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FOR LOVE OR MONEY: AN ANALYSIS OF THE CONTRACTUAL REGULATION OF REPRODUCTIVE SURROGACY

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I. INTRODUCTION

On March 27, 1986, Baby M entered the world. She was the intended child of a surrogacy arrangement in which her gestational and genetic mother, Mary Beth Whitehead, agreed to be artificially inseminated with donor semen from the intended father, William Stem, because his wife, Elizabeth Stem, was infertile. The parties executed a surrogacy contract, which entitled Whitehead to a $10,000 fee. After Baby M's birth, however, Whitehead sued for custody of Baby M, and although the Court invalidated the surrogacy contract because it found "the payment of money to a 'surrogate' illegal, perhaps criminal, and potentially degrading to women," it applied a family law framework to award Mr. Stern custody, giving Whitehead only visitation rights.

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The subject of a bizarre New Jersey custody battle that would raise significant questions about reproductive surrogacy, Baby M became the poster child for all that is awful and wonderful about assisted reproduction. Without it, Baby M would not have been born, but because of it, her life would never be the same. A novelty and a legend, Baby M became the test case in the still unresolved debate regarding the legal and ethical implications of reproductive surrogacy.

At the heart of this debate lies the question of whether the American legal system should permit reproductive surrogacy, and if so, how reproductive surrogacy should be regulated. This Article explores that question by discussing the advantages and disadvantages inherent in the contractual regulation of reproductive surrogacy. Contract law provides a plethora of legal protections, making it the dominant mechanism by which Americans regulate important transactions. From the marriage contract to the last will and testament, if a transaction is considered valuable, we generally get it in writing. Why should a surrogacy arrangement be any different? As such, this Article explains the surrogacy process and explores various problems inherent in its contractual regulation as well as ways to address those problems.

II. SURROGACY: WHAT IS REPRODUCTIVE SURROGACY?

Reproductive surrogacy occurs when a woman known as a “surrogate” carries a child for someone else that she will relinquish upon delivery. In traditional surrogacy, the surrogate’s egg is artificially inseminated with the intended father’s sperm, making him the child’s biological and intended father. By contrast, a gestational surrogate carries a child conceived from donated gametes implanted in the surrogate via in vitro fertilization (IVF). In the alternative, a surrogate could be implanted with gametes donated by one or both of the intended parents or gametes from anonymous donors, such that the child is not biologically related to the intended parents or the surrogate.

3. The recommendations in this Article are made only to the extent permissible by applicable law and regulation and not necessarily with regard to extralegal implications.

4. The “intended father” refers to the male who intends to raise the child. “Intended mother” refers to the female who plans to raise the child. Depending on the type of surrogacy, the intended parents may also be the biological parents if they have donated eggs or sperm for implantation into the surrogate.

5. But see N.H. REV. STAT. ANN. § 168-B:17 (2011) (requiring that the intended mother or intended father provide a gamete to be used to impregnate the surrogate and that the intended mother or surrogate provide the ovum).
Although reproductive surrogacy is becoming more common, the practice is still relatively new. By 1986, only an estimated 600 documented reproductive surrogacy arrangements had occurred in the United States. By 1977 and 1992, an estimated 5,000 surrogate births had taken place in the United States. By 2008, the number of surrogate births had skyrocketed to approximately 28,000.

Reproductive surrogacy involves a complex medical process. The egg donor takes a fertility drug for seven to ten days to stimulate egg production. Blood tests are administered to record the egg donor’s relevant hormone levels, and when her ovarian follicles have properly matured, she receives a final human chorionic gonadotropin shot. Approximately thirty-six hours later, she ovulates, and a physician retrieves her eggs.

Between several hours to one day later, the eggs are removed, examined for maturity, and placed in a Petri dish with donor sperm to facilitate fertilization. Approximately twelve hours after fertilization, the embryo divides into two cells; forty-four to seventy-two hours later, it will become an eight-cell embryo that is implanted into the surrogate’s uterus. It is not uncommon to transfer several embryos during an embryo transfer cycle or to

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10. *Id.*

11. *Id.*

12. *Id.*

13. A less common fertilization technique known as gamete intrafallopian transfer (GIFT) involves injecting a mixture of eggs and sperm directly into the surrogate’s fallopian tube and allowing implantation to occur as it would naturally. Physicians also occasionally recommend zygote intrafallopian transfer (ZIFT), which entails removing eggs via aspiration, allowing fertilization to occur in a laboratory, and then implanting the zygote into the surrogate’s fallopian tube. *Id.*
opt to freeze excess embryos in case the first implantation attempt or pregnancy fails.\textsuperscript{14} Where the surrogate is also the egg donor, artificial insemination, or the transfer of sperm directly into the surrogate's reproductive tract, is often utilized.\textsuperscript{15} Prior to insemination, the donor semen is tested for sexually transmitted diseases (STDs) to prevent the transmission of infection.\textsuperscript{16}

After implantation, the surrogate may be asked to reduce multiple pregnancies by aborting one or more fetuses due to abnormalities or because of the many risks inherent in such pregnancies.\textsuperscript{17} Despite the risks, live birth rates of approximately thirty-four to thirty-nine percent per surrogate have been achieved, which is equivalent to or better than the living birth rate of IVF. Higher success rates for pregnancies involving reproductive surrogacy were reported as compared to those involving IVF when an intended mother, who had undergone a hysterectomy, used a surrogate.\textsuperscript{18}

Although scant empirical research on the impact of surrogacy exists, reproductive surrogacy does not appear to be associated with more negative outcomes than traditional births. One study comparing the outcome of pregnancies resulting from gestational surrogacy with those resulting from standard IVF found that the incidence of low birth weight and prematurity did not significantly differ for single-baby pregnancies.\textsuperscript{19} Pregnancy-induced hypertension and bleeding in the third trimester of pregnancy was significantly lower for pregnancies resulting from gestational surrogacy as opposed to standard IVF.\textsuperscript{20} No increased incidence of abnormalities in children born of reproductive surrogacy has been found.\textsuperscript{21} Because the existing research regarding reproductive surrogacy indicates that it is a relatively safe and effective method of procreation, the primary objections lodged against it are typically social, moral, ethical, and legal.

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Brinsden, \textit{supra} note 18, at 487.
III. REGULATING SURROGACY: SHOULD REPRODUCTIVE SURROGACY BE REGULATED?

Given that reproductive surrogacy appears to be a safe and effective procreation alternative that is increasingly utilized, a pressing need for its regulation exists. In the absence of legislative or contractual regulation, the parties to a surrogacy agreement could easily take advantage of one another, and no existing legal recourse would punish or prevent such abuses. The conflict underlying *Johnson v. Calvert* explains why such protections are necessary.

In 1989, Anna Johnson volunteered to be a surrogate for a co-worker, Crispina Calvert, after learning that Crispina was infertile due to a hysterectomy undergone to remove uterine tumors. Anna allegedly assured Crispina’s husband, Mark, that she had been approved as a surrogate, and Anna was unrepresented when the parties executed the surrogacy contract on January 15, 1990. Four days later, an embryo created from Mark’s sperm and Crispina’s egg was successfully implanted in Anna, but her pregnancy was difficult. She was hospitalized for excessive vomiting and dehydration and experienced premature labor.

The physical complications of the pregnancy were exacerbated by the growing tension between Anna and the Calverts. The Calverts felt deceived because Anna had not disclosed her past miscarriages and stillbirths. Anna became angry because the Calverts did not obtain an insurance policy for her. She sent them a letter demanding that they pay her rent and have her phone reconnected or risk forfeiting the baby. Her demand letter stated in pertinent part:

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23. *Id.* at 778.


25. *Id.*

26. *Id.*

27. *Id.* at 35.

28. *Id.*

29. *Id.*
I don’t think you’d want your child jeopardized by living out on the street. I am asking you for help in paying off the final five thousand. There’s only two months left & once the baby is born, my hands are free of this deal. But see, this situation can go two ways. One, you can pay me the entire sum early so I won’t have to live in the streets, or two you can forget about helping me, but calling it a breach of contract & not get the baby! I don’t want it to get this nasty... The next letter you receive will be from my lawyers, unless I hear from you by return mail at the end of next week.

