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PUTTING ALL OF NORTH CAROLINA'S EGGS IN ONE BASKET: THE CASE FOR COMPREHENSIVE SURROGACY REGULATION

EMILY URCH*

I. INTRODUCTION

On February 22, 2012, Crystal Kelley received a letter in the mail from an attorney informing her that “[she was] obligated to terminate [her] pregnancy immediately” or face legal ramifications.¹ At the time, Kelley was approximately five months pregnant with a baby girl, but she was not the child’s biological mother; instead, she was carrying the baby for a Connecticut couple (the intended parents) as part of a surrogacy arrangement in which the intended parents would pay her \$22,000.² Six days before she received the letter threatening legal action, doctors informed Kelley that the baby was suffering from several severe health impairments which included a cleft palate, a brain cyst, and heart abnormalities.³ While the baby would likely survive, doctors estimated her chances of having a “normal life” to be about twenty-five percent.⁴ The intended parents did not feel equipped to care for a child with such special needs, and believed abortion was “a more humane option.”⁵ Before the resulting pregnancy, Kelley had signed a surrogacy contract which contained a clause providing that Kelley would abort “in case of severe fetus abnormality.”⁶ However, the contract did not clarify what “severe fetus abnormality” meant.⁷ Kelley was morally opposed to abortion and expressed her reservations to the intended parents when they offered her \$10,000 to terminate the pregnancy.⁸ Kelley had recently lost

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1. Elizabeth Cohen, *Surrogate offered \$10,000 to abort baby*, CNN (Mar. 6, 2013, 2:58 PM), <http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

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her job and was supporting her own two children on her surrogacy fees, so she asked for \$15,000.⁹ The parents did not accept the counteroffer, but by that point Kelley had decided she could not go through with the abortion even if they had accepted.¹⁰

According to Connecticut law, the parents who had supplied the genetic material were the legal parents.¹¹ Additionally, the intended parents decided that after the birth they were going to exercise their parental rights by taking custody of the baby.¹² However, immediately after obtaining custody of the baby, they were planning to relinquish the baby to the State because they felt that they could not provide for a child with such severe needs.¹³ In what she considered her only option, Kelley decided to move her family 700 miles away to a state that would consider her the legal parent — Michigan.¹⁴ In Michigan, Kelley found a new set of prospective adoptive parents who felt comfortable raising the child despite health problems.¹⁵ The legal issues compounded when the intended parents filed for custody in Connecticut, especially once court documents revealed that the intended mother was not actually the genetic mother, as “[the couple had] used an anonymous donor egg.”¹⁶ The parties eventually came to an agreement in which the adoptive parents in Michigan would retain custody of the baby so long as the intended parents in Connecticut were kept abreast of her progress.¹⁷

This case illustrates some of the potential for litigation surrounding surrogacy regulation, and leaves other important questions unanswered. For instance, who is considered the parent? What if no parties are genetically related to the child? Which portions of a surrogacy contract should courts enforce? Should the law allow surrogates to accept compensation and, if so, in what instances? Does limiting a woman’s choice to enter into such a contract prohibitively restrict what she can and cannot do with her body? And what happens to the child if neither party wants to parent?

As more individuals enter into surrogacy contracts and reproductive technology rapidly advances, the law in North Carolina inadequately provides redress for many of the considerations that accompany the changing times. This paper illustrates some of the concerns associated with the State’s failure to address surrogacy provisions. Part II explains the different types of surrogacy and explores various state laws acknowledging some of

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

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the legal and ethical issues surrounding the process, including the current climate in North Carolina. Part III proposes a solution for North Carolina which effectively balances the rights of all parties involved while attempting to address potential disputes in the most ethical and equitable manner possible.

II. BACKGROUND

A. Surrogacy Contracts

There are two main types of surrogacy arrangements: traditional and gestational.¹⁸ A traditional surrogate is one who not only carries the child for the intended parents, but also supplies the egg.¹⁹ Accordingly, in traditional surrogacy arrangements, the surrogate mother is biologically related to the child.²⁰ Often, the intended father supplies genetic material.²¹ This means that the intended father and surrogate mother are usually the biological parents whereas the intended mother is not.²² However, sometimes the child is conceived using donor sperm, thus making the surrogate the only party with a genetic connection.²³ Modern couples are increasingly entering into gestational surrogacy rather than traditional surrogacy contracts.²⁴ Gestational surrogacy, which utilizes either donor eggs or the intended mother's own eggs, neutralizes some of the potential conflicts by eliminating the surrogate's genetic connection to the child.²⁵ In gestational surrogacy arrangements, one or both of the intended parents may be the biological parent of the child, but the surrogate is not.²⁶

Women become surrogates for a variety of reasons, including wishing to give others the chance to become parents.²⁷ Typically, an intermediary

18. AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES 15 (2011), available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf.

19. *Id.*

20. *Id.*

21. Lcora I. Gabry, Comment, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 419 (2012).

22. *Id.*

23. *Id.*

24. *Id.* See also n.22 (“[G]estational surrogacy, in which a pre-embryo is implanted in the surrogate, has largely replaced traditional surrogacy, in which the pregnancy results from artificial insemination of the surrogate's own egg.”).

25. Gabry, *supra* note 21, at 419.

26. *Id.*

27. See, e.g., Carol Sangcr, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 76 (2007) (“Study after study reveals that women become surrogates for a combination of three reasons: they like being pregnant, they want the money, and despite the fact of payment, they regard having a baby for a childless couple as a gift — a blessing — of the highest order.”). See also Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK (Mar. 13, 2010, 6:09 PM),

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agency or brokerage firm matches potential surrogates with intended parents.²⁸ The surrogacy agency carefully screens prospective surrogates to ensure both the health of the surrogate, and the likelihood that she will comply with her contract terms.²⁹ Agencies generally do not screen the intended parents.³⁰

B. State Responses and Surrogacy Laws

A majority of the nation's states, including North Carolina, do not address surrogacy in their statutory provisions.³¹ Those states that do attempt to regulate the practice run the full gamut, from entirely banning the practice, to implementing comprehensive statutory schemes.³² There are three common legal approaches to addressing surrogacy arrangements: the most hostile "criminalization" approach, the "unenforceability" approach, and the "enforceability" approach.³³ The "criminalization" approach makes it illegal to participate in all or parts of certain types of surrogacy arrangements.³⁴ The "unenforceability" approach allows parties to enter into a contract but does not enforce the terms; instead, it utilizes custody principles to determine parentage.³⁵ Finally, the "enforceability" approach pertains to states that have adopted a legal schema to guide the courts in navigating issues specific to surrogacy regulation.³⁶

1. States that Ban, Void, or Prohibit

Washington, D.C. imposes the strictest conditions on surrogacy contracts by completely prohibiting surrogacy contracts within the District.³⁷ The

<http://www.newsweek.com/curious-lives-surrogates-84469> (indicating that some women become surrogates because they enjoy the experience of being pregnant).

28. Gabry, *supra* note 21, at 421.

29. *Id.*

30. *Id.*

31. *Id.* See also discussion *infra* Part II.B.4 (providing an overview of North Carolina's current law).

