

SURROGACY: THE PROCESS, THE LAW, AND THE CONTRACTS

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INTRODUCTION

Surrogacy is transformative. I wrote this article because surrogacy changed my life.[†] The purpose of this article is to help the professionals involved with surrogacy, the intended parents, surrogates, and egg donors, understand the legal risks involved in surrogacy and the contracts designed to minimize those risks.

Surrogacy arrangements take a village. A surrogacy arrangement starts with a surrogate, a woman who is willing to become pregnant and give birth to a child for someone who is unable to do so, or for whom pregnancy may be dangerous. The surrogate may carry a baby created with the egg and sperm of the intended parents or donors' eggs and sperm. Sometimes surrogates and donors are friends or relatives. Other times, surrogates and donors are found with the help of friends, family, professionals, doctors, clinics, agencies, or attorneys.

[†] I dedicate this article to the surrogate who worked with my partner and me, and to my family, including, most importantly, my children whom I would never have met without surrogacy. My partner and I recently became parents of two beautiful boys with the help of a wonderful woman who was our surrogate. We will be forever indebted to her. We navigated our way through the process with incredibly supportive professionals. As such, we know that surrogacy can help people achieve their dream of building a family. I hope that this article will encourage more people to embark on their own journey to building a family, and will also help the professionals involved in managing the process effectively achieve nothing short of miraculous results.

Surrogacy allows intended parents to build families by agreement. Surrogacy can be expensive and complicated, but with determination and guidance, the process can be understood and managed. Surrogacy is based on an array of carefully contemplated agreements. For every party that is involved in the surrogacy arrangement, there is typically an agreement between that party and the intended parent or parents.

Imagine a surrogacy arrangement involving a married couple. The wife is infertile and unable to carry a child to term. In this example, the husband and the wife are the intended parents. The intended parents enter into a surrogacy agreement with a surrogate to carry their baby.¹ They also enter into a donor agreement with an egg donor.² The egg is fertilized using the husband's sperm at a clinic that specializes in in vitro fertilization (IVF).³ There is also likely to be an IVF agreement between the intended parents and the IVF clinic.⁴ If the surrogate or donor is found with the help of an agency specializing in surrogacy, then there is also an agreement with the agency or agencies involved.⁵ If neither the surrogate nor the intended parents have insurance that covers surrogacy, then the intended parents may enter into an insurance agreement with an insurance company.⁶ That agreement will cover the medical expenses of the surrogate undertaken in connection with the pregnancy and delivery.⁷

All of these agreements should typically be entered into by the parties with the assistance of attorneys. Ironically, that implicates yet another agreement, an attorney's agreement.⁸ The laws of each state and the fact that some states may not enforce a surrogacy arrangement also influence the surrogacy arrangements. Surrogacy agreements are not enforceable in every state in the United States, and they are even

1. Teo Martinez, *Surrogacy & The Surrogacy Process*, GROWING GENERATIONS (Dec. 4, 2014), <http://www.growinggenerations.com/surrogacy-resources-for-intended-parents/surrogacy-and-the-surrogacy-process/>.

2. *Id.*

3. *Id.*

4. Teo Martinez, *So You're Thinking About Becoming a Surrogate: Legal Contracts*, GROWING GENERATIONS (Aug. 26, 2014), <http://www.growinggenerations.com/resources-for-surrogates/so-youre-thinking-of-becoming-a-surrogate-legal-contracts/>.

5. Martinez, *supra* note 1.

6. *Id.*

7. *Id.*

8. *See id.*

illegal in a few states, including New York and Michigan.⁹ It is crucial that the parties seeking a surrogacy arrangement make sure that they do so in a jurisdiction that enforces such arrangements, or, at a minimum, engage in a surrogacy arrangement with a clear understanding of the risk that their arrangement may not be enforceable. Attorneys can help the parties assess their risks.

Surrogacy arrangements are becoming more common. They have made parents out of people who thought that parenthood may never be possible. While it is difficult to track the number of families who are working with surrogates, the Council for Responsible Genetics concluded that there were 1,400 babies born from surrogates in 2008.¹⁰ That number was nearly double the number from just four years earlier.¹¹ With surrogacy becoming more acceptable and more common, it is likely that the number of surrogate births is growing faster.¹² One agency reports that the overall number of births from surrogacy in America reached 35,000 in 2011.¹³ The *New York Times* reported that there would be 2,000 babies born to surrogates in the United States in 2014 alone.¹⁴

The United States Center for Disease Control and Prevention (CDC) tracks the number of births that result from assisted reproductive technology (ART).¹⁵ In 2011 alone, the last year for which data is available, there were 47,818 live births resulting from ART reported in the United States.¹⁶ Moreover, because the CDC derives its numbers only from reporting clinics, the CDC's number underestimates how many actual live births there were resulting from

9. See MICH. COMP. LAWS § 722.855 (2014); N.Y. DOM. REL. LAW § 122 (Consol. 2015).

10. Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 4 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>.

11. *Id.*

12. Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. (Mar. 1, 2011, 11:40 AM), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/.

13. *Exciting Statistics on Surrogacy*, BUILDING FAMILIES, INC. (May 14, 2012), <http://www.buildingfamiliesinc.com/en/2012/05/exciting-statistics-on-surrogacy/>.

14. Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, at A1.

15. *2011 Assisted Reproductive Technology Fertility Clinic Success Rate*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/ART2011/index.htm> (last updated Nov. 27, 2013).

16. *Id.*

ART.¹⁷

Part I of this article begins with a general overview of a surrogacy arrangement. Part II explains how to navigate the legal risks presented by the laws on surrogacy in each of the fifty states. Part III discusses how to structure a relationship between intended parents and a surrogate through a surrogacy agreement, and provides sample language and contracting advice. Part IV explains how to structure an arrangement between the intended parents and an egg donor.

PART I: THE BASICS

This part discusses the types of surrogacy, the process, and gives estimates of the associated costs. It starts, however, by telling the story of a famous surrogacy arrangement from the 1980s that ended up in the courts when the surrogate decided she wanted to keep the baby. That story is known as the case of *Baby M*. Understanding that story is a starting point to an understanding of how to structure a surrogacy arrangement so that it minimizes the risks of failure.

A. *The Classic Surrogacy Case Study: Baby M*

The famous case of *Baby M* made the world take notice of surrogacy. The case is instructive even today as it illustrates both the nature of the arrangement between the intended parents and the surrogate, and also some of the inherent risks involved with surrogacy. Surrogacy was quite novel thirty years ago. Indeed, the court considering the case referred to surrogacy as “a new way of bringing children into a family.”¹⁸ Despite the novelty of the arrangement, the intended parents and the surrogate were connected through a surrogacy agency.¹⁹

In the *Baby M* case, a married couple that could not have their own biological children sought the help of a surrogate.²⁰ The couple, William and Elizabeth Stern, met while they were each earning their Ph.D. degrees at the University of Michigan.²¹ Later, Mrs. Stern went on to pursue a medical degree and a medical residency.²² The Sterns

17. *Id.*

18. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

19. *Id.* at 1235.

20. *Id.*

21. *Id.*

22. *Id.*

put off having children.²³ When the couple decided to pursue a family, Mrs. Stern learned that she might have multiple sclerosis.²⁴ As a result, Mrs. Stern did not dare to have children naturally due to the associated risks.²⁵ While both Mr. and Mrs. Stern wanted to have children, Mr. Stern had an additional motivation to become a father.²⁶ Mr. Stern's family had been destroyed in the Holocaust, and he fervently wanted to continue his family line.²⁷

Mary Beth Whitehead agreed to be the surrogate mother for the Sterns.²⁸ Mrs. Whitehead was married at the time and already had her own children.²⁹ She decided to be a surrogate even before meeting the Sterns and had unsuccessfully worked with another couple previously.³⁰ The court deciding the case explained that Mrs. Whitehead had become a surrogate because of her sympathy for couples who could not have a child, her desire to give the gift of life, and her interest in supplementing her own family's income with the amount that she would earn as compensation.³¹ Mrs. Whitehead charged \$10,000.³² The agency's fee was \$7,500.³³

Both parties signed a contract outlining all of their rights and responsibilities, including Mrs. Whitehead's compensation and the requirement that she give custody of the child to the Sterns immediately after the child's birth.³⁴

After the baby was born, the Sterns named the child Melissa.³⁵ Unfortunately for the Sterns, Mrs. Whitehead decided to keep the child after it was born.³⁶ After the Sterns brought suit against Mrs. Whitehead to enforce the surrogacy contract and to obtain custody of Melissa, the court entered an order for a hearing. But while the process server was serving the Whiteheads with the court order, the Whiteheads smuggled the child out a back window and ran off with

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1237.

30. *Id.* at 1236.

31. *Id.*

32. *Id.* at 1235.

33. *Id.*

34. *Id.*

35. *Id.* at 1236.

36. *Id.*

her to Florida.³⁷

The Whiteheads remained in Florida for several months, living with relatives and in motels.³⁸ During that time, Mrs. Whitehead periodically contacted Mr. Stern to try to get him to agree to let Mrs. Whitehead have custody of the child.³⁹ Throughout those conversations Mrs. Whitehead expressed desperation, threatening to kill herself and the child.⁴⁰ Finally, with the help of the authorities, the child was apprehended in Florida and the Sterns regained custody in New Jersey.⁴¹

New Jersey had jurisdiction of the matter because all of the parties lived in New Jersey at the time of the surrogacy arrangement and because Melissa was born there. The superior court ruled in favor of the Sterns and enforced the surrogacy agreement. Mrs. Whitehead appealed and the Supreme Court of New Jersey refused to enforce the surrogacy agreement. The Supreme Court of New Jersey ruled that surrogacy contracts are void in New Jersey because public policy forbids them.⁴² In addition, the court opined that such arrangements may be “degrading to women,”⁴³ hinting that surrogacy commodifies women by turning them into vessels that can be bought and sold.⁴⁴

The court discussed the adoption statutes in New Jersey and found that those statutes allowed the woman who gave birth to a child an opportunity after birth to change her mind about whether or not to give the child up for adoption.⁴⁵ The court reasoned that since the adoption laws provided this choice after the birth of the child, a

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1246–50.

43. *Id.* at 1234.

44. Opponents of surrogacy argue that the choice to become a surrogate isn't a choice at all. Opponents point out that many women of lower economic standing may feel coerced into becoming a surrogate for economic reasons and argue that by becoming a surrogate mother, the woman reduces herself to a marketable product. This debate takes on more focus in India where many women live in stark poverty and being a surrogate can mean earning two thousand times more than the next best paying alternative. Advocates for surrogacy argue that being a surrogate is a wonderful and economically empowering option for these women. *See, e.g.,* Kevin Voigt, Mallika Kapur, and Lonzo Cook, *Wombs for Rent: India's Surrogate Mother Boomtown*, CNN (Nov. 3, 2013, 8:00 PM), <http://www.cnn.com/2013/11/03/world/asia/india-surrogate-mother-industry/>.

45. *In re Baby M*, 537 A.2d at 1242.

surrogacy agreement should not be allowed to take away the mother's right to decide after birth to keep the child.⁴⁶ To rule otherwise, the court wrote, would be to condone a market for the sale of babies.⁴⁷ The court stated: "The evils inherent in baby-bartering are loathsome for a myriad of reasons. Baby-selling potentially results in the exploitation of all the parties involved."⁴⁸

This result for the Sterns started a custody battle with the Whiteheads. In this case, Mrs. Whitehead was a traditional surrogate, meaning that the Sterns had used Mr. Stern's sperm to fertilize Mrs. Whitehead's egg. This meant that Mrs. Whitehead was not only a gestational carrier, but also the biological mother of the child. Thus, with the surrogacy contract voided by the court, both the biological father (Mr. Stern) and the biological mother (Mrs. Whitehead) had a claim for custody of the child.⁴⁹ In the end, the Sterns won custody of the child.

The *Baby M* Case

The Baby M case from the 1980s is a great example of an early surrogacy arrangement that went bad. The surrogate, who was also the biological mother, decided she wanted to keep the baby she carried for the intended parents, despite having clearly understood and agreed that she would give them custody after birth.

