1997

A Plea for the Enforceability of Gestational Surrogacy Contracts

Denise E. Lascarides

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

A PLEA FOR THE ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACTS

CONTENTS

I. INTRODUCTION ................................ 1222

II. COMMERCIAL SURROGACY CONTRACTS:
    TRADITIONAL VERSUS GESTATIONAL ............. 1224
    A. Types of Surrogacy Contracts ................. 1225
        1. Traditional Surrogacy ..................... 1225
        2. Gestational Surrogacy ...................... 1226
    B. History & Legal Status of Surrogacy Contracts ... 1226
        1. Judicial Responses to Surrogacy Contracts .... 1227
            a. Judicial Response to Traditional Surrogacy Contracts .... 1228
            b. Judicial Response to Gestational Surrogacy Contracts .... 1229
        2. State Legislatures’ Responses to Surrogacy Contracts ........ 1230
        3. International Developments Regarding Surrogacy Contracts .... 1232
    C. Inappropriate Policy Arguments Against Gestational Surrogacy .... 1233
        1. Potential Devastating Effects ................ 1233
        2. Exploitation .................................. 1234
            a. Economic Exploitation ...................... 1235
            b. Commodification ............................ 1236
            c. Comparison to Prostitution ............... 1237
            d. Non-Exploitative Arrangement .......... 1238
        3. Comparison to Baby-Selling .................. 1240
III. ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACTS .......................... 1245
   A. The Agreement ........................................... 1245
      1. The Parties ........................................... 1245
      2. Voluntary Nature of the Transaction ........... 1246
         a. Mutual Gain ........................................... 1246
         b. Lack of Substantial Third Party Effects .... 1248
   B. Application of Contract Law .................. 1249
      1. Potential Breach of Contract ............... 1249
         a. Surrogate’s Actions ............................... 1250
            i. Custody Dispute .................................... 1250
            ii. Abortion Sought by the Surrogate ...... 1252
         b. Couple’s Actions .................................... 1253
         c. “Acts of God” ......................................... 1254
      2. Inadequate Bargaining Process ............. 1255

IV. CONCLUSION ........................................... 1258

I. INTRODUCTION

Consider the following:

1. Jack and Jill have been married for ten years. During the past five years, they have been trying to have a baby. Unfortunately, Jack has been unable to produce sperm, even with years of infertility treatment. They still, however, desperately want to have a baby genetically related to Jill.

2. Samson and Delilah have been married for ten years. For the past five years, they have been trying to have a baby. Unfortunately, Delilah’s ovaries are incapable of producing healthy ova. After years of taking fertility drugs, Delilah is still unable to conceive. They desperately want a child genetically related to Samson.

3. Romeo and Juliet have been married for ten years. Ever since the deaths of their feuding parents five years ago, they have been trying to have a baby. Unfortunately, Juliet cannot carry the fetus to term even if she is kept at bed rest. After many miscarriages and much heartache, Romeo and Juliet accept the fact that Juliet will never be able to give birth to a Capulet-Montague. They still, however, desperately seek a genetic heir to their vast fortune.
These three couples have a common problem. They all seek to have a child; however, they are unable to do so through natural means. Consequently, each couple will attempt to enter into a contract which will allow them to experience the joy of the miracle of life. Jack and Jill's solution is the simplest: all they must do is obtain sperm through donation or purchase.¹ For the latter two couples, their solution is a bit more complex: Samson and Delilah and Romeo and Juliet may attempt to enter into the "infamous" commercial surrogacy contract,² medical science's attempt to create a human life for an infertile³ married couple with as many as six willing participants.⁴

Arguably, when entering into such a contract, these couples may assert that they have a fundamental right to procreate.⁵ The question remains, however, whether this right extends to reproductive technologies and, in particular, the ability to contract with a third party in order to reproduce a genetic offspring. Unfortunately for these couples, current

---


² Cf. Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981) (finding that although the right to privacy and the right to procreative freedom allow a childless couple to contract with a surrogate, these constitutional rights do not include the right to compensate a surrogate).

³ "Infertility" is defined as the "inability to conceive after twelve months of intercourse without contraception." Anne Goodwin, Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements, 26 Fam. L.Q. 275, 275 (1992); see also Office of Tech. Assessment, U.S. Congress, Infertility: Medical and Social Choices 3 (1988) [hereinafter Infertility].

⁴ In the most complicated scenario, six people are involved: the egg donor, the sperm donor, the gestational host or surrogate and her husband, and the couple who intend to raise the baby. But see Goodwin, supra note 3, at 276 (stating that as many as five persons may participate in noncoital procreation: the egg donor, the sperm donor, the gestational surrogate, and the two non-genetic persons who intend to raise the child); John Lawrence Hill, What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 354 (1991) (same). The surrogate's husband must be included in the contract if the state paternity statutes or state evidence codes give him parental rights. See Hill, supra, at 372-73 (discussing the common law presumption of legitimacy and designation of the birth mother's husband as the legal father of the child); Keith J. Cunningham, Comment, Surrogate Mother Contracts: Analysis of a Remedial Quagmire, 37 Emory L.J. 721, 734-36 (1988) (discussing civil laws governing proof of paternity and their effect on surrogacy arrangements).

⁵ See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). In fact, with respect to the use of contraception, the Supreme Court has found that the right to procreate applies not only to those who are married, see Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965), but also to those who are not married, see Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").
public policy considerations may render these commercial surrogacy contracts unenforceable simply as a result of their subject matter.\(^6\)

Because of the vastness of this controversial topic, this Note considers only the contractual issues involved in commercial surrogacy contracts, with emphasis on gestational surrogacy agreements.\(^7\) Part II argues that there exists no legitimate public policy reason for denying the enforcement of commercial surrogacy contracts of a gestational nature. This section first discusses the difference between traditional and gestational surrogacy contracts and then details the legal status of commercial surrogacy contracts on both a national and international level. Further, it describes the public policy arguments against commercial surrogacy arrangements and reveals their inappropriate application to gestational surrogacy. Lastly, it examines the nature of the commercial gestational surrogacy contract as a contract for a service. Part III investigates the enforceability of the commercial gestational surrogacy contract and considers the application of contract law to solve problems which may arise after the agreement. This Note concludes that the unenforceability of commercial surrogacy contracts is an inappropriate solution: it is problematic not only for the parties to the contract but also for the courts.

II. COMMERCIAL SURROGACY CONTRACTS: TRADITIONAL VERSUS GESTATIONAL

In many jurisdictions within the United States and foreign nations, the enforceability of commercial surrogacy contracts is questionable. Their unenforcement is predicated upon public policy considerations. However, these purported grounds for their unenforceability should not be so all encompassing. Instead, gestational surrogacy contracts must be distinguished from traditional surrogacy arrangements. Consequently, this distinction calls for the legality and the enforcement of gestational surrogacy contracts.

---

7. Detailed discussions of family law issues are outside the scope of this Note.
A. Types of Surrogacy Contracts

A surrogate is defined as the "gestational carrier of any embryo, a fetus, or a child." In other words, she is an incubator in which a baby can grow. Her relation to the child depends upon the type of surrogacy arrangement and the reproductive problem which the married couple encounters.

1. Traditional Surrogacy

Recall the unfortunate situation of Samson and Delilah. The solution to their problem (i.e., Delilah’s inability to produce healthy ova) is the traditional surrogacy contract, an arrangement whereby Samson’s sperm is used to fertilize a surrogate’s ovum which the surrogate will then carry to term. In this situation, the baby is geneti-
nally linked to Samson and the surrogate; Delilah has no genetic ties or parental rights to the baby. Instead, in order for Delilah to become the legal mother, the parties will specify in the contract that, in return for compensation, the surrogate must relinquish all parental rights to the baby so that Delilah can adopt him or her.\textsuperscript{12}

2. Gestational Surrogacy

Unlike Samson and Delilah, Romeo and Juliet seek to enter into a gestational surrogacy arrangement whereby Juliet’s healthy ova are fertilized outside the womb with Romeo’s sperm and the resulting preembryos are implanted within the uterus of a surrogate.\textsuperscript{13} In this situation, the resulting baby is genetically linked to Romeo and Juliet;\textsuperscript{14} the surrogate has no genetic ties to the baby but, instead, simply serves as an incubator. Although the surrogate obviously becomes the birth mother, the contracting parties specify as a term in their contract that Romeo and Juliet become the legal parents of the baby upon his or her birth and, in return for her services, the surrogate is to receive compensation.\textsuperscript{15}

