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## WHY NEW YORK SHOULD LEGALIZE SURROGACY: A COMPARISON OF SURROGACY LEGISLATION IN OTHER STATES WITH CURRENT PROPOSED SURROGACY LEGISLATION IN NEW YORK

*Briana R. Iannacci\**

### INTRODUCTION

Infertility is an ongoing issue that affects over six million couples in the United States.<sup>1</sup> Surrogacy is one way to combat infertility because it gives couples and single parents a method of conceiving a child with genetic connections to their family.<sup>2</sup> During this process, a female, the surrogate, carries a child for someone else who is unable to bear her own children.<sup>3</sup> People utilize surrogates for a variety of reasons.<sup>4</sup> Surrogates are commonly used by couples and single women who are unable to conceive their own genetic children, women who have had their uterus removed or have a uterus that cannot bear a child, and male couples who wish to have a child with a genetic connection to one or both partners.<sup>5</sup>

Persons seeking to use a surrogate typically enter into a formal contract with the surrogate to develop legal obligations for both

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<sup>1</sup> *Fertility and Infertility FAQ*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/infertility/fertility-faq/> (last updated Sept. 10, 2018).

<sup>2</sup> *Surrogacy*, FERTILITY AUTHORITY, <https://www.fertilityauthority.com/treatment/surrogacy> (last visited Sept. 27, 2018).

<sup>3</sup> *The SAI Surrogacy Guide*, SURROGATE ALTERNATIVES, INC. (2018), [https://www.surrogatealternatives.com/wp-content/uploads/2018/08/SAI\\_surrogacy\\_guide\\_Final1.pdf](https://www.surrogatealternatives.com/wp-content/uploads/2018/08/SAI_surrogacy_guide_Final1.pdf).

<sup>4</sup> *Surrogacy*, *supra* note 2.

<sup>5</sup> *Surrogacy*, *supra* note 2.

parties.<sup>6</sup> In these contracts, the surrogate agrees to carry the child of the intended parent or parents for nine months, and after the child is born, she agrees not to have any parental connection to the child.<sup>7</sup> The particular requirements for a valid surrogacy contract differ from state to state.<sup>8</sup> Some states have codified statutes listing the specific requirements for these contracts, while other states still do not enforce surrogacy contracts at all.<sup>9</sup> However, New York is currently one of the only states that not only fails to recognize surrogacy contracts, but also imposes financial and criminal penalties on those who enter, or help people enter, into a surrogacy contract.<sup>10</sup>

Many states have already adopted surrogacy laws, most dealing specifically with gestational surrogacy.<sup>11</sup> Among them are California, Delaware, and the District of Columbia.<sup>12</sup> These statutes include, among many other things, medical and legal criteria that the surrogate and intended parent or parents must satisfy in order to participate in

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<sup>6</sup> *Intended Parents*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/the-legal-process-in-surrogacy/> (last visited Sept. 27, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Surrogacy Laws*, SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (last visited Sept. 27, 2018).

<sup>9</sup> *Id.* The District of Columbia and Delaware both have statutes legalizing surrogacy agreements. D.C. CODE § 16-404 (2018); DEL. CODE ANN. tit. 13, § 8-802 (2018). Michigan and New York do not recognize surrogacy agreements. MICH. COMP. LAWS § 722.855 (2017); N.Y. DOM. REL. LAW § 122 (McKinney 2018).

<sup>10</sup> N.Y. DOM. REL. LAW § 123(2)(b) (McKinney 2018) provides:

[a]ny person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

Michigan also penalizes those who enter surrogacy agreements.

(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being intellectually disabled or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier.

(2) A person other than an unemancipated minor female or a female diagnosed as being intellectually disabled or as having a mental illness or developmental disability who enters into, induces, arranges, procures, or otherwise assists in the formation of a contract described in subsection (1) 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.

MICH. COMP. LAWS § 722.857 (2017).

<sup>11</sup> *State by State Surrogacy Laws*, ALL THINGS SURROGACY, <https://allthingsurrogacy.org/surrogacy-laws-state-by-state/> (last visited Sept. 27, 2018).

<sup>12</sup> *Id.*

the process.<sup>13</sup> New York should follow suit by legalizing surrogacy and adopting legislation that regulates surrogate parent agreements. Surrogacy legislation for New York was proposed in March 2017, but the bill has failed to advance and has been referred back to the Assembly Judiciary Committee.<sup>14</sup> To advance this proposed bill legislators should incorporate criteria from surrogacy laws from other states into the New York bill. This author argues that members of the New York State legislature should repeal the current surrogacy statutes and amend and adopt a proposed surrogacy law that would make surrogacy contracts valid and enforceable in the state.<sup>15</sup>

The drastically increasing use of surrogate mothers supports this argument.<sup>16</sup> Data from the Society for Assisted Reproductive Technology show that the number of babies born to surrogates increased from 738 to almost 1,400 in the four-year period of 2004 to 2008.<sup>17</sup> In light of recent Supreme Court decisions such as *Lawrence v. Texas*<sup>18</sup> and *Obergefell v. Hodges*,<sup>19</sup> this number will only continue to grow. In *Lawrence v. Texas*, a 2003 Supreme Court case, the Court dealt with the constitutionality of a Texas statute that criminalized homosexual sodomy.<sup>20</sup> In holding the Texas statute unconstitutional, the Court articulated the doctrine of “emerging awareness” after surveying recent state laws that embraced societal acceptance of the homosexual community and lifestyle.<sup>21</sup> The “emerging awareness” doctrine provides that liberty protects adults and their private sexual conduct.<sup>22</sup> In *Obergefell v. Hodges*, a 2015 Supreme Court case, the Court found that state statutes that prohibited same sex marriage were unconstitutional because they violated the Equal Protection and Due Process Clauses of the Constitution.<sup>23</sup> The concept of emerging

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<sup>13</sup> See D.C. CODE § 16-405 (2018); DEL. CODE ANN. tit. 13, § 8-806 (2018).

<sup>14</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>15</sup> *Id.*

<sup>16</sup> Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf> (last visited Sept. 27, 2018).

<sup>17</sup> *Id.* The number of surrogates used is likely higher. These statistics incorporated only gestational surrogates using in vitro fertilization (“IVF”); traditional surrogacy was not included.

<sup>18</sup> 539 U.S. 558 (2003).

<sup>19</sup> 135 S. Ct. 2584 (2015).

<sup>20</sup> *Lawrence*, 539 U.S. at 562.

<sup>21</sup> *Id.* at 571-72.

<sup>22</sup> *Id.*

<sup>23</sup> *Obergefell*, 135 S. Ct. at 2604-05.

awareness, coupled with the Supreme Court's finding that statutes denying same sex couples the right to marry are unconstitutional and societal acceptance of same-sex marriage, will inevitably lead to an increased use of surrogacy contracts. Thus, there is a substantial need for all states to enact legislation governing and permitting these contracts. As stated by Cicero and quoted in *Obergefell*, "[t]he first bond of society is marriage; next, children; and then the family,"<sup>24</sup> showing that children are the logical next step in the process.

When someone is among the multitude of individuals who want a child, but unfortunately is unable to conceive a child naturally, surrogacy is a very appealing option.<sup>25</sup> Many individuals desire to continue their bloodline by having a genetic link to their child.<sup>26</sup> In addition, surrogacy provides the intended parent or parents, who cannot conceive a child on their own, with the opportunity to experience the pregnancy with the surrogate and ensure the baby receives the appropriate prenatal care.<sup>27</sup> Furthermore, some individuals might be unable to adopt, so surrogacy provides them with another option.<sup>28</sup>

The need for surrogacy laws is imminent in the wake of the Supreme Court's holding in *Obergefell* because states can no longer enact statutes prohibiting same-sex marriage, which has sparked societal acceptance of same-sex marriage and same-sex partners having children through surrogates. For male couples, this is the only procedure that allows them to have biological children.<sup>29</sup> As previously mentioned, adoption is another way infertile couples and same sex couples can have children; however, it does not provide them with a genetic link to the child.<sup>30</sup> Even though society has begun to

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<sup>24</sup> *Id.* at 2594.

