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Gestational Surrogacy Contract Terms Under the 2017 Uniform Parentage Act

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[*] J.D., University of Maryland School of Law, 2019. I would like to thank Professor Martha Ertman who inspired me to pursue this topic. I would also like to thank my mother, Tabitha Harvey, and grandmother, Olive Harvey, for their endless support throughout this process.

I. INTRODUCTION

Gestational surrogacy provides a pathway to parenthood for those who otherwise may not be able to conceive children. At the core of the gestational surrogacy process are contracts, which provide predictability and security between the parties in a gestational surrogacy arrangement by defining the parties' rights, responsibilities, and expectations. When contracts are breached, the parties rely upon the courts and other enforcement mechanisms to enforce them. However, surrogacy agreements are not enforceable in all United States ("U.S.") jurisdictions, leaving contracting parties vulnerable to unexpected outcomes. The Uniform Parentage Act ("UPA"), updated in 2017 from its earlier 1973 and 2002 versions, attempts to provide states with a uniform statutory framework to govern the surrogacy process.[1] This paper evaluates the enforceability of gestational surrogacy agreement provisions, based upon current drafting practices under the UPA (2017), constitutional law, and contract law principles. Based on this evaluation, this paper also recommends changes to current drafting practices to ensure the enforceability of gestational surrogacy agreements.

Behind every gestational surrogacy arrangement are people who desire to conceive children of their own or for others. A variety of contracts facilitate the creation of this new family. The surrogacy process may involve contracts between the surrogate, surrogacy agency, fertility clinic, gamete providers, intended parents, and attorneys.[2] These contracts cover issues such as payment to the donor, surrogate, and agency; waiver of claims regarding medical procedures, like in vitro fertilization ("IVF"); and the responsibilities, parental rights, and duties pertaining to any child born through surrogacy.[3] The contract between the intended parents and the gestational surrogate is known as a surrogacy agreement, which will be the focus of this paper.

Contracts govern the relationship between intended parents and surrogates by balancing the interests and safety of gestational carriers, intended parents, and the children conceived. An intended parent is a person who commissions a woman to carry a child and becomes the legal parent of the child. A gestational surrogate is a woman who agrees to become pregnant, using donor sperm and egg, through IVF.[4]

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[1] *See generally*, Uniform Parentage Act (2017).

[2] *See generally* Joseph F. Morrissey, *Surrogacy: The Process, The Law, and The Contracts*, 51 WILLAMETTE L. REV. 459, 472-76 (2015).

[3] *Id.*

[4] *See* Uniform Parentage Act § 801(2) (2017).

Gestational surrogacy is one of two forms of surrogacy. The other form of surrogacy is referred to as "traditional" surrogacy. In a traditional surrogacy arrangement, conception occurs through alternative insemination with sperm from the intended parent, meaning that the surrogate is also the child's genetic mother.[5] The surrogate's egg is usually fertilized using alternative insemination.[6] With alternative insemination, a doctor uses a syringe to inseminate the surrogate with the sperm of the intended father or donor.[7] Traditional surrogacy results in a child who is genetically related to the surrogate and is usually the husband of the intended mother.

In contrast, a child born of gestational surrogacy is not genetically related to the surrogate. An egg—provided by the intended mother or a third party—is fertilized with the sperm of the intended father or donor through IVF.[8] The fertilized egg creates an embryo, which is then transferred to the surrogate's uterus.[9] Despite the higher costs and technical complexity of gestational surrogacy, it is the most common form of surrogacy practiced in the U.S. and best protects the parenthood claims of the intended parents because the child is not genetically related to the surrogate.[10]

Generally, family law presumes that genetic parents have custodial and parental rights.[11] Moreover, family law presumes that a husband is the legal father of a child born to his wife.[12] These two presumptions create problems for traditional surrogacy arrangements, in that they treat the surrogate as the legal mother and the surrogate's husband as the legal father. For this reason, traditional surrogacy is rarely practiced in the U.S.[13]

States are divided on how to govern gestational surrogacy. This division is due, in part, to the controversial nature of surrogacy. Since surrogacy agreements are often interstate transactions, parties frequently forum shop to take advantage of favorable laws. The UPA (revised in 2000 and amended 2002 to add provisions regarding surrogacy) sought to prevent forum shopping and ensure consistent results across state

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[5] *See* Morrissey*, supra* note 2*,* at 473-476.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See* MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 29 (Beacon Press, 2015).
[11] *See generally* Morrissey, *supra* note 2, at 471.
[12] *Id*.
[13] *See* Ertman, *supra* note 10, at 29.

lines.[14] However, states were slow to enact the UPA (2002).[15] As of July 2017, only two states[16] enacted the surrogacy provisions of the UPA (2002). The Uniform Law Commission ("ULC")[17] revised the UPA again in 2017 to reflect developments in the area of surrogacy.[18] The process outlined in the UPA (2017) for ensuring legal enforceability of gestational surrogacy agreements is less burdensome for intended parents and surrogates, and better reflects how gestational surrogacy is currently practiced.[19] As of this writing, California, Vermont, and Washington have enacted the UPA (2017), and Pennsylvania, Connecticut, and Rhode Island are considering enactment.[20]

Modeled from existing state statutes,[21] the UPA (2017) could be a better solution for a uniform statutory framework that promotes the legal recognition of surrogacy agreements. The new statutory framework attempts to conform to current surrogacy practices[22] and quell the controversy surrounding surrogacy. In light of the changes to the UPA, attorneys should consider augmenting their drafting practices to ensure conformity with the UPA (2017). Section I of this paper discusses the factual and legal development of surrogacy in the U.S. Section II provides an overview of the 1973 version of the UPA, and its 2002 and 2017 revisions. Section II also evaluates the enforceability of standard gestational surrogacy agreement provisions under the UPA (2017) by considering potential statutory and constitutional challenges, as well as contract law defenses against enforceability. Section II provides recommendations to practitioners, based on the UPA (2017)'s statutory

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[14] *See generally* Uniform Parentage Act (2002).

[15] *See* Uniform Parentage Act, art. 8 cmt. (2017).

[16] As of July 2017, only Texas and Utah have enacted surrogacy provisions based on Article 8 of the Uniform Parentage Act (2002). *See id.*

[17] The Uniform Law Commission is a group of practicing lawyers, judges, legislators, and law professors who have been appointed by state governments to provide states with non-partisan legislation that brings clarity and uniformity to areas of state statutory law. *About Us,* ULC, https://www.uniformlaws.org/aboutulc/overview (last visited Apr. 27, 2021).

[18] *See generally* Uniform Parentage Act § 801-18 (2017).

[19] *Id*.

[20] *Parentage Act*, ULC https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f, (last visited Mar. 11, 2019).

[21] The gestational surrogacy provisions of UPA (2017) were modeled on Delaware, Maine, Nevada, New Hampshire, District of Columbia, and Illinois surrogacy statutes. *See* Uniform Parentage Act, art. 8 cmt. (2017).

[22] In a number of states, intended parents are immediately recognized as the legal parents of a child resulting from a surrogacy arrangement as long as the surrogacy agreement conforms to the state's statutory requirements. *See, e.g.*, D.C. CODE § 16-404 and CAL. FAM. CODE § 7962(i) (West 2018).

scheme, about changes to consider in the drafting process to comply with the most recent changes to the UPA. Lastly, Section III summarizes those recommendations.