B. History & Legal Status of Surrogacy Contracts

Reproductive technologies date back to the eighteenth century.\textsuperscript{16} However, the first child born in the United States of gestational surrogacy did not occur until 1985.\textsuperscript{17} Before then, one woman served as both the genetic mother and gestational mother of the child. Thus, this scientific breakthrough separates the various stages of reproduction.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{12} See \textit{In re Baby M}, 537 A.2d 1227, 1241-42 (N.J. 1988).
\item \textsuperscript{13} This procedure is called in vitro fertilization. It involves the removal of ova from one woman, and after fertilization of the ova in a laboratory culture, the transference of several preembryos to a woman’s uterus for gestation. See \textit{INFERTILITY}, supra note 3, at 123; John Dwight Ingram, \textit{In Vitro Fertilization: Problems and Solutions}, 98 DICK. L. REV. 67, 67-69 (1993). In common parlance, the resulting fetus is called a test-tube baby.
\item \textsuperscript{14} See \textit{In re Marriage of Moschetta}, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (noting that gestational surrogacy creates a baby who is genetically related to both members of the married couple).
\item \textsuperscript{15} See Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (en banc).
\item \textsuperscript{16} The first reported use of artificial insemination of a woman by her husband’s sperm occurred in 1799. See \textit{INFERTILITY}, supra note 3, at 36. The first reported use of artificial insemination by a donor occurred in 1866; however, the procedure was not often used until the twentieth century. See Carmel Shalev, \textit{Birth Power: The Case for Surrogacy} 59 (1989).
\item \textsuperscript{17} See \textit{INFERTILITY}, supra note 3, at 36.
\item \textsuperscript{18} The stages of procreation are coitus, conception, and gestation. See Hill, supra note 4, at 354.
\end{itemize}
causing havoc with respect to legal parenthood.\textsuperscript{19} As a result, even though procreation can no longer be regulated,\textsuperscript{20} many state courts and state legislatures either refuse to enforce, highly regulate, or criminalize traditional and gestational surrogacy contracts for public policy reasons, especially where compensation is involved. Since Congress has yet to enact federal legislation relating to such contracts,\textsuperscript{21} the issue has not been resolved consistently by the state courts and state legislatures. As a result, certain states may become havens for infertile couples seeking children through traditional or gestational surrogacy. Uniform regulation is needed so that infertile couples in every state are offered the same opportunity to produce a genetic offspring through surrogacy arrangements.

1. Judicial Responses to Surrogacy Contracts

At first glance, the case law on surrogacy contracts is not consistent. The reason for this inconsistency lies in the factual differences involved in each case. Considering the judicial response in light of these factual differences helps to clarify the case law. In particular, one must keep in mind the type of commercial surrogacy contract at issue in order to distinguish the seemingly conflicting law. In short, courts generally look down upon traditional surrogacy contracts;\textsuperscript{22} however, they tend to be


\textsuperscript{20} See infra note 5.

\textsuperscript{21} With surrogacy as an interstate business, Congress has the power to enact regulatory legislation under the Commerce Clause. See INFERTILITY, supra note 3, at 26. In fact, there exist two failed attempts by Congress to pass federal legislation that would prohibit or restrict surrogacy arrangements. See Anti-Surrogate-Mother Act of 1989, H.R. 576, 101st Cong.; Surrogacy Arrangements Act of 1989, H.R. 275, 101st Cong.

\textsuperscript{22} See infra Parts II.B.1.a.
a bit more tolerant of gestational surrogacy contracts.\textsuperscript{23}

a. Judicial Response to Traditional Surrogacy Contracts

The enforceability of a commercial surrogacy contract was addressed for the first time in the celebrated case \textit{In re Baby M.}\textsuperscript{24} The case involved a traditional surrogacy contract between William Stern and Mary Beth Whitehead\textsuperscript{25} whereby Mrs. Whitehead agreed to bear a child for the Stems and terminate her parental rights in exchange for $10,000 and payment of all fees and expenses incurred as a result of the pregnancy.\textsuperscript{26} After agreeing to this arrangement, Mrs. Whitehead was artificially inseminated with Mr. Stern's sperm.\textsuperscript{27} The problem arose before the birth of the child when Mrs. Whitehead decided that she wanted to retain custody of the baby.\textsuperscript{28}

The New Jersey Supreme Court declared all surrogacy contracts void and unenforceable as violative of several state laws and public policies.\textsuperscript{29} In particular, the contract's unenforceability was predicated upon the following laws: those which prohibit the exchange of money in connection with adoptions,\textsuperscript{30} those which require "proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted",\textsuperscript{31} and those which permit a woman to revoke her surrender of custody and consent to adoption in private placement adoptions.\textsuperscript{32} Thus, the court compared the practice of commercial surrogacy to baby-selling, arguing that state laws prohibiting the sale of

\textsuperscript{23} For example, courts in California enforce gestational surrogacy contracts, see Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (en banc), but they hold unenforceable traditional surrogacy contracts, see \textit{In re Marriage of Moschetta}, 30 Cal. Rptr. 2d 893 (Ct. App. 1994); see also infra Part II.B.1.b.

\textsuperscript{24} 537 A.2d 1227 (N.J. 1988).

\textsuperscript{25} Mrs. Stern was not a party to the contract. Instead, the contract only referred to her as William Stern's infertile wife. See id. at 1265. In addition, the contract stipulated that in the event of Mr. Stern's death, whether prior or subsequent to the child's birth, Mrs. Stern was to receive custody. See id. at 1267.

\textsuperscript{26} See id. at 1235. The Stems' situation is similar to that of Samson and Delilah, discussed supra p. 1222.

\textsuperscript{27} See Baby M, 537 A.2d at 1267. Consequently, Mrs. Whitehead was both the genetic and gestational mother.

\textsuperscript{28} See id. at 1236.

\textsuperscript{29} See id. at 1240-50.

\textsuperscript{30} See id. at 1240.

\textsuperscript{31} Id.

\textsuperscript{32} See id.
b. Judicial Response to Gestational Surrogacy Contracts

Five years after Baby M, the enforceability of a commercial surrogacy contract was again tested in Johnson v. Calvert. Unlike Baby M, Johnson involved a gestational surrogacy contract between the Calverts and Mrs. Johnson whereby she agreed to gestate the Calverts' child and relinquish all parental rights to the Calverts who would raise the baby. As consideration, the Calverts agreed to pay Mrs. Johnson $10,000 in cash and a $200,000 life insurance policy on her life.

Four days after signing the contract, the zygote which had formed through in vitro fertilization was implanted in Mrs. Johnson’s uterine cavity. As the pregnancy proceeded, relations between the parties deteriorated when the Calverts learned of Mrs. Johnson's previous.

33. The court stated:
This is the sale of a child, or, at the very least, the sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.

Id. at 1248. But see Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (en banc) (arguing that surrogacy can be distinguished from adoption; thus, the prohibition against the exchange of money does not apply). For further discussion of this issue, see infra Part II.C.

34. See Baby M, 537 A.2d at 1255-61; see also In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894-95 (Ct. App. 1994) (holding a traditional surrogacy contract unenforceable); Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 213 (Ky. 1986) (holding surrogacy contracts voidable rather than illegal and void); Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981) (holding that the surrogacy contract was void because it would violate a statute banning the exchange of money in connection with an adoption); In re Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 817 (Sur. Ct. 1986) (holding a surrogacy contract voidable rather than void because its terms violated state adoption statutes).

35. 851 P.2d 776 (Cal. 1993) (en banc).

36. See supra notes 24-34 and accompanying text and discussion infra Part II.C.

37. Unlike the agreement in Baby M, see supra note 25, both Mark and Crispina Calvert entered into the agreement with Anna Johnson. See Johnson, 851 P.2d at 778.

38. See Johnson, 851 P.2d at 778. The Calverts entered into the gestational surrogacy agreement because Crispina Calvert was forced to undergo a hysterectomy and was therefore unable to gestate a fetus. See id. The Calverts' situation resembles that of Romeo and Juliet discussed supra p. 1222.

39. See Johnson, 851 P.2d at 778. The Calverts were to pay $10,000 to Mrs. Johnson in a series of installments and the premiums on the $200,000 life insurance policy. See id.

40. See id. For a discussion of the procedure, see supra note 13 and accompanying text.
miscarriages and stillbirths. Feeling abandoned during an onset of premature labor and angered that the Calverts failed to obtain the life insurance policy as they had promised, Mrs. Johnson demanded immediate payment of the balance of the money due her or she would keep the baby. As a result, both parties filed petitions seeking to be declared the legal parents of the unborn child.

The Calverts and Mrs. Johnson presented to the California Supreme Court a case of first impression. After wrestling with the determination of who was the natural mother of the child, the court held that a surrogate has no parental rights to a child who is not genetically linked to her. The court arrived at this conclusion after rejecting the public policy arguments advanced by Mrs. Johnson. Instead, custody should be awarded to the couple who supplied the zygote and intended to raise the child as per the agreement.