Moreover, the court in New Jersey announced that such arrangements were against the public policy of their state and refused to enforce the surrogacy agreement. Nonetheless, in the end, based on a traditional analysis of what was in the best interests of the child, custody was given to the intended parents.

The case illustrates the risks associated with surrogacy. Today intended parents minimize those risks by:

1. proceeding in a state, or at a minimum under the governing law of a state, where surrogacy agreements are legal and enforceable;

46. *Id.* at 1240.

47. *Id.* at 1242.

48. *Id.* at 1241.

49. *Id.* at 1251.

2. *using an egg donor who is not the surrogate and thereby ensuring that the surrogate does not have the rights of a biological parent;*
3. *making sure that the surrogate has both legal and psychological counseling before proceeding with the arrangement; and*
4. *using a surrogate who has already had her own child or children and so understands the emotional connection created with the baby through a pregnancy.*

In the United States, as the *Baby M* case demonstrates, surrogacy has been left to each of the states to allow, regulate, or forbid. As a result, surrogacy is treated differently from one state to the next. Some states allow surrogacy and regulate it. Still, there are a few jurisdictions (New York, Michigan, and Washington, D.C.) where surrogacy arrangements are illegal.⁵⁰ Moreover, even if surrogacy is not illegal, some states, like New Jersey, continue to refuse to enforce surrogacy contracts.⁵¹ Nevertheless, even if intended parents live in a state with restrictive surrogacy laws, there are ways to proceed. One easy way to do this is for the intended parents to work with a surrogate who lives in a state where surrogacy agreements are enforced and for the parties to agree to be bound by the laws of that state. Illinois is a good example of a state that has a modern surrogacy statute that is designed to regulate the practice and protect the interest of all the parties.

State law is one major risk that must be managed. A second risk present in the *Baby M* case was the fact that the surrogate was actually the biological mother of Baby M. This connection likely strengthened her emotional tie to the baby, making it harder for her to part with the baby after birth. Moreover, it also gave the court a strong factor to consider in granting ultimate custody to the surrogate instead of the intended parents. If the parties had used an egg donor, instead of the eggs of the surrogate, then that may have prevented some of the bonding between the surrogate and the baby. It also would have eliminated the biological connection that a court may use

50. See D.C. CODE §16-401-02 (1997); MICH. COMP. LAWS § 722.857 (2014); N.Y. DOM. REL. LAW § 122 (Consol. 2015).

51. See discussion *supra* Part II.A.

to grant custody or other parental rights to the surrogate.⁵²

B. Gestational Surrogacy is now Preferred over Traditional Surrogacy.

This section describes the differences between traditional surrogacy and gestational surrogacy, and explains why gestational surrogacy is now the recommended approach for most intended parents. In addition, this section describes some of the medical procedures used in the surrogacy arrangements, specifically artificial insemination (AI) and IVF.

Surrogacy refers to an arrangement where a woman, the surrogate mother, carries a baby for an intended parent or parents. There are two basic types of surrogacy arrangements: traditional surrogacy and gestational surrogacy.

1. Traditional Surrogacy

In a traditional surrogacy arrangement the surrogate provides her egg and the intended parents provide the sperm of either the intended father or a sperm donor. The surrogate in this process is referred to as a traditional surrogate. Since the surrogate's egg is used, the surrogate is actually biologically related to the baby that will be born. This was the situation in the *Baby M* case.

With a traditional surrogacy, the intended parents usually choose to proceed by having the egg fertilized through AI, although a couple may also choose IVF. Both AI and IVF are considered forms of ART. With AI, the intended father's sperm is inserted into the surrogate in an attempt to obtain a pregnancy. With IVF, the ovaries of an egg donor (in a traditional surrogacy setting the egg donor is the surrogate) are hyperstimulated to produce multiple eggs. Doctors then remove those eggs from her body and fertilize them with the intended father's sperm. After fertilization, the doctors transfer one to three of the embryos into the surrogate in the hopes of obtaining a pregnancy. The remaining viable embryos can be frozen for use in

52. See *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (enforcing a gestational surrogacy agreement). The Supreme Court of California found support for its conclusion in *Calvert* in Majorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 298, 309, 323 (1990). The court quoted Professor Shultz: "Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."

the future, donated to another person or couple, donated to medical research, or destroyed.

2. Gestational Surrogacy

Traditional surrogacy, however, is now discouraged by experts. The *Baby M* case illustrates why. If for some reason the surrogate decides not to honor her commitment to give the baby to the intended parents after birth, then a legal battle can begin. This situation is, of course, one of the greatest fears of intended parents. The intended parents can minimize this risk by finding the right surrogate and having all of the parties attend counseling before the process begins. Ultimately, though, while this result is unlikely, it is always a possibility. Hopefully, in the event a surrogate attempts to maintain custody of any child born, the surrogacy contract will be upheld by the relevant court, and custody will go to the intended parents. However, if the agreement is not honored for whatever reason, then a typical custody battle will ensue. In that case, the lack of a biological connection between the surrogate and the child strengthens the intended parents' claim to custody. This is especially true where one or both of the intended parents are biologically connected to the child. In sum, the risk of losing custody to a traditional surrogate, while small, is real.

Because traditional surrogacy involves this risk, experts now recommend gestational surrogacy. In a gestational surrogacy arrangement, the surrogate does not provide the egg. The egg is provided by either the intended mother or a third-party egg donor. In this scenario the surrogate is known as the gestational surrogate. A third-party egg donor may be anonymous. Third-party egg donors can also be found with the help of an agency or a doctor's office, or the egg donor may be the intended parents' relative or friend. Intended parents sometimes seek out egg donors who are related to them in order to keep a biological link to the child.

In some ways, proceeding with a gestational surrogacy, as opposed to a traditional surrogacy, complicates matters. If, for example, the intended mother cannot contribute her own eggs, then the intended parents will need to work with another egg donor. That means finding the right egg donor, perhaps working with an agency or doctor's office to do that, and reaching an agreement with the egg donor. However, the risk of losing custody to a traditional surrogate, regardless of how remote, is a risk that most people prefer not to take.

Gestational & Traditional Surrogacy

Gestational surrogacy is now recommended over traditional surrogacy.

Traditional surrogacy involves a surrogate who is using her own eggs in the process. Thus she is also the biological mother of the resulting child or children.

In gestational surrogacy, the intended mother or a third party egg donor provides the eggs, which are fertilized and then transferred to the surrogate. Thus the surrogate is the gestational carrier and not the biological mother.

The difference is helpful for two main reasons:

- 1. The surrogate is less likely to bond as strongly with the baby or babies she carries; and*
- 2. If a relevant court did not uphold the surrogacy agreement and a traditional custody battle ensued, the surrogate would have a much weaker claim to parental rights since she is not the biological mother.*

C. The Process and the Players

The entire surrogacy arrangement begins with the intended parent or parents. However, surrogacy involves a wide array of professionals and others who help the intended parents achieve their dream. There are potentially contracts between the intended parents and the surrogate, an egg donor, a fertility clinic, a surrogacy agency, an obstetrician, an insurance provider, and attorneys representing some or all of the parties. To think of a surrogacy arrangement, it helps to imagine a bicycle wheel with a central hub and spokes emanating from that center. The intended parents are the hub and their contracts follow the spokes to the circle of other participants in the surrogacy arrangement.

1. The Process

The basic process starts with choosing all the right people to work with. If the intended parents proceed with a gestational

surrogacy arrangement, then they will need to choose the egg donor who will be the biological mother of their child. They will also need to choose a fertility clinic to perform the egg retrieval, the IVF procedure, and the transfer of the embryos to the surrogate. Assuming that the surrogate becomes pregnant, the intended parents will need to find an obstetrician to monitor the pregnancy and deliver the baby. The intended parents will also need to find an attorney to work through the contracts with the surrogate and the egg donor. They will also need to decide how to find the right egg donor and surrogate. This can be done by using an agency, referrals, professionals at a fertility clinic, or the intended parents' attorney. Finally, there is the issue of insurance. If the intended parents' medical insurance does not cover the expenses related to a surrogate carrying their child, then they may need to consider purchasing a special insurance policy.

After the intended parents identify the participants for the surrogacy arrangement, they will have to reach agreements with each of the participants about everyone's expected role in the process and their rights and responsibilities. The process of working through those agreements can occur quickly if there are no disagreements about the parameters of the arrangements, or it can take months before everyone finally agrees to all the terms of their particular role.

Once the agreements have been finalized and executed, the medical procedures begin. If there is an egg donor, she will go through the process of donating her eggs, a process which includes hyperstimulating her ovaries to produce an abundance of eggs, sometimes as many as twenty, but more typically ten or twelve. At the same time, the intended father will provide his sperm. If the intended parents are two men (more and more common), they will need to choose whose sperm to use, or tell the clinic to mix the sperm and let fate decide who will be the biological father. When the egg donor is ready, the eggs are retrieved and are then fertilized with the intended father's sperm, creating embryos.

In order for the surrogate to be ready to receive the embryos, she will be taking a variety of medication to stop her own production of eggs and simultaneously thicken her uterine wall so that it is ready for the embryos to be implanted. In order for the surrogate to receive fresh (as opposed to frozen and then thawed) embryos, her body has to be put on the same cycle as the egg donor. Alternatively, the embryos can be frozen and then thawed and transferred whenever the surrogate's body is ready to receive them. Clinics will typically

attempt a fresh transfer to avoid any potential harm that freezing can do to an embryo.

Different clinics transfer embryos at different stages in their development, but generally the embryos are transferred to the surrogate between three and five days after they are fertilized. If the embryos are to be frozen, the embryos are normally frozen immediately after successful fertilization and then allowed to develop after thawing to the three or five day mark. There is some clinical debate about whether success rates are higher with a three-day transfer, which allows the newly fertilized eggs to develop in utero), or with a five-day transfer, which allows the transfer of the embryos that appear the most viable at day five).

There is also clinical debate about how many embryos to transfer to the surrogate. Since the general rate of pregnancy from IVF for any fertilized egg transferred averages less than fifty percent, many clinics will transfer two or three embryos to attempt to achieve a viable pregnancy and a successful live birth.⁵³ In the United States, it is very uncommon for a clinic to transfer more than three embryos into the surrogate. Some clinics with higher-than-average success rates will only transfer one fertilized egg.

The risk of using multiple eggs is having multiple babies, a high-risk situation for the surrogate and the babies that most doctors will try to avoid. Of course, the risk of transferring only one or two embryos is not getting pregnant at all and then having to repeat the process. For some doctors, the decision of how many embryos to transfer will depend on the quality of the particular embryos being used. Embryos are observed and graded based on how well they are growing and developing.

The decision of how many embryos to transfer also might depend on the results of a preimplantation genetic diagnostic (PGD) done on the embryos. A PGD is a relatively new genetic test that is now sometimes used to judge the quality and viability of the embryos. A high-quality embryo has a better chance of a successful pregnancy.

Of course, after the transfer of the embryos, the wait for a pregnancy begins. Even if an early pregnancy test confirms a

53. There are different ways to calculate success, but the most reliable is the rate of live births per IVF procedures performed. In the United States through 2009, that number has been under 50% and the number declines as the age of the woman attempting to get pregnant increases. See *Clinic Summary Report*, SOCIETY FOR ASSISTED REPROD. TECH., https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited July 1, 2015).

pregnancy, a fertility clinic is likely to continue to monitor the surrogate until about the eighth week. If the surrogate is still pregnant, then the surrogate will be referred to the obstetrician chosen by the intended parents and the surrogate. The pregnancy then proceeds as any normal pregnancy would.

If the IVF and embryo transfer does not result in a pregnancy, then some or all of the process must be repeated. If there were any viable embryos left over after the procedure, then they would likely have been frozen so that they can then be used in a subsequent transfer to the surrogate. If there were no viable embryos left over from the previous attempt, then another egg donation cycle will need to occur. Perhaps an entirely new donor will be chosen, depending on the observed quality of the eggs produced in the first cycle, and whether the initial egg donor is willing to go through another cycle.

Assuming a pregnancy is achieved and all goes well, then when the surrogate gives birth, the birth certificate will ultimately list the intended parents as the parents of the child. That process is done differently in different states. Some states require that the surrogate, as the birth mother, be listed on the birth certificate initially, together with the intended father. Florida is an example of such a state. In that state, a court must re-issue the birth certificate to eliminate the name of the surrogate and add the name of the other intended parent, or simply list one intended parent where there is not a second. In Illinois, the state with a model statute, the intended parents can be listed on the birth certificate immediately, provided that the requirements of the statute are met.

