the statutory prohibitions, over five percent of gestational surrogacy contracts are executed in New York.<sup>195</sup>

New York's restrictiveness on surrogacy is surprising considering its typical role as a trailblazer on social issues.<sup>196</sup> Liberalizing laws on surrogacy is the right decision. While S.B. 2547 would accomplish this by simply removing the statutory prohibition, the proposal is inadequate as it does not provide any regulatory support or guidance.<sup>197</sup> S.B. 4617 and Assem. B. 6701 are drastic improvements on the status quo, but they are imperfect. This Part evaluates the proposals in context of existing law and policy, with an eye towards improving the legislation.

#### A. Enforceability

Mandating the enforceability of surrogacy arrangements is the right legislative decision.

The Constitution provides support for enforcing surrogate parenting contracts—whether commercial or altruistic.<sup>198</sup> These supports include the right to privacy, the Fourteenth Amendment, and the penumbra of the Bill of Rights.<sup>199</sup> The Due Process Clause supports freedom of contract, with prohibitions on unconscionable

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surrogacy arrangements); Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 524 (2011) (gestational surrogacy increased from less than five percent to over fifty percent of surrogacy arrangements between 1988 and 1994); *supra* note 22 and accompanying text; Scott, *supra* note 14, at 122.

192. See BLANK & MERRICK, *supra* note 26, at 111.

193. *Id.*

194. Arkansas, Delaware, Hawaii, Maryland, Massachusetts, and Texas all require insurance companies cover the costs of IVF. Jennifer Gunning, *Regulating ART in the USA: A Mixed Approach*, in THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY, 55, 61 (Jennifer Gunning & Helen Szoke eds., 2003).

195. GUGUCHEVA, *supra* note 23, at 15.

196. See, e.g., Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, Jun. 25, 2011, at A1; Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES, Jan. 16, 2013, at A15.

197. Regulation is necessary to prevent peculiar arrangements, such as a surrogate carrying two embryos for two different sets of intended parents. CROCKIN & JONES, *supra* note 1, at 247.

198. “Constitutional challenges to statutes prohibiting surrogacy have also been brought and won (in both Arizona and Utah) by couples and gestational carriers arguing that the statutes violated their constitutional rights.” *Id.* at 214.

199. Caster, *supra* note 5, at 502.

contracts, or those that subjugate others.<sup>200</sup> Freely-entered surrogacy contracts should be treated as other valid contracts—enforceable with the parties’ intent controlling.<sup>201</sup> Arguably, there is a constitutional right to procreate,<sup>202</sup> which should extend from natural to assisted reproduction, as both means seek the same end.<sup>203</sup>

Additionally, the ability to enter contracts, including surrogacy agreements, is included in the meaning of personal autonomy; to prohibit such action would “violate women’s right to self-determination and reinforce the negative stereotype of women as incapable of full rational agency.”<sup>204</sup> Enforcing surrogacy agreements strengthens self-determination and personal autonomy, as enforcement “presupposes that the woman’s body is hers and hers alone unless she consents to some particular use of it.”<sup>205</sup> “The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.”<sup>206</sup> Women who undertake to be surrogates are generally “quite satisfied” with their decision.<sup>207</sup> Many

200. *Id.* at 507.

201. *Id.* at 508.

202. *D.M.T. v. T.M.H.*, No. SC12-261, 2013 Fla. LEXIS 2422, at \*24 (Fla. Nov. 7, 2013) (“It is a basic tenant of our society and our law that individuals have the fundamental constitutionally protected rights to procreate and to be a parent to their children. These constitutional rights are recognized by . . . the United States Constitution.”); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *TASK FORCE*, *supra* note 26. This right has been conceptualized as both a positive and a negative right. ART creates “a claim on society to guarantee, through whatever means possible, the capacity to reproduce.” *BLANK & MERRICK*, *supra* note 26, at 99. However, this could lead to constitutional claims for access to services and financial assistance. More likely, the right will be conceptualized as a negative right: the state does not need to provide affirmative support; it just needs to permit legal access. *ROBERTSON*, *supra* note 7, at 225 (“Procreative rights are negative in protecting against private or state interference, but they give no positive assistance to someone who lacks the resources essential to exercise the right.”). *Contra Ann MacLean Massie*, *Symposium on John A. Robertson’s Children of Choice: Regulating Choice: A Constitutional Law Response to Professor John A. Robertson’s Children of Choice*, 52 *WASH. & LEE L. REV.* 135, 162 (1995) (“[T]he cases suggest that the state may constitutionally regulate reproductive behavior outside the particular context of marital intimacy.”); *see also Radhika Rao*, *Constitutional Misconceptions*, 93 *MICH. L. REV.* 1473, 1484–87 (1995) (reviewing *JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994)) (“If government need not supply the financial resources necessary to exercise the right to procreate, it is not clear why government must supply the judicial resources necessary to exercise the right either.”).

203. *See TASK FORCE*, *supra* note 26.