2. State Legislatures’ Responses to Surrogacy Contracts

Similar to the court’s holding in Johnson, a majority of people in the United States believe that legal parentage should be based upon the intentions of the parties to a surrogacy arrangement and that surrogacy agreements should be legally enforceable. However, state legislatures have not responded accordingly. In fact, only four states have enacted

41. See Johnson, 851 P.2d at 778.
42. See id.
43. See id.
44. See id. at 779-83. For a discussion of this family law issue, see Teresa Abell, Comment, Gestational Surrogacy: Intent-Based Parenthood in Johnson v. Calvert, 45 MERCER L. REV. 1429, 1433-35 (1994).
45. See Johnson, 851 P.2d at 777-78, 782. But see id. at 788-801 (Kennard, J., dissenting) (arguing that the majority should have based its decision on the best interests of the child).
46. See id. at 785. The court also rejected the constitutional arguments raised by Mrs. Johnson. See id. at 785-87.
47. See id. at 782. The court stated: “‘[W]hile all of the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents.”’ Id. (quoting Hill, supra note 4, at 415).

http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss4/4
legislation providing for the legality and enforceability of surrogacy agreements: Florida,\textsuperscript{50} Nevada,\textsuperscript{51} New Hampshire,\textsuperscript{52} and Virginia.\textsuperscript{53} Nevertheless, these four states prohibit couples from paying compensation to the surrogate for her services in excess of any expenses\textsuperscript{54} incurred as a result of the pregnancy.\textsuperscript{55} Furthermore, Florida, New Hampshire, and Virginia are the only states which specifically address gestational surrogacy contracts;\textsuperscript{56} the rest do not distinguish between the two types of surrogacy arrangements. Instead, in at least seven states, all surrogacy agreements are void and unenforceable.\textsuperscript{57} Five other states and the District of Columbia impose civil and criminal penalties on those who enter into such contracts.\textsuperscript{58} This lack of legislative support for the legalization of commercial surrogacy contracts may be attributed to concerns about the possible exploitation of surrogates by the intended

\textsuperscript{50} See FLA. STAT. ANN. §§ 742.13, .15, .16.

\textsuperscript{51} See NEV. REV. STAT. ANN. § 126.045.

\textsuperscript{52} See N.H. REV. STAT. ANN. §§ 168-B:1 to -B:32.

\textsuperscript{53} See VA. CODE ANN. §§ 20-156 to -165.

\textsuperscript{54} In Nevada, the expenses are limited to medical and living expenses. See NEV. REV. STAT. ANN. § 126.045(3).


\textsuperscript{56} See FLA. STAT. ANN. §§ 742.15-.16 (West 1986 & Supp. 1996); N.H. REV. STAT. ANN. §§ 168-B:1 to -B:32; VA. CODE ANN. §§ 20-156 to -165.

\textsuperscript{57} Surrogacy contracts are void in the following states: (1) Arizona, see ARIZ. REV. STAT. ANN. § 25-218(A) (West 1991); (2) Indiana, see IND. CODE ANN. § 31-8-2-1 (West Supp. 1996); (3) Louisiana, see LA. REV. STAT. ANN. § 9:2713(A) (West 1991); (4) Michigan, see MICH. COMP. LAWS ANN. § 722.855 (West 1993 & Supp. 1996); (5) Nebraska, see NEB. REV. STAT. § 25-21,200(1) (Supp. 1996); (6) North Dakota, see N.D. CENT. CODE § 14-18-05 (Michie 1991 & Supp. 1995); and (7) Tennessee, see TENN. CODE ANN. § 36-1-102(46)(A) (1996).

\textsuperscript{58} Surrogacy contracts are outlawed in the following jurisdictions: (1) District of Columbia, see D.C. CODE ANN. § 16-402 (Supp. 1996) (imposing a civil penalty, or one year imprisonment, or both, for entering into, assisting, or inducing another to enter into a surrogacy contract); (2) Kentucky, see KY. REV. STAT. ANN. § 199.990 (Michie 1995) (class D felony); (3) Michigan, see MICH. COMP. LAWS ANN. §§ 722.857(2), .859 (deeming it a felony to enter into surrogacy contracts with a minor or a mentally infirm woman or to procure surrogacy agreements for compensation); (4) New York, see N.Y. DOM. REL. LAW § 123 (McKinney Supp. 1997) (imposing a civil penalty upon those entering into a surrogacy agreement and a felony for third parties who recruit or procure women to become surrogates); (5) Utah, see UTAH CODE ANN. § 76-7-204(1)(d) (1995) (class B misdemeanor); and (6) Washington, see WASH. REV. CODE ANN. § 26.26.250 (West Supp. 1997) (gross misdemeanor).
parents, by agents who bring the parties together for a profit, and by society as a whole.\textsuperscript{59}

\section*{3. International Developments Regarding Surrogacy Contracts}

Many European countries also outlaw commercial surrogacy.\textsuperscript{60} There is little consensus, however, between the countries on the regulation of noncommercial surrogacy.\textsuperscript{61} Some countries prohibit the use of donated ova or sperm or both.\textsuperscript{62} Other countries highly regulate surrogacy and in vitro fertilization.\textsuperscript{63} Still other countries lack in vitro fertilization and surrogacy regulation. Because of these inconsistencies, couples living in one country where surrogacy is banned may seek a contract in a foreign nation which permits such an agreement. Thus, unless all countries make surrogacy criminal,\textsuperscript{64} the emergence of international surrogacy contracts may give rise to certain countries becoming havens for infertile couples seeking children through traditional or gestational surrogacy agreements.

\begin{itemize}
\item \textsuperscript{59} See Hill, supra note 48, at 637-44; see also infra Part II.C.2.
\item \textsuperscript{60} The following European countries ban commercial surrogacy: Britain, France, Germany, Greece, Israel, Norway, Spain, and Switzerland. See Krim, supra note 55, at 215 (citing Leo Uzych, \textit{The Mother of All Questions: How to Govern Surrogacy}, PA. L.J., Mar. 8, 1993, at 2).
\item \textsuperscript{61} For a detailed discussion of international legislation, see \textit{id.} at 215-19.
\item \textsuperscript{62} For example, in Germany, it is unlawful to implant an ovum within a woman who did not provide it. \textit{See id.} at 215. Hence, it is impossible to enter into a legal gestational surrogacy contract. In Sweden, the use of donated ova or sperm and the anonymous donation of sperm have been banned. \textit{See id.} at 215-16 (citing \textit{Improvised Guidelines on Motherhood's Brave New World}, \textit{GUARDIAN} (London), Jan. 5, 1994, at 9).
\item \textsuperscript{63} For example, Britain regulates in vitro fertilization and voluntary surrogacy through the Human Fertilisation and Embryology Act of 1990 which details the criteria for the usage of such procedures and the legal status of the parents. \textit{See id.} at 217-18 (citing Human Fertilisation and Embryology Act, 1990, ch. 37).
\item \textsuperscript{64} A worldwide ban of surrogacy is highly unlikely, considering the current inconsistencies between nations and within the United States.
\end{itemize}
C. Inappropriate Policy Arguments Against Gestational Surrogacy

An obstacle to making consistent the law on surrogacy is the fact that many state courts and legislatures (and even commentators) fail to distinguish between the two types of surrogacy, traditional and gestational, and too quickly refer to both arrangements simply as “surrogacy.” By distinguishing between the two, it becomes clear that the public policy arguments advanced by state courts and legislatures against traditional surrogacy contracts do not apply to gestational surrogacy arrangements. As a result, all surrogacy contracts should not be void and unenforceable as declared by the Baby M court,65 instead, gestational surrogacy arrangements, even if commercial, should remain enforceable.

1. Potential Devastating Effects

In Baby M, the court advanced many policy arguments in finding all surrogacy contracts void and unenforceable, one of which was the potential devastating long-term effects of surrogacy contracts upon all those concerned:

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.66

However, in Johnson, the California Supreme Court was unpersuaded by this argument. Because there existed no substantial evidence to support this claim, the court declared that the “limited data available seem[s] to reflect an absence of significant adverse effects of surrogacy on all participants.”67

Without definitive evidence of harm to those involved in a surrogacy arrangement, it appears too speculative to assume that devastating effects will result. Further, even assuming arguendo that such consequences will follow, they should not be examined in isolation. Instead, courts should perform a balancing test so that they also consider

65. See In re Baby M, 537 A.2d 1227, 1240-50 (N.J. 1988); see also supra notes 29-34 and accompanying text.


the many positive attributes of the arrangement. In addition to the inquiry made by the Baby M court, courts should contemplate the following beneficial effects of the gestational arrangement: the impact on the child who learns that her genetic parents wanted her so much that they went through many medical procedures and spent thousands of dollars in order to bring her into the world, that she was not an accident but, instead, the miracle child for which her parents prayed for years; the impact on the birth mother who realizes that she gave to an infertile couple the miracle of birth and the joy of family life; and the impact on the genetic parents once they hold the child in their arms and acknowledge that she is theirs to raise and love.

2. Exploitation

The exploitation argument against commercial surrogacy contracts takes many forms. Some opponents contend that the contracts economically exploit women. Others argue that commercial surrogacy contracts "commodify" women and children. Others equate surrogacy to prostitution and thus conclude that the former should be banned. However, these opponents fail to acknowledge that the law recognizes a woman's ability to contract and make decisions regarding the use of her own body without government interference. They also fail to recognize that the economic, social, and psychological motivations predisposing a woman to enter into a surrogacy contract do not satisfy all the conditions for exploitation.

68. See Peter H. Schuck, Some Reflections on the Baby M Case, 76 GEO. L.J. 1793, 1801-04 (1988); see also discussion infra Part III.A.2.b.

69. For a detailed discussion of exploitation, see Hill, supra note 48.

70. See Gena Corea, The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs 213-229 (1985); Hill, supra note 48, at 638-39; see also infra Part II.C.2.a.


72. See Corea, supra note 70, at 227-28 (citing Andrea Dworkin, who equates surrogacy to prostitution); see also infra Part II.C.2.c.

73. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (affirming the principle that a woman has the right to choose to have an abortion before fetal viability without government interference).