Ultimately, the Calverts sued, and Johnson countersued. The baby was born in the midst of the litigation, and DNA tests proved it was the Calverts’ biological child. The Calverts prevailed because the court “analogized Anna’s relationship with the child to that of a foster mother, whose liberty interest, if any, in her relationship with the foster child is surely more attenuated than that of the natural parents with the child.” Distinguishing surrogacy from baby-selling, the court asserted that it was permissible for Anna to collect a $10,000 fee for the pain and suffering of childbearing and delivery.

On appeal, the reviewing tribunal avoided the issue of the contract’s enforceability and instead looked to the Uniform Parentage Act for guidance, finding the blood test determination of Crispina’s maternity to be dispositive. As the appellate court explained, “[i]n light of Anna’s stipulation that Crispina is genetically related to the child and because of the blood tests excluding [Johnson] from being the natural mother, there is no reason not to uphold the trial court’s determination that Crispina is the natural mother.”

According to the appellate court, no court had ruled that a gestational surrogate has a constitutionally protected right to a relationship with a child to whom she is not biologically related.

_Calvert_ illustrates that gestational surrogacy poses fewer legal risks because the surrogate has no genetic tie to the child and consequently is less

30. _TATE_, _supra_ note 24, at 35.
32. _Id._ at 784.
33. _Id._ at 779-80.
35. _Id._ at 371.
likely to be granted custody if she revokes her consent.\textsuperscript{36} It is also conceivable that, because the surrogate is not the child’s biological mother, she may be less likely to form a maternal bond with the baby during pregnancy, perhaps reducing the risk of revocation. For the same reason, the surrogate’s partner and existing children may also be less prone to feel an emotional tie to the child and are more apt to encourage the surrogate to relinquish the child. As such, a surrogacy contract is more likely to be enforced if a biological link to the intended parent(s) exists. At least one state, New Hampshire, requires such a link.\textsuperscript{37} This will also circumvent the application of baby-selling laws since a parent cannot “buy” what is already his, his biological child. However, the existence of a genetic link, or the lack thereof, should not be determinative, as this would effectively outlaw arrangements in which both intended parents are infertile and use anonymously donated gametes.\textsuperscript{38}

\textit{Calvert} also demonstrates the importance of regulating reproductive surrogacy to prevent extortion. One can easily imagine a slightly different scenario in which a surrogate shows ultrasound pictures of the child to the excited intended parents and then demands that they pay off her credit card bills or else. The intended parents might meet virtually any of the surrogate’s demands, no matter how egregious, to prevent harm to or loss of their child.

In addition to the type of extortion evinced by Anna Johnson’s demand letter, absent overarching legal protections, brokers could also take advantage of intended parents and surrogates by charging exorbitant fees.\textsuperscript{39} Baby M’s intended parents purportedly paid their surrogacy broker $7,500 to arrange the “agreement;” the surrogate earned only $10,000.\textsuperscript{40} Yet, in the

\textsuperscript{36} Under Virginia law, for instance, when a child is born pursuant to a surrogacy contract not approved by a court, the gestational mother is the child’s mother unless the intended mother is also the genetic parent, in which case the intended mother is the mother for legal purposes. If either of the intended parents is a genetic parent of the resulting child, then the intended father is the child’s father. However, if the surrogate is married, her husband is a party to the contract, and they exercise their right to retain custody, then they are the parents. VA. CODE ANN. § 20-158 (2011).

\textsuperscript{37} N.H. REV. STAT. ANN. § 168-B:17 (2011) (“The intended mother or the intended father shall provide a gamete to be used to impregnate the surrogate.”).

\textsuperscript{38} \textit{But see id.}


\textsuperscript{40} \textit{Id.}
absence of statutory or contractual regulation of reproductive surrogacy, or some combination thereof, surrogates and intended parents have limited, if any, legal recourse against dishonest or unethical surrogacy brokers.

IV. PROBLEMS AND SOLUTIONS IN DRAFTING AND ENFORCING SURROGACY CONTRACTS

Although contractual regulation of reproductive surrogacy is workable, albeit complicated and problematic, drafting enforceable surrogacy contracts is no simple task given their unique and sensitive subject matter. It is unclear which standard of performance applies to a surrogacy contract to determine whether it has been breached. Furthermore, the contract’s enforceability could be challenged because, inter alia, the agreement is unconscionable, illegal, or void against public policy.41

A. Selecting a Standard of Performance

Selecting which standard of performance applies in order to analyze whether a breach has occurred is a threshold issue that must be addressed when determining whether a surrogacy contract is enforceable. Selection of this standard hinges upon whether reproductive surrogacy is considered a sale or service, or some combination of the two.

If a surrogacy agreement is considered a contract for a sale, the perfect tender principle will apply, permitting a buyer to reject a good and refuse to pay for it due to any defect, no matter how minor.42 However, if reproductive surrogacy is considered a service, substantial performance governs and permits a party to withhold payment only if a defect in performance materially impairs the essence of the bargain. Substantial performance is especially useful as a check against the opportunistic practice of “fly-specking,” in which idiosyncratic bargainers contract for a service and just before its completion, refuse to pay because of a slight imperfection.43

Characterization of the surrogacy contract also impacts its legality and thus, enforceability. Because baby-selling is prohibited, characterizing a

41. See, e.g., ARIZ. REV. STAT. § 25-218(A) (2011) (“No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.”).


43. See generally ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 67-76 (Matthew Bender, 3d. ed. 2002); Jacob & Youngs v. Kent, 230 N.Y. 239 (1921) (discussing the idiosyncratic bargainer).
surrogacy agreement as a contract for the sale or purchase of a child would render the agreement illegal and unenforceable. Although framing the agreement as one for gestational services might clear that hurdle, a contract that requires performance of an illegal act is void. As such, whether the agreement is for a sale or a service, it will be illegal and unenforceable if it runs afoul of existing law.

Taking these competing considerations into account, surrogacy contracts are more properly considered service contracts. Characterizing them as sales contracts hints of baby-selling and treating children as commodities. It also implies that a child borne of surrogacy could be lawfully rejected for any trivial defect, such as an unattractive birth mark, although court adjudication might prevent this result.

Substantial performance is the more suitable standard because it could reduce the likelihood of idiosyncratic intended parents rejecting the child for immaterial defects, such as eye color. A breach would occur only if a party impaired the essence of the bargain by, for example, aborting the fetus or refusing to relinquish the child. However, because neither standard of performance is ideal, courts and legislatures should consider fashioning an entirely new standard of performance, modeled on substantial performance but tailored to specifically address issues unique to reproductive surrogacy.

B. Fashioning an Adequate Remedy

Fashioning an adequate remedy for breach of a surrogacy contract is equally, if not more, challenging than selecting the proper standard of performance. Specific performance is the appropriate remedy for a unique good for which no equivalent could be substituted through reasonable means. However, specific performance is never ordered as a remedy in service contracts because doing so violates, inter alia, the constitutional prohibition of involuntary servitude.

44. ISS Int’l. Serv. Sys. v. Widmer, 589 S.E.2d 820, 825 (Ga. Ct. App. 2003) (restating the general rule “where an agreement consists of a single promise, based on a single consideration, if either is illegal, the whole contract is void”); see generally Taylor v. Fields, 178 Cal App.3d 653 (1986) (stating that offering sex for money constitutes illegal consideration that would render a contract unenforceable); Greil Bros. Co. v. McLain, 197 Ala. 136, 140 (1916) (“Executory contracts . . . founded on . . . illegal consideration, are void and unenforceable.”).

45. TATE, supra note 24; see also Robin Fox, Babies for Sale, 111 NAT’L AFFAIRS 114-40 (1993).

46. See generally U.S. CONST., amend. XXIII; Woolley v. Embassy Suites, Inc., 227 Cal. App. 3d 1520, 1533 (1st Dist. 1991) (“[I]t is a fundamental rule that specific performance cannot be decreed to enforce a contract for personal services, regardless of
Setting aside these constitutional concerns, specific performance is also unsuitable because it requires the relinquishment of a child absent an evaluation of the child’s and other parties’ best interests. The child is unique, but classifying her as a “good” treats her as a commodity and hints of baby-selling. However, forcing the surrogate to relinquish the child to the intended parents might be suitable if a court determines that relinquishment is in the child’s best interests.