II. GESTATIONAL SURROGACY IN THE UNITED STATES

Changes to the UPA are a reflection, in part, of ethnological and legal developments in the area of surrogacy. Section II.A. of this paper discusses technological developments in assisted reproductive technology ("ART") and how those developments led to the emergence of gestational surrogacy in the U.S. Section I. B. provides an overview of the evolution of relevant case and statutory law and discusses current state approaches to the enforcement and regulation of surrogacy agreements.

A. Overview of Gestational Surrogacy in the United States

Before discussing the statutes that govern the practice of surrogacy, it is important to understand the history of surrogacy in the U.S. Surrogacies in the U.S. were "traditional" until the 1990s when legal rules and IVF technology developed to their current state. [23] Noel Keane was one of the first well-known lawyers to negotiate and draft traditional surrogacy agreements in the U.S.[24] In the 1970s, he founded the Infertility Centers to facilitate surrogacy arrangements.[25] Mr. Keane arranged approximately 600 births,[26] earning him the title of "father of surrogacy."[27] In fact, Mr. Keane was the lawyer who negotiated the surrogacy agreement for the traditional surrogacy arrangement at issue in the landmark case of *In re* Baby M.[28] The case of *Baby M* was a setback in the social and legal acceptance of surrogacy and, as a result of the case, many states outlawed the practice of traditional surrogacy.[29]

The 1978 birth of Louise Joy Brown paved the way for gestational surrogacy.[30] Louise was conceived using the fertilized egg and sperm of her mother and father, a married couple.[31] After joining the egg with the

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[23] *See generally* Ertman, *supra* note 10, at 27-9.

[24] Lawrence Van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, is Dead,* N.Y TIMES (Jan. 28. 1997), http://www.nytimes.com/1997/01/28/nyregion/noel-keane-58-lawyer-in-surrogate-mother-cases-is-dead.html.

[25] *See* Ertman, *supra* note 10, at 28.

[26] Gelder, *supra* note 24.

[27] *See* Ertman, *supra* note 10, at 28.

[28] *Id*.; *See generally In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[29] *See* Ertman, *supra* note 10, at 29.

[30] *Id*.

[31] *Id*.

sperm in a lab, doctors implanted the embryo into her mother's uterus.[32] Although Louise's birth was not the result of a surrogacy arrangement, it did demonstrate the feasibility of IVF—the procedure performed prior to implanting a fertilized egg into the gestational carrier's uterus. The first successful pregnancy using a donated egg occurred in 1983.[33] Just two years later, in 1985, the first child was born to a gestational surrogate.[34]

Although surrogacy was rare just a few decades ago, the global surrogacy industry is now worth up to six billion dollars.[35] Between 1999 and 2013, there were 18,400 infants born in the U.S. as a result of surrogacy arrangements.[36]

B. The Law of Surrogacy

Case, constitutional, and statutory law has influenced the contents and enforceability of surrogacy agreements. These legal developments have all shaped today's practice of surrogacy in the U.S.

1. Case Law

i. In Re Baby M (1988)

Baby M, the landmark case on traditional surrogacy, involved two couples: the Sterns and the Whiteheads.[37] The Sterns and Whiteheads entered into a surrogacy contract in 1985.[38] The contract provided that the surrogate, Mrs. Whitehead, would become pregnant using her egg and Dr. William Stern's sperm.[39] This resulted in a child that was genetically related to both the surrogate and the intended father. After giving birth to the child, Mrs. Whitehead was emotionally attached to the child and refused to relinquish custody of the child.[40] The Sterns filed for

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[32] *Id.*

[33] *See* Lynn M. Squillace, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMEDICAL L. 135, 137 (2005).

[34] Alyssa James, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 179 (2013).

[35] Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L.
191, 193 (2012).

[36] *Key Findings: Use of Gestational Carriers in the United States*, CDC, https://www.cdc.gov/art/key-findings/gestational-carriers.html (last visited Aug. 13, 2018).

[37] *In In re* Baby M, 537 A.2d 1227, 1235-38 (N.J. 1988).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1236-37.

custody of the child and sought to enforce the surrogacy contract provision that terminated Mrs. Whitehead's parental rights and duties, and made Dr. Elizabeth Stern the child's other legal parent.[41] The New Jersey Supreme Court refused to enforce the surrogacy contract, reasoning that it conflicted with adoption statutes, baby-selling statutes,[42] and public policy.[43] The Court then determined the custodial rights.

Regarding custody, the Court grounded its analysis on what it believed would be in the best interests of the child.[44] The "best interest of the child" analysis is fundamental to family law disputes involving children. Courts employ "best interests" reasoning to make custody decisions with the goal of fostering the child's needs. In *Baby M*, this analysis led to the Court awarding custody to the intended father and his wife.[45] However, New Jersey law required a showing of parental unfitness or abandonment before terminating the natural mother's parental rights, who in this case was also the surrogate.[46] Since that showing was not made, the Court restored the surrogate's parental rights.[47]

The result in *Baby M* demonstrates the court's attempt to balance the interests of the child and the rights of the genetic parents. However, the outcome fell short of what each party contracted for and the relief requested. The legal, moral, and emotional complexities of the traditional surrogacy process, as demonstrated in *Baby M*, propelled legal prohibitions of traditional surrogacy.[48] In recent years, some states have changed their laws to now allow traditional surrogacy;[49] however, many states still criminalize or otherwise prohibit traditional surrogacy.[50] The legal hostility following *Baby M*, coupled with technological

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[41] *Id.* at 1237-38.
[42] *In re* Baby M, 537 A.2d at 1240.
[43] *Id.*
[44] *Id.* at 1238-39.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 1234-35.
[48] Ertman, *supra* note 10, at 29.
[49] For example, Washington, D.C. repealed section 16-402 in 2017, which banned and criminalized surrogacy contracts. D.C. CODE ANN. § 16-402, *repealed by* Collaborative Reproduction Amendment Act of 2016. The new Act streamlines the surrogacy process for intended parents by allowing them to become the legal parents of a child resulting from a surrogacy agreement without having to initiate subsequent adoption proceedings. D.C. CODE ANN. § 16-404 (West 2017).
[50] *See, e.g.,* KY REV. STAT. ANN. § 199.590(4) (West 2021); N.D. CENT. CODE §14-18-05 (West 2019).

advancements in the medical field, has rendered traditional surrogacy nearly obsolete in the U.S.[51]

ii. Johnson v. Calvert (1993)

Just a few years after *Baby M*, a California case created a safe harbor for people to enter and enforce surrogacy agreements. *Johnson v. Calvert* represents the first time a high state court enforced a surrogacy contract.[52] In 1990, Mark and Crispina Calvert entered into a gestational surrogacy contract with Anna Johnson.[53] The contract provided that the fertilized egg and sperm of the Calverts would be implanted into Ms. Johnson and that Ms. Johnson would relinquish all parental rights to the Calverts.[54] The relationship deteriorated after the Calverts discovered that Ms. Johnson had several stillbirths and miscarriages and that the Calverts had not obtained life insurance for Ms. Johnson, as promised.[55] Ms. Johnson filed suit seeking to be declared the child's mother, and the Calverts countersued to be declared the legal parents.[56]

The facts diverged from *Baby M* [57] in one crucial respect: the child in *Johnson v. Calvert* had no genetic relation to the surrogate.[58] The Calverts attempted to assert their parental rights based on their genetic relation to the child, while Ms. Johnson sought to assert her parental rights based upon the fact that she gave birth to the child.[59] Under California Civil Code section 7003, a woman could establish maternity by proving that she is genetically related to the child or gave birth to the child.[60] In traditional surrogacy cases, one woman both gestates and provides the egg, however, here, those two roles were split between Anna Johnson and Crispina Calvert. The court ultimately employed the intended parents test—a contractual test—which provides that when the person who is genetically related to the child, and the person who gave