2. The Players

As mentioned above, surrogacy begins with and circles around the intended parents. In some cases, intended parents are unable to have biological children otherwise. In other cases, the intended parents might technically be able to have their own biological child, but are advised that the process would be risky, either due to age or another physical condition. In a growing number of cases, gay men are using surrogates to have biologically related children.⁵⁴ In rare cases, women opt to use a surrogate in order to avoid the challenges of pregnancy or disruptions to their careers.

As intended parents consider whether surrogacy is right for

54. See Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. Times, Feb. 20, 2014, at E1.

them, they should consider that the main benefit of surrogacy is the ability to have a biologically related child. But they should also consider that surrogacy has its drawbacks too. There is the risk of attempting to use IVF, an egg donor, and a surrogate, and simply never getting pregnant. IVF has no guarantees. Many people hoping to start a family have gone through repeated IVF treatments at great expense and never had a live birth result.

Even if the IVF process ultimately is successful, intended parents may have to go through several IVF cycles that are not successful. The intended parents need to be prepared for the emotional roller coaster that is associated with that process. Some intended parents manage to get pregnant and have their first child from the very first IVF cycle. Others have to undergo several cycles of IVF before being successful. Having to go through multiple cycles is far more costly and far more emotionally taxing.

a. Choosing Whether to Work with an Agency

Intended parents will need to choose whether or not to work with an agency in the first place. Agencies can be wonderful resources for helping intended parents connect with surrogates and egg donors. Agencies will also help explain the process to the intended parents and work through many of the details, including making referrals to attorneys or other professionals who routinely work with surrogacy arrangements. However, agencies involved in surrogacy are currently unregulated and, in fact, charge substantial fees for their services. So intended parents must do their homework. They should try to work with an agency that comes recommended by someone. The professionals at their fertility clinic might have a list of agencies that they have found to be effective. Even then, intended parents should make sure to meet with someone from the agency on a preliminary basis and find out how they structure what they do. Intended parents should ask about the qualifications of the people at the agency.

Agencies are typically expensive. An agency may charge intended parents as much as an egg donor earns for finding the egg donor and helping coordinate that process. They also may take almost as much as the surrogate herself for making that connection. Agencies can also be very strict about the way they proceed. An agency may demand that intended parents use an attorney to work through a specifically negotiated contract with the egg donor. Intended parents will be required to pay for the attorney or attorneys who will be chosen by the agency to represent the egg donor too. So,

the costs continue to climb.

By contrast, some IVF clinics provide a database of egg donors and, if so, may simply have a form agreement that both the intended parents and egg donor sign. IVF clinics tend not to charge as much for the service of matching an egg donor with intended parents. In contrast to egg donor agreements, which might conveniently come as a form agreement, surrogacy arrangements are more complicated.

Some agencies offer various types of plans that are similar to insurance. So, for example, at one agency, an intended parent can pay one price for one egg donor committing to donate one cycle of eggs. However, for a significantly higher price, the agency agrees to provide several cycles of donor eggs in the event that the intended parents are unsuccessful with the first or second cycles of donations. Intended parents should check with the agency they are exploring working with and find out about their payment and plan options.

While agencies can provide great resources and assistance throughout the surrogacy arrangement, they are expensive and not a necessity. As mentioned above, many fertility clinics provide databases of egg donors and matching services at a fraction of the agency price. Fertility clinics might also be able to recommend surrogates with whom they have worked in the past. Attorneys who work with surrogacy may well be able to connect intended parents to egg donors or surrogates for little or no fee. Networking with other people who are considering surrogacy or who have gone through a surrogacy arrangement for suggestions of people who might be interested in being surrogates or egg donors may also help.

And intended parents might begin by thinking about asking friends or relatives to be an egg donor or a surrogate. This is an intensely personal issue. Some intended parents are happy to have friends or family members be a part of their journey. A surrogate who is a friend or a relative will likely undertake that role out of love and compassion and not seek extraordinary compensation. This makes the process that much more affordable.

However, some intended parents do not want to have friends or family closely involved in the process. If intended parents do find their own egg donor or surrogate without the help of an agency or clinic, they should be sure to ask them all the difficult questions that an agency or clinic would ask. If the fit is not right for any reason, the intended parents should not be too embarrassed to say “thank you, but no.”

Choosing the right players to work with in a surrogacy arrangement can mitigate much of the risks associated with surrogacy, but those risks can never be eliminated.

b. The Surrogate

It's common for intended parents to describe their surrogate as their "angel." Indeed, surrogates help intended parents achieve their dream of having children. Surrogates are people who are willing to give up their time, their energy, and put their bodies at risk to help someone else become a parent. However, for the intended parent or parents, choosing the right surrogate is crucial. There is a risk that the surrogate might not be responsible before and during the pregnancy. Likewise, for anyone considering being a surrogate, make sure that undertaking all the related responsibilities makes sense. Best practices currently suggest that the intended parents and the surrogate meet with a psychological counselor to explore whether or not surrogacy makes sense for them.

If someone is considering being a surrogate, she should consider everything involved. The surrogate has to take a variety of medications in order to prepare her body to get pregnant. There will be a myriad of appointments with the IVF doctor and then the obstetrician, if the surrogate is successful in getting pregnant. The surrogate will go through approximately forty weeks of pregnancy with all its unexpected joys and discomforts. Ultimately, she will give the child or children born to the intended parents and will need to cope with any anxiety from parting with that child or those children, if there are multiples. Best practices now suggest that an ideal surrogate is someone who has had their own child or children previously. That way the surrogate will understand how her own body reacted to being pregnant. It is also less likely that a surrogate who is already a mother will want to keep the child or children born for the intended parent or parents.

There is also the scary possibility, as in the *Baby M* case, that the surrogate decides that she wants to keep the baby after the birth or, worse yet, runs off with the baby. To minimize this risk, the intended parents should make sure to proceed under a state law that enforces surrogacy arrangements, use an egg donor to make it easier for the surrogate to part with the child, provide the surrogate with counseling in advance, and, ideally, work with a surrogate who has had one or more children of her own already.

It is crucial to explore both the intended parents' and the surrogate's feelings about abortion. Do those feelings align? It is impossible to compel a surrogate to have an abortion. So, if there are circumstances when the intended parents would want to terminate a pregnancy, it is important that the surrogate is comfortable doing so. Conversely, if the intended parents would never want to terminate a pregnancy, it is important to be sure that the surrogate is comfortable with that.

Choosing the Right Surrogate & Choosing to be a Surrogate

If the intended parents are seeking a surrogate, asking the right questions up front can help find the right surrogate. Likewise, if someone is considering being a surrogate, she should review these questions to make sure the role is right.

- 1. Why do you want to be a surrogate?*
- 2. Have you been a surrogate before?*
- 3. Does your family know you want to do this, and are they supportive?*
- 4. Have you had your own children before?*
- 5. Do you have any physical conditions that might make carrying a baby dangerous to either you or the baby?*
- 6. Do you understand the emotional connection that can occur when a woman carries a baby to term, and are you confident that you can relinquish all parental rights at that point?*
- 7. Are you comfortable carrying twins or even triplets?*
- 8. What are your feelings about terminating a pregnancy?*
- 9. What sort of compensation are you seeking?*
- 10. Will this be your main source of income or is it simply supplemental?*

In addition to all the specific questions and issues involved, there is something intangible about the process of choosing the right surrogate. Intended parents really need to meet the person, discuss all of the aspects of a surrogacy arrangement, and feel comfortable trusting the person to carry their child in a healthy way and to relinquish all parental rights after birth. If it doesn't feel right, the intended parents should keep looking for another candidate.

Likewise, someone interested in being a surrogate, should feel entirely comfortable with her intended parents.⁵⁵ The intended parents and the surrogate should have the same set of expectations before getting involved together.

c. The Egg Donor.

Like surrogates, egg donors are also performing a miraculous deed by helping couples who couldn't otherwise have a child. As with surrogates, choosing the right egg donor is crucial and can also be a daunting process. Similarly, choosing to be an egg donor is a complex decision.

A potential egg donor should consider the effort involved in the process. The egg donor will need to take medication to hyperstimulate her ovaries and undergo a medical procedure to extract her eggs. The egg donor may need to travel to the clinic being used by the intended parents. While egg donors are usually anonymous, an intrepid child might indeed be able to track down his or her biological mother.

There are many agencies today, and some IVF clinics, that recruit egg donors and maintain egg-donor databases. Generally, donors are under thirty years old, with younger donors being considered to have more viable eggs. Each database will contain a profile on each egg donor that likely will include pictures; an outline of her physical characteristics; her and her family's medical history; and a variety of answers to questions about her physical attributes, her personality, her talents, and her accomplishments. The pictures displayed might include pictures of the donor as a child, any children the donor has had, and perhaps family members of the donor. Intended parents can access the profiles of those prospective egg

55. I know of one case where a surrogate confessed that her intended parents made her feel very uncomfortable throughout her pregnancy, micro-managing her life down to what she ate on a daily basis.

donors through those databases.

Still, picking the right egg donor is difficult and somewhat overwhelming. Intended parents have to decide what they are really looking for in a donor.

Choosing the Right Egg Donor

Why not choose a beautiful Ivy League graduate who was an athlete, an artist, and a musician?

What that question misses is that there is absolutely no guarantee that the child will have the physical, intellectual, musical, or athletic attributes expressed by their donor. Further, it is not at all clear, for example, that just because an egg donor did not go to college that a child from that donor wouldn't be extremely successful academically, given the right encouragement and support. Moreover, most intended parents simply want a healthy baby who they can love and raise to be the best person that child can be.

Given that intended parents want to have a successful process, it is perhaps even more important than physical characteristics or talents to consider whether the egg donor has actually donated before and whether that donation resulted in a successful live birth. Some agencies will cite statistics with egg donors and give success as measured in the ability to get a surrogate pregnant with the donor eggs. That is not the same as success measured by a live birth, which is what intended parents really want. Many IVF procedures result in a pregnancy that only lasts a few weeks or a few months. The intended parents should ask about the donor's track record for live births and consider using a known donor with a successful track record. Using a first time donor, in fact, involves a greater risk of not being successful.

Questions for Choosing the Right Egg Donor

The search for the right donor is intensely personal. The intended parents need to ask themselves what matters most to them, and consider these questions:

1. Has the donor been a successful donor previously, with donations resulting in a live birth?

2. *Does she have her own healthy children?*
3. *Are her and her family's medical histories acceptable or are there too many medical risks in her background?*
4. *What about her outward physical appearance is important to you? Ethnicity, height, weight, eye color?*
5. *What about demonstrated intelligence?*
6. *Does she have an aptitude for music?*
7. *Is she athletic?*
8. *Is she creative in some other way?*
9. *Is there something special that resonates with you in her responses? A love of certain types of books? Movies?*
10. *Did she have a particularly compelling reason for why she said she wants to be a donor?*

Also ask the agency or IVF clinic providing the donors how they verify the information supplied by the egg donor. It is, of course, possible for an egg donor to falsify information and, for example, report an excellent family medical history when in fact cancer and diabetes run in her family. The intended parents want an agency or clinic that is doing everything it can to fact-check the donors and verify that the information is accurate.

Some agencies and clinics will actually allow a video conference with the egg donor if the intended parents feel that it is important to see how the donor behaves. In that case, the intended parents likely will not be visible to the donor, but the donor will be visible to the intended parents. The intended parents should ask their agency or clinic if this is possible.

d. Choosing the Right Fertility Clinic

If surrogacy is permitted and enforced in the intended parents'

state, then they should start the process by contacting a few local fertility clinics. If the intended parents are proceeding in another state, then they should choose a few clinics in a city that is convenient for them in that state.