As an alternative to specific performance, expectancy, restitution or reliance damages could be imposed to protect parties’ respective interests. Expectancy damages are based upon a party’s expectation interest, including the loss of value resulting from the other party’s non-performance or any other incidental or consequential losses. If a promise conditioned on an event, such as delivery, is breached, and it is uncertain whether the event would have occurred in the absence of the breach, the injured party may recover damages based on the value of the conditional right as of the breach. However, to recover one must prove the amount lost. Expectancy damages are typically not awarded if they are too speculative and cannot be proven to a reasonable certainty. The calculation of such damages is problematic in the context of reproductive surrogacy because it is difficult, if not impossible, to prove the measure of the loss one incurs when forced to relinquish a child. How does one adequately measure the value of the anticipation of intended parents anxiously awaiting the birth of their child or the heartbreak of a surrogate forced to relinquish a child with whom she has unintentionally bonded? As such, an award of expectancy damages is likely unsuitable in the context of reproductive surrogacy.

Restitution, or the return of expenses paid to the surrogate as of the date of the breach, might be the most suitable remedy for breach of a surrogacy contract and the easiest to calculate. A court could order a breaching surrogate to reimburse the intended parent(s) for various expenses, such as the cost of maternity clothing and medical expenses. Likewise, the intended

which party seeks enforcement . . . [because doing so] would run contrary to the Thirteenth Amendment’s prohibition against involuntary servitude.”).


48. § 347.

49. § 348.

50. § 346(2).

51. § 360.
parent(s) could request reliance damages from the surrogate resulting from expenses incurred in reasonable reliance on her promise to relinquish the child, such as the cost of constructing a nursery or the purchase of baby clothes. Although courts will continue to struggle in fashioning proper remedies for breaches of surrogacy contracts, a well-drafted surrogacy contract might ease that burden by outlining the damages that the parties agree should result from a breach.

In reality, no remedy could fully compensate for the emotional, psychological, and financial damages incurred when a surrogacy arrangement goes awry, but some remedy for breach is necessary to provide an incentive for the parties to fulfill their contractual obligations. Although money damages are inadequate to soothe the heartache of the disappointed intended parent(s) or remorseful surrogate, an imperfect remedy is better than no remedy at all.

C. Consideration

The fact that money is exchanged for a child, or at least for the child’s gestation, is one of the most controversial aspects of reproductive surrogacy. However, in order for a surrogacy contract to be enforceable, valuable consideration must be exchanged. As such, one must determine what constitutes proper consideration in the unique context of surrogacy without running afoul of law, ethics, and public policy.

The payment of a surrogate’s reasonable medical expenses should constitute sufficient valuable consideration to render a surrogacy agreement enforceable. Not only would payment of such fees be less likely to run afoul of existing law, but also the implied covenant of good faith and fair dealing in every contract, which requires each party to enable the other party to perform, justifies payment of the surrogate’s reasonable medical expenses because it enables her to undergo the medical treatment necessary to uphold her end of the deal - delivering a baby - which she might otherwise be unable to afford.

Facilitation and encouragement of good prenatal care is also consistent with public policy. Permitting payment of a surrogate’s reasonable medical expenses advances the best interests of the child, the intended parent(s), and

52. § 71.

53. See, e.g., KAN. STAT. ANN. § 59-2121 (2011) (permitting payment of, inter alia, the birth mother’s and intended child’s actual medical expenses attributable to pregnancy and birth, and the birth mother’s reasonable living expenses during or as a result of the pregnancy).

society by ensuring good prenatal care and possibly discouraging the intended parent(s) from demanding that the surrogate undergo unnecessary but expensive or painful medical tests and procedures. On the other hand, the surrogate has a disincentive to seek frivolous tests, even if she does not pay for them, because such tests and procedures are often time-consuming and painful. Imposing the onerous financial burden of such testing on the surrogate might cause her to refuse to undergo pertinent tests, such as amniocentesis, which detects treatable conditions; such a refusal contravenes the child’s best interests. For example, the contract at issue in *Baby M* required the surrogate to undergo amniocentesis “or similar tests” to detect genetic and congenital defects. Aside from the promise of payment, the possibility that the surrogate may keep the child also incentivizes her receipt and practice of proper prenatal care.

In the alternative, a surrogacy contract could permit minimal compensation above and beyond reasonable medical expenses, unless otherwise prohibited by law. By way of illustration, throughout the pregnancy, the surrogate could also receive a reasonable allowance for maternity clothes, prenatal vitamins, and reasonable pregnancy-related items. For all expenses, documentary written evidence, such as receipts of purchase, should be provided. If permissible, such surrogacy payments should be held in an escrow account until the relinquishment of the child to the intended parent(s). In contemplating the reasonableness of such fees, the parties could take into account foreseeable risks and complications of pregnancy, including death, aneurism, hypertension, vaginal scarring, stretch marks, etc., and the approximately 6,480 hours of “labor” the surrogacy contract may entail.

Compensation may also alleviate paternalistic concerns that reproductive surrogacy necessitates the exploitation of women. Perhaps surrogacy bears no more risk of exploitation than other money-making means, such as exotic

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55. These tests can detect, *inter alia*, certain birth defects and fetal abnormalities.

56. Michigan’s Surrogate Parenting Act defines “compensation” as “a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother or surrogate carrier.” *Mich. Comp. Laws § 722.853 (2011)* (emphasis added); *see also Va. Code Ann. § 20-156 (2011)*. This statute defines “reasonable medical and ancillary costs” as:

T[he costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable post partum period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy.

*Id.*
dancing, posing for pornographic magazines, donating gametes, or serving as a telephone sex operator, and legislatures should focus on ensuring that surrogates are properly paid rather than prohibiting reproductive surrogacy altogether. Though some women choose to become surrogates out of dire financial need rather than completely free choice, denying women the opportunity to choose for themselves may be a greater evil than providing them with contractual and statutory protection once the choice to serve as a surrogate has been made.

On the other hand, providing valuable consideration in addition to reasonable medical expenses may make a surrogacy contract more susceptible to claims that it is an illegal and unenforceable baby-brokering contract. It is well settled that an illegal contract is unenforceable.\textsuperscript{57} State laws prohibit baby-brokering, \textit{i.e.}, the exchange of valuable consideration for adoption.\textsuperscript{58} Similar concerns underlie baby-brokering and reproductive surrogacy, and surrogacy has been described as baby-selling in disguise. However, because legislatures typically did not contemplate reproductive surrogacy when drafting and enacting baby-brokering statutes, such laws are not intended to govern surrogacy. It is improper to flex such laws beyond their intended scope.

Compensation raises another pertinent consideration regarding whether the parties’ relationship is tainted by duress and unequal bargaining power. Such concerns are important because “if a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”\textsuperscript{59} Unequal bargaining power and duress are also likely to trigger allegations of procedural unconscionability on the grounds that the surrogate did not freely

\textsuperscript{57} See supra note 44.

\textsuperscript{58} See, \textit{e.g.}, ALA. CODE § 26-10A-23 (2011) (“No person, organization, group, agency or any legal entity may accept any fee whatsoever for bringing the adopting parent or parents together with the adoptee or the natural parents.”); 720 ILL. COMP. STAT. 525/1 (2011) (“No person and no agency, association, corporation, institution, society, or other organization, except a child welfare agency . . . shall request, receive or accept any compensation or thing of value, directly or indirectly, for providing adoption services . . . .”); KAN. STAT. ANN. § 59-2121 (2011) (“Except as otherwise authorized by law, no person shall request, receive, give or offer to give any consideration in connection with an adoption, or a placement for adoption . . . .”); IOWA CODE § 710.11 (2010) (“A person commits a class ‘C’ felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement.”).