74. See Hill, supra note 48, at 683-90; see also infra Part II.C.2.d.
a. Economic Exploitation

A public policy argument advanced by the court in *Baby M* was that commercial surrogacy, like baby-selling, potentially degrades and financially exploits the natural mother.\(^75\) The monetary enticement takes advantage of the surrogate’s circumstances, especially her need for money,\(^76\) and causes her decision to be involuntary:

[The surrogate] never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary.\(^77\)

Furthermore, since the arrangement involves a large payment, a class distinction arises whereby the rich benefit at the expense of the poor.\(^78\)

Acknowledging that women of a lower economic class would more likely serve as surrogates than those of a higher economic class, the *Johnson* court nevertheless was unpersuaded by this argument since there existed no factual basis to support exploitation.\(^79\) The court reasoned that surrogacy contracts do not necessarily exploit poor women any more than society in general exploits them:

Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.\(^80\)

In fact, data compiled on surrogates shows that they are not economically exploited.\(^81\) Although women generally serve as surrogates for monetary

\(^{75}\text{See In re Baby M, 537 A.2d 1227, 1250 (N.J. 1988).}\)
\(^{76}\text{See id. at 1249.}\)
\(^{77}\text{Id. at 1248.}\)
\(^{78}\text{See id. at 1249. The court stated:}\)
\(^{79}\text{[I]t is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.}\)
\(^{80}\text{Id. (citation omitted).}\)
\(^{81}\text{See Hill, supra note 48, at 691-95 (noting that “there is little compelling evidence for the claim that surrogate arrangements are inherently exploitative”).}\)
reasons, there exist nonmonetary factors motivating them as well: many assert an altruistic desire to provide an infertile couple a baby;\(^{82}\) some would like to experience pregnancy without having to raise a child;\(^{83}\) and others are attracted to the arrangement after having worked in a "nurturing field" such as medicine or childhood education.\(^{84}\) Furthermore, surrogates tend to be drawn from the lower-middle and middle classes "with annual incomes between $15,000 and $50,000 in 1987 dollars."\(^{85}\) As a consequence, the economic exploitation argument fails.

b. Commodification

The second type of exploitation argument deals with commodification. In particular, many feminist scholars argue that women will be commodified as a result of their reproductive capacity.\(^{86}\) They fear that women will be hired as surrogates as a result of their beauty, intelligence, or race.\(^{87}\) They further argue that all surrogacy arrangements promote a system of purchase and sale of babies, and thus commodify children.\(^{88}\)

However, Professor Epstein rejects each of these arguments.\(^{89}\) First, he concludes that women are not reduced to commodities unless they themselves believe they have been commodified:

The claim about commodification therefore has nothing whatsoever to do with what a woman may or may not do with her own body, or what a man may or may not do with his own sperm. Instead it is an effort by some to *impose* their own conception of the right and proper thing to do with bodies, eggs and sperm on other individuals who hew to different conceptions of the good. In order to restrain the behavior of others, some greater warrant than a diffuse condemnation of their conduct is needed . . . No one's views on commodification should be imposed on other individuals who do not share those views. The women who want to enter into surrogacy contracts are not reduced to

---

82. See id. at 692 (citations omitted).
83. See id.
84. See id.
85. Id. at 691 (footnote omitted).
86. See id. at 639-44.
87. See id. at 639.
commodities solely because others mistakenly hold to that view.90

Second, Professor Epstein determines that surrogacy arrangements do not commodify children.91 He argues that unlike a good, a commodity is typically meant for consumption and does not have a unique subjective value.92 In other words, a commodity may be perfectly substituted with another unit.93 Since a baby is unique and cannot be perfectly substituted, the term “commodity” is inappropriate to describe the relationship of a parent to a child.94 Thus, Professor Epstein concludes that it is impossible for the arrangement to commodify a child.95

c. Comparison to Prostitution

Next, feminist scholars argue that surrogacy contracts are a form of prostitution or slavery whereby a woman exchanges the use of her body for money.96 They argue that prostitutes (who are usually women) and surrogates usually choose their roles as a result of economic necessity.97 Consequently, both are women who remain the victims of exploitation.98 Since prostitution is illegal for moral reasons, they conclude that surrogacy should also be prohibited.99

This argument fails for two reasons. First, as Professor Epstein notes, the enforcement of contracts cannot be blocked simply because others disapprove of the motives and actions of the parties to the agreement.100 In other words, morality alone is not a sufficient reason to criminalize these contracts; some other justification is needed. For example, with respect to abortion, the Supreme Court has explicitly stated that morality alone cannot be the basis for the law:

90. Id. at 2326.
91. See id.
92. See id. at 2327.
93. See id.
94. See id. at 2326-38.
95. See id. at 2328.
96. See Katherine B. Lieber, Note, Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?, 68 IND. L.J. 205, 211 (1992) (explaining that feminists view surrogacy as a form of prostitution or slavery which exploits the surrogate through “the enticements of money, the social expectation of self-sacrifice, or both”).
97. See Hill, supra note 48, at 641-42.
98. See id. at 641.
99. See id. at 641-42.
100. See Epstein, supra note 89, at 2341.
Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.¹⁰¹

Similarly, morality alone cannot control the law of surrogacy: the state cannot impose its view of surrogacy as an immoral practice upon others who do not share that same view. As a result, the contracts must be upheld so long as the individual terms of the contract do not violate an existing law (other than those specifically addressing surrogacy arrangements) and there exists no problem in the bargaining process.

Second, surrogacy arrangements can be distinguished from prostitution by simply examining the purpose behind each transaction to determine whether the ends justify the means.¹⁰² In other words, to understand the difference between these two arrangements, one must consider why these contracts are sought: why do men seek prostitutes, and why do infertile couples seek surrogates? Admittedly, in both situations, a woman is paid money for the use of her body. However, surrogacy arrangements are sought to bring a wanted life into this world, that of a child whom the infertile couple desperately seeks but has not been able to produce on its own. There exist no base qualities in the transaction. Prostitution, on the other hand, is a sordid arrangement. Its sole objective is physical pleasure, and unlike gestational surrogacy contracts, it has the potential of affecting society as a whole. Hence, this comparison fails: how can one possibly compare the miracle of life to vile pleasure?¹⁰³

d. Non-Exploitative Arrangement

Even if the above arguments against surrogacy seem logical, they all misinterpret the meaning of exploitation in its truest sense. According

¹⁰³. A third possible argument against this morality-based comparison is the contradictory laws in Nevada. Ironically, prostitution is legal in licensed houses of prostitution, see NEV. REV. STAT. ANN. § 201.354 (Michie 1997) (deeming it legal for a person to engage in prostitution or solicitation if such acts occur in a licensed house of prostitution), yet surrogacy contracts, although enforceable, are limited to compensating the surrogate for medical and living expenses, see NEV. REV. STAT. ANN. § 126.045(3) (Michie Supp. 1995).
to Professor Hill, actual exploitation is a psychological, rather than a social or economic, concept consisting of six elements:

The putatively exploitative proposal must: 1) consist of an offer of benefit, never a threat; 2) which is made intentionally, knowingly or recklessly on the part of the offeror, such that it is likely to involve, implicate or take advantage of; 3) a psychologically recognized vulnerability or weakness on the part of the offeree; 4) where the vulnerability or weakness characteristically results in a significant impairment of the rational-emotional capacity of the individual; 5) that the offer actually has the effect of impairing the rational-emotional capacity of the offeree; 6) such that, but for the impairment of this capacity, the offeree would not have accepted the offer.

In other words, to be exploitative, an offer must create or take advantage of a recognized psychological vulnerability which, in turn, interferes with the offeree’s capacity to reason. As a result, commercial surrogacy arrangements are not generally exploitative. At issue in these contracts are the third and fourth elements of exploitation: psychological vulnerability resulting in the incapacity to reason effectively.

Vulnerability, as defined by Professor Hill, is “an internal psychological condition that typically or routinely causes an impairment in the rational-emotive capacities of the actor.” In other words, the offeree’s capacity to reason is hampered by her personality or circumstance of life. Poverty, political oppression, or social alienation do not establish this criterion unless they create an internal psychological disability.

Consequently, for surrogates to be exploited, they must as a class have a predisposition of personality or circumstance of life which impairs their ability to reason effectively. However, there exists no compelling evidence supporting inherent exploitation. Monetarily speaking, economic incentive may create a psychological weakness resulting in rational

---

104. Hill, supra note 48, at 683-84.
105. To understand the basis for this conclusion, see id. at 661-83.
106. See id. at 691-95.
107. See id. at 691. Assume for this discussion that the first and second elements (offer and the requisite mental state) are satisfied. As for the fifth and sixth elements (actual cognitive impairment and causation), they must be determined on an individual basis, so for the purpose of this discussion, assume that they too are satisfied. See id.
108. Id. at 687.
109. Circumstances of life affecting the offeree’s rational-emotive process include fear, grief, guilt, severe depression, and psychological addiction. See id. at 686.
110. See id. at 687.
impairment only in the most extreme cases. Yet, surrogacy contracts generally involve only $10,000, a sum of money that can hardly be considered substantial when considering that it entails nine months or forty weeks of service. Thus, the economic incentive is not extreme enough in nature to result in exploitation.