32. See discussion *infra* Part II.B.1–4.

33. Katharine T. Bartlett, *Surrogate Parenthood: Finding A North Carolina Solution*, 18 N.C. CENT. L.J. 1, 2–3 (1989).

34. *Id.* at 2.

35. *Id.*

36. *Id.* at 3 (noting that some aspects of such contracts, such as a requirement to undergo an abortion, might not be enforceable).

37. D.C. CODE § 16-402(a) (West, Westlaw through 2014 legislation) ("Surrogate parenting contracts are prohibited and rendered unenforceable in the District."). See also D.C. Code § 16-401(4)(A)–(B) (West, Westlaw through 2014 legislation) ("'Surrogacy parenting contract' means any agreement, oral or written, in which: (A) A woman agrees either to be artificially inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilization with the sperm of a man who is not her husband; and (B) A woman agrees, or intends to, relin-

code further penalizes participation in such contracts by imposing both civil penalties of up to \$10,000 and criminal sanctions of up to one year incarceration.³⁸ New York also declares surrogacy contracts void as contrary to public policy, thus rendering such contracts unenforceable.³⁹ Moreover, New York prohibits all surrogacy contracts regardless of whether fees are exchanged.⁴⁰ However, so long as no fees are paid, contracting parties are not subject to civil or criminal penalties.⁴¹ In cases where funds are exchanged, the penalties are much stiffer for the intermediaries than the surrogate and intended parents themselves.⁴² Repercussions are both civil and criminal in nature with felony charges possible for intermediaries who are caught brokering surrogate contracts after a first offense.⁴³

Michigan law is comprehensive enough to address both traditional and gestational surrogacy arrangements, and prohibits both.⁴⁴ Michigan voids all surrogacy contracts as against public policy.⁴⁵ In cases where custody disputes do arise between the intended parents and the surrogate, the law grants the court the power to determine custody based upon what is in the best interest of the child; the party with physical custody at the time of the dispute retains custody until the court's determination.⁴⁶ Experts note that Michigan's laws leave "intended parents . . . with great uncertainty as to whether they will have the opportunity to be the parents of the child they so desperately desired."⁴⁷ As such, it is not surprising that Crystal Kelley chose Michigan when she sought to avoid enforcement of the contract she had entered into in Connecticut.⁴⁸ Several other states have also implemented legislation which renders surrogacy contracts unenforceable, including Indiana,⁴⁹ Nebraska,⁵⁰ and Louisiana.⁵¹

quish all parental rights and responsibilities and consent to the adoption of a child born as a result of insemination or in vitro fertilization . . .").

38. D.C. CODE § 16-402(b) (West, Westlaw through 2014 legislation) ("Any person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise 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.").

39. N.Y. DOM. REL. LAW § 122 (McKinney, Westlaw through 2014 legislation).

40. N.Y. DOM. REL. LAW § 123 (McKinney Westlaw through 2014 legislation).

41. *Id.*

42. *Id.* (noting the contracting parties may face a penalty of up to \$500 whereas those who arrange such contracts for profit may be fined up to \$10,000).

43. *Id.*

44. Gabry, *supra* note 21, at 425.

45. MICH. COMP. LAWS § 722.855 (Westlaw through 2014 legislation).

46. *Id.* § 722.861.

47. Gabry, *supra* note 21, at 426.

48. Cohen, *supra* note 1.

49. IND. CODE § 31-20-1-1 (Westlaw through 2014 legislation) (providing that any contract requiring a woman to provide a gamete to conceive a child, become pregnant, consent to undergo an abortion, waive parental rights or duties to a child, or terminate care, custody, or control of a child will be unenforceable for public policy reasons).

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2. States Regulating the Practice

Other states have instituted regulations that attempt to curtail some of the more controversial aspects of legalized surrogacy without displaying a complete reluctance to proclaim surrogacy contracts unenforceable as a matter of law. For example, several states uphold gestational surrogacy contracts. North Dakota is one such state.⁵² North Dakota distinguishes gestational surrogacy from traditional surrogacy by referring to the gestational surrogate as the “gestational carrier.”⁵³ North Dakota does not “consider third party surrogacy arrangements in which donor sperm or eggs are used.”⁵⁴

Florida requires that at least one of the intended parents have a genetic connection to the child to enter into a “pre-planned adoption.”⁵⁵ Florida refers to gestational surrogacy contracts as “pre-planned adoption” arrangements.⁵⁶ Florida further provides that couples using these “pre-planned adoption” arrangements must do so in response to health issues that would make carrying a child dangerous for either the intended mother or the child.⁵⁷ Moreover, only married couples may legally enter into “pre-planned adoption” agreements.⁵⁸ Once the child is born, the “intended parents must petition the court for an expedited affirmation of parental status, and the court must then schedule a hearing.”⁵⁹ The court will then order that

50. NEB. REV. STAT. § 25-21,200 (Westlaw through 2014 legislation) (making surrogacy contracts unenforceable while imposing all rights and obligations required by law upon the biological father and specifying that the law limits surrogate parenthood contracts to contracts where the surrogate is compensated for her services).

51. LA. REV. STAT. ANN. § 9:2713(A) (LexisNexis, LEXIS through 2014 legislation) (proclaiming contracts for surrogate motherhood as null and void under public policy). *See also* Melissa Deslatte, *Louisiana Gov. Bobby Jindal vetoes controversial surrogacy bill*, ASSOCIATED PRESS (June 21, 2013, 5:12 PM), http://www.nola.com/politics/index.ssf/2013/06/louisiana_gov_bobby_jindal_vet.html (indicating that the state introduced legislation with a pro-surrogacy focused approach that the governor vetoed).

52. N.D. CENT. CODE § 14-18-05 (LexisNexis, LEXIS through 2014 legislation) (stating that any arrangement where a mother agrees to become a surrogate is void and the surrogate is the mother for legal purposes.) *But see id.* § 14-18-08 (“A child born to a gestational carrier is a child of the intended parents for all purposes and not a child of the gestational carrier . . .”).

53. *Id.* § 14-8-08.

54. Gabry, *supra* note 21, at 428.

55. *Id.* (citing FLA. STAT. § 63.213 (2013) (providing that individuals may enter into pre-planned adoption agreements if certain conditions are met, including that if the mother is genetically related to the child, she has the right to rescind the contract within forty-eight hours of the child’s birth)). *See also* FLA. STAT. § 742.13(2) (“‘Commissioning couple’ means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.”).

56. *Id.*

57. *Id.* at 428–29 (citing FLA. STAT. § 742.15(2)(b)–(c) (2013)).

58. *Id.* at 428 (noting that this option is not available for same-sex couples or single adults).