\textsuperscript{59} \textsc{Restatement (Second) of Contracts} § 175 (1979).
enter into the contractual relationship. Unequal bargaining power and financially-induced duress are significant issues because the surrogate is often of lower socioeconomic status than the intended parent(s). For instance, Baby M's surrogate mother was a high school dropout who held numerous low-paying part-time jobs.\textsuperscript{60} Financial problems plagued her family, and they eventually lost their home.\textsuperscript{61} By contrast, Baby M's intended parents held doctorate degrees and enjoyed a combined total income of $89,500 per year.\textsuperscript{62}

\textit{Munoz v. Haro} highlights the dangers of unequal bargaining power in the surrogacy context.\textsuperscript{63} There, Alejandra Munoz discovered that her cousin, Nattie, had manipulated her into serving as a surrogate.\textsuperscript{64} Munoz was an illegal immigrant who left her job as a bank sanitation worker in Mexico to come to America, bringing along the illegitimate child she had had as a teenager.\textsuperscript{65} But unlike Nattie, whose tubal ligation rendered her infertile, Munoz was a young and healthy woman who spoke no English.\textsuperscript{66} In exchange for assistance in crossing the border, Munoz agreed to conceive and gestate a baby that Nattie and her husband, Mario, would raise.\textsuperscript{67} Munoz later contended that she agreed only to be inseminated with Mario's semen, carry the embryo for a few weeks, and then implant it in Nattie.\textsuperscript{68} A month into the pregnancy, Munoz allegedly asked Nattie when they planned to implant the baby into her, and only then did Nattie explain that Munoz would have to carry the baby to term.\textsuperscript{69}

\textsuperscript{60.} Baby M: Traditional Surrogacy Gone Wrong, INFORMATION ON SURROGACY, available at http://www.information-on-surrogacy.com/baby-m.html (last visited Apr. 25, 2011).

\textsuperscript{61.} \textit{In re Baby M}, 537 A.2d 1227, 1249 (N.J. 1988).

\textsuperscript{62.} \textit{Id.}

\textsuperscript{63.} TATE, supra note 24, at 22, 24; see also Munoz v. Haro, No. 572834 (San Diego Super. Ct. 1983).

\textsuperscript{64.} TATE, supra note 24, at 22, 24.

\textsuperscript{65.} \textit{Id.} at 21.

\textsuperscript{66.} \textit{Id.} at 20-21.

\textsuperscript{67.} \textit{Id.} at 21-22.

\textsuperscript{68.} \textit{Id.}

\textsuperscript{69.} \textit{Id.} at 22.
With family present and purportedly pressuring her and already one month pregnant with the child, Munoz signed the agreement given to her by Nattie even though she had no representation present.\textsuperscript{70} Munoz then used Nattie’s name to receive prenatal care and to enter the hospital.\textsuperscript{71} Even then, Munoz thought that she would get the baby in the end because in her own words, “mothers always get the babies.”\textsuperscript{72} When Munoz entered the hospital, staff purportedly demanded that she sign a paper, which unbeknownst to her, was a birth certificate. Because she had signed Nattie’s name, Nattie was able to take the baby home from the hospital.\textsuperscript{73} She refused to let Munoz see the child, at which time Munoz sought legal counsel and sued.\textsuperscript{74}

The court relied on the constitutional right to procreate embedded in the right to privacy to declare the surrogate parenting contract not void and claim that people have a “constitutional right to enter into such contracts.”\textsuperscript{75} However, as in Baby M, the court focused on family law, not contractual, issues.\textsuperscript{76} The Haros ultimately retained custody, but Munoz received visitation.\textsuperscript{77}

Because payment of significant expenses or fees can be potentially coercive, a woman’s decision to serve as a surrogate made while she is in dire financial straits might make the surrogacy contract more susceptible to allegations of undue influence. Money could be used as leverage to prevent the surrogate from revoking her consent, especially if the surrogate had spent part of their fee or indebted herself to others in anticipation of receiving it. Because it may be difficult, if not impossible, to return the monies paid, the surrogate might have no choice but to relinquish the child, even if she no longer wants to do so. Were the surrogate to breach the

\begin{thebibliography}{99}
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\bibitem{Id2011} Id. at 22-23.

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\bibitem{Id2011d} Id.

\bibitem{Id2011e} Id. at 24.

\bibitem{Tate2011b} Tate, supra note 24; see also In re Baby M., 525 A.2d 1128, 1167 (N.J. Super. Ct. Ch. Div. 1987).

\bibitem{Tate2011c} Tate, supra note 24, at 25.
\end{thebibliography}
contract, a court could order pecuniary damages; as such, a surrogate might be forced to surrender the child because she cannot afford to pay the damages. Although this application of a contractual framework regulates the revocation of consent and provides added security for the intended parent(s), it can constitute economic coercion of the surrogate who consents not out of volition, but because her potential indebtedness gives her no other choice. Of course, this illustration is less applicable to situations in which the surrogate and the intended parent(s) are of equal socioeconomic status, but those situations are uncommon and typically involve intra-familial or otherwise purely altruistic surrogacy.

D. Substantive Unconscionability

Surrogacy contracts are also susceptible to challenges of substantive unconscionability. If a contractual term is substantively unconscionable at the time of contract formation, a court can refuse to enforce the entire contract, only enforce portions of the contract not deemed unconscionable, or limit application of the contract so as to avoid an unconscionable result. The surrogacy agreement at issue in Baby M illustrates the risk of substantive unconscionability posed by carelessly drafted surrogacy contracts. The surrogacy agreement at issue in Baby M stated in pertinent part:

Surrogate . . . understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to . . . Natural Father, immediately upon the birth of the child; and terminate all parental rights to said child pursuant to this agreement.

No surrogate can realistically promise not to form a bond with the child she bears; it is likely beyond her control. Because this provision demanded the surrogate perform a task for which she could not reasonably guarantee performance, an argument exists that the clause was substantively unconscionable. Surrogacy contracts should be carefully drafted to avoid such substantive unconscionability.

78. Restatement (Second) of Contracts § 208 (1979).

E. Procedural Unconscionability and Informed Consent

Surrogacy contracts are also often attacked on grounds of procedural unconscionability because, *inter alia*, to be fully enforceable, each party must give his or her voluntary, informed consent. As such, parties entering surrogacy agreements should fully disclose and exchange relevant information prior to conception and contract execution.

1. Mandatory Evaluations and Full Disclosure of Relevant Information

*Baby M* demonstrates the importance of full disclosure. There, the intended parents knew little about the surrogate’s past.Sources later alleged that the surrogate had worked as a go-go dancer, domestic abuse tainted her marriage, and her husband had a history of alcoholism and drunk driving. The agency that paired Baby M’s intended parents with her surrogate also failed to disclose the surrogate’s psychiatric evaluation to the intended parents despite the psychiatrist’s concern that the surrogate might be unwilling to relinquish the child. Specifically, the psychiatrist noted:

[The surrogate] is sincere in her plan to become a surrogate mother and [ ] she has thought extensively about the plan. However, I do have some concern about her tendency to deny feelings and think it would be important to explore with her in somewhat more depth whether she will be able to relinquish the child.

Had full disclosure of the evaluation and the surrogate’s history been required before entering the agreement, the affected parties may have made a more informed and perhaps better choice.

As such, parties affected by a surrogacy agreement, including the intended parent(s), the surrogate, and her partner, should be required to undergo background checks, psychiatric evaluations, and home studies prior to conception and contract execution, and the results should be provided to parties upon request. The agency or broker facilitating the surrogacy arrangement should be required to confidentially maintain these results for at least ten years after the date of contract execution. This requirement serves


81. *Id.*

82. *Id.*

83. *Id.*

84. See, e.g., COLO. REV. STAT. § 19-4-106 (2010) (“All papers and records pertaining to the assisted reproduction, whether part of the permanent record of a court or
the child's best interests because the agency or broker should, to the extent permissible by law, reject a potential surrogate or intended parent deemed mentally unstable, providing screening similar to that performed by an adoption agency. In addition, the evaluation could prevent a situation akin to Baby M's by excluding surrogates who show a high probability of revoking their consent or lapsing into a serious post-relinquishment depression. The surrogate may decide that she does not want to bear a child for a man whom a psychiatrist has found to have abusive tendencies. The intended parent(s) could avoid selecting a surrogate with a high likelihood of revoking her consent.

