The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts

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In 2006, Angelia Robinson agreed to act as a gestational surrogate and carry a pregnancy for her brother, Donald Hollingsworth, and his same-sex spouse, Sean.[1] Robinson became pregnant and gave birth to twin girls, who were genetically related to Sean and an anonymous egg donor.[2] Five months after giving birth, Robinson filed a lawsuit to gain physical and legal custody of the twins.[3] Despite not being genetically related to the twins, a superior court judge ruled that Robinson was the legal mother of the children.[4] After a five-year-long court battle, full custody was awarded to the biological father, Sean, but Robinson maintained parental visitation rights.[5]

Gestational surrogacy arrangements have become increasingly common in recent years as they provide a way for infertile couples to have children.[6] However, as the example above illustrates, these agreements have the potential to end negatively, often in prolonged litigation. States have approached the issue of gestational surrogacy in varying ways, with no uniformity amongst the many approaches.[7] Without clear and comprehensive guidelines for gestational surrogacy arrangements, individuals will be left without guidance in creating these contracts, which will ultimately lead to the courts

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1 Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES (Dec. 30, 2009), http://www.nytimes.com/2009/12/31/us/31surrogate.html?_r=1&.

2 *Id.*

3 *Id.*

4 *Id.*

5 Ted Sherman, *N.J. Gay Couple Fight for Custody of Twin 5-Year-Old Girls*, NJ.COM (Dec. 20, 2011, 7:00 AM), http://www.nj.com/news/index.ssf/2011/12/nj_gay_couple_fight_for_custod.html.

6 *See infra* Part I.

7 *See infra* Part I.

having to decide who is legally responsible for the children born of these agreements.

Without federal guidance, states have been left to formulate their own approaches for permitting, enforcing, and regulating gestational surrogacy agreements. This has led to a complete lack of uniformity among the states, with some expressly prohibiting these agreements[8] and others failing to address this issue at all.[9] The District of Columbia has even gone so far as to criminalize surrogacy arrangements, subjecting offenders to civil fines, imprisonment, or both.[10] Therefore, the outcome of each gestational surrogacy agreement is entirely dependent on which state law controls the situation and how that particular state has chosen to handle gestational surrogacy contracts.

California and Connecticut are two states that have chosen to permit gestational surrogacy arrangements by statutorily regulating the gestational surrogacy process. However, despite the fact that California and Connecticut have taken similar approaches to regulating gestational surrogacy, the statutory schemes utilized by these states differ greatly from one another. As will be discussed below, California's statutes provide more specific and thorough regulations of the gestational carrier process, while Connecticut's statutes provide the bare minimum in terms of detail.

This Comment will argue that states should implement comprehensive statutory regulations for gestational surrogacy agreements that provide specific and complete guidelines for parties wishing to create these contracts. Part I will provide relevant background information and a brief history of assisted reproductive technology in the United States. Part II will outline and analyze the relevant California and Connecticut gestational surrogacy statutes, identifying the strengths and weaknesses of the current regulations in place in those states. Part III will propose that states wishing to enact legislation to regulate and enforce gestational agreements should emulate the approach utilized by the California legislature, as opposed to that of the Connecticut legislature, since California's statutory scheme is more complete, stringent, and efficient. Finally, Part IV will

8 John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 924 (1996); *see also infra* Part I.C.

9 *See* Diane S. Hinson, *State-by-State Surrogacy Law: Actual Practices*, CREATIVE FAM. CONNECTIONS (2013), http://www.creativefamilyconnections.com/state-map-surrogacy-law-practices.

10 D.C. CODE § 16-402 (2014) ("Any person . . . who . . . violates this section, shall be subject to a civil penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both.").

briefly discuss the need for state legislatures to strike a delicate balance when creating surrogacy-based statutory regulations.

I. A BRIEF HISTORY

A. Assisted Reproductive Technology

For people who are unable to conceive or carry a child naturally, there are many alternative approaches that can be utilized to help start a family. Many couples choose adoption, which is both a costly and time-consuming process.[11] In recent years, however, an increasing number of people have turned to assisted reproductive technology, commonly referred to as "ART," as a means to have children. ART has been defined in varying ways, but the broadest definition includes "any technology that is employed to conceive a child by means other than sexual intercourse."[12] Such technology includes egg donation, embryo donation, in vitro fertilization, and the transfer of fertilized embryos.[13]

The first uses of ART began in the mid-1970s, and the world's first "test-tube baby" was born as a result of these early ART procedures in 1978.[14] The number of ART cycles performed in the United States per year has drastically increased, and in 2011 a total of 151,923 ART cycles took place.[15]

The possibilities ART provides to individuals who need assistance starting a family are great. Unlike adoption, couples

11 Adoptions performed independently or through private adoption agencies can cost upwards of $40,000. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., COSTS OF ADOPTING 2 (2011), *available at* https://www.childwelfare.gov/pubs/s_cost/s_costs.pdf. Inter-country adoptions often take well over a year to complete, and some countries even require adoptive parents to live in the foreign country for six months before completing the adoption. James G. Dwyer, *Inter-country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189, 191 (2013).

12 CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, at xii (2006)); *see also Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2013), http://www.cdc.gov/art/ (defining "assisted reproductive technology" as "all fertility treatments in which both eggs and sperm are handled").

13 Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002).

14 Louise Brown was the first child born as a result of in vitro fertilization (IVF). Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 619 (1997).