59. *Id.* at 429. *See also* FLA. STAT. § 742.16(1) (2013).

the intended parents are the legal parents.⁶⁰ Florida provides that the intended parents may only compensate the gestational surrogate for "reasonable living, legal, medical, psychological, and psychiatric expenses . . . that are directly related to prenatal, intrapartal, and postpartal periods."⁶¹

Finally, in 2004, Illinois passed the Gestational Surrogacy Act.⁶² The Act requires that at least one of the intended parents supply genetic material for the child.⁶³ The Act is comprehensive enough to delineate who may become either an intended parent or a surrogate carrier.⁶⁴ Illinois's Act also provides guidance in suggesting that parties may include provisions such as a requirement that the surrogate "abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child."⁶⁵

3. States Addressing Surrogacy Through Case Law

In the absence of statutory regulations, California has addressed some of the problematic issues surrounding surrogacy contracts through its courts.⁶⁶ In *Johnson v. Calvert*,⁶⁷ the Court analyzed a gestational surrogacy arrangement where the intended parents had contributed genetic material, and held that, in such cases, the intended parents are the natural and legal parents.⁶⁸ The Court further noted that an absence of statutory authority on the matter did not mean that the legislature intended for such contracts to be void.⁶⁹ Later, California's Courts of Appeal held that even when the intended parents were not genetically related to the child, the parties' intent, rather than any biological connections, governed the arrangement.⁷⁰ As such, the Court determined the intended parents to be the legal parents.⁷¹

60. FLA. STAT. §§ 742.15(3)(d), 742.16(6) (Westlaw through 2013 legislation) (concluding that there is a binding and enforceable gestational surrogacy contract and that at least one of the intended parents is the genetic parent of the child).

61. *Id.* § 742.15(4).

62. Gabry, *supra* note 21, at 429.

63. *Id.* n.103 (citing 750 ILL. COMP. STAT. 47/10 (Westlaw through 2014 legislation)).

64. *Id.* at 429–30, n.105.

65. *Id.* at 430. See also 750 ILL. COMP. STAT. 47/25(d)(2) (Westlaw through 2014 legislation).

66. Gabry, *supra* note 21, at 422 ("The court[] in California . . . had the opportunity to consider cases in which the intended parents were not genetically related to the baby, and relied on the intent of the parties to determine the child's legal parents.").

67. 851 P.2d 776 (Cal.1993).

68. Gabry, *supra* note 21, at 422.

69. *Calvert*, 851 P.2d at 787 ("It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.").

70. Gabry, *supra* note 21, at 422–23. See also *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410, 1428, 72 Cal. Rptr. 2d 280, 293 (1998).

71. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293 ("Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth.").

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Connecticut, which also does not have a statutory scheme for regulating the enforceability of surrogacy contracts, has addressed these issues in its case law.⁷² The courts in Connecticut suggest that the practice is not prohibited.⁷³ While the legality of such contracts has not been the central focus of any of the state's published cases, the courts have had occasion to analyze the impacts of surrogacy arrangements on other areas of law, and have hinted that surrogacy contracts may be enforceable depending on the specific situations.⁷⁴ For instance, in 2011, the Connecticut Supreme Court carefully crafted its *Raftopal v. Ramey*⁷⁵ opinion to state, "[u]ntil the legislature clarifies specifically what requirements must be met in order for a gestational agreement to be valid."⁷⁶ However, it did uphold a gestational surrogacy arrangement and finally answered one "narrow question" determining that, upon court order, a valid gestational surrogacy agreement would be upheld regardless of whether the intended parents supplied genetic material.⁷⁷

4. North Carolina

None of North Carolina's laws currently address the issue of surrogate contracting. Some family law experts have turned to the adoption statutes and contract principles in an attempt to piece together a standard.⁷⁸ North Carolina law provides that "a person or entity may not pay or give, offer to pay or give, or request, receive or accept any money or anything of value, directly or indirectly," for placing a child for adoption.⁷⁹ However, the law does allow "an adoptive parent or another person acting on behalf of an adoptive parent" to pay the reasonable fees associated with the birth and other medical expenses which the mother may incur as a result of the pregnancy.⁸⁰ The compensation cannot be contingent upon the mother relinquishing rights to her child.⁸¹ As such, intended parents in North Carolina must adopt their children after birth. Additionally, the State's adoption reg-

72. Leslie I. Jennings-Lax, *Surrogacy — The Law in Connecticut*, 79 CONN. B.J. 59, 60 (2005).

73. *Id.*

74. *See id.* at 64. (noting that while the Connecticut Supreme Court has upheld surrogacy contracts, it has also explicitly refused to create a bright-line rule on exactly when such contracts will be enforceable).

75. 12 A.3d 783 (Conn. 2011).

76. *Id.* at 804.

77. *Id.* ("[I]ntended parents who are parties to a valid gestational agreement acquire parental status and are entitled to be named as parents on the replacement birth certificate, without respect to their biological relationship to the children.").

78. Bartlett, *supra* note 33, at 12.

79. N.C. GEN. STAT. § 48-10-102(a) (2013). *See also id.* § 48-10-102(b) (stating the first offenses are Class 1 misdemeanors and subsequent offenses are Class H felonies which may incur a fine of up to \$10,000).

80. N.C. GEN. STAT. § 48-10-103(a) (2013) (allowing payment of agency, legal, counseling, and court services).

81. *Id.* § 48-10-103(c).

ulations allow for the birth mother to change her mind seven days after consenting to the adoption.⁸²

Further, the common law in North Carolina presumes that the husband of a pregnant woman is the child's father.⁸³ This means that if the surrogate is married when the child is born, the surrogate is the legal mother and her husband is the legal father, regardless of whether either of them share any genetic makeup with the child. Accordingly, both the surrogate and her husband must consent to the adoption.⁸⁴

Finally, North Carolina only allows married couples or single adults to adopt children.⁸⁵ If the person petitioning to adopt the child is married, his or her spouse must join in the adoption petition.⁸⁶ However, "[i]f the individual who files the petition is unmarried, no other individual may join in the petition"⁸⁷ This means that North Carolina restricts unmarried couples from adopting children together.

C. *The American Bar Association Model Act*

The American Bar Association Model Act Governing Assisted Reproductive Technology (Model Act) also provides direction to state legislatures in the process of drafting their own laws governing assisted reproduction technology, including surrogacy.⁸⁸ Under the Model Act, parentage is determined based upon the parties' intent.⁸⁹ Thus, pursuant to the terms of a valid gestational carrier agreement, the Model Act allows the intended parents to exercise parental rights without having to adopt the child.⁹⁰ The Model Act is divided into Alternative A and Alternative B.⁹¹

82. N.C. GEN. STAT. § 48-3-608 (2013).

83. *State v. Bowman*, 52 S.E.2d 345, 345 (N.C. 1949) ("When conception occurs during the marriage of its mother, a child is presumed to be the legitimate offspring of the then husband of the mother").

84. N.C. GEN. STAT. § 48-3-601(2) (2013) (stating that consent for adoption is needed by the child's father if the father and mother were married when the minor was born).

85. N.C. GEN. STAT. § 48-2-301(b)-(c) (2013).

86. *Id.*

87. *Id.*

88. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. (Feb. 2008) available at <http://apps.americanbar.org/family/committees/artmodelact.pdf> [hereinafter MODEL ACT]. See *id.* § 102(15)-(16) (referring to a gestational surrogacy agreement as a "gestational agreement" and the surrogate as a "gestational carrier").