Similarly, Professor Hill argues that the claim of social conditioning does not provide a basis for the allegation of exploitation. The decision to bear a child is made just as any ordinary decision. To argue that it is the result of social conditioning would imply that all decisions made by women are so influenced and similarly tainted. As Professor Hill states, "[i]f no woman is demonstrably free in such matters, when is any decision an expression of her true self?" To make such a generalization is inappropriate. Furthermore, even assuming that the decision to become a surrogate is the result of social conditioning, this does not provide a basis for the assertion of exploitation because it is not clear how it creates the requisite form of psychological vulnerability.

Finally, assuming arguendo that social conditioning does provide a psychological weakness, it could not possibly result in that form of vulnerability which produces irrational decisions. The choice to become a surrogate can be considered rational: just because some women would never so choose does not make the decision to become one intrinsically irrational. Since the fourth condition (irrationality) is not met, Professor Hill concludes that there can be no exploitation of the surrogate.

3. Comparison to Baby-Selling

Lastly, an extremely popular policy argument against the enforceability of commercial surrogacy contracts depicts commercial surrogacy as the sale of a baby. Opponents of surrogacy contend that adoption statutes prohibiting the exchange of money in connection with an adoption should apply to commercial surrogacy contracts since such

111. See id. at 693.
112. See id. at 691-92 & n.392 (noting that $10,000 is the most common surrogate fee).
113. This would amount to only $250 a week or $1.49 for each hour of the pregnancy.
114. See Hill, supra note 48, at 693.
115. Id.
116. See id.
117. See id. at 694.
118. See id. at 695.
contracts ultimately result in the sale of a baby.\textsuperscript{119} For example, the court in Baby M reasoned that, unlike adoption statutes which value the child’s welfare, a surrogacy contract does not consider the child’s best interests:

It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.\textsuperscript{120}

Thus, like baby-selling, commercial surrogacy places a child in a home without considering whether the prospective parents would be suitable to raise the child. Instead, money is paid to the surrogate in exchange for her parental rights, and thus, the couple has bought a baby.\textsuperscript{121}

However, the following question seems to escape the minds of these commentators: can a baby, or the parental rights to a child, be considered a “good”? In general, “goods” are defined as the following:

“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . .

Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.\textsuperscript{122}

\textsuperscript{119} See In re Baby M, 537 A.2d 1227, 1241-42 (N.J. 1988). In referring to a law prohibiting the payment or receipt of money in connection with the placement of a child for adoption, the New Jersey Court stated:

The prohibition of our statute is strong. Violation constitutes a high misdemeanor, a third-degree crime, carrying a penalty of three to five years imprisonment. The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. Furthermore, the adoptive parents may not be fully informed of the natural parents’ medical history. Baby-selling potentially results in the exploitation of all parties involved. Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child.

\textit{Id.} (citations omitted).

\textsuperscript{120} \textit{Id.} at 1250. The court further argued that “[t]he contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody.” \textit{Id.} at 1246.

\textsuperscript{121} See \textit{id.} at 1248.

\textsuperscript{122} U.C.C. § 2-105(1)-(2) (1978).
In a gestational surrogacy contract, there exists no baby and thus no parental rights to one at the time of agreement. As a result, both the lack of a child and parental rights to the child clearly cannot be considered an existing good. With respect to future goods, one must have a right to the future goods at the time of the contract in order to sell them. Since the gestational surrogate never has parental rights to the child, she has no interest in the baby at any time and thus cannot sell the baby or any rights to the child as a future good. Hence, gestational surrogacy contracts cannot be considered contracts for the sale of a "good."

Accordingly, the Johnson court determined that surrogacy contracts did not involve the sale of a baby. The court distinguished surrogacy from adoption, remaining unpersuaded by the argument that surrogacy will promote the view that children as well as surrogates are mere commodities. The court reasoned that, unlike an adoption arrangement, when the surrogate entered into the contract, she did not have a baby to sell and thus would not be "vulnerable to financial inducements to part with her own expected offspring." The court concluded that the exchange of money in the gestational surrogacy contract was meant to compensate the surrogate for her services rather than relinquish her parental rights to the child.

Interestingly, Professor Epstein, who believes in the enforcement of commercial surrogacy contracts, has argued not that they are contracts for a service but that they are contracts for the relinquishment of parental rights and obligations. In other words, Professor Epstein argues that the payment of money "only converts the transaction from a voluntary

124. See id. at 784 ("The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived . . . ").
125. See id. at 785.
126. Id. at 784. Interestingly, at least one court has applied similar reasoning to a traditional surrogacy arrangement whereby the surrogate received compensation for her services:
[T]he central fact in the surrogate parenting procedure is that the agreement to bear the child is entered into before conception. The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.
Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 211-12 (Ky. 1986).
127. See Johnson, 851 P.2d at 784.
128. See Epstein, supra note 89, at 2328.
donation of parental rights to a sale of parental rights.”\textsuperscript{129} It does not make the transaction involuntary; it does not make it corrupt.\textsuperscript{130} There exists no fraud, no concealment, and no misrepresentation simply from the payment of money.\textsuperscript{131} If anything, there exists a conflict of interest between parent and child because the mother will weigh one interest against another and ultimately sell the child to the highest bidder.\textsuperscript{132} This conflict of interest, Professor Epstein argues, is not a reason to ban the transaction; after all, “[s]tate-run adoption systems are rife with conflicts of interest and incompetence, yet the response is not to ban their operation entirely.”\textsuperscript{133}

Professor Epstein’s argument is persuasive with respect to traditional surrogacy contracts; however, it does not apply to those of a gestational nature. Although he distinguishes between the two types of surrogacy arrangements,\textsuperscript{134} his argument falters because it assumes that the birth mother will have parental rights to sell. However, in Johnson, the California court held that the surrogate who simply gestates the baby and has no genetic link to the child obtains no parental rights to the baby.\textsuperscript{135} Similarly, in Ohio, a court ordered that a birth certificate read the genetic mother’s name and not that of the birth mother.\textsuperscript{136} Thus, unless the surrogate has parental rights to the child, and in gestational surrogacy arrangements she does not, Professor Epstein’s argument is nugatory. Consequently, its application must be limited to commercial surrogacy contracts of a traditional arrangement.

As for gestational surrogacy contracts, they should be viewed as personal services contracts as the California Supreme Court implied in Johnson.\textsuperscript{137} In general, a personal services contract is defined as a contract which requires the promisor himself to perform.\textsuperscript{138} For exam-
ple, a contract with an opera singer to perform a series of engagements in Carnegie Hall depicts a personal services contract. The contract requires that this particular person perform; no one would be an adequate substitute.

Although gestational surrogacy arrangements do not precisely fall within this definition of personal services contracts at first glance, they ultimately require the surrogate herself to perform. Unlike the diva who is hired for her voice, the gestational surrogate has no unique quality for which she is hired. Rather, she develops a uniqueness unmatched by any other woman when she is impregnated with the couple's zygote. From that time forward until the birth of the child, she remains the only woman who can perform the contract: she is the only woman bearing this particular genetic child of the married couple with whom she contracted. Thus, like the opera singer, the gestational surrogate provides a unique service for those with whom she contracts.

Moreover, like other personal services contracts, performance of a gestational surrogacy contract produces something of substance: a unique child. Like an artist who paints the promisee’s portrait, or a travel agent who arranges a honeymoon for the promisees, or an architect who designs the house of the promisee’s dreams, the surrogate gives life to the promisee’s child. Performance is complete when the artist gives the promisee her portrait, when the travel agent produces the airplane tickets, when the architect delivers the house’s blue prints, and when the surrogate surrenders the child to the genetic parents. Thus, although each of these situations results in something of substance, they all involve a service. Moreover, since the subject matter in each situation is personal in nature, the promisors cannot keep the finished products for themselves without breaching their contracts. After all, the products are unique and cannot be replaced with a substitute.¹³⁹

Nevertheless, there remains one question: what must the surrogate do for her performance to be considered a service? Of course, the simple answer is that she must gestate the fetus to term and at birth, give the baby to the promisees. However, her performance involves more than the simple “renting of a womb.”¹⁴⁰

Typically, like other personal services contracts, gestational surrogacy contracts often include a substantial number of promises by the promisor. The gestational surrogate usually promises to refrain from

¹³⁹. See id. § 12.6, at 861-62.
¹⁴⁰. Cunningham, supra note 4, at 742.
behavior which might be harmful to the fetus.\textsuperscript{121} She also promises to regularly obtain prenatal care.\textsuperscript{122} As a result, to adequately perform her service, she must abide by all of the contract’s provisions \textit{and} relinquish all claims to the baby after its birth. It is at that point that her service is complete.

III. \textbf{ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACTS}

Since there exist no persuasive policy arguments against gestational surrogacy contracts, these contracts should be enforced and their intentions respected unless there exists a problem in the bargaining process. If such a problem were to arise, state contract law must be applied to remedy the situation.

\textit{A. The Agreement}

The surrogacy contract must include in the written agreement all terms in which the couple has any interest. Acceptance of the offer will occur when the surrogate signs the document, thus making it a valid personal services contract. To avoid many problems, the parties to the contract must be selected with the utmost care, and the contract must always be carefully drafted.