15 CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 2011, at 47 (2013), *available at* http://www.cdc.gov/art/ART2011/PDFs/ART_2011_National_Summary_Report.pdf. This number more than doubled from a total of 64,681 ART cycles that took place in 1996. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 61 (2007), *available at* http://www.cdc.gov/art/ART 2005/508PDF/2005ART508.pdf.

utilizing ART have the ability to be genetically related to the resulting child.[16] Women who are unable to carry a child to term, but are otherwise reproductively healthy, can still be genetically related to their child through these technologies.[17] Reproductive technology has even come so far as to allow a child to be genetically related to two mothers, as well as a father.[18]

B. Surrogacy: A Form of ART

One form of ART is surrogacy, which includes two specific subcategories: traditional surrogates and gestational carriers. A traditional surrogate is a woman who becomes pregnant by way of a sperm donor and carries the pregnancy to term.[19] In a traditional surrogacy arrangement, the woman carrying the child is the biological mother and agrees to relinquish all parental rights to her child upon giving birth.[20] Statistics on the rates of traditional surrogacy in the United States are rare, and some studies have gone so far as to say there is "no data whatsoever on the use of traditional surrogacy."[21] Lack of statistical data aside, traditional surrogacy has been present in society for hundreds, if not thousands, of years.[22]

A gestational carrier, however, is a woman who is not related to the child she carries and ultimately bears. In a gestational carrier arrangement, the woman "is implanted with the sperm of the biological father and the eggs of the biological mother[,] . . . eliminating any biological relationship between the surrogate mother and child."[23] Gestational carrier arrangements

16 Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989) (arguing for contractual enforcement of traditional surrogacy contracts, which allow for "genetic continuity" between at least one intended parent and the child).

17 Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 640–41 (1991).

18 In a technique known as "egg cell nuclear transfer," the nucleus of one woman's egg cell can be joined with an enucleated egg cell from another woman, which creates an egg cell comprised of two different sets of DNA. Bonnie Steinbock, *Defining Parenthood*, *in* FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE 107, 107 (JR Spencer & Antje du Bois-Pedain eds., 2006).

19 SUSAN L. CROCKIN & HOWARD W. JONES, LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 209 (2010).

20 MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 1, 6 (2010), *available at* http://www.councilforresponsiblegenetics.org/page documents/kaevej0a1m.pdf.

21 *Id.*

22 Christine L. Kerian, Note, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 116–17 (1997) (positing that surrogacy dates back to the Old Testament).

23 Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 98–99 (2010).

in the United States have grown rapidly in recent years, nearly doubling in frequency from 2004 to 2008.[24]

C. Surrogacy Statutes Throughout the United States

With the increased frequency of ART and surrogacy arrangements in the United States, legislation to regulate these procedures became a necessary and logical step for states. Yet, how states have chosen to go about regulating surrogacy and gestational carrier agreements is entirely inconsistent. Some states have decided to ban surrogacy and prohibit the enforcement of traditional or gestational surrogacy agreements entirely.[25] A few states have held that surrogacy contracts are only legal if the woman carrying the child is not compensated.[26] Other states have explicitly enacted legislation holding these arrangements to be valid,[27] while some states merely rely on case law to uphold surrogacy agreements.[28] Yet, some states have simply left the issue alone for now, and remain without case law or statutes addressing the validity of surrogacy.[29] Given this lack of consensus amongst states regarding surrogacy, a great responsibility is placed upon all parties entering into such

24 The Society for Assisted Reproductive Technology (SART) found the number of children born via gestational surrogacy per year to rise from 738 in 2004 to 1395 in 2008. GUGUCHEVA, *supra* note 20, at 11–12. In the last several years, many celebrities have even turned to gestational carriers as a way to have children. *Celebrities Who Used Surrogate Mothers*, FOX NEWS MAG. (Aug. 30, 2012), http://magazine.foxnews.com/at-home/celeb rities-who-used-surrogate-mothers.

25 Robertson, *supra* note 8, at 924. Indiana's statute declares enforcement of a surrogacy contract to be against public policy. IND. CODE § 31-20-1-1 (2014). Michigan's statutes also prohibit surrogacy contracts on the basis of public policy. MICH. COMP. LAWS § 722.855 (2014).

26 Spivack, *supra* note 23, at 101 (including Kentucky, Louisiana, Nebraska, New York, North Carolina, and Washington). Furthermore, Louisiana's surrogacy laws are presently in a state of flux, with the governor vetoing a recently proposed bill. *Louisiana House Bill 187*, LEGISCAN, http://legiscan.com/LA/bill/HB187/2014 (last visited Jan. 10, 2015). This bill sought to permit gestational surrogacy only in the case of a married man and woman using their own genetic material. H.R. 187, 40th Leg., Reg. Sess. (La. 2014). Aside from limiting the use of egg and sperm donors in these arrangements, this bill restricted homosexual couples from engaging in gestational carrier contracts in Louisiana whatsoever. *Id.* Critics of the bill considered this proposed legislation a reminder that true reproductive freedom is not yet a reality. *See* Richard Vaughn, *Louisiana Surrogacy Bill Advances from Bad to Worse*, INT'L FERTILITY L. GROUP (Apr. 15, 2014), http://www.iflg.net/louisiana-surrogacy-bill-advances-from-bad-to-worse/.

27 These states include California and Illinois. CAL. FAM. CODE § 7962 (West 2014); 750 ILL. COMP. STAT. 47/25 (2014).

28 For Ohio's Supreme Court decision finding gestational surrogacy contracts do not violate public policy see *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007). Maryland case law supports the enforcement of gestational surrogacy contracts as well. *See In re* Roberto d.B., 923 A.2d 115 (Md. 2007) (finding a gestational carrier was allowed to not be listed as the child's birth mother and, instead, the child's father could be listed as the only parent).

29 Hinson, *supra* note 9 (citing Alaska, Georgia, Delaware, and several other states as having no definitive case law or statute on the issue of gestational surrogacy).

agreements to be well informed of the legal landscape of their particular state.[30]

II. THE CURRENT STATE OF GESTATIONAL CARRIER REGULATIONS: CALIFORNIA AND CONNECTICUT AS EXAMPLES

As if the inherent disparity between how states choose to address gestational carrier agreements isn't enough, there is a great lack of uniformity among states that have enacted legislation protecting surrogacy and regulating the process. While these states have all determined that surrogacy and gestational carrier agreements are permissible, a shockingly small number have enacted comprehensive regulatory schemes to control the surrogacy process. Without thorough and detailed guidelines for gestational carrier agreements, the courts, legal professionals, and citizens looking to enter into these agreements are left in need of answers.

California and Connecticut are states that have both determined gestational carrier contracts to be permissible[31] and have enacted legislation specifically addressing such contracts. However, the differences between California's and Connecticut's regulation of gestational carrier agreements are vast. This section will discuss those differences in depth and identify the ways Connecticut's statutory scheme is lacking in substance.