<sup>25</sup> Shannon Philpott, *Weighing the Options Between Adoption and Surrogacy*, MOM.ME (May 15, 2013), <https://mom.me/kids/7325-weighing-options-between-adoption-and-surrogacy/>.

<sup>26</sup> *10 Reasons Why People Want Kids (and 10 Reasons They Don't)*, WE HAVE KIDS, <https://wehavekids.com/misc/Most-Common-Reasons-Why-People-Want-Children> (last updated Aug. 16, 2018); *Why Some Couples Chose Surrogacy over Adoption*, CIRCLE LIFE SURROGACY (Sept. 27, 2016), <http://www.circleoflifesurrogacy.com/future-parents/couples-choose-surrogacy-adoption/>.

<sup>27</sup> Philpott, *supra* note 25.

<sup>28</sup> *Why Some Couples Chose Surrogacy over Adoption*, *supra* note 26.

<sup>29</sup> *See For Gay Men: Becoming a Parent Through Surrogacy*, INFERTILITY RESOURCES, <http://www.ihf.com/infertility/surrogacy/gay-parent-through-surrogacy.html> (last visited Sept. 27, 2018).

<sup>30</sup> *Why Some Couples Chose Surrogacy over Adoption*, *supra* note 26.

accept same sex marriage, same-sex couples still face many challenges when seeking to adopt a child.<sup>31</sup>

History has demonstrated that humans will do anything to pursue their self-interest, even if it means doing something they are told they cannot do.<sup>32</sup> Prior to the decision in *Roe v. Wade*,<sup>33</sup> which held that statutes prohibiting abortions were unconstitutional,<sup>34</sup> women were still finding ways to abort their pregnancies, knowing how medically dangerous and potentially life threatening these illegal abortions were.<sup>35</sup> Outlawing abortion did not reduce the abortion rate; rather, it forced women to seek unsafe abortions.<sup>36</sup> Therefore, it is essential that states, including New York, adopt legislation to protect those who want to enter into surrogacy contracts because regardless of the law, people will act on their desire for children and enter into these contracts regardless.

To provide readers with a foundational background of surrogacy laws and the impact they have on our society, Part I of this Note discusses the two different types of surrogacy, gestational and traditional,<sup>37</sup> along with the most notable traditional surrogacy case, *In re Baby M*.<sup>38</sup> Part II surveys the current surrogacy statutes in New York that impose penalties on those who enter surrogacy agreements. Part III examines the surrogacy statutes of California, Delaware, and the District of Columbia. Part IV discusses the proposed legislation in New York and compares it to the laws adopted in other states. The main discussion focuses on the inadequacies of the proposed legislation and the beneficial aspects of other states' laws which should be included in the New York Bill. Finally, Part V analyzes constitutional arguments that have been raised to invalidate surrogacy laws and why courts have rejected these arguments.

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<sup>31</sup> *Same Sex Adoption*, FINDLAW, <http://family.findlaw.com/adoption/same-sex-adoption.html> (last visited Sept. 27, 2018).

<sup>32</sup> Charles S. Jacobs, *Don't Read This: The Big Mistake Managers Make*, PSYCHOL. TODAY (May 29, 2013), <https://www.psychologytoday.com/blog/management-rewired/201305/dont-read>.

<sup>33</sup> 410 U.S. 113 (1973).

<sup>34</sup> *Id.* at 166.

<sup>35</sup> Claire Landsbaum, *4 Women on Having Abortions Before They Were Legal*, CUT (Nov. 29, 2016), <https://www.thecut.com/2016/11/4-women-on-getting-an-abortion-before-roe-v-wade.html>.

<sup>36</sup> *Id.*

<sup>37</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>38</sup> 537 A.2d 1227 (N.J. 1988).

This author views surrogacy as a positive reproductive method for couples seeking to expand their families and have children with genetic ties. In our world today, we must realize the growth, popularity, and overall appeal of this reproductive process, and our legislatures must enact laws to protect those who seek to enter into these agreements.

## I. DIFFERENT TYPES OF SURROGACY

### A. Traditional Surrogacy and Baby M

Many people view surrogacy as a fairly new concept; however, the idea of surrogacy traces back to Biblical time.<sup>39</sup> The story of Abraham and Sarah describes surrogacy in its most basic form. Sarah, Abraham's wife, was unable to bear him a child<sup>40</sup> and consequently gave their surrogate, Hagar, to Abraham so the two could conceive a child, Ishmael.<sup>41</sup> Sarah and Abraham then raised Ishmael as their child.<sup>42</sup>

The story of Abraham and Sarah is similar to traditional surrogacy today because both Hagar and traditional surrogates are biologically related to the child.<sup>43</sup> Additionally, both traditional surrogates and Hagar show the use of a third-party surrogate in conceiving a child that is genetically tied to one of the parents.<sup>44</sup> Today, advanced technology allows for a traditional surrogate to become pregnant using her own egg and the sperm of another male.<sup>45</sup> This process is known as artificial insemination (hereinafter "AI").<sup>46</sup> A doctor will insert the sperm into the surrogate's uterus during her ovulation cycle.<sup>47</sup>

*In re Baby M*, one of the most notable traditional surrogacy cases, exemplifies the problems that arise with this method of

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<sup>39</sup> *Genesis* 16:1-16.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>44</sup> *Genesis* 16:1-16; *The SAI Surrogacy Guide*, *supra* note 3.

<sup>45</sup> *The SAI Surrogacy Guide*, *supra* note 3. The sperm can either be from the intended father or a sperm donor.

<sup>46</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>47</sup> *The SAI Surrogacy Guide*, *supra* note 3. For the most part, traditional surrogacy has been superseded by gestational surrogacy, which is the most common type of surrogacy used today. *The SAI Surrogacy Guide*, *supra* note 3; *see* discussion of gestational surrogacy *infra* Part I.B.

surrogacy.<sup>48</sup> In February 1985, William and Elizabeth Stern entered into a surrogacy contract with Mary Beth Whitehead because Elizabeth was infertile.<sup>49</sup> The Sterns married in 1974 and put off having a child for financial reasons.<sup>50</sup> When they decided to start a family, they learned of Elizabeth's infertility.<sup>51</sup> Their original plan was adoption, but they decided against it because of foreseeable issues regarding their age and different religious backgrounds; therefore, surrogacy was their only option.<sup>52</sup> The surrogacy contract was entered into between Mr. Stern and Mrs. Whitehead.<sup>53</sup> The agreement stated that Mrs. Whitehead was to become pregnant through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead was to do whatever was necessary to terminate her maternal rights, and, upon birth of the child, she was to receive \$10,000.<sup>54</sup>

Everything seemed to be going as planned until the birth of the child on March 27, 1986.<sup>55</sup> When the baby was born, Mr. and Mrs. Whitehead did not want anyone at the hospital to become aware of the fact that they were surrogate parents, so they placed the name Sara Elizabeth Whitehead on the birth certificate and identified Mrs. Whitehead's husband, Richard, as the father.<sup>56</sup> Right after giving birth, Mrs. Whitehead realized that she did not want to give up the child she had just given birth to.<sup>57</sup> However, she complied with the contract and the baby left the hospital with the Sterns on March 30th.<sup>58</sup>

Problems quickly arose when Mrs. Whitehead informed the Sterns that she could not live without the child that she had given birth to and asked to take the baby for a week.<sup>59</sup> The Sterns allowed Mrs. Whitehead to take their child, whom they renamed Melissa, because they believed that Mrs. Whitehead would commit suicide if they did not comply.<sup>60</sup> They also believed that she would be true to her word

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<sup>48</sup> 537 A.2d 1227 (N.J. 1988).

