

COMMENTS

THE MODERN DAY STORK: VALIDATING THE ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACTS IN LOUISIANA

I. INTRODUCTION	588
II. BACKGROUND.....	592
A. EARLY PARENTING ALTERNATIVES TO INFERTILITY.....	592
1. ADOPTION	593
2. ART AND THIRD-PARTY SURROGATES.....	596
B. THE CASE FOR AND AGAINST SURROGACY AND THE REVOLUTIONARY <i>BABY M</i> CASE	598
C. DIFFERING STATE RESPONSES TO <i>BABY M</i>	601
1. STATE LEGISLATIVE RESPONSES TO TRADITIONAL SURROGACY.....	602
2. <i>JOHNSON V. CALVERT</i> AND THE JUDICIARY’S RESPONSE TO GESTATIONAL SURROGACY	604
3. ACCOUNTING FOR GESTATIONAL SURROGACY IN STATE REGULATION	606
4. THE NEWFOUND PARENTAGE PROBLEM	609
D. LOUISIANA’S INITIAL REACTION TO <i>BABY M</i> AND THE CURRENT STATE OF THE LAW ON SURROGACY CONTRACTS	611
1. EARLY REACTIONS IN THE PELICAN STATE.....	611
2. THE PARENTAGE PROBLEM REVISITED: LOUISIANA EDITION	612
E. RECENT LEGISLATIVE EFFORTS IN LOUISIANA	615
1. SENATE BILL 162 OF THE 2013 REGULAR SESSION	615
2. HOUSE BILL 187 OF THE 2014 REGULAR SESSION .	617
III. ANALYSIS	618
A. LOUISIANA’S CONTINUING LACK OF GUIDANCE ON THE ENFORCEABILITY OF GESTATIONAL SURROGACY ..	618
1. ISSUES IN SENATE BILL 162 OF THE 2013 LEGISLATIVE SESSION.....	619
a. Commercialization and Exploitation	

Concerns	619
b. The Morality Argument: “Traditional” Procreation is the Only Means of Procreation?	622
c. The Parentage Problem Remains Unsolved	624
d. Choice of Law Problems	626
2. ISSUES IN HOUSE BILL 187 OF THE 2014 LEGISLATIVE SESSION.....	628
B. EVEN IF SIGNED INTO LAW, THE RECENT LEGISLATIVE BILLS WERE NOT WITHOUT ISSUES	630
1. BOTH BILLS LEFT GESTATIONAL CARRIERS INADEQUATELY COMPENSATED	631
2. BOTH BILLS’ MARRIAGE REQUIREMENTS FOR THE INTENDED PARENTS WERE TOO RESTRICTIVE	632
3. CHOICE OF LAW REVISITED.....	635
4. OTHER CONSIDERATIONS	637
IV. PROPOSAL	638
A. ERADICATING THE MARRIAGE REQUIREMENT.....	639
B. GESTATIONAL SURROGACY NOW ENFORCEABLE.....	640
C. CHANGES TO THE VITAL RECORDS STATUTES	643
V. CONCLUSION.....	645

I. INTRODUCTION

“Where do babies come from?” Curious children almost inevitably ask their parents this question at some point during their youth. To avoid the awkwardness of giving a straight answer to their young children, parents everywhere have devised fictional stories to keep these inquiries temporarily at bay. One of the most widely accepted fables is the story of the “baby-delivering stork.” This bird represented fertility in many ancient cultures and has been associated with childbirth for hundreds of years.¹ Its symbolism has led to the stories that parents retell to their children, generation after generation. Of course, when children are old enough to understand the biological aspect of

1. See Emily Upton, *Why Storks are Associated with Delivering Babies*, TODAYIFOUNDOUT.COM, <http://www.todayifoundout.com/index.php/2013/05/why-storks-are-associated-with-delivering-babies/> (last visited Oct. 1, 2014) (on file with author).

their origin, parents are forced to come clean on the white lies they have told.

However, the miracle of childbirth is not something that every prospective parent enjoys. For a variety of reasons, many couples are unable to have children of their own. Moreover, many single adults want to become parents but are physically incapable of birthing a child on their own. To alleviate their misfortunes, a number of people regularly turn to an alternative method of becoming parents via the adoption process. In many ways, adoption agencies act as “storks” for these parents, providing the gift of parenthood to those unable to bear children.

With recent advances in modern science, aspiring parents have gained yet another means for having children of their own through artificial reproductive technology (ART).² Still, barriers to the widespread acceptance of ART have emerged among all states—especially when hopeful parents contract with third-party surrogates to carry children for them. Such agreements are known as “surrogacy contracts,”³ and they have evoked a wide variety of opinions regarding their enforceability.⁴ Much like adoption agencies, surrogates play the role of “stork” for hopeful parents; but, unlike the adoption process, the child bears a genetic relationship to at least one of the intended parents⁵ depending on the type of surrogacy arrangement. Generally, surrogacy contracts come in two forms: gestational and traditional.⁶ Gestational surrogacy is the process by which a fertilized embryo is implanted in a gestational carrier, who then carries the resulting child to term but bears no genetic

2. Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 673 (2000).

3. For clarity purposes, the terms “contracts,” “agreements,” and “arrangements” will be used interchangeably throughout this Comment.

4. See, e.g., COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:2 (2009 ed.); Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2258-62 (2012).

5. For purposes of this Comment, “Intended Parent” means a person who enters into a gestational surrogacy contract with a gestational carrier pursuant to which he or she will be the legal parent of the resulting child.

6. *Frequently Asked Questions for Surrogates*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/surrogates/faqs> (last visited Dec. 17, 2013) [hereinafter *FAQs for Surrogates*] (on file with author).

relationship to the child.⁷ Conversely, traditional surrogates are both genetic and gestational carriers who “undergo artificial insemination and relinquish custody of the resulting child[] upon birth.”⁸

Many states have voiced apprehension regarding the enforceability of surrogacy agreements. Louisiana is one state that offers no resolution to this issue.⁹ While it appears that its laws prohibit all forms of *traditional* surrogacy,¹⁰ the exact parameters of the state’s regulation of *gestational* surrogacy are less clear.¹¹ In other words, Louisiana’s stance on the enforceability of gestational surrogacy contracts is unknown. As a result, if one were to contract with a surrogate in this state, the intended parents’ rights to the child would be unclear. Additionally, if confected in another state, it would be uncertain whether Louisiana would uphold a surrogacy agreement.

State lawmakers have expressed these concerns in recent legislative sessions.¹² Correspondingly, a surrogacy regulation Bill swiftly passed through both houses of the 2013 legislature; however, Governor Bobby Jindal vetoed it, citing concerns from various feminist and religious organizations.¹³ As a result, surrogacy in Louisiana remained unclear. However, had the Bill been implemented, it would have been far too restrictive in limiting intended parents to those that were married, and the contractual provisions would have afforded the surrogate

7. *FAQs for Surrogates*, *supra* note 6 (explaining that in gestational surrogacy, surrogates act only as gestational carriers for the intended parents, and bear no genetic relationship to the resulting child because the surrogate uses the genetic material of a male and another female to create the embryo).

8. *Id.* (explaining that in traditional surrogacy, surrogates not only act as gestational carriers for the intended parents, but also bear a genetic relationship to the resulting child because the surrogate only uses a male’s genetic material to create an embryo).

9. Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187, 1193-94 (2013) (explaining the lack of clarity Louisiana’s surrogacy laws provide).

10. *See* LA. REV. STAT. ANN. § 9:2713 (2005) (defining in Subsection B that the particular surrogacy arrangements the statute prohibits are those involving insemination—the process by which traditional surrogacy takes place).

11. *See* LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012).

12. *See, e.g.*, S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478>.

13. Memorandum from the Office of Governor Bobby Jindal to Hon. Glenn Koepp, Sec’y of the Senate (June 20, 2013) [hereinafter 2013 Jindal Veto Memo], *available at* <http://legiscan.com/LA/supplement/SB162/id/10679> (on file with author).

2014]

The Modern Day Stork

591

inadequate compensation for her sacrifice.

Nonetheless, state legislators quickly regrouped and proposed a similar Bill for consideration in the 2014 session.¹⁴ The pros and cons of this Bill were the same—although gestational surrogacy contracts would have been enforceable, very few people would have been able to enter into a valid contract in the first place, and surrogates would have been insufficiently rewarded for their service to the intended parents. After virtually no resistance from either house, Governor Jindal yet again exercised his veto power, for similar reasons as in the previous year.¹⁵ Consequently, the same problems that arose following the 2013 veto resurfaced after the 2014 veto, and a glaring deficiency persists in Louisiana’s surrogacy laws.

This Comment will address the need for Louisiana to reconsider surrogacy legislation in three main areas. Initially, Louisiana should legalize gestational surrogacy and clarify the uncertainty regarding parental rights to children born through ART. Next, there should be no marriage requirement for the intended parents to these contracts. This will benefit the majority of aspiring parents looking to utilize surrogacy, while remaining consistent with Louisiana’s adoption laws. Lastly, surrogates should be entitled to receive reasonable compensation for their service beyond out-of-pocket expenses, subject to court approval. This will incentivize women wishing to help prospective parents have children, while simultaneously allowing a court to prevent unreasonably low or high payment to surrogates.

Section II of this Comment provides a historical background of the rise of ART in modern society and the varying stances among the states regarding its regulation. Next, Section III specifically details Louisiana’s latest legislative efforts to adopt a standardized model. It offers a critique of the 2013 and 2014 legislature’s actions, examines the problems that would have ensued had the 2013 Bill become law, and addresses the issues that the 2014 legislation raised. Lastly, Section IV suggests a

14. H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (original), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=871407&n=HB187%20Original>.

15. Memorandum from the Office of Governor Bobby Jindal to Hon. Alfred Speer, Clerk of the House of Representatives (May 30, 2014) [hereinafter 2014 Jindal Veto Memo], *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=911932> (on file with author).

legislative solution that the state should consider to address the ever-evolving perception of a “family” in our society.

II. BACKGROUND

The circumstances that gave rise to Louisiana’s recent attempts to regulate surrogacy agreements can be traced back to a time before ART even existed. This section explores the many different factors that put the idea of surrogacy contracts in motion. Subsection A details the underlying problems that have led many to seek alternative methods to becoming parents and explains the two most popular of these methods—adoption and ART. Subsection B presents the primary arguments in favor of and against surrogacy contracts and analyzes a New Jersey supreme court decision that set the tone for state-by-state regulation of these contracts. Subsection C outlines the varying actions taken among the different states in their own regulation of surrogacy agreements. Subsection D discusses Louisiana’s earliest efforts to regulate surrogacy and scrutinizes the issues that have correspondingly resulted. Lastly, Subsection E evaluates Louisiana’s two latest efforts to enact legislation that would—to an extent—have addressed these problems.

A. EARLY PARENTING ALTERNATIVES TO INFERTILITY

In many circumstances, aspiring parents have encountered barriers—both natural and regulatory—preventing them from having children. The natural barriers usually result from infertility.¹⁶ This unfortunate condition is not uncommon; in fact, recent data shows that 1.5 million married women in the United States are infertile.¹⁷ However, infertility in women is not the only barrier to pregnancy; a variety of problems can result from the man’s semen, which may inhibit fertilization.¹⁸ Regardless of

16. Infertility is the inability to become pregnant after one year of unprotected sex. *Reproductive Health: Infertility FAQs*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/> (last updated June 20, 2013) [hereinafter *Infertility FAQs*] (on file with author).

17. *FastStats: Infertility*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/infertility.htm> (last updated Feb. 13, 2014) (on file with author). Moreover, 6.7 million women—regardless of marital status—have reported an impaired ability to become pregnant or carry a pregnancy to term, a condition known as impaired fecundity. *Id.*

18. A CDC study analyzed data from the 2002 National Survey of Family Growth and found that 7.5% of all sexually experienced men younger than 45 reported seeing a fertility doctor during their lifetime—roughly 3.3–4.7 million men. Of men who

the source of the infertility, the effect can be devastating on prospective parents. Luckily, there are alternative parenting options available, many of which have been subject to a number of regulatory barriers over the years. These alternatives generally exist in two different processes: (1) adoption and (2) ART, which will be discussed in the following subsections.

1. ADOPTION¹⁹

The widely accepted practice of adoption is the oldest and most recognized alternative parenting method. Adoption serves as a means of fulfilling many adults' dreams of becoming parents and effectuates a humane method for biological parents who cannot care for their children, for one reason or another, to nevertheless ensure them a home.²⁰ The process was originally accomplished through a matching system, which sought to assimilate adopted children into families most similar to their own physical characteristics.²¹ However, after the Supreme Court's decisions in *Eisenstadt v. Baird*²² and *Roe v. Wade*,²³ which permitted a more widespread acceptance of birth control technology, the number of healthy infants available for adoption drastically decreased.²⁴ As a result, prospective parents were encouraged to reconsider their preference for same-race adoptions, and correspondingly, the matching system's focus

sought help, 18% were diagnosed with a male-related infertility problem, including sperm or semen problems in 14%. *Infertility FAQs*, *supra* note 16.

19. Adoption is defined as “[a] two-step judicial process in conformance to state statutory provisions in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents.” *Adoption*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/adoption> (last visited Dec. 19, 2013).

20. *E.g.*, Ellen Herman, *Adoption History in Brief*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/adoptionhistbrief.htm> (last updated Feb. 24, 2012) (on file with author).

21. *See* Ellen Herman, *Matching*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/matching.html> (last updated Feb. 24, 2012) (on file with author).

22. *See generally* *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court struck down a Massachusetts statute prohibiting distribution of contraceptives to single persons as an unconstitutional violation of the equal protection clause. *Id.* at 454-55.

23. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (ruling that states may not regulate abortions before the point of fetal viability).

24. *See* Ellen Herman, *Transracial Adoptions*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/transracialadoption.htm> (last updated Feb. 24, 2012) [hereinafter *Transracial Adoptions*] (on file with author).

shifted away from making adoptions less “visible.”²⁵ Today, hopeful parents are generally more willing to engage in trans-racial and international adoptions.²⁶ Thus, those wishing to have children have become more open to adopting a child regardless of apparent physical differences.

While preventative measures for pregnancies have been systematically legalized, the demand for children has not slowed. Over the years, an increasing number of single adults have applied to adopt children, a movement that was initially met with resistance from state legislatures and adoption agencies.²⁷ Specifically, state welfare officials began lobbying for regulations that would impede the ability of single adults to adopt, citing concerns for the emotional and economic interests of the children.²⁸ These barriers have since been lifted, and as of 2008, every state has repealed legislation preventing singles from adopting.²⁹ Still, although each state allows single adults to adopt children, many adoption agencies continue to prefer two-parent families.³⁰

25. See *Transracial Adoptions*, *supra* note 24.

26. See *id.*; Ellen Herman, *International Adoptions*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/internationaladoption.htm> (last updated Feb. 24, 2012).

27. See Kenneth Strauss, *Recent Developments in Single Parent Adoptions*, 11 J. CONTEMP. LEGAL ISSUES 597, 597 (2000); Mady Prowler, National Adoption Center, *Single Parent Adoption: What You Need to Know*, ADOPTION.COM, <http://childbirthsolutions.com/articles/preconception/adoption/single-parent-adoption-what-you-need-to-know/> (last updated Aug. 2, 2000) (on file with author) (recalling that for many years, several states had laws precluding single parents from adopting children).

