

# THE SILENCE SURROUNDING SURROGACY: A CALL FOR REFORM IN ALABAMA

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Surrogacy is the “use of [a] woman’s gestational capability to assist in the development of a child” that another person or couple intends to parent.<sup>1</sup> Once considered merely science fiction, surrogate motherhood is now commonplace in sitcoms,<sup>2</sup> magazines,<sup>3</sup> and movies.<sup>4</sup> While the use of assisted reproductive technology (ART) has increased significantly since the birth of the first “test-tube” baby in 1978,<sup>5</sup> the number of children born through surrogate arrangements has also risen dramatically. From 2004 to

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1. Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 800 (2012).

2. *Friends: The One with Phoebe’s Uterus* (NBC television broadcast Jan. 8, 1998).

3. Chantal Waldholz, *Bill & Giuliana Rancic: Meet Our Son, Edward Duke*, LIFE & STYLE, Sept. 11, 2012, available at <http://www.lifeandstylemag.com/entertainment/news/bill-giuliana-rancic-meet-our-son-edward-duke#.UOiSaInjlgM>.

4. BABY MAMA (Universal Pictures 2008).

5. Louise Brown, the first child born through in vitro fertilization, was born in 1978. See MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf> (last visited May 13, 2014). At this time, there are no statistics available on the prevalence of traditional surrogacy.

2008, the number of babies born to gestational surrogates increased by 89%, reaching almost 1,000 births annually and far exceeding the growth in the number of babies born through in vitro fertilization (IVF).<sup>6</sup> With this marked increase in the use of surrogate mothers, the general public's knowledge of surrogacy's existence, acceptance of the practice, and awareness of surrogacy's accompanying issues have also increased significantly.

As with many cultural changes and technological advancements, the increased use of surrogacy has sparked moral and ethical controversy. Courts across the country have found themselves confused by the lack of legislation addressing the practice and the unknown long-term consequences of surrogacy. While uncertainty may have been understandable and expected in the 1980s and 1990s, this article calls for guidance in the form of uniform federal legislation, and if not that, then the rapid enactment of state statutes.<sup>7</sup>

It has been thirty-one years since the first surrogate birth in Alabama.<sup>8</sup> With the rapid advent of new reproductive technologies, the law governing these advances has failed to keep pace. Alabama citizens interested in using surrogacy are still without guarantee that their intended, planned-for, and cherished child will end up in their arms.

In Part I, this Note will provide a general overview of the basic definitions and methods of surrogacy, as well as the history and current state of the practice of surrogacy in the United States and Alabama. Part II will focus on the two major cases in United States surrogacy law. Part III will describe the regulation of surrogacy on both the federal and state level. Part IV will consider the legal treatment of surrogacy in Alabama and exhort Alabama legislators to expediently enact laws to govern surrogacy.

## I. METHODS OF SURROGACY AND ITS PLACE IN THE UNITED STATES AND ALABAMA

Surrogate motherhood is not a new concept to humanity, as evidence of its use can be seen in the Christian Bible.<sup>9</sup> The book of Genesis, found within the Old Testament, tells the story of Abraham and his wife Sarah,

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6. *Id.*

7. See generally Austin Caster, Note, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477 (2011); see also Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113 (1997).

8. *In-Law Convinced Man to Approve Surrogate Birth*, THE GADSDEN TIMES, Aug. 19, 1983, at A1.

9. See Kerian, *supra* note 7, at 116–17.

who was considered barren.<sup>10</sup> With the couple seeking a child, Sarah offered her handmaiden, Hagar, to her husband.<sup>11</sup> Abraham slept with Hagar, producing a son for Sarah named Ishmael, whom she raised as her own.<sup>12</sup> No surrogacy contracts were needed, as there was no concern that the surrogate mother would refuse to “relinquish her parental rights upon the birth of the child.”<sup>13</sup>

Today, surrogacy arrangements are not as simple, creating the need for laws which govern “arrangements where a woman contracts to become pregnant by means of assisted reproduction with or without the use of an egg from her own body.”<sup>14</sup> The primary purpose of the contract is that the gestational carrier agrees to relinquish her parental rights upon the child’s birth.<sup>15</sup>

Surrogacy is divided into two categories: traditional and gestational. In a traditional surrogacy, the surrogate carrier bears a child “formed from her own egg.”<sup>16</sup> The sperm used is usually from the intended father, but it can also be from a donor.<sup>17</sup> In a gestational surrogacy, “a non-childbearing female supplies the ova,” and the intended father or a donor supplies the sperm cells.<sup>18</sup> As a result, in a traditional surrogacy the surrogate is genetically related to the resulting child; in contrast, the surrogate in a gestational surrogacy is not genetically related to the resulting child.<sup>19</sup>

Due to the large number of women suffering from infertility in the United States,<sup>20</sup> many American women turn to infertility services to help

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10. See *Genesis* 16.

