

Navigating Surrogacy Law in the Non-United States: Why All States Should Adopt a Uniform Surrogacy Statute

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NAVIGATING SURROGACY LAW IN THE NON-UNITED
STATES: WHY ALL STATES SHOULD ADOPT A UNIFORM
SURROGACY STATUTE

By: Stephanie Canner*

INTRODUCTION

“My water broke; the baby is coming! Come now!” Normally, a woman in labor makes this frantic phone call to her partner, who would immediately drop whatever they were doing to be by her side at the local hospital and be present to welcome their child into the world. However, this scenario is not the reality for many couples across the United States. For example, there is a New York couple who have a different story to tell their daughter about her birth.¹ Brad Hoylman and David Sigal received a phone call a month before their baby’s due date from their surrogate, a woman who lived across the country in California, to inform them that she was having contractions.² Mr. Sigal had a more flexible schedule, so he was able to fly to San Diego while Mr. Hoylman stayed behind in New York.³ The contractions were a false alarm; four weeks later, the baby was induced, and both Mr. Sigal and Mr. Hoylman were able to fly back to San Diego to be there for the birth of their daughter.⁴ Luckily for this couple, they could afford the multiple last-minute flights across the country from New York to California. However, if the early contractions had not been a false alarm, Mr. Hoylman would likely have missed the birth of his daughter.⁵ Many people will wonder why this couple took such

* Notes & Comments Editor, J. C.R. ECON. DEV., 2017-2018. St. John’s University School of Law ‘18.

¹ See generally Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. TIMES (Feb. 19, 2014), <https://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html>.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

a huge risk by using a surrogate who lived miles away from them. While using a surrogate in New York would have been the most cost-effective and less stress-inducing option, New York is one of the last few states that have statutorily banned commercial gestational surrogacy.⁶

Many women across the country struggle with the ability to bear children.⁷ A study conducted by the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention showed from 2006-2010, eleven percent of all women aged fifteen to forty-four, and twelve percent of married women within that age group, suffered from impaired fecundity—a medical condition where the woman has physical difficulty getting pregnant or carrying a pregnancy to live birth,⁸ and six percent of married women were deemed infertile.⁹ These women are unable to carry a child and could greatly benefit from the services of a surrogate in order to have a child. Further, men who wish to have children related to them cannot do so on their own, for obvious biological reasons.¹⁰ These groups of individuals are left with two options if they want to grow their families: adoption or surrogacy.¹¹ The desire to have a biologically-related child leaves the option of surrogacy.¹² However, the inconsistencies of

⁶ *See id.*

⁷ *See generally Female Infertility*, U.S. DEPT HEALTH & HUM. SERVICES, <https://www.hhs.gov/opa/reproductive-health/fact-sheets/female-infertility/index.html> (last visited February 16, 2020).

⁸ *See ANJANI CHANDRA ET AL., Infertility and Impaired Fecundity in the United States, 1982-2010: Data From the National Survey of Family Growth*, 67 NAT'L HEALTH STAT. REP. 1, 10, (Aug. 14, 2013).

⁹ *See id.* at 1. Infertility is described as “a lack of pregnancy in the 12 months prior to survey, despite having had unprotected sexual intercourse in each of those months with the same husband or partner.” *Id.*

¹⁰ *See Male Infertility*, AM. PREGNANCY ASS'N. While gay men are also hugely affected by inconsistent surrogacy laws across the United States, this Note's main focus is on the effects inconsistent surrogacy laws have on women who want to become surrogates and why eligibility requirements for potential surrogates are necessary.

¹¹ *See Adoption After Infertility*, ADOPTION NETWORK, <https://adoptionnetwork.com/how-to-adopt-a-baby/adoption-after-infertility> (last visited Oct. 13, 2019); *About Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/can-single-parents-pursue-surrogacy/> (last visited Oct. 13, 2019); *Reasons You Might Need a Surrogate*, S. CAL. REPROD. CTR. (Sept. 7, 2018), <https://blog.scrclf.com/reasons-you-might-need-a-surrogate>.

¹² *See generally Doree Shafrir, 10 Ways to Have a Baby*, DAILY BEAST, <https://www.thedailybeast.com/10-ways-to-have-a-baby> (last updated July 14, 2017, 5:08 PM).

surrogacy laws across the United States gives families who are left with this option extra hurdles to overcome.

Surrogacy laws across the United States vary greatly, making it difficult for couples who are in need of this assisted reproductive technology to fully understand the options they have.¹³ While more than half of the states are considered to be more surrogacy-friendly than others, the case law and legislation are inconsistent.¹⁴ These inconsistencies can lead to a multitude of problems, the biggest being that an arrangement would be unenforceable and the parentage of the child becomes legally uncertain.¹⁵ Individuals who are turning to surrogacy as their final option to start their own biological family are already under an enormous amount of emotional and financial stress, so the lack of uniformity in laws across the United States is just an unnecessary additional stressor.

This Note advocates for the adoption of a uniform, pro-surrogacy statute across the United States that allows for compensated surrogacy agreements. Surrogacy is becoming more prominent in everyday life and it is time for the states who are the outliers with prohibitions against surrogacy to reconsider their dated positions, as well as for the states who allow for it to regulate it more efficiently. States should include eligibility requirements for women who are looking to become gestational carriers to clarify this complicated process. States who have already adopted surrogacy statutes have included eligibility requirements for potential gestational carriers, but they vary.¹⁶ Uniform eligibility requirements will make it simpler for women to understand what they are in for and what is expected from them, no matter what state they enter an agreement in. This Note is proposing that the

¹³ See generally ALEX FINKELSTEIN ET AL., SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 6 (May 2016). The report was prepared to “inform advocates and citizens about important developments and fundamental issues concerning surrogacy.” *Id.* at 3.

¹⁴ See *Intended Parents: Surrogacy Law by State*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited Feb. 17, 2020).

¹⁵ See SITAL KALANTRY ET. AL, SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED? 15 (CORNELL L. FAC. PUBLICATIONS, Sept. 2017).

¹⁶ See Lucia Peters, *How To Become A Surrogate Mother, And All The Standards You Have To Meet To Be Eligible*, BUSTLE (June 21, 2017), <https://www.bustle.com/p/how-to-become-a-surrogate-mother-all-the-standards-you-have-to-meet-to-be-eligible-65866>.

following eligibility requirements are necessary to include in a surrogacy statute: (1) she must be at least 21 years old; (2) she must undergo a medical evaluation; (3) she must have independent legal counsel; (4) she must have health insurance that covers “major medical treatments” for the relevant period; (5) she must have already given birth to at least one child; (6) she must undergo a psychological evaluation prior to entering the agreement; and (7) she must attend counseling services during the pregnancy and for a period of time after.

Part I of this Note will provide an overview on surrogacy, including an explanation of the terminology used in surrogacy agreements, a discussion of the momentous case in surrogacy law, *In re Baby M*, and a brief summary of the position of each state on surrogacy agreements. *In re Baby M* is a New Jersey case from the 1980s that prompted discussion about how to handle surrogacy agreements.¹⁷ As you will see, many states now allow surrogacy agreements, but lack of uniform legislation makes it difficult for the parties involved to truly know what to expect. Part II of this Note will address why it is necessary for the states to pass a uniform, pro-surrogacy statute. It has been over twenty years since surrogacy has been a huge discussion in state legislatures, and society’s views have changed drastically since that time.¹⁸ Part III of this Note will address the list of eligibility requirements for potential gestational carriers that should be included. Specifically, Part III will discuss the importance of three requirements: (1) the gestational carrier must attend counseling services during the pregnancy and for a period of time after; (2) the gestational carrier must undergo a psychological evaluation before entering the agreement; and (3) the gestational carrier must have already given birth to at least one child. These requirements will provide additional protection for the gestational carrier to make sure she has the support necessary for this process.