2. **Mandatory STD Testing and Disclosure of Results**

To prevent the spread of infectious diseases and related but preventable birth defects, the surrogacy agreement should also require gamete donors and the surrogate to undergo physical and gynecological exams before contract execution and conception. Gamete donors and the surrogate should be tested for sexually transmitted diseases (STDs) and HIV/AIDS prior to contract execution and again before insemination and pregnancy, in case a party has contracted an STD in the interim. To prevent the spread of STDs and the transmission of birth defects or other health complications to the child, STD carriers and individuals with AIDS or HIV should not be permitted to serve as surrogates or gamete donors.

3. **Post-Birth Revocation Period and Birth Certificate**

In order to avoid the claim that a surrogate's pre-birth waiver of consent is not dispositive because it was not fully informed, some states require a post-delivery grace period during which the gestational mother can consent again in writing and/or her consent is presumed if she does not revoke her earlier consent. As such, a surrogacy contract may not fully satisfy the criterion of

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85. See generally AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, GONORRhea, Chlamydia, and Syphilis (Jan. 2011), available at http://www.acog.org/publications/patient_education/bp071.cfm (explaining that gonorrhea, chlamydia, and syphilis can be passed from mother to baby and can cause, *inter alia*, a miscarriage, eye infection or blindness, birth defects, pneumonia, and death.) [hereinafter GONORRhea]; see also N.H. REV. STAT. ANN. § 168-B:17 (2011) (requiring that the intended mother or intended father provide a gamete to be used to impregnate the surrogate and that the intended mother or surrogate provide the ovum).

86. GONORRhea, supra note 85; N.H. REV. STAT. ANN. § 168-B:17.
informed consent unless it allows for a post-delivery grace period for revocation because the surrogate’s agreement to relinquish her parental rights upon delivery constitutes a pre-birth waiver of consent, which is void in some states. \(^8^7\) Where pre-birth waivers of consent are unenforceable, a surrogacy agreement should provide for a forty-eight hour post-delivery grace period for revocation of consent. This provision will enable the intended parent(s) to have the security of knowing that after a requisite period of time, their legal rights to the child are cemented.

The grace period for revocation should be short enough to prevent trauma to the child from bonding for a lengthy period of time with one party, only to be separated from them when the surrogate later revokes her consent. Yet the grace period should be sufficient to provide the surrogate ample time to recover her capacity to consent after delivery and to make an informed, voluntary decision to go through with the agreement. For example, in \textit{RR v. MH}, a surrogate changed her mind in the sixth month of pregnancy, and a Massachusetts court rejected the contract on public policy grounds, pointing to her pre-birth consent and the payment of a fee by the intended parents as the basis for its decision. \(^8^8\) The court indicated that, had no compensation beyond pregnancy related expenses been paid and if the surrogate had been bound only by a post-birth consent, then the agreement may have been enforceable. \(^8^9\) In \textit{A.H.W. v. G.H.B.}, a court voided a pre-birth termination of the surrogate’s parental rights, as requested by the surrogate, but the biological, intended parents’ names could go on the birth certificate after a seventy-two hour waiting period. \(^9^0\)

Unfortunately, requiring a grace period of revocation and a post-delivery waiver of consent could increase the intended parents’ insecurity because they will not know whether the surrogate will relinquish the child. Yet they, too, could give their informed consent to the arrangement by having the surrogate’s rights, including her right to revoke her consent during the grace period, adequately explained to them by an attorney before executing a surrogacy agreement. This notice might allow the intended parents to maintain disconnectedness from the pregnancy until delivery, perhaps

\(^{8^7}\) \textit{Compare} \text{IND. CODE ANN.} \S 31-19-9-2 (LexisNexis 2011) (stating that consent to adoption may be executed at any time after the birth of the child and prohibiting pre-birth consent to adoption), \textit{with} \text{Code of Ala.} \S 26-10A-12 (2011) (permitting pre-birth consent if signed and confirmed before a judge of probate).

\(^{8^8}\) \text{RR v. MH, 689 N.E.2d 790, 791 (Mass. 1998).}

\(^{8^9}\) \textit{Id.} at 797.

mitigating the heartache and disappointment they might endure if the surrogate revoked her consent.

A related concern is the emotional and psychological impact on a surrogate caused by relinquishing a child. In the surrogate's anxious post-relinquishment state of mind, she might lack the necessary mental capacity to make an enforceable post-delivery decision to terminate her parental rights. As such, although a post-birth ratification procedure after the end of a grace period for revocation may be necessary to satisfy the informed consent requirement and make the surrogacy contract enforceable, such requirements will not entirely resolve whether the consent was given entirely free of coercion or duress.

Despite the forty-eight hour period revocation grace period, the child's birth certificate should reflect, either at the outset or at the conclusion of the forty-eight hour period, that the intended parent(s) are the child's legal parent(s), and the child should be released into their custody forty-eight hours after delivery. Otherwise, the surrogate could obtain access to the child. If the surrogate is permitted to take the child home during the forty-eight hour grace period for revocation because she is the parent listed on the birth certificate, then she may be more likely to revoke her consent due to the bonding that could occur in the interim as occurred in Baby M. Baby M's birth certificate listed the surrogate as Baby M's mother, so the hospital released Baby M to the surrogate and her husband. The couple became attached to Baby M and ultimately, refused to relinquish her.

4. Selecting a Surrogate

To better ensure that the surrogate is capable of giving her informed consent, select a surrogate who is at least twenty-one years of age and who

91. See, e.g., N.H. Rev. Stat. Ann. § 5-C:29 (2011) (stating that if the surrogate is married, a three party affidavit of paternity must be prepared showing the natural father as the child's father, but if she is not married, the birth certificate will only show how the natural father as the child's father after an affidavit of paternity has been executed); Va. Code Ann. § 20-158 (2011) (explaining that generally, “[t]he husband of the gestational mother of a child is the child’s father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child’s birth and in which it is determined that he did not consent to the performance of assisted conception.”).


93. Id.
has already borne and/or relinquished a child because this may make the contract less susceptible to informed consent challenges since it better guarantees that the surrogate is more aware of the sacrifice she is making, the potential of gestational bonding, the feelings of guilt, depression, and anxiety that may accompany the loss of a child, and the other psychological and emotional upheavals that she could experience as a result of the arrangement.\textsuperscript{94}

For similar reasons, choose a surrogate who is married with children or who has experienced a pregnancy or adoption to the extent doing so does not run afoul of existing law.\textsuperscript{95} This aims to better ensure that surrogates are informed of the emotional pain of giving up a child, but it is unlikely to decrease the number of women currently interested in becoming surrogates. A married surrogate has a partner and perhaps existing children to offset the potential emotional loss caused by relinquishing a child, which may reduce the risk that she will revoke her consent or suffer adverse emotional consequences following relinquishment of the child. She is also likelier to have financial support, so she may be less susceptible to financial coercion.

This reasoning is persuasive but not foolproof. After all, while a surrogate might know what it was like to give up a particular child or to experience a particular pregnancy, she has no idea what it will be like to give up a different child or to experience another pregnancy under distinguishable circumstances. No matter a surrogate's experience or wisdom, nothing can adequately inform her about what to expect, except the pregnancy and birth. Depending on one's definition of "informed consent," an argument exists that only after delivery a surrogate can give her informed consent.

5. \textit{Mandatory Counseling}

Another pertinent issue is lack of informed consent by participants who, absent statutory or contractual mandates, may have no legal recourse if they do not receive adequate counseling on reproductive surrogacy or accurate and sufficient background information on each participant. The potentially tremendous impact of reproductive surrogacy on all affected parties supports the notion that they be required to receive counseling before and after the birth. This lack of preparedness could increase their susceptibility to emotional and legal issues resulting from foreseeable but unanticipated

\textsuperscript{94} See \textsc{N.H. Rev. Stat. Ann.} § 168-B:17 (2011) (requiring all parties to a surrogacy contract to be at least twenty-one years of age and stating that "[n]o woman may be a surrogate, unless she has a documented history of at least one pregnancy and viable delivery.").

\textsuperscript{95} Perhaps for similar reasons, Virginia requires the intended parents to be a married husband and wife. \textsc{Va. Code Ann.} § 20-156 (2011).
complications, including the divorce of the intended parents, multiple births, who retains physical custody of the intended child during the pendency of a contractual dispute and in the absence of a court order, an abnormal fetus, a surrogate's spontaneous abortion, or revocation of consent. The absence of legal protections may also exacerbate the parties' anxiety as to whether, *inter alia*, the surrogate will follow the physician's recommendations during the pregnancy or revoke her consent.