<sup>49</sup> *Id.* at 1235.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1236.

<sup>53</sup> *In Re Baby M*, 537 A.2d at 1236.

<sup>54</sup> *Id.* at 1235.

<sup>55</sup> *Id.* at 1236.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *In Re Baby M*, 537 A.2d at 1236.

<sup>59</sup> *Id.* at 1236-37.

<sup>60</sup> *Id.*

and return their child to them after a week.<sup>61</sup> Once the Sterns filed a complaint seeking enforcement of the surrogacy contract, the Whiteheads fled the state and took Melissa to Florida.<sup>62</sup> The Whiteheads kept the baby for three months until the Sterns were able to track them down.<sup>63</sup>

At trial, the court held that the surrogacy contract was valid and ordered that Mrs. Whitehead's parental rights be terminated and Mrs. Stern be allowed to adopt the baby.<sup>64</sup> However, there were issues with the trial court's findings because the court relied on the best interest of the child analysis, which was unrelated to the contract.<sup>65</sup> The Supreme Court of New Jersey granted direct certification after Mrs. Whitehead appealed and reversed the findings of the trial court.<sup>66</sup> The main reason the court determined the surrogacy contract invalid was the belief that the contract violated public policy.<sup>67</sup> In New Jersey, courts have held that children being raised by their natural parents is consistent with public policy.<sup>68</sup> The court held that the surrogacy contract in this case directly contradicted this policy by permitting the separation of the child from the natural mother.<sup>69</sup>

The problems in *In re Baby M*<sup>70</sup> arose from the fact that the child was biologically related to the mother. This case exemplifies the legal implication of entering into traditional surrogate contracts. In *In re Baby M*, the court stated that:

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of . . . her child . . . .<sup>71</sup>

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<sup>61</sup> *Id.* at 1237.

<sup>62</sup> *Id.*

<sup>63</sup> *In Re Baby M*, 537 A.2d at 1237.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1238.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1246.

<sup>68</sup> *In Re Baby M*, 537 A.2d at 1246-47.

<sup>69</sup> *Id.* at 1246.

<sup>70</sup> *Id.* at 1246.

<sup>71</sup> *Id.* at 1250.

These concerns lessened as gestational surrogacy became prevalent because gestational surrogates are not the biological mothers. Had this case involved gestational surrogacy, the court's public policy argument would not hold water.

### B. Gestational Surrogacy

Today, when individuals or lawmakers make references to surrogacy, they are most often referring to gestational surrogacy.<sup>72</sup> Gestational surrogacy originated in 1978 when Louise Brown became the first baby successfully born in Great Britain through a process known as In-Vitro Fertilization (hereinafter "IVF").<sup>73</sup> During IVF, the ovum/eggs are retrieved through the intended mother or egg donor's body.<sup>74</sup> The ovum/eggs are then combined with the intended father's or sperm donor's sperm in a laboratory to form an embryo<sup>75</sup> which is transferred into the uterus of the gestational surrogate.<sup>76</sup> The gestational surrogate is not the biological mother of the child when IVF treatment is used.<sup>77</sup>

People wish to use gestational rather than traditional surrogacy for many reasons.<sup>78</sup> In gestational surrogacy, the lack of biological connection between the surrogate and child allows for a less complicated legal procedure because the intended parent's or parents' biological connection to the child is not questioned.<sup>79</sup> This procedure also allows single parents, infertile couples, and members of the LGBT community to expand their families.<sup>80</sup> In addition, families face fewer limitations with surrogacy than with adoption.<sup>81</sup> With adoption, a factor such as age may not allow a person to adopt. However, many

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<sup>72</sup> *Id.*

<sup>73</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>74</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>75</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>76</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>77</sup> *The SAI Surrogacy Guide*, *supra* note 3.

<sup>78</sup> *About Surrogacy: What is Gestational Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-gestational-surrogacy/> (last visited Sept. 27, 2018).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *About Surrogacy: Benefits of Surrogacy for Everyone Involved*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-101/benefits-of-surrogacy-for-everyone-involved/> (last visited Sept. 27, 2018).

states do not have a cut off age for using a surrogate.<sup>82</sup> Finally, gestational surrogacy allows intended parents to have a child who is genetically linked to both parents.<sup>83</sup>

Surrogates also benefit from this process. Becoming a surrogate is not for everyone, but for those who choose to become surrogates, the experience is generally rewarding.<sup>84</sup> These women enjoy a deep sense of pride knowing that they were able to give someone the most life-changing gift, a child.<sup>85</sup> These women are also able to set the best example of selflessness to those surrounding them.<sup>86</sup> Additionally, surrogacy allows women who enjoy pregnancy to go through this experience again, even if they no longer want children of their own.<sup>87</sup>

## II. SURROGACY LAWS IN NEW YORK

### A. Current Surrogacy Laws in New York

All surrogacy contracts and agreements created in New York State are void and unenforceable.<sup>88</sup> New York's surrogacy laws are found in Article 8 of New York Domestic Relations Law,<sup>89</sup> which refers to surrogacy contracts as a "surrogate parenting contract."<sup>90</sup> Surrogate parenting contracts are defined under New York law as:

any agreement, oral or written, in which:  
 (a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and

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<sup>82</sup> *Id.*

<sup>83</sup> *About Surrogacy: What is Gestational Surrogacy, supra* note 78.

<sup>84</sup> *About Surrogacy: Benefits of Surrogacy for Everyone Involved, supra* note 81.

<sup>85</sup> *About Surrogacy: Benefits of Surrogacy for Everyone Involved, supra* note 81.

<sup>86</sup> *About Surrogacy: Benefits of Surrogacy for Everyone Involved, supra* note 81.

<sup>87</sup> *About Surrogacy: Benefits of Surrogacy for Everyone Involved, supra* note 81.

<sup>88</sup> N.Y. DOM. REL. LAW § 122 (McKinney 2018). "Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable." *Id.*

<sup>89</sup> *Id.* §§ 121-123.

<sup>90</sup> *Id.*

(b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.<sup>91</sup>

This statutory language renders both traditional and gestational surrogacy agreements invalid and unenforceable. The State of New York banned these agreements as a violation of public policy directly following the decision of *In re Baby M*<sup>92</sup> because they have been interpreted as “baby selling” agreements.<sup>93</sup> Therefore, New York courts will not assist parties who enter into surrogacy contracts and seek to enforce them.<sup>94</sup>

New York law currently provides that those parties who enter into a commercial surrogacy contract, or even assist in the facilitation of these agreements, are potentially subject to harsh penalties.<sup>95</sup> A commercial surrogacy contract is either an agreement where one party receives payment from the other party for entering into the contract or a third-party is paid a fee for arranging, inducing, or assisting in the creation of the contract.<sup>96</sup> Under section 123 of the New York Domestic Relations Law, parties to the surrogacy agreement, typically the biological mother or father and the intended parents, are subject to a civil penalty not to exceed five-hundred dollars if they enter into commercial surrogacy agreements.<sup>97</sup>

Individuals who help potential parents enter into surrogacy agreements, such as doctors and lawyers, are also penalized under this statute.<sup>98</sup> Those who induce, arrange or otherwise assist in the formation of a surrogacy parenting contract for any type of compensation are also in violation of section 123 and subject to a civil penalty not to exceed ten thousand dollars.<sup>99</sup> After having been subject

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<sup>91</sup> § 121. The mere agreement by a woman to be impregnated with an ovum or inseminated with sperm is not enough to bring the agreement within the statutory prohibition. The type of prohibited agreements only arises when the woman agrees to surrender the child for adoption and that is the specific purpose of the agreement.