A. California Case Law

1. Establishing the Intent Doctrine for Determining Parentage

The current framework of California's gestational surrogacy statutes had its beginning in case law. The most influential case, *Johnson v. Calvert*, established the intent doctrine for determining legal parentage.[32] In *Johnson*, Mark and Crispina Calvert were a married couple who could not have a child traditionally.[33] They contracted with Anna Johnson to gestate an embryo comprised of Mark's sperm and Crispina's egg.[34] However, the relationship between the Calverts and Johnson deteriorated and the Calverts initiated suit to declare that they were the legal parents of the child. Johnson responded with an

30 CROCKIN & JONES, *supra* note 19, at 212–13.

31 While both California and Connecticut allow parties to enter into gestational carrier agreements, Connecticut's statutes do not contain a presumption of validity provision for these contracts. *See infra* Part II.C.5.

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

33 *Id.* at 778.

34 *Id.*

action to assert her status as the child's legal mother.[35] In holding that Johnson had no legal rights to the child, the court reasoned that the Calverts were the legal parents of the child based on their intention in entering into the gestational carrier contract.[36] The court articulated the intent doctrine, which it identified as the proper way to determine the child's parentage, as "when [genetic consanguinity and giving birth] . . . do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[37]

2. Expanding the Intent Doctrine

After *Johnson v. Calvert*, case law in California quickly expanded the application of the intent doctrine to extend beyond married heterosexual couples who were genetically related to the child. In *In re Marriage of Buzzanca*, the California Court of Appeal extended the intent doctrine to include parents who were not genetically related to a child born via a gestational surrogacy arrangement.[38] Luanne and John Buzzanca entered into a contract with a gestational carrier, under which the woman would carry and give birth to a child genetically unrelated to either John or Luanne.[39] After divorcing, Luanne claimed that she and John were the lawful parents, while John claimed he had no legal obligation to the child.[40] Astonishingly, the trial court found that the child had *no* legal parents.[41] The Court of Appeal disagreed with the trial court's decision and found that John and Luanne were the child's legal parents "given their initiating role as the intended parents in [the child's] conception and birth."[42]

The court in *Buzzanca* expressed concern that the state of gestational surrogacy laws was woefully underdeveloped and specifically made a call for the legislature to address the problem. The court noted that artificial reproduction, including artificial insemination, traditional surrogacy, gestational surrogacy, and

35 *Id.*

36 *Id.* at 782.

37 *Id.*

38 *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

39 *Id.*

40 *Id.*

41 *Id.* The trial court reasoned that the gestational carrier and her husband were not the lawful parents because neither was genetically related to the child. The trial court then found that Luanne was not the mother because she had neither provided the egg nor given birth to the child. Finally, the court found that John was not the legal father because he had not contributed his sperm to the embryo implanted in the gestational carrier. *Id.* The Court of Appeal also noted that the woman and man who donated the egg and sperm to create the embryo made no legal claim to the child. *Id.* at 288.

42 *Id.* at 293.

even cloning, is something that the courts will have to address. The court asked the legislature to enact a law that, even if not perfectly implemented on a case-by-case basis, "would bring some predictability to those who seek to make use of artificial reproductive techniques."[43]

In 2000, the California Court of Appeal further expanded the reach of the intent doctrine for determining parentage to include parents who were not married when they contracted to bring about the birth of the child. In *Dunkin v. Boskey*, an unmarried couple entered into an agreement to use artificial insemination by an anonymous sperm donor to conceive their child.[44] After the child was born, the parents ended their relationship and sought to establish a custody agreement.[45] The court held that the intent doctrine also applies to unmarried couples and the man who contracted to create the child was the legal father.[46] The court noted that the decision to apply the intent test in this way "serves . . . the compelling public policies of family law to legitim[ize] children, provide for their support, foster the best interests of the child, and promote familial responsibility."[47]

In 2005, the Supreme Court of California expanded the intent doctrine again to apply to situations where same-sex couples had intended to create a child through ART. In *Elisa B. v. Superior Court*, an unmarried lesbian couple utilized artificial insemination to conceive children with the aid of a sperm donor.[48] After ending their relationship, the women sought to establish the legal parentage of their three children.[49] The court held that both women were the legal parents of all three children under the intent doctrine.[50] In *Elisa B.*, the court referenced the legislature's declaration that "'[t]here is a compelling state interest in establishing paternity for all children,'" as doing so provides children with "both emotional and financial support."[51]

43 *Id.*

44 Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 48 (Cal. Ct. App. 2000). There are two kinds of artificial insemination: homologous and heterologous. Homologous insemination involves the use of the husband's sperm to create the child and, as a result, does not raise any questions about the child's paternity. Heterologous insemination utilizes the semen of a third-party donor to conceive a child. People v. Sorenson, 437 P.2d 495, 498 n.2 (Cal. 1968).

45 *Dunkin*, 98 Cal. Rptr. 2d at 48.

46 *Id.* at 56.

47 *Id.*

48 Elisa B. v. Superior Court, 117 P.3d 660, 663 (Cal. 2005).

49 *Id.*

50 *Id.* at 670.

51 *Id.* at 669.

B. Connecticut Case Law

1. Early Case Law

Connecticut case law, as compared to California's, has been slower to adopt the intent doctrine for determining legal parentage in gestational carrier agreements. In 2007, a Connecticut superior court found that a husband and wife were the legal parents of a child conceived under a gestational carrier agreement.[52] In that case, and many others with similar factual situations, the court examined the gestational carrier agreement and determined that the agreement was reasonable, fair, and valid.[53] However, the courts in Connecticut were not consistent with their decisions concerning gestational carrier agreements. In 2008, a Connecticut superior court explicitly refused to apply the intent doctrine and held that the biological father's same-sex partner needed to legally adopt the child in order to be included on the birth certificate as a parent.[54] Instead of utilizing the intent doctrine, the court focused on the best interests of the child and reasoned that a formal adoption process was better suited to serve the child's overall interests.[55] In support for the best interest test, the court cited legal scholars who advocated that a child's interests were better served by adoption than by the more removed and less thorough intent doctrine.[56] The court raised concerns about the state of Connecticut's gestational surrogacy laws and called upon the legislature to establish a regulatory scheme to govern such transactions.[57]

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52 De Bernardo v. Gregory, No. FA074007658S, 2007 WL 4357736, at *4 (Conn. Nov. 7, 2007).