1. \textbf{The Parties}

The parties to gestational surrogacy contracts differ from those of traditional surrogacy arrangements. In the latter situation, there exist only three parties to the contract: the natural father, the surrogate, and the surrogate’s husband, if she is married.\textsuperscript{123} The natural father’s wife need not be party to the agreement.\textsuperscript{124} However, with respect to a gestational surrogacy arrangement, there exist four parties to the contract: the natural father, the natural mother, the surrogate, and the surrogate’s husband, if she is married. The natural mother is included in the contract because she

\begin{itemize}
\item \textsuperscript{121} This may include conduct such as smoking, drinking, or taking drugs. See Katie Marie Brophy, \textit{A Surrogate Mother Contract to Bear a Child}, 20 J. Fam. L. 263, 282-83 (1981-1982).
\item \textsuperscript{122} See Cunningham, supra note 4, at 742 n.119; see also Epstein, supra note 89, at 2333 (arguing that the surrogate must obey all of the doctor’s orders).
\item \textsuperscript{123} See Brophy, supra note 141, at 263-64, 268. The surrogate’s husband must be included in the contract if the state paternity statutes or state evidence codes give him parental rights. See supra note 4.
\item \textsuperscript{124} For example, in Baby M, Mrs. Stem was not a party to the contract. See \textit{In re Baby M}, 537 A.2d 1227, 1265-73 (N.J. 1988) (reprinting the entire surrogacy contract between the parties); see also supra note 25 (discussing the contract in Baby M).
\end{itemize}
has parental rights to her genetic child.\textsuperscript{145}

Nevertheless, there remains the problem of choosing the appropriate woman to serve as the gestational surrogate. Since the genetic parents have a personal interest in the surrogate’s conduct and health, they must choose her with a great amount of care.\textsuperscript{146} In fact, although the terms of the agreement are important, the most important decision the infertile couple must make is with whom the contract will be made.\textsuperscript{147} Careful selection of the surrogate “helps protect against diffuse concerns of exploitation and advantage that could lead to fraud and other forms of sharp practice”;\textsuperscript{148} it ensures the child’s safety from misbehavior; and it allows for the enforcement of the contract:

That [form of] vested interest in the health and the welfare of the surrogate mother in turn helps protect against the manifold forms of contracting abuse. In the event that some abuse does take place, all the standard legal remedies for fraud and misrepresentation are available to the surrogate mother as a matter of course.\textsuperscript{149}

Thus, it is in the couple’s best interest to find a woman who is trustworthy, who can fend for herself, and who will not be exploited by the arrangement so that there exists no threat to the bargaining process or the enforceability of the contract.

2. Voluntary Nature of the Transaction

Once the parties are chosen, they must always maintain the voluntary nature of the transaction.\textsuperscript{150} To do so, the contract must benefit both sides of the transaction while having few negative effects on third parties.

a. Mutual Gain

Economists insist that a contract result in a mutual gain for both parties.\textsuperscript{151} In particular, they argue that a contract should presume

\textsuperscript{145} See \textit{Johnson v. Calvert}, 851 P.2d 776, 777-78 (Cal. 1993) (en bane). In \textit{Johnson}, Crispina Calvert was a party to the contract. See \textit{id.} at 778; see also \textit{supra} note 37 (noting the same).
\textsuperscript{146} See \textit{Epstein}, \textit{supra} note 89, at 2317.
\textsuperscript{147} See \textit{id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 2317-18.
\textsuperscript{150} See \textit{supra} notes 76-77, 129-31 and accompanying text for a discussion of the voluntary nature of the transaction (or lack thereof) if compensation is involved.
\textsuperscript{151} See \textit{Epstein}, \textit{supra} note 89, at 2313.
mutual gain rather than mutual or one-sided exploitation.\textsuperscript{152} This presumption of mutual gain seems logical since parties generally enter into a contract to benefit rather than harm themselves. Furthermore, it reinforces the concept of consideration and the court's tradition of not looking into its adequacy.\textsuperscript{153}

Consideration consists of two components: a bargain and legal detriment.\textsuperscript{154} There exists no requirement that the exchange be equivalent;\textsuperscript{155} it merely must not be a sham.\textsuperscript{156} In gestational surrogacy contracts, the bargain consists of one express condition and one bilateral promise: (1) the gestational surrogate promises to return the baby to the couple if the couple gives her its zygote;\textsuperscript{157} and (2) the gestational surrogate promises to gestate the couple's zygote if the couple promises to raise the baby.\textsuperscript{158} The $10,000 payment serves as the consideration necessary to seal the deal,\textsuperscript{159} its purpose being to compensate the surrogate for her services in gestating the fetus to term.\textsuperscript{160}

Consequently, if no presumption of mutual gain exists, the only way to make such a determination would be to require the courts to examine the adequacy of the consideration: the court would have to closely examine the terms of the exchange to determine whether each party benefits from the transaction by gaining something they did not already have. However, this determination contradicts the court's general practice of not examining the adequacy of the consideration.\textsuperscript{161} Hence, there must exist a presumption of mutual gain in order to respect the court's custom. To rebut it, one would only have to prove that the terms of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} See \textit{id}.
\item \textsuperscript{153} See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) (stating that "the usual rule [is] that the terms of the agreement are not to be questioned").
\item \textsuperscript{154} See John D. Calamari & Joseph M. Perillo, \textit{The Law of Contracts} § 4-2, at 187-90 (3d ed. 1987). The authors state that "[t]he essence of consideration, then, is legal detriment, that has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor." \textit{Id.} § 4-2(c), at 189 (footnote omitted).
\item \textsuperscript{155} See \textit{id.} § 4-4, at 192.
\item \textsuperscript{156} See \textit{id.} § 4-6, at 197-99.
\item \textsuperscript{157} See Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (en banc). The court determined that the Calverts did not intend to donate a zygote to the surrogate. See \textit{id}. Instead, the intention of both parties was to give life to the Calverts' child. See \textit{id}. The court further stated that "it is safe to say that [the surrogate] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother." \textit{Id.}
\item \textsuperscript{158} See \textit{id.} at 778.
\item \textsuperscript{159} See \textit{id.} at 784. Strictly gratuitous promises are typically not enforced. See Calamari & Perillo, \textit{supra} note 154, § 4-1, at 185.
\item \textsuperscript{160} See Johnson, 851 P.2d at 784.
\item \textsuperscript{161} See supra note 153.
\end{itemize}
\end{footnotesize}
agreement violate existing laws or public policies, or that there exists a
defense to a valid contract; otherwise, the presumption of mutual gain
should stand.

b. Lack of Substantial Third Party Effects

Externalities, or third party effects, must also be examined in order
to maintain the voluntary nature of the transaction. An externality
generally involves harmful or beneficial effects external to the contract-
ing person(s):

[T]he concept includes external costs, external benefits, and pecuniary
as well as nonpecuniary externalities. . . . What converts a harmful or
beneficial effect into an externality is that the cost of bringing the effect
to bear on the decisions of one or more of the interacting persons is too
high to make it worthwhile . . . .

For example, returning to Romeo and Juliet, if they wanted to hire
a surrogate to gestate their baby, Romeo and Juliet might not consider
the positive and negative effects external to them: they might not
contemplate the long-term effects on the surrogate or her family, or the
potential negative effects on the child. Although there currently exists a
tendency toward considering only negative externalities, that is, those
effects which are harmful to persons not party to the transaction,
economists argue that positive externalities must also be considered.
Thus, transactions should be presumed voluntary unless the negative
externalities outweigh the gains to the contracting parties. With
respect to surrogacy arrangements, this means that a balancing test must
be performed to determine whether the gains to the couple and the
surrogate outweigh the potential negative effects on those not party to the
contract.

162. See Epstein, supra note 89, at 2315-16.
163. Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. PAPERS &
PROCEDURES 347, 348 (1967).
164. See supra p. 1222.
165. See, e.g., In re Baby M, 537 A.2d 1227, 1250 (N.J. 1988) (considering only the potential
negative long-term effects of the surrogacy arrangement).
166. See Epstein, supra note 89, at 2315.
167. See id.
168. For a discussion of the factors which must be considered when balancing the effects of
surrogacy, see supra Part II.C.1.
B. Application of Contract Law

From the foregoing discussions, it seems all too clear that the only negative aspect of commercial surrogacy contracts is their level of uncertainty. From the transfer of the zygote to the delivery of the child, the contracting couple is never fully assured that the surrogate will not back out of the agreement for one reason or another. During these nine months, there always exists the possibility that the surrogate might change her mind and try to retain custody of the child whom the genetic parents desperately want to raise. The couple's resulting anxiety is justified.

However, in this respect, surrogacy arrangements are not unlike any other contract: all enforceable contracts have an element of uncertainty. There always exists the possibility that a party to a contract might breach. To reduce most risks, contract law provides many remedies. For surrogacy contracts, this means that instead of holding them unenforceable, courts should apply contract law when there exists the possibility of breach of contract or inadequate bargaining process.

1. Potential Breach of Contract

Like all contracts, surrogacy arrangements inherently involve a myriad of risks. Problems may arise due to the actions of the surrogate, the couple, or God. The available remedy should depend upon who caused the problem.