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[51] Ertman, *supra* note 10, at 29.
[52] Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
[53] *Id.* at 778.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *See generally In re* Baby M, 537 A.2d 1227 (N.J. 1988).
[58] Johnson, 851 P.2d at 778.
[59] *Id.* at 779.
[60] *Id.* at 795 (Kennard, J., dissenting). The now repealed statute provided that man may prove he is a child's natural father through genetic marker evidence derived from blood testing. *Id.* The California statute also "permit[ted] a woman to establish that she is 'the natural mother' of a child by "proof of . . . having given birth to the child." *Id.*

birth to the child are two different people, the natural mother is the person who intended to procreate the child.[61]

The court's response to a wide range of public and social policy arguments presented against the enforcement of surrogacy agreements is as important as its holding. The surrogate in *Johnson* argued that gestational surrogacy contracts are unenforceable because they: (1) involve a payment for a child and a pre-birth waiver of parental rights, prohibited under California adoption laws; (2) violate the constitutional prohibition on involuntary servitude; (3) exploit women of lower socioeconomic status; and (4) may result in the commodification of children.[62]

Regarding the prohibition on payments in adoption, the court quickly dismissed that issue by noting significant differences between surrogacy and adoption.[63] For example, the court reasoned, a gestational surrogate is not the genetic mother of the child she carries, and therefore does not waive parental rights by signing a surrogacy agreement.[64] Additionally, the court viewed payments to gestational surrogates as compensation for their services and not for relinquishing the child.[65]

The court likewise rejected the surrogate's claim regarding involuntary servitude, since "extrinsic evidence of coercion or duress were utterly lacking."[66] The contract at issue did include a provision giving the intended parents the right to make decisions regarding the abortion of the fetus.[67] However, to the extent that the contract's provisions on abortion would force the surrogate to bear or abort a child—a potential form of involuntary servitude—the court did not rule on the issue because the contract also provided that it was within the sole discretion of the surrogate to abort or not to abort the fetus.[68] Abortion provisions, such as the one discussed in *Johnson*, are frequently used in surrogacy contracts.[69] Abortion provisions may be disconcerting as they generally provide that the intended parents may request for the pregnancy to be terminated or the number of fetuses to be reduced. However, the abortion provision in the contract at issue in *Johnson*

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[61] Johnson, 851 P.2d at 782.
[62] *Id*. at 783-85.
[63] *Id.* at 783–84.
[64] *Id.*
[65] *Id.*
[66] Johnson, 851 P.2d at 782.
[67] *Id*.
[68] *Id*.
[69] This information is based on a review of sample surrogacy agreements, including one provided by Jennifer Fairfax, Esquire.

included a clause that stated, '[a]ll parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable.'[70] The constitutional implications of abortion provisions are further discussed below.

The court then addressed the appellant's argument that surrogacy contracts tend to exploit women of lower socioeconomic status. The court acknowledged that women of lower-socioeconomic status are more likely to enter into surrogacy agreements.[71] However, the court was not persuaded that surrogacy contracts influenced women to pursue surrogacy any less than they might be persuaded to accept an otherwise low paying job.[72] The court also rejected the argument that surrogacy exploits women by pointing out the lack of data to support this proposition.[73]

Another paramount concern addressed by the court is the commodification of children.[74] Some fear that the exchange of surrogacy services for compensation will transform the procreation of children into a commercial enterprise, thus creating a "baby-selling" market. Again, the court rejected this argument by pointing out the lack of data to support the proposition that children will be treated as commodities.[75] On the contrary, the court found limited data that showed an absence of an adverse effect on all parties in a surrogacy arrangement, including children.[76] Following the lead of *Johnson v. Calvert*, courts in the U.S. began enforcing surrogacy agreements citing the rationale used in the case.[77]

2. Constitutional Cases Influencing Surrogacy Agreements

The Supreme Court has yet to weigh in on surrogacy, however, there have been decisions relating to one's right to privacy and the right to marry that has legal consequences on the legality of surrogacy agreements and laws. *Roe v. Wade*, *Obergefell v. Hodges*, and *Pavan v.*

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[70] Johnson, 851 P.2d at 784.
[71] *Id.* at 785.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] Johnson, 851 P.2d at 785.
[77] *See, e.g.,* C.M. v. M.C., 213 Cal. Rptr. 3d 351 (Ct. App. 2017); P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018).

Smith, have all shaped the contents and enforcement of surrogacy agreements and laws.[78]

Like the agreement at issue in *Johnson*, many surrogacy agreements contain abortion provisions. When the enforceability of a surrogacy agreement is challenged, such provisions trigger a constitutional analysis as a result of the Supreme Court's decision in *Roe v. Wade*. Decided in 1973, *Roe v. Wade* arguably limits the ability of intended parents to compel surrogates to terminate or maintain a pregnancy.[79] *Roe v. Wade* implicated the constitutionality of a Texas law criminalizing abortions.[80] The Supreme Court held that the decision of whether to continue or terminate a pregnancy in the first trimester fell within the right of privacy and therefore struck down the law as unconstitutional.[81] Due to the Supreme Court's decision in *Roe*, intended parents are prohibited from forcing surrogates to terminate a pregnancy.[82] Instead, intended parents utilize surrogacy agreements to outline the conditions under which the parties may request the surrogate to terminate the pregnancy and provide for monetary remedies if the agreed-upon conditions are not met.[83]

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[78] Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).

[79] Roe v. Wade, 410 U.S. 113 (1973).

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] For example, below is a sample abortion and selective reduction provided by an attorney.

Abortion And Selective Reduction Provision:

The Gestational Carrier has a Constitutional right to abort or not abort any child she is carrying and cannot waive such a right. However, she agrees not to abort the pregnancy except for medical reasons placing the Gestational Carrier's life or health at risk, if recommended by the attending OB/GYN physician and only after prior consultation with the Intended Parents unless a medical emergency prevents such prior consultation. Moreover, if her life or health is not at risk and she aborts the Child contrary to the wishes of the Intended Parents then she will be in breach of this Agreement and will be considered a material breach subject to the damages set out in the next paragraph. If there is adequate time, the Intended Parents may choose to engage a second consulting physician or specialist; however, if the opinion of the Gestational Carrier's OB/GYN physician is that the Gestational Carrier's life and health are at imminent risk unless an abortion occurs, then that attending OB/GYN Physician's decision shall govern.

If the Gestational Carrier aborts the fetus contrary to the medical opinion as defined above and contrary to the desires of the Intended Parents, the Gestational Carrier agrees to pay to the Intended Parents a sum of money equal to the expenses already paid by the Intended Parents including, but not limited to, all legal and medical expenses, fertility clinic fees and all fees and expenses paid to the Gestational Carrier with respect to this Agreement. This shall include, but not be limited to, any medical expenses incurred by the Intended Parents in relation to proceeding with the embryo creation and transfer process.