53 *See* Griffiths v. Taylor, No. FA084015629, 2008 WL 2745130, at *7 (Conn. June 13, 2008) (finding that two homosexual domestic partners were the legal parents of a child born via a valid gestational surrogacy agreement); Davis v. Kania, 836 A.2d 480, 483 (Conn. Super. Ct. 2003) (finding a gestational carrier agreement valid, enforceable, and irrevocable under the laws of Connecticut).

54 Oleski v. Hynes, No. KNLFA084008415, 2008 WL 2930518, at *12 (Conn. July 10, 2008).

55 *Id.* at *10.

56 *Id.* (quoting Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000)).

57 *Id.* at *11. The court posed the following concern about continuing to leave regulation of gestational carrier agreements in the hands of the judiciary:

> The combination of high vulnerability on the part of their consumers, the presumably lucrative environment in which these services are being provided, the lack of public awareness as to what they do and how they do it, and the fundamental, lifelong consequences to the children whose lives their efforts literally bring into being all warrant discussion of whether our becoming one of the few, if not the only venue in this land in which such a business can be carried on without effective supervision, is a desirable goal.

Id.

2. Establishing the Intent Doctrine for Determining Parentage

In 2011, the Supreme Court of Connecticut followed California's lead and adopted the intent doctrine for deciding a child's legal parentage under gestational surrogacy agreements.[58] In *Raftopol v. Ramey*, two male domestic partners contracted with a woman to carry children who were to be genetically related to one of the two men.[59] The court found both men were properly named as the legal parents of the children and reasoned "that the legislature intended . . . to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children."[60] The court noted its decision to adopt the intent test was influenced directly by *Johnson v. Calvert*.[61] Finally, the Connecticut Supreme Court in *Raftopol* expressed concerns about the "many remaining ambiguities" in Connecticut's gestational carrier statutes and impliedly called upon the legislature to remedy these ambiguities.[62]

C. Current Statutes in California and Connecticut

In response in part to the judicial pleas in *Buzzanca* and *Raftopol*, both California and Connecticut enacted and currently follow statutory schemes that attempt to regulate the surrogacy process. At first glance, it appears that California and Connecticut have both adopted sufficient legislation and, therefore, taken the steps necessary to appropriately regulate traditional and gestational surrogacy. However, further analysis reveals that California's statutory scheme is much more comprehensive and effective than Connecticut's legislation, which leaves much to be desired.

1. Definitions Provided

a. Definitions in California and Connecticut Statutes

Under current California law, the legislature has provided definitions for many terms relating to ART and, specifically, gestational carrier agreements. These definitions have fully incorporated the intent doctrine, first established in *Johnson*

58 *See* Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011).

59 *Id.* at 787.

60 *Id.* at 799.

61 *Id.* at 801.

62 *Id.* at 797. The court identified some of the ambiguities present in Connecticut law, which included the nature and scope of the phrase "order of a court of competent jurisdiction," the types of gestational agreements that were covered under the law, and who could be recognized as an intended parent. *Id.*

v. Calvert,[63] into California law. The term "assisted reproduction agreement" is defined as "a written contract that includes a person who *intends* to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract."[64] California law also defines the term "intended parent" to mean an "individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction."[65] The statute also provides a definition of the term "assisted reproduction."[66]

As previously discussed, there are two types of surrogacy and each gives rise to unique concerns regarding implementation and public policy. The California legislature took care to define these terms separately and make clear that each type of surrogacy presents a very different factual situation.[67] Other terms that are statutorily defined include "non-attorney surrogacy facilitator," "surrogacy facilitator," and "fund management agreement."[68]

Turning to Connecticut's relevant surrogacy statutes, Connecticut law defines "gestational agreement" as "a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child."[69] The statute also defines "intended parent" to mean "a party to a gestational agreement who agrees, under the gestational agreement, to be the parent of a child born to a woman by means of assisted reproduction, regardless of whether the party has a genetic relationship to the child."[70] This definition makes no mention of whether the party to the gestational agreement may be married or unmarried, as the California definition provides.[71] Importantly, Connecticut law does not provide a definition for

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

64 CAL. FAM. CODE § 7606(b) (West 2014) (emphasis added).

65 *Id.* § 7960(c).

66 "Assisted reproduction" is defined by the California Family Code as "conception by any means other than sexual intercourse." *Id.* § 7606(a).

67 The term "surrogate" is defined as "a woman who bears and carries a child for another through medically assisted reproduction and pursuant to a written agreement." *Id.* § 7960(f). "Surrogate" is then further defined to include traditional and gestational surrogates. "Traditional surrogate" is defined as "a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents." *Id.* § 7960(f)(1). "Gestational carrier," or "surrogate," is defined as "a woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement." *Id.* § 7960(f)(2).

68 *See id.* § 7960(b), (d), (e).

69 CONN. GEN. STAT. § 7-36(16) (2014).

70 *Id.* § 7-36(17).

71 *See* CAL. FAM. CODE § 7960(c).

surrogacy, nor does it distinguish between traditional surrogacy and gestational carrier agreements.

b. Analysis of Definitions Provided

California law provides more complete definitions regarding statutory terms and language. Connecticut law makes no mention of the marital status of intended parents, while California specifically provides that intended parents can be either married or unmarried. This may present significant problems for the Connecticut judiciary in interpreting the current statute and determining whether it even applies to unmarried intended parents.[72] Absent statutory language indicating otherwise, the question of whether the intent doctrine applies to unmarried couples will necessarily be left up to the courts.