89. *Id.* § 701(2)-(4) [Alternative B]. See also *id.* § 102(17) ("'Gestational carrier arrangement' means the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational carrier has made no genetic contribution.").

90. *Id.* § 701(2)(d) [Alternative B] ("Parental rights shall vest in the intended parent or parents immediately upon the birth of the child[.]"). See also *id.* § 102(15) ("'Gestational agreement' is a contract between intended parents and a gestational carrier intended to result in a live birth.").

91. See *id.* art. 7 (referring to Legislative Note).

Alternative A provides an approach utilizing “judicial preauthorization” to interpret gestational carrier agreements, while Alternative B establishes an “administrative model” which allows for a parent-child relationship between the child and the intended parents to begin immediately upon the child’s birth.⁹² Alternative A specifies that the intended parents and their prospective gestational carrier may enter into a gestational carrier agreement which may be validated by a court order declaring the intended parents as the legal parents of a child born to the gestational carrier during the agreement.⁹³ During the hearing to validate the agreement, the court will make findings that: (1) the intended parents have met the suitability criteria required for adoptive parents; (2) the agreement is voluntary and the parties understand its terms; (3) the parties have considered and arranged for the gestational carrier’s medical expenses throughout the course of the pregnancy and postpartum period; and (4) any compensation is reasonable.⁹⁴

The parties may also terminate the agreement before the gestational carrier becomes pregnant by filing notice with the court.⁹⁵ Upon a showing of good cause, the court may also terminate the agreement *sua sponte*, if necessary.⁹⁶ Within 300 days of the child’s birth, the intended parents must file notice with the court indicating that the child has been born.⁹⁷ At that time, the court will issue an order confirming their parentage and directing the agency that maintains birth records to issue a birth certificate which names the intended parents as the parents.⁹⁸ In the event that a dispute arises, the order also instructs the gestational carrier to surrender the child to the intended parents.⁹⁹ The court will order genetic testing as opposed to instructing the gestational carrier to surrender the child, if there is a question as to whether the child is actually a product of the assisted reproduction technique or the carrier’s biological child.¹⁰⁰

Alternative B specifies that when a valid gestational agreement is used,¹⁰¹ the child is considered the child of the intended parents.¹⁰² Alternative B further notes that the parties must fulfill certain requirements before the court will uphold the agreement. For example, the gestational carrier must

92. *Id.* See also *id.* § 705(1) [Alternative B].

93. *Id.* §§ 701, 703 [Alternative A] See also *id.* § 702(2)(b) [Alternative A] (providing if the gestational carrier is married, her husband must be joined as a party to the contract).

94. *Id.* § 703(2)(b)–(c) [Alternative A].

95. *Id.* § 706(1), (3) [Alternative A].

96. *Id.* § 706(2) [Alternative A].

97. *Id.* § 707(1) [Alternative A].

98. *Id.* § 707(1)(a), (c) [Alternative A].

99. *Id.* § 707(1)(b) [Alternative A].

100. *Id.* § 707(2) [Alternative A].

101. *Id.* § 703(1)–(4) [Alternative B] (providing, in pertinent part, that a valid agreement is written, completed before any medical procedure, and each of the parties has independent counsel).

102. *Id.* § 701(2)(a), (4) [Alternative B].

be at least twenty-one years old and have previously given birth.¹⁰³ She must also have completed both a medical and mental health evaluation.¹⁰⁴ Further, the intended parents must contribute at least one of the gametes and have a medical reason to enter into a gestational carrier agreement.¹⁰⁵ The Model Act also provides that a gestational carrier agreement shall not be void if the agreement requires the gestational carrier to undergo prenatal care or to abstain from specified behaviors such as smoking, drinking alcohol, or using certain drugs.¹⁰⁶

The Model Act provides comprehensive insight into many of the facets of assisted reproductive technology. States should address the provisions in their statutory schemas, thus decreasing the need for litigation. In addition, the Model Act provides an ethical framework¹⁰⁷ and attempts to ensure that the wealthier class does not turn children into commodities or exploit vulnerable women.¹⁰⁸

III. ANALYSIS

As gestational surrogacy has become the preferred surrogacy method, North Carolina's laws do not adequately address this method of assisted reproduction technology. From 2004 to 2008, the United States saw an eighty-nine percent increase in babies born via gestational surrogacy.¹⁰⁹ As this field of assisted reproductive technology is growing exponentially, it behooves North Carolina to acknowledge legal issues before they erupt. Furthermore, it makes little sense, especially when the intended parents have supplied the fetus's genetic material, to force people to adopt their own children. Accordingly, a comprehensive statutory scheme provides courts with indispensable guidance when analyzing potential issues in a litigation context. Unfortunately, even when states attempt to establish a framework that assesses the nuances of the process, the law often fails to address key issues. For example, North Dakota requires that both intended parents have a genetic connection to the child in order to enter into a surro-

103. *Id.* § 702(1)(a)–(b) [Alternative B].

104. *Id.* § 702(1)(c)–(d) [Alternative B].

105. *Id.* § 702(2)(a)–(b) [Alternative B].

106. *Id.* § 703(4)(a)–(b) [Alternative B].

107. See *id.* prefatory cmt. ("The [Model] Act provides a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may have not yet occurred, and to guide the expansion of ways by which families are formed.").

108. Compare *id.* with Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 236 (2001) ("[A] free-market scenario would create a world where the poor would become a 'breeder class' for the rich.").

109. Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 3 (2010), available at <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevcj0a1m.pdf>.

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gacy arrangement.¹¹⁰ As an unfortunate result, when couples are both infertile, they cannot utilize this option to start a family.¹¹¹ Finally, North Carolina law does not allow for gay couples to take advantage of surrogacy. North Carolina relies on the State's adoption statutes to achieve the same results intended by surrogacy legislation.¹¹²

The following sub-sections of this article address some of the legal and ethical issues surrounding surrogacy contracts. These issues illustrate why North Carolina needs to implement a clear statutory scheme delineating when courts must enforce surrogacy contracts. Such provisions must also address who may enter into these contracts and how to effectively deal with ethical issues. By establishing such a law, the legislature will curtail future litigation, and ensure as little exploitation of women and children as possible.

A. Moral Quandaries

Surrogacy remains controversial for several reasons. Critics have considered the practice to be *baby-brokering*.¹¹³ For public policy reasons, states do not allow adoptive parents to pay birth mothers any type of fee which may be construed as contingent upon relinquishment of parental rights.¹¹⁴ However, the differences between paying someone to give up her child and paying someone to carry another's child are fundamentally different and render the comparisons moot. With regard to the mistreatment of women, even feminist theorists disagree about whether the practice of surrogacy exploits or empowers those who choose to become surrogates.¹¹⁵ For example, scholars have argued that a *laissez-faire* attitude toward surrogacy will create a "breeder class" of poor women supplying children to the wealthier echelons of society.¹¹⁶ At the same time, it is a widely recognized sentiment that pregnancy can be a difficult period in a woman's life. In contrast, other scholars believe that the government should dictate that a woman undergo-

110. Gabry, *supra* note 21, at 431.

111. *Id.*

112. See *supra* text accompanying notes 84–86.

113. Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 18 (1986) ("It has been argued that paying someone to have a baby is equivalent to buying the baby."). Compare with Ali, *supra* note 27 ("Some medical ethicists describe the process of arranging surrogacy as 'baby brokering[]' . . .").