204. *Liezl van Zyl & Anton van Niekerk*, *Interpretations, Perspectives and Intentions in Surrogate Motherhood*, 26 *J. MED. ETHICS* 404, 404 (2000).

205. *Arneson*, *supra* note 7, at 162.

206. *Caster*, *supra* note 5, at 512.

207. *Ciccarelli & Beckman*, *supra* note 9, at 31. There is little evidence showing women are exploited by surrogacy contracts. *Jennifer L. Watson*, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogates Be Compensated for Their Services?*, 6 *WHITTIER J. CHILD. & FAM. ADVOC.* 529, 545 (2007).

surrogates receive an increase in “self-worth” from the experience.<sup>208</sup> Prohibitions on surrogacy are reminiscent of outdated patriarchal doctrines, like coverture. Legalizing commercial surrogacy contracts furthers women’s independent rights to make decisions and to contract.<sup>209</sup> As in other fields, the right to contract can be governed by regulations addressing legitimate public policy concerns while still safeguarding personal autonomy.

Further, enforcing surrogacy contracts would provide social and economic benefits to the parties involved. Economically, parties would not contract if they were not to receive a benefit outweighing their investment.<sup>210</sup> Without the agreement being enforceable at the outset, neither intended parents nor surrogates have a guaranteed incentive, and thus they will be less willing to engage.<sup>211</sup> Further, by permitting the enforcement of such contracts, society benefits through the creation of families.<sup>212</sup>

### B. Eligibility

The New York proposals generally strike an appropriate balance between preventing exploitive arrangements and safeguarding personal autonomy, however three additional requirements would further these goals: require the surrogate and her spouse to undergo psychological and medical exams, require a surrogate to have previously given birth, and require physical and psychological exams for the intended parents with the results provided to the surrogate so she can make an informed decision.

#### 1. Surrogates

The proposed requirements mandating that the surrogate be at least twenty-one years old,<sup>213</sup> have consulted with independent legal counsel<sup>214</sup> and possess health

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208. Vasanti Jadva, Clare Murray, Emma Lycett, Fiona MacCallum & Susan Golombok, *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2204 (2003).

209. Caster, *supra* note 5, at 512; Watson, *supra* note 207, at 545–46.

210. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 22–23 (1989).

211. *Id.* at 23 (lacking assurances that the contract will be enforced, intended parents will not be willing to invest as much money into the agreement, so surrogates are deprived the ability to set fees according to their needs).

212. There is no adverse effect on the family relationship or the parent-child bond when children lack a genetic or gestational bond with their parents at age three. See Susan Golombok, C. Murray, V. Jadva, E. Lycett, F. MacCallum & J. Rust, *Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3*, 21 HUM. REPROD. 1918, 1919 (2006).

213. Mandating surrogates be over twenty-one is a valid restraint that presumably is intended to protect younger women who may not be able to fully understand the seriousness of a surrogacy agreement. Other states have similar requirements. See, e.g., 79 Del. Laws 88 (2013) (surrogate must be at least twenty-one.); FLA. STAT. ANN. § 742.15 (2013) (surrogate must be at least eighteen.). See also ASRM Opinion, *supra* note 191, at 1840 (“Given the very complex emotional tasks of the pregnancy and postpartum, as well as the demands of negotiating a relationship with intended parents, it is reasonable to adopt a conservative

insurance lasting eight weeks postpartum<sup>215</sup> are straightforward and justified requirements that do not warrant further discussion.

Requiring potential surrogates to have a medical “evaluation and consultation with a health care provider regarding the anticipated pregnancy”<sup>216</sup> is a good start, but inadequate because it does not require a psychological evaluation.<sup>217</sup> The required consultation protects the physical health of potential surrogates,<sup>218</sup> however it does not assess nor protect psychological or emotional wellbeing. Psychological screening could prevent women prone to surrogacy-induced distress from participating by identifying those with unstable personalities.<sup>219</sup> Additionally, a mandatory psychological exam, with or without mandatory counseling,<sup>220</sup> would help assuage concerns about coercion, lack of informed consent, and undue influence.<sup>221</sup> Further, ensuring psychological stability would ensure surrogates are able to “view the child they are carrying as not theirs” and are comfortable relinquishing the child to the intended parents.<sup>222</sup> Intended parents would also be more comfortable with a surrogate who has a clean bill of mental health, as mental state can impact pregnancy outcomes.<sup>223</sup> Making these steps routine in surrogacy

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position about age and surrogacy by setting the minimum age at 21.”).

214. Mandating that the parties be independently represented is common. *See, e.g.*, CAL. FAM. CODE § 796279 (2013); Del. Laws 88 (2013); 750 ILL. COMP. STAT. 47/15 (2006).

215. Such a requirement is logical as recovery from labor and delivery usually takes around eight weeks. *Patient Education Post-Partum*, PHYSICIANS FOR WOMEN (2004), <http://www.physicians-for-women.com/patients/postpartum.asp>. Insurance can be procured by the surrogate or intended parents. Assem. B. 6701 § 581-404(a)(4) (N.Y. 2013).