Constitutional cases regarding same-sex marriages are also relevant to surrogacy. *Obergefell v. Hodges* and *Pavan v. Smith,* which both concerned the legal treatment of same-sex marriages*,* have shaped state definitions of marriage.[84] A state's legal definition of marriage is relevant to surrogacy because some states only allow married couples to enter into surrogacy agreements.[85] If a state's legal definition of marriage excludes same-sex couples, then same-sex couples, by definition, are prohibited from entering into a surrogacy agreement. For example, Virginia restricts the practice of surrogacy to married couples.[86] Additionally, Virginia defines intended parents as "a man and a woman,

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The Gestational Carrier agrees to undergo an abortion at the request of the Intended Parents, which request the Intended Parents may make if the treating physician advises that the Child has identified a very low IQ mental deficiency or has medical issues that are incompatible with life outside the womb or otherwise such severe and significant defects to the point that the child's or children's quality of life would be affected and/or cause suffering (a painful life or eventual death) and understands this is a material term.
The Gestational Carrier shall not undergo the medical procedures for selective reduction without prior notification to and consultation with the Intended Parents unless the attending physician believes the Gestational Carrier's life is endangered. Intended Parents shall not request that the Gestational Carrier have a selective reduction unless she is carrying more than 2 fetuses or unless there is a severe or significant handicap, deformation, malformation, or defect in one of the fetuses that is not surgically correctable (like a cleft palate). Should the Gestational Carrier become pregnant with more than 2 healthy fetuses, which is not at all likely as only one embryo is to be transferred at a time, the Parties, along with the Parties attending physician will make a determination regarding reduction at that time. The Gestational Carrier will not carry more than two fetuses. The Parties acknowledge their understanding that selective reduction could pose a risk to the continuing pregnancy, including causing the loss of the entire pregnancy, and all Parties assume this risk.
Notwithstanding the foregoing section, all Parties, and specifically the Intended Parents, acknowledge their understanding that a pregnant woman has an absolute Constitutional right to abort or not abort any fetus she is carrying, regardless of the fact that she may not be the genetic parent of such Child, and that any promise to the contrary is unenforceable. All Parties also acknowledge that the Gestational Carrier has a right to make a determination regarding whether or not to reduce any pregnancy she is carrying regardless of the terms herein and that any promise to the contrary is unenforceable. However, it is the Parties' intention and they agree at the time of signing this Agreement that they intend to perform as specifically stated herein and such terms are material.

[84] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (where same-sex couples brought action challenging the constitutionality of state laws banning same-sex marriages or refusal to recognize same-sex marriages); Pavan v. Smith, 137 S. Ct. 2075 (2017) (where two same-sex couples challenged the constitutionally of a birth-certificate law, as applied).

[85] *See* LA. STAT. ANN. § 9:2718.1(6) (2016) (defining intended parents as a married couple who "each exclusively contribute their own gametes to create their embryo").

[86] *See* VA. CODE ANN. § 20-156 (West 2019).

married to each other."[87] As a consequence of such laws, same-sex couples were not recognized as the legal parents of a child resulting from a surrogacy arrangement. That changed in 2015 when the Supreme Court declared in *Obergefell* that state laws barring same-sex marriages were unconstitutional.[88] As a result of the Court's ruling in *Obergefell*, same-sex marriages are legally recognized in all states, including Virginia and others that refused to extend marriage equality to same-sex couples.[89]

In 2017, *Pavan v. Smith*[90] extended the holding of *Obergefell*[91] to issues more directly related to surrogacy. *Pavon* involved two same-sex couples: Leah and Jana Jacobs, and Terrah and Marisa Pavan.[92] Leah Jacobs and Terrah Pavan each gave birth to a child and listed their respective spouses as the parents on the birth certificate paperwork.[93] However, the Arkansas Department of Health only included the birth mother's name on the certificate, citing an Arkansas state law.[94] The Arkansas law required a child's birth certificate to list the male spouse of the biological mother, regardless of his biological relationship to the child.[95] However, the state did not extend that rule to same-sex couples, thus, preventing biological mothers and fathers from listing their same-sex spouses on birth certificates.[96] The central question presented in *Pavan* was if it was unconstitutional for states to prevent same-sex spouses from being listed on a birth certificate if that same right is afforded to heterosexual couples.[97] The court answered in the affirmative, explaining that state laws that treat same-sex couples differently than heterosexual couples are unconstitutional and inconsistent with the Court's ruling in *Obergefell*.[98]

The Court's decision in *Pavan* is important to surrogacy because many same-sex couples use surrogacy to form their families. *Pavan* paves the way for intended parents to list their same-sex spouses on their child's birth certificate, even if their spouse is not genetically related to

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[87] *Id*.; As of June 2018, there is proposed legislation to change the definition of "intended parents" to mean a "married couple," rather than "a man and a woman." *See* 2018 VA SB 612.

[88] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[89] *Id*.

[90] Pavan v. Smith, 137 S. Ct. 2075 (2017).

[91] *See generally* Obergefell, 135 S. Ct at 644.

[92] Pavan, 137 S. Ct. at 2076.

[93] *Id*.

[94] Pavan, 137 S. Ct. at 2077 (discussing ARK. CODE ANN. 20-18-401).

[95] *Id.*

[96] *Id.*

[97] *See* Pavan v. Smith, 137 S. Ct. 2075 (2017).

[98] *Id.*

the child resulting from a gestational surrogacy agreement. In light of *Obergefell* and *Pavan*, state laws that treat same-sex couples differently than heterosexual couples may be deemed unconstitutional. To prevent lawsuits and other legal ramifications, state legislatures (such as Virginia) have considered changes to surrogacy laws to cure constitutional infirmities.[99] Going forward, laws that restrict the practice of surrogacy should apply equally to same-sex and heterosexual couples.

Although none of these cases directly involve surrogacy, they involve issues that are intricately intertwined with the practice of surrogacy. Practitioners and lawmakers should keep these holdings in mind when drafting surrogacy agreements, laws, and regulations.

3. Statutes Governing Surrogacy Agreements

No federal laws or regulations govern surrogacy in the U.S. Consequently, each state employs its own approach, resulting in inconsistencies in the practice and enforcement of surrogacy agreements. Statutes governing surrogacy fall into four categories of statutes: (1) those that permit surrogacy contract enforcement; (2) those that permit surrogacy contract enforcement, but with significant restrictions; (3) those that civilly or criminally prohibit surrogacy agreement enforcement; and (4) those that are silent on the issue of surrogacy.[100]

California falls within the first category by explicitly declaring that gestational surrogacy agreements are "presumptively valid and shall not be rescinded or revoked without a court order."[101] Texas and Virginia fall within the second category by only enforcing surrogacy agreements commissioned by married couples.[102] States within the third category include New York and Michigan,[103] which treat surrogacy contracts as "void and unenforceable," contrary to public policy.[104] Fourth, and

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[99] *Supra* note 87, at 2078

[100] *See* Morrissey*, supra* note 2, at 503.

[101] CAL. FAM. CODE § 7962(i). ("An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.").

[102] TEX. FAM. CODE ANN. § 160.754 (West); VA. CODE ANN. § 20-156 (West).

[103] *See* MICH. COMP. LAWS ANN. § 722.859 (West). (Surrogacy is criminalized under Michigan law. Michigan Surrogate Parenting Act provides that, "[a] person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.").