¹⁷ See generally Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?_r=0.

¹⁸ See *infra* pp. 18-19 and notes 112-14.

I. UNDERSTANDING THE HISTORY OF CURRENT SURROGACY POLICIES

A. *Basic Terminology and Information for Surrogacy Agreements*

To understand surrogacy, it is necessary to first understand the terminology. A “surrogate” is defined as a woman who agrees to become pregnant by having an embryo implanted as part of a surrogacy arrangement; other terms used are “surrogate mother, gestational mother, birth mother, and gestational carrier.”¹⁹ She carries the child for the “intended parents,” who are the individuals who plan to receive the child after birth and raise the child.²⁰ It is estimated that several thousand children are born through surrogacy worldwide each year, but this is potentially an extremely low estimate due to the limited data available regarding surrogacy trends.²¹ There are two types of surrogate pregnancy: traditional surrogacy and gestational surrogacy.²² Gestational surrogacy is a “surrogacy arrangement in which all of the genetic material involved originates either from the intended parents or donors.”²³ The gestational carrier does not have a genetic relationship with the embryo she is carrying.²⁴ Gestational surrogacy also “requires the use of assisted reproductive technology.”²⁵ Currently, it is estimated that ninety-five percent of all surrogacies are gestational.²⁶ Due to the prevalence of gestational surrogacy today, this Note will focus solely on this form.²⁷

¹⁹ See FINKELSTEIN ET AL., *supra* note 13, at 5.

²⁰ See *id.*

²¹ See *id.* at 6.

²² See *id.* at 5. Traditional surrogacy is also referred to as partial surrogacy. See *id.* Traditional surrogacy is a surrogacy arrangement where the surrogate’s genetic material is used to create the embryo. *Id.* This form of surrogacy was commonly used in the past, before assisted reproductive technology was fully developed. *Id.*

²³ *Id.* Gestational surrogacy is also referred to as full surrogacy. *Id.*

²⁴ See *generally id.*

²⁵ *Id.* Assisted reproductive technology is used to treat infertility, and the most common and effective type is in vitro fertilization. See *id.* See also *Assisted Reproductive Technology*, MEDLINEPLUS (Aug. 6, 2019), <https://medlineplus.gov/assistedreproductivetechnology.html>.

²⁶ See FINKELSTEIN ET AL., *supra* note 13, at 7.

²⁷ See *id.* Additionally, many lawyers are either reluctant to get involved with traditional surrogacy agreements or refuse to handle the agreement entirely. See Mark

Even though surrogacy is considered a modern technology, it is a process that some have traced back to Biblical times.²⁸ However, society's concept of what surrogacy is and what the process entails actually dates back to the mid-1970s.²⁹ During this time, important milestones were achieved: Noel Keane, who founded the Infertility Center, wrote the first surrogacy contract, and Louise Joy Brown made headlines by being the first "test-tube baby" born.³⁰ In the early 1980's, a woman was able to give birth via the use of eggs donated by another, which later led to the first gestational surrogacy in 1985.³¹ However, this scientific breakthrough was not what pushed surrogacy and surrogacy contracts into the nation's spotlight. The event that spurred the nation to re-evaluate its surrogacy law was the traditional surrogacy arrangement between the Sterns and the Whiteheads over Baby M.³²

B. In re Baby M

In re Baby M was a New Jersey case that was the "first instance of American courts' dealing with the validity of a surrogacy contract."³³ William and Elizabeth Stern married in July 1974 and wanted to have children, but decided not to because of health risks

Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. (Mar. 1, 2011, 11:40 AM),

http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate. This is because of the legal issues involved since a woman who gives birth to a child using her own egg is legally presumed to be that child's mother. *See id.*

²⁸ *See History Of Surrogacy – When And Where Did It All Begin!*, SURROGATE MOTHERS, <http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-did-it-all-begin> [<https://perma.cc/74UX-T75H>] (last visited Feb. 5, 2017); *see also* *Genesis* 16:1-5 (King James). Abraham's wife, Sarah, was unable to conceive children, so she gave him her handmaid, Hagar, to conceive children through her. *See id.*

²⁹ *See History Of Surrogacy – When And Where Did It All Begin!*, *supra* note 28.

³⁰ *See id.*

³¹ *See id.*

³² *See* Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (March 23, 2014), http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?_r=0; Joanna L. Grossman, *Time to Revisit Baby M?: A Trial Court Refuses to Enforce a Surrogacy Agreement, Part One*, FINDLAW (Jan. 19, 2010), <https://supreme.findlaw.com/legal-commentary/time-to-revisit-baby-m-a-trial-court-refuses-to-enforce-a-surrogacy-agreement-part-one.html>.

³³ Haberman, *supra* note 32.

Mrs. Stern faced if she were to get pregnant.³⁴ This decision was not one made lightly since Mr. Stern lost most of his family in the Holocaust and, as his family's only survivor, wanted to continue his bloodline.³⁵ They turned to a surrogacy agency, the Infertility Center of New York ("ICNY"), where they met Mary Beth Whitehead.³⁶ Mary Beth Whitehead was twenty-nine years old when she became a surrogate for the Sterns.³⁷ One reason Mrs. Whitehead responded to ICNY's advertisements out of the sympathy she felt for her family members as well as others who could not have children, stating that "she wanted to give another couple the 'gift of life.'"³⁸

On February 6, 1985, Mr. and Mrs. Whitehead and Mr. Stern executed a parenting agreement.³⁹ Baby M, named Melissa⁴⁰ by the Sterns, was born on March 27, 1986, through traditional surrogacy, which involved the use of Mr. Stern's sperm and Mrs. Whitehead's eggs.⁴¹ After giving birth, Mrs. Whitehead realized that she could not part with the baby, stating that she, "felt a bond . . . even during pregnancy."⁴² Melissa was turned over to the

³⁴ See *In re Baby M*, 109 N.J. 396, 412-13 (N.J. 1988). Mrs. Stern had learned that she might have multiple sclerosis, a disease that can cause blindness, paraplegia, or other forms of debilitation if she were to become pregnant. See *id.* at 413.

³⁵ See *id.* at 413. The couple did consider adoption but realized that was not going to be their best option to start a family due to substantial delays and a potential problem involving their age and religious backgrounds. See *id.*

³⁶ See *id.* at 413-14; see also Mary Beth Whitehead, *A Surrogate Mother Describes Her Change of Heart – and Her Fight to Keep the Baby Two Families Love*, PEOPLE (Oct. 20, 1986, 12:00 PM), <http://people.com/archive/a-surrogate-mother-describes-her-change-of-heart-and-her-fight-to-keep-the-baby-two-families-love-vol-26-no-16/>. At fifteen, Mary Beth Whitehead dropped out of high school and at seventeen she got married. See *id.*

³⁷ See Whitehead, *supra* note 36.

³⁸ *In re Baby M*, 109 N.J. 413-14. Mrs. Whitehead was involved as a potential surrogate for another family before contracting with the Sterns, but that effort was abandoned after a number of unsuccessful insemination attempts. See *id.* at 414.

³⁹ *Id.* at 414. Mrs. Stern was not a party to the surrogacy contract because it is prohibited under New Jersey state law to pay for or accept money for the placement of a child for adoption. See *id.* at 423. While the compensation was stated to be for Mrs. Whitehead's services, the court disagreed and said it was clear that the money was for the adoption of the child. See *id.*

⁴⁰ See *id.* at 415. The Whiteheads originally named Baby M, Sara Elizabeth Whitehead. See *id.* at 414. Because neither party wanted the hospital to be aware of the surrogacy agreement, both Mr. and Mrs. Whitehead signed the birth certificate and not the Sterns. See *id.*

⁴¹ See *id.* at 411-12.