Counseling should also be required for all affected parties before signing the contract, before conception, during the pregnancy, and for one year after delivery. "Affected parties" include the intended parent(s), the surrogate, and if they exist, the surrogate's partner, and the existing children of the intended parent(s) and/or the surrogate. Affected parties should see a counselor to obtain advice about surrogacy. Topics to be discussed with the intended parent(s) should include but are not limited to: alternative treatment options, including adoption or being childless; the full cost of treatment; practical difficulties of gestational surrogacy, including failed attempts and legal uncertainty; medical, psychological, and emotional risks, both long and short-term, to the intended parent(s), the surrogate, her partner and children, and the intended child; the implications of multiple pregnancies and selective abortion; the risks and implications of having a miscarriage, stillbirth, or a child with birth defects, abnormalities, or disabilities; the degree of involvement the surrogate may wish to have with the child; the legal risks of revocation of consent; social stigma; and the means to be used to inform child about its origin. Similarly, topics to be discussed with the surrogate should include but not be limited to: all of the aforementioned issues discussed with the intended parent(s); implications of IVF and delivery, including a Caesarian section; potential feelings of guilt, bereavement, jealousy, and depression at giving up the child; the effect on

96. See, e.g., 2011 N.M. ADV. LEGIS. SERV. 124 (contemplating the impact of divorce and death in the surrogacy context); MICH. COMP. LAWS § 722.861 (2011) (stating that if a contractual dispute arises, the party having physical custody of the intended child at the onset of the dispute may retain physical custody until a court orders otherwise).

Any child resulting from insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that either party filed for a divorce or annulment during the ten-month period immediately preceding the birth. Any person who is a party to an action for divorce or annulment commenced by filing before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the filing can reasonably be communicated to the physician performing the procedure or (ii) the person consents in writing to be a parent, whether the writing was executed before or after the implantation.

the surrogate’s existing children and how she will explain the arrangement to them; the full measure of the expenses that she will be able to receive under law; and her relevant constitutional rights, including her right to abort.

Once the counseling sessions are completed, the parties’ combined medical and counseling report must be reviewed by an ethics committee or other relevant oversight body at the surrogacy center or medical facility performing the procedure, to the extent one is available. This reviewing body should make recommendations regarding whether the arrangement should proceed, which should generally be followed by the clinic, broker, and parties.97

The surrogate’s partner and existing children should also undergo counseling since unfortunately, their interests and emotions are often overlooked and deemphasized. The partner is effectively condoning or facilitating his or her partner’s participation in what some might call conceptual adultery, which could compromise the relationship. The partner’s loved ones know that the surrogate is carrying another person’s child, and it is not unreasonable to assume that, as with ordinary adultery, that situation might be emotionally difficult. During the pregnancy, the surrogate’s partner might also unintentionally bond with the child, making him or her hesitant to relinquish the child.

Reproductive surrogacy could also adversely impact the surrogate’s existing children. Anecdotal evidence supports this conclusion. For example, Baby M’s surrogate mother had two existing children, both of whom allegedly became attached to Baby M and were upset when their visitation rights with her ended.98 If courts and legislatures grapple with the complexities of reproductive surrogacy, imagine the confusion and turmoil the practice would have upon a child who sees her perceived sibling given away to pay off the mortgage, buy a new car, or perhaps worse, enroll her in private school.

In considering the scope of informed consent, the interests of the surrogate’s partner, to the extent one exists, warrant at least some consideration. If the surrogate is married, her partner must typically sign a non-consent form, depending on applicable state law;99 otherwise, the

97. See infra Section III.


99. See, e.g., ALA. CODE § 26-17-201 (2011); ARIZ. REV. STAT. § 25-218(C) (2011) ("If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable."); CAL. FAM. CODE § 7450 (2011) (stating that a child born to woman cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the
partner may be presumed to be the child’s natural parent, vesting the partner with financial responsibilities to the child and requiring the partner to terminate his or her parental rights before adoption of the intended child can proceed. In Baby M, for instance, the surrogate’s husband signed a surrogate parenting agreement so that the intended father would be deemed Baby M’s natural father and the surrogate’s husband would not be responsible for child support.

For this reason, surrogacy contracts should require the surrogate’s partner, if one exists, to sign a “Refusal to Consent” form prior to conception and again, if necessary, upon delivery. The surrogate’s marriage, civil union, or registered domestic partnership during pregnancy or after delivery should not affect the contract or court order’s validity, and the partner should not be deemed a party to the contract. Signing this form will rebut applicable statutory presumptions so that the intended parents may avoid lengthy, expensive adoption proceedings to establish parentage and to gain or retain custody of the intended child.

6. Independent Representation

Before executing a surrogacy agreement, parties should be strongly encouraged to retain independent legal counsel. The surrogacy agency should provide independent legal counsel to an indigent surrogate. In all other circumstances, independent counsel for both parties is strongly recommended. A rebuttable presumption against the enforcement of surrogacy contracts created when only one of the parties had independent counsel may exist. Where language barriers exist, a translator should be provided to the non-English speaking party.

In re Adoption of Matthew B illustrates the significance of independent representation. There, Nancy B. became a surrogate to enjoy a positive birth experience absent the ensuing responsibility of raising a child as a single mother. The surrogacy broker hired an independent attorney to explain the surrogacy contract to Nancy, and she reviewed the agreement with the

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100. Baby M, 537 A.2d at 1265.

attorney in a three and a half hour meeting during which he made contract additions in Nancy’s interest. However, Nancy later claimed that she had not given her informed consent because she had no idea what she would be sacrificing. She stayed silent during the eight months between the contract signing and the conception, and after Matthew was born, she signed the release form for adoption. The intended parents filed the requisite documents for proof of paternity and stepparent adoption and maintained a positive relationship with Nancy; Nancy even threw the intended mother a birthday party, giving her the original copy of the signed consent form as a present.

However, only months after the adoption, Nancy appeared on television and in the newspaper, announcing her intent to seek custody of Matthew. She sued to withdraw her consent and to vacate the judgment of paternity, but both motions were denied. The court rejected her claim that she did not know her rights by pointing to her long meeting with independent counsel, the explicit language in her contract, and her conduct during and after the birth, which provided clear evidence that she did understand the consequences of signing the consent form. The court also rejected Nancy’s argument that the contract was illegal primarily because she had failed to make it in the original pleading. The court further noted that even if the contract was illegal, the parties had assumed the risk that it might be unenforceable. As the court explained:

[E]ven if Nancy were in a position to raise the issue, and even were we to find the contract illegal, we would not automatically void the consent. The effect of illegality on a transaction depends on the facts

102. Id. at 1252.
103. Id. at 1255-56.
104. Id. at 1252.
105. Id. at 1252-53.
106. Id. at 1251.
108. Id. at 1260.
109. Id. at 1255.
110. Id. at 1256.
and equities of the particular case . . . including 'the kind and degree of illegality involved, the public policy or policies to be served, whether those public policies will best be served by enforcing the agreement or denying enforcement and the relative culpability and equities of the parties' . . . . Accordingly, even if were to assume that the parties' conduct was illegal, the state's paramount interest in Matthew's welfare overrides its interest in 'deterring illegal conduct.'

Requiring each party to have independent counsel present at the contract negotiation and signing may unduly burden the parties, especially the surrogate who is often of lower socioeconomic status than the intended parent(s). However, some attorneys might provide such representation on a pro bono basis. Infertility centers with sufficient financial means should provide free legal counsel to indigent surrogates in the event that they are unable to provide an attorney. This would not only protect parties' interests but also could decrease the success of surrogates' claims of coercion, duress, undue influence, and unequal bargaining power. Instead, each party would have equal representation and could voice his or her concerns about the contract. Further, counsel for the surrogate could reduce the danger that the counsel for the affluent party will manipulate the presumptively less sophisticated surrogate; the surrogate's attorney could also advise her to sign or to negotiate for different contractual terms.