28. See Ellen Herman, *Single Parent Adoptions*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/singleparentadoptions.htm> (last updated Feb. 24, 2012) [hereinafter *Single Parent Adoptions*] (on file with author).

29. In 2005, Utah was the only state exhibiting a statutory preference for marriage in adoption law. See JOSHUA K. BAKER & WILLIAM C. DUNCAN, MARITAL PREFERENCES IN ADOPTION LAW: A 50 STATE REVIEW, IMAPP POLICY BRIEF 1-2 (2005), available at <http://www.marriagedebate.com/pdf/iMAPPmarriage.adoption.pdf> (on file with author); UTAH CODE ANN. § 78-30-9, repealed by H.R. 78, 57th Leg., 2008 General Sess., 2008 Utah Laws 457 (formerly stating that it is “not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state”). Effective February 7, 2008, the Utah legislature repealed this statutory preference and established a system whereby the courts “examine[d] each person appearing before it” and measured adoptability by looking at whether “the interests of the child [would] be promoted by the adoption . . . [of] the adoptive parent or parents.” UTAH CODE ANN. § 78B-6-137 (LexisNexis 2012) (emphasis added).

30. See *supra* note 29 and accompanying text. This preference is shown particularly when healthy infants are up for adoption, as fewer singles adopt healthy

While single adults face many obstacles in the adoption process, these difficulties pale in comparison to those faced by same-sex couples.³¹ Currently, various differences exist among the states regarding same-sex couples' ability to adopt.³² These distinctions range from complete prohibition on gay couples adopting children,³³ to second parent adoption,³⁴ to general acknowledgment of joint adoption by same-sex couples.³⁵ Several states have failed to provide any legislative rules on the adoption rights of same-sex couples; instead, judges determine parental rights on a case-by-case basis.³⁶ Still, this parental avenue has become more welcoming to same-sex couples in the last decade.

In short, adoption has been the primary alternative for infertile couples wishing to become parents. Single adults and same-sex couples have long faced difficulties in accessing the adoption process, but these obstacles have been largely eliminated in recent years. Still, due to the lengthy time period and rising costs that often come with the adoption process, many

infants domestically or internationally than do two-parent households. In contrast, singles account for a much larger percentage of adoptions from the public foster care system as well as adoptions of special needs children. This difference suggests that single parents are a "last resort" for adoption agencies looking to place children in permanent homes, while these agencies prefer to place healthy infant children in two-parent homes. *Single Parent Adoptions*, *supra* note 28.

31. See, e.g., Ann. K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1 (2011) (detailing the variances among the states' stance on same-sex adoption); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1970-71 (2012).

32. See generally Wooster, *supra* note 31 (detailing the variances among the states' stance on same sex adoption).

33. MISS. CODE ANN. § 93-17-3(5) (2013) ("Adoption by couples of the same gender is prohibited."); UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2012) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

34. "A second-parent adoption allows a second parent to adopt a child without the 'first parent' losing any parental rights. In this way, the child comes to have two legal parents. It also typically grants adoptive parents the same rights as biological parents in custody and visitation matters." See *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Dec. 21, 2013) (on file with author); see also *Parenting Laws: Joint Adoption*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/joint_adoption_6-10-2014.pdf (last updated June 10, 2014) [hereinafter *Parenting Laws*] (on file with author).

35. *Parenting Laws*, *supra* note 34 (laying out the various states that allow same sex couples to jointly adopt children).

36. *Id.*

aspiring parents have turned to science to realize their wishes.³⁷ The next subsection addresses this alternative.

2. ART AND THIRD-PARTY SURROGATES

The newer and more controversial alternative parenting solution is known as artificial reproductive technology (ART).³⁸ Unlike adoption, ART allows for aspiring parents to beget a child who bears a genetic relationship to them.³⁹ This Comment will focus on two of the various methods of ART: (1) artificial insemination and (2) in vitro fertilization. Both of these methods allow at least one of the intended parents to produce a child with his or her gametes.⁴⁰

Artificial insemination is defined as “the process by which a woman is medically impregnated using semen from her husband or from a third-party donor.”⁴¹ Importantly, artificial insemination uses only the male’s extracted genetic material.⁴² Whoever is implanted with the extracted sperm will also bear a genetic relationship to the child because the female genetic material is never extracted. In contrast, in vitro fertilization is defined as “a technique by which an ovum is fertilized with sperm in a laboratory dish and subsequently implanted in a uterus for gestation.”⁴³ In vitro fertilization takes place when both male and female gametes are extracted by mixing sperm and an ovum in a petri dish where the ovum fertilizes.⁴⁴ Notably, the woman who is implanted with the fertilized ovum does not necessarily bear a

37. See *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988) (stating that the primary reason why the intended parents to a surrogacy contract turned away from adoption was a potential multiple-year wait period); see also *IAC Adoption Fees*, INDEPENDENT ADOPTION CENTER, <http://www.adoptionhelp.org/adoption-fees-out> (last visited Oct. 3, 2014) (detailing the prices related to adoption).

38. See Havins & Dalessio, *supra* note 2, at 673.

39. *Id.*

40. The terms “gamete” and “genetic material” are interchangeable. A “gamete” is a sex reproduction cell containing one-half of the forty-six chromosomes contained in all other human body cells. Gametes are either spermatozoa (sperm) or ova (eggs). See Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825, 832 (1999).

41. *Artificial Insemination*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Artificial+Insemination> (last visited Dec. 21, 2013).

42. See Havins & Dalessio, *supra* note 40, at 833.

43. *In Vitro Fertilization*, THE FREE DICTIONARY BY FARLEX, <http://www.thefreedictionary.com/in+vitro+fertilization> (last visited Dec. 21, 2013).

44. See Havins & Dalessio, *supra* note 40, at 833-34.

genetic relationship to the child, because the embryo was created before implantation.⁴⁵

Unfortunately, surrogacy statistics are not available to the public, so all data relies heavily on estimates.⁴⁶ The Organization of Parents Through Surrogacy (OPTS) estimates that in the last twenty-five years, approximately 25,000 births have occurred through surrogate carriers in the United States, with most of these births occurring in the last decade.⁴⁷ While these reproductive techniques may serve as successful alternatives to sexual intercourse, problems arise at the regulatory level when intended parents contract with third-party surrogates for the purpose of carrying the parents' child to term.⁴⁸ Many of these problems are entirely dependent upon the nature of these contracts. Typically though, surrogacy contracts come in two main types—gestational and traditional.⁴⁹

Gestational surrogacy uses in vitro fertilization techniques.⁵⁰ The contract for this arrangement occurs between the individual or couple desiring to have a child and the surrogate, who is usually genetically unrelated to the embryo.⁵¹ The gestational surrogate provides her uterus to incubate the embryo, which she agrees to carry to term.⁵² Because in most of these situations the gestational carrier is unrelated to the child, courts are usually sympathetic to parties that seek to enforce this type of contract.⁵³

45. This Comment acknowledges the possibility that the surrogate *can* use her own gametes in the in vitro fertilization process. However, since this Comment takes the position that the absence of a genetic relationship between the surrogate and the child makes compensation to the surrogate more acceptable, it will be presumed throughout this Comment that the surrogate is using another woman's gametes.

46. *Surrogacy Statistics*, MODERN FAMILY SURROGACY CENTER, http://www.modernfamilysurrogacy.com/page/surrogacy_statistics (last visited Feb. 10, 2014) (on file with author).

47. Maria Trimarchi, *Surrogacy Overview*, HOWSTUFFWORKS.COM, <http://health.howstuffworks.com/pregnancy-and-parenting/pregnancy/fertility/surrogacy.htm> (last visited Feb. 10, 2014) (on file with author).

48. See Havins & Dalessio, *supra* note 2, at 673-74.

49. *FAQs for Surrogates*, *supra* note 6.

50. See Havins & Dalessio, *supra* note 40, at 853 ("In gestational surrogacy, an ovum is fertilized with sperm in vitro.")

51. *Id.*

52. *Id.* The fetal development period in the carrier's uterus is known as "gestation." See *id.*

53. *E.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (reasoning that when the gestational surrogate is genetically unrelated to the child, compensation beyond

In contrast, traditional surrogacy largely employs artificial insemination procedures.⁵⁴ Specifically, a traditional surrogacy contract exists between an infertile individual or couple and a fertile surrogate, who will undergo artificial insemination.⁵⁵ While not always involving artificial insemination, the practice of traditional surrogacy can be traced back thousands of years.⁵⁶ In recent years, however, traditional surrogacy contracts have generated many concerns with the increased popularity of ART. These concerns revolve around the surrogate carrier's agreement to relinquish all rights to the child—with whom she bears a genetic relationship—upon birth.⁵⁷ Additional problems arise when the intended parent or parents agree to pay the surrogate a fee for her services, in addition to paying for her pregnancy-related expenses.⁵⁸ While the practice of traditional surrogacy has generally diminished due to the rise of gestational surrogacy, its popularity in the late 1980s prompted a deluge of regulatory responses among the states.

B. THE CASE FOR AND AGAINST SURROGACY AND THE REVOLUTIONARY *BABY M* CASE

Due to the unconventional nature ART pregnancies, artificial insemination and in vitro fertilization are not without significant opposition, particularly when surrogate carriers are involved. Opponents of surrogacy arrangements typically argue that surrogacy exploits women and commodifies the ability to become pregnant.⁵⁹ Furthermore, religious leaders and

pregnancy-related expenses differs from compensation for relinquishing parental rights to the child—as in traditional surrogacy—thus, the gestational surrogacy contract was not in violation of California public policy).

54. See Havins & Dalessio, *supra* note 40, at 847.

55. See *id.*; Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 451 (2009) (explaining the permutation in traditional surrogacy contracts whereby the surrogate "serves as both the genetic and the gestational mother to a child conceived with [third-party] donor gametes").

56. See Havins & Dalessio, *supra* note 2, at 675 n.11 (stating that anecdotes of surrogacy can be located in the Book of Genesis; in these instances, the infertile wife gave her husband consent to impregnate a third-party surrogate).

57. See Havins & Dalessio, *supra* note 40, at 848.

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

59. See, e.g., Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205 (1992) (examining the argument that surrogacy reduces the control that women have over their bodies); John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631 (1994) (comparing the practice of surrogacy contracts to organ selling and experimentation on prisoners as

organizations voice disagreement with all forms of surrogacy—regardless of whether compensation is exchanged for the surrogate’s services—on the basis that it violates the sanctity of marriage.⁶⁰ In contrast, proponents of surrogacy contracts contend that such agreements provide infertile aspirant parents with a safe, quick alternative to adoption, which can take years to finalize.⁶¹ Additionally, many hopeful parents still prefer biological children, and adoption cannot provide a means to this end. Advocates also maintain that several improper assumptions about the parties’ motivations behind the agreement fuel their opponents’ animosity toward compensated surrogacy contracts.⁶²

While these arguments are currently the topic of hot debate in state legislatures, their origin can be traced to the story of Bill and Betsy Stern, a middle-aged, infertile New Jersey couple in the 1980s who were the main players in the landmark *Baby M* case.⁶³ The Sterns had contemplated adoption, but were turned off to the idea after realizing the extensive waiting period and the possibility that adoption agencies would give preference to younger couples.⁶⁴ After consulting with an attorney, the Sterns

exploitative—even though they may be voluntary); Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127 (1986) (asserting that surrogacy contracts not only coax financially unstable women to become surrogates, but also that surrogacy is analogous to slavery).

60. Michelle Ford, Student Article, *Gestational Surrogacy is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 97-98 (2008).

61. *E.g.*, *Surrogate Motherhood*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood> (last visited Dec. 23, 2013) (on file with author) (“Advocates of surrogacy also argue that [a]doption does not adequately meet the needs of infertile couples who wish to have a baby. They point out that there are many times more couples than available [i]nfants. Moreover, couples must wait three to seven years on average to adopt an infant.”); Hofman, *supra* note 55, at 467.

62. See Dominique Ladomato, Note, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245, 258-64 (2012). Speaking in the context of traditional surrogacy, the author reasons that failure by states to regulate surrogacy contracts uniformly evidences a failure by the states to recognize both the surrogate’s as well as the intended parents’ motivations involved in the surrogacy relationship. *Id.* Regarding the surrogate, the author argues that states’ permission of no-pay surrogacy contracts relies on the assumption that giving birth should be altruistic and that the surrogate would undergo the process solely for payment. Additionally, the author maintains that states precluding for-pay surrogacy fail to consider the intended parents’ desire for a healthy and certain pregnancy. *Id.*

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

64. *Id.* at 1236.

learned of Mary Beth Whitehead's surrogate application.⁶⁵ The couple met with Mrs. Whitehead, and they all agreed to a traditional surrogacy contract whereby Mrs. Whitehead would be artificially inseminated with Mr. Stern's sperm, carry the potential pregnancy to term, and relinquish custody of the child at birth in favor of Mrs. Stern.⁶⁶ In return, the Sterns agreed to pay Mrs. Whitehead \$10,000 for her services.⁶⁷

Unfortunately, all civility between Mrs. Whitehead and the Sterns ceased shortly after the child's birth because Mrs. Whitehead became overwhelmed by the thought of parting with the child she had carried for the previous nine months.⁶⁸ When Mrs. Whitehead refused to surrender the child to the Sterns, a custody battle ensued.⁶⁹ Mrs. Whitehead then fled the state with the child, and the Sterns obtained a court order requiring Mrs. Whitehead to turn over the child, which was enforced when police ultimately located her in Florida.⁷⁰ A highly publicized six-week custody trial followed, in which the Sterns "sought custody of the child and enforcement of the surrogacy contract."⁷¹ The trial court eventually "held that the surrogacy contract was valid[,] ordered that Mrs. Whitehead's parental rights be terminated," awarded sole custody to Mr. Stern, and entered an order allowing Mrs. Stern to adopt the child.⁷² However, on appeal, the New Jersey supreme court reversed the superior court's decision, declared that under New Jersey law surrogacy contracts were illegal and perhaps criminal, and nullified Mrs. Stern's adoption of the child.⁷³ Nonetheless, the court affirmed the lower court's grant of custody to the Sterns, not "as a matter of contract enforcement but by applying the 'best interest of the child' standard used generally in contested custody cases between

65. The attorney in this case ran an operation that matched infertile couples with surrogate applicants. See Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 68, 85-86 (2007). Notably, Mary Beth Whitehead was a married woman. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

66. See Sanger, *supra* note 65, at 68.

67. *Id.* This payment was not only reimbursement for out-of-pocket expenses, it also included a service fee. *In re Baby M*, 537 A.2d at 1241.

68. *In re Baby M*, 537 A.2d 1227, 1236-37 (N.J. 1988).

69. *Id.* at 1237.

70. *Id.*

71. *Id.*; Sanger, *supra* note 65, at 69.

72. *In re Baby M*, 537 A.2d at 1237-38.

73. Sanger, *supra* note 65, at 69 (citing *In re Baby M*, 537 A.2d at 1234).

2014]

The Modern Day Stork

601

parents.”⁷⁴

Most scholars have articulated that the New Jersey supreme court’s custody order is far less significant than its conclusion that compensated traditional surrogacy contracts are unenforceable.⁷⁵ This rationale purports that enforcing such a contract would force the child’s *genetic* mother to adhere to an agreement she made before giving birth, at perhaps an economically vulnerable time, to give up her own, *genetic* child for payment as consideration.⁷⁶ This practice is commonly referred to as “baby-selling.”⁷⁷ In its discussion, the New Jersey supreme court indicated that it had no problem with a potential situation in which a woman “voluntarily and without payment [would agree] to act as a surrogate mother, provided that she [would] not [be] subject to a binding agreement to surrender her child.”⁷⁸ In other words, the court suggested that uncompensated, traditional surrogacy contracts would be enforceable in the state because no payment would be rendered to the surrogate for relinquishing her parental rights. This statement left state legislatures and judiciaries with a crucial consideration—whether a surrogacy contract should be enforceable if no payment is given to the surrogate carrier.