⁴² *Id.* at 414. ("Some indication of the attachment was conveyed to the Sterns at the hospital when they told Mrs. Whitehead what they were going to name the baby. She apparently broke into tears and indicated that she did not know if she could give up the

Sterns on March 30th to go home with them, but later that evening Mrs. Whitehead became “deeply disturbed, disconsolate, stricken with unbearable sadness.”⁴³ The following day, Mrs. Whitehead went to the Sterns’ house and told them how much she was suffering without her baby, prompting the Sterns’ to temporarily give Melissa to Mrs. Whitehead out of concern for her well-being, with the belief that Melissa would be returned to them.⁴⁴ However, Mrs. Whitehead fled to Florida with Melissa, and Melissa was not returned to the Sterns until four months later.⁴⁵

The Sterns’ complaint sought enforcement of the surrogacy contract, as well as custody of Melissa.⁴⁶ They requested that Melissa “be permanently placed in their custody, that Mrs. Whitehead’s parental rights be terminated, and that Mrs. Stern be allowed to adopt the child.”⁴⁷ The trial court granted the Sterns’ requests, holding that the surrogacy contract was valid and ordered the termination of Mrs. Whitehead’s parental rights, granted sole custody to Mr. Stern, and entered an order for Mrs. Stern to adopt Melissa.⁴⁸ The trial court “concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money⁴⁹ in connection with adoptions, do not apply to surrogacy contracts ... because the Legislature did not have surrogacy contracts in mind when it passed those laws.”⁵⁰ The Supreme Court of New Jersey reversed and invalidated the contract because “it

child. She talked about how the baby looked like her other daughter, and made it clear she was experiencing a great difficulty with the decision.”).

⁴³ *Id.* at 414-15.

⁴⁴ *Id.* at 415.

⁴⁵ *See id.*

⁴⁶ *See id.* at 417.

⁴⁷ *See id.* at 417.

⁴⁸ *See id.*

⁴⁹ *See id.* at 424. (describing the “payment of money” contracted for in this case.) The \$7,500 fee to the Infertility Center “was stated to be for legal representation, advice, administrative work, and other ‘services’” but the court instead believed the money was paid in connection with an adoption. *See id.* Also, Mrs. Whitehead was to receive \$10,000 only on “surrender of custody of the child and ‘completion of the duties and obligations,’ ... including termination of her parental rights to facilitate adoption by Mrs. Stern.” *See id.* Additionally, in the event that the child died before the fourth month of pregnancy, the Sterns would pay Mrs. Whitehead nothing, and if the child was stillborn, Mrs. Whitehead would only receive \$1,000. *See id.*

⁵⁰ *Id.* at 418.

conflict[ed] with the law and public policy” of New Jersey.⁵¹ Ultimately, the New Jersey court used this opportunity to explain why surrogacy contracts went against the policy of the state, becoming one of the first states to oppose surrogacy agreements.⁵²

C. Early Concerns About Surrogacy Contracts

The New Jersey court focused on two areas of concern in their opinion: the best interests of children born through surrogacy and the dignity of women involved in surrogacy.

1. Considering the Best Interests of Children

One large concern with commercial surrogacy was that the payment for surrogacy could lead to ill-suited couples becoming parents just because they are the highest bidder.⁵³ In the court’s opinion, the surrogacy contract arguably did not consider what was in the best interest of the child.⁵⁴ The court could not view surrogate parenting and surrogacy contracts as a way to facilitate anything other than the sale of children.⁵⁵ It did not see the payment to Mrs. Whitehead as payment for her services, but rather as payment for a baby.⁵⁶ The provisions of the contract between Mrs. Whitehead and the Sterns stated that the Infertility Center would hold \$10,000 in escrow for Mrs. Whitehead.⁵⁷ If she suffered a miscarriage prior to the fifth month of pregnancy, she would not receive any payment.⁵⁸ If she had a miscarriage during or after the fifth month, or if the child died or was stillborn, she

⁵¹ *Id.* at 411.

⁵² *See id.* at 411, 434-36, 443-44.

⁵³ *See id.* at 437-38. The court believed that with surrogacy contracts the child would go to the intended parents, regardless if it is in the best interest of the child or not, as long as the intended parents were willing to pay. *See id.*

⁵⁴ *See id.* at 437. Today, this analysis may have been different if gestational surrogacy was involved rather than traditional surrogacy because Mrs. Whitehead’s own eggs would not have been used. Instead Mrs. Stern’s egg could have been implanted, or an anonymous donor’s egg could have been used, and Mrs. Whitehead would not have had a genetic relationship with the embryo.

⁵⁵ *See id.* at 437-38.

⁵⁶ *See id.* at 423-25. The court viewed surrogacy contracts as “baby-bartering.” *See id.* at 425.

⁵⁷ *See* THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, 119 (May 1988).

⁵⁸ *See id.*

would receive \$1,000.⁵⁹ If testing indicated a genetic or congenital abnormality in the fetus and she refused to abort, she would receive little to no compensation for her services.⁶⁰

Another concern was the lack of care in the separation of children from their natural mother.⁶¹ According to the court, the policy of New Jersey was that “to the extent possible, children should remain with and be brought up by both of their natural parents.”⁶² By granting Mr. Stern full custody of Melissa and stripping Mrs. Whitehead of her parental rights through the provisions in the surrogacy contract, the court believed that the father’s parental rights were being weighed greater than the natural mother’s parental rights, which went against the state’s public policy.⁶³ There were also concerns that the surrogate mother would form a bond with the child, like Mrs. Whitehead did with Melissa, and the intended parents would not have that same emotional bond.⁶⁴ These factors were thought to go against the best interests of the child in New Jersey, since public policy states that children should be with and have the opportunity to bond with their natural parents.⁶⁵

2. Undermining the Dignity of Women

Another major divide between proponents and opponents of commercial surrogacy was what surrogacy contracts meant for women.⁶⁶ Proponents for surrogate parenting argued that the right to enter into a surrogacy agreement is part of the fundamental right to reproduce, and that there is no tangible harm caused to the individuals involved.⁶⁷ However, this

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See In re Baby M*, 109 N.J. at 435, 441-44.

⁶² *See id.* at 434. New Jersey’s previous adoption act, N.J.S.A. 9:3-17 (repealed) previously stated, “it is necessary and desirable (a) to protect the child from unnecessary separation from his natural parents” This language is not in the present adoption statute, but the court says its purpose is still part of public policy. *Id.*

⁶³ *See id.* at 435-37. “The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.” *Id.* at 436.

⁶⁴ *See id.* at 414, 437, 456.

⁶⁵ *See id.* at 417-18, 434.

⁶⁶ *See id.* at 411, 439-40, 443.

⁶⁷ *See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW*, *supra* note 57, at 73-74, 121.

argument was rejected by the court, which took the position that surrogacy contracts had the potential of undermining the dignity of women.⁶⁸

Those who have reviewed surrogacy laws and agreed with the New Jersey court, such as the New York State Legislature, took the position that the commercialization of pregnancy and the characterization of gestation as a service “depersonalizes women and their role in human reproduction.”⁶⁹ They described a surrogacy agreement as a lose-lose situation for the gestational carrier: she is dehumanized if she denies herself any emotional responses that occur during her pregnancy, but if she ends up attached to the child she contracted away the rights to, she creates a conflict for all parties involved.⁷⁰

The court noted how surrogacy contracts are vastly different from the laws for traditional adoptions.⁷¹ When surrendering a child in the context of a surrogacy contract, the natural mother is not offered counseling, evaluations, or warnings.⁷² Mrs. Whitehead did not receive any legal advice regarding the surrogacy contract she entered with the Sterns; the only advice received was from the previous surrogacy contract she had with another couple.⁷³ Mrs. Whitehead was psychologically evaluated, but the evaluation did not appear to be considered because the report from the psychologist “warned that Mrs. Whitehead demonstrated certain traits that might make the surrender of the child difficult and that there should be further inquiry into this issue in connection with her surrogacy.”⁷⁴ These oversights

⁶⁸ See *In re Baby M*, 109 N.J. at 411, 442.