If there is only one intended parent, or if the intended parents are gay, then the intended parents need to make sure that the clinic will work with them. Surprisingly and tragically, some will not. Another consideration is whether the intended parents can work with the clinic remotely. A doctor's willingness to provide that service might be indicative of his or her overall support for the intended parents.

e. Choosing the Right Attorney

Attorneys who work in the surrogacy field can be a wonderful resource and an enormous help to intended parents. Because of the array of contracts involved, intended parents really do need to work with an attorney to make sure that the arrangement is legally binding and reflects the expectations of the parties to each contract. While most surrogacy arrangements will never end up being challenged in a court, the very process of getting the parties together to work through all of the aspects of their role in the process results in each party better understanding their role and what is expected of them. Without an experienced attorney to lead this process, many issues might go unaddressed in the early discussions and result in problems as the surrogacy proceeds.

D. The Cost

Surrogacy involves a number of people and complex contracts between the intended parents and those people. Accordingly, the entire process can be quite expensive. Agencies and other professionals, including attorneys are available to help, but those professionals need to charge for their services, driving the costs up even higher.

Sample Estimated Budget	
<i>Egg donor fee</i>	\$10,000
<i>Agency fee for matching with an egg donor</i>	\$10,000

<i>Surrogate fee and expenses</i>	\$30,000
<i>Agency fee for matching with a surrogate</i>	\$20,000
<i>Attorney fees</i>	\$10,000
<i>Counseling fees for intended parents and surrogate</i>	\$1,000
<i>Medical fees for each IVF procedure</i>	\$10,000
<i>Medical fees for retrieval of donor eggs</i>	\$5,000
<i>Medical fees for prenatal care and delivery</i>	\$20,000
<i>Total estimated costs</i>	\$116,000

These are rough estimates and actual costs will vary depending on the particular arrangements involved and the exact fees charged by the people with whom the intended parents work. Costs can run higher if more than one IVF procedure is required, which is often the case. The blow of that increased expense is sometimes mitigated by clinics that charge less for subsequent procedures if the first is unsuccessful. Egg donor fees typically cover one cycle of donation. Thus, if the IVF doesn't work with that donor's eggs (and there might be enough eggs to cover two or even three IVF cycles), costs will increase again if another egg donation would be necessary with another fee due.

Costs can also be considerably lower if the intended parents do not need to work through an agency, but instead are able to work through family and friends to find the appropriate egg donor and surrogate. Costs would also be significantly lower if the intended parents have a surrogate or egg donor who is a friend or relative who does not charge anything for their participation, except perhaps for out-of-pocket expenses. Additionally, the medical costs for all the medical procedures can be reduced if there is insurance to cover those expenses. Some intended parents might have insurance that would cover a certain number of IVF procedures. Some surrogates may also

have insurance that covers the prenatal care and the delivery. However, many insurance policies do not cover costs of prenatal care and delivery for surrogates. There are specialty insurance policies that intended parents can buy to cover the costs of the prenatal care and delivery for the surrogate. That insurance currently costs about the same as the care for a routine pregnancy and delivery, or is even slightly higher, but extraordinary expenses in case complications arise would be covered by that insurance too.

In sum, the range of costs can vary dramatically depending on the intended parents' situation. The outline of costs above is simply intended to give a rough idea of what intended parents might expect. The intended parents might find that they have additional costs. For example, if they live in a state that doesn't allow surrogacy, then they may need to add in travel expenses to travel to the state where the surrogate lives and will give birth. Likewise, depending on how they pick their egg donor, they may need to add in travel expenses for the egg donor to travel to wherever the surrogate lives to have her eggs retrieved there.

Surrogacy is complicated, and is very expensive by any measure. Surrogacy is only one option for people hoping to build or expand a family. There are other wonderful choices that intended parents should consider when thinking about starting or expanding their family.

PART II: MANAGING STATE SURROGACY LAWS

One of the primary risks involved in any surrogacy arrangement is navigating the legal environment. Surrogacy laws differ on a state-by-state basis. This may seem odd to nonlawyers, as the rights and privileges of a citizen of the United States concerning surrogacy are now, at least partly, contingent on where that citizen lives. While there are many federal laws that are uniform throughout the states, many laws in the United States vary on a state-by-state basis as a result of the federalist system. Marriage and family law is an area that has traditionally been left to each state to regulate as it deems fit.⁵⁶ Many scholars and jurists think that it is helpful to allow the law

56. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Maynard v. Hill*, 125 U.S. 190, 206 (1888); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) (quoting *U.S. v. Windsor*, 133 S.Ct. 2675, 2691 (2013)) (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”).

to develop separately in each state since it allows each state to be a laboratory for the next.⁵⁷ States can then choose the laws that are appropriate for their own state.⁵⁸

It is crucial for intended parents, as well as surrogates and others involved, to understand the surrogacy laws in their states. But even if they live in a state where surrogacy agreements are not enforced, they can proceed in a state where surrogacy agreements are enforceable.

The intended parents can also proceed in the intended parent's own state, but use a choice-of-law clause to use the laws of a state where surrogacy is legal and the arrangements are enforceable.⁵⁹ This option is not without its own risks, as the courts in the jurisdiction where the surrogacy and birth occur may potentially need to determine the enforceability of that choice-of-law clause. There is also still a chance that such courts will deem choosing the law of a different state to be unenforceable as against the public policy of their state. These alternatives are discussed in more detail below.

This part summarizes the current state of surrogacy law in each of the states in the United States. It will then explore in more detail the options available if surrogacy is not legal or enforceable in the parties' home state. Finally, this part examines the model surrogacy act that went into effect in Illinois in 2005 to provide a good example of a law that parties may choose to govern their arrangements.

A. *An Overview of the Surrogacy Laws*

The laws relating to surrogacy in the United States often distinguish between surrogacy that is compensated and surrogacy that is not.⁶⁰ In other words, there are states that allow a woman to be a surrogate so long as she is not paid to do so or paid to give up custody of the child she will bear.⁶¹ The idea is that someone paying a surrogate to carry or give up a child is offensive and similar to selling or renting the surrogate's body and then selling the resulting child.

57. *E.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

58. *Id.*

59. *See Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004).

60. *See, e.g.*, *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000) (indicating that surrogacy contracts in the absence of compensation are permitted, but surrogacy contracts for compensation are not).

61. *Id.* at 950–53.

States that take this approach have often stated in their statutes that compensated surrogacy arrangements are void because they violate the public policy of that state.⁶² Indeed, someone may be willing to be a surrogate for free if she is a good friend or relative of the intended parent(s). Uncompensated surrogacy arrangements still generally allow the intended parent(s) to pay for the surrogate's expenses in connection with the arrangement.⁶³

Some advisors will recharacterize paid surrogacy arrangements as uncompensated arrangements by categorizing the pay as reimbursement for living expenses or foregone wages in order to qualify for statutory enforcement. That approach is risky since a court may recognize that the arrangement, in substance, is a paid surrogacy agreement, and, therefore, refuse to enforce it.

The laws in this area are complicated and are subject to change as attitudes towards surrogacy evolve and more people turn to surrogacy as a way to start or expand their families. Accordingly, parties should check with their attorneys to make sure that they understand the current law regarding surrogacy in their states.

1. Alabama

Alabama law does not expressly make surrogacy agreements enforceable. Under the Alabama Adoption Code, it is a Class C felony for any person or agency to receive any money for placing or arranging a minor placement for adoption.⁶⁴ The Code expressly excludes surrogate motherhood from coverage under the section criminalizing child placement.⁶⁵

A 1996 Alabama case involved parties to a surrogacy agreement, but did not specifically address the validity of the agreement.⁶⁶ In *Brasfield v. Brasfield*, the Court of Civil Appeals of Alabama upheld the trial court's award of custody to the intended mother in a surrogacy agreement.⁶⁷ In that case, the biological father of the child and the intended mother were divorcing.⁶⁸ The biological father contended the intended mother should not be awarded custody

62. See, e.g., WASH. REV. CODE § 26.26.240 (1989).

63. See, e.g., VA. CODE ANN. § 20-165 (West 2010).

64. ALA. CODE § 26-10A-34(b) (1990).

65. *Id.* § 26-10A-34(c).

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

67. *Id.* at 1095.

68. *Id.* at 1092.

because she was not the natural mother of the child, who was born as a result of a surrogacy agreement.⁶⁹ The court awarded the intended mother custody based on the trial court's evaluation of the best interest of the child but did not specifically address the enforceability of the surrogacy agreement.⁷⁰

2. Alaska

There is no legal authority in Alaska governing the enforceability of surrogacy agreements. The Alaska statutes are silent on the subject, and there are no instructive published Alaska opinions.

3. Arizona

Arizona statutory law expressly prohibits surrogacy agreements.⁷¹ In fact, the Arizona statute governing surrogacy provides that the surrogate is the legal mother of a child who is born as a result of a surrogacy contract. And if the surrogate is married, then her husband becomes the child's father.⁷²

The law regarding surrogacy is, however, unclear in Arizona. In 1994, the Court of Appeals of Arizona found "that the surrogate statute affects a fundamental liberty interest."⁷³ The court also found that "the surrogate statute as it exists violates the equal protection guarantees of the United States and Arizona Constitutions."⁷⁴ There are no published opinions reconciling the conflict between the Arizona surrogacy statute and the appellate court's decision.

4. Arkansas

Surrogacy agreements are expressly enforceable under Arkansas law.⁷⁵ The Arkansas statutes addressing surrogacy provide that the biological father and intended mother are the parents of any child born as a result of a surrogacy agreement.⁷⁶

69. *Id.*

70. *Id.* at 1095.

71. ARIZ. REV. STAT. ANN. § 25-218(A) (1989).

72. *Id.* § 25-218(B)-(C).

73. Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994).

74. *Id.*

75. ARK. CODE ANN. § 9-10-201(b)-(c) (1989).

76. *Id.*

5. California

The California Family Code provides that paid and unpaid surrogacy agreements are valid and enforceable, subject to statutory requirements.⁷⁷ Several cases also indicate that surrogacy agreements are enforceable in California. In 1993, the Supreme Court of California decided that a surrogacy agreement is enforceable in California.⁷⁸ In that case, the court wrote: “A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without any expectation that she will raise the resulting child as her own.”⁷⁹

In 2005, the Supreme Court of California decided three companion cases that involved lesbian couples who engaged in surrogacy agreements as a means of reproduction.⁸⁰ The Court held that both people in a same-sex relationship can be the presumptive parents of a child born as a result of a surrogacy agreement even though one person is not the child’s biological parent.⁸¹

6. Colorado

Colorado statutory law does not directly address the issue of surrogacy, and there are no published decisions that deal directly with enforceability of surrogacy agreements. The only Colorado statute addressing the issue of surrogacy governs the parental rights of children conceived through assisted reproduction.⁸² That statute, however, explicitly excludes children born as a result of a surrogacy arrangement from coverage under that particular law.⁸³ However, practice indicates that arrangements are routinely upheld in Colorado.

7. Connecticut

Connecticut statutory law does not directly address the

77. CAL. FAM. CODE §§ 7960–62 (West 2015).

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

79. *Id.* at 787.

80. *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

81. *See* *Elise B.*, 117 P.3d. at 670 (concluding that even though one of the women was not the child’s biological mother, she was still the presumptive parent because she “actively participated in causing the child[] to be conceived with the understanding that she would raise the child[] as her own together with the birth mother . . .”).

82. COLO. REV. STAT. § 19-4-106 (2009).

83. *Id.* § 19-4-106(1).

enforceability of surrogacy agreements. The Connecticut General Statutes do, however, provide that if a birth was subject to a surrogacy agreement, then the Connecticut Department of Public Health is permitted to create a replacement birth certificate for the child that names the intended parents as the child's parents rather than the surrogate.⁸⁴

In *Vogel v. Kirkbride*, the Superior Court of Connecticut, Judicial District of New Haven, upheld a gestational surrogacy agreement.⁸⁵ In 2003, the Superior Court of Connecticut, Judicial District of Hartford, held that a parental designation created in a surrogacy agreement from another jurisdiction was enforceable because it neither violated state law nor contravened state policy.⁸⁶ Thus, while the enforceability of surrogacy agreements is unclear under Connecticut law, the 2003 decision indicates that a surrogacy agreement, wherein the parties choose to be governed by the laws of a state in which surrogacy agreements are clearly enforceable, would be enforced by the Connecticut courts.