114. See, e.g., N.C. GEN. STAT. § 48-10-103(c) (2013) ("A payment . . . may not be made contingent on the placement of the minor for adoption . . . or cooperation in the completion of the adoption.").

115. See Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717 (2003); Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 402 (2012) (illustrating various feminist responses to surrogacy and noting "[f]eminist commentators have produced a diverse body of literature relating to commercial surrogacy.").

116. Hecht, *supra* note 108.

ing the process of surrogacy should be barred from profiting for her services. Finally, as with Crystal Kelley's case, an increasing number of surrogacy agreements address the issue of abortion.¹¹⁷ Abortion clauses present different moral quandaries because they attempt to take the power to terminate a pregnancy out of the mother's hands by suggesting that the intended parents have the right to dictate the circumstances under which a surrogate must abort. Additionally, the intended parents face the possibility that the surrogate could abort the child without their consent.

1. Compensation, Exploitation, and the Commoditization of Children

In 1988, in what was one of the first cases addressing the enforceability of surrogacy contracts, the New Jersey Supreme Court stated, "[W]e find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women."¹¹⁸ In *In re Baby M*,¹¹⁹ intended parents William and Elizabeth Stern entered into an agreement with Mary Beth Whitehead in which Mrs. Whitehead would carry a child for the Sterns.¹²⁰ Mrs. Stern did not want to exacerbate her multiple sclerosis and the health issues associated with it so she chose not to become pregnant herself.¹²¹ The terms of the agreement provided that Mrs. Whitehead would carry the child, who was a product of her own egg and Mr. Stern's sperm, and would turn the child over to the Sterns in exchange for \$10,000.¹²² There is evidence that the Sterns were aware that giving up the child would cause Mrs. Whitehead some degree of grief.¹²³ When the child, a baby girl, was born, the hospital listed Mrs. Whitehead and her husband as the parents on the birth certificate.¹²⁴ Almost immediately, Mrs. Whitehead became distraught over the prospect of having to part with the baby.¹²⁵ When the baby was three days old, Mrs. Whitehead physically delivered her to the Sterns.¹²⁶ Later that day, "Mrs. Whitehead became deeply disturbed, disconsolate, [and] stricken with unbearable sadness" due to the separation.¹²⁷ The Sterns were so concerned about Mrs. Whitehead's emotional state, fearing that she would commit suicide, they allowed her to have the baby

117. See discussion *supra* Part I.

118. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

119. *Id.*

120. *Id.* at 1235 ("Mrs. Whitehead's husband, Richard, was also a party to the contract; Mrs. Stern was not.").

121. *Id.*

122. *Id.*

123. *Id.* at 1236.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

“even if only for one week, as requested by Mrs. Whitehead.”¹²⁸ Four months later, when Mrs. Whitehead still had not surrendered the child, Mr. Stern commenced an action seeking enforcement of the surrogacy contract.¹²⁹ In consequence, Mr. and Mrs. Whitehead took the child and fled to Florida.¹³⁰ Eventually, the Sterns obtained an order which required the Whiteheads to turn over the baby, and litigation commenced.¹³¹

The New Jersey Supreme Court lambasted the trial court for initially determining that the surrogacy arrangement was valid and again for concluding that the state statutes concerning payment in exchange for adoption were not applicable to surrogacy contracts.¹³² The Court called the contract one of “coercion.”¹³³ Moreover, the Court noted that an “irrevocable agreement prior to birth, even prior to conception, to surrender [a] child to [an] adoptive couple” would be completely unenforceable in an adoption agreement.¹³⁴ The Court specifically noted the contract delineated that the intended parents would deliver the fee in its entirety once Mrs. Whitehead had actually surrendered the child to the Sterns and completed her “duties and obligations,” which included terminating her parental rights.¹³⁵ Thus, the Court found the arrangement “illegal and unenforceable,”¹³⁶ poignantly opining, “[t]here are, in a civilized society, some things that money cannot buy.”¹³⁷

Baby M was a catalyst of a large-scale response addressing paid surrogacy; many states currently prohibit compensating surrogates beyond reasonable expenses relating to the pregnancy and birth.¹³⁸ Unfortunately for the women who choose to serve as surrogates, even if altruism is the primary motivating force, pregnancy can be difficult and uncomfortable. Becoming a surrogate allows women in need of financial assistance to support them-

128. *Id.* at 1237.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1238.

133. *Id.* at 1240.

134. *Id.*

135. *Id.* at 1241 (“[W]e need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only \$1,000 if the child were stillborn, even though the ‘services’ had been fully rendered. Additionally, one of Mrs. Whitehead’s estimated costs, to be assumed by Mr. Stern, was an ‘Adoption Fee,’ presumably for Mrs. Whitehead’s incidental costs in connection with the adoption.”).

136. *Id.* at 1255.

137. *Id.* at 1249.

138. See, e.g., FLA. STAT. § 742.15(4) (Westlaw through 2014 legislation); see also *supra* text accompanying note 55; 750 ILL. COMP. STAT. 47/25(d)(3)–(4) (Westlaw through 2014 legislation) (providing the intended parents may provide *reasonable* compensation and reimbursement); N.C. GEN. STAT. § 48-10-103 (2013) (pertaining to expenses related to adoption); Bartlett, *supra* note 33, at 2 (“Virtually every state has laws which prohibit the payment of money in connection with adoption.”).

selves while staying home with their children¹³⁹ or even while earning a living from other employment. One gestational surrogate who gave birth to twin boys in June 2011 noted that she was able to finish her nursing degree while using her surrogacy fees for daily expenses without having to assume large amounts of student loan debt or worry about balancing work and her studies.¹⁴⁰ This view is not without its critics. Katharine Bartlett suggests that, “[i]f surrogate parenting arrangements were to become an acceptable way of earning money, women — especially poor women with limited options for economic well-being — may feel considerable pressure, either self-imposed or imposed by others, to bear a child for someone else.”¹⁴¹

While the desire to help others is often a primary motivator behind surrogacy, pregnancy has very real health consequences.¹⁴² In fact, a vast majority of women who become surrogates would not undertake the experience absent monetary consideration.¹⁴³ These women should be able to make the informed decision to take on such health risks in exchange for monetary gain. Because “surrogacy agreements in the United States involve payments of \$20,000 to \$25,000 to the woman who bears the child,”¹⁴⁴ these types of contracts provide much needed cash flow. This is especially enticing to women who wish to stay home with their own young children, and single mothers who are already working one full-time job.¹⁴⁵ Critics note that, while this seems like a vast sum of money, when one performs the actual calculations, the payments average about fifty cents per hour.¹⁴⁶ However, as a society we must recognize that women who decide to enter into these arrangements are capable of determining how much they think their services are worth. As independent adults, women deserve the freedom to improve their financial situations. Courts and legislatures curtailing women’s reproductive freedoms and bodily autonomy cannot serve to better society.