11. *Id.*

12. *Id.*

13. Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 560 (1999) (also recounting the biblical story of Sarah and Abraham).

14. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 603 (2002).

15. See *id.* at 607.

16. Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 194 (1996).

17. Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL’Y 353, 360–61 (2011).

18. Adam P. Plant, Note, *With a Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 ALA. L. REV. 639, 643 (2003).

19. Arshagouni, *supra* note 1, at 801.

20. Infertility is defined as “a disease of the reproductive system that impairs the body’s ability to perform the basic function of reproduction.” Am. Soc’y for Reprod. Med., *Quick Facts About Infertility*, REPRODUCTIVEFACTS.ORG, <http://www.reproductivefacts.org/detail.aspx?id=2322> (last visited May 13, 2014). Infertility in the United States is becoming a topic increasingly at the forefront of conversation as approximately 6.7 million women in the United States have an impaired ability to have children and 1.5 million married women ages 15–44 are considered infertile. Ctrs. for Disease Control and Prevention, *FastStats—Infertility*, CDC.GOV, <http://www.cdc.gov/nchs/fastats/fertile.htm> (last visited May 13, 2014).

them produce a child.<sup>21</sup> Couples are increasingly turning to surrogacy as an alternative method of bearing a child genetically related to them.<sup>22</sup> If a couple is unable to carry a child to term, the use of a surrogate is the only available option to have a child genetically related to one or both parents.<sup>23</sup> Often, surrogates offer their gestational services altruistically, finding joy in being able to provide a couple with the child they desperately want.<sup>24</sup> The motivating factors vary: some surrogates simply enjoy being pregnant, others find “a sense of empowerment and self-worth” in the process, and still others feel that surrogate motherhood is their calling.<sup>25</sup>

Gestational surrogacy is “increasingly more popular than traditional surrogacy” because it allows an infertile couple the chance to have a child who is genetically related to both the male and the female parent.<sup>26</sup> As a result, it has “transform[ed] the legal and cultural debate surrounding surrogacy,” since it raises complex issues of legal parenthood.<sup>27</sup> Although opponents to traditional surrogacy argue that forcing a woman to give up her biological child equates to baby-selling, the legal issues surrounding traditional surrogacy are not as complicated as those in a gestational surrogacy.<sup>28</sup> Some opponents are generally concerned about the “commodification and exploitation” of women,<sup>29</sup> but others raise a more basic issue: who is the child’s mother? The definition of “mother” is barely challenged in traditional surrogacy since the surrogate is both the natural and biological mother of the child. But in gestational surrogacy agreements, three potential females may claim maternal rights: the surrogate, the genetic donor, and the intended mother.<sup>30</sup> Other commentators have found up to eight different potential parents in a gestational surrogacy contract.<sup>31</sup>

Nevertheless, surrogacy as an assisted reproductive technology is thriving.<sup>32</sup> According to the most recent ART Report, Alabama has six fertility clinics across the state.<sup>33</sup> Four of those offer surrogacy services.<sup>34</sup>

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21. 7.4 million women ages 15–44 have used infertility services. Ctr. for Disease Control and Prevention, *supra* note 20.

22. See Kerian, *supra* note 7, at 113 & n.2 (“Various social factors have contributed to [the rise] of infertility,” including a “trend toward later marriages, and delays in having children . . .”).

23. *Id.* at 113.

24. Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 535 (2011).

25. *Id.*

26. *Id.* at 527.

27. See Dana, *supra* note 17, at 362.

28. See *id.* at 361, 363.

29. *Id.*

30. Hisano, *supra* note 24, at 517.

31. See Sara K. Alexander, Note, *Who Is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature*, 38 GA. L. REV. 395, 398 (2003).

32. See GUGUCHEVA, *supra* note 5, at 3.

## II. LEGAL TREATMENT OF SURROGACY AGREEMENTS IN THE UNITED STATES

The Supreme Court has yet to address surrogacy, and Congress has not created any federal legislation governing the process. Therefore, because few states had laws specifically governing surrogacy agreements in the 1980s and 1990s, when disputes between parties developed, courts lacked statutory guidance in settling the disputes.<sup>35</sup>

Two seminal cases in state courts show conflicting interpretations of surrogacy agreements. Although the cases vary factually, *In re Baby M*<sup>36</sup> and *Johnson v. Calvert*<sup>37</sup> illustrate two courts facing the same question—is a surrogacy agreement valid?—and answering differently.<sup>38</sup>

### A. *The First Landmark Case: In re Baby M*

In 1988, the New Jersey Supreme Court focused the nation's attention on surrogacy in *In re Baby M*.<sup>39</sup> In the first major surrogacy case in United States history, the court held a traditional surrogacy contract unenforceable and against public policy.<sup>40</sup>