216. Assem. B. 6701 § 581-103(s) (N.Y. 2013).

217. Some states already require a psychological evaluation. *See, e.g.*, 79 Del. Laws 88 (2013) § 8-806(a)(2)–(3); UTAH CODE ANN. § 78B-15-803(2)(d) (2013). The 2012 proposal required the surrogate pass a mental health evaluation. Assem. B. 10499, 235th Leg., Reg. Sess. § 581-402(A) (N.Y. 2012).

218. *Cf.* Belkin, *supra* note 101, at B3. It is logical to require medical examinations to ensure the surrogate does not communicate a disease to the fetus. CROCKIN & JONES, *supra* note 1, at 190. It would also be valuable to require the surrogate’s medical records be provided to intended parents. *See* BLANK & MERRICK, *supra* note 26, at 117 (describing case where surrogate transferred a potentially lethal strep infection to the fetus she was carrying). Providing the surrogate’s medical records could alert intended parents to surrogate behavior that could make her a suboptimal carrier for their fetus. *Id.*

219. *See, e.g.*, Arneson, *supra* note 7, at 160. Surrogacy does not lead to psychological trauma or negative outcomes for willing participants. Jadva, Murray, Lycett, MacCallum & Golombok, *supra* note 208, at 2203. Any psychological unease is short-lived and transient in nature. *Id.*

220. Providing therapy and other support to surrogates may improve their satisfaction with the surrogacy process. Ciccarelli & Beckman, *supra* note 9, at 34. The 2012 version required the mental health professional to offer counseling to all participants in the surrogacy arrangement. Assem. B. 10499 § 581-402(B) (N.Y. 2013). If the evaluation was unfavorable, further counseling could be used in order to pass the mental evaluation. *Id.* § 581-402(C).

221. Caster, *supra* note 5, at 509.

222. Jadva, Murray, Lycett, MacCallum & Golombok, *supra* note 208, at 2203.

223. *See, e.g.*, Ctr. for Neuroscience in Women’s Health, *Pregnancy and Mental Health*, STANFORD SCH. OF MED., [http://womensneuroscience.stanford.edu/wellness\\_clinic/Pregnancy.html](http://womensneuroscience.stanford.edu/wellness_clinic/Pregnancy.html). For example, untreated depression can lead to low birth weight for the infant and premature or prolonged labor for the surrogate. *Id.* In cases where mental health issues are treated, the fetus can be exposed to the medication through the placenta. *Id.* New

contract formation would protect all parties by promoting voluntary compliance and decreasing litigation.<sup>224</sup>

The surrogate's partner should also be subject to both a medical and a psychological exam. The medical evaluation would protect a fetus from communicable disease<sup>225</sup> and provide more information to the intended parents, allowing them to make informed decisions about the risks to which they are willing to expose their intended child. Similarly, the psychological exam would provide a window into the surrogate's support structure and ensure that her partner acknowledges and approves of her undertaking.<sup>226</sup>

Legislation should require surrogates to have already given birth.<sup>227</sup> While a competent woman is the best judge of what she can and cannot handle and whether to undertake a particular risk, especially when dealing with her own body,<sup>228</sup> she can only do so effectively when able to make an informed decision. Women who have already had children are better informed as to the nature of pregnancy and can more easily gauge the likelihood that they will be distressed by the fact that the fetus developing within her is not hers.<sup>229</sup>

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Hampshire already requires the intended parents receive a copy of a nonmedical evaluation by a psychologist, psychiatrist, or the equivalent prior to contract formation. N.H. REV. STAT. ANN. § 168-B:18 (2013). Virginia already requires medical and psychological reports be accessible for all parties. VA. CODE ANN. § 20-160(B)(7) (2010). Utah requires certification that all parties have participated in counseling and have discussed options and consequences of the contract. UTAH CODE ANN. § 78B-15-803(2)(d) (West 2008). Required sharing of medical and psychological information, even when the surrogate is known to the intended parents, promotes informed decisionmaking.

224. Ciccarelli & Beckman, *supra* note 9, at 34. Further, if the women who are considering entering into surrogacy contracts are aware that contracts are presumptively enforceable, they will know their decision is likely irrevocable. This encourages self-selection of surrogates who are comfortable with this outcome. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L.R. 2305, 2339 (1995).

225. Cf. CROCKIN & JONES, *supra* note 1, at 190. Other states already require this. *See, e.g.*, VA. CODE ANN. § 20-160(B)(7) (2010). Requiring these evaluations from other members of the surrogate's household would be requiring too much.

226. The 2012 version would have required the surrogate's spouse pass a mental evaluation as well. Assem. B. 10499 § 581-402(A) (N.Y. 2012). Generally, even where members of the surrogate's support network were initially concerned or opposed to the surrogacy arrangement, by the contract's conclusion they were often supportive. Jadva, Murray, Lycett, MacCallum & Golombok, *supra* note 208, at 2203.