8. Delaware

Surrogacy agreements are expressly legal and enforceable under Delaware law.⁸⁷ The Delaware Code provides that the purpose of the laws governing surrogacy is “to establish consistent standards and procedural safeguards for the protection of all parties to a gestational carrier agreement in [Delaware]”⁸⁸

9. District of Columbia

Surrogacy agreements are expressly prohibited by statute in Washington, D.C. The statute provides that “[a]ny person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration . . . [is] subject to a civil penalty not to exceed \$10,000 or imprisonment for not more than 1 year, or

84. CONN. GEN. STAT. ANN. § 7-48a(b) (West 2011).

85. *Vogel v. Kirkbride*, No. FA 02-0471850, 2002 WL 34119315, at *1 (Conn. Super. Ct. Dec. 18, 2002); *see also* *Griffiths v. Taylor*, No. FA084015629, 2008 WL 2745130 (Conn. Super. Ct. June 13, 2008) (relying on *Vogel*).

86. *Davis v. Kania*, 836 A.2d 480, 483 (Conn. Cir. Ct. 2003).

87. DEL. CODE ANN. tit. 13, § 8-807 (2013).

88. *Id.* § 8-802(a).

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both.”⁸⁹

10. Florida

Surrogacy agreements are expressly legal and enforceable under Florida law.⁹⁰ Florida has the additional requirements that the intended parents must be married, and that “the commissioning mother cannot physically gestate a pregnancy to term; the gestation will cause a risk to the physical health of the commissioning mother; or the gestation will cause a risk to the health of the fetus.”⁹¹ The statute also requires the intended parents to be married.⁹²

11. Georgia

There is no legal authority in Georgia governing the enforceability of surrogacy agreements. The Georgia statutes are silent on the subject and there are no instructive published Georgia opinions.

12. Hawaii

There is no legal authority in Hawaii governing the enforceability of surrogacy agreements. The Hawaii statutes are silent on the subject and there are no instructive published Hawaii opinions.

13. Idaho

Surrogacy agreements are not specifically addressed by Idaho statutory or published case law. However, a 1986 opinion by the Supreme Court of Idaho indicates that surrogacy agreements might be enforceable in Idaho courts.⁹³ In that case the court held that biological relation is one factor in determining the best interest of the child, but biological relation is not to be treated as a presumption in favor of granting custody to natural parents in custody disputes.⁹⁴

89. D.C. CODE § 16-402(a)–(b) (2001).

90. FLA. STAT. § 742.15 (2012).

91. *Id.* § 742.15(1)–(2).

92. *See* *Lowe v. Broward Cnty.*, 766 So.2d 1199, 1206 (Fla. Dist. Ct. App. 2000).

93. *Ex rel. Steve B.D.*, 723 P.2d 829 (Idaho 1986).

94. *Id.* at 835.

14. Illinois

Surrogacy agreements are expressly legal and enforceable under Illinois statutory law.⁹⁵ The Illinois statutes governing surrogacy agreements set forth a rigid set of requirements for both the surrogate and the intended parents for the purpose of protecting all parties involved.⁹⁶ The Illinois statutes governing surrogacy agreements represent best practices with regard to state laws concerning surrogacy agreements.

15. Indiana

The Indiana Code expressly provides that surrogacy agreements are void, unenforceable, and against the public policy of the state of Indiana.⁹⁷

16. Iowa

The law governing surrogacy agreements in Iowa is unclear. The Iowa Code does not speak directly to the enforceability of surrogacy agreements. The Code does, however, exclude surrogacy from laws forbidding purchase or sale of individuals.⁹⁸ Based on this exclusion, it is reasonable to infer that surrogacy agreements are not against the public policy of Iowa and may be enforceable.

17. Kansas

There is no binding authority governing the enforceability of surrogacy agreements in Kansas. However, the Attorney General of Kansas has issued two opinions suggesting surrogacy agreements are against the public policy of Kansas.⁹⁹

95. 750 ILL. COMP. STAT. 47/25 (2005).

96. *Id.*

97. IND. CODE § 31-20-1-1, (2) (1997).

98. IOWA CODE § 710.11 (2008) (“A person commits a class ‘C’ felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement. For purposes of this section, a ‘surrogate mother arrangement’ means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple.”).

99. Payment for Adoption, 30 Op. Kan. Att’y Gen. 29 (1996); Domestic Relations, 16 Op. Kan. Att’y Gen. 54 (1982).

18. Kentucky

There is little binding authority governing the enforceability of surrogacy agreements in Kentucky. A 1980 opinion from the Kentucky Attorney General, however, indicated that compensated surrogacy agreements are against the public policy of Kentucky.¹⁰⁰ A 1986 opinion from the Kentucky Supreme Court suggested that uncompensated surrogacy agreements are not void as against the public policy of Kentucky.¹⁰¹ When read together, these authorities suggest uncompensated surrogacy agreements are enforceable and not void as against the public policy of Kentucky.

19. Louisiana

The Louisiana statute governing surrogacy provides that “[a] contract for surrogate motherhood . . . shall be absolutely null and shall be void and unenforceable as contrary to public policy.”¹⁰² That statute defines “contract for surrogate motherhood” as “any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.”¹⁰³ A literal reading of the Louisiana statute indicates that while compensated surrogacy agreements are unenforceable, an uncompensated agreement might be enforceable and not void as against Louisiana public policy.

20. Maine

There is no legal authority in Maine governing the enforceability of surrogacy agreements. The Maine statutes are silent on the subject and there are no instructive published Maine opinions.

21. Maryland

Maryland statutory law does not speak directly on the enforceability of surrogacy agreements. However, a 2007 opinion from the Court of Appeals of Maryland clearly stated that

100. Ward, 1980–1981 Op. Ky. Att’y Gen. 2-588 (1981).

101. *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 214 (Ky. 1986) (“The surrogate parenting procedure as outlined in the [agreement between the surrogate and the intended parents] is not foreclosed by legislation now on the books.”).

102. LA. REV. STAT. ANN. § 9:2713(A) (2009).

103. *Id.* § 9:2713(B).

compensated surrogacy agreements are illegal in Maryland.¹⁰⁴ The enforceability of uncompensated surrogacy agreements is unclear.

22. Massachusetts

Massachusetts statutory law does not speak directly to the enforceability of surrogacy agreements. Opinions by the Massachusetts Supreme Judicial Court indicate that surrogacy agreements are enforceable in Massachusetts. In 2001, the genetic parents in a surrogacy agreement sought a prebirth order directing the hospital to enter the names of the intended parents as the parents of the unborn twin children.¹⁰⁵ The court granted injunctive relief and upheld the terms of the surrogacy agreement.¹⁰⁶ The court also called on the Massachusetts legislature to address questions related to the validity of surrogacy agreements. The court opined that the Massachusetts legislature needs to provide a “comprehensive set of laws that deal with the medical, legal, and ethical aspects of [surrogacy agreements].”¹⁰⁷

In 2004, the court upheld the authority of a Massachusetts Probate and Family Court judge to issue a prebirth judgment of parentage in an equity action brought by intended parents of a surrogacy agreement.¹⁰⁸ In that case, the court ordered the probate judge to enter a judgment “declaring the [intended parents] to be the legal parents of the unborn child.”¹⁰⁹ The court ordered the hospital to “place the [intended parents’] names on the record of birth . . . listing the [intended parents] as the father and mother, respectively, of the child.”¹¹⁰

23. Michigan

Michigan statutory law governing enforceability of surrogacy agreements expressly provides that “[a] surrogate parentage contract is void and unenforceable as contrary to public policy.”¹¹¹ That

104. *In re Roberto d.B.*, 923 A.2d 115, 130 (Md. 2007) (“It requires noting that surrogacy contracts, that is, payment of money for a child, are illegal in Maryland.”).

105. *Culliton v. Beth Israel Deaconess Med. Cent.*, 756 N.E.2d 1133, 1135 (Mass. 2001).

106. *Id.*

107. *Id.* at 1139.

108. *Hodas v. Morin*, 814 N.E.2d 320, 321 (Mass. 2004).

109. *Id.* at 327.

110. *Id.*

111. MICH. COMP. LAWS § 722.851 (2009).

section defines “surrogate parentage contract” as “a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child”¹¹²

24. Minnesota

Minnesota does not have any instructive published cases on surrogacy. But in *In re Baby Boy A.*, an unpublished appellate court opinion, a court does uphold a choice-of-law provision in a surrogacy agreement, and enforces the agreement under the law of Illinois, indicating that such enforcement is not against the public policy of Minnesota.¹¹³ The state does also not have any statutory law governing surrogacy.

25. Mississippi

There is no legal authority in Mississippi governing the enforceability of surrogacy agreements. The Mississippi statutes are silent on the subject. And there are no instructive published Mississippi opinions.

26. Missouri

There is no statutory or case law controlling the enforceability of surrogacy agreements in Missouri.

27. Montana

There is no legal authority in Montana governing the enforceability of surrogacy agreements. The Montana statutes are silent on the subject and there are no instructive published Montana opinions.

28. Nebraska

Nebraska statute provides that “[a] surrogate parenthood contract entered into shall be void and unenforceable.”¹¹⁴ Further, the statute provides that “a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man

112. *Id.* § 722.853(i).

113. See discussion *infra* Part II.B.2.

114. NEB. REV. STAT. § 25-21,200(1) (1988).

who is not her husband.”¹¹⁵ The definition of a surrogate-parenthood contract indicates that paid surrogacy agreements are clearly unenforceable.

29. Nevada

Under Nevada law, paid and unpaid surrogacy agreements are explicitly permitted and are enforceable in Nevada courts.¹¹⁶

30. New Hampshire

Paid and unpaid surrogacy agreements are expressly enforceable under New Hampshire law.¹¹⁷ The statute provides that “[a] gestational carrier agreement . . . is a legal contract that is presumed to be valid and enforceable and is legally enforceable by the court.”¹¹⁸

31. New Jersey

New Jersey law is unclear on the enforceability of surrogacy agreements. The now-famous case *In re Baby M* established that paid surrogacy agreements are not enforceable in New Jersey.¹¹⁹ More recently, the Superior Court of New Jersey, Chancery Division, held that “[a] court order for the pre-birth termination of [a surrogate’s] parental rights is the equivalent of making her subject to a binding agreement to surrender the child and is contrary to New Jersey statutes and *Baby M*.”¹²⁰ In that case, the court refused to allow the surrogate to relinquish her parental rights until seventy-two hours after the child was born.¹²¹ The court chose that time frame because it would still allow the intended parents to be named on the original birth certificate since, under New Jersey’s law, a birth certificate need not be prepared until five days after the child is born.¹²²

32. New Mexico

New Mexico law does not speak directly to the enforceability of surrogacy agreements. The New Mexico Children’s Code does,

115. *Id.* § 25-21,200(2).

116. NEV. REV. STAT. § 126.710 (2013).

117. N.H. REV. STAT. ANN. § 168-B:11 (2014).

118. *Id.* § 168-B:10.

119. *In re Baby M*, 537 A.2d 1227 (1988).

120. *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Ch. 2000).

121. *Id.*

122. *Id.*

however, imply that paid and unpaid surrogacy agreements are enforceable. The Code provides that “[o]nly a prospective adoptive parent . . . shall make payments for services relating to the adoption or the placement of the child”¹²³ The Code also provides that those payments may include “medical, hospital, nursing, pharmaceutical, traveling or other similar expenses incurred by a mother”¹²⁴ Uncompensated surrogacy arrangements may be allowed.

33. New York

The New York statute governing the enforceability of surrogacy agreements expressly provides that “[s]urrogate parenting contracts are . . . contrary to the public policy of [New York], and are void and unenforceable.”¹²⁵ A first offense results in a civil penalty, and a second offense results in a felony.¹²⁶

34. North Carolina

North Carolina law does not speak directly to the enforceability of surrogacy agreements.

35. North Dakota

North Dakota law is unique in that it explicitly distinguishes traditional surrogacy from gestational surrogacy.¹²⁷ The North Dakota Status of Children of Assisted Conception Act states that “[a]ny agreement in which a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as a parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child”¹²⁸ “Surrogate” is defined as “[a]n adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.”¹²⁹ Traditional surrogacy agreements, where the surrogate is biologically related to the child she carries, are unenforceable.

123. N.M. STAT. ANN. § 32A-5-34(B) (West 2012).

124. *Id.* § 32A-5-34(B)(2).