Furthermore, Connecticut law does not explicitly make clear the distinction between traditional and gestational surrogates. Although Connecticut law does indicate that gestational agreements apply only to women who have contributed no genetic material to the child,[73] greater clarity could be achieved by explaining the difference between traditional and gestational surrogacy arrangements. In enacting the current statutory scheme in California, the legislature made clear that separating out the definitions of traditional and gestational surrogates would help to specifically limit the other provisions of the statute to gestational carrier agreements, rather than traditional surrogates.[74] This increased level of clarity helps provide contracting parties with a better understanding of what type of agreements are permitted under the law.

2. Requirements for the Contents of Gestational Agreements

Gestational carrier and surrogacy agreements are a type of contract governed by contract law.[75] There are issues that arise when considering the implications of utilizing contract law to govern these agreements; however, efficient statutory schemes, like California's, specifically address certain terms and

72 California case law first answered this question in *Dunkin v. Boskey*, holding that the intent doctrine for determining parentage applies to unmarried couples, as well as married couples. *See* Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 56 (Cal. Ct. App. 2000). Connecticut case law, however, has never specifically addressed the issue of whether the intent doctrine applies to unmarried couples.

73 CONN. GEN. STAT. § 7-36(17).

74 Assemb. 1217, 2012 Leg., Reg. Sess. (Cal. 2012).

75 *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (arguing that surrogacy contracts can be fully regulated under the canons of contract law).

conditions that must be included in these contracts.[76] This specificity provides contracting parties with more certainty and predictability before the child is even conceived.[77] The more detailed contractual requirements mandated by California's statutes provide more guidance for intended parents, gestational carriers, legal professionals, and the courts.

a. Requirements Under California and Connecticut Law

California law includes many requirements for gestational carrier agreements to be presumed valid. Written gestational carrier agreements must include the following: (1) the date on which the agreement was executed; (2) information identifying the persons from which the gametes originated, unless donated anonymously; and (3) the identity of the intended parent or parents.[78] Before parties complete the written gestational carrier agreement, each party must secure independent legal counsel to represent them in the execution of the agreement.[79] This means both the intended parents and gestational carrier must find and retain licensed attorneys of their choosing before any written agreement can be created. The agreement must also be signed by all parties and notarized.[80]

Connecticut law requires three main components for gestational surrogacy agreements. The agreement must: (1) name each party to the agreement and indicate each party's respective obligations under the agreement; (2) be signed by each party to the agreement and the spouse of each party, if any; and (3) be witnessed by at least two disinterested adults and acknowledged in the manner prescribed by law.[81] Under Connecticut law, the parties are not required to identify the sperm and egg donors, or even indicate where the gametes were obtained. Furthermore, Connecticut law does not require that the parties be represented by separate legal counsel. In fact, under Connecticut law, the parties to a gestational carrier agreement need not be represented by legal counsel at all.

76 *Id.* at 2335.

77 Lori B. Andrews, Commentary, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2368 (1995) (arguing that enforcing surrogacy contracts will not allow surrogates to change their mind and initiate long, taxing court battles to determine the legal parents of the child; instead, all parties involved will know who is to be the legal parents from the time the contract is entered into, creating certainty).

78 CAL. FAM. CODE § 7962(a)(1)–(3) (West 2014).

79 *Id.* § 7962(b).

80 *Id.* § 7962(c).

81 CONN. GEN. STAT. § 7-36(16) (2014).

b. Analysis of Statutory Requirements

California's legislation provides clearer guidelines as to what gestational carrier contracts must contain. California law requires the parties to identify where the gametes came from, unless donated anonymously,[82] and to be represented by independent legal counsel before entering into the agreement[83]—provisions the Connecticut statutes make no mention of. Requiring that parties to the agreement obtain separate legal counsel ensures that the interests of all parties will be advocated for and protected by a licensed attorney. Absent a similar provision, Connecticut's statutes would allow for one attorney to represent both parties in the agreement or, worse, for neither party to be represented by an attorney in drafting the contract. Although attorneys are bound by the applicable rules of professional conduct,[84] having one attorney represent both parties does not ensure that each side will receive proper and effective representation. Legislative history reveals that the California legislature was specifically concerned with the possibility of ineffectual representation, and it was this fear that led to the inclusion of the independent counsel provision.[85] Independent counsel for both parties was considered necessary "because of the complexities of surrogacy agreements," and independent counsel was seen as a way to ensure both the contract's validity and that all parties were clear on their rights and responsibilities under the agreement.[86]

3. Regulation of the Gestational Carrier Process

The actual process of conceiving a child through ART and utilizing a surrogate or gestational carrier's services is incredibly complex. Obtaining the donor gametes and implanting the embryos involves many medical procedures and various types of medications.[87] Intended parents often utilize the services of companies that specialize in facilitating and creating gestational carrier agreements, which introduces a third party into the situation.[88] Finally, gestational carrier contracts often concern a

82 CAL. FAM. CODE § 7962(a)(2).

83 *Id.* § 7962(b).

84 The Connecticut Rules of Professional Conduct prohibit attorneys from representing a client where the client's interests are adverse to that of an existing client. CONN. RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2014).

85 Assemb. 1217, 2012 Leg., Reg. Sess. (Cal. 2012).

86 *Id.*

87 *See ART: Step-by-Step Guide*, SOC'Y FOR ASSISTED REPROD. TECH., www.sart.org/detail.aspx?id=1903 (last visited Oct. 31, 2014).

88 *Patient Resources*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/art/PatientResources.htm (last updated July 2, 2013) (explaining that "[i]n the

great deal of money used for medical procedures, medications, and monetary compensation for the woman carrying the pregnancy.[89] Monitoring the medical and financial aspects of the gestational carrier process requires that states include specific statutory language to address these issues.

a. Regulation of Process in California and Connecticut

Aside from regulating the contents of the gestational carrier agreement itself, the process of actually conceiving a child and managing the finances are also controlled by the applicable California statutes. First and foremost, before any medical steps can be made towards conceiving a child, California law mandates that the gestational carrier agreement be properly executed and completed.[90] Unless the agreement meets all of the requirements listed in the previous section, parties are not permitted to even begin medically preparing for an anticipated embryo transfer.