Finally, courts have also wrestled with the notion that allowing payment for carrying the child of another effectively renders the child a product. A majority of people agree that civilized societies do not buy and sell babies.

139. See Gabry, *supra* note 21, at 440.

140. Interview with a surrogate who wishes not to be named in Durham, N.C. (Nov. 8, 2013) (noting her primary motivator was to help another couple become parents).

141. Bartlett, *supra* note 33, at 5.

142. Gugucheva, *supra* note 109, at 17–23 (noting, the health risks of pregnancy in general as well as the added risks specific to surrogacy include artificial hormones, procedures to image the reproductive organs during implantation of the fetus, and the increased probability of multiples with gestational surrogacy).

143. Munyon, *supra* note 115, at 718 (“Eighty-nine percent of surrogate mothers would not have become surrogates but for the agreed compensation.”).

144. Ali, *supra* note 27.

145. See Gabry, *supra* note 21, at 440.

146. Gugucheva, *supra* note 109, at 5 (noting that surrogates regularly come from the lowest income brackets).

In fact, every state bans payment in exchange for adoption.¹⁴⁷ However, adoption agreements are not comparable to surrogacy arrangements. In adoption, the child already exists, and until the adoption occurs, remains the child of the biological mother, in most cases. The surrogacy process is much different. In gestational surrogacy, the intended parents seek to create their own child, merely needing someone to carry that child prior to birth.¹⁴⁸ In essence, the surrogate is not giving up her child. Instead, she is helping hopeful parents birth their own biological child. One of the most compelling reasons that some individuals view surrogacy as baby-selling is likely dependent upon our culture and how we view babies. People continue to speak of babies as “gifts” when addressing both surrogate arrangements and adoption agreements.¹⁴⁹ Even Mrs. Whitehead in *Baby M* noted that she initially became a surrogate because “she wanted to give another couple the ‘gift of life.’”¹⁵⁰ This language is pervasive in our society and remains problematic because a baby is not a gift, but rather, a person. Moreover, the surrogate is not actually giving it to the intended parents, as the baby would not exist without their intent to procreate. Changing our lexicon could dispel some of the stigmas associated with surrogacy and clarify what the process actually is: a service. Accordingly, as surrogate fees are payment for a valuable service, the law should allow compensation.

2. Abortion Clauses and Other Unconscionable Provisions

It is not likely that courts would ever enforce contracts requiring a surrogate to have an abortion against her will.¹⁵¹ However, the converse could manifest as a potential issue — with the surrogate choosing to terminate over the intended parents’ objections. Thus, while it is easy to simply state the unlikelihood of any court ever enforcing an unconscionable contract provision, it remains possible for the two parties’ interests to conflict. For instance, a surrogate may develop a health condition which renders pregnancy intolerable or even dangerous.¹⁵² Our abortion laws are premised

147. See *supra* notes 113, 138, and accompanying text.

148. See Ashley Peyton Holmes, *Baby Mama Drama: Parentage in the Era of Gestational Surrogacy*, 11 N.C. J.L. & Tech. On. 233, 245 (2010).

149. See Susan M. Sterrett, *Introductory Essay*, 36 LAW & SOC’Y REV. 209, 211–12 (2002); see also Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 156 (1997); see also Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1233, 1271 (2013).

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

151. This assertion did not stop the attorney in Crystal Kelley’s case from threatening legal action if Kelley did not terminate, which leaves unexplored a whole other range of ethical issues.

152. See Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT’L L.J. 665, 674–75 (2012).

upon a woman's right to her own bodily "liberty."¹⁵³ In such an instance, where the fetus at issue is not the child of the woman carrying it, courts must decide whether the intended parents have any interest in preserving the life of their child or whether a woman's right to bodily autonomy remains the ultimate trump card. It is not likely that any court would force a woman whose life or health was in danger to carry a fetus to term.¹⁵⁴ It is also unlikely that a woman who had completed the entire surrogate screening process and invasive procedures associated with the actual assisted reproduction would change her mind during the pregnancy and wish to have an abortion without a valid medical reason. However, after spending time and money enlisting her services, the intended parents in such a situation should know, to a reasonable degree of certainty, that they can collect damages for breach of contract if the surrogate does not continue the pregnancy absent a *bona fide* medical excuse. Failure to enforce such contracts leaves the intended parents with uncertainty on this issue.

B. Surrogacy Bans are Paternalistic in Nature

In analyzing the State of North Carolina's surrogacy laws, Katharine Bartlett opines, "one does not need to be already pregnant to be exploited for one's procreative potential."¹⁵⁵ While this position is laudable, less than one percent of gestational surrogates actually change their minds regarding the terms of their contracts.¹⁵⁶ As such, laws prohibiting such arrangements do not keep up with the changing times. Some feminist scholars have denounced the practice, "lik[e]n[ing] gestational carriers to prostitutes who degrade themselves by renting out their bodies."¹⁵⁷ Others argue that allowing surrogacy contracts "treats children like property" and women like incubators subject to economic coercion.¹⁵⁸ Some ethical theorists further bolster this argument by noting that statistically, gestational carriers are primarily women of lower socio-economic status.¹⁵⁹ As such, many feminist theorists worry that allowing enforcement of surrogacy contracts reinforces the pa-

153. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 834 (1992).

154. Brugger, *supra* note 152.

155. Bartlett, *supra* note 33, at 5.

156. Amanda Mcchell Holliday, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1125 (2003).

157. Ali, *supra* note 27. See also London, *supra* note 115, at 405 ("[S]urrogacy serves as another attempt by the paternalistic, male-dominated medical establishment to exploit women's reproductive capabilities to serve its own interests.").

158. Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1656 (1984).

159. Gugucheva, *supra* note 109, at 5 ("[T]hese paltry figures further suggest that surrogacy agreements exploit vulnerable women.").

triarchal notion that society should only value women for their reproductive capabilities.¹⁶⁰

There is a fine line between protecting women from exploitation and paternalization. Legally prohibiting whether a woman can enter into such an arrangement undermines a woman's autonomy and assumes that she is unable to make informed choices regarding her reproductive health. Another scholar, Jessica Munyon, notes that "mistrust of a woman's ability to make informed reproductive decisions underlies many court determinations regarding surrogacy contracts."¹⁶¹ In fact, when courts refuse to enforce such contracts in an effort to "protect" surrogates from exploitation, they end up achieving the exact opposite.¹⁶² For instance, in 1990, the New York Family Court ruled that a surrogate must forego her agreed upon compensation of \$10,000.¹⁶³ After giving birth to the child the surrogate sought to judicially relinquish her rights, and the Court stated that in order to do so she must "swear under oath before this Court that she has not and will not request, accept or receive the \$10,000 promised to her."¹⁶⁴ In a misguided attempt at justice, Family Court Judge Carolyn Demarest reasoned that the only way to ensure that the surrogate's consent to the contract was truly voluntary was to require her to forego the promised fee.¹⁶⁵ Consequently, the surrogate was left with the choice to give up her compensation or keep a child she never intended to parent in the first place. Such a result can only serve to further disadvantage women who enter into surrogacy contracts to earn an income. It is not often argued that compensation for male-dominated yet dangerous or emotionally-charged services such as military and police work is coercive. Yet, a large cross-section of legal and ethical writers seem to suggest that only when a woman foregoes compensation can surrogacy work be purely non-exploitive, further contributing to the notion that women's work does not deserve proper payment.¹⁶⁶ The focus on the fact that women of lower socio-economic status tend to become surrogates in greater numbers than other women¹⁶⁷ further smacks of prejudice, distrust and paternalism, and invokes visions of academics sitting around in their ivory towers speculating as to how they can save poor women from their own bad choices.