125. N.Y. DOM. REL. LAW § 122 (McKinney 1992).

126. *Id.* § 123(2).

127. *Compare* N.D. CENT. CODE ANN. § 14-18-05 (West 2005) (establishing enforceability of surrogacy agreements), *with* N.D. CENT. CODE ANN. § 14-08-08 (West 2005) (establishing the enforceability of gestational carrier agreements).

128. N.D. CENT. CODE ANN. § 14-18-05.

129. *Id.* § 14-18-01(3).

The Act also provides that “[a] child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier’s husband, if any.”¹³⁰ “Gestational carrier” is defined as “[a]n adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.”¹³¹ Thus, gestational surrogacy agreements, where the intended parents are both biologically related to the child, are enforceable.

36. Ohio

Ohio statutory law does not expressly address the enforceability of surrogacy agreements. Ohio case law, however, indicates that gestational surrogacy agreements are not prohibited by Ohio law and are therefore enforceable in an Ohio court.¹³² A surrogate who is the biological mother of a child born as a result of a surrogacy agreement is presumed to be the legal mother of that child.¹³³ However, that presumption can be rebutted if the biological mother has waived or relinquished her parental rights by means of a valid, enforceable surrogacy agreement.¹³⁴

37. Oklahoma

Oklahoma statutes and case law do not specifically address the enforceability of surrogacy agreements.

38. Oregon

Oregon statutory and case law indicates that surrogacy agreements are not against the public policy of Oregon.¹³⁵ An Oregon statute provides that buying or selling a person who is less than 18 years of age is a Class B felony.¹³⁶ That section, however, explicitly does not “[a]pply to fees for services in an adoption

130. *Id.* § 14-18-08.

131. *Id.* § 14-18-01(2).

132. *See, e.g.*, *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007); *S.N. v. M.B.*, 935 N.E.2d 463, 470–71 (Ohio Ct. App. 2010).

133. *Belsito v. Clark*, 644 N.E.2d 760, 763 (Ct. Com. Pl. Ohio 1994).

134. *Id.* at 767.

135. *See In re Adoption of Baby A*, 877 P.2d 107 (Or. Ct. App. 1994).

136. OR. REV. STAT. § 163.537(3) (1997).

pursuant to a surrogacy agreement.”¹³⁷

39. Pennsylvania

Pennsylvania law on surrogacy agreements is unclear. Pennsylvania statutory law does not address the enforceability of surrogacy agreements. In 2006, the Superior Court of Pennsylvania overturned a lower court’s decision granting custody of children born as a result of a surrogacy agreement to the gestational carrier.¹³⁸ That case involved a “biological father seeking custody of his children from a third party gestational carrier who [was] not the children’s biological mother, and who took the children from the hospital in direct defiance of [the] [f]ather’s wishes after she completely changed her mind about how matters would proceed.”¹³⁹ The court invalidated the lower court’s ruling based on the gestational carrier’s ability to show standing.¹⁴⁰ The court “declin[ed] to rule on the propriety of surrogacy contracts generally; it reasoned that [t]hat task is for [Pennsylvania’s] legislators.”¹⁴¹

40. Rhode Island

There is no legal authority in Rhode Island governing the enforceability of surrogacy agreements. The Rhode Island statutes are silent on the subject and there are no instructive published Rhode Island opinions.

41. South Carolina

There is no legal authority in South Carolina governing the enforceability of surrogacy agreements. The South Carolina statutes are silent on the subject and there are no instructive published South Carolina opinions.

42. South Dakota

There is no legal authority in South Dakota governing the enforceability of surrogacy agreements. The South Dakota statutes are silent on the subject and there are no instructive published South

137. *Id.* § 163.537(2)(d).

138. *J.F. v. D.B.*, 897 A.2d 1261, 1265 (Pa. 2006).

139. *Id.* at 1280.

140. *Id.*

141. *Id.*

Dakota opinions.

43. Tennessee

Surrogacy agreements are likely enforceable under Tennessee law. In 2014 the Supreme Court of Tennessee wrote that “the public policy of [Tennessee] does not preclude the enforcement of traditional surrogacy contracts . . . the terms of a surrogacy contract may not circumvent the statutes governing a person’s status as a legal parent or the statutory procedures for terminating parental rights.”¹⁴² The Tennessee Code defines “surrogate birth” as:

(i) The union of the wife’s egg and the husband’s sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or (ii) [t]he insemination of a woman by the sperm of a man under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father’s wife to parent.¹⁴³

When read together, the case and statute indicate that surrogacy arrangements, wherein the intended parents are both the biological parents of the child, are enforceable. Furthermore, surrogacy arrangements, wherein the surrogate is the biological mother and the intended father is the biological father, are also enforceable. But it is unclear whether a Tennessee court would enforce a surrogacy agreement wherein neither the surrogate nor the intended parents are biologically related to the child.

44. Texas

Gestational surrogacy agreements are expressly enforceable under Texas law.¹⁴⁴ The Texas Family Code also expressly requires that “[t]he intended parents must be married to each other” and that “[e]ach intended parent must be a party to the gestational agreement.”¹⁴⁵

142. *In re Baby*, 447 S.W.3d 807, 833 (Tenn. 2014).

143. TENN. CODE ANN. § 36-1-1(102)(48)(i)–(ii) (2010).

144. TEX. FAM. CODE ANN. § 160.754(a) (West 2003).

145. *Id.* § 160.754(b).

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45. Utah

The Utah statute governing the enforceability of surrogacy agreements expressly provides that compensated and uncompensated surrogacy agreements are enforceable if they conform to strict requirements.¹⁴⁶ The statute also requires that: “The intended parents shall be married, and both spouses must be parties to the gestational agreement.”¹⁴⁷

46. Vermont

There is no legal authority in Vermont governing the enforceability of surrogacy agreements. The Vermont statutes are silent on the subject. And there are no instructive published Vermont opinions.

47. Virginia

The Virginia statute governing the enforceability of surrogacy agreements expressly provides that “[a] surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child.”¹⁴⁸ That statute defines “intended parents” as “a man and a woman, married to each other”¹⁴⁹ This means that only heterosexual married couples can be intended parents under Virginia’s Code. Furthermore, the Code expressly provides that compensated surrogacy agreements are void and unenforceable.¹⁵⁰

48. Washington

The Revised Code of Washington expressly provides that “[n]o person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.”¹⁵¹ In cases of an uncompensated surrogacy agreement, “[i]f a child is born to a

146. UTAH CODE ANN. § 78B-15-801(4) (West 2008).

147. *Id.*

148. VA. CODE ANN. § 20-159(A) (1997).

149. *Id.* § 20-156.

150. *Id.* § 20-160(B)(4).

151. WASH. REV. CODE ANN. § 26.26.230 (1989).

surrogate mother pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the superior court orders otherwise. The superior court shall award legal custody of the child based upon the [best interests of the child].”¹⁵²

49. West Virginia

The law governing surrogacy agreements in West Virginia is unclear. The Code of West Virginia does not speak directly to the enforceability of surrogacy agreements. The Code does, however, exclude surrogacy from laws that prohibit the purchase or sale of a child.¹⁵³

50. Wisconsin

Wisconsin statutory law does not directly speak to the enforceability of surrogacy contracts. In 2013 the Supreme Court of Wisconsin, however, held that surrogacy agreements are enforceable. The court reasoned that enforcing surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties of the agreement, and reduces contentious litigation that could drag on for the first several years of the child’s life.”¹⁵⁴ The court also held that surrogacy agreements are not void as against the public policy of Wisconsin.¹⁵⁵ The court determined that surrogacy agreements are “enforceable contract[s] unless enforcement is contrary to the best interest of the child.”¹⁵⁶ Finally, the court “respectfully urge[d] the [Wisconsin] legislature to enact legislation regarding surrogacy.”¹⁵⁷

152. *Id.* § 26.26.260.

153. W. VA. CODE § 61-2-14h(a), (e)(3) (2012) (“Any person or agency who knowingly offers, gives or agrees to give to another person money, property, service or other thing of value in consideration for the recipient’s locating, providing or procuring a minor child for any purpose which entails a transfer of the legal or physical custody of said child, including, but not limited to, adoption or placement, is guilty of a felony and subject to fine and imprisonment as provided herein. This section does not apply to fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.”).

154. *In re F.T.R.*, 833 N.W.2d 634, 650–51 (Wis. 2013).

155. *Id.*

156. *Id.* at 653.

157. *Id.*

51. Wyoming

There is no legal authority in Wyoming that addresses the enforceability of surrogacy agreements. The Wyoming statutes are silent on the subject and there are no instructive published Wyoming opinions.

B. Managing the Law and Minimizing Your Risk

As the section above makes clear, each state has different laws regarding surrogacy. If the surrogacy law in the state of the intended parents will enforce a surrogacy arrangement, then the intended parents need only follow that law and its requirements. If, however, the law in the intended parents' state does not permit a surrogacy arrangement or will not enforce a surrogacy agreement, then intended parents have two potential options. They should proceed, however, by understanding that the state where the child is born is most likely to be the state where a custody battle would occur.

The first option is to proceed by having the surrogate give birth in a state that does support and enforce surrogacy arrangements. This is the safest approach since the parties' intentions as outlined in the surrogacy agreement should be honored and enforced.¹⁵⁸

The second option is to proceed in the state where the intended parents live but use a choice-of-law provision to choose another state's laws to govern the agreement. This second option is the riskier of the two options, as state courts may or may not honor such a choice-of-law clause. Some state courts tend to honor such choice-of-law provisions, but not if they perceive them to contravene the public policy of the state whose law would otherwise apply.¹⁵⁹ Sometimes courts do not honor choice of law clauses if the state whose law was chosen does not have a substantial connection to the subject of the contract, in this case the surrogacy arrangement. This section will examine each of these options in turn.

1. Proceed in a State Where Surrogacy is Legal

If the intended parents' home state does not support surrogacy,

158. Parties may also decide to proceed in a foreign country that will enforce a surrogacy arrangement. India and Thailand, for example, have both become centers for international surrogacy.

159. Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 95-98 (2009).

then they should proceed physically in a state that does. The states that allow and enforce surrogacy arrangements typically have the infrastructure, clinics and agencies that specialize in surrogacy, to help intended parents embark on a surrogacy arrangement at a distance. For example, if intended parents live in New York City, the laws of that state prohibit surrogacy agreements. Those intended parents should choose a state where they are comfortable proceeding. Illinois has a model law requiring courts to enforce gestational surrogacy arrangements that comply with the statute.¹⁶⁰ California is another jurisdiction where gestational surrogacy agreements are enforced by courts.¹⁶¹ The intended parents should choose a jurisdiction that is convenient for them. Perhaps they have family in one of those states or perhaps they simply like visiting a city in one of those jurisdictions. Intended parents should also survey the clinics and agencies (if they choose to use them) that may work within each of the jurisdictions. If intended parents are going to proceed in a state other than the one where they live, it is more likely that they will need the help of an agency to find their surrogate in that state. Intended parents should find a clinic and an agency that they are comfortable with in a pro-surrogacy state that is convenient for them.

Ultimately, intended parents should choose a state that allows surrogacy agreements and then conduct most, if not all, of the actions related to their surrogacy arrangement in that state. The child's place of the birth is likely to be the jurisdiction where any custody battle would occur and where it is crucial for the applicable law to support surrogacy.¹⁶²

Intended parents should also make sure all relevant agreements are governed by the law of that pro-surrogacy state. In contract-

160. See *infra*, Part II.A; see also 750 ILL. COMP. STAT. 47/25 (2005).

161. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (enforcing a gestational surrogacy agreement). In *Johnson*, the court held that the intended parents in a gestational surrogacy agreement should be recognized as the natural and legal parents. See also Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, Sept. 18, 2014, at A1 (describing California as having the "most permissive law" and "a booming surrogacy industry" as a result).

162. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, § 201(a)(1), 9 U.L.A. 671 (1997). Under this Act, the child's home state is the state with jurisdiction to make the initial child-custody determinations. The Act defines the *Home State* for a child who is less than six months old as the state in which the child lived from birth, *id.* at 658. See generally Jessica Grose, *The Sherri Shepherd Surrogacy Case Is a Mess*, SLATE (Apr. 28, 2015, 5:54 PM), http://www.slate.com/blogs/xx_factor/2015/04/28/sherri_shepherd_surrogacy_case_there_s_little_consensus_on_the_ethical_dimensions.html (discussing the complex nature of surrogacy law in the United States).

related disputes, if the parties do not use a choice-of-law provision in their agreements, then it is still likely that the law of the state where they proceed will apply simply based on general choice-of-law rules.¹⁶³ It is always best to be clear in the agreements so that there is no doubt. If the intended parents specify the law of the pro-surrogacy state where they are going to proceed and they in fact do proceed there, then there should be little risk of any other law being applied. After the surrogate successfully delivers a child or children for the intended parents, the intended parents will need to assert their parental rights in that state and they will want the courts of that state to apply their laws to the surrogacy arrangement.

Managing a surrogacy arrangement at a distance involves more costs and potentially more effort since every appointment will involve either travel or discussions over the phone or internet. Still, the risks of a surrogacy arrangement going sour and having the relevant courts not support the intended parents and enforce the agreement are too great to ignore. As shown with the *Baby M* case, surrogates do sometimes decide that they want to keep custody of the child or children born.¹⁶⁴ If a surrogacy agreement is not enforced, then the surrogate may indeed have a chance to get custody of the child.¹⁶⁵ The intended parents will also likely have to pay child support to the surrogate. Intended parents should be careful to avoid this awful scenario by proceeding in a jurisdiction that supports surrogacy.

Managing the law is all about managing risk. In fact, most surrogacy arrangements do not end up in court, and intended parents may not have any problems even if they do proceed in a jurisdiction that does not clearly support surrogacy (as long as it is not a state where surrogacy is illegal). Even if the surrogate does contest custody and the intended parents' state will not enforce the surrogacy agreement, the intended parents may well still be awarded full custody if it is in the best interests of the child. This was the end result of the *Baby M* case. If intended parents proceed with

163. The common law doctrine of *lex loci contractus* requires that, when determining the construction, validity, enforceability, or interpretation of a contract, the court applies the law of the jurisdiction where the contract was made. See, e.g., *Cunningham v. Feinberg*, 107 A.3d 1194 (2015) (discussing common law's choice-of-law rules in contracts). See Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 413 (1990) (discussing the fact that choice-of-law analysis will apply to contractual claims and noting that the contract's enforceability may be subsumed by the question of whether the court will grant the adoption in a surrogacy case).

164. See *supra* Part I.B; see also *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

165. See, e.g., *In re Baby M*, 537 A.2d. 1227 (N.J. 1988).

gestational surrogacy (the surrogate is not the biological parent), then custody will likely be awarded to the intended parents because one of them is a biological parent.¹⁶⁶

As a result, the risk may be acceptable if the intended parents proceed in their home state even if the state that does not clearly support surrogacy. Again, if the intended parents do live in one of the states where surrogacy is not supported, then they should consult an attorney to get specific advice on how to manage the legal risks.

2. Proceed Under the Laws of a Pro-Surrogacy State

If proceeding in a state other than the one where the intended parents live seems daunting, or if the intended parents want to use a surrogate who lives in their home state, then an alternative option is to add a choice-of-law clause to the agreement that uses the law of a pro-surrogacy state to govern the agreement. In this situation, a court may apply the law of that pro-surrogacy state if there are any challenges to the agreement. For example, in the case of *In re Baby Boy A.*, a Minnesota state court evaluated a surrogacy agreement that contained a choice-of-law clause that used Illinois law.¹⁶⁷ In an unpublished opinion, the Minnesota court honored that choice-of-law clause and enforced the surrogacy agreement.¹⁶⁸ Since Minnesota's law on surrogacy is unclear, it was prudent for the intended parent in *In re Baby Boy A.* to include the Illinois choice of law clause. The court evaluated the choice-of-law clause and explained that surrogacy agreements with choice-of-law clauses that are freely entered into by the parties are enforceable unless they are a bad-faith attempt to evade Minnesota law.¹⁶⁹ Since there was no Minnesota law regarding surrogacy, the court found no attempt by the parties to evade Minnesota law, and the court applied Illinois law on both parentage and the gestational surrogacy agreement.¹⁷⁰ Unfortunately, this case

166. See, e.g., *Gray v. Chambers*, 222 A.D.2d 753, 753 (N.Y. App. Div. 1995) ("It is fundamental that a biological parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances. Until it is shown that one of these circumstances exists, the inquiry is at an end and the biological parent must be given custody of the child.")

167. *In re Baby Boy A.*, No. A07-452, 2007 WL 4304448, at *1 (Minn. Ct. App. Dec. 11, 2007).

168. *Id.*

169. *Id.* at *3.

170. *Id.* at *8.

was not reported by the court, which means that the court's decision is not precedent for Minnesota courts.¹⁷¹

Despite the case's lack of precedential value, the case's facts are instructive. Although *In re Baby Boy A.* is more recent than the *Baby M* case, it has a similar fact pattern. In both cases the surrogate decided to keep custody of the child after the child was born, despite having entered into a gestational surrogacy agreement where she agreed to give custody to the intended father.

The facts of the *In re Baby Boy A.* case are even more outrageous than the facts of *Baby M.* In *In re Baby Boy A.*, a single gay man, J.M.A., sought to have a biological child with the help of a surrogate.¹⁷² The intended parent lived in New York City. He asked his sister Mary, who lived in Minnesota, to be his surrogate. She declined but brought the idea up to her daughter, the intended parent's niece, who also lived in Minnesota. The niece then contacted J.M.A. and volunteered to be his surrogate. At that time, the niece was currently pregnant, and the parties agreed to wait until after the niece had her baby before deciding on anything definitively.

The niece had her baby and continued to express an interest in being a surrogate for J.M.A. She and J.M.A. executed a gestational surrogacy agreement where she agreed to give custody of any child born to J.M.A.¹⁷³ The parties also agreed that J.M.A. would reimburse all expenses and pay the niece \$20,000 in compensation.

Partway through the pregnancy the niece demanded an additional \$120,000 in compensation.¹⁷⁴ She told J.M.A. that she would abort the child if he did not pay the additional \$120,000.

The intended parent refused to pay. And the niece did not go through with the abortion. The surrogate niece gave birth to the child, named the child, and intended to keep custody of the child. J.M.A. then brought suit Minnesota to assert his paternity rights and to obtain custody of the child.¹⁷⁵

J.M.A. and his niece's surrogacy agreement included a choice-of-law clause that used the laws of Illinois to govern the agreement. The Minnesota courts hearing the matter upheld that choice-of-law

171. MINN. STAT. § 480A.08(3) (2015).

172. *In re Baby Boy A.*, 2007 WL 4304448, at *1.

173. *Id.*

174. *Id.* at *2.

175. *Id.*

clause, applied Illinois law, and enforced the surrogacy agreement.¹⁷⁶ J.M.A. was determined to be the father, and he was given custody of the child.

The case is instructive for several reasons. First, it is an example of a case where a court upheld the parties' choice-of-law clause. Second, it illustrates that surrogacy agreements between relatives can derail. In this respect, parties should put legal protections in place in advance to protect the interests of the intended parent, regardless of how much they trust their surrogate.

While choice-of-law standards are different in each state, courts in all states will generally respect the choice-of-law provisions adopted by the parties to a contract.¹⁷⁷ However, as in the *In re Baby Boy A.* case, many state courts will not enforce choice-of-law provisions if the court believes that the parties are acting in bad faith or trying to evade the laws or policies of the state in which the court sits.¹⁷⁸ In Florida, for example, the courts have stated that choice-of-law clauses should be honored "unless a showing is made that the law of the chosen forum contravenes strong public policy or that the clause is otherwise unreasonable or unjust."¹⁷⁹ These standards are problematic for parties who want their surrogacy agreement to be governed by the laws of a pro-surrogacy state but who proceed in a state that does not support surrogacy. Choosing the laws of a pro-surrogacy state may be found to be against the public policy of the state considering the case. Thus, parties in those states should strongly consider proceeding in a pro-surrogacy state.

Many state courts will also look to see if there is some connection between the parties to the contract and the jurisdiction of the applicable governing law before enforcing that choice of law. In the *In re Baby Boy A.* case, for example, the parties actually used an IVF clinic in Illinois and signed a variety of documents in Illinois.¹⁸⁰ While the Minnesota court did not rely on this connection in order to enforce the Illinois choice of law, it did mention those facts in its opinion.¹⁸¹ But other states, including California, expressly evaluate whether the law chosen bears a "substantial relationship" to the

176. *Id.* at *7.

177. *See Green, supra* note 159.

178. *In re Baby Boy A.*, 2007 WL 4304448, at *1.

179. *Magner Int'l Corp. v. Brett*, 960 So. 2d 841, 843–44 (Fla. Dist. Ct. App. 2007).

180. *In re Baby Boy A.*, 2007 WL 4304448, at *2.

181. *Id.*

transaction involved.¹⁸² If there is no such relationship, then courts may not honor the choice-of-law provision. Because some courts will look for a connection to the jurisdiction chosen for the applicable law, the safest approach is to do something substantial in connection with the surrogacy arrangement in that state beyond just choosing its law. As with proceeding physically in that state, this may include using a clinic in that state, or using an agency, surrogate or egg donor from that state.

Again, this area of law is complicated. It is best for intended parents to discuss these issues with their attorney to make sure they are proceeding prudently and managing the legal risks.

C. Illinois: A Model Statute Reflecting Best Practices

As discussed above, one way to manage legal risk is to either proceed in a state that is pro-surrogacy or have the relevant agreements governed by the law of a pro-surrogacy state. This section will explore the Gestational Surrogacy Act of Illinois, a pro-surrogacy law that went into effect in 2005.¹⁸³ The Act reflects best practices in structuring the surrogacy arrangement.

The Act makes clear that the intended parent or parents are the parents of the child born to a surrogate “immediately upon the birth of the child.”¹⁸⁴ Note here that the Act does not discriminate against single people embarking on a surrogacy arrangement to become a parent, nor does it require the intended parents to be married.¹⁸⁵ There are, however, certain requirements that potential intended parents must meet.¹⁸⁶ The statute also prohibits the surrogate and her husband from being considered the parents of the children.¹⁸⁷

The Act has strict requirements for who can be a surrogate and for what the intended parents must do in order to qualify for the protection of the statute.¹⁸⁸

182. See, e.g., *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151–52 (Cal. 1992). See generally RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971).

183. 750 ILL. COMP. STAT. 47/1 (2005).

184. *Id.* § 15(b)(1)–(6).

185. *Id.* § 20(b)(1)–(4).

186. *Id.*

187. *Id.* § 15(b)(6).

188. *Id.* § 20(a)–(b).

Requirements for the Surrogate¹⁸⁹

The Act requires that the surrogate:

- 1. Is at least 21 years old;*
- 2. Has given birth to at least one child;*
- 3. Has completed a medical evaluation;*
- 4. Has completed a mental health evaluation;*
- 5. Has had an independent attorney consult with her on the surrogacy agreement; and*
- 6. Has health insurance covering her throughout the pregnancy and 8 weeks thereafter.*

Each of these requirements reflects best practices for a successful surrogacy arrangement.¹⁹⁰ It is crucial that the surrogate is old enough to fully understand what she is doing. If the surrogate has given birth before then the surrogate knows how her body reacts to a pregnancy. Because she will also understand the emotional ties that develop during pregnancy, she will understand the implications of carrying a child and giving custody to the intended parents. In addition, if a surrogate has her own child or children, then it may also make it less likely that she will want custody of the child or children born through the surrogacy.

It is also essential for the surrogate to be healthy and physically able to become a surrogate. Moreover, it is helpful for the surrogate to undergo a mental health evaluation to establish that the surrogate is mature and stable enough to honor her commitment.

A surrogacy arrangement is complicated. Because of this, it is important that the surrogate have her own attorney. This will help make sure that the surrogate understands all of the terms and commitments set forth in that agreement, including how and when she

189. *Id.* § 20(a)(1)–(6).

190. Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 809–11 (2012).

is to be compensated, under what circumstances she may be able to terminate the pregnancy, and her commitment to support the parental rights of the intended parents.