The gestational surrogacy process is further regulated by statute through requirements concerning the handling of money related to the agreement. The statute provides clear instructions for surrogacy facilitators and attorneys regarding how to handle client funds. All client funds must be placed in either "[a]n independent, bonded escrow depository maintained by a licensed, independent, bonded escrow company" or "[a] trust account maintained by an attorney."[91] Furthermore, the statute explains that "[c]lient funds may only be disbursed by the attorney or escrow agent as set forth in the assisted reproduction agreement and fund management agreement."[92] The statute also provides guidelines for funds that do not need to meet these stringent requirements.[93]

Connecticut law does not specifically contain any provisions that regulate the process of gestational carrier agreements. The statutes make no mention of the general timeline of the process

United States, more than 440 clinics provide services to patients seeking to overcome infertility" through the use of ART).

89 *See generally Financial Information*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/detail.aspx?id=1891 (last visited Oct. 31, 2014).

90 *See* CAL. FAM. CODE § 7962(d) (West 2014) ("The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.").

91 *Id.* § 7961(a).

92 *Id.* § 7961(c).

93 *See id.* § 7961(d) ("This section shall not apply to funds that are both of the following: (1) Not provided for in the fund management agreement. (2) Paid directly to a medical doctor for medical services or a psychologist for psychological services.").

or of how monetary funds are to be managed and maintained throughout the process.

b. Analysis of Statutory Regulation of Process

California law requires that the parties hold off on all medical procedures, including the injection of medication in preparation for procedures, until a valid agreement is in place.[94] Connecticut law is void of any similar requirement and does not regulate the actual gestational carrier process in any way. This type of provision provides procedural safeguards for both the intended parents and the gestational carrier and demands that each side is fully aware of their obligations under the contract before beginning the process of actually conceiving a child. This kind of regulation provides the contracting parties with a clear timeline of how the entire gestational carrier process must be executed, which provides predictability to all involved parties.

As previously stated, gestational carrier arrangements can be incredibly expensive and often require that a great deal of money change hands. Connecticut statutes are completely void of any regulation for the monetary aspects of these agreements. These kinds of regulations are absolutely essential in safeguarding parties against fraud. A recent example of such fraud comes from California where Tonya Collins, founder and operator of surrogacy agency SurroGenesis, defrauded dozens of families looking to have a child through gestational carriers.[95] Collins created a fake financial firm to handle the financial aspects of the gestational carrier business and used upwards of $2 million of client funds for cars, jewelry, vacations, and other personal expenses.[96] State laws regulating the handling of money in gestational carrier arrangements provide an important financial safeguard for intended parents who invest a significant amount of money in these arrangements.

4. Establishing the Parent-Child Relationship

Determining the legal parentage of a child born pursuant to a gestational carrier agreement is of the utmost importance to ensure that someone is legally responsible for the well-being of the child. Some states require that the intended parents legally

94 *See id.* § 7962(d).

95 *See* Carlos Saucedo, *Surrogacy Scam Unites Valley Families*, ABC30 (May 15, 2013, 12:03 AM), http://abclocal.go.com/kfsn/story?id=9100963.

96 *Id.*; *see also* Maria Medina, *SurroGenesis Scams Women Wanting Children*, CBS SACRAMENTO (Apr. 20, 2012, 11:50 PM), http://sacramento.cbslocal.com/2012/04/20/surrogenesis-scams-women-wanting-children/.

adopt the child after he or she is born.[97] However, California and Connecticut have opted to utilize pre-birth judgments to establish legal parentage, and both states have provided for this option in their respective statutes.[98] This statutory approach provides more certainty to the intended parents and stability to the child, which ultimately supports the child's best interests.[99]

California law provides for pre-birth judgments so that the intended parents can be listed on the child's birth certificate as the legal parents.[100] An action to achieve this "may be filed before the child's birth" and "[t]he judgment or order may be issued before or after the child's or children's birth."[101] Furthermore, an action to establish the parent-child relationship may be brought by any party to the gestational carrier agreement, so long as the order sought is consistent with that agreement.[102]

Connecticut's approach to establishing a parent-child relationship is essentially identical to California's statutory language. Just as in California, pre-birth judgments are permitted in Connecticut and, as a result, the intended parents can be listed on the child's birth certificate from the moment the child is born.[103] Furthermore, Connecticut law provides that the replacement birth certificate issued, which will list the intended parents as the child's parents, "shall include all information required to be included in a certificate of birth" and be exactly the same as a birth certificate issued for a child who is not the product of a gestational agreement.[104]

97 *See, e.g.*, *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009) (holding that the genetic mother to the child in question could only legally establish parentage through adoption when the child was born to the genetic mother's wife through means of implanting the embryo into the wife's uterus).

98 Pre-birth judgments present several benefits to the parties in a gestational carrier agreement, including the ability of the intended parents to make all medical decisions for the child from the moment of its birth, the ability of the hospital to discharge the child to the intended parents, the solidification of insurance coverage for the child under the intended parent's plan, and emotional stability for both the intended parents and the child from the moment of birth. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634–35 (2005).

99 *See* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986).

100 A recently approved California bill requires that birth certificates in California replace the existing fields currently labeled as "Name of Mother" and "Name of Father" with "Name of Parent." Each parent is then able to further identify as the child's "mother," "father," or "parent" by checking the applicable box. Assemb. 1951, 2014 Leg., Reg. Sess. (Cal. 2014).

101 CAL. FAM. CODE § 7962(e), (f)(2) (West 2014).

102 *Id.* § 7630(f).