The case involved a married couple, Mr. and Mrs. Stern, and a surrogate, Mary Beth Whitehead. The Sterns wanted to have a child, but Mrs. Stern had been told by doctors that she might have multiple sclerosis and feared that a pregnancy might trigger blindness, paraplegia, or other debilitating conditions.<sup>41</sup> The couple considered adoption but was warned that, as a result of their differing religions and older age, they could face significant and discouraging delays.<sup>42</sup> Desperate, the Sterns responded to an advertisement by the Infertility Center of New York (ICNY).<sup>43</sup>

Mrs. Whitehead and her husband also responded to the advertisement.<sup>44</sup> Mrs. Whitehead desired to become a surrogate mother to help couples like

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33. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2011 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 25–31 (2013), [http://www.cdc.gov/art/ART2011/PDFs/ART\\_2011\\_Clinic\\_Report-Full.pdf](http://www.cdc.gov/art/ART2011/PDFs/ART_2011_Clinic_Report-Full.pdf) (last visited May 13, 2014).

34. *Id.*

35. Arshagouni, *supra* note 1, at 802.

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

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

38. Arshagouni, *supra* note 1, at 803.

39. *See Baby M*, 537 A.2d at 1234.

40. *Id.*

41. *Id.* at 1235.

42. *Id.* at 1236.

43. *Id.*

44. *Id.*

the Sterns.<sup>45</sup> In addition, she wanted the \$10,000 surrogacy fee.<sup>46</sup> Thus, the Whiteheads and the Sterns formed a contractual agreement.

The contract provided that Mrs. Whitehead would become pregnant through artificial insemination using Mr. Stern's sperm, "carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child."<sup>47</sup> Mr. Whitehead also promised to do everything within his power "to rebut the presumption of paternity under the Parentage Act."<sup>48</sup> Although Mrs. Stern was not a party to the contract, it did give her sole custody of the child if Mr. Stern died.<sup>49</sup>

After the birth, Mrs. Whitehead found that giving the baby over to the Sterns was more difficult than she expected. She did, however, relinquish the little girl, much to the Sterns' delight.<sup>50</sup> Soon, though, "Mrs. Whitehead became deeply disturbed, disconsolate, stricken with unbearable sadness" and desperate for the child she birthed.<sup>51</sup> The next day, she went to the Sterns' home and told them that she could not live without the child, requesting to have her back for a week.<sup>52</sup> After that week, she promised to return the child to the Sterns.<sup>53</sup> Relying on Mrs. Whitehead's promise and not wanting to risk her suicide, the Sterns complied.<sup>54</sup> Mrs. Whitehead did not keep her word, and the Sterns did not receive the child back until four months later, when it was taken from the home of Mrs. Whitehead's parents in Florida.<sup>55</sup>

The Sterns sued, seeking to enforce the surrogacy agreement and asking for permanent custody of the child.<sup>56</sup> The trial court found the surrogacy contract enforceable and awarded permanent custody to Mr. Stern.<sup>57</sup> The New Jersey Supreme Court, however, invalidated the contract on the grounds that it violated New Jersey adoption statutes.<sup>58</sup> The court determined that the \$10,000 fee awarded to Mrs. Whitehead was for the adoption of the child, not for Mrs. Whitehead's services.<sup>59</sup> Because New

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45. *Id.*

46. *Id.*

47. *Id.* at 1235.

48. *Id.*; see also N.J. STAT. ANN. §§ 9:17–43a(1), 44a (West 2013).

49. *Baby M*, 537 A.2d at 1235.

50. *Id.* at 1236.

51. *Id.*

52. *Id.* at 1236–37.

53. *Id.* at 1237.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1240.

59. *Id.*

Jersey's laws prohibited the payment of money in connection with a child's adoption, the court considered the surrogacy agreement as an attempt to skirt the law.<sup>60</sup>

Furthermore, the court held that surrogacy contracts violate public policy, since "[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."<sup>61</sup> The court emphasized the "best interests of the child" standard, holding that a contract in which the parents decide who would get custody before the child's birth is contrary to the child's best interest.<sup>62</sup> Further, the court found the pre-birth counseling received by Mrs. Whitehead to be inadequate<sup>63</sup> and construed public policy to require children to remain with and be raised by both natural parents.<sup>64</sup> Overall, the court portrayed surrogacy as a "parade of horrors," echoing the sentiments of the opponents of surrogacy who argue that such negative consequences should not be risked.<sup>65</sup> As a result, the court took on a paternalistic and protective role, fearful of the social and psychological impact of enforcing the surrogacy contract.<sup>66</sup>

But even as it held surrogacy contracts invalid, the court was bound by the "best interests of the child" standard in determining which couple was awarded permanent custody of the child.<sup>67</sup> Expert testimony revealed instability in the Whiteheads' home, whereas the court found that "all indications are that [the Sterns'] household and their personalities promise a much more likely foundation for [the child] to grow and thrive."<sup>68</sup> Therefore, applying principles of family law, the court concluded that placing the child in the custody of Mr. Stern would be in the best interests of the child.<sup>69</sup> Three years after the invalid surrogacy contract was created, the Sterns finally received permanent custody of their child,<sup>70</sup> while Mrs. Whitehead received only visitation rights.<sup>71</sup>

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60. *Id.*

61. *Id.* at 1246.