⁶⁹ See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 57, at 121. Former Governor Cuomo organized the Task Force on Life and Law in March 1985 to deal with the unanticipated problems posed by surrogacy contracts. See *id.* at i. The role of the Task Force was to develop recommendations on a range of issues arising from recent advances in medical technology. See *id.* The Task Force’s report was released in 1988 and concluded that the public policy of the state should discourage surrogate parenting. See *id.* at 138.

⁷⁰ See *id.*

⁷¹ See generally *In re Baby M*, 109 N.J. at 438-39.

⁷² See *id.* at 436.

⁷³ See *id.* Her lawyer came from the Infertility Center. *Id.* The lawyer spent an hour going through the contract with the Whiteheads. *Id.* Mrs. Whitehead did not receive any further legal advice. *Id.*

⁷⁴ See *id.* at 436-37. The Sterns felt the evaluation was important, but the record indicated that neither the Whiteheads nor the Sterns were informed of the results from the

highlight the need for states to include the proposed eligibility requirements in a pro-surrogacy statute to ameliorate any continued fear the dignity of women is being undermined.

D. Current State of Surrogacy Law Across the United States

Surrogacy is an assisted reproductive technology that is largely regulated by state law.⁷⁵ Accordingly, surrogacy law varies greatly across the country.⁷⁶ Some states explicitly permit and regulate compensated and/or uncompensated surrogacy either through legislation or case law, while other states use case law and legislation to explicitly prohibit compensated and/or uncompensated surrogacy.⁷⁷ The following states are considered surrogacy-friendly: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Washington D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin, Wyoming.⁷⁸ These states have either legislation or case law that permit compensated and uncompensated surrogacy agreements, or they do not have any legislation or case law that directly addresses the issue.⁷⁹ Arizona and Indiana refuse to enforce all surrogacy contracts, and Michigan and New York take the refusal to enforce one step further by also imposing criminal sanctions.⁸⁰

psychological evaluation. *See id.* Had they been informed, this surrogacy agreement might not have gone forward. *See id.* at 437.

⁷⁵ *See* Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 *GEO. J. GENDER & L.* 313, 354 (2019).

⁷⁶ *See Surrogacy by State*, SURROGATE.COM, <https://surrogate.com/surrogacy-by-state/> (last visited Oct. 2, 2019).

⁷⁷ *See Should Compensated Surrogacy Be Permitted or Prohibited?*, *supra* note 15, at 14.

⁷⁸ *See id.* Alaska, Arizona, Idaho, Indiana, Iowa, Louisiana, Michigan, Mississippi, Montana, Nebraska, New York, Oklahoma, Tennessee, Virginia, and Wyoming are considered less surrogacy-friendly states. *Intended Parents: Surrogacy Law by State*, *supra* note 14.

⁷⁹ *See Should Compensated Surrogacy Be Permitted or Prohibited?*, *supra* note 15, at 14.

⁸⁰ *Id.*

While a vast majority of states permit some form of surrogacy, there is still uncertainty of what will happen when the intended parents enter into an agreement with a potential gestational carrier.⁸¹ Having uniform legislation across the United States will ease some of the stress off of both the intended parents and the potential gestational carrier. Intended parents will be able to find a surrogate within their home state and not have to go across the country, like Mr. Hoylman and his husband had to. Additionally, potential gestational carriers will be better informed of what is expected of them and the requirements they need to satisfy if they stop varying from state to state. The next section of this Note will further discuss why it is time for all states to adopt a uniform, pro-surrogacy statute.

II. WHY ALL STATES SHOULD PASS A UNIFORM, PRO-SURROGACY STATUTE

A. The Rationale Behind the Surrogacy Ban No Longer Makes Sense in Today's World

When the Baby M opinion was written, surrogacy was a recent medical advancement and surrogacy contracts were new.⁸² The New Jersey court even stated itself that “the long-term effects of surrogacy are not known, but feared.”⁸³ However, enough time has now passed and enough experiences have been cultivated to test whether the court’s concerns proved correct. Due to the advances made in assisted reproductive technologies, surrogacy is a procedure that will become more common place, and taking steps

⁸¹ See generally Michael Alison Chandler, *With New Surrogacy Law, D.C. Joins Jurisdictions That Are Making It Easier for Gay and Infertile Couples to Start Families*, WASH. POST (June 3, 2017), https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html.

A majority of states have a law or case law “that guides surrogacy decisions, though they vary in how restrictive they are.” *Id.* However, “in many states, decisions are left to the judges and can be unpredictable.” *Id.*

⁸² See Grossman, *supra* note 32.

⁸³ See *In re Baby M*, 109 N.J. 396, 441 (N.J. 1988).

to make sure the surrogate is eligible can help prevent future problems.⁸⁴

The surrogacy method used by the Sterns and the Whiteheads was traditional surrogacy, meaning that Baby M was biologically related to Mrs. Whitehead and Mr. Stern; however, today ninety-five percent of all surrogacies in the United States are strictly gestational.⁸⁵ The fear of separating a child from her genetic mother is no longer a strong argument against surrogacy, since the baby would have no genetic relationship to the surrogate mother. Instead, because it is likely that the egg used is from the intended mother, surrogacy unites children with their genetic mothers.

Further, the court's concern about the impact the surrogacy agreement would have on children born of these agreements appears to be unfounded—specifically when looking at Baby M. Melissa is now a married adult who lives in London.⁸⁶ When she turned eighteen, Melissa terminated Mrs. Whitehead's parental rights and was formally adopted by Elizabeth Stern.⁸⁷ Naturally, not all experiences are the same for everyone, so not all children born through surrogacy are going to have the same positive experience that Melissa did.⁸⁸ However, this is not a strong enough reason to not implement pro-surrogacy statutes throughout the United States.

⁸⁴ See *Surrogates The Emotional And Medical Risks Of Surrogacy: What To Expect*, SURROGATE.COM, <https://surrogate.com/surrogates/pregnancy-and-health/emotional-and-medical-risks-of-surrogacy/> (last visited Oct. 4, 2019).

⁸⁵ See FINKELSTEIN ET AL., *supra* note 13, at 7; see also Bill Buell, *All in the family: Minister's wife carrying baby for stepson and wife*, DAILY GAZETTE (Nov. 8, 2015), <http://www.dailygazette.com/news/2015/nov/08/all-family-ministers-wife-agrees-carry-baby-stepsos/print>. The first successful gestational surrogacy was completed in 1985. See *id.*

⁸⁶ See Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

⁸⁷ See *Baby-M*, BERGEN RECORD (Mar. 3, 2007), <http://web.archive.org/web/20070526004403/njmonthly.com/issues/2007/03-Mar/babym.htm>.

⁸⁸ Mary P. Riddle, *An investigation into the psychological well-being of the biological children of surrogates*, 4 COGENT PSYCHOL. (Apr. 3, 2017), <https://www.tandfonline.com/doi/full/10.1080/23311908.2017.1305035>.