103 CONN. GEN. STAT. § 7-48a(b) (2014).

104 *Id.*

5. Presumption of Validity

Finally, if gestational carrier contracts are deemed to be presumptively valid, courts will not have to determine whether the contract is valid. Such a presumption will provide greater certainty to both the intended parents and the woman acting as the gestational carrier in these agreements.

a. Presumption of Validity in California and Connecticut Statutes

California law contains specific provisions that provide a presumption of validity for gestational surrogacy contracts. Addressing the concern that surrogate mothers giving birth to the child may attempt to assert their rights as parents, California law states:

> A notarized assisted reproduction agreement for gestational carriers signed by all the parties, with the attached declarations of independent attorneys, and lodged with the superior court . . . shall rebut any presumptions . . . as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.[105]

Furthermore, California law extends a presumption of validity to all gestational carrier agreements executed in accordance with California Family Code section 7962, meaning the agreement cannot be revoked or rescinded without a court order.[106]

Unlike California law, Connecticut statutes do not contain a presumption of validity provision for gestational carrier agreements. Parties who enter into these agreements in Connecticut are not provided statutory protection as to the validity of their agreements, regardless of whether the agreement complies with the other provisions of Connecticut law.

b. Analysis of Statutory Approaches to Presumption of Validity

Connecticut's lack of presumed validity for gestational carrier agreements provides less protection to parties engaged in these contracts. When the law presumes the validity of these agreements, all parties involved have much more certainty when entering into the contract. If a state presumes these agreements to be valid, surrogate mothers will be less likely to believe they have a right to custody of the child, and intended parents will

105 CAL. FAM. CODE § 7962(f)(1).
106 *Id.* § 7962(i).

have more certainty that when their baby is born, they, and they alone, will have a legal claim to custody.[107]

III. PROPOSED SOLUTION: STATES ENACTING GESTATIONAL CARRIER STATUTES SHOULD EMULATE CALIFORNIA'S STATUTORY SCHEME TO BETTER REGULATE THESE ARRANGEMENTS

In creating the statutes currently in place, the California legislature expressed its desire to provide intended parents, surrogates, and courts with "a clear procedure to follow in creating and enforcing surrogacy agreements and determining parental rights."[108] While Connecticut law does provide some guidance to parties wishing to enter into these agreements, Connecticut's statutory scheme is just one example of how some states may be able to do a better job of comprehensively regulating gestational carrier agreements. Ultimately, states looking to enact statutes for the first time, or to amend their current laws, should more closely follow California's statutory approach in order to provide clearer and more complete guidelines for gestational carrier agreements.

All states should write or amend their gestational surrogacy statutes to include more complete definitions of relevant terms. It is necessary for the legislature to provide definitions for statutory terms so that questions do not arise as to a word's meaning. The Supreme Court has noted the importance of providing definitions for terms given that "statutory definitions control the meaning of statutory words."[109] If a statute provides a definition for a term, courts "must follow that definition, even if it varies from that term's ordinary meaning."[110] Furthermore, "'[a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'"[111] If the legislature fails to provide a definition for a term, it falls on the judiciary to interpret the meaning of those terms. In doing so, courts may turn to dictionaries, uses of the same term in other statutes, the legislative purpose in enacting the statute, and other forms of legislative history.[112] However, if the legislature does provide a definition and meaning of terms, courts must simply look to the statutory definition alone, and the

107 June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 610 (1988).

108 CAL. SENATE JUDICIARY COMM., BILL ANALYSIS FOR CA A.B. 1217: SURROGACY AGREEMENTS 10 (2012), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1217_cfa_20120702_135152_sen_comm.html.

109 Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949).

110 Stenberg v. Carhart, 530 U.S. 914, 942 (2000).

111 Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979) (internal citations omitted).

112 Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2104 (2002).

judiciary does not need to resort to guessing at the legislature's meaning.[113]

As previously mentioned, traditional and gestational surrogacy are different procedures that lead to different legal outcomes and varying policy implications.[114] States should explicitly make clear this important distinction to provide courts and contracting parties with a greater understanding of what kinds of agreements will be permitted. Definitions provided in statutes can often be the deciding factor in a court's interpretation of a case, and statutory definitions have even given rise to political debates.[115]

States should also include specific statutory requirements for the legal representation of parties when creating written gestational carrier agreements. California's provision for each party to be represented by independent legal counsel in creating the agreement ensures that both parties will be on an equal playing field. Many critics of surrogacy argue that women who agree to carry another family's child are driven solely by monetary concerns and are forced by their economic situation to sell their reproductive abilities.[116] Such situations lead to concerns of duress or coercion in contracting.[117] Legal representation will help parties be fully informed of their obligations under the agreement and to understand the legal implications of the surrogacy contract. Requiring parties to be represented by legal counsel ensures that the parties will discuss all essential terms and obligations, which will result in an accurate contractual depiction of each party's wants and needs under the agreement.[118] Furthermore, parties to gestational carrier agreements are often from different states, which necessitates that a trained legal professional research the laws of both states in order to draft agreements that comply with the

113 *Id.*

114 CROCKIN & JONES, *supra* note 19, at 213–14 (explaining that gestational surrogacy agreements are often treated more liberally than traditional surrogacy arrangements).

115 *See* Rosenkranz, *supra* note 112, at 2110 (noting that the Defense of Marriage Act provided a definition for the term "marriage" which only identified a union between a man and a woman as a marriage, giving rise to significant debate and controversy).

116 *See* Kerian, *supra* note 22, at 151–52 (discussing whether women are truly harmed by participating in surrogacy arrangements); Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39, 72–73 (1993); Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1234 (1997).

117 *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 146 n.24 (citing *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300 (1942), which characterizes duress as "feebleness on one side, overpowering strength on the other").

118 Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 103 (2011).

laws of all states that are involved.[119] For all of these reasons, states should implement a statutory provision similar to California's, requiring parties to be represented by independent legal counsel before entering into gestational carrier agreements.

With regard to contract completion and how that relates to the overall timeline for gestational surrogacy, states should require that parties complete the written agreements before beginning any medical procedures. By requiring that parties complete their contract before beginning medical procedures, states can better ensure that parties will memorialize and agree upon their respective obligations and responsibilities *before* a child is conceived.[120] This will eliminate situations where parties engage in litigation to determine parental rights and legal responsibilities after the child is born. By creating valid agreements before the medical processes begin, the best interests of the child are served, as they will have valid, legal parents from the moment they are born.[121]

With regard to the financial aspects of gestational surrogacy, states should also include statutory regulations for how money is to be handled during the gestational carrier process. The cost to intended parents for one child born via gestational surrogacy is often around $100,000.[122] When using a surrogacy agency to facilitate the process, the cost can be even higher.[123] Surrogacy agencies usually require that any funds used for the surrogacy process go through their agency, which means intended parents are entrusting the agency with tens of thousands of dollars.[124] By regulating the financial aspects of surrogacy agreements and providing procedures regarding how funds should be handled through state law, state legislation can help protect intended parents against fraud.