62. *Id.* at 1246–48.

63. *Id.* at 1247.

64. *Id.* at 1246–47.

65. Arshagouni, *supra* note 1, at 805.

66. See Jessica H. Munyon, Note, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 729 (2003).

67. *Baby M*, 537 A.2d at 1256.

68. *Id.* at 1259.

69. *Id.*

70. *Id.* at 1260–62.

71. *Id.* at 1261.

B. *California's Response: Johnson v. Calvert*

Five years after the decision in *Baby M*, the California Supreme Court determined that gestational surrogacy contracts did not violate the United States Constitution, California law, or public policy.<sup>72</sup> In *Johnson v. Calvert*, the Calverts wanted to have a child, but Mrs. Calvert could not physically bear a pregnancy.<sup>73</sup> She could, however, produce ova. After hearing the couple's story, Anna Johnson approached the Calverts to offer her services as a surrogate. They signed a surrogacy contract, in which Johnson agreed to carry the child created from the union of the couple's ova and sperm, and then to relinquish all parental rights upon the child's birth.<sup>74</sup> In return, Johnson received \$10,000 for her services, as well as related expenses.<sup>75</sup>

During the pregnancy, tensions arose between Johnson and the Calverts, so each party sought a judicial declaration that he or she was the legal parent of the child.<sup>76</sup> When the child was born, blood testing revealed that the child was biologically related to the Calverts, and not to Johnson.<sup>77</sup> Based on these findings, the trial court, appellate court, and eventually the Supreme Court of California held that the Calverts were the "genetic, biological and natural" parents of the child, affirming the validity and enforceability of the surrogacy agreement.<sup>78</sup>

The California Supreme Court focused its decision on two issues: first, whether the genetic or birth mother was the child's "natural mother" under state law; and second, whether gestational surrogacy agreements circumvent the policies of California's state statutes.<sup>79</sup> With regard to motherhood, the court looked to the Uniform Parentage Act (UPA)<sup>80</sup> for guidance. Because the UPA was passed before commercial surrogacy arrangements were reported, the court determined that it was not intended

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

73. *See id.* at 778.

74. *Id.*

75. *Id.*

76. *Id.*; *see also* *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Cal. Ct. App. 1991).

77. *Johnson*, 851 P.2d at 778.

78. *Id.* (quoting *Anna J. v. Mark C.*, 286 Cal. Rptr. at 373).

79. *Johnson*, 851 P.2d at 777–78.

80. The Uniform Parentage Act (UPA) was designed to equalize treatment of legitimate and illegitimate children. UNIF. PARENTAGE ACT (amended 2002). "The Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association (ABA)." Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2261 n.96 (2012). The UPA has been adopted by Alabama, California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, and Rhode Island. Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1, n.16 (2011).



to resolve such disputes.<sup>81</sup> But, since the UPA facially applied to any parentage decision, including maternity determinations, the court considered the UPA in deciding to whom to grant maternal rights.<sup>82</sup> The UPA provided various ways to determine maternity, including birth and blood testing.<sup>83</sup>

Since both Johnson and Mrs. Calvert could make claims of motherhood under the Act, the court looked to the intent of the parties in the surrogacy agreement.<sup>84</sup> The court determined that, when genetic consanguinity and the act of giving birth do not coincide in one woman, the woman “who intended to bring about the birth of a child” to raise as her own is the natural mother.<sup>85</sup> The court upheld the payments to Johnson, finding that the Calverts were compensating Johnson for her services in carrying the child to term and relinquishing her parental rights, but they were not paying for the baby itself.<sup>86</sup> As a result, Johnson’s compensation did not violate public policy.<sup>87</sup>

### III. REGULATION OF SURROGACY

#### A. Federal Legislation

Currently, there is no uniform federal law explicitly governing surrogacy agreements. Generally, the topic is considered a matter of state legislation, leaving the country’s existing law something like a “patchwork quilt.”<sup>88</sup> As one commentator noted: “There are more laws in the United States governing the breeding of dogs, cats, fish, exotic animals, and wild game species than exist with respect to the use of surrogates and reproductive technologies to make people.”<sup>89</sup> This lack of guidance, coupled with the inconsistency of the laws that are in place, has caused many to argue that the only way to bring order to the surrogacy process is through uniform federal legislation.<sup>90</sup>

However, in order to pass federal legislation, the law must overcome federalism issues. Family law generally falls under the states’ power, but

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81. *Johnson*, 851 P.2d at 779.

82. *Id.* at 779–80.