<sup>92</sup> *In re Adoption of J.*, 72 N.Y.S.3d 811 (Fam. Ct. 2018).

<sup>93</sup> *Id.* at 811.

<sup>94</sup> *Id.*

<sup>95</sup> § 123.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

to a civil penalty for violating this statute, those who induce, arrange or assist in these agreements will be guilty of a felony.<sup>100</sup>

### B. Proposed Surrogacy Legislation in New York

The most recent bill which proposed a change to the surrogacy laws of New York was introduced on April 21, 2017.<sup>101</sup> This legislation sought to amend the Family Court Act by adding section 5-C, the Child-Parent Security Act.<sup>102</sup> For the purpose of this Note, the focus will be on Part 4 of the Child-Parent Security Act which centers on gestational surrogacy contracts.<sup>103</sup> This proposed bill began by listing some basic requirements that the contracts must follow.<sup>104</sup> These requirements are as follows:

- (b) A gestational agreement shall not apply to the birth of a child conceived by means of sexual intercourse.
- (c) A gestational agreement may not provide for payment of compensation under part five of this article.
- (d) A gestational agreement may not limit the right of the gestational carrier to make decisions to safeguard the gestational carrier's health or that of any fetus or embryo the gestational carrier is carrying.

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<sup>100</sup> § 123

2. (a) A birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars.

(b) Any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seven thousand two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

*Id.*

<sup>101</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

(e) A gestational agreement may not limit the right of the gestational carrier to terminate the pregnancy or reduce the number of fetuses or embryos the gestational carrier is carrying.<sup>105</sup>

Next, the proposed legislation focused on separate criteria that the intended parent or parents and surrogate must satisfy to create a valid contract, which included five requirements.<sup>106</sup> A surrogate must be at least twenty-one years old, cannot have provided the egg used to conceive the child, completed a medical evaluation with a health care practitioner, undergone independent legal consultation regarding the agreement and its legal consequences, and obtained a health insurance policy prior to the embryo transfer.<sup>107</sup>

The list of requirements for an intended parent or parents under the proposed legislation in New York was less extensive than the requirements for the surrogate. Similar to the surrogate, an intended parent or parents needed to also speak with independent legal counsel regarding the agreement and potential legal consequences of the agreement.<sup>108</sup> Under this legislation, an intended parent or parents could be a single adult who was not involved in a relationship, a married couple, or two adults who are intimate partners.<sup>109</sup> However, the spouse of an intended parent would not have parental rights to the child and did not have to be a party to the gestational agreement if

the intended parent and his or her spouse:

- (i) are living separate and apart pursuant to a decree of judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded; or
- (ii) have been living separate and apart for at least three years prior to execution of the gestational agreement.<sup>110</sup>

The proposed legislation also set forth requirements that the gestational agreement needed to satisfy to be enforceable.<sup>111</sup> The

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<sup>105</sup> *Id.*

<sup>106</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

intended parents, surrogate, and surrogate's spouse needed to sign and verify the agreement.<sup>112</sup> The agreement needed to be executed before the embryo was transferred, and all who participated in the agreement needed to meet the requirements that were set forth in Section 581-404 of the proposed legislation.<sup>113</sup> Further, the agreement needed to

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- <sup>112</sup> *Id.* Gestational carrier's spouse is not to verify or sign if
- A. the gestational carrier and the gestational carrier's spouse are living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded; or
  - B. have been living separate and apart for at least three years prior to execution of the gestational agreement . . . .

*Id.*

- <sup>113</sup> *Id.*
- Eligibility
- (a) A gestational carrier shall be eligible to enter into an enforceable gestational agreement under this article if the gestational carrier has met the following requirements at the time the gestational agreement is executed:
    1. The gestational carrier is at least twenty-one years of age; and
    2. The gestational carrier has not provided the egg used to conceive the resulting child; and
    3. The gestational carrier has completed a medical evaluation with a health care practitioner relating to the anticipated pregnancy; and
    4. The gestational carrier, and the gestational carrier's spouse if applicable have undergone legal consultation with independent legal counsel of their own choosing which may be paid for by the intended parent regarding the terms of the gestational agreement and the potential legal consequences of the gestational carrier arrangement; and
    5. The gestational carrier has, or the gestational agreement stipulates, that prior to the embryo transfer, the gestational carrier will obtain, a health insurance policy that covers major medical treatments and hospitalization, and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for eight weeks after the birth of the child; the policy must be procured and paid for by the intended parents on behalf of the gestational carrier pursuant to the gestational agreement.
  - (b) The intended parent shall be eligible to enter into an enforceable gestational agreement under this article if her, she, or they have met the following requirements at the time the gestational agreement was executed:
    1. He, she or they have undergone legal consultation with independent legal counsel regarding the terms of the gestational agreement and the potential legal consequences of the gestational carrier arrangement; and
    2. He or she is an adult person who is not in a spousal relationship, or adult spouses together, or any two adults who are intimate partners together, except the spouse of the intended parent is not required to be a party to the gestational agreement and shall not have parental rights or obligations to the child where the intended parent and his or her spouse:
      - i. are living separate and apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed

establish how the intended parent or parents would cover the surrogate's and future child's medical expenses.<sup>114</sup> If the agreement included compensation payments to the surrogate, then the compensation would be placed in an escrow account before the surrogate began any medical procedures and evaluations.<sup>115</sup>

Finally, the proposed statute required the gestational agreement to include additional terms.<sup>116</sup> Regarding the surrogate and the surrogate's spouse (if applicable) the agreement needed to specify:

- (A) the agreement of the gestational carrier to undergo embryo transfer and attempt to carry and give birth to the child; and
- (B) the agreement of the gestational carrier and the gestational carrier's spouse, if any, to surrender custody of all resulting children to the intended parent . . . ; and
- (C) the right of the gestational carrier to utilize the services of a health care practitioner of the gestational carrier's choosing, to provide her care during the pregnancy . . . .<sup>117</sup>

The intended parent or parents needed to agree to accept custody of all resulting children,<sup>118</sup> assume responsibility for support of the child, and not assign their rights.<sup>119</sup>

A discussion of other states' surrogacy statutes is helpful to an analysis of the defects in New York's proposed surrogacy law. The laws in California, Delaware and the District of Columbia are particularly instructive.

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by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded; or

- ii. have been living separate and apart for at least three years prior to execution of the gestational agreement.

*Id.*

<sup>114</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>115</sup> *Id.* "If the gestational agreement provides for the payment of compensation to the gestational carrier, the compensation shall have been placed in escrow with an independent escrow agent prior to the gestational carrier's commencement of any medical procedure other than medical evaluations necessary to determine the gestational carrier's eligibility . . . ." *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Assemb. 6959, 240th Reg. Sess. (N.Y. 2017). The intended parent or parents must agree to accept custody regardless of the number, gender, or mental or physical condition of the child. *Id.*

<sup>119</sup> *Id.*

### III. SURROGACY IN THE UNITED STATES

The laws on gestational surrogacy vary greatly from state to state.<sup>120</sup> For the most part, states view surrogacy in three ways: 1) surrogate friendly states, that is, states that do not have codified surrogacy laws but generally accept surrogacy agreements; 2) states that have adopted legislation on surrogacy and find that agreements are valid and enforceable; and 3) states, like New York, that have a statutory ban on surrogacy agreements.<sup>121</sup>

At one extreme is Florida, which permits both traditional and gestational surrogacy, but allows gestational agreements only after the baby is born and between legally married persons.<sup>122</sup> At the other end of the spectrum is New York, which is not the only state that forbids surrogacy, but is the only state that applies potential civil and criminal penalties to those who enter or assist in commercial surrogacy agreements.<sup>123</sup>

The remainder of this Note will focus on three specific jurisdictions that are either surrogate friendly or have made surrogacy agreements valid and enforceable through legislation. These jurisdictions are California, Delaware and the District of Columbia.