B. Women are Negatively Affected by Inconsistent and Anti-Surrogacy Statutes

Since Baby M, changes in technology and society have also weakened the reasoning behind a state not having a pro-surrogacy statute. Two groups of people directly affected by decisions made regarding surrogacy are women and same-sex couples. Women have always been the group most affected by states who choose to ban surrogacy.⁸⁹ Women who want to become surrogates, but wish to receive compensation for their services, cannot do so; and women who are unable to have children, and want to have a child via surrogacy, must leave their home state if it does not allow for surrogacy agreements.⁹⁰

Women have always been a point of contention in the surrogacy debate. An argument against surrogacy is that surrogacy exploits women.⁹¹ This was an assertion made by the New York State Legislature in the 1980s and it remains one still made across the country today.⁹² Individuals view surrogacy as a service that exploits vulnerable women and takes advantage of poorer women.⁹³ Because some people still view surrogacy as baby-selling, some people believe that the service turns human beings into “things” and mothers into “ovens.”⁹⁴ However, this antiquated view of surrogacy still makes the assumption that women are “too ignorant, ill-informed or otherwise unable to make rational decisions to be surrogates and use their minds and bodies to help

⁸⁹ See FINKELSTEIN ET AL., *supra* note 13, at 32.

⁹⁰ See Bernadette Hogan, *Cuomo criticizes NY lawmakers for not approving surrogacy law*, N.Y. POST, <https://nypost.com/2019/05/29/cuomo-criticizes-ny-lawmakers-for-not-approving-surrogacy-law/> (last updated May 29, 2019). Additionally, same-sex couples, specifically same-sex male couples, have no other option other than using out-of-state surrogates if they want to have children biologically related to them. *Id.*

⁹¹ See FINKELSTEIN ET AL., *supra* note 13, at 32.

⁹² See Yancey Roy, *What you need to know about the NY debate over paid surrogacy*, NEWSDAY, <https://www.newsday.com/news/region-state/paid-surrogacy-state-legislature-1.32265468> (last updated June 11, 2019).

⁹³ See generally Kathleen Parker, *Kathleen Parker: The exploitations of surrogate mothers*, WASH. POST, Opinion (May 24, 2013), https://www.washingtonpost.com/opinions/kathleen-parker-the-exploitation-of-surrogate-mothers/2013/05/24/90bc159e-c4b0-11e2-8c3b-0b5e9247e8ca_story.html?utm_term=.9472a6dbad41.

⁹⁴ See generally *id.*

those who cannot carry a fetus to term.”⁹⁵ The motivations for women to decide to become surrogates vary: some women do it after seeing family members and friends struggle with infertility, and others do it for the payment so they can be able to afford things that they would have been incapable of affording otherwise.⁹⁶

Contrary to what individuals may believe, research done on surrogates has demonstrated there has not been a “trend of less educated and psychologically vulnerable women acting as surrogates at disproportionate rate in Western countries.”⁹⁷ Most women who agree to become either altruistic or compensated surrogates are “Caucasian, Christian, and in their late 20s-early 30s.”⁹⁸

Surrogates in the United States “are not necessarily poor and nor claim to feel pressured into surrogacy.”⁹⁹ These women are “appreciative of the fee,” but also had other reasons for becoming a surrogate.¹⁰⁰ Receiving compensation for becoming a surrogate is not the sole reason for a couple, but is certainly still factored into a potential surrogate’s consideration, because if that was not the case, there would most likely be a higher number of altruistic surrogacies.¹⁰¹ For some, the “sense of empowerment and self-worth is one of the greatest rewards surrogate mothers

⁹⁵ Judith Sperling-Newton, *Surrogacy Should Be Regulated, Not Banned, Letter to the Editor*, WASH. POST, https://www.washingtonpost.com/opinions/surrogacy-should-be-regulated-not-banned/2013/05/29/2198c134-c7db-11e2-9cd9-3b9a22a4000a_story.html (last visited Feb. 8, 2020).

⁹⁶ See Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, (Mar. 29, 2008, 10:55 AM), <http://www.newsweek.com/curious-lives-surrogates-84469?GT1=43002>. See also Jennifer Bixler, *Carrying these babies for my brother*, CNN, <http://www.cnn.com/2012/09/07/health/surrogate-sisters/> (last updated Sept. 12, 2012, 10:52 AM); Tiffany Burke & Natalie Lucich, *How We Got Here, A BELLY FOR ME, A BABY FOR YOU*, <http://abellyformeababyforyou.blogspot.com/p/how-we-got-here.html>. In 2012, Tiffany Burke was a surrogate for her brother, James, and his wife, Natalie. *Id.* Natalie gave birth to their son, Hunter, and had severe complications that led to the doctors having to remove her uterus to save her life. *Id.* Tiffany already had two children of her own and did not have plans to have anymore, but saw that her sister-in-law was devastated by the idea of being unable to have more biological children, so she offered to be their surrogate. *Id.* She gave birth to twin boys, Parker and Levi, on November 9th, 2012. *Id.*

⁹⁷ See FINKELSTEIN ET AL., *supra* note 13, at 34.

⁹⁸ See *id.* at 34-35.

⁹⁹ See *id.* at 34.

¹⁰⁰ See *id.* Some of these reasons include that the woman enjoys being pregnant and wants to make a difference in a couple’s life who are unable to have children. *Id.*

¹⁰¹ See *id.*

experience.”¹⁰² One woman, who was carrying twins for a couple on the East Coast who could not have children on their own due to a hysterectomy, said she wanted to make a difference and do something substantial for someone else.¹⁰³

Surrogacy is a way women can contribute positively to their own lives and the lives of others. While many of these women become surrogates out of compassion and a desire to help others, the payment received from a surrogacy arrangement plays a role in the decision to become a surrogate.¹⁰⁴ The compensation received, combined with the sense of helping others, seems to be what draws women to become a surrogate.¹⁰⁵ One agency, Circle Surrogacy, offers up to \$40,000 as a standard base fee to their surrogates.¹⁰⁶ Compensation varies for first-time applicants depending upon their state and if they have an approved insurance.¹⁰⁷ Additionally, experienced surrogates may receive an additional \$5,000 over their previous base fee.¹⁰⁸

Being able to receive this compensation is attractive to women, such as military wives, who want to contribute financially to their families, but have difficulty doing so. Most military wives are young, stay-at-home moms who have completed their families before they reach their thirties.¹⁰⁹ Because they move around often, starting a career is not always feasible.¹¹⁰ Ninety percent of female military spouses are either unemployed or

¹⁰² Ali, *supra* note 96.

¹⁰³ *See id.*

¹⁰⁴ *See* Linda Kanefield, *Surrogates and Egg Donors: Deconstructing Layers of “Mother”*, 2(4) ADOPTION Q. (1999).

¹⁰⁵ *See id.*

¹⁰⁶ *See How Surrogates Get Paid*, CIRCLE SURROGACY (Feb. 14, 2019), <https://www.circlesurrogacy.com/blog/circle-surrogacy/surrogates-paid-compensation/>.

¹⁰⁷ *See id.* If the surrogate does not have an approved insurance, then they are typically compensated less to allow the intended parents to purchase them insurance. *See FAQs: Surrogates*, CIRCLE SURROGACY <https://www.circlesurrogacy.com/surrogates/faqs> (last visited Oct. 13, 2019).

¹⁰⁸ *See How Surrogates Get Paid*, *supra* note 106. This increase occurs provided that their insurance has not changed since their last surrogate pregnancy. *Id.*

¹⁰⁹ *See Military Families: “Growing” Younger!*, BRANCH MIL. PARENT TECHNICAL ASSISTANCE CTR., <https://branchta.org/military-families-growing-younger/> (last visited Oct. 6, 2019); *see also* Julie Bogen, *The Dismal Career Opportunities for Military Spouses*, ATLANTIC (Mar. 28, 2019), <https://www.theatlantic.com/family/archive/2019/03/majority-military-spouses-are-underemployed/585586/>.