160. Munyon, *supra* note 115, at 725.

161. *Id.* at 719.

162. *Id.* at 728–29.

163. *See In re Adoption of Paul*, 550 N.Y.S.2d 815, 818–19 (N.Y. Fam. Ct. 1990).

164. *Id.* at 819.

165. *Id.*

166. *See* London, *supra* note 115, at 406 ("[C]onfining the practice of surrogacy to its altruistic form invokes the problematic notion that women should be motivated by sentiment while men deserve payments for their efforts and services.").

167. *See* Gugucheva, *supra* note 109, at 5.

C. *A North Carolina Solution*

Using other states and the American Bar Association Model Act Governing Assisted Reproductive Technology¹⁶⁸ as guidance, this section of the article proposes a solution which could alleviate some of the murkiness that would invite future litigation. Relying on North Carolina's adoption statutes is problematic because the issues arising between assisted reproduction, gestational surrogacy in particular, and adoption are not even remotely analogous. Moreover, in only allowing second-parent adoptions for married couples, the adoption statutes do not provide gay couples with adequate means to start their own families.¹⁶⁹

The Model Act is not all-encompassing. For example, Alternative B specifies that at least one of the intended parents must provide genetic material.¹⁷⁰ Once again, this solution leaves intended parents who are both infertile without adequate redress or the option to enter into a surrogacy contract. It is a more reasonable solution to allow intended parents to enlist the services of a surrogate, even when the resulting child is the product of both donor sperm and donor egg. The parties should still enter into the pre-birth parentage agreement that the Model Act espouses; however, if the surrogate supplies the egg, the court should not order the determination of parentage until the surrogate has delivered the baby and the statutory seven-day period has passed. Today's technology allows intended parents to pursue gestational surrogacy, thus eliminating the pitfalls that occur when there is a genetic link between the child and the surrogate. Public policy dictates that courts cannot hold a woman to a promise to give up her own child before the child is born.¹⁷¹

This is not to suggest that the practice of traditional surrogacy should be banned. When individuals decide to pursue traditional surrogacy arrangements,¹⁷² courts may continue to determine parentage as consistent with the existing adoption statutes.¹⁷³ Of paramount importance is the requirement that the birth mother have the opportunity to change her mind.¹⁷⁴ Finally,

168. See *supra* text accompanying note 87.

169. N.C. GEN. STAT. § 48-3-201. See also *supra* text accompanying note 80.

170. See *supra* text accompanying note 87.

171. See *In re Baby M*, 537 A.2d 1227, 1259 (N.J. 1988). (“[W]e think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there?”).

172. Gugucheva, *supra* note 109, at 6 (noting that traditional surrogacy is a cheaper alternative to gestational surrogacy and for that reason, couples will often pursue this route despite the desire to have a genetic link to the resulting child).

173. See discussion *supra* Part II.B.4 (North Carolina adoption laws).

174. N.C. GEN. STAT. § 48-3-608 (2013) (allowing a birth mother seven days to revoke her consent).

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intended parents must realize and plan for the possibility that the courts will not enforce a traditional surrogacy contract when agreeing to the terms.

Several states utilize pre-birth orders in determining parentage.¹⁷⁵ In an effort to expedite the process and ensure that each party is fully apprised of his or her rights and responsibilities pursuant to the contract, North Carolina should recognize pre-birth orders for gestational surrogacy agreements. This is especially necessary in cases where neither of the intended parents is genetically related to the child and will not have the biological connection to protect their rights. Several states currently recognize that pre-birth orders are not contrary to public policy.¹⁷⁶ Determining parentage prior to birth, based on the intent of the parties, is vital to ensuring protections and curtailing future litigation should issues later arise. If the surrogate has reason to believe that she is actually the biological mother, the court may order genetic testing, but only in these rare cases where the court considers whether the surrogate is the child's legal mother.¹⁷⁷

In drafting legislation, North Carolina lawmakers should look to Connecticut's "intent test" as a model.¹⁷⁸ *Raftopol v. Ramey*¹⁷⁹ held that even an intended parent who was not biologically related to the child could be named on the child's birth certificate without undergoing an adoption. This holding was premised upon the notion that Connecticut's legislative body did not believe that forcing intended parents through the adoption process was the "right thing to do."¹⁸⁰ As a result, the intent to create a child pursuant to a legally valid gestational agreement allows an intended parent to list his or her name on the child's birth certificate despite lacking any genetic connection.¹⁸¹ Such a test provides greater equality for same-sex couples, as both members of same-sex couples cannot provide genetic material for a single child. Additionally, if the intended parents decide to end their relationship or change their minds about raising the child during the course of

175. See Steven H. Snyder & Mary P. Brynn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings* 39 FAM. L.Q. 633, 645 (2006) (indicating that at the time of publication, only twelve states did not have statutes or case law on point addressing prebirth parentage proceedings).

176. See e.g., *Davis v. Kania*, 836 A.2d 480, 483 (Conn. 2003) (holding that a California prebirth adoption order declaring both same-sex domestic partners to be parents of a child carried by a gestational surrogate could be upheld in the state of Connecticut and was not contrary to public policy).

177. This provision is specific to gestational contracts.

178. Jennifer L. LaPorte, Note, *Connecticut's Intent Test to Determine Parentage: Equality for Same-Sex Couples at Last*, 26 QUINNIPIAC PROB. L.J. 291, 308 (2013).

179. 12 A.3d 783, 804 (Conn. 2011).

180. *Id.* at 798–99. (quoting Rep. Donald B. Sherer during legislative hearings) (The author concedes that under N.C. GEN. STAT. § 48-3-301 (2013) which disallows two adults to adopt, except in the cases of married heterosexual couples, it would be difficult for any court to conclude that North Carolina's legislative intent was to make it easier for unmarried couples, including same-sex couples, to circumvent the adoption laws.).