#### A. California

From 1993 to 2016, California operated as a surrogate friendly state, meaning even though no laws on the books discussed surrogacy, the courts generally accepted these agreements.<sup>124</sup> As recently as January 2018, California adopted California Family Code Section 7962, which codified the requirements for enforceable surrogate contracts.<sup>125</sup> California also adopted legislation that became effective in January 2016 dealing with the location of compensation for surrogacy contracts during the surrogacy process.<sup>126</sup>

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<sup>120</sup> *Surrogacy Laws*, *supra* note 8.

<sup>121</sup> *Surrogacy Laws*, *supra* note 8.

<sup>122</sup> *Surrogacy Laws*, *supra* note 8.

<sup>123</sup> *Surrogacy Laws*, *supra* note 8.

<sup>124</sup> *Starting the Surrogacy Process: 4 Things to Know About California Laws*, SURROGATE PARENTING SERVICES (July 15, 2016), <http://surrogateparenting.com/starting-surrogacy-process-4-things-know-california-laws/>.

<sup>125</sup> CAL. FAM. CODE § 7962 (West 2018).

<sup>126</sup> *Id.* § 7961.

For the purpose of this Note, the focus will be on California during the years it was a surrogate friendly state. The leading case on surrogacy in California is *Johnson v. Calvert*,<sup>127</sup> in which the court discussed new legal questions that arose through advances in reproductive technology.<sup>128</sup> More specifically, the court addressed the question of who the natural mother is, under California law, when two parents implanted their fertilized sperm and egg into the uterus of a third party, who had no biological relation to the child.<sup>129</sup>

Mark and Crispina Calvert were married and longed to have children; however, Crispina was unable to carry her own child because of her prior hysterectomy. The couple decided that surrogacy was their best option, and Anna Johnson offered to be their surrogate.<sup>130</sup> Mark, Crispina and Anna signed a contract which stated that Anna was to carry the embryo created by the couple.<sup>131</sup> Further, Anna agreed that the child would become Mark's and Crispina's, and she agreed to relinquish all parental rights.<sup>132</sup> Anna was compensated in installment payments by the couple.<sup>133</sup>

Once Anna became pregnant, her relationship with the Calverts deteriorated.<sup>134</sup> The Calverts learned that Anna suffered several stillbirths and miscarriages but never informed the couple.<sup>135</sup> Eventually, litigation ensued after Anna filed an action seeking a declaration that she was the child's mother in response to the Calverts' lawsuit seeking a declaration that they were the unborn child's legal parents.<sup>136</sup>

Under the Uniform Parentage Act, both women were able to establish a mother-child relationship—Anna through giving birth and Crispina through genetic consanguinity.<sup>137</sup> However, since California only recognized one natural mother, the court established a test for determining the child's natural mother when the child is not a genetic

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<sup>127</sup> 851 P.2d 776 (Cal. 1993).

<sup>128</sup> *Id.* at 778.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Johnson*, 851 P.2d at 778.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Johnson*, 851 P.2d at 782.

match to the woman who gives birth to him.<sup>138</sup> In these situations, the court held that it will evaluate “who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own.”<sup>139</sup>

The court was very clear in identifying why it came to this decision.<sup>140</sup> The Calverts wanted to have this child and, if it were not for their actions in moving forward with the surrogate process, the child would not have existed.<sup>141</sup> Originally, both parties had the same goal in mind, that was, bringing a Calverts’ baby into the world.<sup>142</sup> The court determined that Anna’s eventual change of heart should not distract from the central fact in this case that Crispina was the natural mother.<sup>143</sup> Thus, Crispina was declared the natural mother of the child.<sup>144</sup>

## B. Delaware<sup>145</sup>

In 2013, Delaware enacted legislation that made gestational carrier agreements valid and enforceable.<sup>146</sup> The purpose of these laws is to ensure consistent standards and to protect those who enter into gestational carrier agreements.<sup>147</sup> Delaware’s laws also confirm the legal status of a child born as a product of these agreements.<sup>148</sup>

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Johnson*, 851 P.2d at 782.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> This note addresses only portions of Delaware’s statute that are relevant to this discussion.

<sup>146</sup> DEL. CODE ANN. tit. 13, §§ 8-801 to 8-810 (West 2013). Delaware refers to surrogacy contracts as gestational carrier agreements. DEL. CODE ANN. tit. 13, §§ 8-801 to 8-810 (West 2018).

(a) The purpose of this subchapter is to establish consistent standards and procedural safeguards for the protection of all parties to a gestational carrier agreement in this State and to confirm the legal status of children born as a result of these agreements. These standards and safeguards are meant to facilitate the use of this type of reproductive agreement in accordance with the public policy of this State.

(b) This subchapter does not apply to the birth of a child conceived by means of sexual intercourse.

§ 8-802.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Additionally, these laws ensure that gestational carrier agreements do not violate the public policy of Delaware.<sup>149</sup> Delaware's legislation also addresses the issue of jurisdiction, specifically when the state has personal jurisdiction over non-residents regarding these agreements.<sup>150</sup>

Delaware's law clearly states that a child born to a gestational carrier as a result of a gestational carrier agreement is not the child's parent.<sup>151</sup> It sets forth the legal responsibilities of the intended parent or parents and explains that breaching the surrogacy agreement will not relieve the intended parent or parents from support obligation.<sup>152</sup>

Similar to New York's proposed surrogacy legislation, Delaware has multiple requirements that a surrogate must satisfy in order for the gestational carrier agreement to be enforceable.<sup>153</sup> A

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<sup>149</sup> *Id.*

<sup>150</sup> § 8-803.

[A] tribunal of this State may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

- (a) The individual is personally served with notice within this State;
- (b) The individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (c) The individual resided in this State at the time the individual executed the gestational carrier agreement or consented to the embryo transfer;
- (d) The individual executed a gestational carrier agreement with a person or persons who resided in this State at the time the gestational carrier agreement was executed and voluntarily submitted to the jurisdiction of this State in the gestational carrier agreement;
- (e) The nonresident gestational carrier had, or is expected to have an embryo transfer performed in this State pursuant to a gestational carrier agreement;
- (f) The nonresident intended parent(s) consented to a gestational carrier having an embryo transfer in this State pursuant to a gestational carrier agreement;
- (g) The child was, or is expected to be born in this State as demonstrated by a provision in the gestational carrier agreement;
- (h) The child resides in this State as a result of the acts or directives of the individual; or
- (i) There is any other basis consistent with the Constitutions of this State and the United States for the exercise of personal jurisdiction.

*Id.*

<sup>151</sup> § 8-804.