[104] *See* MICH. COMP. LAWS ANN. § 722.855 (West); N.Y. DOMESTIC REL. LAW § 122 (McKinney 2021).

finally, states such as Mississippi have neither statutory nor case law regarding the enforcement of surrogacy agreements.[105]

Inconsistent approaches to the treatment of surrogacy agreements are due, in part, to public policy concerns discussed in *Johnson*[106] regarding the potential impact of surrogacy on women, family relations, and children. The previously discussed statutes are the legislatures' varying attempts at addressing these concerns. However, the prevalence of cross-state surrogacy transactions and forum shopping has propelled the need for a uniform approach to the legal treatment of surrogacy agreements.[107]

III. THE UPA AND THE ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACT PROVISIONS

A uniform approach to surrogacy was introduced in 2000 with the promulgation of the UPA (2000). Section III.A discusses the evolution of the UPA through its current 2017 version. In an effort to guide drafting practices, Section III.B evaluates the enforceability of gestational surrogacy agreement provisions under the UPA (2017).

A. *The Uniform Parentage Act*

The UPA was revised to reflect changes in society and technology. The following sections discuss the history of the UPA and highlight some key changes to the UPA over the years.

1. Pre-UPA and the Uniform Parentage Act of 1973

In response to a series of Supreme Court decisions,[108] the ULC promulgated the UPA, which focused on creating a modern civil paternity action for determining the natural father of any child and eliminating any distinctions between "legitimate" and "illegitimate" children.[109] Prior to its promulgation in 1973, a child born to an unmarried mother was 'illegitimate' under the common law.[110] The

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[105] *See Gestational Surrogacy in Mississippi*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/mississippi/ (last visited Aug. 13, 2018).

[106] *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

[107] *See* Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67 (2013).

[108] *See e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

[109] *See generally* Uniform Parentage Act § 2 cmt. (1973).

[110] *See Parentage Act Summary*, ULC (May 27, 2015), http://lgbtbar.org/annual/wp-content/uploads/sites/7/2015/05/10-Parentage-Act-Summary.pdf.

common law placed harsh penalties on illegitimate children by denying them inheritance and property rights.[111] Additionally, biological fathers of illegitimate children were not afforded parental rights and were not burdened with parental obligations.[112] The legal status of illegitimate children changed in 1968 after the Supreme Court's ruling in *Levy v. Louisiana*.[113] In *Levy*, the Court held a statute construed as denying a right to recovery based on a child's status as an illegitimate child was a violation of the Equal Protection Clause of the Fourteenth Amendment.[114] The original goal of the UPA (1973) was to provide a legal relationship between natural parents and their children regardless of marital status.[115] Given its narrow scope, the UPA (1973) did not address surrogacy. As of 2000, nineteen states enacted the 1973 version of the UPA.[116]

2. The Uniform Parentage Act of 2002

The ULC revised the UPA in 2000 in light of technological advancements in the area of assisted reproductive technology ("ART"). The UPA (2000) was broader in scope than its predecessor, incorporating and replacing the Uniform Status of Children of Assisted Conception Act ("USCACA") and Uniform Putative and Unknown Fathers Act ("UPUFA").[117] Further changes were made to the UPA (2000) after objections from the American Bar Association that there were discrepancies in the 2000 version between the treatment of children of unmarried parents and children of married parents.[118] The ULC responded by further updating the UPA in 2002, resulting in the UPA (2002). The 2002 version of the UPA included: provisions regarding genetic testing, provisions permitting a non-judicial acknowledgment of paternity, and rules for determining the parent-child relationship for children who were conceived through ART.

One of the most progressive changes to the UPA was the addition of Article 8 authorizing traditional and gestational surrogacy agreements. The 2002 version of the UPA adopted a procedurally intensive model that required contracting parties to go through a pre-conception process

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111 *Id*.
112 *Id*.
113 *See generally* Levy v. Louisiana, 391 U.S. 68 (1968).
114 *Id*.
115 *See generally* Uniform Parentage Act § 2 cmt. (1973).
116 *See* Uniform Parentage Act (2002).
117 *Id*.
118 *Id.*

in which the parties petitioned the court to validate the agreement.[119] In order for the agreement to be validated following elements needed to be met: (1) the contents of the agreement must adhere to statutory requirements; (2) parties must petition the court to commence a proceeding to validate the agreement; and (3) parties must participate in a hearing where the court makes a determination regarding the validity of the gestational agreement and whether the intended parents should be declared the legal parents of the child.[120]

As of July 2017, only Texas and Utah have enacted the UPA (2002)'s surrogacy provisions.[121] Overall, eleven states adopted the 2002 version of UPA; with at least five states adopting non-uniform surrogacy provisions.[122] Objections from both anti- and pro-surrogacy camps hampered legislative enactment. Some resisted the UPA's legitimizing of still-controversial surrogacy agreements, and others objected to its procedurally intensive model for that legitimization. The UPA (2002) was likely too pro-surrogacy for states that were obstructive towards the practice of surrogacy, by providing a pathway to parenthood through the legal recognition of surrogacy agreements where surrogates were paid for their services. Conversely, the 2002 version's statutory framework for the legal recognition of surrogacy agreements was likely too burdensome for states that were supportive of the practice of surrogacy.

3. Uniform Parentage Act of 2017

The ULC tried again to achieve uniformity and reflect changes in law, technology, and surrogacy practice with the 2017 revision of the UPA. In light of the Supreme Court's decision in *Obergefell*[123] and *Pavan,*[124] the 2017 version of the UPA ensures equal treatment of children of same-sex couples. It also adopted gender-neutral terms such as "individual," in place of "father" or "mother." Most important for present purposes, the recent changes to the UPA provide a uniformed and modernized statutory framework for the establishment of parent-child relationships between intended parents and children resulting from surrogacy agreements.

The 2017 version of the UPA streamlines the gestational surrogacy process. Previously, the UPA provided the same rules for gestational and

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[119] *See generally* Uniform Parentage Act § 801-805 (2002)
[120] *Id.*
[121] *See* Uniform Parentage Act, art. 8 cmt. (2017).
[122] Id.
[123] *See* Obergefell v. Hodges*,* 135 S. Ct. 2584 (2015).
[124] *See* Pavan v. Smith, 137 S. Ct. 2075 (2017).

traditional surrogacy by requiring parties to get their surrogacy agreements approved by a court through a petitioning process.[125] The 2017 version of the UPA dispensed of the pre-conception petition model for gestational surrogacy agreements. As long as the UPA (2017)'s statutory requirements are met, intended parents are now treated as the legal parents of a child, without having to go through the court petitioning process.[126] The UPA (2017) provides for a different legal treatment for traditional surrogacy. The UPA (2017)'s approach to traditional surrogacy agreements is similar to the pre-conception process outlined in the UPA (2002) for both gestational and traditional surrogacy agreements.[127] The UPA (2017) also allows for the termination of traditional surrogacy agreements by the surrogate within seventy-two hours of childbirth.[128] As of July 2018, only Vermont and Washington had enacted the most recent version of the UPA, and it had been introduced in Rhode Island and California.[129]

B. Enforceability of Gestational Surrogacy Contract Provisions under the 2017 Uniform Parentage Act

As more jurisdictions begin to adopt the UPA (2017), it is imperative to evaluate and augment current drafting practices to ensure the enforceability of surrogacy agreements. The following section provides an overview of the contents of gestational surrogacy agreements. The sections that follow evaluate the legality of current drafting practices under the UPA (2017)'s surrogacy provisions,

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[125] *See,* Uniform Parentage Act § 802-803 (2002).