7. Foreseeable Consequences

To better ensure that the parties have given their informed consent, the surrogacy agreement should contemplate the vast array of foreseeable consequences that could result. In re Marriage of Moschetta demonstrates why. In 1989 Elvira Jordan was inseminated with Robert Moschetta's sperm to conceive a child for him and his wife, Cynthia, but during the second trimester, Robert asked Cynthia for a divorce. The Moschettas never told Elvira of their marital difficulties until after their daughter was born. When Elvira learned of the Moschettas' impending divorce, she refused to relinquish her parental rights; she had not contracted to bear a child for a divorcing, dysfunctional couple. Elvira only allowed the

111. Id.
113. Id. at 1223.
114. Id.
115. Id.
Moschettas to take the child home if they agreed to stay together, which they did.116 Six months later, however, Robert took the child and left Cynthia.117 A nasty custody battle ensued, in which a court held that Cynthia had no cognizable custody claim to the child because she was neither her biological nor gestational mother.118 Moschetta undermined the importance of the intended mother and raised the question of whether the potential divorce should have been disclosed to Elvira during the first trimester so she could have chosen to abort the pregnancy or revoke her consent.119

McDonald v. McDonald provides another poignant illustration of the impact of divorce in the context of assisted reproduction.120 There, an ex-husband claimed that he was the only natural parent of children borne of his sperm and a donated egg, which were implanted and carried to term by his ex-wife.121 The court declared the wife to be the natural mother of the children and allowed her to sue for custody.122 In re Marriage Buzzanca v. Buzzanca involves a couple procreating via reproductive surrogacy who separated during the pregnancy.123 After their divorce, the husband disclaimed responsibility for the child, refusing to pay child support.124 The surrogate did not want the child, but the court rejected the notion that the baby had no legal parents.125 Rather, it ruled that the intended parents were the legal parents responsible for the child's care and support and forced the

116. Id.
117. Id.
119. See, e.g., COLO. REV. STAT. 19-4-106 (7) (a) (2010) (“If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child.”).
121. Id.
122. Id. at 12.
124. Id.
125. Id. at 1425.
ex-husband to pay child support because he was analogous to a man who consents to his wife's artificial insemination and is therefore, presumed to be the baby's father. In *Soos v. Superior Court*, the court rejected an intended father's allegation that his wife had custody rights to children borne of eggs she donated to the surrogate. The court declared a state law, which provided that the surrogate is the child's legal mother, to be unconstitutional on equal protection grounds as applied to a biological mother.

Case law provides no clear answer as to who retains custody of the intended child in the event of a party's separation or divorce during the pregnancy or after the birth. This lack of legal clarity makes it all the more important that these issues be discussed before conception or the execution of a contract by the parties to the surrogacy, and to the extent possible, reflected therein.

For the same reasons, the surrogacy contract should also anticipate multiple births and selective reduction. Fertility drugs, which are administered to egg donors to stimulate egg production, substantially increase the likelihood of multiple pregnancies. As such, couples utilizing assisted reproduction are commonly faced with the choice to selectively abort one or more fetuses due to abnormalities or because multiple pregnancies pose many associated risks. Furthermore, in some situations, parties to a surrogacy agreement are faced with a difficult situation when the intended parents contract for one child, but the surrogate becomes pregnant with multiple children whom the intended parents do not want. Selective abortion also raises the question of whether aborted or extra embryos should be donated to research.

Likewise, the surrogacy agreement should anticipate miscarriage(s) and/or stillbirth(s). Miscarriages and stillbirths are not uncommon, often due to no fault of the gestational mother. As such, it seems unfair to penalize the surrogate for a miscarriage or stillbirth absent proof that her high-risk behavior caused the event. Such a clause is ill-advised because it increases the likelihood that the contract will be construed as violating baby-selling statutes and treating children as commodities. One solution is to pay the surrogate a *pro rata* apportionment of her fees for services rendered based on the duration of the pregnancy. For example, if her entire fee is $9,000, and she miscarry in the second month, she would receive $2,000. This could undercut a claim that the surrogacy contract is for a sale, not

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126. *Id.* at 1426-27.


128. *Id.* at 1360.
gestational services. By contrast, providing that no compensation be paid if the surrogate miscarries suggests that payment is for the baby, not the gestational services rendered.

The surrogacy contract should similarly contemplate the consequences of fetal abnormalities. Given recent advances in genetic technology, parents increasingly test fetuses for genetic abnormalities. A surrogacy agreement should address the issue of whether the intended parents will request the surrogate to undergo any genetic testing as well as what action the couple will take in the event the child is diagnosed with a genetic abnormality. The contract at issue in Baby M left unanswered questions that have become pertinent in subsequent surrogacy cases, such as who bears legal responsibility for a child born with genetic or birth defects. Are the intended parents liable for the child’s care even if they did not contribute the bad genes or because the birth defects result from the surrogate’s improper prenatal care, such as drinking or smoking during the pregnancy?

A comprehensive surrogacy agreement should address such issues as Stiver v. Parker demonstrates. In 1983, Judy Stiver agreed to serve as a surrogate for the Malahoffs, but when she gave birth to a mentally handicapped infant boy, neither she nor the intended couple wanted the child. Blood tests established that Stiver’s husband was the child’s father, yet the Malahoffs sued the Stivers for not maintaining abstinence during the attempted insemination period as required. The Stivers sued their doctor, lawyer, and psychiatrist for not advising them about the timing of intercourse and also sued Malohoff for violating their privacy by making the incident public. The Stivers also unsuccessfully alleged that the handicap was due to a virus carried by Malahoff’s sperm.

The surrogacy agreement should also address other miscellaneous foreseeable consequences, including but not limited to the death of the intended parent(s) or surrogate during the pregnancy or upon delivery, an


130. Id.

131. Id. at 264.

132. Id. at 263-64.

133. See, e.g., Colo. Rev. Stat. § 19-4-106 (8) (2010) (“If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.”); 2011 N.M. Adv. Legis. Serv. 124 (addressing issues, including the death of an intended parent(s) during the pregnancy); Va. Code Ann. § 20-158 (2011).
embryo mix-up resulting from fertility center error, health complications of the intended parent(s) or surrogate, the arrest, indictment or imprisonment of the surrogate, her partner, or the intended parent(s), and the financial instability of the intended parent(s).

In addition to foreseeable consequences, the surrogacy agreement should contemplate changed conditions. As with pre-nuptial agreements, the "changed conditions" provision may serve as a catch-all that will encompass unanticipated contingencies. Perhaps as in the pre-nuptial context, the parties may circumvent the contract's enforcement by arguing that circumstances have changed so dramatically since they executed the agreement that enforcing it under present circumstances would be unconscionable.

8. Abortion

Although the United States Supreme Court has not squarely resolved the issue, a surrogacy agreement that does not allow a traditional surrogate to abort pursuant to Roe and its progeny is likely violative of the surrogate’s constitutional rights and as such, is unenforceable. For example, the surrogacy contract at issue in Baby M did not permit the surrogate to abort unless the physician deemed it necessary to protect the surrogate’s physical health or if the child is physiologically abnormal.\(^1\)\(^2\)\(^3\) If she refused to abort, the intended father’s obligations ceased, “except as to obligations of paternity imposed by statute.”\(^4\)\(^5\)

A surrogacy agreement should envision the implications of abortion whether as a result of fetal abnormalities or the surrogate’s exercise of her constitutional rights. Such a contract might permit the surrogate to abort the fetus, as permissible under law, so long as she reimburses the intended parent(s) for all fees provided to her until that time, unless the parties mutually consent to the abortion because, for instance, the child suffers from debilitating birth defects. However, the surrogate could be liable for intentional infliction of emotional distress claims on the part of the intended parent(s) if she chooses to abort, but a full discussion of the legal liability arising from such an abortion exceeds the scope of this Article.

F. Void against Public Policy

Because a contract is unenforceable if it is void against public policy, public policy concerns pose yet another challenge to the enforceability of


135. Id. (citing the surrogate parenting agreement).
Survey evidence regarding reproductive surrogacy illuminates public sentiment regarding contractual regulation of the practice. One poll revealed that seventy percent of Americans believe that the contract at issue in Baby M should have been enforced. Less than twenty percent of participants felt that Baby M should be left with her surrogate mother, contract or no contract. The poll suggests that public opinion cut against the court’s refusal to enforce the surrogacy contract.