<sup>152</sup> § 8-805. The statute further addresses the technology aspect of these agreements and acknowledges that if there is a laboratory error and because of this error the child is not genetically related to either child, the parties will still be responsible absent a court determination to the contrary. *Id.*

<sup>153</sup> § 8-806.

surrogate in Delaware, like in New York's proposed legislation, must be at least twenty-one years old, must complete a medical evaluation, must have been informed of the potential consequences of the agreement by independent legal counsel, and must have obtained a health insurance policy.<sup>154</sup> Unlike New York's proposed surrogacy legislation, however, Delaware requires the surrogate to have given birth to a child and complete a mental health evaluation.<sup>155</sup>

Requirements for intended parent or parents under Delaware's statute have both similarities to and distinctions from New York's proposed surrogacy legislation.<sup>156</sup> Both require the intended parent or parents to seek independent counsel regarding the agreement and that the surrogate be at least twenty-one years of age.<sup>157</sup> However, unlike New York's proposed legislation, Delaware requires that the intended parent or parents complete a mental health evaluation.<sup>158</sup>

Delaware then lists all criteria that must be included in the actual gestational carrier agreement for it to be enforceable.<sup>159</sup> Among other things, a gestational carrier agreement must be contained in a writing by the gestational carrier and intended parent or parents and executed prior to the initiation of an embryo transfer.<sup>160</sup> Both parties must be represented by independent legal counsel in all matters concerning the gestational carrier agreement.<sup>161</sup> If the agreement provides for payment or compensation to the gestational carrier, the compensation shall be placed in escrow.<sup>162</sup> The gestational carrier agreement is to be witnessed by two competent, disinterested adults.<sup>163</sup>

In addition, the agreement must state that the gestational carrier is to "[u]ndergo embryo transfer and attempt to carry and give birth to

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<sup>154</sup> *Id.*; Assemb. 6959, 240th Reg. Sess. (N.Y. 2017). The policy must cover[] major medical treatments and hospitalization and the health insurance policy [must have] a term that extends throughout the duration of the expected pregnancy and for eight weeks after the birth of the child; the policy may be procured by the intended parents on behalf of the gestational carrier pursuant to the gestational carrier agreement.

§ 8-806.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>158</sup> § 8-806.

<sup>159</sup> § 8-807.

<sup>160</sup> § 8-807(b)(1)-(2).

<sup>161</sup> § 8-807(3).

<sup>162</sup> § 8-807(5).

<sup>163</sup> § 8-807(6).

the child[] and [s]urrender custody of all resulting children to the intended parent or parents immediately upon the birth of the child(ren).”<sup>164</sup> If the gestational carrier is married, her spouse must agree to surrender custody and abide by the same gestational carrier agreement.<sup>165</sup> The agreement must also state that the intended parent or parents “[a]ccept legal custody of all resulting children immediately upon birth[] and [a]ssume sole responsibility for all resulting children immediately upon birth.”<sup>166</sup> If any of the requirements above are not satisfied, then the court will look to the intent of the surrogate and intended parent or parents when entering the contract to determine parentage.<sup>167</sup>

### C. District of Columbia<sup>168</sup>

The District of Columbia enacted surrogacy legislation on April 7, 2017, becoming the most recent jurisdiction in the United States to legalize surrogacy agreements.<sup>169</sup> This statute creates enforceable surrogacy agreements so long as all requirements are satisfied.<sup>170</sup> Similar to New York’s proposed legislation and

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<sup>164</sup> § 8-807(c)(1)(i)-(ii).

<sup>165</sup> § 8-807(c)(2).

<sup>166</sup> § 8-807(c)(4)(i)-(ii).

<sup>167</sup> § 8-807(e).

<sup>168</sup> Not all portions of the District of Columbia’s statute will be addressed. Only portions of this statute that are relevant to this discussion will be addressed.

<sup>169</sup> D.C. CODE § 16-403 (2018).

<sup>170</sup> *Id.*

(a) An individual seeking to serve as a surrogate shall enter into a written surrogacy agreement and, at the time that the surrogacy agreement is executed, shall:

- (1) Be at least 21 years of age;
- (2) Have given birth to at least one live child;
- (3) Have undergone a medical evaluation in which the individual was approved to serve as a surrogate;
- (4) Have completed a mental health evaluation by a mental health professional in which the individual was approved to serve as a surrogate; provided, that the mental health professional has received specialized training in, or has a practice that includes a specialty in, collaborative reproduction; and
- (5) Have completed, with the intended parent or parents, a joint consultation with a mental health professional regarding issues that could arise during the surrogacy.

(b)

Delaware's statutes, the District of Columbia lists requirements for the surrogate and intended parents, along with requirements for the content of the surrogacy agreements.<sup>171</sup>

The District of Columbia requires that a surrogate must be twenty-one years old and complete a medical evaluation, which is similar to New York's proposed legislation and Delaware's statutes.<sup>172</sup> Additionally, the District of Columbia requires the surrogate to complete a mental health evaluation, which Delaware also requires.<sup>173</sup> In contrast, the District of Columbia has added two requirements that both Delaware and New York's proposed legislation do not mandate.<sup>174</sup> First, the District of Columbia requires that the surrogate has given birth to at least one live child.<sup>175</sup> The addition of the word "live"<sup>176</sup> changes the whole meaning of this requirement and may disqualify some potential surrogates in the District of Columbia who otherwise would have been eligible in Delaware. Second, the District of Columbia requires the surrogate and intended parent or parents to complete joint consultation with a mental health professional regarding issues that could arise during the surrogacy.<sup>177</sup> This differs from Delaware's requirement that the surrogate and intended parent or parents seek independent legal counsel to review the potential legal consequences of the gestational carrier arrangement.<sup>178</sup>

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(1) An individual or individuals seeking to become an intended parent or parents shall enter into a written surrogacy agreement and, at the time the surrogacy agreement is executed, shall:

(A) Be at least 21 years of age; and

(B) Have completed with the surrogate a joint consultation with a mental health professional regarding issues that could arise during the surrogacy.

(2) If an individual is married or in a domestic partnership, both parties to the marriage or domestic partnership must satisfy the requirements of this subsection.

*Id.* § 16-405.

<sup>171</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); *Id.* § 8-807; Assemb. 6959, 240th Reg. Sess. (N.Y. 2017); D.C. CODE § 16-405 (2018); *Id.* § 16-406.

<sup>172</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); Assemb. 6959, 240th Reg. Sess. (N.Y. 2017); D.C. CODE § 16-405 (2018).

<sup>173</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); D.C. CODE § 16-405 (2018).

<sup>174</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); Assemb. 6959, 240th Reg. Sess. (N.Y. 2017); D.C. CODE § 16-405 (2018).

<sup>175</sup> § 16-405.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018).

For intended parent or parents, the District of Columbia requires that they are at least twenty-one years old and complete “joint consultation with a mental health professional regarding issues that could arise during the surrogacy” with their surrogate.<sup>179</sup> Neither Delaware’s statute nor New York’s proposed legislation specifically sets an age requirement for an intended parent or parents or require joint consultation with their surrogate.<sup>180</sup>

Requirements of the District of Columbia’s surrogacy agreement include that the agreement be in writing, be executed before the surrogate is impregnated, include affirmations by the surrogate and the surrogate’s spouse or domestic partner,<sup>181</sup> and include affirmations by the intended parent or parents.<sup>182</sup> The agreement must also

<sup>179</sup> D.C. CODE § 16-405 (2018).

<sup>180</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); Assemb. 6959, 240th Reg. Sess. (N.Y. 2017).

<sup>181</sup> D.C. CODE § 16-406(a)(4) (2018).

(4) Include an affirmation by the surrogate and the surrogate’s spouse or domestic partner, if any, that that surrogate and the surrogate’s spouse or domestic partner:

(A) Acknowledge and agree that the surrogate and the surrogate’s spouse or domestic partner are not and shall not be the parents of the child;

(B) Agree to surrender physical custody of the child to the intended parent or parents immediately after the child’s birth;

(C) Agree that at all times during the pregnancy and until delivery, regardless of whether the court has issued an order of parentage, the surrogate shall maintain control and decision-making authority over the surrogate’s body;

(D) Agree to cooperate in any necessary legal proceedings to recognize the intended parent or parents as the legal parent or parents or any other proceeding related to the surrogacy agreement; and

(E) Agree to all other terms, consistent with this chapter and as negotiated and agreed upon by the surrogate, the surrogate’s spouse or domestic partner, and the intended parent or parents . . .

*Id.*

<sup>182</sup> § 16-406(a)(5).