States should also enact initial legislation or amend their current laws to include a provision that gestational carrier

119 Debra E. Guston & William S. Singer, *A Well-Planned Family: How LGBT People Don't Have Children by Accident*, N.J. LAW. MAG., June 2013, at 25, 28.

120 *See* Hakes, *supra* note 118, at 101, 103.

121 Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 267 (2011).

122 Susan Donaldson James, *Infertile Americans Go to India for Gestational Surrogates*, ABC NEWS (Nov. 7, 2013), http://abcnews.go.com/Health/infertile-americans-india-gestational-surrogates/story?id=20808125.

123 When utilizing the services of a large surrogacy agency, the price can often be as much as $120,000. *See* Mike Anderson, *Surrogacy Financing: How to Afford That $60K Price Tag*, U.S. NEWS (Oct. 21, 2013, 2:45 PM), http://money.usnews.com/money/blogs/my-money/2013/10/21/surrogacy-financing-how-to-afford-that-60k-price-tag.

124 *See What to Expect when Working with a Surrogacy Agency*, REPROD. POSSIBILITIES, http://www.reproductivepossibilities.com/parents_expect.cfm (last visited Jan. 10, 2015) (noting that this particular surrogacy agency requires the intended parents to put all funds into an escrow account).

agreements are presumptively valid. Without this presumption, both parties are harmed because the enforceability of the contract is in question.[125] A presumption of validity provides both parties with an understanding that the agreement will be carried through, and this certainty provides legitimacy to the process as a whole.[126] Furthermore, by providing that gestational carrier agreements are presumptively valid, doctors, hospitals, and clinics are protected from potential liability. If a gestational carrier agreement is completed, signed, and notarized, medical professionals know that they are legally permitted to act on the parties' wishes and that they will not be subject to liability for allowing the intended parents to make medical decisions pursuant to the agreement.[127]

Additionally, clearer and more complete regulation of gestational carrier contracts will help keep costs down for intended parents because increased predictability will lead to less litigation and lower attorneys' fees.[128] This will help reduce the number of couples who cannot utilize gestational surrogates because of the prohibitively high cost of these arrangements.[129] Therefore, states should draft their gestational surrogacy laws in the interest of judicial efficiency because the overall impact these arrangements have on courts will be lower if state statutes provide greater predictability. Greater certainty with regard to these contracts will also allow more infertile couples to confidently utilize the services of gestational carriers.

IV. STRIKING THE PERFECT BALANCE: HOW MUCH SPECIFICITY IS TOO MUCH?

While this Comment supports the statutory approach taken by the California legislature, it should be noted that some states have very comprehensive and even more specific gestational surrogacy statutes that provide an even greater level of detail than California's. Illinois, for example, has statutes that provide for how a married surrogate's husband is to be included in the

125 Posner, *supra* note 16, at 23.

126 *See* Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 255 (2010) (arguing that certainty in contracting is essential because "[a]n uncertain outcome makes the [gestational carrier] contract less valuable to both parties").

127 Alyssa James, Note, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 208 (2013).

128 Michelle Ford, Note, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 97 (2008).

129 *Id.*

contract,[130] the right of the surrogate to use a physician of her choosing,[131] and requirements for a woman to even become a surrogate in the first place.[132] However, this statutory scheme is not without its deficiencies. Illinois's statute has effectively removed the judiciary from the surrogacy process entirely, making it possible for intended parents to establish their parentage without a court order.[133] This opens the door for legal issues when intended parents who travel to Illinois to utilize a surrogate return home to their own state, which may or may not have a favorable view of surrogacy. Authorities may question the intended parent's legal custody of their child and, if asked to produce documentation of their parentage, they will not have a court order identifying themselves as the child's legal guardians. As this area of the law develops, it will be important for legislatures and advocates alike to consider the practical implications of statutory schemes, whether they provide minimal or specific amounts of detail.

CONCLUSION

By adopting a statutory model similar to California's, states can better regulate and monitor gestational surrogacy arrangements. Although Connecticut has created a workable statutory framework to enforce gestational surrogacy agreements, more can be done to provide a greater level of certainty and predictability for those who are parties to these contracts. Surrogacy agreements are here to stay, and states should not take a minimalist approach to the regulation of these complex contracts. In working towards creating statutory provisions with predictable practical implications, legislatures

130 *See* 750 ILL. COMP. STAT. 47/25(c)(2) (2014) ("A gestational surrogacy contract shall provide for[,] . . . if the gestational surrogate is married, the express agreement of her husband to: (i) undertake the obligations imposed on the gestational surrogate pursuant to the terms of the gestational surrogacy contract; [and] (ii) surrender custody of the child to the intended parent or parents immediately upon the birth of the child.").

131 *See* 750 ILL. COMP. STAT. 47/25(c)(3) ("A gestational surrogacy contract shall provide for . . . the right of the gestational surrogate to utilize the services of a physician of her choosing, after consultation with the intended parents, to provide her care during the pregnancy.").

132 *See* 750 ILL. COMP. STAT. 47/20. To be eligible to be a gestational carrier under this statute, a woman must be at least twenty-one years old, have given birth to at least one child, completed a medical and mental health evaluation, undergone legal consultation regarding the terms and potential consequences of the contract, and obtained a health insurance policy that will cover major medical expenses throughout the intended pregnancy and for eight weeks after the birth of the child. 750 ILL. COMP. STAT. 47/20(a).

133 *See* 750 ILL. COMP. STAT. 47/35. Under this statutory scheme, "a parent-child relationship shall be established prior to the birth of a child born through gestational surrogacy if . . . the attorneys representing both the gestational surrogate and the intended parent or parents certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements" of the Act. 750 ILL. COMP. STAT. 47/35(a).

will be one step closer towards creating a more uniform state-statutory approach in regulating surrogacy. By including more specific and comprehensive regulations of the contents of gestational carrier contracts and the surrogacy process itself, states can better provide intended parents with certainty and assurance that they will be recognized as the legal parents of their children born through a gestational surrogate.