C. DIFFERING STATE RESPONSES TO *BABY M*

The *Baby M* decision generated a nationwide reaction. Due to the vast amount of attention the case received, and because surrogacy was virtually unregulated by Congress or the states prior to the New Jersey supreme court’s holding, there was a widespread response among state legislatures and judiciaries.⁷⁹ The results were incredibly inconsistent throughout the country. This subsection outlines several important facets of the country’s attempt to regulate surrogacy contracts post-*Baby M*. Subsection 1 discusses the immediate legislative responses to *Baby M*,

74. Sanger, *supra* note 65, at 69.

75. See, e.g., Carroll, *supra* note 9, at 1190 (“The true contribution of [the] *Baby M* [case] lies not so much in its holding.”); Ladomato, *supra* note 62, at 250 (“[T]he court invalidated a traditional surrogacy contract for \$10,000, but ultimately placed the child in the custody of the intended parents, utilizing the child’s best-interest test.”).

76. See Carroll, *supra* note 9, at 1190-91.

77. Ladomato, *supra* note 62, at 250.

78. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988) (internal quotations omitted).

79. *Surrogate Motherhood*, *supra* note 61 (“The *Baby M*. decision inspired state legislatures around the United States to pass laws regarding surrogate motherhood.”).

traditional surrogacy contracts among the states, and the first nationwide effort to account for parental rights to children born through ART. Subsection 2 examines the first judicial response to gestational surrogacy agreements and the importance of the parties' intent in the contract. Subsection 3 analyzes the new wave of state legislative action to account for gestational surrogacy and the factors that divide different states on this issue. Finally, Subsection 4 warns of the parentage problems that can arise in these situations if a state does not regulate surrogacy contracts.

1. STATE LEGISLATIVE RESPONSES TO TRADITIONAL SURROGACY

In the wake of the *Baby M* case, Michigan was the first state to enact legislation invalidating surrogacy contracts, and even went as far as criminalizing the procurement of such agreements.⁸⁰ Some states reacted similarly by passing statutes that declared traditional surrogacy contracts void and unenforceable,⁸¹ while others recognized these agreements as enforceable in limited situations.⁸² Noticing a potential for significant inconsistency throughout the different states, the Uniform Law Commission drafted a proposition to deal with this new, ever-evolving issue of parentage.⁸³ This scheme, known as

80. See *Surrogate Motherhood*, *supra* note 61; MICH. COMP. LAWS § 722.855 (2014) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); MICH. COMP. LAWS § 722.859(3) (2014) ("A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.")

81. See, e.g., LA. REV. STAT. ANN. § 9:2713 (2005) (recognizing all compensated surrogacy contracts as void and unenforceable); N.D. CENT. CODE ANN. § 14-18-05 (West 2008) (declaring all traditional surrogacy contracts void).

82. See, e.g., N.M. STAT. ANN. § 32A-5-34(F) (West 2013) ("Nothing in this section shall be construed to permit payment to a woman for conceiving and carrying a child."); VA. CODE ANN. § 20-160(B)(4) (West 2001) ("All the parties have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable."); WASH. REV. CODE ANN. § 26.26.240 (West 2005) ("A surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy.")

83. The Uniform Law Commission is a non-profit unincorporated association, established in 1892 for the purpose of providing "states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical

the Uniform Status of Children of Assisted Conception Act (USCACA),⁸⁴ established parental rights to “children conceived other than by sexual intercourse and possibly carried by” a surrogate.⁸⁵ In many ways, this Act followed the provisions regarding parental rights set forth in the Uniform Adoption Act.⁸⁶

The USCACA was not intended to be a regulatory, binding act but to provide guidance on how states could protect the “security and well-being of children” born through ART.⁸⁷ In other words, states were free to adopt the USCACA in its entirety, to use the Act as a basis for enacting their own laws, or to ignore it completely. Notably, the USCACA contained two provisions applicable to surrogacy contracts: one authorized these agreements as subject to court approval, and the other rendered all surrogacy contracts void and unenforceable.⁸⁸ Currently, only two states have implemented the surrogacy provisions in the USCACA.⁸⁹

Still, many states chose not to adopt the USCACA and instead internally addressed parental rights to children born through ART and the enforceability of surrogacy agreements.⁹⁰ Although the *Baby M* court invalidated contracts in which the compensated surrogate carrier was genetically related to the child, there was no clear condemnation of scenarios involving a *genetically unrelated* gestational carrier, who was to become

areas of state statutory law.” *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Dec. 25, 2013) (on file with author). These propositions are not binding legislation, but instead, they offer a model that states can adopt for themselves. *See id.*

84. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9C U.L.A. 363 (2001), available at <http://claradoc.gpa.free.fr/doc/269.pdf>.

85. *Parentage Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited Dec. 25, 2013) (on file with author).

86. *See generally* UNIF. ADOPTION ACT, 9 U.L.A. 11 (1999), available at <http://www.uniformlaws.org/shared/docs/adoption/adoption69.pdf> (laying out various provisions regarding parental rights to adopted children).

87. FLA. S. COMM. ON THE JUDICIARY, INTERIM REPORT 2010-122: REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES 6 (2009) [hereinafter INTERIM REPORT 2010-122], available at http://archive.flsenate.gov/data/publications/2010/senate/reports/interim_reports/pdf/2010-122ju.pdf (on file with author).

88. *Id.*

89. *Id.*; *see also* VA. CODE ANN. § 20-160 (West 2001) (requiring petition and hearing for court approval of surrogacy contract); N.D. CENT. CODE ANN. § 14-18-05 (West 2008) (declaring all traditional surrogacy contracts void).

90. *See* Carroll, *supra* note 9, at 1191.

pregnant via in vitro fertilization.⁹¹ Thus, the resulting state-by-state legislative and judicial responses dealt primarily with traditional, rather than gestational, surrogacy.⁹² Plausibly, this is because at the time of the New Jersey Supreme Court decision, in vitro fertilization was a much newer ART technique and not nearly as common as artificial insemination.⁹³ Therefore, the states' initial responses to the *Baby M* decision more than likely did not address gestational surrogacy contracts.

2. *JOHNSON V. CALVERT* AND THE JUDICIARY'S RESPONSE TO GESTATIONAL SURROGACY

It was not until 1993 that states received better guidance for gestational surrogacy. It was the judiciary, rather than the legislature, that had the first crack at regulating these agreements. Specifically, the California supreme court ruled on this issue in *Johnson v. Calvert*, a watershed case that not only spoke to the enforceability of gestational surrogacy contracts but also addressed parental rights to children born through in vitro fertilization.⁹⁴ In *Johnson*, a married couple, Mark and Crispina Calvert, sought a declaratory judgment that they were the legal parents of a child born to a gestational carrier, Anna Johnson, with whom they had contracted to carry their baby in exchange for \$10,000.⁹⁵ Both of the Calverts provided their gametes to Ms. Johnson.⁹⁶ Soon after Ms. Johnson became pregnant, relations between the Calverts and Ms. Johnson soured, and both parties

91. Carroll, *supra* note 9, at 1190-91. Keep in mind that *Baby M* was a New Jersey state case, so in no way were states bound to follow it. Rather, because it was the first state court to address the enforceability of surrogacy contracts (though only dealing with traditional surrogacy), many other states used the *Baby M* decision as guidance in crafting their own regulations.

92. *See id.* (noting that “*Baby M* likely did not speak to gestational surrogacy . . . [it]’s lessons should, therefore, be interpreted narrowly, as limited to traditional surrogacy”).

93. Eric A. Gordon, Note and Comment, *The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 194 (1993) (explaining that the first case of gestational surrogacy in the United States was reported in 1985—more or less around the time the Sterns first met with Ms. Whitehead).

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

95. *Id.* at 778.

96. Ms. Johnson agreed that she would be implanted with an embryo created from Mr. Calvert’s sperm and Mrs. Calvert’s ovum, carry the resulting pregnancy to term, and relinquish all parental rights to the Calverts upon the birth of the child. *Id.* Mrs. Calvert had been forced to undergo a hysterectomy several years before the surrogacy agreement, but her ovaries were still capable of producing eggs. *Id.*

initiated actions to be declared the legal parent(s) of the child once it was born.⁹⁷ The case made its way to the California supreme court, where the court faced two principal issues: (1) whether the genetic mother or the birth mother was the child's "natural mother" under state law; and (2) whether gestational surrogacy contracts violated the state's public policy and constitution.⁹⁸

The court first looked to California's statutory scheme to determine the child's "natural mother."⁹⁹ Because the state's legal provisions on parental rights were enacted before the state's first gestational surrogacy agreement, the court was faced with an intriguing task in statutory interpretation.¹⁰⁰ Eventually, the court found that both Mrs. Calvert, the child's biological mother, and Ms. Johnson, the child's birth mother, had produced sufficient proof that each could be considered the child's natural mother.¹⁰¹ To resolve this discrepancy, the court probed into the parties' original intentions in negotiating the surrogacy contract.¹⁰² The court then reviewed the agreement in conjunction with its interpretation of California law, and held that the parties' clearly intended for the child to belong to the Calverts because they wished to bring the child into the world.¹⁰³ Additionally, the court rejected the notion that compensated gestational surrogacy contracts are contrary to state public

97. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

98. *Id.* at 777-78.

99. *Id.* at 778-79; Gordon, *supra* note 93, at 196-97. See also *Uniform Matrimonial and Family Laws Locator*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uniform/vol9.html> (last visited Dec. 25, 2013) (listing California as one of nineteen states that adopted the Uniform Parentage Act of 1973).

100. See *Johnson v. Calvert*, 851 P.2d 776, 778-83 (Cal. 1993) (noting that the purpose of the Act was to eliminate disparate treatment of legitimate and illegitimate children in the wake of the Supreme Court's decision in *Levy v. Louisiana*, 391 U.S. 68 (1968)). While California's Uniform Parentage Act provided that determination of the mother-child relationship was proved by evidence of the mother's giving birth to the child, the court kept in mind the parties' unique circumstances. Accordingly, the court extended the provisions applicable to the father-child relationship—specifically, proof of genetic relationship—to the situation at hand. *Id.*; see also Gordon, *supra* note 93, at 197-98.

101. See *Johnson*, 851 P.2d at 778, 782. After blood test results excluded Ms. Johnson as the genetic mother of the child, the parties stipulated that the Calverts were the child's genetic parents. *Id.* at 778.

102. See *id.* at 782; Gordon, *supra* note 93, at 197-98.

103. *Johnson*, 851 P.2d at 782-83.

policy.¹⁰⁴

In essence, *Johnson* changed the landscape of surrogacy by an appropriate exercise of judicial activism. By accounting for the fluid nature of familial roles and practices, the California supreme court fittingly applied a flexible interpretation of the state's parentage laws to the situation at hand. As a result, states began regulating surrogacy agreements with an eye to the parties' intent.

3. ACCOUNTING FOR GESTATIONAL SURROGACY IN STATE REGULATION

Until the *Johnson* decision, maternity disputes between the genetic mother and birth mother were not prevalent because of the increasing shift from ART procedures using artificial insemination to those employing in vitro fertilization.¹⁰⁵ Due to this concern and the growing popularity of in vitro fertilization, the Uniform Law Commission saw a growing need to address the potential discrepancies concerning parental rights to children born through ART.¹⁰⁶ In 2000, the Commission promulgated several changes to the Uniform Parentage Act of 1973, primarily addressing technological changes and genetic testing to determine parentage.¹⁰⁷ Specifically, Article 8 of the 2000 UPA allowed married heterosexual couples to enter into gestational surrogacy agreements after a judicial hearing and court-ordered validation.¹⁰⁸ Due to criticism that the Act perpetuated discrimination, the Commission again revised the UPA in 2002, this time rescinding the marriage requirement for the intended

104. *Johnson v. Calvert*, 851 P.2d 776, 783-84 (Cal. 1993); Gordon, *supra* note 93, at 198-99 (distinguishing the nature of gestational surrogacy from adoption, in that the payment Ms. Johnson received under the contract was meant to compensate her for her services, rather than relinquishing her parental rights to the child).

105. This is because it was possible for *both* women to have a claim to the child; the intended mother, if able to provide her gametes, could be considered the *biological* parent, while the surrogate, by giving birth to the child, also could make her case as the child's parent. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (observing that both the intended mother and surrogate could both have a valid claim to be recognized as the child's mother).

106. See *Parentage Act Summary*, *supra* note 85; INTERIM REPORT 2010-122, *supra* note 87, at 6.

107. INTERIM REPORT 2010-122, *supra* note 87, at 6.

108. 2000 UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 295, 362 (2001) ("The intended parents must be married, and both spouses must be parties to the gestational agreement."); see also INTERIM REPORT 2010-122, *supra* note 87, at 6.

parents.¹⁰⁹ Accordingly, more and more states began to recognize distinctions between traditional and gestational surrogacy agreements, relying heavily on the UPA as a basis for enacting their own surrogacy laws.¹¹⁰

Because there is no binding U.S. Supreme Court decision or congressional regulation, states currently remain free to regulate surrogacy agreements to their liking.¹¹¹ Of the states that have directly spoken on the issue of surrogacy agreements, the regulations are significantly diverse. The main state-by-state distinctions depend largely on three issues: (1) whether the surrogacy agreement is traditional or gestational, (2) whether the surrogate is compensated beyond pregnancy-related expenses, and (3) “the marital status and sexual orientation of the intended parents.”¹¹²

Initially, the strong distinction that states have created between enforcement of a gestational or traditional surrogacy contract turns on the genetic connection between the parent and child. Because the surrogate bears a genetic relationship to the child in cases of traditional surrogacy, any agreement to terminate parental rights upon the child’s birth may be contrary to public policy.¹¹³ For similar reasons, the same risks and societal concerns do not necessarily present themselves in

109. 2000 UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 295 (Supp. 2014), available at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf (amending Section 801(b) of the Uniform Parentage Act to state that “[t]he man and the woman who are the intended parents must both be parties to the gestational agreement” (emphasis added)); see also INTERIM REPORT 2010-122, *supra* note 87, at 6 (noting that “[t]he 2000 UPA, as amended in 2002, supersedes previous uniform acts dealing with parentage, including the USCACA”).

110. See, e.g., DEL. CODE ANN. tit. 13, §§ 8-101 to 8-904 (2009); WASH. REV. CODE ANN. §§ 26.26.011-26.26.914 (West 2005 & Supp. 2013); WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2011).

111. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). The U.S. Supreme Court has yet to hear a case regarding surrogacy agreements. In *Johnson*, the U.S. Supreme Court denied Anna Johnson’s petition for writ of certiorari after the California Supreme Court ruled in favor of the Calverts. *Johnson v. Calvert*, 510 U.S. 874 (1993) (denying writ). In 1989, Congress made two attempts to regulate surrogacy—both of which failed. See INTERIM REPORT 2010-122, *supra* note 87, at 7.