To solve the problems which may arise, courts must consider the objective rather than subjective intent of the parties.\textsuperscript{169} What matters is not the secret intentions of the parties but rather what a reasonable person in the position of the other party would believe the party intended.\textsuperscript{170} This approach limits the court's inquiry: it need only consider whether there existed "a mutual manifestation of assent to the same terms"\textsuperscript{171} and not that there existed a "meeting of the minds" between the parties.\textsuperscript{172} To make such a determination, the court examines the parties' words, whether written or oral, and actions.\textsuperscript{173}

\begin{thebibliography}{99}
\bibitem{169} In general, contract law values the objective intent of the parties. \textit{See} \textsc{Calamari \& Perillo}, \textit{supra} note 154, § 2-2, at 26-27.
\bibitem{170} \textit{See} \textit{id.} at 27.
\bibitem{171} \textit{Id.} § 2-1, at 25.
\bibitem{172} \textit{See} \textit{id.} § 2-2, at 26.
\bibitem{173} \textit{See} \textit{id.}.
\end{thebibliography}
a. Surrogate's Actions

The first set of problems which may arise are those caused by the gestational surrogate when she refrains from performing her part of the agreement. Two instances of nonperformance are of particular importance: (1) when the surrogate retains custody of the baby and (2) when the surrogate seeks an abortion. Both involve the surrogate trying to avoid the contract, and thus, her behavior should result in a material breach.

i. Custody Dispute

When faced with the custody dispute, courts must determine whether a reasonable person would believe that the parties to the written surrogacy contract agreed upon who would obtain custody of the child.\textsuperscript{174} Examination of the contract shows that custody remains in the infertile couple: after all, the bargain includes both a bilateral promise on this issue and an express condition, the latter requiring strict compliance.\textsuperscript{175} Moreover, a reasonable person would believe that the couple did not donate a zygote to the surrogate but, instead, hired her to gestate it.\textsuperscript{176} As a result, the surrogate's secret intention of keeping the child, or her change of heart, is irrelevant.\textsuperscript{177} Instead, contract law provides that the surrogate must relinquish all claims to the baby, allowing custody to remain with the infertile couple.\textsuperscript{178}

Of course, opponents of surrogacy argue that the written contract should be disregarded and that courts should instead turn to the law of adoption\textsuperscript{179} which looks to the child's best interests.\textsuperscript{180} Typically, this argument centers on the reasoning that if courts were to enforce the surrogacy contract as the parties had agreed, this decision would

\textsuperscript{174} Assume for the purpose of this discussion that the gestational surrogate obtains parental rights to the nongenetic child.
\textsuperscript{175} See CALAMARI & PERILLO, supra note 154, § 11-9, at 445.
\textsuperscript{176} See Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (en banc).
\textsuperscript{177} See Schuck, supra note 68, at 1799. Professor Schuck concludes that "[t]he risk of subsequent regret is the price we pay for our commitment to personal autonomy and responsibility in the face of uncertainty." Id.
\textsuperscript{178} See Johnson, 851 P.2d at 782.
\textsuperscript{179} See Brinig, supra note 88, at 2379.
\textsuperscript{180} See In re Baby M, 537 A.2d 1227, 1246 (N.J. 1988) (holding that the best interests of the child shall determine custody); see also Johnson, 851 P.2d at 799-801 (Kennard, J., dissenting) (arguing for the use of the best interests test when establishing legal parenthood).
GESTATIONAL SURROGACY CONTRACTS

ultimately result in the contractual placement of children before they are born without investigation of the prospective parents. Hence, these opponents conclude that courts must examine the best interests of the child when determining the custody dispute.

Although this concern is quite valid, awarding custody as per the gestational surrogacy agreement does not necessarily operate contrary to the child’s best interests. Typically, courts applying the best interests of the child standard to a surrogacy contract consider both (1) the child’s future and (2) the parties’ physical, mental, and emotional health, personal integrity, and ability to provide for the child. Yet, these courts fail to acknowledge that the surrogacy agreement itself takes into consideration this two-part balancing test; after all, how many people enter into a surrogacy contract with the intent to hurt or neglect the child? Rather, these couples would likely become responsible, loving parents:

The people who have struggled so hard to conceive their own child are probably the best candidates to be good parents and not the worst. It hardly seems likely that a couple that endured so much grief to have its own child would embark on a course of abuse and neglect with a surrogate child. . . . The first obligation of a parent is unconditional love of a child. Would that all parents showed that to their own children. But is there any reason to think that parents by surrogacy would not love the children whom they obtain by this arrangement?

Although risks do exist, they are not extreme enough in nature to ban surrogacy or even to overlook the agreement. Courts should enforce

181. See Brinig, supra note 88, at 2379.
183. Epstein, supra note 89, at 2320-21 (footnotes omitted).
184. See Tamar Lewin, Man Accused of Killing Son Borne by a Surrogate Mother, N.Y. TIMES, Jan. 19, 1995, at A16 (unmarried man who had entered into surrogacy contract accused of killing child after obtaining custody).
185. Children conceived in the typical means run a far greater risk of abuse and neglect than do children of surrogacy. See Epstein, supra note 89, at 2321 & n.26. Children born in stable homes, those born of troubled marriages, and illegitimate children are all at risk of potential abuse, such risk increasing in each scenario. See id. Thus, to ban the practice hardly seems to be the appropriate response: “In these cases, we do not think that the risk of harm to children constitutes a powerful
the agreement and assign custody as the parties intended since the parties themselves ultimately have the child's best interests at heart. 186

Ironically, by giving custody to the contracting couple, the court would be specifically enforcing the contract, an equitable remedy frequently not available to personal services contracts 187 because it normally requires constant judicial supervision. However, with respect to this custody issue, all that would be required is that the surrogate surrender the baby to the couple; specific performance would not result in the continuance of undesirable personal relations between the surrogate and the couple. Thus, it should be available as a remedy in this instance of breach.

ii. Abortion Sought by the Surrogate

Unquestionably, abortion by the surrogate would result in a breach of the surrogacy contract to which she is a party. Although the surrogate has the right to obtain one, 188 to do so would contravene the terms of the contract. The court would have to choose between specifically enforcing the contract before the abortion is performed or granting monetary damages.

Since gestational surrogacy arrangements should be viewed as personal services contracts, 189 specific performance will be generally unavailable. 190 In all likelihood, the court would not stop the surrogate from obtaining an abortion. If the surrogate were to abort the fetus, this behavior should result in a material breach of the surrogacy contract, 191 thus discharging the couple's duty to pay the promised fee. 192 In such

reason to license, limit, or ban procreation: it seems hard to believe that these concerns rise to this level in a surrogacy context." Id. at 2321.

186. Further, one may argue that the best interests of the child standard used in adoption cases should not apply to gestational surrogacy contracts since the surrogate has no parental rights to be terminated. See Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (en banc). In fact, the Johnson court expressly stated, "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." Id. Unlike the birth mother in the adoption scenario, the gestational surrogate at no time obtains any parental rights to the child. See id. Rather, the genetic parents are always the legal parents of the child, and as a result, no adoption takes place. See id. Hence, there is no need for the best interests of the child standard.


188. See supra note 73.

189. See supra Part II.C.3.


191. See id. § 241.

192. See id. § 242.
a situation, a court would be inclined to award the couple legal damages\textsuperscript{199} to restore its reliance interest rather than its expectation or restitution interest.

Expectation damages are awarded to put the injured party in as good a position as he would have been in had the contract been performed as promised.\textsuperscript{194} They are not based upon what he had hoped at the time of the contract but what he would have received.\textsuperscript{195} In the gestational surrogacy arrangement, the injured couple would have received a baby had the surrogate performed as agreed. Yet, how does one place a monetary value on life?

Restitution damages include only those expenditures that have conferred some benefit on the other party.\textsuperscript{196} In other words, the injured party should be restored the benefit he has conferred on the other party.\textsuperscript{197} Clearly in the surrogacy situation, the court cannot award this type of damages to the contracting couple; after all, the only possible benefit that the couple had conferred to the surrogate is the now aborted fetus. Consequently, only the payments to her would fall into this category, but they can be returned to the couple through the award of reliance damages.

Thus, the court should award reliance damages to put the injured party in the position he would have been in had the contract not been made.\textsuperscript{198} These damages can easily be calculated in the gestational surrogacy arrangement: any compensation paid to the surrogate must be returned to the couple. Additionally, the surrogate must reimburse the couple for all fees and expenses incurred as a result of the agreement.

\begin{itemize}
  \item[b. Couple’s Actions]
\end{itemize}

Another type of problem may occur due to the fault of the couple. Typically included in surrogacy contracts is an abortion clause which gives the couple the right to order an abortion.\textsuperscript{199} However, if the couple exercises such a right, it should be considered a material breach

\textsuperscript{193. See id. § 243.}
\textsuperscript{194. See CALAMARI & PERILLO, supra note 154, § 14-4, at 591-92.}
\textsuperscript{195. See id. at 592.}
\textsuperscript{196. See id.}
\textsuperscript{197. See id.}
\textsuperscript{198. See id.}
\textsuperscript{199. See, e.g., In re Baby M, 537 A.2d 1227, 1268 (N.J. 1988) (reprinting the clause of the original contract between the parties which gives the genetic father the right to order an abortion).}
of contract, thus discharging the surrogate’s duty to perform. Since she was willing to carry the fetus to term and was performing in good faith, it seems only fair that the surrogate should be awarded expectation damages: she should receive full payment as though the contract had been performed as promised.