227. Such a requirement can be found in other states' statutes. *See, e.g.*, VA. CODE ANN. § 20-160. It was also found in the 2012 version of the proposal. Assem. B. 10499 § 581-404(A)(2) (N.Y. 2012). *See also* ASRM Opinion, *supra* note 191, at 1840 ("To give true informed consent without the experience of a pregnancy and a delivery is problematic because of the prolonged, intense, and unique nature of the experience.").

228. *See* Kristen Walker, *Should There Be Limits on Who May Access Assisted Reproductive Services? A Legal Perspective*, in *THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY*, 123, 125 (Jennifer Gunning & Helen Szoke eds., 2003).

229. Ciccarelli & Beckman, *supra* note 9, at 34; *see* Jadva, Murray, Lycett, MacCallum & Golombok, *supra* note 208, at 2203-04.

## 2. Intended Parents

The proposals should maintain their liberal eligibility requirements for intended parents, but they should have to undergo physical and emotional evaluation.<sup>230</sup> Intended parents can be married, coupled, or single.<sup>231</sup> The proposals maximize access to parenthood by not placing arbitrary requirements on intended parents, such as requiring a biological link between an intended parent and the resulting child,<sup>232</sup> or that a medical condition prevent the intended mother from safely carrying a pregnancy to term.<sup>233</sup> Limiting surrogacy contracts to genetically linked intended parents would unfairly restrict access.<sup>234</sup> Similarly, commercial surrogacy should not be limited to those who physically cannot gestate a pregnancy; it should be available to women who want to have genetic children but do not want to be pregnant.<sup>235</sup> Society does not require one be physically unable to care for her parents to hire a nurse, nor that someone be physically unable to stay home and take care of her children to hire a nanny; anyone can hire other caretakers. This principle should apply to surrogates. Similarly, surrogacy should be available to women who do not want to be *mommy tracked*, thus allowing reproduction to no longer be a hindrance to women's careers, possibly allowing more women the opportunity to enter the upper echelons of government and business by making their parenting role analogous to a father's.<sup>236</sup>

Yet, New York should require physical and psychological examinations for intended parents, with the results accessible to potential surrogates to provide them more information to make an informed decision about whether they want to work

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230. The 2012 proposal would have required intended parents pass a mental health evaluation. Assem. B. 10499 §§ 581-402(A), 581-404(B)(1) (N.Y. 2012).

231. Compare Assem. B. 6701 § 581-404(b)(1), (2) (N.Y. 2013) with FLA. STAT. ANN. § 742.15 (2013), and NEV. REV. STAT. ANN. § 126.045(2) (2013). The only restriction is that a married intended parent cannot be separated from his or her spouse. Assem. B. 6701 § 581-404(b)(2) (N.Y. 2013). However, if the intended parent has been separated for over three years before the formation of the agreement, then the spouse does not have to be involved in the contract and is unable to receive parental rights through the surrogacy contract. *Id.* § 581-404(b)(2)(ii).

232. Cf. FLA. STAT. ANN. 742.15(3)(e); VA. CODE ANN. § 20-160(B)(9).

233. Cf. FLA. STAT. ANN. § 742.15; 750 ILL. COMP. STAT. 47/20 (2006); VA. CODE ANN. § 20-160(B)(8).

234. The use of donated genetic material for procreation has become a mainstay in ART. CROCKIN & JONES, *supra* note 1, at 190. Donor gametes can be used to create an embryo for use in a gestational surrogacy contract. See SPONSOR MEMO, *supra* note 151, at 1.

<sup>235</sup> In fact, there has been an increase in the use of surrogacy by women who want to have children but do not want to be pregnant. 'Social Surrogacy' an Option for Moms-to-Be Who Shun Pregnancy, ABC NEWS (Apr. 18, 2014), <http://gma.yahoo.com/blogs/abc-blogs/social-surrogacy-option-moms-shun-pregnancy-160413402--abc-news-parenting.html>.

236. This would, on a micro level, allow women to have it all—a family and a career—without having to sacrifice one for the other. Eduardo Porter, *Motherhood Still a Cause of Pay Inequality*, N.Y. TIMES, June 13, 2012, at B1 (much of the pay gap between men and women is caused by motherhood and the constraints it places on their careers), and, on the macro level, allow society to reap the benefits of female leadership. See, e.g., Sam Bennett, *Who Needs More Women in Government? Everyone.*, [http://www.huffingtonpost.com/sam-bennett/who-needs-more-women-in-g\\_b\\_485685.html](http://www.huffingtonpost.com/sam-bennett/who-needs-more-women-in-g_b_485685.html) (women work collaboratively for “win-win outcomes,” increasing net benefits to all).