¹¹⁰ *See generally* Lauren Tamm, *5 Ridiculous Lies About Military Spouse Unemployment*, MIL. WIFE & MOM, <https://themilitarywifeandmom.com/5-ridiculous-lies-about-military-spouse-unemployment/> (last visited Oct. 20, 2019).

underemployed.¹¹¹ As surrogates, this group of women can bring in a paycheck that roughly matches the annual base pay their husbands earn.¹¹² Having this opportunity available can open more doors for multiple women.

C. Gestational Surrogacy Needs to be More Readily Available to All Families

It is time for states to individually reconsider their current surrogacy laws and pass a pro-surrogacy statute. Many states, such as New York, have been governed by anti-surrogacy laws for over twenty years.¹¹³ While the purpose for some of these state laws—namely, reducing the amount of surrogacy agreements—may have been reasonable years ago, society has changed since the late 1980s and early 1990s. Surrogacy has become more prominent in today's society, especially among those who are wealthy.¹¹⁴ Because the states are inconsistent with their laws, surrogacy has the appearance of being an elitist option, when in reality it is an option that all people looking to start a family should have.

Many celebrities have utilized the services provided by gestational surrogates when they were unable to create or continue to build their own families.¹¹⁵ Most recently, Kim Kardashian-West and Kanye West used a gestational surrogate to have their third child, Chicago West, because Kim was unable to carry a third child due to previous pregnancy complications.¹¹⁶

¹¹¹ Erin Dooley, *90% of Military Wives Jobless or Underemployed 'Not Acceptable'*, ABC NEWS (Mar. 1, 2014, 2:00 AM), <http://abcnews.go.com/Politics/90-military-wives-jobless-underemployed-acceptable/story?id=22720559>. This percentage is equivalent to more than 600,000 people. *Id.*

¹¹² See Ali, *supra* note 96.

¹¹³ See Makenzie B. Russo, *The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States* 41 (Spring 2016) (unpublished senior theses and projects, Trinity College) (on file with the Trinity College Digital Repository).

¹¹⁴ See Leslie Morgan Steiner, *Who Becomes a Surrogate?*, ATLANTIC (Nov. 25, 2013), <https://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/>.

¹¹⁵ See generally Jen Juneau, *34 Famous Families Who've Welcomed Children Through Surrogacy*, PEOPLE (May 10, 2019, 2:50 PM), <http://people.com/babies/celebrities-who-have-used-surrogates/kanye-and-kim-kardashian-west>.

¹¹⁶ See *id.* Kim Kardashian-West had early-onset preeclampsia when she was pregnant with her first daughter, North. See Gabi Duncan, *Kim Kardashian Admits Surrogacy is Now Her "Reality" After Doctors Say It's Definitely Not Safe to Get Pregnant Again*, ENEWS (Apr. 2, 2017, 6:55 PM), <http://www.eonline.com/shows/kardashians/news/839133/kim-kardashian-admits-surrogacy-is-now-her-reality-after-doctors-say-it-s-definitely-not-safe-to-get-pregnant-again>. In hopes of having a third child, she had surgery to repair her

Giuliana Rancic had her son via a gestational carrier after she suffered a multitude of health problems, including infertility, a miscarriage, and breast cancer.¹¹⁷ Celebrities are not the only women who struggle with these health issues, but their financial situations make surrogacy a more attainable option for them.

Surrogacy is an extremely expensive process, which is why it typically is not the first choice for couples who are struggling with starting their family.¹¹⁸ Couples who live in a state that bans compensated surrogacy agreements, or where the state law is unclear on the enforceability of surrogacy agreements, need to factor in additional costs for out-of-state travel. Additionally, being unable to enter into a surrogacy agreement with a potential gestational carrier who does not live in your state increases the emotional stress on the intended parents.¹¹⁹ These parents want to be there for every step of the pregnancy, whenever possible. If a couple lives in New York or Michigan and cannot afford to travel to California for every doctor's appointment or other opportunities, they are missing out on chances to bond with the surrogate and the child being carried.¹²⁰ Having the ability to hire a gestational carrier who is local is not just a convenience, it is a way to keep everyone involved in the surrogate pregnancy.

III. ADDITIONAL REQUIREMENTS ALL STATES NEED TO HAVE IN ITS SURROGACY STATUTES

Surrogacy is an event that involves everyone: the gestational carrier and her family and the intended parents and their families. From the intended parents' point of view, choosing the right woman to carry their child for nine months can be a daunting task. Having a list of requirements for gestational carriers within state

uterus. *Id.* Her doctors advised against a third pregnancy, feeling that it was unsafe for her to conceive again. *Id.* Even after the surgery, the doctors determine that she definitely should not carry another child. *Id.*

¹¹⁷ See Juneau, *supra* note 115.

¹¹⁸ See *Intended Parents*, AM. SURROGACY, <https://surrogate.com/intended-parents/overcoming-infertility/infertility-to-surrogacy/> (last visited Oct. 6, 2019).

¹¹⁹ See Our Journeys, *Working With Out-of-State Surrogate. Factors to Consider?*, SURROGATE MOTHERS ONLINE (Jan. 2, 2013, 3:29 PM), <http://www.surromomsonline.com/support/showthread.php?203613-Working-with-out-of-state-surrogate-Factors-to-consider>.

¹²⁰ See generally *id.*

statutes helps relieve some of the stress caused by this process. States that have already passed pro-surrogacy statutes have included a list of requirements that woman need to satisfy if they wish to become a gestational carrier.¹²¹

This Note proposes that all states should adopt the following eligibility requirements for gestational carriers: (1) she must be at least twenty-one years old; (2) she must undergo a medical evaluation; (3) she must have independent legal counsel; (4) she must have health insurance that covers “major medical treatments” for the relevant period; (5) she must have already given birth to at least one child; (6) she must undergo a psychological evaluation prior to entering the agreement; and (7) she must attend counseling services during the pregnancy and for a period of time after.

The first four requirements listed are common requirements found in statutes that have already been passed by Delaware,¹²² Maine,¹²³ and New Hampshire.¹²⁴ They are also found in the proposed surrogacy statute that has been introduced in New York¹²⁵ and in the statute that Washington D.C.¹²⁶ recently passed. Logically, these requirements ensure the potential surrogate is medically healthy to carry the intended parents’ child, has medical insurance to cover costs, and is fully informed by an independent attorney of the agreement she is entering into.

The last three requirements are ones that are important to ensure the psychological health of the surrogate, and are not found in most statutes.¹²⁷ The very last proposed requirement—that the potential gestational carrier must attend counseling services

¹²¹ See generally, *Surrogate Mothers and Gestational Surrogacy*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/surrogates/about-surrogate-mothers-and-gestational-surrogacy/> (last visited October 16, 2019).

¹²² See DEL. CODE ANN. tit. 13, § 8-806 (West 2013).

¹²³ See ME. REV. STAT. ANN. tit. 19-A, § 1931 (2016).

¹²⁴ See N.H. REV. STAT. ANN. § 168-B:9 (2014).

¹²⁵ See S.B. 17, 2017 Leg., 239th Sess. (N.Y. 2017).

¹²⁶ See D.C. Code Ann. § 16-404 (West 2017). “A surrogacy agreement shall be enforceable; provided, that all parties to the agreement and the agreement itself meet the requirements of § 16-405 and § 16-406.”