[126] Uniform Parentage Act § 802 (2017). ("(a) To execute an agreement to act as a gestational or genetic surrogate, a woman must: (1) have attained 21 years of age; (2) previously have given birth to at least one child; (3) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor; (4) complete a mental-health consultation by a licensed mental-health professional; and (5) have independent legal representation of her choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement. (b) To execute a surrogacy agreement, each intended parent, whether or not genetically related to the child, must: (1) have attained 21 years of age; (2) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor; (3) complete a mental-health consultation by a licensed mental health professional; and (4) have independent legal representation of the intended parent's choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.").

[127] Uniform Parentage Act § 813-15 (2017).

[128] Uniform Parentage Act § 814 (2017).

[129] *Enactment Map,* ULC, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited July 10, 2018).

constitutional law, and contract law principles. Additionally, each evaluation is coupled with recommendations for adjustments to drafting practices to ensure that surrogacy agreements are compliant with the UPA (2017).

1. Overview of Gestational Surrogacy Agreements

Four surrogacy agreements provide the source material for this section.[130] Two attorneys who represent intended parents and surrogates in Maryland, Washington, D.C., and Pennsylvania use these agreements. While the agreements vary, this review focuses on the commonalities since they may well be present in other surrogacy agreements.

Surrogacy agreements must reflect the state law that governs, but they tend to contain some relatively standard clauses. These clauses fall into seven categories: (1) representations or factual promises regarding the present or past; (2) covenants regarding the surrogate's behavior; (3) compensation to the surrogate and agency, including reimbursements and financing; (4) decision-making regarding abortion or reduction of multiples; (5) breaches and remedies; (6) confidentiality; and (7) consequences of the separation, death, or divorce of intended parents.[131] Due to space limitations, this paper focuses on behavior; finance; abortion and reduction; separation and death provisions; and the enforceability of those provisions under the statutory framework of the UPA (2017), constitutional law, and contract law principles.

2. Behavior Provisions

Parents usually make lifestyle changes during pregnancy. Naturally, some intended parents expect surrogates to make similar changes during the pregnancy period. Behavior provisions are used in surrogacy agreements as a way for intended parents to exert control over surrogates' conduct during pregnancy.[132] Provisions regarding behaviors may include guidelines regarding communication, restrictions on sexual activities, and requirements regarding physical exercise.[133] Some agreements place limitations on the kind of foods surrogates may

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[130] The sample agreements used as the source for this information are available on file with the author.

[131] *Id*.

[132] Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor,* 49 LAW & SOC'Y REV. 143, 157-59 (Mar. 2015).

[133] *Id*.

consume and prohibitions on activities, such as microwave use.[134] One contract required that the surrogate, "abstain from any sexual conduct which may result in contraction of a sexually transmitted disease."[135] Another contract prohibited the surrogate from engaging in sexual conduct during the third trimester of pregnancy.[136] The diet and exercise routine of surrogates is also a concern for intended parents. One contract provided that the surrogate should "refrain from strenuous exercise, to the extent that exercise is contrary to her attending physicians' advice."[137] Another contract was more invasive, requiring the surrogate to engage in acupuncture.[138]

The UPA (2017) section 804(a)(7) may limit the ability of intended parents to include lifestyle restrictions in surrogacy agreements.[139] The first sentence in section 804(a)(7) provides that "[t]he agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy."[140] In light of this section, provisions limiting the sexual conduct, diet, and exercise of the surrogate may be unenforceable, if construed as a "health and welfare" limitation. Surrogacy agreements may still outline the expectations of intended parents as it pertains to the surrogate's health and welfare. However, the agreement should also acknowledge that it is within the surrogate's sole discretion to abide by such expectations. Lifestyle restrictions may also be unenforceable on contract law grounds. Lifestyle restrictions that dictate a surrogate's ability to get a manicure[141] or the number of times a surrogate engages in sexual conduct may be deemed unconscionable by the courts and thus unenforceable.

There are also contract law considerations. Such provisions may be deemed to be an unduly restriction on a surrogate's autonomy and therefore unconscionable. Some scholars argue that lifestyle restrictions are analogous to involuntary servitude.[142] Proponents of this argument contend that, much like slaves, surrogates do not have autonomy over their bodies; instead, their bodies (or more specifically, wombs) are

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[134] *Id.*
[135] *See Enactment Map, supra* note 129.
[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *See generally* Uniform Parentage Act §804(a)(7) (2017).
[140] *Id*.
[141] *See Enactment Map, supra* note 129.
[142] *See generally* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990).

controlled by the intended parents.[143] Arguments against the enforceability of lifestyle restrictions based on unconscionability are unlikely to succeed. First, proponents of this argument often ignore an essential difference between the lack of autonomy that may be involved in a surrogacy arrangement and slavery: choice. Slaves were either born or sold into slavery and therefore were never given a choice regarding the relinquishment of their autonomy. In contrast, surrogates in the U.S. voluntarily enter into surrogacy arrangements. By entering into a surrogacy contract, a surrogate makes the choice to relinquish some control of her body for a set period of time. Not only is this choice voluntary, but it is also negotiable. Surrogates are free to negotiate the type and amount of autonomy they are willing to relinquish.

3. Finance Provisions

Provisions relating to financing during the surrogacy process usually concern the compensation, reimbursement, and health insurance coverage of the surrogate's expenses incurred as a result of the surrogacy arrangement. The UPA (2017) permits compensated surrogacy and provides guidelines for payments made to surrogates and the use of the surrogate's health insurance plan to cover medical expenses.[144]

i. Compensation & Reimbursements

Surrogates incur significant medical, legal, and living expenses during the surrogacy process. The gestational surrogacy agreements in my sample provided for the reimbursement of such expenses; carefully noting that such reimbursements do not constitute compensation for services or the relinquishment of parental rights.[145] The term "compensation" is rarely used in surrogacy agreements.[146] Instead, payments made to surrogates and their spouses are often construed as

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[143] *Id*.

[144] *See generally* Uniform Parentage Act §804 (2017).

[145] For example, the sample finance provision in one agreement provided:

It is expressly understood and agreed that reimbursements for expenses for legal, medical, psychological and psychiatric expenses, and other miscellaneous expenses, paid on behalf of the Gestational Carrier as described herein shall in no way be construed as a fee for termination of parental rights or a payment in exchange for the placement of the Child with the Intended Parents.

All payments made pursuant to this Agreement are to be deemed reimbursements or payments for reasonable medical and ancillary costs and expenses including reasonable household and living expenses. Consequently, no payments shall be construed as fees or compensation for services.

[146] *See supra* note 83.

reimbursements for medical, living, and other ancillary expenses. This is done to avoid the tax implications of directly compensating surrogates for their services. One portion of an agreement stated:

> [I]t is expressly understood and agreed that reimbursements for expenses for legal, medical, psychological and psychiatric expenses, and other miscellaneous expenses, paid on behalf of the gestational carrier as described herein shall in no way be construed as a fee for termination of parental rights or a payment in exchange for the placement of the child with the intended parents. [. . .] [A]ll payments under this agreement are to be construed solely as reimbursements, and therefore not subject to taxation.