with these specific people.<sup>237</sup> Such examination of the intended parents would help fulfill the duty of care owed to surrogates and the resulting children by the surrogacy agency.<sup>238</sup> Additionally, the American Society for Reproductive Medicine (ASRM) strongly recommends psychological evaluations for all gamete donors and recipients,<sup>239</sup> there is no reason this should not extend to intended parents, as ASRM's guidelines mandate that "psychological consultation should be required in individuals in whom there appear to be factors that warrant further evaluation."<sup>240</sup> However, these evaluations should not be used as an automatic bar on intended parents' entering surrogacy contracts; an automatic bar would lead to discrimination and impermissible denials of access.<sup>241</sup> Even if the intended parents would be able to procreate naturally, their ability to do so through surrogacy is not a given.<sup>242</sup> The key to a surrogacy agreement is the surrogate, who should be able to make an informed decision before agreeing to an enforceable surrogacy contract.

### C. Compensation

The proposals would permit intended parents to compensate surrogates above and beyond costs associated with pregnancy, as long as compensation is reasonable and negotiated in good-faith,<sup>243</sup> and however the promised payment should be guaranteed.

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237. A similar requirement is already in place in New Hampshire. N.H. REV. STAT. ANN. § 168-B:18 (2013). Virginia requires medical and psychological reports be accessible to all parties. VA. CODE ANN. § 20-160(B)(7) (2013). For example, a surrogate may be interested in knowing the environment in which the child she would carry will be raised. *Cf. Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997) (holding that a prima facie case of negligence existed against surrogacy clinic that failed to evaluate intended father's psychological state and the child was murdered by the intended father). Screening intended parents could identify potential dangers and prevent tragedies by permitting informed surrogates to decide against providing services to questionable intended parents. CROCKIN & JONES, *supra* note 1, at 239. Further, testing could reduce the number of surrogates that seek custody of children they carried. *See* Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 12, 2009, at A1.

238. *See Huddleston*, 700 A.2d at 460 ("[A] business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from such endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a 'special relationship' exists between the surrogacy business, its client-participants, and, most especially, the child which the surrogacy undertaking creates.").

239. CROCKIN & JONES, *supra* note 1, at 132.

240. *Id.* at 133. Couples who learn that they need to use the contribution of others to achieve pregnancy often become quite upset, including experiencing "a major crisis," depression, "a blow to their self-esteem," or guilt. *Cf. MACHELLE M. SEIBEL & SUSAN CROCKIN, FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES* 35 (1996).

241. CROCKIN & JONES, *supra* note 1, at 362.

242. Without the voluntary acquiescence of a surrogate, the intended parents are unable to pursue a child through surrogacy.

243. Assem. B. 6701 § 581-502(b) (N.Y. 2013). Notably, the Center for Surrogate Parenting pays its surrogates between \$20,000 and \$30,000 per pregnancy, with experienced surrogates receiving higher fees. Steiner, *supra* note 12.

Society allows people to purchase services every day; surrogacy is another service to be purchased.<sup>244</sup> We already use skilled or manual labor as means to an end in various aspects of our lives, often with no objection.<sup>245</sup> It is acceptable to hire a nurse for the sick, an aide for the infirm, and a sitter for children. A surrogate should be treated equivalently to a paid caretaker.<sup>246</sup> Morally, there is no difference between paying a nanny to care for a toddler for a year and paying a woman to gestate a fetus for nine months. In both cases, a parent is paying someone to provide care, including feeding and protecting the child; in both cases it is possible for the caretaker to emotionally invest in and develop an attachment to the charge. We even permit men to sell sperm and women to sell eggs. We do not require these individuals provide these materials from the goodness of their hearts; we allow compensation above and beyond the costs for retrieval. It logically follows that we should permit women to use their biological capability to help others procreate while increasing their own welfare.<sup>247</sup>

Though surrogates may undertake the process and associated risks for altruistic or personal reasons,<sup>248</sup> they deserve compensation above and beyond reasonable costs because they are performing a unique service.<sup>249</sup> The surrogacy process is not speedy. Women that undertake this labor of love deserve to have their time and effort compensated.<sup>250</sup> Further, they should be compensated for the risks they undertake.<sup>251</sup> The proposals explicitly permit surrogates' compensation based on

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244. See van Niekerk & van Zyl, *supra* note 8, at 346.

245. See *id.* For example, the relationship between a surrogate and the intended parents is comparable to other contractually held jobs: a police officer and the village government; or a professional athlete and the team for which he plays. In all cases, the employee contracts away some control over his or her body for the benefit of others to achieve the goals agreed to at the contract's signing. See Arneson, *supra* note 7, at 161. Regulation of surrogacy, such as in the manner suggested here, would operate similarly to laws regulating the workplace. See generally 29 C.F.R. § 1910 (OSHA regulates workplaces).

246. See Callman, *supra* note 28, at 278.

247. See Watson, *supra* note 207, at 545–46; ASRM Opinion, *supra* note 191, at 1839 (noting that permitting compensated surrogacy arrangements is consistent with permitting paid gamete donation).