Problems often arise due to an act of God, such as instances of miscarriage, still birth, or the delivery of twins. Each of these instances adversely affects the terms of the contract: the surrogate does not gestate a single fetus to term as promised. Thus, the unhappy party may seek to excuse its performance, arguing that there has been a breach by the other party. However, since there has been no material breach by either party in any of these instances, performance should not be excused.

As long as the surrogate performs all of her promises in good faith, she has not breached the contract. If the surrogate’s behavior comports with good faith and fair dealing, her failure to render performance may not be considered material. Keeping this duty in mind, in the instance of natural miscarriage, so long as the surrogate is performing in good faith, the spontaneous miscarriage should not function as a material breach which would discharge the couple’s duty to pay her for services rendered. Instead, under these circumstances, it seems only fair that the court require the contracting couple to pay the surrogate for services performed.

Further, the fact that the gestational surrogacy contract is a contract for a service also supports the finding that there has been no material breach by the surrogate in any of these instances. As a contract for a service, performance requires the promisor herself to perform, and in

201. See id. § 242.
202. See id. § 205.
203. See id. § 236.
204. The unhappy party differs in each of these scenarios. In terms of miscarriage and still birth, the married couple will seek to excuse its performance, arguing that the surrogate materially breached the contract. In terms of twins, the surrogate will be the party disadvantaged: she contracted to gestate the couple’s one fetus, not two.
206. See id. § 241.
207. See supra Part II.C.3.
208. See FARNsworth, supra note 138, § 9.5, at 701-06.
each of these natural occurrences, the surrogate adequately has done so. Under the terms of the surrogate contract, the surrogate provides the service of gestation through pregnancy, refrains from any behavior that might harm the fetus, and regularly obtains prenatal care. In the situation of a still birth, since the surrogate gestated the fetus to term, she has performed her end of the bargain. As long as she performed in good faith, she should still be paid the full contractual amount.

Accordingly, in the twin scenario, the surrogate performs the promised gestative function and should receive payment for her services. The only difference between her performance and that for which the couple bargained is that the surrogate gestates two babies instead of only one. However, since the contract's purpose was for her to endure one pregnancy, the fact that she carries two fetuses should not have any affect on the exchange. Payments are to compensate the surrogate for her services of gestation through one pregnancy. As a result, she should receive the same amount of money no matter how many babies she gestates.

2. Inadequate Bargaining Process

Like all other contracts, surrogacy arrangements should be scrutinized for abuses in the bargaining process. This includes examination into the defenses of fraud, lack of capacity, undue influence, duress, and unconscionability. If the court were to find that any one of these defenses exists, the contract becomes voidable by the party so injured.

Of these defenses to a valid contract, opponents of surrogacy generally choose to argue that surrogacy contracts are unconscionable and therefore unenforceable. Contract law provides that if a court finds an agreement, or a provision of an agreement, unconscionable at the time the agreement was made, the court may refuse to enforce the entire agreement, or the provision thereof, in order to avoid an unconscionable result. In general, when making such a determination, courts focus on two components of unconscionability: procedural

---

209. See supra text accompanying notes 141-42.


211. See id. §§ 152-153, 164, 175, 177.

212. "[A]s a matter of common law . . . unconscionable contracts are not enforceable. . . . [T]he notion that an unconscionable bargain should not be given full enforcement is by no means novel." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (footnote omitted).

unconscionability and substantive unconscionability. Procedural unconscionability focuses on the procedure of the agreement and whether there existed an absence of a meaningful choice. Courts consider such factors as gross inequality of bargaining power, inability to read the provisions of the contract, age, intelligence, education, fraud, unfair surprise, and sharp practices. Substantive unconscionability focuses on the fairness of the exchange and whether there exists oppressive terms that are unreasonably favorable to one party. Only upon a finding of both procedural and substantive unconscionability may the court refuse to enforce the agreement.


217. See Maxwell, 907 P.2d at 58; Olsen, 55 Cal. Rptr. 2d at 824; Kohler, 555 N.W.2d at 646; CALAMARI & PERILLO, supra note 154, § 9-40, at 407. Courts may look into the adequacy of the exchange when faced with the possibility of substantive unconscionability:

[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Walker-Thomas Furniture, 350 F.2d at 449-50 (footnote omitted).

218. See CALAMARI & PERILLO, supra note 154, § 9-40, at 406. Courts are split on whether both components need to be present. Many require a showing of both procedural and substantive unconscionability. See, e.g., Golden, 882 F.2d at 493 (stating that “[b]oth procedural unconscionability and substantive unconscionability must exist before the provision is unenforceable”); Jones Distrib., 943 F. Supp. at 1460 (stating that both procedural and substantive unconscionability are required); Olsen, 55 Cal. Rptr. 2d at 824 (requiring both procedural and substantive elements of unconscionability); Kohler, 555 N.W.2d at 645 (“A clause is deemed unconscionable when there is both a quantum of procedural and a quantum of substantive unconscionability.”). However, other courts may find a contract unconscionable if only one element of unconscionability is present. See, e.g., Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1041 (Utah 1985) (recognizing both procedural and substantive unconscionability but finding that “[g]ross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability”). For a discussion of the history of unconscionability and the division of
Consequently, opponents of surrogacy argue that surrogacy contracts satisfy the two components of unconscionability. Procedurally speaking, opponents argue that surrogacy agreements generally function to the benefit of the prospective parents and the infertility clinic at the expense of the surrogate. It is not unusual for infertility clinics to require surrogates to agree to many terms included in the contract, claiming that the provisions are meaningless when, in fact, they are not. For example, included in some surrogacy contracts is a "hold harmless" clause. Although clinics tell surrogates that this clause is meaningless, it ultimately releases the clinics from liability. If typical surrogacy agreements are the result of such unequal bargaining, opponents argue that they are procedurally unconscionable.

In addition, opponents of surrogacy argue that the specific terms of the agreement are unfair to surrogates, thus satisfying substantive unconscionability. For example, surrogates are required to use the medical and counseling services chosen by the infertility clinic. Further, although surrogacy agreements may not stipulate that they may be subjected to major surgery, surrogates must follow the advice of the attending physician, even if it means undergoing a Caesarean section or other medical procedure. Since such oppressive terms, unfair to the surrogate, satisfy substantive unconscionability, opponents of surrogacy argue that if such terms are included in typical surrogacy agreements, courts must find them unconscionable and refuse to enforce either the unconscionable terms or the entire contract.

However, opponents of surrogacy contracts fail to realize that unconscionability must be determined on a case-by-case basis. All
cases do not include the same terms or the same facts surrounding those terms. As such, courts must review the terms and the facts surrounding the contract and bargaining process in order to determine whether there exists procedural and substantive unconscionability. If such is the case after adequate examination, then clearly the court may refuse to enforce the agreement or the terms in question.

IV. CONCLUSION

Only one percent of surrogates change their minds and seek custody of the child. That statistic may explain the few court decisions on surrogacy contracts. In fact, there exist far more law review articles discussing this topic than court decisions.

Nevertheless, many state courts and legislatures mistakenly make all commercial surrogacy arrangements, including those of a gestational nature, unenforceable or even criminal. Yet, this sweeping


232. See In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 898 n.13 (Ct. App. 1994) (noting the abundance of law review articles and the scarcity of court decisions).

unenforceability not only causes problems for the parties to the contract, but it generates problems for the courts which have the misfortune of determining the custody issue.

Gestational surrogacy contracts, even if commercial, should be viewed as personal services contracts, free from all purported public policy arguments, and completely enforced, so that infertile couples like Romeo and Juliet\textsuperscript{234} may enjoy the miracle of birth and the joy of family life. Out of desperation, some will still choose to enter into such an arrangement, even if the contract is unenforceable, illegal, or both. If honored by the parties, they will go unpunished. If challenged, the court will determine the custody issue, award the appropriate remedy, if any is needed, and possibly dole out punishment. Hence, unless current laws are amended to reflect the difference between the types of surrogacy contracts, Romeo and Juliet's plight remains disheartening:

\begin{quote}
A glooming peace this morning with it brings;  
The sun, for sorrow, will not show his head:  
Go hence, to have more talk of these sad things;  
Some shall be pardon'd, and some punished;  
For never was a story of more woe,  
Than this of Juliet and her Romeo.\textsuperscript{235}
\end{quote}

\textit{Denise E. Lascarides*}

\begin{flushright}
\textsuperscript{*} The Author wishes to express her gratitude to Professor Mark L. Movsesian for his expert guidance, and to all the members of her family for their unending encouragement and support. The Author dedicates this Note to the memory of her father, Dr. Emanuel Lascarides, whose contribution to the medical profession and sincere devotion to others will always be remembered.
\end{flushright}

\textsuperscript{234} See supra p. 1222.
\textsuperscript{235} WILLIAM SHAKESPEARE, ROMEO AND JULIET act 5, sc. 3.