The exclusion of contract provisions regarding compensation for surrogacy services from surrogacy agreements may also be a reflection of current state laws. Some jurisdictions prohibit surrogates and intended parents from entering into surrogacy agreements by which the surrogate is being compensated for her services.[147] Such laws are enacted, in part, to prevent the creation of a "baby-selling" market.[148]

The UPA (2017) sections 804(a)(6) and 804(b)(1)-(2) provide guidelines regarding payments made to surrogates.[149] Section 804(a)(6) provides that surrogacy agreements must disclose "how each intended parent will cover the surrogacy–related expenses of the surrogate and the medical expenses of the child."[150] Additionally, section 804(b) authorizes compensated surrogacy by permitting "payments of consideration and reasonable expenses" to surrogates.[151] Existing drafting practices regarding surrogacy payments would remain fairly unaffected under the UPA (2017). If enacted, attorneys in jurisdictions, such as California,[152] that currently permit compensated surrogacy can continue to use contract language similar to the language quoted above. Jurisdictions, such as New York,[153] that currently prohibit compensated surrogacy must include contract language to outline how the intended parents will reimburse the surrogate for expenses incurred during the arrangement and how, if at all, the surrogate will be compensated for her services.

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[147] *See e.g.,* NEB. REV. STAT. § 25-21,200; MICH. COMP. LAWS § 722.855.

[148] *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (Harv. Univ. Press 1st ed., 1996).

[149] Uniform Parentage Act §804 (2017).

[150] Uniform Parentage Act §804(a)(6) (2017).

[151] Uniform Parentage Act §804(a)(7) (2017).

[152] CAL. FAM. CODE § 7962(a)(4) (West).

[153] N.Y. DOM. REL. LAW § 123(1) (McKinney).

Given the tax implications, it seems unlikely that practitioners will augment contract language to include provisions regarding payments to surrogates for their services, making the UPA (2017)'s permissive approach to compensated surrogacy unavailing.

There are also contract law considerations when evaluating the enforceability of payment provisions in surrogacy agreements. Opponents to the practice of surrogacy have argued against the enforcement of compensated surrogacy agreements based on public policy grounds.[154] Some fear that the exchange of surrogacy services for compensation will transform the procreation of children into a commercial enterprise, thus creating a baby-selling market.[155] The court in *Johnson v. Calvert* rejected this argument by pointing out the lack of data to support this proposition.[156] Logical reasoning also illustrates why this proposition does not hold true. Gestational surrogacy has not and is unlikely to result in the commodification of children because intended parents are not paying for children. Instead, intended parents compensate surrogates for their service and pregnancy-related expenses.[157] In light of the foregoing reasons, public policy arguments against the enforcement of surrogacy payment provisions are unlikely to succeed.

ii. Health Insurance

Surrogates are not typically reimbursed for all medical expenses. Surrogates are expected to utilize their health insurance, if available, to cover medical expenses.[158] Intended parents are expected to reimburse the surrogate for medical expenses to the extent that those expenses are not covered by the surrogate's health insurance. One sample agreement included a clause that stated:

> [G]estational carrier confirms that she has a personal comprehensive health insurance policy [. . .] in place which, to the best of her knowledge, will cover the cost associated with her pregnancy, labor and delivery.

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[154] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (the Court addressed the commodification argument by noting that no evidence was offered to support it).

[155] *See generally* Radin, *supra* note 148.

[156] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

[157] *See generally Enactment Map, supra* note 129.

[158] *Id.*; *see also* HEATHER JACOBSON, LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES (Naomi R. Gerstel et al. eds., 2016).

Some health insurers have resisted this practice.[159] However, health insurance policies remain one of the primary ways of covering the costs of surrogacy in the U.S.

The UPA (2017) section 804(a)(6) governs the inclusion of health insurance provisions in surrogacy agreements.[160] The section provides that surrogacy agreements "must include a summary of the health-care policy provisions related to coverage for surrogate pregnancy," if the surrogate's health insurance is used to cover medical expenses.[161] The section also requires that "any possible liability of the surrogate, third-party-liability liens, other insurance coverage, and any notice requirement that could affect coverage or liability of the surrogate," must be disclosed.[162] Each agreement in the sample required the use of the surrogate's health insurance plan to cover medical expenses. However, none of the agreements summarized or included any information regarding the surrogate's health insurance policy and the coverage available under the policy.[163] Assuming the sample agreements are representative of standard drafting practices, existing surrogacy agreements will not be enforceable under section 804(a)(6). Attorneys must adjust drafting practices to include a summary of the surrogate's health insurance coverage.

4. Abortion and Selective Reduction Provisions

Significantly more controversial than compensation provisions are abortion provisions. Abortion provisions are intended to provide intended parents with the option of terminating the pregnancy in the event of multiple fetuses or medical issues. One sample agreement provided that the surrogate agrees:

> [N]ot to abort the pregnancy except for medical reasons placing the [her] life or health at risk, if recommended by the attending OB/GYN physician and only after prior consultation with the

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[159] *See e.g.,* Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757 (D.S.C. 2003) (where health insurer brought action seeking declaratory judgment that its policy did not cover surrogacy related medical expenses for medical services provided to the insured who served as a surrogate for biological intended parents).

[160] *See generally* Uniform Parentage Act §804(a)(6) (2017).

[161] *Id*.

[162] *Id*.

[163] *See e.g*., the contract at issue in Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *see also supra,* note 83.

> intended parents unless a medical emergency prevents such prior consultation.[164]

The agreement also stated that the surrogate "agrees to undergo an abortion at the request of the intended parents" if it is determined that there may be a risk to the child's health or identified a very low IQ mental deficiency.[165] The effectiveness of the previously mentioned clauses is limited because surrogacy agreements generally acknowledge the right of the surrogate to terminate or continue the pregnancy, while providing remedies for intended parents if the surrogate decides to continue or terminate a pregnancy against the wishes of the intended parents.[166] One agreement provided that "if the gestational carrier aborts the fetus contrary to the medical opinion as defined above and contrary to the desires of the intended parents, the gestational carrier agrees to pay to the intended parents a sum of money equal to the expenses already paid by the intended parents."[167]

Abortion provisions have constitutional implications. As a result of *Roe* (which held that a woman's right to privacy included the right to terminate her pregnancy), surrogacy agreements acknowledge the right of the surrogate to terminate or continue the pregnancy.[168] Any attempt to force a surrogate to terminate or continue a pregnancy would be inconsistent with the principles of *Roe*.

The UPA (2017) sections 804(a)(5) and 804(a)(7) also govern the inclusion of abortion provisions in surrogacy agreements.[169] In relevant part, section 804(a)(5) provides that the intended parents "will assume responsibility for the financial support of the child, regardless of number of children born or gender or mental or physical condition of each child."[170] Section 804(a)(5) has important implications regarding the enforceability of abortion provisions and the remedies available to intended parents. Even if intended parents request that the surrogate undergo an abortion, as provided for in the sample agreement, the intended parents will remain financially responsible for the child if the surrogate does comply with the request. Intended parents should

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[164] *Id*.
[165] *Id*.
[166] *Id*.
[167] *Id.*
[168] *See generally* Roe v. Wade, 410 U.S. 113 (1973). *See* Uniform Parentage Act §812(d) (2017) (also limits the ability of intended parents to request that the surrogate terminate or continue the pregnancy).
[169] Uniform Parentage Act §804(a)(5) (2017); Uniform Parentage Act §804(a)(7) (2017).
[170] Uniform Parentage Act §804(a)(5) (2017)

carefully select their surrogate candidates, giving careful consideration to a surrogate's willingness to undergo an abortion. Section 804(a)(7) compliments section 804(a)(5) by reinforcing a surrogate's constitutional right to continue or terminate the pregnancy.[171] Section 804(a)(7) provides:

> [T]he agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy. This [act] does not enlarge or diminish the surrogate's right to terminate her pregnancy.[172]

Section 804(a)(7) will have little to no impact on drafting practices because, as previously discussed, abortion provisions generally acknowledge the surrogate's constitutional right to terminate or maintain the pregnancy while outlining the conditions and expectations in the event that the intended parents or surrogate does decide to terminate the pregnancy.