181. *Id.* at 797–98 (noting that this arrangement is in the best interest of the child).

gestation, a pre-parentage determination based upon the intent of the parties to create a child will ensure that the child is supported.¹⁸² Moreover, surrogacy contracts often provide that the intended parents are allowed to disclaim a child, should the child be diagnosed with genetic abnormalities and the surrogate refuses to abort the child.¹⁸³ Such a provision is unconscionable and should not be enforced as a matter of public policy. Because the child would not have existed without the intended parents commissioning the surrogate's services, the intended parents must continue to assume responsibility for the child. After the child's birth, the intended parents may place the child for adoption if they feel they cannot adequately care for the child. As such, an intent test is the ideal model for determining parentage in gestational surrogacy disputes. The state cannot plausibly create a rule for every possible situation, yet a framework of regulations can preemptively ensure equity and guard against exploitation.¹⁸⁴

North Carolina should further incorporate the Model Act's requirement that all participants in any method of assisted reproduction technology, including surrogacy, undergo mental health screening.¹⁸⁵ The Model Act provides that this counseling is not supposed to evaluate the ability of the intended parents to adequately parent, but rather to assess their "suitability to participate in collaborative reproduction."¹⁸⁶ For instance, in *Baby M*, there remained speculation as to whether the surrogate would be emotionally prepared to allow the intended parents to take the child.¹⁸⁷ Knowledge of this information should have screened her out of participation in a surrogacy arrangement. Moreover, the parties in Crystal Kelley's agreement could have avoided their legal situation with more conclusive screening to determine her level of comfort with termination.¹⁸⁸

182. See, e.g., *In re Marriage of Buzzanca*, 851 P.2d 776 (Cal. 1993) (stating when intended parents divorced while their hired surrogate was pregnant, the intended father who did not supply gametes was nevertheless responsible for child support payments despite his contention that he was not the "father" because the child would not have existed without the intended parents' agreement to become parents via surrogacy). See also MODEL ACT, *supra* text accompanying note 87, § 704 [Alternative B] (indicating the intended parents shall be obligated to support the resulting child notwithstanding any breach they may commit).

183. London, *supra* note 115, at 421.

184. Holmes, *supra* note 148, at 241 ("Legislation is the best method by which states should address this issue as it offers potential users of reproductive technologies the unanimity and stability that individual court cases may not provide.").

185. See *supra* text accompanying note 103.

186. *Id.*; MODEL ACT § 302(1)(c).

187. *In re Baby M*, 537 A.2d 1227, 1247–48 (N.J. 1988) (stating that while Mrs. Whitehead was evaluated, a psychologist noted that she exhibited many traits indicating that she might not be emotionally able to surrender a child after birth. The agency did not disclose this to either Mrs. Whitehead or the Sterns).

188. See discussion *supra* Part I.

Next, North Carolina should allow for reasonable compensation beyond the necessary expenses of pregnancy and childbirth, so long as such compensation is not contingent upon the surrogate relinquishing her rights.¹⁸⁹ As pregnancy can be uncomfortable at best and potentially dangerous, to completely ban paid compensation disregards the fact that a woman who enters into a contract to carry a child for another is providing a much needed service.¹⁹⁰ Furthermore, suggesting that a woman should not be paid for such an extraordinary service continues to subjugate women by dictating that they cannot profit from the use of their bodies. Such prohibitions further illustrate the ways society denigrates typically feminine spheres of influence, including childcare and housework, by relegating such duties as unpaid or undercompensated.¹⁹¹

Balancing the rights of the surrogate to be paid for her services with the policy interest in assuring that human children are not reduced to commodities is instrumental. The Model Act, while allowing for both reimbursement and compensation, explicitly states that compensation cannot “be conditioned on genotypic or phenotypic characteristics of the donor or of the child.”¹⁹² The Model Act further provides that any compensation must be “reasonable and negotiated in good faith between the parties.”¹⁹³ However, in providing no further guidance on the matter, the Model Act seems to acknowledge that it would be nearly impossible to construe today’s gestational surrogacy arrangements as equivalent to selling children on the open marketplace. Accordingly, the payments must adequately reflect only the service of carrying and giving birth to a child.

IV. CONCLUSION

While laws banning surrogacy are seemingly premised upon antiquated notions of controlling women’s bodies, it is still important for North Carolina to implement a statutory framework as legal issues arise. Relying on the State’s adoption statutes conflates two distinct legal realms. As assisted reproductive technology is becoming more and more commonplace, the State’s statutes should also evolve to encompass the changing times. Individuals are choosing to enter into gestational surrogacy contracts and, as

189. Although, this contingency would likely only be a factor in traditional surrogacy agreements; thus, void *ab initio*.

190. Holmes, *supra* note 148, at 248–49. (“A surrogate must assume an extremely intrusive medical condition for nine months, and, as such, should expect consideration for the atypical nature of her service.”).

191. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 376 (1992).

192. See *supra* text accompanying note 87.

193. *Id.* § 802(1).

such, the State should afford them the protection to raise their own children. Further, the State has an obligation to children born of such contracts to ensure that those who intended to create them are also held responsible for their care in the event that the unforeseen occurs.

From surrogacy's inception, academics and judges have pontificated about the possible ramifications that entering into these contracts may have upon the women who choose to become surrogates. As a result, many states have banned the practice, while others have restricted compensation. Assisted reproduction technology continues to advance; consequently, such restrictions are not sustainable. Couples desire to share a genetic connection with their child, so gestational agreements are becoming more commonplace. Gestational surrogacy contracts eliminate many of the ethical dilemmas that accompany enforcement of traditional surrogacy contracts by ensuring that the surrogate has no biological connection to the child. In accord, there is no possible way to misconstrue the contract as payment for a child instead of a service. As such, North Carolina should enforce gestational surrogacy contracts. In an effort to expedite the process and not require parents to have to adopt their own children, the State should further allow the courts to rule on pre-birth parentage orders. Only when the surrogate suspects that she might actually be the mother of the ensuing child should the State step in and require genetic testing.

As a matter of public policy, the State should not enforce traditional surrogacy contracts; however, the State should not criminalize them either. Requiring a mother to relinquish her biological child, whom she has carried in her body for nearly nine months, is unconscionable. The State should look to the codified adoption statute for guidance in drafting legislation that effectively balances the needs and interests of all parties. The current adoption statute allows a birth mother seven days after the child's birth to rescind the adoption contract and assume custody of her child.¹⁹⁴ Intended parents must be aware when entering into traditional surrogacy contracts that this possibility exists, and should examine whether a traditional surrogacy arrangement is appropriate for their needs.

In creating a statutory regulatory scheme addressing surrogacy, the State will also preemptively stave off some of the ethical dilemmas that accompany these types of contracts. For example, regulations should clarify that women who provide surrogacy services are entitled to their bargained-for consideration and not allow activist judges to usurp that authority. Moreover, regulations will explicitly state that courts cannot enforce unconscionable provisions such as abortion requirements. Finally, the State should re-

194. N.C. GEN. STAT. § 48-3-608(a) (2013).

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quire counseling for all parties to accurately assess whether they are appropriate candidates for assisted reproductive technology. For example, better counseling before the making of Crystal Kelley's contract, especially by a neutral party, should have screened Kelley out of the process and matched the intended parents with a surrogate whose beliefs regarding abortion were more closely aligned with their own.

The policy implications of surrogacy continue to plague legal scholars as cases increasingly make it to the news channels and the courtrooms. Moral considerations have undoubtedly prompted some of the restrictions that families face when attempting to have children using assisted reproductive technology. However, these restrictions have proved paternalistic and dismissive of a woman's bodily autonomy. North Carolina's laws must evolve to keep pace with today's technology and ensure that all parties are protected.