¹²⁷ Washington D.C., Delaware, Maine, and New Hampshire all require within their surrogacy statutes that the potential surrogate, prior to executing the surrogacy agreement, complete a mental health evaluation and have given birth to at least one child. See D.C. CODE ANN. § 16-404 (West 2017); DEL. CODE ANN. tit. 13, § 8-806 (West 2013); ME. REV. STAT. ANN. tit. 19-A, § 1931 (2016); N.H. REV. STAT. ANN. § 168-B:9 (2014).

during the pregnancy and for a period of time after—is not found in many state surrogacy statutes.¹²⁸ These three requirements, in conjunction with the additional requirements mentioned above, will help ease some of the stress on the intended parents when picking a gestational carrier, while also protecting the mental health of the surrogate. Further, over time these requirements should quell many of the concerns over the surrogacy process.

A. Counseling Services Must be Made Available for the Gestational Carrier and She Must Attend

Just as every woman does not have a satisfactory pregnancy of her own, not every woman has a satisfactory surrogacy experience. However, with surrogacy, “[i]t is unclear whether the dissatisfaction stems from the surrogacy process itself, the lack of therapeutic intervention, or both.”¹²⁹ Stephanie Scott, who was a surrogate for a couple on the East Coast, stated that life after surrogacy was not what she expected.¹³⁰ Her pregnancy went well, but she could not resist the nesting urges.¹³¹ She tried to avoid the baby stores, but ended up buying six months’ worth of baby clothes that she gifted to the intended parents during delivery.¹³² When she gave birth, she said she “couldn’t look, so [she] closed [her] eyes tight, counted 10 fingers and 10 toes, then gave her away.”¹³³ She believes if the agency she was a surrogate for had counseled her more on attachment issues, she might have not felt so devastated after the pregnancy was over.¹³⁴

¹²⁸ See D.C. CODE ANN. § 16-404 (West 2017) (“An individual seeking to serve as a surrogate shall enter into a written surrogacy agreement and, at the time that surrogacy agreement is executed, shall: ... have completed, with the intended parent or parents, a joint consultation with a mental health professional regarding issues that could arise during the surrogacy”). While this is certainly a step in the right direction for protecting the mental well-being of the surrogate by discussing potential issues that can arise, more needs to be done. This Note encourages a more extensive mental health counseling to be made available for the surrogate so there is a support system in place if the potential issues discussed early on do come up and are more troubling than anticipated.

¹²⁹ See Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 27 (2005).

¹³⁰ See Ali, *supra* note 96.

¹³¹ *Id.*

¹³² See *id.*

¹³³ *Id.*

¹³⁴ See *id.*

Surrogacy is not an isolated experience; it involves more people than just the gestational carrier. While the general fear is the gestational carrier will form a relationship with the child she is carrying, what typically happens is that she forms a relationship with the intended parents.¹³⁵ The relationship with the intended parents plays a large role in the experience of the gestational carrier.¹³⁶ Providing “[p]rofessional support and intervention, including therapy, . . . during the surrogacy process may maximize satisfaction rates among surrogates.”¹³⁷ Research indicates that “access to competent professionals who helped guide [surrogate mothers] through the process and deal with emotional issues” increased their satisfaction with the surrogacy process.¹³⁸ The study was done by Janice C. Ciccarelli.¹³⁹ It involved a sample of fourteen women “who were surrogates [three] to [ten] years previously,” and data was collected through “open-ended interviews.”¹⁴⁰ The specific aim of counseling would be to “ease specific anxieties, facilitate decision-making and ensure that issues are resolved at an early stage before difficulties have a chance to arise.”¹⁴¹ Making counseling services available for gestational carriers during the pregnancy and for a period of time after the birth will help the surrogate by providing her an extra support system.¹⁴²

Because surrogacy has a type of stigma attached to it, some women may feel reluctant to inform their friends and family about their decision to become a surrogate, and that can cut off their support system. A study done on the experience of surrogate mothers informing their families show that “in [seven percent] of the cases, the family reaction was negative, in [forty-eight percent] was positive, and in [forty-six percent] was neutral or mixed of

¹³⁵ See Ciccarelli and Beckman, *supra* note 129, at 26.

¹³⁶ See *id.*

¹³⁷ *Id.* at 34.

¹³⁸ *Id.* (alteration to original).

¹³⁹ See *id.* at 29, 34.

¹⁴⁰ *Id.* at 25. Variables considered in this study were the surrogate’s “motivations; relationship with the [intended parents]; experience of the surrogacy arrangement; expectations and whether or not they were met; post-birth experiences; [and] satisfaction. *Id.*

¹⁴¹ Olga B.A. van den Akker, *Psychological aspects of surrogate motherhood*, 13 *HUM. REPROD. UPDATE* 53, 59 (2007) (internal quotation marks omitted).

¹⁴² See Hoda Ahmari Tehran et al., *Emotional experiences in surrogate mothers: A qualitative study*, 12 *IRAN J. REPROD. MED.* 471, 479 (2014).

negative and positive.”¹⁴³ “The follow up study showed that family feeling toward this issue was positive in [seventy-six percent] of cases and only [three percent] of the cases had a negative feeling one year after child delivery.”¹⁴⁴ While hindsight shows that family and friends will be okay with the surrogacy, those initial negative feelings toward the woman can have a huge impact on the surrogacy experience.¹⁴⁵ Providing counseling during the pregnancy and for a duration after can give the surrogate a much-needed support system if her friends and family are not initially supportive. Negative attitudes toward surrogacy can result from an unawareness of what surrogacy entails.¹⁴⁶ While providing more information to make them more aware of surrogacy and its process, education can only go so far because you cannot force people to change their opinions. It is not guaranteed that the surrogate’s friends or family will change their attitudes toward the pregnancy during the duration of it, but a counselor or therapist will be available for the surrogate during those nine months and a duration after when she needs support the most.

B. The Surrogate Must Undergo a Psychological Evaluation Prior to Entering the Agreement

As prepared as a gestational carrier may believe she is for the pregnancy, some thoughts and emotions cannot be controlled. Utilizing a psychological evaluation could have prevented Mrs. Whitehead from becoming the surrogate for the Sterns. Mrs. Whitehead did partake in a “psychological evaluation to determine her suitability as a potential candidate” through ICNY.¹⁴⁷ This was done almost two years prior to the surrogacy contract with the Sterns, and while Mrs. Whitehead was recommended as a suitable surrogate candidate, there was a suggestion from the examiner to “explore her ability to relinquish the child in more depth.”¹⁴⁸ All

¹⁴³ *Id.* at 478.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ Karen H. Rothenberg, *Surrogacy and the Health Care Professional: Baby M and Beyond*, in *SURROGATE MOTHERHOOD: PRIVACY AND POLICY* 201, 206 (Lawrence O. Gostin ed., 1990) (internal quotation marks omitted).

¹⁴⁸ *Id.*

states should require a psychological evaluation of the potential surrogate before entering the agreement to protect the gestational carrier, the intended parents, and the child born from this arrangement. Psychological evaluations are commonly done if the intended parents find a surrogate through a surrogacy agency.¹⁴⁹ “As part of the selection process . . . potential candidates are assessed for their psychological suitability to function in the role of surrogacy.”¹⁵⁰ Because “the impact of relinquishing a child following birth can have emotional consequences for the surrogate mothers,” it is essential to obtain “a thorough understanding of [her] psychological functioning.”¹⁵¹ The common test used for assessing candidates is the Minnesota Multiphasic Personality Inventory-2nd Edition (“MMPI-2”).¹⁵² A study was conducted in 2012 to understand what makes a potential surrogate psychologically suitable.¹⁵³ Forty-three surrogate candidates “underwent a psychological evaluation as a part of the application process to become a surrogate” and “were administered the MMPI-2 to assess their psychological and personality characteristics.”¹⁵⁴ Findings from this study showed that “the psychological suitability of surrogate mother candidates appear to be a composite of being both tough-minded and sensitive, sufficiently resilient to manage the role of surrogacy, and aware of the importance of emotional boundary-setting related to pre-natal attachment.”¹⁵⁵ Requiring potential surrogates to take the MMPI-2 will help prevent any potential future problems for both the

¹⁴⁹ See, e.g., *Surrogacy Process Overview*, SIMPLE SURROGACY, <https://simplesurrogacy.com/surrogates/surrogacy-process-surrogates/> (last visited Oct. 9, 2019) (“The tests that accompany Surrogacy with an Egg Donor include but are not limited to Hysteroscopy/HCG, STD testing, trial transfer, and psychological testing.”).