112. See Hofman, *supra* note 55, at 460.

113. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (noting that the only valid method for terminating parental rights is through the adoption process; therefore, because traditional surrogacy contracts require the natural mother to relinquish her parental rights without completing the adoption process, such contracts run afoul of state public policy).

gestational surrogacy contracts because the surrogate carrier ordinarily has no genetic relationship to the child.¹¹⁴ As a result, some states specifically permit gestational surrogacy contracts while categorically prohibiting traditional surrogate agreements.¹¹⁵

Regarding the second issue, the principal cause for divide among states as to compensation of surrogates rests on the argument that this practice amounts to “baby-selling,” or procurement of a child for payment.¹¹⁶ Also, as mentioned previously, several critics assert that payment for consideration in surrogacy contracts is exploitative of women and commodifies a woman’s ability to bear children.¹¹⁷ As a result, some states that permit surrogacy agreements—traditional, gestational, or both—generally authorize them only in the event that the surrogate carrier is not compensated beyond pregnancy-related expenses.¹¹⁸

The last issue dividing state courts and legislatures concerns the marital status of the intended parents in the contract. Currently, five states that permit surrogacy contracts allow such agreements only when the intended parents are married.¹¹⁹ But this limitation is not without criticism. Specifically, opponents of the marriage requirement have argued that restricting unmarried individuals’ and couples’ access to surrogacy raises constitutional concerns.¹²⁰ Opponents also draw parallels

114. Carroll, *supra* note 9, at 1190.

115. Compare N.D. CENT. CODE ANN. § 14-18-08 (West 2008) (allowing for gestational carrier agreements), with N.D. CENT. CODE ANN. § 14-18-05 (West 2008) (voiding traditional surrogacy agreements). For a survey of surrogacy regulations by state, refer to Hofman, *supra* note 55, at 454-67.

116. Havins & Dalessio, *supra* note 2, at 689.

117. See *supra* note 59 and accompanying text.

118. See, e.g., N.M. STAT. ANN. § 32A-5-34 (West 2013); VA. CODE ANN. §§ 20-159, 20-160(B)(4) (West 2001); WASH. REV. CODE ANN. §§ 26.26.101, 26.26.210-.260 (West 2005 & Supp. 2013).

119. See FLA. STAT. ANN. §§ 742.15-742.16 (West 2010); TENN. CODE ANN. § 36-1-102(48) (West 2009) (showing that while not specifically requiring the intended parents in a surrogacy contract to be married, within Tennessee’s definition for “surrogate birth,” the biological parents of the child are construed to be husband and wife); TEX. FAM. CODE ANN. § 160.754(b) (West 2014); UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2012); VA. CODE ANN. § 20-156 (West 2001).

120. See generally Carroll, *supra* note 9; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (arguing that discrimination against unmarried persons in accessing ART is unconstitutional). *But cf.* Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV.

between adoption and ART, noting that no state prohibits unmarried adults from adopting children.¹²¹ Moreover, in many states, there is even greater uncertainty as to whether gay individuals or couples are permitted to contract with surrogates for the purpose of having a child.¹²² However, current trends indicate that states are repealing the marriage requirement.¹²³

In summary, the high degree of variance among state surrogacy laws hinges on three issues: the nature of the surrogacy agreement, whether the surrogate receives a “service fee” for carrying the child, and whether the intended parents are married. These distinctions have ties to the varying public policies among the states. However, without any direct authority governing the enforceability of these contracts, even greater problems could potentially surface.

4. THE NEWFOUND PARENTAGE PROBLEM

As discussed above, not all states have drafted legislation on or judicially determined the enforceability of surrogacy contracts. Depending on the position taken by a state, the intended parent or parents’ parental statuses could greatly differ. Of course, while some states may expressly forbid surrogacy agreements, they must nevertheless account for the child’s wellbeing, even if the child was the result of an unrecognized arrangement. States that prohibit some or all forms of surrogacy and states where the legal status of surrogacy is unclear typically afforded parentage rights to the surrogate.¹²⁴ Unfortunately, intended mothers gain no parental role in these states because courts tend to give more credence to the individual who birthed the child.¹²⁵

1135 (2008) (taking a much narrower position on whether the right to ART is constitutionally protected).

121. See Storrow, *supra* note 120, at 334-36.

122. See generally JOSLIN & MINTER, *supra* note 4 (recognizing that the ability of LGBT individuals and couples to enter into surrogacy contracts largely coincides with the state’s laws on gay marriage and joint or second parent adoption by LGBT couples).

123. *E.g.*, NEV. REV. STAT. ANN. § 126.045, *repealed by* Act of May 28, 2013, A.B. No. 421, § 36 (replacing the former requirement for valid surrogacy contracts that the intended parents be married with provisions affording unmarried couples or individuals the right to enter into such agreements with surrogates).

124. Hofman, *supra* note 55, at 460. The “intended father, the surrogate’s husband, both, or neither” share these rights—depending on the jurisdiction and the genetic origin of the child. *Id.*

125. *Id.*

Even in states that explicitly acknowledge some or all forms of surrogacy, the procedures for determining parental rights vary.¹²⁶ Essentially, there are three approaches that states take in this area: (1) implementation of the procedures prescribed in the Uniform Parentage Act; (2) varied or modified versions of the UPA's procedures; and (3) state-specific procedures, independent from the UPA's provisions.¹²⁷ These procedures are largely within the domain of the judiciary, which considers several factors to decide who has parental rights over the child.¹²⁸ Depending on the jurisdiction, the court will generally consider: (1) "whether the child is genetically related to the plaintiff"; (2) "whether the plaintiff intended to create the child and become his or her parent"; (3) whether, "in the case of a woman, . . . she gave birth to the child"; and (4) various other factors, subject to the state's stance on surrogacy contracts.¹²⁹ These factors provide an interested party (usually one or both intended parents) in a surrogacy agreement with guidance as to the steps he or she must take to initiate a parentage proceeding.¹³⁰

Like any uncertainty in the legality of a particular practice, people will eventually push its limits. Thus, absent any clear law with consequences, people will test the waters regarding surrogacy contracts. Therefore, without regulation of surrogacy contracts—traditional and gestational—there is room for confusion on parental rights to children born through ART.

126. Hofman, *supra* note 55, at 460. Hofman further explains that in states where surrogacy is not acknowledged, intended mothers often do not have an avenue for establishing a filial link to the child, whereas intended genetic fathers may have the option to initiate paternity actions for filiation purposes. *Id.* at 460-61.

127. Sandi Varnado, Comment, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 636-46 (2006).

128. See Rachel M. Kane, *Cause of Action for Determination of Status as Legal or Natural Parents of Children Borne by Surrogate or Gestational Carrier*, in 48 CAUSES OF ACTION 2d 687, §§ 8-16 (2011), available at Westlaw COA2d (identifying several factors adjudicating courts look to when determining parentage of children born through ART).

129. *Id.* § 8.

130. *Id.* § 1.

**D. LOUISIANA'S INITIAL REACTION TO *BABY M* AND THE
CURRENT STATE OF THE LAW ON SURROGACY CONTRACTS**

1. EARLY REACTIONS IN THE PELICAN STATE

Like many other states that had no governing rule on surrogate arrangements prior to the *Baby M* case, the Louisiana legislature quickly acted to ensure that a similar situation would never occur within its borders.¹³¹ During the 1987 Regular Legislative Session, Louisiana passed Act 583, which expressly prohibits *all* compensated surrogacy contracts, rendering them absolutely null.¹³² The law provides:

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration *to be inseminated*, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.¹³³

It is unclear as to whether this proscription extends to both traditional *and* gestational surrogacy contracts. An argument could be made that the statute prohibits all surrogacy in Louisiana.¹³⁴ Based on the language of this provision, it is difficult to debate that *compensated, traditional* surrogacy contracts are unenforceable in the state. But given both the time period in which the statute was enacted, as well as the language explicitly specifying insemination as the prohibited practice, it has been argued that the statute was not intended to and should not be construed to forbid gestational surrogacy agreements.¹³⁵

131. See Carroll, *supra* note 9, at 1193-94.

132. Act of July 9, 1987, No. 583, 1987 La. Acts 1433 (codified as amended at LA. REV. STAT. ANN. § 9:2713 (2005)).

133. LA. REV. STAT. ANN. § 9:2713 (2005) (emphasis added).

134. Carroll, *supra* note 9, at 1193.

135. See Carroll, *supra* note 9, at 1193-94. Professor Carroll contends that because the in vitro fertilization procedures used in gestational surrogacy agreements were not yet popularized at the time the act was passed, the statutory ban on surrogacy in Louisiana likely covers only traditional agreements. *Id.* She bolsters her argument by noting that the statute prohibits only compensated surrogacy contracts employing ART procedures using insemination, a technique that gestational surrogacy does not utilize. *Id.*

Thus, because existing Louisiana law differentiates between traditional and gestational surrogacy contracts and specifically precludes traditional surrogacy contracts, the state lacks clear guidance on the enforceability of gestational surrogacy contracts.

2. THE PARENTAGE PROBLEM REVISITED: LOUISIANA EDITION

While there is still no well-defined legislation speaking to the *enforceability* of gestational surrogacy contracts in Louisiana, there are a small number of vital records statutes that, when read in conjunction with one another, appear to clear up the state's position on the matter—at least to some extent.¹³⁶ State legislators passed these laws in recent sessions to designate parental rights over children born through ART procedures—only in very narrow circumstances. Pertinently, these statutes provide:

“Biological parents” means a *husband and wife*, joined by *legal marriage recognized as valid in this state*, who provide *sperm and egg* for in vitro fertilization, performed by a licensed physician, when the resulting fetus is carried and delivered by a *surrogate birth parent who is related by blood or affinity to either the husband or wife*.¹³⁷

The certificate of birth shall contain, as a minimum . . . [the] [f]ull name of [the] child In the case of a child born of a *surrogate birth parent who is related by blood or affinity to a biological parent*, the surname of the child's biological parents shall be the surname of the child.¹³⁸

While these statutes give *some* guidance as to the state's stance on gestational surrogacy, they do not specifically declare that such a situation is an enforceable agreement.¹³⁹ As one commentator has suggested, although Louisiana does not directly provide that gestational surrogacy agreements are enforceable in

136. Because the enforceability of gestational surrogacy contracts was unknown in Louisiana, parental rights over children born through ART were unknown. Thus, state legislators addressed this problem in recent sessions, passing several laws that dealt with this problem. See LA. REV. STAT. ANN. §§ 9:121-133 (2008); LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012). Chapter 3 on “Human Embryos” in Title I of Book I of the Civil Code Ancillaries—specifically § 9:122, provides, in pertinent part that “[t]he sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.” LA. REV. STAT. ANN. § 9:122 (2008).

137. LA. REV. STAT. ANN. § 40:32(1) (2012) (emphasis added).

138. LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012) (emphasis added).

139. See LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012).

the state, there is “some indication that these agreements are not viewed in the same abhorrent manner as are traditional surrogacy agreements,” due to the lack of genetic relationship between the surrogate and the child.¹⁴⁰ The parental rights designated in the vital records statutes reflect this sentiment. Still, these provisions presuppose that the surrogacy agreement is altruistic in two fashions: that both intended parents are able to donate their gametes to the surrogate, and that the surrogate is related to either of the intended parents—extremely narrow requirements.

Furthermore, to the extent that the vital records statutes recognize the existence of uncompensated, gestational surrogacy agreements, they are only available to validly married couples.¹⁴¹ Because Louisiana does not permit same-sex marriage,¹⁴² it follows that same-sex couples would not be able to contract with a surrogate for the purpose of having a child. In contrast with its adoption laws, through which single adults can petition to adopt a child through an agency (thus, tacitly allowing same-sex couples to adopt via individual or second parent adoption),¹⁴³ gay individuals and couples in Louisiana face a significant barrier to parental rights via ART.

If the narrow circumstances in the vital record statutes are not satisfied, default parental presumptions would likely apply

140. Carroll, *supra* note 9, at 1194 (comparing the express prohibition of traditional surrogacy contracts defined in LA. REV. STAT. ANN. § 9:2713 to the parentage rights under the narrow circumstances defined in the vital records statutes).

141. See LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012); see also LA. CONST. art. XII, § 15 (“Marriage in the state of Louisiana shall consist only of the union of one man and one woman.”); LA. CIV. CODE ANN. art. 86 (2013) (“Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law.”); LA. CIV. CODE ANN. art. 87 (2013) (“The requirements for the contract of marriage are: [t]he absence of legal impediment[;] [a] marriage ceremony[;] [and] [t]he free consent of the parties to take each other as husband and wife, expressed at the ceremony.”).

142. See LA. CIV. CODE ANN. art. 86 (2013); *id.* art. 89 (“Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II [“Status”] of Book IV [“Conflict of Laws”] of the Civil Code.”).

143. Compare LA. CHILD. CODE ANN. art. 1198 (2014), with *Parenting Laws*, *supra* note 34, and *Parenting Laws: Second Parent or Stepparent Adoption*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/second_parent_adoption_6-10-2014.pdf (last updated June 10, 2014) (showing that Louisiana does not expressly prohibit same-sex couples from adopting jointly or by second parent adoption).

over children born via gestational surrogacy.¹⁴⁴ Unfortunately, as one commentator suggested, these presumption provisions were not drafted with the possibilities of ART in mind.¹⁴⁵ Of particular consequence is Louisiana's avowal action (allowing for the possibility of dual paternity), as well as a noticeable absence of alternate methods for establishing maternity aside from evidence of giving birth.¹⁴⁶ Thus, even if an intended mother offers her genetic material to the surrogate, the surrogate remains the child's natural mother if the other limitations in the vital records statutes are not met.¹⁴⁷ Sadly, these laws have not been amended to account for children born through ART procedures, leaving questions surrounding the parental rights over these children unanswered. Therefore, although Louisiana provides clear indication of parental rights to children born under the narrow set of conditions implicitly permitted in its vital records

144. See LA. CIV. CODE ANN. arts. 184-98 (2007). Chapter 2 of Title VII of Book I of the Louisiana Civil Code is referred to as "Filiation by Proof of Maternity or Paternity." *Id.*

145. See Varnado, *supra* note 127, at 626-35 (describing the Civil Code's various presumptions of maternity and paternity, methods for rebutting the presumptions, additional actions available to establish parentage, and the problems that children born through ART pose for these approaches).

146. See Varnado, *supra* note 127, at 626-35. Varnado points to the fact that a paternity action (utilized by children to establish filiation) or an avowal action (the procedural device used by men to establish paternity) could be greatly complicated when third-party sperm donors are in the picture. *Id.* Also, she questions whether an avowal action would extend to establishing maternity because in surrogate births an intended mother is not always the birth mother. *Id.*; see also LA. CIV. CODE ANN. art. 184 (2007) (stating that the only method of establishing maternity recognized by the Louisiana Civil Code is by evidence that the child was born of a particular woman; interestingly enough, the last phrase of the article, "except as otherwise provided by law," leaves room for the possibility for other ways of proving maternity); LA. CIV. CODE ANN. art. 184 cmt. (c) (2007) (stating that there are exceptions provided in the Civil Code Ancillaries, pertinently LA. REV. STAT. ANN. 9:121-133, as well as the two provisions in the vital records statutes; however, it should be noted that all of these considerations only account for children born under the very narrow requirements in the vital records statutes, thus, if these conditions are not met, there is an evident parentage issue that will arise for all parties to the surrogacy agreement); LA. CIV. CODE ANN. art. 198 (2007) (specifically noting that the "avowal action" is available to a man; nowhere in the text or in the revision comments does it address whether a woman has standing to bring this action).