83. *Id.* at 779.

84. *Id.* at 778, 782.

85. *Id.* at 782.

86. *Id.* at 784.

87. *Id.* at 785.

88. Arshagouni, *supra* note 1, at 844.

89. Arthur Caplan, *The Baby Market*, NY TIMES ROOM FOR DEBATE BLOG (Dec. 29, 2009, 5:24 PM), <http://roomfordebate.blogs.nytimes.com/2009/12/29/the-baby-market/>.

90. For a detailed discussion as to why federal legislation is in the country’s best interest, see Caster, *supra* note 7.

Congress can regulate family law if it falls under one of its enumerated powers.<sup>91</sup> Proponents of federal legislation argue three possible means by which Congress could claim power to pass such legislation.<sup>92</sup> First, Congress could regulate surrogacy “if surrogacy is considered a constitutionally protected right.”<sup>93</sup> Second, Congress could regulate surrogacy under its Commerce Clause powers if surrogacy is found to affect interstate business through either the payments to fertility centers or through the impact on health.<sup>94</sup> Finally, the federal government’s broad treaty power has the potential to “provide a basis for regulation” of surrogacy.<sup>95</sup> The Senate has the power “to give ‘advice and consent’ to a treaty, allowing Congress to approve” enacting legislation on a subject that is traditionally considered to fall under the states’ power.<sup>96</sup>

In 1989, in the wake of *Baby M*, two members of the House of Representatives attempted to pass federal legislation prohibiting or restricting surrogacy agreements. The first bill, known as the Surrogacy Arrangements Act of 1989, sought to impose criminal penalties upon anyone who “knowingly makes, engages in, or brokers a surrogacy arrangement.”<sup>97</sup> Ultimately, the bill garnered a meager three co-sponsors and failed to advance out of the House Committee on Energy and Commerce.<sup>98</sup> The second bill, called the Anti-Surrogate-Mother Act of 1989, sought to criminalize all activities relating to surrogacy, whether commercial or non-commercial.<sup>99</sup> This bill, however, found no co-sponsors and stalled in the House Committee on the Judiciary.<sup>100</sup> No further attempts at uniform federal legislation have been made, leaving courts, prospective parents and surrogates with only the “patchwork quilt” of state legislation as guidance.<sup>101</sup>

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91. See Mortazavi, *supra* note 80, at 2267.

92. *Id.*

93. *Id.*

94. *Id.* at 2268.; *see also* U.S. CONST. art. I, § 8, cl. 3.

95. Mortazavi, *supra* note 80, at 2269; *see also* U.S. CONST. art. II, § 2.

96. Mortazavi, *supra* note 80, at 2269 (citing U.S. CONST. art. II, § 2); *see also* Mortazavi, *supra* note 80, at 2269 (stating that *Habrzyk v. Habrzyk*, 759 F. Supp. 2d 1014 (N.D. Ill. 2011), “specifically suggests that the treaty power can be used to override state family law”).

97. H.R. 275, 101st Cong. § 2(a) (1989).

98. See Jerald V. Hale, Note, *From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP. L. 335, 341 (1998).

99. H.R. 576, 101st Cong. (1989).

100. See Hale, *supra* note 98, at 341.

101. Arshagouni, *supra* note 1, at 844.

### B. *The Model Acts*

While the U.S. Congress has failed to pass any law regulating surrogacy, two model acts address the subject. Both the Uniform Parentage Act and the ABA Model Act Governing Assisted Reproductive Technologies address the validity of gestational surrogacy agreements.

#### 1. *Uniform Parentage Act*

The Uniform Law Commissioners created the UPA in 1973.<sup>102</sup> Revolutionary in its time, it focused on the law regarding determination of parentage, paternity actions, and child support.<sup>103</sup> The UPA was revised in 2000 and 2002.<sup>104</sup>

Article 8 of the UPA<sup>105</sup> addresses gestational surrogacy agreements. While the UPA has been adopted in part by several states, few have elected to include Article 8, which deems gestational agreements enforceable<sup>106</sup> and valid if a court approves them first.<sup>107</sup> Before a court can approve the agreement, a child welfare agency must conduct “a home study of the intended parents” to ensure fitness and readiness for parenthood.<sup>108</sup> Furthermore, the Act provides that the intended parents may petition the court for an order designating them the legal parents of the child after he or she is born.<sup>109</sup> While not without criticism, UPA Article 8 is generally considered a good-faith attempt to address the practice of surrogacy and could be a reasonable model for states to adopt.<sup>110</sup>

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102. UNIF. LAW COMM'N, PARENTAGE ACT SUMMARY, <http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited May 13, 2014).

103. *Id.*

104. *Id.*

105. UNIF. PARENTAGE ACT §§ 801–809 (amended 2002).

106. *Id.*; see also Arshagouni, *supra* note 1, at 813–14.