(5) Include an affirmation by the intended parent or parents that the parent or parents shall:

(A) Accept physical custody of the child immediately after the child’s birth, regardless of the child’s gender or mental or physical condition or the number of children; and

(B) Assume sole responsibility for the support of the child immediately after the child’s birth, including paying for any funeral expenses if a stillbirth, preterm birth, or any other birth issue occurs that results in the child’s death.

*Id.*

“[a]llocate responsibility for the assumption of costs in the event of termination of the pregnancy, termination of the contract, or breach of the contract by any party. . . .”<sup>183</sup> Further, the parties to these agreements are prohibited from placing limitations on the rights of surrogates to make decisions that safeguard their health or the health of the embryo or fetus.<sup>184</sup>

The District of Columbia’s statutes also address issues of parentage in both gestational and traditional surrogacy.<sup>185</sup> In cases of gestational surrogacy, the children born are considered the children of the intended parent or parents, regardless of a genetic relationship between the parties.<sup>186</sup> This section also clarifies that a gamete or embryo donor and the spouse or domestic partner who is not an intended parent are not the parents and will not have any rights with respect to the child.<sup>187</sup> These same rules of parentage apply to cases of traditional surrogacy.<sup>188</sup> The intended parent or parents, not the traditional surrogate, are considered the parents of the child and have all responsibilities with respect to that child.<sup>189</sup>

#### IV. CHANGES TO NEW YORK’S CURRENT AND PROPOSED LEGISLATION

There are significant differences among New York’s current surrogacy laws, its proposed legislation, and the surrogacy laws and statutes in other states.<sup>190</sup> Acknowledging how California, Delaware, and the District of Columbia view surrogacy is necessary to understand

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<sup>183</sup> § 16-406(7).

<sup>184</sup> § 16-406(c).

<sup>185</sup> § 16-407.

<sup>186</sup> § 16-407(a)(2)-(3).

(2) The child shall have all rights, powers, privileges, immunities, duties, and obligations existing under law between apparent and child with the intended parent or parents, including the rights of inheritance.

(3) A gestational surrogate and the gestational surrogate’s spouse or domestic partner, if any, shall not be the parent or parents of the child, and shall not have rights, powers, privileges, immunities, duties, or obligations with respect to the child. . . .

*Id.*

<sup>187</sup> § 16-407.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> For the purpose of this section, the main focus will be on the requirements for surrogates, intended parent or parents and the surrogacy agreement.

the steps New York must take in adopting surrogacy legislation to protect those individuals who wish to enter into surrogacy contracts.

The existing ban on surrogacy in New York is a major impediment for couples dealing with infertility as well as same sex couples who are seeking to have biological children. As the law stands now, these individuals are forced to pursue out-of-state help to find and use a surrogate. Generally, these are couples who have already faced countless hardships trying to conceive their own child without success, or male same-sex couples whose only hope to have their own biological children would be through a surrogate.<sup>191</sup> New York's current ban creates an additional hurdle that these individuals face in starting a family.

For those in New York seeking to find a surrogate, the current law forces them to use out-of-state surrogates.<sup>192</sup> Because the surrogate will have to live out-of-state, the intended parent or parents do not have the ability to meet with their surrogate throughout all stages of the pregnancy. Generally, when intended parents are expecting a child through gestational surrogacy, they have the opportunity to create a strong bond with the child over the nine-month journey.<sup>193</sup> New York's penalty statute makes it extremely difficult for individuals wishing to use a surrogate to participate in any of these experiences.

Unlike New York, states that allow surrogacy give an intended parent or parents other ways to start the bonding process with their child. Proximity to the surrogate facilitates their involvement in the pregnancy without constantly traveling out of state. The intended parent or parents who live near their surrogate can have bonding experiences, such as attending their surrogate's doctors' appointments,<sup>194</sup> and more meaningful communication.<sup>195</sup> Intended parent or parents who are close to their surrogate may also gain a sense

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<sup>191</sup> *Six Reasons to Use a Surrogate Mother*, CONCEIVEABILITIES (Feb. 12, 2017), <https://www.conceiveabilities.com/about/blog/reasons-why-couples-use-surrogates>.

<sup>192</sup> *Thinking About an Out-of-State Surrogacy Relationship? Here are a Few Things to Consider.*, SURROGATE SOLUTIONS, <http://surrogatesolutions.net/out-of-state-surrogacy/> (last visited Sept. 27, 2018).

<sup>193</sup> *Intended Parents: How to Emotionally Transfer a Baby Born via Surrogacy*, SURROGATE.COM, <https://surrogate.com/intended-parents/raising-a-child-born-from-surrogacy/how-to-emotionally-transfer-a-baby-born-via-surrogacy/> (last visited Sept. 27, 2018).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

of comfort by knowing they are nearby in case of emergency. Having a surrogate located out of state makes it more challenging if unexpected complications, such as preterm labor, occur.<sup>196</sup>

New York State should repeal its current statutes on surrogacy law that place penalties on those seeking to use surrogacy. Instead, New York should adopt the proposed legislation that brings its surrogacy laws further in line with Delaware, California and the District of Columbia that accept and recognize surrogacy as a viable pregnancy option. New York has been proactive in protecting the rights of same sex couples as seen through the acceptance of same sex marriage in 2011.<sup>197</sup> Now New York, a state that was once ahead of all others in expanding rights of homosexual individuals, has fallen behind in protecting the rights of same sex couples by failing to abandon the current surrogacy laws and adopt new legislation in their place.<sup>198</sup> At the very least, even if New York does not want to accept an extensive surrogacy law, it should abandon the current laws and become a surrogate friendly state like California.

#### A. Surrogate Friendly

To begin the process of creating laws for valid and enforceable surrogacy contracts, New York should first abolish the current surrogacy statutes. Once New York invalidates the current, penalizing laws, it should follow California's lead by becoming a surrogate friendly state before slowly adopting surrogacy legislation. As of now, New York is one of the few states that actually penalizes individuals for entering into or helping with the creation of surrogacy agreements.<sup>199</sup> Even if New York does not wish to adopt legislation regarding surrogacy, it should repeal its penalizing statute. Acceptance of surrogacy, like California does, would be a step in the right direction.

With the recent acceptance of same-sex marriages, it is inevitable that those couples will soon seek to expand their families. As acceptance grows, the need for surrogacy will become more

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<sup>196</sup> *Thinking About an Out-of-State Surrogacy Relationship?*, *supra* note 192.

<sup>197</sup> *State-by-State History of Banning and Legalizing Gay Marriage, 1994-2015*, PROCON.ORG, <https://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated Feb. 16, 2016).

<sup>198</sup> *Id.*

<sup>199</sup> *Surrogacy Laws*, *supra* note 8.

prevalent. It is only a matter of time before other states start enacting valid surrogacy statutes. Therefore, New York should repeal the current law and focus on implementing legislation that will legalize surrogacy agreements.

### **B. Living Child**

After invalidating its current surrogacy laws and accepting surrogacy contracts as valid, New York should amend its proposed surrogacy legislation to incorporate requirements from Delaware and the District of Columbia's surrogacy statutes. By amending New York's proposed legislation to incorporate key features of Delaware and the District of Columbia's statutes, New York would ensure the most effective surrogacy process available.

The first requirement New York should include in its proposed legislation deals with requirements surrogates must satisfy. New York should adopt the District of Columbia's requirement that a surrogate must have carried and given birth to at least one live child of her own. Both Delaware and the District of Columbia incorporated the requirement of a prior pregnancy in their statutes,<sup>200</sup> but the District of Columbia took this a step further when it required a live birth.<sup>201</sup> Currently, New York's proposed legislation does not include this requirement.