147. See LA. CIV. CODE ANN. art. 184 (2007); LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012). Again, this is due to the Civil Code's only mention of establishing maternity by evidence of giving birth. Coupled with the vital records' strict limitation that both intended parents must provide their genetic material to the uncompensated, relative-surrogate, it seems the intended mother in surrogate agreements has very little leverage.

2014]

The Modern Day Stork

615

statutes,¹⁴⁸ the path to filiation is still quite hazy for those involved in surrogacy agreements not meeting these requirements.¹⁴⁹

E. RECENT LEGISLATIVE EFFORTS IN LOUISIANA

State lawmakers saw the need to address the concerns arising from Louisiana's lack of surrogacy laws. In consecutive years, the legislature drafted Bills that addressed gestational surrogacy contracts. This Subsection will chronologically discuss these efforts. Subsection E(1) will analyze Senate Bill 162 of the 2013 session and Subsection E(2) will review House Bill 187 of the 2014 session.

1. SENATE BILL 162 OF THE 2013 REGULAR SESSION

Due to the unclear status of gestational surrogacy agreements in Louisiana, the Louisiana State Law Institute (LSLI) recently began working to draft new legislation that would resolve this ambiguity.¹⁵⁰ The result was Senate Bill 162.¹⁵¹ The Bill distinguished traditional (or genetic) surrogacy from gestational surrogacy, proposed the continued unenforceability of traditional surrogacy contracts, and authorized gestational surrogacy contracts upon court approval.¹⁵² The Bill also provided specific contractual and procedural requirements for the parties entering into a gestational surrogacy contract and limited the amount of compensation to be paid to the surrogate.¹⁵³ Specifically, the Bill entitled the surrogate to recover reasonable expenses associated with the surrogacy agreement—but nothing beyond out-of-pocket expenses.¹⁵⁴

148. See LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012).

149. LA. CIV. CODE ANN. art. 178 (2007) (“Filiation is the legal relationship between a child and his parent.”).

150. The LSLI was created “to establish an institute dedicated to law revision, law reform and legal research. . . . The purposes of the Institute are declared by the Legislature to be: ‘to promote and encourage the clarification and simplification of the law of Louisiana and its better adaption to present social needs; to secure the better administration of justice and to carry on scholarly legal research and scientific legal work.’” *Philosophy and Purposes of the Louisiana State Law Institute*, LOUISIANA STATE LAW INSTITUTE, <http://www.lsl.org/purpose> (last visited Dec. 29, 2013) (on file with author).

151. S. 162, 2013 Leg., Reg. Sess. (La. 2013) (original), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=834922&n=SB162%20Original>.

152. *Id.*

153. *Id.*

154. *Id.*

After the Bill passed through both houses, it came to Governor Jindal for final approval.¹⁵⁵ During the time the Bill sat on the Governor's desk, competing political groups voiced concerns on the Bill's implications in an attempt to sway Governor Jindal's final decision, including the heavily influential Louisiana Family Forum (LFF).¹⁵⁶ While some groups primarily objected to the practice of creating human embryos through ART, others opined that surrogacy contracts reduce women to "exploitable commodities through financial inducement."¹⁵⁷ Equality Louisiana, an LGBT rights advocacy group, also opposed the Bill.¹⁵⁸ The group contested the Bill because it allowed only married, heterosexual couples that both provided their gametes to a surrogate to enter into surrogacy contracts.¹⁵⁹

Having aided the LSLI in drafting Senate Bill 162, LSU Law Professor Andrea Carroll was uniquely positioned to address any concerns over its implications.¹⁶⁰ Accordingly, she weighed in on the various arguments presented to the Governor in an op-ed to the *Baton Rouge Advocate*.¹⁶¹ Specifically, Professor Carroll

155. *Legislative History: SB162*, LOUISIANA STATE LEGISLATURE, <http://www.legis.la.gov/legis/BillInfo.aspx?s=13RS&b=SB162&sbi=y> (last visited Oct. 4, 2014).

156. Lauren McGaughey, *Louisiana House Gives Final Approval to Surrogate Parenting Bill That Would Bar Unmarried, Gay Couples*, THE TIMES PICAYUNE (June 2, 2013), http://www.nola.com/politics/index.ssf/2013/06/surrogacy_law_gay_doma_la.html (on file with author) (noting the various groups in opposition to the Bill: the Louisiana Conference of Catholic Bishops (LCCB), the Louisiana Family Forum (LFF), the National Organization for Women (NOW), and the Center for Bioethics and Culture (CBC)); see also Robert Tasman, *La. Conference of Catholic Bishops, Letter: Surrogacy Bill Demeans Human Life*, THE ADVOCATE (June 4, 2013), <http://theadvocate.com/news/opinion/6108499-123/letter-surrogacy-bill-demeans-human>; Gene Mills, *La. Family Forum, An Open Letter to the Louisiana Legislature*, THE HAYRIDE (May 25, 2013), <http://thehayride.com/2013/05/mills-an-open-letter-to-the-louisiana-legislature/>; Kathleen Sloan, Nat'l Org. for Women, & Jennifer Lahl, Ctr. for Bioethics & Culture, *An Open Letter Re: Louisiana SB 162 (Provides for Surrogacy Contracts)*, THE CENTER FOR BIOETHICS AND CULTURE NETWORK (May 8, 2013), <http://www.cbc-network.org/2013/05/an-open-letter-re-louisiana-sb-162-provides-for-surrogacy-contracts/>.

157. McGaughey, *supra* note 156.

158. *Id.*

159. See Micah Caswell, *SB 162: A Bad Bill Gets Amended to be Even Worse*, EQUALITY LOUISIANA (May 25, 2013), <http://equalityla.org/sb-162-a-bad-bill-gets-amended-to-be-even-worse/> (on file with author).

160. See generally Andrea Carroll, *Letter: Surrogacy Bill Good for Louisiana*, THE ADVOCATE (June 7, 2013), <http://theadvocate.com/news/opinion/6120152-123/letter-surrogacy-bill-good-for> (on file with author).

161. See *id.*

2014]

The Modern Day Stork

617

repudiated the contention that society should reject “commercial” surrogacy contracts and stated that the only “commercial” nature of the proposed contract in the Bill was reimbursement for reasonable expenses associated with the surrogacy agreement.¹⁶² Moreover, she rejected the notion that nontraditional procreation is “immoral,” implying that traditional procreation is not always an option.¹⁶³

After weighing these divergent outlooks, Governor Jindal ultimately sided with the opposing groups and vetoed the Bill.¹⁶⁴ Jindal was particularly concerned with the potential for commercialization of gestational surrogacy contracts, as well as the nontraditional procreative nature associated with surrogacy.¹⁶⁵ As a result of this veto, the enforceability of gestational surrogacy agreements and the resulting parental rights remained incredibly indeterminate.

2. HOUSE BILL 187 OF THE 2014 REGULAR SESSION

When the 2013 legislative effort to regulate gestational surrogacy contracts fell short,¹⁶⁶ state lawmakers wasted no time preparing another surrogacy law for consideration in the 2014 Session. The proposed legislation was House Bill 187,¹⁶⁷ which largely resembled the previous year’s vetoed Bill, particularly in its marriage requirement for the intended parents.¹⁶⁸ The pertinent distinctions that House Bill 187 made were an explicit limitation on direct compensation for the surrogate (outside of out-of-pocket, pregnancy-incurred expenses) and an express ban of contracts that would require the termination of pregnancy due to possible birth defects.¹⁶⁹ These modifications were enough to

162. Carroll, *supra* note 160.

163. *Id.*

164. 2013 Jindal Veto Memo, *supra* note 13; *see also* Corinne Donnelly, *Louisiana Surrogacy Bill 162 Vetoed*, THE SPIN DOCTOR (June 21, 2013), <http://www.eggdonor.com/blog/2013/06/21/louisiana-surrogacy-bill-162-vetoed/> (on file with author).

165. 2013 Jindal Veto Memo, *supra* note 13.

166. The effect of the 2013 veto will be addressed in Part III, *infra*.

167. *See* H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (original), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=871407&n=HB187%20Original>.

168. *Id.*

169. *Id.*; Associated Press, *La. House Backs Bill Creating Rules for Surrogacy*, NEW ORLEANS CITY BUSINESS (Apr. 2, 2014), <http://neworleanscitybusiness.com/blog/2014/04/02/la-house-backs-bill-creating-rules-for-surrogacy/> [hereinafter *House Backs Bill*] (on file with author); *see also infra* Part III(C)(2) (discussing the subtle differences between Senate Bill 162 and House Bill 187).

sway the majority of the conservative groups that opposed Senate Bill 162, including the LFF.¹⁷⁰ Because most of those who were behind the 2013 Bill's veto decided to voice support for the 2014 Bill, it appeared as though there was finally a definite answer to the legality of gestational surrogacy contracts in Louisiana. Nonetheless, Governor Jindal once again exercised his veto power, citing similar concerns as the 2013 veto.¹⁷¹ Thus, Louisiana is left at the same impasse that resulted from the previous year's legislation.

III. ANALYSIS

As Section II indicated, an abundance of problems stem from Louisiana's lack of statutory or jurisprudential guidance on the enforceability of gestational surrogacy agreements. This Section analyzes the state's latest efforts to solve these problems in two subsections. Subsection A scrutinizes the problems stemming from both of Governor Jindal's vetoes and brings to light the continued absence of legal directives on the enforceability of gestational surrogacy contracts in Louisiana. Subsection B examines what the consequences of Senate Bill 162 and House Bill 187 would have been, had Governor Jindal signed them into law.

A. LOUISIANA'S CONTINUING LACK OF GUIDANCE ON THE ENFORCEABILITY OF GESTATIONAL SURROGACY

Due to both of the Governor's vetoes, Louisiana still has no exact answer to the issue of the enforceability of gestational surrogacy contracts. Consequently, the questions surrounding filiation between children born through these agreements and the intended parent(s) remain unanswered. Additionally, the recent legislative actions have prolonged the period of uncertainty with regard to gestational surrogacy agreements in Louisiana. This subsection first scrutinizes four issues arising from the Governor's 2013 veto. It then addresses the problems that the 2014 veto left for the state.

170. Michelle Millhollon, *Surrogacy Births Bill Sails Through House Committee*, THE ADVOCATE (Apr. 1, 2014), <http://theadvocate.com/news/8726361-123/surrogacy-bill-sails-through-house> (on file with author).

171. 2014 Jindal Veto Memo, *supra* note 15.

1. ISSUES IN SENATE BILL 162 OF THE 2013 LEGISLATIVE SESSION

As indicated above, this subsection outlines four problems that resulted from the 2013 veto. Subsection 1(a) discusses the arguments stemming from the Bill's compensation provisions. Subsection 1(b) addresses the notions of morality that those in opposition to the Bill questioned. Subsection 1(c) scrutinizes the parentage issues that linger as a result of the veto. Subsection 1(d) analyzes a number of choice of law problems resulting from the continuing lack of surrogacy law.

a. Commercialization and Exploitation Concerns

In the wake of the *Baby M* decision, Louisiana's initial legislative response to traditional surrogacy incorporated similar concerns to those cited by the New Jersey supreme court.¹⁷² Many argued that traditional surrogacy was both dehumanizing and exploitative of women, particularly if compensation was involved.¹⁷³ The same "exploitation" and "commercialization" arguments resurfaced when Senate Bill 162 landed on the Governor's desk.¹⁷⁴ Governor Jindal considered these concerns in his veto, reasoning that gestational surrogacy contracts have the potential to "commercialize the use of surrogacy."¹⁷⁵ These contentions were misguided. The precise language of the Bill indicated that it did not entitle gestational carriers to recover beyond out-of-pocket, pregnancy-related expenses.¹⁷⁶ In fact, the Bill specifically prohibited payment of any compensation beyond these incurred expenses.¹⁷⁷ Although an argument can be made

172. See *supra* text accompanying notes 131-32.

173. See Barbara L. Keller, Comment, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 LA. L. REV. 143, 189-90 (1988).

174. McGaughy, *supra* note 156.

175. 2013 Jindal Veto Memo, *supra* note 13.

176. In particular, the Bill purported to enact a provision that would permit payment to a gestational carrier for: (a) reasonable medical expenses—including hospital, testing, midwifery, pharmaceutical, travel, or other similar expenses for prenatal care and those medical and hospital expenses incurred incident to the birth; (b) reasonable expenses incurred for mental health counseling services prior to the birth and up to six months after birth; (c) reasonable living expenses before the birth of the child and for no more than sixty days after birth; and (d) reasonable travel costs related to the pregnancy and delivery, court costs, and attorney fees incurred by the gestational carrier. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

177. *Id.* (stating that "[t]he gestational carrier will receive no compensation other

that a gestational surrogate is “living for free” during her contract with the intended parents, this compensation amounts to nothing more than reimbursement for her act of sacrifice.

If anything, the Bill’s compensation provision was no different than the recovery that Louisiana adoption law authorizes for women who relinquish children for adoption.¹⁷⁸ The reimbursement statute in Louisiana’s adoption laws authorizes payment of reasonable pregnancy-related expenses, paid by the intended adoptive parent or parents to the biological mother, who has agreed to surrender custody of her child upon his or her birth in favor of the intended adoptive parent(s).¹⁷⁹ This statute precludes any “service fee” to the birth mother as consideration for yielding her maternal rights to the child.¹⁸⁰ This limitation is premised on Louisiana’s strong opposition to the practice of “baby-selling”—the exercise of receiving payment in exchange for giving up a child.¹⁸¹ However, Senate Bill 162 did not present a baby-selling issue because it did not sanction payment to gestational carriers beyond pregnancy-incurred expenses.¹⁸²

Moreover, a strong case could be made that baby-selling concerns are absent from gestational surrogacy because the surrogate does not bear a genetic relationship to the child; thus, she is not “selling” the product of her own biology.¹⁸³ While some

than” all reasonable pregnancy-related expenses).

178. This, of course, deals with arranged adoptions prior to the child’s birth. *See* LA. CHILD. CODE ANN. art. 1200(B)(1) (2014) (permitting reimbursement for “[r]easonable medical expenses, including hospital, testing, nursing, pharmaceutical, travel, or other similar expenses, incurred by the biological mother for prenatal care and those medical expenses incurred by the biological mother and child incident to birth”). It should be noted that Senate Bill 162’s purported reimbursement provision very closely mirrored the Children’s Code provision for reimbursement of expenses to a biological mother who gives up her child for inter-country adoption. *See* LA. CHILD. CODE ANN. art. 1283.2(B)(1)-(5) (2014).

179. *See* LA. CHILD. CODE ANN. arts. 1200(B), 1283.2 (2014).

180. *See* LA. CHILD. CODE ANN. arts. 1200(B), 1283.2 (2014). Section C of both statutes provides, “[t]he payment of expenses permitted by [this Article] may not be made contingent on the placement of a child for adoption, relinquishment of the child, or consent to the adoption.” *See* LA. CHILD. CODE ANN. arts. 1200(C), 1283.2(C) (2014).

181. *See* Keller, *supra* note 173, at 188-89.