248. Overwhelmingly, surrogate mothers volunteer for altruistic reasons. While money may be a factor for some, few cite financial gain as the main reason why they volunteered. Ciccarelli & Beckman, *supra* note 9, at 30. Surrogates empathize with the intended parents and want to help them become parents. *Id.* Some surrogates pursue surrogacy as a way to improve themselves—some seek to increase self-esteem; some suffered a previous pregnancy-related loss and seek wholeness; some want to be pregnant again, seeking pregnancy, but not another child. *Id.*

249. Caster, *supra* note 5, at 498; Belkin, *supra* note 101, at B3.

250. Belkin, *supra* note 101, at B3. Surrogate Mother Program, Inc., a surrogacy brokerage firm, had a standard protocol that required monitoring the potential surrogates for half a year to ensure their fitness. *Id.* It is not unreasonable to believe such precautions could become the industry standard.

251. ASRM Opinion, *supra* note 191, at 1839 (“Payment to the gestational carriers should take into account 9 months of possible illness, risks to employment, burdens on other family members, and the like, but should not, however, create undue inducement or risks of exploitation or incentivize gestational carriers to lie about their own health conditions or family history.”).

financial costs, inconvenience, and time.<sup>252</sup>

Placing the payment in an escrow account prior to the start of IVF ensures surrogates receive the promised compensation, protecting against exploitation.<sup>253</sup> Because payments must conclude within two months of the pregnancy's end, funds would not be used to purchase an interest in a child.<sup>254</sup> To assuage concerns that the fee is being used to buy children, compensation should be disbursed to the surrogate throughout the pregnancy.<sup>255</sup> This would further support the statutory suggestion that compensation be based on the time spent, the inconvenience caused, and the costs accumulated.<sup>256</sup>

#### D. Contractual Requirements

The legislative proposals set out reasonable requirements for enforcement of surrogacy contracts, however enforcement should be expanded to include traditional surrogacy agreements. Requiring the contract be in writing is a logical way to protect all parties,<sup>257</sup> and is not overly burdensome.<sup>258</sup> Requiring the contract be signed by all parties<sup>259</sup> prior to the cycle similarly protects the parties so that they enter the contract voluntarily and not due to guilt or coercion. Requiring the surrogate to choose her medical practitioners preserves her autonomy and privacy. The other proposed substantive requirements are unremarkable.<sup>260</sup>

Notably, the proposals only sanction gestational surrogacy contracts.<sup>261</sup> This will satisfy most intended parents, but the legislature should sanction commercial traditional surrogacy contracts as well. While gestational surrogacy has increased in popularity,<sup>262</sup> some intended parents prefer to forgo the intended mother's

252. Assem. B. 6701 § 581-502(a) (N.Y. 2013). This is an appropriate, albeit flexible, formula for calculating surrogates' compensation. *See* Watson, *supra* note 207, at 551–52 (“Surrogacy is a twenty-four hour per day job that lasts for nine months. The job involves danger to the woman’s life and health. There is no vacation time from this job, and there are few tangible job perks. Clearly, surrogates deserve compensation for their services.”).

253. ASRM Opinion, *supra* note 191, at 1839. Use of an escrow account also protects the intended parents by separating the financial incentive from their interactions with the surrogate. *Id.*

254. Assem. B. 6701 § 581-502(a) (N.Y. 2013).

255. *See* Caster, *supra* note 5, at 513.

256. Assem. B. 6701 § 581-502(a) (N.Y. 2013).

257. Requiring the contract be written is not unique to the New York proposal. *See, e.g.*, 750 ILL. COMP. STAT. 47/15 (2006); UTAH CODE ANN. § 78B-15-801(1) (2013); VA. CODE ANN. § 20-160(A) (2010).

258. *Compare* Assem. B. 6701 § 581-405(a)(1) (N.Y. 2013) *with* VA. CODE ANN. § 20-160(A)-(B) (requiring a hearing on the merits of the surrogacy contract, a court-appointed guardian ad litem for the resulting child, and a home study for both parties before approving the agreement and permitting the procedures to commence).

259. Requiring a married surrogate’s husband to be a party to the contract avoids the presumption of paternity for the resulting child. This is codified in other states’ surrogacy laws. *See, e.g.*, VA. CODE ANN. § 20-160(B)(10).

260. For example, the proposals require the contract to clearly assign obligations to all parties and the parties to be independently represented.

261. *See* Assem. B. 6701 § 581-103(m)–(o) (N.Y. 2013).

262. *See* Scott, *supra* note 14, at 122, 139.

genetic connection to the child to improve their odds for a successful pregnancy.<sup>263</sup> Others prefer traditional surrogacy because it costs much less than gestational surrogacy.<sup>264</sup> Also, conceptually, it is strange to allow egg donation for profit and to allow gestational surrogacy for profit but not to allow the combination of services. It is arbitrary to limit enforcement to gestational surrogacy contracts. Women willing to enter traditional surrogacy contracts are still the best judges of what they are able and willing to undertake.<sup>265</sup> Enforcement of traditional surrogacy arrangements should be permitted under the legislative proposals.