107. UNIF. PARENTAGE ACT § 801(c) (amended 2002).

108. *Id.* § 803(b)(2).

109. *Id.* § 807(a).

110. For a detailed discussion of the UPA, see Arshagouni, *supra* note 1, at 813–17 (arguing that Article 8's use of the term “gestational mother” is inappropriate because it “fosters the false presumption that the gestational carrier is actually the child's mother,” and that the requirement that the “man and the woman” who are the intended parents be parties to the gestational agreement precludes same-sex couples from legally using surrogacy to have a child).

## 2. *ABA Model Act Governing Assisted Reproductive Technologies*

In 2008, the American Bar Association (ABA) created the Model Act Governing Assisted Reproductive Technology.<sup>111</sup> The ABA Model Act lays out two approaches to surrogacy agreements: Alternative A and Alternative B.<sup>112</sup> Alternative A tracks the UPA, with many of the same requirements for enforceable gestational surrogacy agreements, such as residency requirements,<sup>113</sup> judicial pre-approval,<sup>114</sup> and a “home study of the intended parents.”<sup>115</sup>

The main difference between the two alternatives is that Alternative B allows for self-executing contracts without requiring prior court approval, which many consider more practical than either Alternative A or the UPA.<sup>116</sup> Alternative B imposes certain eligibility requirements for the surrogate as well.<sup>117</sup> For example, she must be at least twenty-one years old; have given birth to at least one child; have completed a medical evaluation and mental health evaluation; be represented by independent legal counsel; and have medical insurance.<sup>118</sup> Furthermore, Alternative B requires that the intended parents have a medical need for having a child through surrogacy, and that at least one of the parents must provide gametes for the embryo.<sup>119</sup> The ABA Model Act allows for the enforceability of both traditional and gestational surrogacy agreements, but given the distinction between the two, some argue that each type warrants specific legislation.<sup>120</sup>

### *C. State Legislation*

When it comes to laws pertaining to surrogacy agreements, states can be separated into four categories: “prohibition, inaction, status regulation, and contractual ordering.”<sup>121</sup> Prohibition states attempt to prohibit surrogacy through an explicit statutory ban or by levying civil and criminal

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111. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (Proposed Official Draft 2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf> (last updated Feb. 15, 2008).

112. *Id.* at art. 7, legislative note.

113. *See id.* § 702(2)(a) (Alternative A).

114. *See id.* § 701(3).

115. *See id.* § 703(2)(b). For further discussion, see Arshagouni, *supra* note 1, at 817.

116. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(1) (Alternative B); *see also* Arahsagouni, *supra* note 1, at 818.

117. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 702 (Alternative B).

118. *Id.*

119. *Id.*

120. Arshagouni, *supra* note 1, at 819.

121. *See* Caster, *supra* note 7, at 486 (internal punctuation omitted).

penalties on parties to a surrogacy contract.<sup>122</sup> Arizona,<sup>123</sup> the District of Columbia,<sup>124</sup> Indiana,<sup>125</sup> Michigan,<sup>126</sup> Nebraska,<sup>127</sup> and North Dakota<sup>128</sup> fall into this category.

Inaction states essentially withdraw their support of surrogacy by “passive resistance.”<sup>129</sup> The legislatures decline to create a specific set of rules governing surrogacy, and therefore, the state courts may refuse to enforce surrogacy agreements on policy grounds.<sup>130</sup> States falling under this category are Kentucky,<sup>131</sup> Louisiana,<sup>132</sup> New Jersey,<sup>133</sup> New York,<sup>134</sup> North Carolina,<sup>135</sup> Oregon,<sup>136</sup> and Washington.<sup>137</sup>

Status regulation states allow court-approved surrogacy contracts containing mandatory requirements and creating prescribed status relationships.<sup>138</sup> These regulations include limits on the marital status and age of the parties and a requirement that the intended mother have a medical need for child-bearing through surrogacy.<sup>139</sup> Furthermore, most states in this category require that the parties be both physically and mentally fit to enter into the surrogacy agreement.<sup>140</sup> Florida,<sup>141</sup> Illinois,<sup>142</sup> Nevada,<sup>143</sup> New Hampshire,<sup>144</sup> Utah,<sup>145</sup> and Virginia<sup>146</sup> are status-regulation

122. *Id.*

123. ARIZ. REV. STAT. ANN. § 25-218 (West 2009) (Although the Arizona Appellate Court held the statute unconstitutional, it has not been repealed yet. *See Soos v. Superior Court of Ariz.*, 897 P.2d 1356 (Ariz. Ct. App. 1994)).

124. D.C. CODE §§ 16-401, 402 (2013).

125. IND. CODE § 31-20-1-1 (West 2008).

126. MICH. COMP. LAWS ANN. §§ 722.851–861 (West 2011).

127. NEB. REV. STAT. § 25-21,200 (1995).

128. N.D. CENT. CODE ANN. §§ 14-18-05, 08 (West 2009).

129. *See Caster, supra* note 7, at 486–87.