5. Provisions Regarding the Separation, Divorce, Incapacitation, or Death of Intended Parents

In addition to governing the relationship between surrogates and intended parents, gestational surrogacy agreements may provide guidelines for the determination of parentage in the event of unforeseen circumstances, such as divorce or death. Parentage provisions are important in surrogacy agreements because they reduce ambiguity regarding parentage, thus reducing the need for litigation.

Some surrogacy agreements detail the procedures for carrying out or terminating the agreement in the event that the intended parents become separated, divorced, incapacitated, or deceased prior to or after the embryo transfer. Generally, surrogacy agreements are deemed null and void if the separation, divorce, incapacitation, or death of the intended parent occurs prior to embryo transfer.[173] If separation or divorce occurs after the embryo transfer, some surrogacy agreements provide that the parentage of the child is determined pursuant to a custody agreement or a court order.[174] If incapacitation or death occurs after the embryo transfer, either intended parent may agree to proceed with the agreement.[175] If both intended parents are deceased, surrogacy

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[171] Uniform Parentage Act §804(a)(7) (2017).
[172] *Id.*
[173] *Enactment Map, supra* note 129.
[174] *Id*.
[175] *Id.*

agreements typically provide that the parentage of the child is determined according to the last will and testament of the intended parents or by the parentage laws of the governing state.[176]

i. Separation or Divorce

With a significant number of U.S. marriages ending in divorce,[177] surrogacy agreements must account for the possibility that the intended parents' marriage may dissolve before, during, or after the embryo is implanted in the surrogate.

The UPA (2002) did not explicitly address the parentage of a child if the intended parents divorced or died during the arrangement. To provide clarity regarding this issue, the UPA (2017) sections 805, 809, and 810 address the parentage of a child resulting from a surrogacy arrangement when the intended parents are divorced or deceased.[178] Section 805 also addresses the impact of a subsequent marriage on the surrogacy agreement. Section 805(b)(2) provides:

> [T]he divorce, dissolution, annulment, declaration of invalidity, legal separation, or separate maintenance of an intended parent after the agreement is signed by all parties does not affect the validity of the agreement.[179]

In other words, a change in the relationship status between the intended parents does not change their legal status as a parent of a child resulting from a surrogacy agreement. Additionally, section 805(b)(1) provides that the subsequent marriage of an intended parent "does not affect the validity of a surrogacy agreement," and the spouse of the intended parent is not the parent of the child resulting from the agreement.[180] The parentage of a child whose intended parents separate[181] during or after the pregnancy is an important legal issue that has been litigated. Such cases usually concern a dispute between former spouses regarding custody and financial support for a child resulting from a surrogacy agreement.[182] The inclusion of section 805(b) reduces

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[176] *Id.*

[177] *National Marriage and Divorce Rates*, CDC (2016), https://www.cdc.gov/nchs/data/dvs/national_marriage_divorce_rates_00-16.pdf.

[178] *See generally* Uniform Parentage Act §805 (2017); Uniform Parentage Act §809 (2017); Uniform Parentage Act §810 (2017).

[179] Uniform Parentage Act §805(b)(2) (2017).

[180] Uniform Parentage Act §805(b)(1) (2017).

[181] The term "separate" is used to reference all forms of separation including divorce.

[182] *See, e.g.,* Jaycee B. v. Superior Court, 42 Cal. App. 4th 718 (4th Dist. 1996); *In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410 (4th Dist. 1998).

ambiguity regarding parentage in the event of separation by affirming the validity of the agreement.[183] Notably, section 805 is a default provision that only applies if the surrogacy agreement fails to address the issue of separation.

While the UPA (2017) does provide a baseline for determining parentage, it does not provide clarity regarding the specific duties and responsibilities of each parent. To avoid future disputes, attorneys should carefully consider potential conflicts that may arise as a result of the separation of the intended parents. Surrogacy agreements should include a custody arrangement (or guidelines for determining custody) and provisions regarding financial support for a child resulting from a surrogacy agreement.

ii. Incapacitation or Death

A custody arrangement may also be beneficial in the event of the death or incapacitation of the intended parents. Considering death in the midst of preparing an agreement to create life may be daunting and uncomfortable. However, the death of an intended parent may have serious inheritance and custody implications. Therefore, it is important for intended parents to solidify their postmortem wishes in the surrogacy agreement or a will.

The addition of the UPA (2017) section 810 has significant drafting implications for attorneys. First, as a threshold matter, section 809 declares that each intended parent is the parent of a child conceived under a gestational surrogacy agreement.[184] Under section 810, the intended parent is still the parent of the child even if the parent dies while the surrogate is pregnant.[185] However, section 810 also provides that an intended parent is not the parent of a child resulting from a surrogacy arrangement if the intended parent dies before the transfer of an embryo unless:

> (1) the agreement provides otherwise; and
>
> (2) the transfer of a gamete or embryo occurs not later than [36] months after the death of the intended parent or birth of the child occurs not later than [45] months after the death of the intended parent.[186]

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[183] Uniform Parentage Act §804(b) (2017).
[184] Uniform Parentage Act §809 (2017).
[185] Uniform Parentage Act §810 (2017).
[186] *See id*.

Under the default rules of the UPA (2017), an intended parent who dies prior to the embryo transplant may not be the parent of a child who results from a surrogacy arrangement, even if the child is genetically related to the deceased parent. The default rules have serious implications on the child's inheritance rights and the order of parentage. Intended parents can avoid the potential impact of the UPA (2017)'s default rules by addressing the parentage of a deceased intended parent within the surrogacy agreement. However, an intended parent who dies prior to the embryo transfer may still lack parental rights even if an agreement provides otherwise. Section 810's requirements to avoid the default rules of the UPA (2017) are conjunctive, meaning that the agreement must address the parentage of a deceased parent and the embryo transfer or the childbirth must occur within the time period allotted in the UPA (2017) section 810.[187]

Notably, the UPA (2017) does not address the issue of both intended parents dying during the surrogacy arrangement, nor does it address the issue of incapacitation. Drafting attorneys should include surrogacy agreement provisions that address parentage and how the surrogacy arrangement should proceed if both intended parents die or if one or both parents become incapacitated.

IV. CONCLUSION

If adopted by state legislatures, the UPA (2017) will result in moderate changes to the drafting practices in gestational surrogacy agreements. Attorneys will need to augment their drafting practices to ensure that behavior provisions do not hinder the surrogate's statutory right to make all decisions concerning her health and welfare. Like before, attorneys should also consider the unconscionability of behavioral provisions. The UPA permits compensated surrogacy and attorneys may freely include contract provisions regarding payments to the surrogate for her services.

The UPA also includes provisions regarding the use of health insurance policies to cover medical expenses. Attorneys must include a summary of the health insurance coverage to remain in compliance with the UPA (2017). Abortion provision drafting practices will remain unchanged. As usual, attorneys must acknowledge the surrogate's right to continue or terminate her pregnancy. The UPA's provisions regarding the separation or death of intended parents will have minimal impact on drafting practices because the provisions do not dictate what should be

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[187] *See id.*

included in the surrogacy agreement. However, if the parties wish to avoid the default rules of the UPA, attorneys must include provisions regarding separation and death. Overall, the statutory scheme of the UPA (2017) may bring uniformity to a developing area while codifying and streamlining existing drafting practices.