¹⁵⁰ Todd D. Pizitz ET AL., *Do Women Who Choose to Become Surrogate Mothers Have Different Psychological Profiles Compared to a Normative Female Sample?*, 26 *WOMEN & BIRTH: J. AUSTRAL. C. MIDWIVES* e15, e15 (2012).

¹⁵¹ *Id.* (alternation to original).

¹⁵² See *id.* at e16. This test is a “567 self-report true and false measure that illuminates personality structure and psychopathology.” *Id.* “The comprehensive nature of the [test] assists practitioners in determining the presence of psychopathology, as well as personality characteristics, problem solving styles, problematic behaviors, and resiliency. Such information is essential in understanding the psychological profiles of surrogate mothers.” *Id.*

¹⁵³ See generally *id.* at e15.

¹⁵⁴ See *id.* at e16. “The normative comparison sample consisted of 40 female MMPI-2 profiles randomly drawn from a large archival database of non-patient female participants compiled by Dr. Roger Greene, a preeminent MMPI-2 researcher and author.” *Id.*

¹⁵⁵ *Id.* at e15.

gestational carrier and the intended parents by determining at the outset if the woman in question is suitable to be a surrogate.

C. The Surrogate Must Have Given Birth to One Child Prior to Entering the Agreement

A common argument in the surrogacy debate is whether the gestational carrier can make a fully informed decision when entering a surrogacy agreement. Because a woman experiences significant hormonal, biological, and physiological changes during pregnancy and birth, opponents of surrogacy question the ability of a surrogate to make a fully informed decision.¹⁵⁶ Those who oppose surrogacy have concerns about the unanticipated emotional consequences, such as psychological or emotional trauma, that can occur when the gestational carrier turns over the child to intended parents.¹⁵⁷ However, proponents for surrogacy have noted “few women have regretted participating in surrogacy contracts or experienced distress on giving up the child after birth, and that surrogates rarely refuse to relinquish the child after birth.”¹⁵⁸

Concerns about informed consent before entering the agreement are drastically reduced by requiring potential gestational carriers have already had one pregnancy that resulted in the delivery of a child.¹⁵⁹ A woman who has never been pregnant and has not delivered a child is already vulnerable to contentions that she is unable to give true informed consent because of the “prolonged, intense, and unique nature of the experience.”¹⁶⁰

Many women who choose to become gestational carriers are already women who have been pregnant previously and have enjoyed the experience, but do not want more children of their

¹⁵⁶ See FINKELSTEIN ET AL., *supra* note 13, at 25, 30.

¹⁵⁷ See *id.* at 30.

¹⁵⁸ *Id.* at 30. There was also a concern that placing the blame on a woman’s hormones impeding her ability to give informed consent would lead down a slippery-slope that would excuse other hormone-based activities. See *id.* at 36. This could set a dangerous precedent which, if taken to the extreme, could potentially exclude crimes such as rape. *Id.*

¹⁵⁹ See Am. Soc’y for Reprod. Med., *Consideration of the gestational carrier: a committee opinion*, 99 ASRM PAGES 1838, 1840 (2013).

¹⁶⁰ See *id.*

own.¹⁶¹ For one woman, her decision to become a surrogate came from seeing families “devastated by infertility or the inability to have children of their own through traditional ways.”¹⁶² She was able to make this decision by knowing she enjoyed being pregnant, but she did not want any more children.¹⁶³ Another woman wanted to help gay couples have families of their own, and she enjoyed her surrogate pregnancy more because there was no additional stress that came with it, such as setting up a nursery, picking out a name, or even buying baby items—all she had to do was give birth and hand the child over to his parents.¹⁶⁴ She entered into both of her surrogacies fully aware of what may or may not happen during the nine month pregnancy and gave birth to two boys for two separate gay male couples.¹⁶⁵

CONCLUSION

Many people have thought about starting a family at one point in their lives, but for some, a family of their own might only ever be a dream. Surrogacy gives these people the option to make their dream a reality. Assisted reproductive technologies have advanced over the years so that the surrogate does not have to be biologically related to the embryo she is carrying through gestational surrogacy.¹⁶⁶ The battle over Melissa between the Sterns and the Whiteheads is a cautionary tale, but it is not the norm. The Baby M case was a case of first impression, and many states across the country reacted to it and made decisions thought to be proper during that time. Times have changed and surrogacy is no longer a novel medical procedure. The concerns that held weight during the 1980s do not resonate with the modern society we live in today.

¹⁶¹ See e.g., Crystal Henry, *The 5 Craziest Things I've Heard As A Gestational Surrogate*, SCARY MOMMY (July 1, 2009), <http://www.scarymommy.com/5-things-say-gestational-surrogate/>.

¹⁶² Miss Walker, *How did I choose to become a surrogate? Always the first question im asked*, THEIR BUN, MY OVEN... (Oct. 1, 2014, 10:19 AM), <http://mysurrojourney1.blogspot.com/2014/10/how-did-i-choose-to-become-surrogate.html>.

¹⁶³ See *id.*

¹⁶⁴ See Andrea, *39 Weeks – Reflecting*, MY BODY. THEIR BABY. (Oct. 29, 2012, 5:15 PM), <http://mybodytheirbaby.blogspot.com/search?updated-max=2012-11-29T18:02:00-08:00&max-results=10&start=15&by-date=false>.

¹⁶⁵ See *id.*

¹⁶⁶ See Hartocollis, *supra* note 1.

All states should pass a pro-surrogacy statute which would legalize compensated surrogacy agreements. In doing so, women and couples would no longer have to venture out of their home state to have a child via surrogacy, which increases the already expensive costs of this procedure. Additionally, it allows for additional, legal compensation for women who need to contribute to their families financially. Pregnancy is as life-changing experience many women enjoy and sometimes want to experience again, but the thought of adding to her own family is burdensome. To be able to help a family who cannot conceive a child on their own is a noble choice, and receiving payment for it does not make it any less selfless. The antiquated views that led to the laws enacted do not match the views that many citizens have today.

The additional eligibility requirements of a prior birth, a psychological evaluation, and counseling services to be made available helps both the gestational carrier and the intended parents make sure they are entering a successful agreement. These requirements provided the gestational carrier the support needed through the surrogate pregnancy, while also providing the intended parents some peace of mind that the arrangement is likely to work as planned.

We are on “the cusp of a generation that is embracing parenthood ... in the next generation, of kids now in their 20s and 30s, this will be really, really common.”¹⁶⁷ Despite the inconsistencies across the states, surrogacy is flourishing, and it is not something that is going to disappear. The public have read the stories about the celebrities who have been able to grow their families through the use of a surrogate, and Mr. Hoyleman and Mr. Sigal’s surrogacy story has not ended either—they are having a second child through a surrogate.¹⁶⁸ However, wealthy individuals should not be the only group who are able to utilize this assisted reproductive technology. The next generation that is looking to start families should be able to do so—within their home state and without having to incur a greater financial burden solely because their home state’s surrogacy statute is unfavorable. It has been thirty years since surrogacy was pushed into the spotlight and the

¹⁶⁷ Hartocollis, *supra* note 1.

¹⁶⁸ See Chandler, *supra* note 81.

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United States pushed back with heavy regulations. It is time we learn from the next generation and embrace parenthood as well.