130. *Id.*

131. KY. REV. STAT. ANN. § 199.590(4) (West 2013).

132. LA. REV. STAT. ANN. § 9:2713 (2005).

133. *See In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988) (finding a surrogacy contract for compensation void, but noting that “[n]owhere . . . do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights”).

134. N.Y. DOM. REL. LAW § 123 (McKinney 2010).

135. N.C. GEN. STAT. ANN. §§ 48-10-102, 103 (West 2013).

136. *See* 46 Op. Ore. Att’y Gen. 221 (1989) (concluding that there is no specific statute addressing surrogacy in the state, but that the state will not enforce the exchange of money for the right of adoption).

137. WASH. REV. CODE ANN. § 26.26.230 (West 2005).

138. *See Caster, supra* note 7, at 487.

139. *Id.*

140. *Id.* at 487–88.

141. FLA. STAT. ANN. § 742.15(2) (West 2010).

142. 750 ILL. COMP. STAT. ANN. 47/20 (West 2009).

143. NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010) (repealed 2013).

144. N.H. REV. STAT. ANN. § 168-B:13 (LexisNexis 2010).

145. UTAH CODE ANN. §§ 78B-15-801 to 803 (LexisNexis 2012).

states. “Texas,<sup>147</sup> Arkansas,<sup>148</sup> and Tennessee<sup>149</sup> have partial surrogacy regimes that leave unclear whether surrogacy contracts will be enforced, compensated or not.”<sup>150</sup>

Finally, in contractual ordering states, parties to a surrogacy agreement “are entirely free to negotiate their rights and responsibilities under the surrogacy contract.”<sup>151</sup> The twenty-eight states that uphold contractual ordering fail to address surrogacy through legislation, so individuals seeking to enter into a surrogacy agreement are left to the mercy of the courts.<sup>152</sup>

The lack of consistent legislation in the U.S. is concerning. The vacuum of federal legislation and the general dearth of clarity in most states’ laws can have devastating effects on families across the country that enter into surrogacy agreements, desperate for a child, without any certainty that the contract will be enforceable if a dispute arises. Uniform federal regulation would best “reduce the risk of the exploitation and commercialization of women,” while also setting controllable standards to govern the surrogacy industry and giving citizens in every state the same opportunity to have a child when faced with devastating infertility.<sup>153</sup> In the absence of federal legislation, though, it is imperative that state legislatures at least define their state’s stance on surrogacy, giving its citizens certainty and predictability in an area in which those qualities are of the utmost importance.

#### IV. LEGAL TREATMENT OF SURROGACY AGREEMENTS IN ALABAMA

##### A. *Call for Legislative Action*

“Legislative action is likely the most direct and least problematic manner of addressing assisted conception.”<sup>154</sup> Alabama is one of the states that has remained legislatively silent on the issue of surrogacy. However,

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146. VA. CODE ANN. § 20-160 (Supp. 2013).

147. See TEX. FAM. CODE ANN. §§ 160.754, 160.762 (West 2008).

148. For more information on Arkansas’s surrogacy law, see The Human Rights Campaign, *Arkansas Surrogacy Laws*, HRC.ORG (Sept. 8, 2009, 11:00 AM), <http://www.hrc.org/laws-and-legislation/entry/arkansas-surrogacy-law>.

149. TENN. CODE ANN. § 36-1-102(48) (West 2010).

150. See Caster, *supra* note 7, at 488.

151. *Id.* at 488–89.

152. Alabama, Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming are legislatively silent when it comes to surrogacy agreements. See Mortazavi, *supra* note 80, at 2261.

153. See Krim, *supra* note 16, at 214.

154. Plant, *supra* note 18, at 655.

the legislature did explicitly exclude surrogacy agreements from the Alabama Parentage Act.<sup>155</sup> Thus, surrogacy in Alabama has been decriminalized and removed “from the scope of the state’s ‘baby selling’ prohibition.”<sup>156</sup> While the “commentary to the statute [notes] that the legislature determined [that] surrogacy contracts” would properly be addressed by separate legislation, no such legislation has passed.<sup>157</sup>

The only court to address surrogacy in the state did so indirectly. *Brasfield v. Brasfield*<sup>158</sup> involved a custody dispute over a minor child following a couple’s divorce.<sup>159</sup> The husband sought custody of the child based in part on the fact that the child had been born to a surrogate mother, and that he was the child’s biological father.<sup>160</sup> The court did not address the husband’s argument but awarded custody to the mother with little comment after failing to find an abuse of discretion by the trial court.<sup>161</sup> Thus, the court implicitly acknowledged the parental rights of non-biological participants in a surrogacy agreement.