### *E. Legal Parentage*

The other major change endorsed by the proposed legislation is to permit “judgments of parentage” prior to birth of children born to surrogates.<sup>266</sup> While the formal requirements laid out in the proposals are fairly unremarkable,<sup>267</sup> the end result is not: at birth the child’s legal parents are the intended parents, who immediately get custody without adoption by the intended mother.

Determining parentage under a surrogacy contract is incredibly important; it is unwise to enter such agreements without parentage being enforceable at the outset.<sup>268</sup> Parents have a constitutionally protected interest in developing and maintaining relationships with their children.<sup>269</sup> Similarly, most states guarantee

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263. The miscarriage rate is higher when the carrier is not related to the embryo. *See* Caster, *supra* note 5, at 481.

264. The average cost of traditional surrogacy is \$50,000, which is less than half the average cost of gestational surrogacy, which averages between \$120,000–\$140,000. *See* *Surrogacy: What to Expect*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/surrogacy-what-to-expect>.

265. This would however make medical examinations more important. Sperm being used for intrauterine insemination should be screened to protect surrogates from exposure to sexually transmitted diseases. *See* Walker, *supra* note 228, at 126. Further, a “special relationship” exists between the ART clinic and the surrogate, in which it has a duty of care to look out for her health and well-being. *See* *Stiver v. Parker*, 975 F.2d 261, 268–71 (6<sup>th</sup> Cir. 1992).

266. Assemb. B. 6701 §§ 581-201(c)(ii), 203 (N.Y. 2013).

267. The proposals basically ensure that New York has jurisdiction over the contract, that the statutory eligibility and enforceability requirements are met, and that the contract was entered voluntarily. *Id.* § 581-203(b)(1)–(3).

268. Without the agreement being enforceable at the outset, neither the intended parents nor the surrogate has a guaranteed incentive, and thus will be more hesitant. Posner, *supra* note 210, at 23; CROCKIN & JONES, *supra* note 1, at 216. Legal and social parental status should be determined by the contract and its parties’ intentions at formation. Scott, *supra* note 14, at 122. If the law does not safeguard the parties’ intentions, the results can prove disastrous—namely, custodial disputes (or anxiety about that possibility), can lead to horrific consequences for the intended parents. *See* Scott, *supra* note , at 123. If parentage is not able to be determined before the child’s birth, peculiar things can happen. For example, a child could end up having no legal mother, no legal father, or no legal parents. Bonnie Steinbock, *Defining Parenthood*, in *FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE* 107, 108 (J.R. Spencer & Anteje Du Bois-Pedain, eds. 2006).

269. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood* 54 *AM. J. COMP. L.* 125, 128 (2006) (referencing *Stanley v. Illinois*, 405 U.S. 645 (1972)). A Utah law prohibiting surrogacy

children the right to legally recognized relationships with their parents.<sup>270</sup> “By allowing the intended parents to be listed on their children’s birth certificates, they can avoid unnecessary litigation regarding parentage, custody or even intestacy rights.”<sup>271</sup> Immediately listing the intended parents reflects the legal and social reality of parenthood, the parties’ intentions, and thus would decrease anxiety and uncertainty for the intended parents.<sup>272</sup> Birth certificates are legal documents, maintained and created as proscribed by law; they are not governed by biology or genetics, so they should simply reflect legal reality.<sup>273</sup> The law should respect the parties’ intentions and enforce their decisions on parental roles.

Without the surrogacy contract, the resulting child would not exist; the child was intentionally conceived at the behest of the intended parents.<sup>274</sup> That is the reason adoption is inadequate and inappropriate.<sup>275</sup> This is something the legislative proposals recognize: where intended parents do not pursue and obtain a judgment of parentage under the statute, the court assigns legal parentage based on “the best interests of the child,”<sup>276</sup> informed by “genetics and the intent of the parties.”<sup>277</sup>

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contracts was found unconstitutional because the law interfered with the biological parents’ “fundamental liberty interest[] in their parental relationship with their children.” J.R. v. Utah, 261 F. Supp. 2d 1268, 1297 (D. Utah 2003); CROCKIN & JONES, *supra* note 1, at 257.

270. Meyer, *supra* note 269, at 129.

271. Caster, *supra* note 5, 494–95.

272. Ciccarelli & Beckman, *supra* note 9, at 40.

273. Caster, *supra* note 5, at 495. Even New York’s Task Force on Life and the Law relatively recently recommended that the law should provide an efficient manner for enforcing the intent of the parties to a surrogacy contract with regards to legal parentage. TASK FORCE, *supra* note 26.