The addition of this requirement is critical to the success of New York's proposed legislation. It is important that the surrogate gave birth in the past, but essential to add that the birth resulted in a living child. A woman wishing to become a surrogate must understand what it is like to be pregnant and go through that experience. Pregnancy is not an easy task. A woman experiences a great deal of changes during this time, including physical, emotional, and hormonal transformations.<sup>202</sup> Mood disorders such as postpartum stress and postpartum depression are not uncommon outcomes after giving birth.<sup>203</sup> Those women seeking to become surrogates must understand that these are real outcomes after birth. They must also appreciate the

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<sup>200</sup> DEL. CODE ANN. tit. 13, § 8-806 (West 2018); D.C. CODE § 16-407 (2018).

<sup>201</sup> D.C. CODE § 16-407 (2018).

<sup>202</sup> UnityPoint Health, *You're Not Alone: The Emotional Struggles of Pregnancy*, LIVEWELL (Sept. 5, 2016), <https://www.unitypoint.org/livewell/article.aspx?id=356075b9-469b-40c8-b3b9-2e90c623faf7>.

<sup>203</sup> *Id.*

large responsibility accompanied by surrogacy. The life and well-being of another person's unborn child is in their hands. A surrogate who had a successful pregnancy in the past will understand the emotional and physical attachment involved with the process.

More importantly, New York must include the District of Columbia's requirement that the surrogate has given birth to a live child. Women who experience a miscarriage or stillbirth have a higher risk of experiencing postpartum depression.<sup>204</sup> Understandably so, women who experience such a loss would likely find it more challenging to give up a child to another family after giving birth.<sup>205</sup> Having left the hospital in the past without their child would make it more heartbreaking to leave the hospital again without a child. To avoid conflicts that could potentially arise from this situation, it is important to include the requirement that the past pregnancy resulted in a live child.

Without this addition, there is the risk that a woman will become a surrogate without fully understanding all aspects of pregnancy. Not having full knowledge of the emotional and physical challenges that will inevitably occur during the pregnancy increases the risk that the surrogate will struggle when she has to part with the child. Further, requiring the surrogate to have given birth to a living child will reduce the likelihood that the surrogate will want to keep the child or that the surrogate will be emotionally traumatized by another pregnancy resulting in her not bringing home a baby from the hospital. Therefore, it is in New York's best interest to adopt the requirement that a surrogate must have carried and given birth to at least one live child of her own.

### C. Joint Counseling

The second major amendment that New York legislators should make to the proposed surrogacy legislation is the requirement for joint counseling between the surrogate and the intended parent or

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<sup>204</sup> Katherine Stone, *Postpartum Depression After Miscarriage or Stillbirth*, POSTPARTUM PROGRESS, <http://www.postpartumprogress.com/postpartum-depression-after-miscarriage-or-stillbirth> (last visited Sept. 27, 2018).

<sup>205</sup> In *Johnson v. Calvert* the surrogate Anna suffered multiple stillbirths and miscarriages. 851 P.2d 776 (Cal. 1993). Once she successfully became pregnant as a surrogate, she wished to keep the child and entered into litigation with the intended parents. *Id.* at 778. This case exemplifies the difficulties a surrogate will potentially face if she did not have a successful pregnancy in the past.

parents. The District of Columbia requires that the surrogate and intended parent or parents complete joint counseling with a health care professional to review the agreement and the potential problems that may arise.<sup>206</sup> This amendment to New York's proposed legislation is crucial. It is not enough to require only the surrogate to go through counseling, or to require the surrogate and intended parent or parents to seek independent legal counsel. That is not to say that those requirements are not significant. However, there should be the additional requirement mandating both the parents and surrogate to discuss expectations and potential problems together in counseling.

Having both parties sit through joint counseling with a health care professional is extremely beneficial. First, by sitting down together, the surrogate and intended parent or parents start the initial bonding phase, thereby fostering their relationship. It is helpful to the relationship between the intended parent or parents and the surrogate to have as many face-to-face meetings before the actual pregnancy takes place. These meetings ensure that both parties become familiar with one another and are given the opportunity to build a more trusting relationship. Entering into these types of agreements with little knowledge of who the surrogate is, or the surrogate not knowing much about the intended parent or parents, makes the process more challenging for both parties to fully comprehend the situation. It is comforting for the intended parent or parents to get to know their surrogate, so they can be assured that she is taking care of their child in the best way possible. Further, it is beneficial for the surrogate to communicate with the intended parent or parents because she can get to know the people that she is helping. Forming these bonds between the surrogate and intended parent or parents limits the risk of litigation in the future because both parties better understand the person they are dealing with. Additionally, meeting with one another permits the parties to determine whether they wish to enter into this surrogacy contract.

A joint meeting also ensures that both parties obtain the same information about their expectations of the future and the possible risks. The surrogate and intended parent or parents will hear potential risks from their independent counsel, but this meeting guarantees that everyone is fully informed of the relevant problems. In addition, during these meetings the surrogate and intended parent or parents can

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<sup>206</sup> D.C. CODE § 16-405 (2018).

express their concerns to each other. Expressing these concerns in the presence of a health care professional is beneficial because both parties can then work together to ease their minds about these problems or work together on a plan in case something goes wrong.

As it is currently written, New York's proposed legislation does not put in place detailed criteria for intended parent or parents. New York should add a requirement for joint legal counseling between the surrogate and intended parent or parents because it would help prevent litigation between surrogates and intended parents.

## V. CONSTITUTIONAL ARGUMENT

Critics of surrogacy argue that gestational surrogacy violates the Thirteenth Amendment of the United States Constitution.<sup>207</sup> The Thirteenth Amendment abolished slavery and protects against involuntary servitude.<sup>208</sup> In *Johnson v. Calvert*, the Supreme Court of California addressed the issue of surrogacy with regard to the Thirteenth Amendment.<sup>209</sup>

As previously discussed, Anna was the surrogate for Mark and Crispina and later did not want to give up the child.<sup>210</sup> One argument raised by Anna's counsel was that gestational surrogacy was a violation of involuntary servitude, which is prohibited under the Thirteenth Amendment.<sup>211</sup> The court quickly determined that no such violation took place when the couple entered into their gestational surrogacy agreement.<sup>212</sup> In this case, as is the scenario in other gestational surrogacy agreements, there was a lack of coercion and duress.<sup>213</sup> Therefore, when the surrogate enters into a surrogacy agreement voluntarily, that is, without a showing of any force or duress, there is no constitutional violation.<sup>214</sup>

Additionally, Anna argued that, based on her status as the child's birth mother, she had a constitutionally protected liberty interest in a relationship with the child.<sup>215</sup> The court rejected this

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<sup>207</sup> *Johnson*, 851 P.2d at 784.

<sup>208</sup> U.S. CONST. amend. XIII.

<sup>209</sup> *Johnson*, 851 P.2d at 784.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Johnson*, 851 P.2d at 784.

<sup>215</sup> *Id.* at 786.

constitutional argument and did not believe that society had traditionally protected the right of the surrogate woman in this way.<sup>216</sup> This arrangement, a woman being impregnated and delivering a child that is not her own, is too recent to “claim the protection of tradition.”<sup>217</sup> Further, the court was concerned that recognizing some liberty interest between the surrogate and child would compromise the liberty interests of the natural parents.<sup>218</sup> Therefore, the court did not find this constitutional argument valid.<sup>219</sup>

## VI. CONCLUSION

Surrogacy agreements are continually growing in popularity among individuals in the United States who are seeking to start families in spite of various challenges. Now more than ever, states should adopt legislation that enforce surrogacy agreements and protect both the surrogate and intended parent or parents.

Many states have already enacted such statutes and have seen positive effects on those families wishing to gain a biological child. It is now time for New York to follow suit by abandoning its current, unnecessarily punitive statutes and adopt legislation to protect its citizens who long to expand their families. New York should amend its proposed legislation to include parts of Delaware’s and the District of Columbia’s surrogacy legislation in places where its legislation is lacking.

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Johnson*, 851 P.2d at 786.