Alabama “has a gaping hole in its [legislation] which legislators should fill.”<sup>162</sup> Otherwise, Alabamians entering into a surrogacy contract will be uncertain as to whether their agreement will be enforced by the courts, many of which may not be as amenable to surrogacy agreements as the *Brasfield* court seemed to be. While the morality of surrogacy motherhood itself is beyond the scope of this Note, it is likely irrelevant, given the increasing prevalence of the practice. No matter one’s personal beliefs regarding surrogacy, it is clear that the legislature should enact a law addressing this increasingly common practice. Indeed, the passage of a surrogacy law will allow for open debate that will let both proponents and opponents voice their causes, placing the power of lawmaking in the hands of the people and out of judicial chambers. Legislative silence is no longer an option.

### B. Legislative Recommendation for Alabama

Alabama can neither ignore surrogacy agreements nor legislatively ban them. A ban on surrogacy would arguably violate the Constitution of the

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155. See ALA. CODE § 26-10A-33, 34(c) (2009) (stating that “[s]urrogate motherhood is not intended to be covered by this section”).

156. *Id.*; see also Plant, *supra* note 18, at 653.

157. Plant, *supra* note 18, at 653.

158. *Brasfield v. Brasfield*, 679 So. 2d 1091 (Ala. Civ. App. 1996).

159. *Id.* at 1092.

160. *Id.*

161. *Id.* at 1095.

162. See Alexander, *supra* note 31, at 398–99 (encouraging Georgia’s legislature to do the same).

United States, which promises a fundamental right to procreate.<sup>163</sup> But beyond this, a ban on surrogacy contracts would fail to recognize the “positive motivations and experiences” of both surrogate mothers who desire to give a baby to infertile couples, and the intended parents who turn to surrogacy as a ray of hope in the bleakness of infertility.<sup>164</sup> The majority of women enter into surrogate agreements “willingly and voluntarily,” as a result of altruistic and self-validating motives.<sup>165</sup> Furthermore, American laws recognize individuals’ right to contract freely, and to deny women this right is to subordinate and dehumanize them.<sup>166</sup> As one proponent states, “In order to ensure that women are respected and celebrated in American society, women should have the power to freely exercise their right to contract and to make a living as they see fit.”<sup>167</sup>

Thus, Alabama legislators should draft a statute regulating surrogacy, ensuring that the law respects a woman’s right to contract and reflects the state’s traditional adherence to the “best interests of the child” in family law.<sup>168</sup> Alabama’s surrogacy legislation should permit and encourage parties, with the assistance of counsel, to reach a well-defined and clear agreement that satisfies the objectives and needs of each party to the contract.

Some eligibility requirements will be necessary to ensure that surrogacy agreements maintain conformity with public policy. The ABA Model Act is a viable model for Alabama, with such requirements as a home study of the intended parents and residency rules.<sup>169</sup> But with the increasing rate of surrogacy agreements and the continued rise in infertility, the judicial pre-approval required by Alternative A is unnecessarily cumbersome.<sup>170</sup> Instead, Alabama should use Alternative B as a model. Alternative B tracks Alternative A’s requirements but allows for self-executing contracts, which would take the burden off the already overly burdened state courts.<sup>171</sup> Furthermore, the additional requirements Alternative B imposes on the surrogate ensure that willing, educated, and experienced mothers are able to knowledgeably enter surrogacy

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163. See Behm, *supra* note 13, at 596 (describing surrogacy as “an ideal reproductive alternative . . . that provides [infertile] couples with the constitutionally protected freedom of procreation and the joy and love that comes with parenthood”).

164. See *id.*

165. See *id.* at 597.

166. *Id.* at 596–97 (arguing that banning surrogacy agreements could “dehumanize” women).

167. *Id.*

168. See, e.g., *Thomas v. Thomas*, 101 So. 738, 739 (Ala. 1924) (“[T]he court should look first to the good of the child.”).

169. See *supra* notes 111–115.

170. See *supra* notes 111–115.

171. See *supra* notes 116–120.



contracts.<sup>172</sup> These requirements decrease the likelihood of litigation after the baby is born by taking steps to ensure that the surrogate mother understands the emotions and risks involved, has the capacity to uphold her end of the agreement, is independently represented, and has insurance coverage.<sup>173</sup>

#### CONCLUSION

Currently, children born through surrogacy in Alabama face potential custody and parentage disputes due to the lack of clarity in the state's law. In the absence of uniform federal legislation, the Alabama Legislature must address surrogacy agreements so that well-meaning parties are not at the mercy of the courts' differing interpretations. The ABA Model Act Alternative B is a viable model, with enough requirements and safeguards in place to ensure that the legislation conforms to public policy and all parties are protected, including the child. With a large number of couples suffering from infertility and a rising demand for alternative reproductive methods, legislative silence is no longer an option.

*A. Paige Miller\**

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172. See *supra* notes 116–120.

173. See *supra* notes 116–120.

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