182. *See* S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

183. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (noting that since the surrogate was not the genetic mother of the child, the payments she received were

may still argue that the genetic tie is not necessary to form an emotional bond between a woman and the fetus, the California supreme court found this distinction sufficient to allow compensation for the surrogate.¹⁸⁴ Thus, it would be remiss to compare compensation in gestational surrogacy to baby-selling because the biological mother is not the one giving birth.¹⁸⁵ Therefore, the argument that the Bill had the potential to “commercialize” surrogacy fails for two reasons. First, the Bill’s compensation provision mirrored those contained in Louisiana’s adoption statutes, which allow for reimbursement of reasonable pregnancy-related expenses to the birth mother. Second, there is no biological tie between birth mother and child in gestational surrogacy.¹⁸⁶

Alternatively, even if the Bill had allowed for compensation to gestational carriers beyond reasonable pregnancy-related costs, there is nothing wrong with “commercializing” gestational surrogacy. Opponents of surrogacy have labeled this service “selling of the womb” and analogized it to prostitution and other controversial, exploitative practices.¹⁸⁷ These contentions actually imply that women cannot consciously choose to provide this service to aspiring parents.¹⁸⁸ In particular, this contention suggests that women who become paid surrogates are coerced into these agreements because of desperate financial need, thereby relegating these women to a class of individuals parallel to slaves.¹⁸⁹ These claims are not only based on stereotypes but also discount the cognizant decision-making ability of women who wish to achieve financial security by carrying a child for those

meant to compensate her for services rather than for giving up any parental rights to the child).

184. See *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993).

185. See discussion *supra* Part II(C)(2).

186. See *supra* text accompanying note 45.

187. See, e.g., Hill, *supra* note 59, at 641-42.

188. See Aristides N. Hatzis, “Just the Oven”: A Law & Economics Approach to Gestational Surrogacy Contracts, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 412, 420-21 (Katharina Boele-Woelki ed., 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=381621 (on file with author).

189. See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 143 (2009); Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1237 (1997) (noting that one critique of surrogacy “fees” is that surrogates are enslaved by their own bodies).

otherwise incapable of doing so.¹⁹⁰

While the exploitation argument presumes to protect the bodily integrity of women, it actually devalues the benevolent service that surrogates provide.¹⁹¹ Assuredly, proponents of the exploitation argument believe that surrogates value the payment for their service higher than the service itself.¹⁹² Again, this outlook can hardly speak for all women who provide this assistance to hopeful parents. While most American surrogates are not as wealthy as the intended parents, few are poor, and of those paid for their services, many have used the compensation to better their own families.¹⁹³ Regardless of how a surrogate uses her payment, however, those asserting that surrogates are exploited overlook the surrogates' ability to decide whether to assist hopeful parents in bringing children into the world.

Therefore, labeling Senate Bill 162's compensation provision as "commercial" is ill advised because the Bill permitted no compensation beyond out-of-pocket expenses. However, even if it had sanctioned payment to gestational carriers beyond pregnancy-related expenses, exploitation would not be a concern because women are not coerced into this service. Additionally, financial inducement for such a benevolent service cannot be viewed in the same light as prostitution or slavery.

b. The Morality Argument: "Traditional" Procreation is the Only Means of Procreation?

Aside from the exploitation and commercialization concerns addressed in Governor Jindal's veto message, various religious organizations played a major role in the Governor's decision to not pass the Bill—in particular, the Louisiana Conference of Catholic Bishops (LCCB) and the LFF.¹⁹⁴ The LCCB opposed gestational surrogacy as "violat[ing] human dignity, threaten[ing] life and alter[ing] the sacred unit of family."¹⁹⁵ The LCCB took particular issue with the selective reduction or destruction of

190. See Hatzis, *supra* note 188, at 421.

191. *Id.*

192. See Hatzis, *supra* note 188, at 421. ("The emotional cost of the attachment to the child and the psychic and physical costs of labouring are valued less (by the surrogate) than the goals she is going to achieve with the compensation.").

193. Scott, *supra* note 189, at 138.

194. See 2013 Jindal Veto Memo, *supra* note 13; Tasman, *supra* note 156; Mills, *supra* note 156.

195. Tasman, *supra* note 156.

2014]

The Modern Day Stork

623

human embryos as well as the introduction of a third party to the marriage dynamic.¹⁹⁶ The LFF opined that if a pregnancy were to go awry, the surrogate would have a “duty to abort”—a practice generally abhorred in Louisiana.¹⁹⁷ These contentions mainly derive from the Catholic Church’s strong stance against surrogacy, an exercise the Vatican has called “not morally licit.”¹⁹⁸

The Governor’s reliance on these religious groups’ stances was problematic for a couple of reasons. First, the LCCB and LFF’s condemning remarks about the practice of surrogacy as “immoral” discounts the underlying reasons behind the service: bringing the joy of parenthood to those who are unable to have children. In addition, the LFF’s declaration that potential complications in surrogacy contract pregnancies promote a “duty to abort” overlooks the constitutionally protected rights that pregnant women already have.

The primary problem with the LCCB and LFF’s statements is the claim that surrogacy is “immoral.” An issue with generic statements such as this one is the failure to consider the circumstances of all parties involved. In many situations, surrogacy may be the best option for individuals and couples that strongly desire to become parents but are physically unable to become pregnant. Likewise, serving as a surrogate carrier may be gratifying for women that want to grant the parental wishes of infertile adults. One commentator with personal experience as the intended mother in a surrogacy contract noted a variety of aspects supporting this rationale, such as: desire for a genetic child after one or more miscarriages, the male aspiration of carrying on a bloodline, and the emotional reward that fertile women receive as a result of their surrogacy.¹⁹⁹ The fact that religious groups, such as the LFF and LCCB, find themselves to be in a superior position to decide the validity of certain parties’ path to parenthood is shortsighted.²⁰⁰

196. Tasman, *supra* note 156.

197. Mills, *supra* note 156.

198. *See* Ford, *supra* note 60, at 97.

199. *See* Ford, *supra* note 60, at 96-97.

200. *See* Carroll, *supra* note 160. It should be noted that the Supreme Court has found that immorality, by itself, is not sufficient to invalidate a law. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (quoting *Bowers v. Hardwick*, 478

Lastly, the LFF's duty to abort claim is particularly misguided. Essentially, this argument presupposes that the intended parent(s) would not carry out their own biological pregnancy, should they run into problems. Even if the surrogate would run into complications in her pregnancy, the Constitution protects the decision to terminate the pregnancy at any stage due to health-related concerns.²⁰¹ Moreover, the state cannot restrict a woman's right to terminate a pregnancy prior to the point of fetal viability.²⁰² These same issues exist in conventional pregnancies. Nothing in Senate Bill 162 would have made the decision to abort more likely or given any further protection to this choice.²⁰³ Nor did any language in the Bill require termination of the surrogacy contract if there were possible birth defects.²⁰⁴ Rather, the only time that the parties were free to terminate the agreement was *before* the embryo transfer and implantation into the surrogate.²⁰⁵ Thus, there would not have been any requirement to terminate the pregnancy by abortion at any point because there would *not yet have been a pregnancy* at this point. The LFF's argument merely voiced the negative sentiments it holds toward abortion. Consequently, it should not have had any bearing on the Bill's veto.

c. The Parentage Problem Remains Unsolved

While not a perfect solution by any means, Senate Bill 162 would have, at the very least, helped to clear up the uncertainty surrounding parental rights over children born to surrogate carriers. The proposed legislation would have directly spoken on the enforceability of gestational surrogacy contracts by defining and sanctioning such agreements—to an extent.²⁰⁶ Specifically, the Bill would have authorized gestational surrogacy contracts subject to several requirements concerning the parties,

U.S. 186, 216 (1986) (Stevens, J., dissenting)).

201. See *generally* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992) (holding that states have the power to restrict abortions after fetal viability, as long as there are exceptions for pregnancies that would endanger the woman's life or health).

202. See *generally id.*

203. Carroll, *supra* note 160.

204. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

205. *Id.*

206. S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

confidentiality stipulations, and remedies in the event of a failure to perform.²⁰⁷ It would have also provided for enforceability of gestational surrogacy contracts meeting the requirements of the Bill upon court approval.²⁰⁸ Importantly, the Bill contained stipulations for a post-birth court order that expressly provided for the creation of a new birth certificate, which would have listed the intended parents as the child's parents.²⁰⁹ Thus, any ambiguities surrounding parentage would have been put to rest with this Bill.

Instead, the Governor's veto placed these parental uncertainties back at square one. Had the Bill been signed into law and enacted, the resulting statutes would have fallen within the exceptions to establishment of maternity in Civil Code Article 184.²¹⁰ Due to the Bill's failure to become law, aspiring parents that contract with gestational carriers still must meet the strict conditions imposed by Louisiana's vital records statutes.²¹¹ Moreover, parental rights will only attach if the surrogate meets the vital records statutes' stringent requirements.²¹² Otherwise, the state's current laws do not seem to give a serviceable answer to establishing a filial link between children born through ART and their intended parents. As ART procedures and surrogacy agreements are becoming far more common throughout the country, it is imperative that the Louisiana legislature considers the potential for a serious problem concerning parentage if gestational surrogacy agreements continue to elude the language of the law.

207. S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

208. *See id.*

209. *See* S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

It should also be noted that the Bill accounted for situations whereby the child was alleged not to be the child of the intended parents and called for DNA testing to resolve these disputes. *Id.*

210. LA. CIV. CODE ANN. art. 184 (2007).

211. *See* LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012). As indicated previously, the vital records statutes do *not* authorize surrogacy agreements, but only govern parental rights to children born through ART procedures, under a very specific set of conditions.

212. The vital records statutes only recognize the intended parents as the biological parents of the child if *both* the sperm and egg are attributable to the husband and wife. The statutes further require the surrogate to be related to either the husband or wife, by blood or affinity, and that she receive no compensation for her services. LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012).

d. Choice of Law Problems²¹³

While Louisiana has not yet offered a solution to the enforceability of gestational surrogacy agreements, many other states expressly allow for these contracts. This begs the question of whether individuals adversely affected by Louisiana's current laws can circumvent these inhibitions by entering into a surrogacy agreement in a state that authorizes them. According to Louisiana's Conflict of Laws provisions regarding contract law, "an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."²¹⁴ When determining which state law to apply, courts are to:

[E]valuat[e] the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, *including the place of negotiation, formation, and performance of the contract*, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) *the nature, type, and purpose of the contract*; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.²¹⁵

The place of negotiation, formation, and performance seem to hold great weight in making such a determination; nonetheless, if the contract's effect would be felt in another state, the place of performance may not be dispositive of the law to be used.²¹⁶ As indicated earlier, regarding compensated surrogacy agreements,

213. It should be noted that the scope of this Comment does not entail a full discussion about potential choice of law problems arising from this issue; rather, it only scratches the surface on this additional consequence of having no statutory regulation of gestational surrogacy contracts.

214. LA. CIV. CODE ANN. art. 3537 (2011).

215. *Id.* (emphasis added).

216. *See, e.g., Cox v. United States*, 31 U.S. 172, 202-03 (1832) ("[T]he law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed."). *But see Gen. Talking Pictures Corp. v. Pine Tree Amusement Co.*, 156 So. 812, 813 (La. 1934) ("[A] contract [which is] to have effect in Louisiana . . . must be construed under and governed by [the] laws of [Louisiana].").

Louisiana has expressly proscribed those of the traditional nature.²¹⁷ Thus, if such an arrangement were contracted by one or more Louisiana parties and performed in a jurisdiction that permitted traditional surrogacy, it would seem as though Louisiana's prohibition would be ineffective if the parties remained in said jurisdiction. However, should the intended parent(s) plan on raising the child in Louisiana, a strong case can be made that the traditional surrogacy agreement's effect is in Louisiana, where such contracts are null.²¹⁸

Interestingly, certain states have postulated residency requirements in their surrogacy statutes.²¹⁹ This has deterred out-of-state residents from "forum shopping" to gain the protection that "surrogate-friendly" states afford. Senate Bill 162 contained such a residency provision and required all parties to the surrogacy agreement to be Louisiana domiciliaries for at least 180 days.²²⁰ Consequently, the veto leaves yet another question unanswered—whether aspiring parents may leave the state to contract with a surrogate and have the contract recognized as enforceable upon their return. Thus, if Louisiana takes issue with its citizens leaving the state to garner the legal safeguards other states provide, it should consider enacting a residency requirement of its own if and when this activity is regulated. Therefore, regardless of the competing viewpoints, Louisiana's lack of clear instruction on the validity of gestational surrogacy agreements presents complex choice of law questions in the event that Louisiana residents attempt to confect such an agreement in another state.

217. LA. REV. STAT. ANN. § 9:2713(A) (2005) ("A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.") Also, Louisiana's public policy against baby-selling would likely govern this hypothetical scenario. *E.g.*, Keller, *supra* note 173, at 188-89.

218. *See* LA. CIV. CODE ANN. art. 3540 (2011) ("All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537."). Because traditional surrogacy contracts are contrary to Louisiana's public policy, the state's prohibition would govern, and the contract would be null. *See* LA. REV. STAT. ANN. § 9:2713(A) (2005).

219. *E.g.*, UTAH CODE ANN. § 78B-15-802 (LexisNexis 2012) ("A petition to validate a gestational agreement may not be maintained unless either the mother or the intended parents have been residents of this state for at least 90 days.").

220. S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

2. ISSUES IN HOUSE BILL 187 OF THE 2014 LEGISLATIVE SESSION

After a year of regrouping, state legislators reconvened in the 2014 session with a new surrogacy Bill.²²¹ The Bill was initially greeted by the same resistance as the 2013 legislation; however, after much compromising, House Bill 187 made its way through the rest of the legislative process with relative ease.²²² In many ways, House Bill 187 mirrored Senate Bill 162. Like the 2013 Bill, the 2014 legislation limited the availability of gestational surrogacy to a small group of individuals.²²³ Thus, House Bill 187 equally prevented many deserving people from having children.²²⁴ However, the 2014 legislation was clearer on two things: the unequivocal prohibition of compensation to gestational surrogate carriers and the overt ban of surrogacy contracts that would require termination of the pregnancy due to potential birth defects.²²⁵

Despite House Bill 187's explicit transcription of the latter two concerns, there was virtually no change from the previous year's Bill in these regards. Specifically, the 2013 Bill tacitly prohibited compensation to surrogates beyond reimbursement for out-of-pocket expenses during the pregnancy.²²⁶ The 2014 Bill clarified this preclusion by expressly limiting compensation to the surrogate to a finite list of reimbursement expenses.²²⁷ As for the 2013 Bill's contract termination provisions, the surrogacy agreement could only be terminated prior to the embryo transfer and implantation into the surrogate carrier.²²⁸ Therefore, the

221. H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), *available at* <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

222. See Michelle Millhollon, *Jindal Vetoes Surrogacy Bill*, THE ADVOCATE (June 2, 2014), <http://theadvocate.com/home/9326504-125/jindal-vetoes-surrogacy-bill> (on file with author).

223. See *supra* text accompanying note 168 (noting how House Bill 187's marriage requirement for the intended parents replicates Senate Bill 162's from 2013).

224. See *infra* Part III(B)(2) (discussing the problems with Senate Bill 162's marriage requirement).

225. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), *available at* <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

226. See *infra* Part III(B)(1) (discussing Senate Bill 162's provisions on compensation for surrogates).

227. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (original), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=871407&n=HB187%20Original>.

228. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), *available at* <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

parties to the agreement were never required to terminate the pregnancy if birth defects were possible because the pregnancy had not yet occurred.²²⁹ House Bill 187 superfluously codified this concern into its language, prohibiting the aforementioned scenario.²³⁰

While these seem like minimal changes, they were enough to gain support from one of the 2013 Bill's biggest opponents, the Louisiana Family Forum.²³¹ Though the Louisiana Conference of Catholic Bishops still opposed House Bill 187,²³² the LFF's support seemed like it would have had much more influence on the Bill's ultimate disposition. Accordingly, the Bill garnered an overwhelming endorsement from both Houses of the state legislature.²³³ As the LFF played a considerable role in convincing Governor Jindal to veto the 2013 Bill, it appeared as though a different result would have come about in 2014. Nevertheless, when the Bill made its way to the Governor, the LFF abruptly changed its position on the matter, taking particular issue with one possibility that it projected could arise if the Bill became law.²³⁴ Specifically, the LFF was concerned that the Bill did not expressly prohibit a situation in which multiple embryos would be implanted in a surrogate, who could then selectively abort them to prevent a multiple birth.²³⁵

Presumably due to pressure by the LFF, Governor Jindal once again exercised his veto power, declaring that he could not

229. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>; see also *supra* Part III(A)(1)(b) (explaining the flaws in the Louisiana Family Forum's allegations that Senate Bill 162 provided the surrogate carrier with a "duty to abort" in the case of potential birth defects).

230. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

231. See Millhollon, *supra* note 170.

232. See *House Backs Bill*, *supra* note 169.

233. See *id.* (stating that the Bill passed through the House of Representatives with a 79-14 vote); Julia O'Donoghue, *Surrogacy Birth Faces No Opposition in Senate Committee: Snapshot*, THE TIMES PICAYUNE (Apr. 29, 2014), http://www.nola.com/politics/index.ssf/2014/04/surrogacy_birthing_faces_no_oppos.html (on file with author) (explaining that the Bill was quickly approved by the Senate Committee and is currently awaiting full Senate consideration).

234. See Millhollon, *supra* note 222; Emily Lane, *Louisiana Surrogacy Bill Backers Won't Try to Override Bobby Jindal's Veto*, THE TIMES PICAYUNE (June 1, 2014), http://www.nola.com/politics/index.ssf/2014/06/bobby_jindal_surrogacy_veto_ov.html (on file with author).

235. See Millhollon, *supra* note 222. This is known as "selective fetal reduction."

“in good conscience, sign [the] bill.”²³⁶ Intriguingly, the Governor mentioned that “[a]ll Louisianians are at liberty . . . to engage in informal agreements regarding surrogacy [and that the veto] simply [concerns] a question of whether we ought to codify and regulate such agreements, and if so, what these regulations ought to entail.”²³⁷ What the Governor fails to realize however, is that without any existing regulation, the overarching issues of parental rights outlined throughout this Comment are still in question. As a result, the same problems stemming from last year’s veto have resurfaced: (1) Louisiana still lacks clear regulation of gestational surrogacy agreements, but (2) even if the 2014 Bill would have gone into effect, it would have been strikingly inadequate in many regards.²³⁸

In summary, the Governor’s vetoes of Senate Bill 162 and House Bill 187 have left Louisiana in a rut. Unfortunately, his decisions were based on the undue influences of religious organizations. Moreover, the effect of these actions has left the state with numerous unanswered questions of parenthood and conflicts with other state laws. If this result remains, Louisiana will continue to wallow in uncertainty while at the same time preventing a significant number of aspiring parents from accomplishing their dreams.

B. EVEN IF SIGNED INTO LAW, THE RECENT LEGISLATIVE BILLS WERE NOT WITHOUT ISSUES

Though the latest legislative proposals would have undoubtedly clarified the legal boundaries of surrogacy contracts in Louisiana, passage of these Bills may not have ultimately proven to be as utilitarian as hoped. Had Governor Jindal signed either of these Bills into law, the new surrogacy statutes would have brought to light additional implications on many of the primary demographics that seek to use this practice in the first place. In fact, two main aspects of these Bills made those in support of surrogacy still appreciative of the Governor’s veto. Specifically, there was cause for concern regarding the compensation provisions as well as the marriage requirements for the intended parents. Additionally, the Bills would have created

236. 2014 Jindal Veto Memo, *supra* note 15.

237. *Id.*

238. *See infra* Part III(B) (laying out the issues that would have surfaced if Senate Bill 162 would have been approved by Governor Jindal in 2013).

tension with other states that have more lenient surrogacy laws.

1. BOTH BILLS LEFT GESTATIONAL CARRIERS INADEQUATELY COMPENSATED

Initially, the 2013 Bill's purported compensation arrangements capped the amount of compensation for surrogates at out-of-pocket expenses incurred as a result of the pregnancy.²³⁹ The 2014 Bill implemented this language in its compensation provisions and also authorized reimbursement to the surrogate for any wages actually lost during the pregnancy.²⁴⁰ This reimbursement is clearly necessary, as the costs related to a pregnancy can be staggering, but the surrogate's service to the intended parent(s) exceeds the tangible expenses.²⁴¹ Consider the fact that Louisiana allows adoption agencies to charge reasonable expenses and specific fees related to the adoption—subject to court approval.²⁴² As previously mentioned, the main reason that biological mothers are not entitled to more than reimbursement costs derives from the state's policy against baby-selling.²⁴³ This practice is premised on a genetic tie between parent and child—

239. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled> (allowing for reimbursement for pregnancy-related expenses). The 2014 legislation took this aspect of the 2013 Bill one step further by explicitly forbidding any payment beyond reimbursement as contrary to public policy. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

240. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

241. Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, THE NEW YORK TIMES (June 30, 2013), http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?pagewanted=all&_r=2& (on file with author) (“As of 2010, the average total price charged for pregnancy and newborn care in the United States was about \$30,000 for vaginal delivery and \$50,000 for a caesarean section, with commercial insurers paying out an average of \$18,329 and \$27,866.”).

242. See LA. CHILD. CODE ANN. art. 1200(B)(3), (B)(4), (B)(9) (2014) (permitting payment to a child-placing agency in the form of reasonable expenses incurred by the agency; administrative costs incurred by the agency, including overhead, court costs, travel costs, and attorney fees connected with an adoption; and any other specific service or fee the court finds is reasonable or necessary). The Revision Comments specify that overhead costs operate as a cost-spreading device, which agencies recoup part of the costs of failed adoptions and adoptions with large expenses. LA. CHILD. CODE ANN. art. 1200 cmt. (d) (2014).

243. See Keller, *supra* note 173, at 188-89.

something that adoption agencies do not have.²⁴⁴ It follows that payment to adoption agencies for facilitating adoptions is not viewed with the same distaste.

In the same way, gestational carriers do not have a genetic relationship to the children they carry. Much like the role adoption agencies play, surrogates facilitate the process by which the intended parents can have children of their own. Additionally, adoption agencies may not charge astronomical fees; rather, any compensation provided is contingent upon court approval.²⁴⁵ Similarly, there is no reason why parties to a gestational surrogacy agreement should not be able to stipulate to a reasonable service fee in the contract, so long as it is subject to court approval. Thus, although both Bills' compensation provisions were more favorable than an entirely gratuitous act, they still would have significantly underappreciated the value that surrogates provide.

2. BOTH BILLS' MARRIAGE REQUIREMENTS FOR THE INTENDED PARENTS WERE TOO RESTRICTIVE

Both Bills' marriage requirements were even more troubling. Much like the marriage requirement in the vital records statutes, both Bills would have explicitly discriminated against unmarried adults.²⁴⁶ The marriage requirements would have also precluded gay individuals and couples from making use of surrogacy.²⁴⁷ Had either Bill been made law, unmarried intended parents and same-sex couples would not have been able to avail themselves of this service—although ironically, they are able to petition for adoption under current Louisiana law.²⁴⁸ This distinction

244. See *supra* text accompanying notes 183-84.

245. See LA. CHILD. CODE ANN. art. 1200 (2014).

246. The vital records statutes do not authorize gestational surrogacy contracts as enforceable; instead, they only provide for parental rights under a narrow set of circumstances—one being that the intended parents be married. See LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012). The Bills would have used similar marital restrictions for the intended parents but in the context of the contractual requirements for surrogacy agreements. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>; H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

247. See *supra* text accompanying notes 141-43.

248. See LA. CHILD. CODE ANN. art. 1198 (2014) (permitting single or unmarried adults to adopt children); Carroll, *supra* note 9, at 1194.

highlights the statutory inconsistency that would have manifested had either Bill become law. It is puzzling why adoption is available to unmarried adults and same-sex couples, while surrogacy would not have been an available alternative. It is likely that, if enacted, either Bill's marriage requirement would have triggered an abundance of potential civil rights claims.

As previously referenced, Louisiana's vital records statutes applicable to surrogacy agreements require that the intended parents be married.²⁴⁹ Much of the language in both Bills' intended parent requirements mirrored the language in the vital records provisions.²⁵⁰ Consequently, if the Governor had signed either Bill into law, a plethora of potential parents would have been categorically precluded from having their parental rights recognized. While this categorization most strikingly affected single adults, it also burdened cohabiting, unmarried couples. Additionally, the Bill thwarted the ability of gay couples to become parents, as Louisiana does not allow for marriage between two people of the same sex.²⁵¹ Likewise, gay individuals would have had no way around this roadblock because single adults were expressly left out of the Bills' intended parent requirements.²⁵² As discussed above, because no such prohibition exists in Louisiana's adoption laws, both Bills' marriage

249. The vital records statutes do not presuppose the validity of a contract for surrogacy. Instead, these provide stipulations for establishing parentage—under very narrow circumstances. See LA. REV. STAT. ANN. §§ 40:32(1), 40:34(B)(1)(a)(viii) (2012).

250. Compare LA. REV. STAT. ANN. § 40:32(1) (2012), and LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012), with S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>, and H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

251. See *supra* text accompanying notes 141-43.

252. See S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled> (defining “intended parents” as “*married persons* who contribute their gametes to be used in assisted reproduction, and who enter into an enforceable gestational surrogacy contract . . . with a gestational carrier pursuant to which they will be the legal parents of the child resulting from that assisted reproduction” (emphasis added)); H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled> (defining “intended parents” as “*a man and a woman who are married to each other in accordance with Louisiana law* who contribute their gametes and who enter into an enforceable gestational surrogacy contract, as defined in this Chapter, with a gestational mother pursuant to which they will be the legal parents of the child resulting from that assisted reproduction.” (emphasis added)).

requirements created a patent inconsistency in the state's avenues to parenthood.²⁵³ These exclusions could have presented additional constitutional concerns—specifically whether the inability of single adults and same-sex couples to qualify as the legal parents of a child born through ART violates the Equal Protection Clause in the U.S. Constitution.²⁵⁴ The implicit and glaring issues in these provisions may have given rise to a bevy of potential claims. Thus, amending these provisions in future legislation to encompass unmarried adults would resolve any future constitutional problems.

Interestingly, either Bill's enactment could have even adversely affected married couples. Specifically, both Bill's purported "definitions" statute defined the "intended parents" to a gestational surrogacy contract as "married persons *who contribute their gametes* to be used in assisted reproduction."²⁵⁵ Consequently, a husband or wife with infertile gametes could not have used surrogacy in his or her marriage. Paradoxically, it is couples with this exact problem that make up a large number of those who seek the help of surrogate carriers.²⁵⁶ Both Bills eradicated even the possibility that these particular married couples could use the gametes of a third-party donor. Essentially, either Bill would have effectively denied this useful benefit to those who need it most. While the Bills' marriage requirements would have disqualified unmarried adults from entering into a gestational surrogacy contract, infertile married couples would likewise have felt the wrath of these exclusions. Therefore, while the Bills may have initially set out to clarify the uncertainties

253. See *supra* text accompanying note 143.

254. See U.S. CONST. amend. XIV, § 1. While constitutionality issues are beyond the scope of this Comment, future legislatures should unquestionably consider that limiting certain capabilities of particular groups—whether express or implied—can make for potential civil rights claims if the state cannot justify such limitations. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); Carroll, *supra* note 9, at 1198-1200; see also Wesley J. Smith, *Louisiana's Unconstitutional Surrogacy Bill*, NATIONAL REVIEW ONLINE (May 29, 2014), <http://www.nationalreview.com/human-exceptionalism/379050/louisianas-unconstitutional-surrogacy-bill-wesley-j-smith> (on file with author) (criticizing House Bill 187's marriage requirement).

255. S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled> (emphasis added).

256. Cf. *Using a Surrogate Mother: What You Need to Know*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> (last visited Aug. 10, 2014) (on file with author) (listing the reasons that people turn to surrogacy).

surrounding gestational surrogacy agreements in the state, their ultimate enactment would still have presented a variety of problems. Because these provisions would have further complicated surrogacy in Louisiana, the Governor's vetoes may not have been such a bad result after all.

3. CHOICE OF LAW REVISITED

As indicated earlier, differing state-by-state stances on surrogacy contracts have the potential to create issues whenever such contracts are confected in "surrogacy-friendly" states, and the parents of the child subsequently establish domicile in a state that is less "friendly" toward these agreements.²⁵⁷ Had Senate Bill 162 or House Bill 187 become law, there would have been less uncertainty in the event that the family of a child born through ART moved to Louisiana after carrying out a surrogacy contract in another state. However, there would still have been ambiguity as to the governing state law if an out-of-state surrogacy contract conflicted with both Bills' marriage requirements and compensation provisions.

The marriage requirement would have primarily raised issues when dealing with the status of those entering into these agreements in other states. This is particularly due to the narrow class of individuals that Louisiana would have allowed to become the intended parents in surrogacy contracts.²⁵⁸ If a single adult, same-sex couple, or married couple incapable of contributing their gametes were to become the parents in a surrogate birth outside of Louisiana, and were to subsequently establish domicile in this state, Senate Bill 162 and House Bill 187 would have conflicted with the other state's laws. As a result, Louisiana's choice of law provisions would have governed the situation. In this instance, Civil Code Articles 3519²⁵⁹ and 3520²⁶⁰ would have been implicated. Article 3519 provides:

The status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue.

257. *See supra* Part III(A)(1)(d).

258. *See supra* Part III(B)(2).

259. LA. CIV. CODE ANN. art. 3519 (2011).

260. LA. CIV. CODE ANN. art. 3520 (2011).

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue; (2) the policies referred to in Article 3515; and (3) the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability.²⁶¹

Given the language in this provision, it would appear as though either Bill would have been applicable because the underlying policies in both Bills would have been most seriously impaired if not applied to the issue. In fact, if the hypothetical Louisiana law did not govern this scenario, the result would have given parties a means of circumventing the state's strict parental requirements for surrogacy agreements. Thus, had either Bill become law, it would have effectively prevented hopeful parents from eluding Louisiana's marriage requirement.

Additionally, Louisiana's failure to recognize same-sex marriages would equally have prevented these couples from becoming the parents of a surrogate-born child. Specifically, Article 3520 provides:

A. A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519.

B. A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.²⁶²

Therefore, because Louisiana does not recognize same-sex marriages, though validly executed in other states, a contract in which such a couple was to be the intended parents of a

261. LA. CIV. CODE ANN. art. 3519 (2011).

262. LA. CIV. CODE ANN. art. 3520 (2011).

2014]

The Modern Day Stork

637

surrogate-born child would have been inconsistent with Senate Bill 162 and House Bill 187.