274. Arneson, *supra* note 7, at 157. It is this intent that should control. Legal- and biological-parentage are not equivalents, in either law or reality. TASK FORCE, *supra* note 26. For example, New York law assigns legal paternity to a woman’s husband when she is inseminated with another man’s sperm. *Id.*

275. The legislative scheme surrounding adoption is inappropriate to regulate parentage of children resulting from surrogacy. The obvious—and major—difference is that in adoption there already exists a child, whose birth parents have rights that need to be terminated. Children resulting from surrogacy only exist because of the executed agreement and the parental rights should vest only in the intended parents. Oftentimes, without the explicit direction of law, biological parents face the adoption process for their own children or can be unable to establish their biological/legal connection with their children. *See* CROCKIN & JONES, *supra* note 1, at 234. Without a legislative prescription like that described in the proposals, parents face a long legal process to get their names printed on their children’s birth certificates. *Id.* at 235.

276. Assem. B. 6701 § 581-408 (N.Y. 2013).

277. *Id.* Other outcomes may violate the Equal Protection Clause. An Arizona statute was violative of the Equal Protection Clause when it allowed fathers to prove paternity but prevented mothers from proving maternity. CROCKIN & JONES, *supra* note 1, at 237. Surrogates were presumed to be the mothers of the children they birthed, while their husbands could be proven not to be the fathers. *Id.* Similarly, Maryland found that, under principles of Equal Protection, a woman can deny maternity, just as a man can deny paternity of a child. *Id.* at 269; *In re Roberto D.B.*, 923 A.2d 115, 123–24 (Md. 2007). Interestingly, an increasing number of states permit unmarried men to challenge the paternity of married women’s children, even over those women’s husbands, in order to establish legal recognition of their biological connection. Meyer, *supra* note 269. Equal protection demands that women be afforded this same ability.

*F. Termination*

The proposals provide that for resolving disputes and for terminating a surrogacy contract, “all remedies available at law or equity” are available, except specific performance when it requires the surrogate become pregnant,<sup>278</sup> however they do not provide a framework for resolving major disputes between the intended parents and the surrogate: the bills are silent on what should become of the money or the fetus if anyone wants to terminate the agreement after embryo transfer and judgment of parentage. This flexibility is a double-edged sword.

While specific performance cannot be ordered to impregnate the surrogate, courts could order specific performance of lifestyle clauses forcing the surrogate to refrain from activities that could negatively impact the fetus (such as drinking, smoking, or using drugs), or to engage in behavior that could positively impact the fetus (such as eating better, taking prenatal vitamins, or taking folic acid).<sup>279</sup> Despite, or even because, the intended parents pledge to accept all children regardless of “mental or physical condition” resulting from the arrangement, many contracts will provide an obligation for the surrogate to undergo prenatal testing and to abort if the intended parents determine the fetus has an abnormality they find unacceptable.<sup>280</sup> Enforceability of such a clause is questionable under *Roe v. Wade*,<sup>281</sup> however, refusal to comply could still lead to litigation,<sup>282</sup> as it is possible neither surrogate nor intended parents would want the offspring.<sup>283</sup> Another possibility would be that the intended parents would be willing to parent, but would seek damages from the surrogate.<sup>284</sup>

This silence may be intended to provide courts with the most flexibility permissible. With this flexibility, courts are able to adjudicate more equitably, especially as they are not bound by precedent.<sup>285</sup> However, intended parents would likely be more comfortable knowing that their investment would be protected if the agreement went irreparably sour.<sup>286</sup> While many parties to surrogacy arrangements may benefit from flexible regulation, more thorough legislative guidance would better protect their interests.

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278. Assem. B. 6701 § 581-409(a)–(c) (N.Y. 2013).

279. See BLANK & MERRICK, *supra* note 26, at 129.

280. *Id.* at 117.

281. 410 U.S. 113, 153 (1973) (explaining that the right to privacy ensures that the decision to undergo an abortion is made by the pregnant woman).

282. See, e.g., Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013), <http://edition.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html> (describing circumstances where, despite the surrogate contract requiring “abortion in case of severe fetus abnormality,” the surrogate refused to abort a fetus with abnormalities).

283. BLANK & MERRICK, *supra* note 26, at 117 (describing two cases where children resulting from surrogacy agreements were rejected by both the intended parents and the surrogate because of congenital problems).

284. See *id.* at 129.

285. Assem. B. 6701 § 581-410 (N.Y. 2013) (requiring all “proceedings, records, and identities of the individual parties” be sealed unless petitioned by the parties or the resulting child).

286. Notably, less than one percent of surrogacy contracts end in dispute. John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 689 (1993).

## CONCLUSION

After over twenty years of status quo, the New York Legislature has an opportunity to liberalize its surrogacy laws whether during this legislative session or the next. By adopting the proposals with the suggested changes, the Legislature would simultaneously bring the law into conformity with the desires of many New Yorkers and recognize important technological developments. The proposals are marked improvements on the present prohibitory regime; however, they are not perfect. The legislature should consider further protections for the parties to surrogacy arrangements and amend the proposals accordingly. The legislature's renewed interest in the topic is refreshing; this interest should lead to major legislative overhaul in the near future.