Reproductive surrogacy raises public policy concerns because it allegedly disrupts family ties, offends ethical sensibilities, condones the treatment of children as commodities, leads to the exploitation of women, and could negatively impact affected parties, especially the child. Although little or no empirical research regarding the long-term impact of reproductive surrogacy on the intended child exists, it is reasonable to assume that the intended child could feel rejected by her surrogate mother or suffer psychological effects, which are not in her best interests. On the other hand, absent surrogacy, she would not have existed, so perhaps her existence trumps the impact the unique circumstances of her conception might cause. Furthermore, terminating parental rights and relinquishing a child for adoption are permissible even though relinquished children may experience feelings of rejection and sometimes search for their biological parents.

In the absence of clear empirical proof regarding the impact of surrogacy, one can only speculate as to whether the circumstances unique to reproductive surrogacy, including the exchange of money, could increase or decrease the psychological impact of reproductive surrogacy on the intended child. On the other hand, perhaps a child’s knowledge of his intended parents’ willingness to go to extremes and expend substantial financial resources to bring him into existence might counter any feelings of rejection.

Although reproductive surrogacy is commonly criticized as perverting traditional notions of “family” and disrupting family ties, which contravenes public policy and is not in the child’s best interests, at least some survey evidence suggests otherwise. A 2004 study found that intended parents who conceived via reproductive surrogacy experience greater psychological well-being and adaptation to parenthood than counterparts who conceived through natural, planned pregnancies. The study also found that intended

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137. Field, supra note 39.

138. Id.

parents experienced lower levels of stress and showed greater warmth and attachment to their infants in the first year of life.\textsuperscript{140} Infant temperament did not appear to significantly vary based on the manner of procreation, and there was no difference in the level of parental expressed warmth or emotional involvement according to the presence or absence of a genetic link.\textsuperscript{141} Surrogacy arrangements in which a sibling or friend served as the surrogate had more positive outcomes than ones involving strangers, which could be the result of a reduction in the social stigma.\textsuperscript{142}

The authors of the 2004 study discuss several explanations for their findings. They suggest that parents who resort to reproductive surrogacy have a greater desire to be parents, so it is unsurprising that they greatly invest in their children.\textsuperscript{143} The authors hypothesize that parents who procreate via reproductive surrogacy may be less likely to have psychological problems at the outset of the surrogacy process and are, thus, less susceptible to stress.\textsuperscript{144} In addition, the older in age the mothers who use surrogacy taken together with the smaller number of children in their families may explain why they are typically more emotionally involved with their children than younger mothers who conceive naturally.\textsuperscript{145}

The potentially adverse impact of reproductive surrogacy on the intended mother is another public policy concern, but little empirical research has been done in this area. At least some evidence indicates that reproductive surrogacy may psychologically strain the intended mother.\textsuperscript{146} As a result, she may deliberately avoid bonding with the intended child due to the uncertainty of the enforceability of the surrogacy contract; this errs in favor of stronger contractual protections.\textsuperscript{147} Especially when artificial

\textsuperscript{140.} Id.

\textsuperscript{141.} Id. at 408-09.

\textsuperscript{142.} Id.

\textsuperscript{143.} Id. at 408.

\textsuperscript{144.} Golombok et al., supra note 139, at 408.

\textsuperscript{145.} Id.

\textsuperscript{146.} Id.

\textsuperscript{147.} Id.

be noted, however, that the 2004 study examined parent-child relationships before the manner of conception was revealed to the child. Id. at 408.
insemination is used to impregnate a younger, fertile surrogate, an older, infertile intended mother could experience jealousy, inadequacy, guilt, and resentment, compromising her marriage and poisoning her relationship with the surrogate or even the child.\textsuperscript{148} Stigma, prejudice, and other expressions of disapproval, especially from family and friends, could intensify such feelings.\textsuperscript{149} To complicate matters, intended parents that utilize reproductive surrogacy must explain the origin of their child to others, because unlike other forms of assisted reproduction, which can be kept secret, the intended mother is never visibly pregnant.\textsuperscript{150} Taken together, parental depression, low self-esteem, marital strain, and the lack of social or familial support could taint the parent-child relationship.\textsuperscript{151}

Furthermore, surrogacy may not be in the child’s best interests because a surrogacy broker may have little or no incentive or legal duty to find the most suitable home for a child. Rather, an unscrupulous surrogacy broker might place the baby in the hands of any person(s) who can pay his fees, regardless of their suitability for childrearing. By contrast, an adoption agency considers a plethora of factors and may perform home studies when determining whether to place a child; this better protects the child’s best interests by ensuring that she goes to a suitable home. As such, absent regulation, reproductive surrogacy may lack the safeguards that adoption affords.

Requiring suitability determinations and mandatory home studies may alleviate these concerns. Surrogacy should ideally be limited to “suitable” individuals or couples as determined on a case-by-case basis via home studies, psychiatric evaluations, and other pertinent criteria. While a variety of factors may be considered when making this suitability determination, no one factor should be dispositive. It is in everyone’s best interests that the parties to the surrogacy agreement be properly screened and deemed suitable.

Aside from the child’s best interests, the most obvious public policy concern inherent in reproductive surrogacy is its potential negative impact on the surrogate. Surrogacy agreements compel a surrogate to relinquish a child that she has carried for nine long months. This leads to a separation of the child from her gestational (and, in some cases, biological) mother absent a showing of unfitness, intentional abandonment, or neglect. However, to

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 401.

\textsuperscript{150} Golombok et al., supra note 139, at 401.

\textsuperscript{151} Id.
say that a woman cannot contract to be a surrogate simply because surrogacy can be psychologically and physically harmful to her is paternalistic. Should the potential for later regrets by the surrogate be a valid reason to altogether remove her right to choose? Such paternalistic reasoning could be employed to oppose access to non-therapeutic abortions in contravention of *Roe v. Wade* and its progeny or to prohibit gamete donation. Informed consent presupposes that the woman will decide for herself whether she will perform the contract. As explicated by *Roe*, the state should not remove her power of choice based on paternalism just as it is not allowed to decide whether or not she will able to withstand the emotional and psychological feelings that result from having an abortion.

**G. Additional Recommendations**

Because a surrogacy contract involves such important subject matter and may result in litigation, a surrogacy agreement should be memorialized in writing signed by both parties. The writing may also serve as evidence in subsequent litigation.

The surrogacy contract should also contain a merger clause to clarify that the writing constitutes the entire agreement, which will prevent the use of extrinsic evidence in interpreting the agreement if litigation ensues. It should also include a subsequent modification clause stating that subsequent oral modifications will not modify the agreement unless they are in a writing signed by the parties with their fully informed consent. This clause should limit the authority to modify to the surrogate and the intended parent(s). In addition, the contract should incorporate a severability clause to ensure that even if one or more provisions of the contract are deemed unenforceable, the other contractual provisions will remain in force.

**IV. THE FUTURE OF REPRODUCTIVE SURROGACY**

Although the future of reproductive surrogacy will not likely be as bleak as Atwood imagines, the concerns that she raises will not soon disappear. Women increasingly defer pregnancy until completion of their education and career plans; their mature age often complicates procreation. As assisted reproduction technologies advance and a growing number of women battle such infertility, the waiting list for healthy infants will expand, leading more couples to pursue reproductive surrogacy. As reproductive surrogacy becomes more common, it may also become more affordable and less stigmatized.

While the future of reproductive surrogacy remains unclear, its regulation, contractual or otherwise, is a necessary evil and perhaps a societal good.

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Contractual regulation, however, is not enough. Although some legislators have dismissed the need for uniform comprehensive surrogacy legislation because they view surrogacy as a fringe issue, a pressing need for legal clarification in the surrogacy arena exists to ensure that surrogacy contracts do not contravene existing law and public policy. In the absence of comprehensive surrogacy legislation, however, contractual regulation will at least honor the parties’ intent to the extent possible, giving them the freedom and security to create life by unorthodox means. Perhaps that is all that the contractual regulation of reproductive surrogacy is—an imperfect means to miraculous births.