Furthermore, the compensation provisions in either Bill would have created a conflict with states that allow for surrogate carriers to be paid beyond reimbursement for out-of-pocket expenses. Notably, House Bill 187 expressly declared compensated gestational surrogacy contracts absolutely null, whether executed in Louisiana or elsewhere.²⁶³ As discussed previously, Louisiana's provisions on conflicts of law for conventional obligations would have dictated this facet of the purported surrogacy agreement.²⁶⁴ As such, a surrogacy contract executed in a state that allowed for payment to the surrogate beyond reimbursement for pregnancy-related costs would have run afoul of either Bill. This would have impaired Louisiana's policies to a greater extent than the conflicting state's policies.²⁶⁵ Consequently, had either Bill become law, its compensation provisions more than likely would have overridden any other state's provisions to the contrary, particularly House Bill 187's. Therefore, both Bills would have effectively prevented any attempts to sidestep their requirements by entering into a surrogacy contract elsewhere.

4. OTHER CONSIDERATIONS

As previously addressed, the principal reason for Governor Jindal's veto of the 2014 Bill was to cater to the pro-life community, namely the LFF. Specifically, because the Bill left open the possibility for multiple embryos to be implanted, only to be selectively aborted, the Governor felt obliged to express his conscious concerns.²⁶⁶ While much of the LFF's influence in the legislative process resulted in questionable solutions within the Bill's provisions, this Comment agrees, to an extent, that the cause for concern regarding selective fetal reduction was

263. H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), *available at* <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled> (“No personal shall enter into a gestational surrogacy contract for compensation as defined [herein] Any such contract executed in the state of Louisiana or any other state shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy.” (emphasis added)).

264. *See supra* text accompanying note 214.

265. *See* LA. CIV. CODE ANN. art. 3537 (2011); *see also* H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), *available at* <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled>.

266. *See* 2014 Jindal Veto Memo, *supra* note 15.

warranted.

Even if this practice were allowed, it should only authorize selective abortions before the point of fetal viability.²⁶⁷ Nevertheless, though multiple embryotic implantations obviously increase the chances of pregnancy, the autonomy of the parties in the surrogacy contract must be respected. In other words, if the parties were open to the possibility of multiple children, then the basis for multiple implantations would seem stronger.

Under House Bill 187, the court would have still played a huge role in determining the validity of the agreement, however.²⁶⁸ As such, the court would have gauged the intent of the parties before allowing the implantation to occur. Because the Bill was silent as to the propriety of selective fetal reduction, it would have given the parties the ability to manipulate their intentions before the court. Put differently, the parties could have kept their true intentions regarding selective embryo reduction silent in their contract because the Bill did not require the contract to address such intentions. Consequently, parties could have duped the court into authorizing their surrogacy contract and thereafter engaged in post-viability selective embryo reduction. Therefore, the Governor's veto proved positive in this regard, because it effectively prevented these devious schemes.

IV. PROPOSAL²⁶⁹

Taking into account Louisiana's surrogacy laws—or lack thereof—as well as detailing the solutions made by other states, this Comment provides a legislative model for Louisiana to consider in the future. This proposed legislation remains consistent with the language of Senate Bill 162 and House Bill 187, with major changes made to the Bills' marriage

267. See generally *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

268. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014) (enrolled), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=904605&n=HB187%20Enrolled> ("Prior to in utero embryo transfer, the intended parents or the gestational mother and her husband, if she is married, may initiate a summary proceeding in the court exercising jurisdiction over the adoption of minors where the intended parents or the gestational mother reside, seeking to have the court approve a gestational surrogacy contract.").

269. Unless otherwise indicated in this Section, the majority of the language in the model comes from Senate Bill 162's text. For reference, see S. 162, 2013 Leg., Reg. Sess. (La. 2013) (enrolled), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=854478&n=SB162%20Enrolled>.

2014]

The Modern Day Stork

639

requirements for the intended parents and to the surrogate compensation provisions. These changes will hopefully shed some light on the validity of gestational surrogacy contracts in the state, and more importantly, will remain consistent with Louisiana's current laws. The principal attributes of the proposed legislation are highlighted below.

A. ERADICATING THE MARRIAGE REQUIREMENT

The first significant difference between the original text of Senate Bill 162, House Bill 187, and this proposed legislation (Model) is the abolition of the marriage requirement for the intended parents from the Bills' "Definitions" section. The Model abandons the stringent parental requirements imposed by the Bills' text. Specifically, it eliminates the necessity that the intended parents of the child born to a surrogate be husband and wife. Further, the model removes the Bills' added burden that the husband and wife both donate their gametes to the surrogate. Instead, it takes a much more flexible approach in authorizing the availability of this service to aspiring parents. This provision will read as followed:

§ 1. Definitions

As used in this Chapter, the following terms shall have the meanings ascribed to them in this Section unless otherwise provided for or unless the context otherwise indicates:

(3) "Gestational surrogacy" means the process by which a woman attempts to carry and give birth to a child conceived by in vitro fertilization using the gametes of the intended parents or donor gametes and to which the gestational carrier has no genetic contribution.²⁷⁰

(7) "Intended parent" means a person or persons who enters into a gestational surrogacy contract with a gestational carrier pursuant to which he or she will be the legal parent of the resulting child. In the case of a married couple, any reference to an intended parent shall include both husband

270. Added the possibility that the gestational carrier use donor gametes as well as those from an intended parent, thus encompassing a wider range of potential parents.

and wife for all purposes of this Act. This term shall include the intended mother, intended father, or both.²⁷¹

The rationale behind this change emanates from several implications outlined throughout this Comment. Specifically, by not requiring that the intended parent(s) be validly married couples who are able to provide their genetic material to surrogate carriers, surrogacy will be a viable option for the individuals and couples who need it most.²⁷² Additionally, the Model's removal of the Bills' marriage requirement establishes consistency with Louisiana's adoption laws.²⁷³ Lastly, the Model's openness to a wider variety of intended parents eliminates the potential for civil rights claims because neither unmarried adults nor same-sex couples would be excluded from seeking a surrogate's services. Thus, for the aforementioned reasons, the effect of this provision will certainly best serve the goals of surrogacy.

B. GESTATIONAL SURROGACY NOW ENFORCEABLE

The next noteworthy section of the Model contains several provisions regulating gestational surrogacy contracts. Under this section, such contracts are enforceable only if approved by court order before the ART procedure takes place. This is also analogous to Louisiana's adoption proceedings, in which an individual or couple seeking to adopt a child must first obtain court approval.²⁷⁴ The proceeding ensures that the parties are

271. Replaced "intended parents," as stipulated in the Bill's definitions, with Illinois' definition in its surrogacy statutes. See 750 ILL. COMP. STAT. ANN. 47/10 (West 2009).

272. As mentioned throughout this Comment, the primary reason that hopeful parents consult with surrogate carriers is some form of impairment to their ability to become pregnant. First, the Model accounts for this fact by eliminating the marriage requirement because aspiring single parents cannot, by themselves, have children. Moreover, same-sex couples, a group that is unable to legally marry in this state, are likewise unable to physically procreate with one another. Second, the Model further accounts for this fact by no longer offering surrogacy only to those married couples that are able to provide both the husband and wife's gametes to the surrogate—since infertility would normally prevent one or both parents from providing functioning gametes.

273. See *supra* text accompanying note 244.

274. See LA. CHILD. CODE ANN. art. 1171 (2014) ("[N]o child who is the subject of a private adoption shall be placed in the home of the prospective adoptive parents prior to their either obtaining a current certification for adoption . . . or by their obtaining a current order of a court of competent jurisdiction approving the adoptive

2014]

The Modern Day Stork

641

acting in compliance with the rest of the requirements for these contracts rather than allowing for whimsical and potentially unfair stipulations proposed by either party. This facet of the Model makes no changes to the Bills' court order requirements.

This section then provides numerous contractual requirements for each party. Namely, it lists certain qualifications that surrogate carriers must meet, performance obligations imposed on both parties to the contract, procedural requirements for the contract approval hearing, confidentiality requirements, methods of terminating the contract, and damages in the event of a failure to perform by either party. The Model makes two principal changes to the text of the Bills in this regard: the compensation provision and the addition of an express provision regarding selective fetal reduction.

The first of these modifications—the compensation provision—increases the amount of payment to a surrogate from reimbursement for pregnancy-related expenses to court-approved reasonable and necessary fees. Certainly, this will invite the same opposition normally raised in response to compensated surrogacy agreements.²⁷⁵ However, because the court must first approve the additional payment, it eliminates the potential for one party to obtain unfair bargaining power. Moreover, the court-approved payment clause parallels the provision in Louisiana's adoption laws providing for reasonable and necessary compensation to adoption agencies.²⁷⁶ Therefore, the model expands the amount of compensation available to surrogate carriers. This change reads as follows:

§ 3.5 Pre-Embryo Transfer Order

B. The court shall issue a Pre-Embryo Transfer Order upon finding that:

(3) The gestational carrier shall be entitled to receive compensation in the form of:²⁷⁷

placement.”).

275. See *supra* note 59 and accompanying text.

276. See LA. CHILD. CODE ANN. art. 1200(B)(9) (2014).

277. Replaced the more limiting phrase in the Bill's compensation provision with a more open-ended option.

(a) Reasonable medical expenses, including hospital, testing, nursing, midwifery, pharmaceutical, travel, or other similar expenses, incurred by the gestational carrier for prenatal care and those medical and hospital expenses incurred incident to the birth.

(b) Reasonable expenses incurred for mental health counseling services provided to the gestational carrier prior to the birth and up to six months after birth.

(c) Reasonable living expenses incurred by the gestational carrier before the birth of the child and for no more than sixty days after the birth.

(d) Reasonable travel costs related to the pregnancy and delivery, court costs, and attorney fees incurred by the gestational carrier.

(e) Actual lost wages of the gestational carrier, not covered under a disability insurance policy, when bed rest has been prescribed for the gestational carrier for some maternal or fetal complication of pregnancy and the gestational carrier, who is employed, is unable to work during the prescribed period of rest.²⁷⁸

(f) Any other specific service or fee the court finds is reasonable and necessary.²⁷⁹

(g) The parties understand the contract and freely give consent.

(4) If the gestational surrogacy contract provides for the payment of compensation to the gestational carrier, the compensation shall have been placed in escrow with an independent escrow agent prior to the gestational surrogate's commencement of any medical procedure (other than medical or mental health evaluations necessary to determine the gestational surrogate's eligibility).²⁸⁰

278. Incorporated from House Bill 187's compensation provisions.

279. Borrowed from the provision in the Louisiana Children's Code providing for compensation to adoption agencies. *See* LA. CHILD. CODE ANN. art. 1200(B)(9) (2014).

280. Added the escrow account provision in the event of compensation to be paid to the surrogate, much like that in Illinois's statutes. *See* 750 ILL. COMP. STAT. ANN. 47/25 (West 2009).

The other change that this Model makes is the addition of an express provision addressing selective fetal reduction. Recall that the absence of such language in the 2014 Bill proved fatal, as Governor Jindal echoed the concerns of the LFF and other pro-life organizations.²⁸¹ Keeping the principles of party autonomy in mind, this Model requires that the parties stipulate that no selective fetal reduction shall take place after the point of fetal viability, unless the surrogate must terminate the pregnancy due to health-related reasons. The court would then determine the validity of this clause prior to the embryo transfer order, along with the compensation provisions within the surrogacy contract. This way, the Model protects the surrogate's constitutional right to terminate the pregnancy, and the state can ensure that any post-viability abortions will not go unpunished because the court order will serve as evidence of a breach by the parties.

C. CHANGES TO THE VITAL RECORDS STATUTES

The last key distinction in the Model gives a solution to the parentage problems discussed throughout this Comment.²⁸² Specifically, the Model aligns with the more lenient "intended parent" requirement by providing the filial link between the intended parent(s) and the child born to a gestational carrier. As previously mentioned, Louisiana's vital records statutes currently recognize an incredibly limited set of conditions through which the intended parents may establish their legal parentage for a child born to a surrogate.²⁸³ By relaxing the current restrictions in the vital records statutes, the Model solidifies the parental rights to children born through ART. Additionally, by validating gestational surrogacy contracts, the Model creates a lawful exception to Louisiana's maternity presumption.²⁸⁴ Furthermore, in the case that maternity or paternity is ever in dispute, the

281. See 2014 Jindal Veto Memo, *supra* note 15.

282. See *supra* Parts II(D)(2), III(A)(1)(c).

283. See LA. REV. STAT. ANN. § 40:32(1) (2012) ("Biological parents' means a husband and wife, joined by legal marriage recognized as valid in this state, who provide sperm and egg for in vitro fertilization, performed by a licensed physician, when the resulting fetus is carried and delivered by a surrogate birth parent who is related by blood or affinity to either the husband or wife."); LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012) ("In the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the surname of the child's biological parents shall be the surname of the child.").

284. See LA. CIV. CODE ANN. art. 184 (2007) ("Maternity may be established by a preponderance of the evidence that the child was born of a particular woman, *except as otherwise provided by law.*" (emphasis added)).

model allows for DNA testing to corroborate or rebut any or all of these allegations. These changes will eradicate uncertainty and effectively establish the legal relationship between aspiring parents and the children they intend to raise as their own. The new vital records statute states:

§ 34. Vital records forms

B. The forms shall be printed and supplied or provided by electronic means by the state registrar and the required contents are:

(1) Contents of birth certificate. The certificate of birth shall contain, as a minimum, the following items:

(a) Full name of child.

(viii) In the case of a surrogate birth parent as a result of an enforceable gestational surrogacy contract, as defined herein, the surname of the child's biological parent(s) shall be the surname of the child.

(j) In the case of a child born of a surrogate birth as a result of an enforceable gestational surrogacy contract, as defined herein, the biological parent(s) shall be considered the parent(s) of the child.

In conclusion, this Model legislation would finally legitimize gestational surrogacy agreements—a much needed course of action in the state of Louisiana. By eliminating the marriage requirement for the intended parents, the Model affords this service to a much more comprehensive group of hopeful parents as well as surrogate carriers. Also, by involving the court in preliminary and post-birth hearings, the surrogacy contract (and the parties to it) will be under the conscientious watch of a neutral decision maker. Finally, by amending the current vital records statutes to fall in line with the model's relaxed "intended parent" requirement, the parentage rights of countless aspirant parents will be protected. Therefore, the Model serves as the gateway to parenthood for the myriad of once-incapable parents.

2014]

The Modern Day Stork

645

V. CONCLUSION

In summary, with the ever-increasing “stork-like” role that ART plays in the parenting realm, it is vital that the Louisiana legislature steps up and enacts legislation to govern gestational surrogacy contracts in the state. Without controlling law, children born through ART will have an array of problems in determining who their legal parents are. Moreover, if left unanswered, Louisiana’s lack of guidance on the enforceability of gestational surrogacy contracts may present serious conflict of law issues if aspiring parents seek to sidestep Louisiana’s parentage limitations in its vital records statutes.

Louisiana’s recent attempt to answer the long list of questions on surrogacy appeared to have come to an end when Governor Jindal vetoed Senate Bill 162 in 2013 and House Bill 187 in 2014. While these Bills would have undoubtedly given some teeth to the enforceability of gestational surrogacy contracts, they still would have afforded inadequate payment to surrogate carriers and would have excluded many of the people who seek the aid of surrogacy. Therefore, through a scan of the various state-by-state stances on this matter, this Comment provides a solution that the Louisiana legislature should consider in upcoming Sessions. If adopted, this proposal will ensure coherency and compliance among Louisiana domiciliaries, legislators, and judiciaries while implementing this revolutionary new practice in the state.

Taylor E. Brett