Finally, the Act requires insurance coverage. The insurance will cover any major medical expenses of the surrogate throughout the pregnancy and eight weeks after birth.¹⁹¹ Note that many standard insurance policies will not cover expenses related to a surrogacy. There are special policies specifically designed to cover the major medical expenses of a surrogate throughout her pregnancy. The Act states that the intended parents may purchase the insurance policy for the surrogate. In practice, this is generally what happens.¹⁹²

There are also legal requirements for the intended parents. These legal requirements are below.

Requirements for the Intended Parents¹⁹³
<p><i>With respect to the intended parent or parents, the Act requires that:</i></p> <ol style="list-style-type: none"><i>1. At least one of the intended parents has contributed an egg or a sperm to create the “pre-embryo” that the surrogate will carry;</i><i>2. At least one has a medical need to proceed with surrogacy;</i><i>3. The intended parent or parents also complete a mental health evaluation; and</i><i>4. The intended parent or parents have consulted with an independent attorney regarding the surrogacy agreement.</i>

The last two of these requirements are identical to requirements for the surrogate. The intended parents should complete a mental health evaluation to make sure that they are mature and stable enough to go through with the surrogacy arrangement and take custody of the child or children delivered. As shown above, a major risk of surrogacy is the surrogate attempting to keep custody of the child. It is also a great fear of many surrogates that the intended parent or parents will not take custody and thereby leave the child or children

191. 750 ILL. COMP. STAT. 47/20(a)(6).

192. *Id.*

193. *Id.* § 20(b)(1)–(4).

with the surrogate who likely does not want to have any more children of her own.

Also, similar to the requirement for the surrogate, it is important that the intended parents understand the terms of the surrogacy agreement. This includes an understanding of what they are promising to pay the surrogate, whether and when a pregnancy may be terminated, and how they will establish parentage and custody when the child is born. Thus, the intended parents should work with an attorney who can make sure that they understand and manage the risks involved with surrogacy.

The first two requirements are unique for the intended parents. The Act requires at least one of the intended parents to be genetically related to the child or children born to the surrogate.¹⁹⁴ In addition, the Act requires that a doctor actually certify that there is a medical need for surrogacy.¹⁹⁵ Again, this is normally why intended parents proceed with a surrogacy arrangement in the first place. This requirement does, however, prevent intended parents from proceeding with surrogacy when their only reason is convenience. The Act does not specify that same-sex couples are permitted or banned from becoming intended parents.

The Act has certain formal requirements for the surrogacy agreement. These requirements are reflected below.

Requirements for the Surrogacy Agreement¹⁹⁶

The Act requires that the surrogacy agreement:

- 1. be in writing;*
- 2. be executed before any medical procedures are done;*
- 3. the surrogate and intended parent(s) must be represented by separate attorneys and sign acknowledgments that they understand their commitments;*
- 4. any compensation to be paid must be put in an escrow account and disbursed by an escrow agent; and*

194. *Id.* § 20(b)(1)–(2).

195. *Id.* § 20(b)(2).

196. *Id.* § 25(b)(1)–(5).

5. be witnessed by two competent adults.

The formal requirements for the surrogacy agreement are designed to make sure that the intentions of the parties to the surrogacy arrangement are clearly set forth and recorded in a written contract.¹⁹⁷ The writing requirement for a contract is generally referred to as a statute of fraud.¹⁹⁸ This requirement is designed to prevent fraud. A contract that is memorialized in writing gives objective evidence of the precise intentions of the parties. It also ensures that the parties review all of the terms and conditions contemplated.

It is also important for all of the details of the arrangement to be worked out before any medical procedures take place. If the parties cannot come to a mutual agreement, then they should never begin medical procedures.

Once again, having separate attorneys representing each of the parties ensures that each party understands their commitments and is able to negotiate for the terms they want and need. If the intended parents place money in an escrow account, then that also assures the surrogate that there will be sufficient funds to compensate her for her services. The requirement for two witnesses helps safeguard against the production of any fraudulent agreement.

The Act also requires the parties to include certain provisions in the surrogacy agreement. These provisions are below.

Provisions of the Surrogacy Agreement¹⁹⁹

The Act requires that the surrogacy agreement provide that:

- 1. the surrogate attempt to carry and give birth to one or more children for the intended parent(s);*
- 2. the surrogate then give custody of the child to the intended parent(s);*

197. *See id.* § 25.

198. *See id.*

199. *Id.* § 25(c)–(d).

3. if the surrogate is married, her husband must also agree to give up custody of the child or children born to the intended parents; and

4. the intended parents agree to take custody and assume responsibility for any child born by the surrogate at birth.

The Act provides that the surrogacy agreement may include:

1. the surrogate's agreement to undergo any medical procedure or test deemed necessary or prudent for the health of the child or children she carries;

2. the surrogate's agreement to behave in ways the intended parents or relevant physicians believe is in the best interests of the health of the child or children she carries;

3. the intended parents' agreement to compensate the surrogate reasonably; and

4. the intended parents' agreement to reimburse the surrogate for reasonable expenses related to the surrogacy.

The required provisions for the agreement are at the heart of any surrogacy arrangement. Under the Act, the surrogate and her spouse must agree that she will work with the intended parents to get pregnant and delivery a healthy child or children.²⁰⁰ The surrogate and the spouse must also agree that the intended parents will be the legal parents of the child or children born and that the surrogate and spouse will acknowledge that fact and act accordingly.²⁰¹ Last, the intended parents have to agree that they will acknowledge and honor that parenthood of the child and assume that role at the birth.²⁰²

The Act also includes optional provisions. One important optional provision in the Act is a requirement that the surrogate do or refrain from doing certain things, including undergoing recommended medical tests or procedures and living in a way that is beneficial to

200. *Id.* § 25(c)(2)(i).

201. *Id.* § 25(c)(2)(ii).

202. *Id.* § 25(c)(4)(i)–(ii).

the health of the child or children that the surrogate will carry.²⁰³ In addition, the Act provides express statutory authorization for the intended parents to compensate the surrogate.²⁰⁴ The Act allows not only reimbursement of the surrogate's expenses, but also "reasonable compensation" for her service.²⁰⁵

The key to the Act is that if all of the requirements of the statute are met, then the intended parents are deemed to be the parents of the children born to the surrogate at the time of their birth.²⁰⁶ Further, custody automatically vests in the intended parents immediately upon birth.²⁰⁷ Thus, no court involvement is necessary to amend or restate any birth certificate. Even if there is not strict compliance with every requirement of the statute, the Act instructs courts attempting to determine parental rights and custody to consider the intent of the parties set forth in the surrogacy agreement.²⁰⁸

PART III: THE SURROGACY AGREEMENT

The previous parts introduced the fundamentals of surrogacy and discussed how to manage different states' surrogacy laws. This part will explore how to structure a surrogacy agreement between the intended parents and a surrogate in more detail.

It is important to note that a contract is an agreement, that is, a set of promises, between parties that is legally binding.²⁰⁹ Thus, a surrogacy agreement is a contract. The structure for any surrogacy arrangement is set forth in the agreement between the parties. The surrogacy agreement is a roadmap for how the relationship between the intended parents and the surrogate will proceed. Thinking through that agreement, drafting it, negotiating it, and executing it helps the parties further contemplate and understand the scope of their rights and obligations and the gravity of the arrangement.

As reflected in the Illinois Gestational Surrogacy Act, there are certain provisions that are fundamental in any surrogacy contract. These provisions include the surrogate's agreement to attempt to

203. *Id.* § 25(d)(1)–(2).

204. *Id.* § 25(d)(3)

205. *Id.*

206. *Id.* § 15(b)(3).

207. *Id.* § 15(b)(5).

208. *Id.* § 25(e).

209. Restatement (Second) of Contracts § 1 defines a contract as "[a] promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

become pregnant and the agreement that custody of any resulting children vests with the intended parents. The Act legally requires that those central provisions be present in the agreement.²¹⁰

Beyond those few required provisions, however, there are many issues that the parties should consider and agree upon prior to executing a surrogacy arrangement. This part will consider the types of provisions that should be included and will highlight the interests at stake for the intended parents and the surrogate.

Both the intended parents and the surrogate should be represented by independent attorneys when preparing and negotiating the surrogacy agreement. This requirement reflects best practices around the country. Even if the state where the parties are executing the agreement does not mandate attorneys for each of the parties, independent attorneys are highly beneficial. Attorneys help non-professional individuals fully understand the implications of the agreement and the range of alternatives available. Typically, attorney fees for the surrogate are paid by the intended parents as another cost associated with surrogacy.

The provisions of a typical surrogacy contract address issues and events in the order that they occur. First, the agreement addresses preliminary matters. Second, the agreement confronts the types of issues that arise at the beginning of a surrogacy arrangement (for example, the preliminary medical testing of the parties) through the implantation stage. Third, it covers the pregnancy stage. And fourth, the agreement addresses the birth and issues that arise thereafter.

Intended parents and surrogates should work with their own counsel to develop a surrogacy agreement that works for their unique set of circumstances. This part provides sample language to illustrate what a basic surrogacy contract may look like. The sample provisions provide guidance on the issues involved and how the parties may address them in their own agreement.

A. Prefatory Clauses

Contracts typically begin with a set of prefatory paragraphs that explain the setting for the arrangement that is the subject of the agreement and set the tone for the entire agreement. Each prefatory paragraph may be identified by a sequential number or letter; or the clauses may each begin with the word “Whereas.” In practice, the

210. 750 ILL. COMP. STAT. 47/25(c)(1)

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prefatory clauses usually do not contain the promises that a court would need to enforce. However, prefatory clauses provide useful background information that a court may use to establish the intent of the parties. Sample prefatory clauses are shown below.

Example 3-1: Prefatory Clauses

Whereas: the Intended Parents are unable to have natural children of their own and seek to work with a surrogate to have one or more biologically related children; and

Whereas: the Surrogate is sympathetic to the needs of the intended parents, and seeks to help the intended parents have one or more children by embarking on the surrogacy arrangement described herein; and

Whereas: as a result the Intended Parents are incredibly appreciative of Surrogate's willingness to help and commit to compensate her as outlined in this agreement; and

Whereas: the parties understand that all the medical procedures associated with this surrogacy arrangement, including pregnancy and childbirth, are inherently risky; and

Whereas: notwithstanding those risks, the parties to this agreement herein set forth with specificity their mutual intention that the Surrogate (i) be impregnated with one or more embryos created with the sperm of the Intended Father and the egg of an Egg Donor, and (ii) ultimately birth one or more children for the Intended Parents; and

Whereas: the Intended Parents will take full parental responsibility for, and custody of, the children so born; and neither the surrogate nor her spouse will have any legal relationship with the children so born;

Now therefore, the parties agree

There are general tensions and principles that exist with drafting contracts. First, there is a general tendency for attorneys to write agreements using overly complex sentences and language. Best

practices dictate that contracts should be written in plain English. This means that contract drafters should write every sentence in plain English so that the agreement is easy to read.

Another tension that exists in contract drafting is the tension between being brief and including too much detail. A brief contract is less inclusive, but it may be easier for a reader to understand. A detailed contract is more thorough, but it may be more difficult for the reader to understand. There is a middle ground that provides a balance between brief and detailed contracts. Every attorney has his or her own approach to striking this balance. For example, some attorneys prefer to detail the risks associated with pregnancy and surrogacy arrangements at the beginning of the contract. This detail may even be in the prefatory clauses.

As mentioned, one of the functions of the contracting process is to make sure the parties understand what they are committing to do. Parties sometimes rely too heavily on their attorneys and do not always read through the entire contract. For that reason, drafters often set forth any major issues during the first few pages of the contract.

These major issues will also be set forth in greater detail further into the agreement. Thus, how much detail and how much discussion to put into the prefatory clauses is a question of balance. Drafters should highlight important details up front to be sure that the intent of the parties is fully clear. However, the detail of the arrangement can be left for the later sections.

Tales from the Field: Beware Being Overly Aggressive

In one surrogacy agreement, the drafting attorney working for the intended parents decided to emphasize in the prefatory clauses the high degree of risk that the surrogate was undertaking to be sure she understood that risk. The agreement therefore included language about the parties understanding that pregnancy carries with it a high degree of risk, even risk of death and that the parties still willingly agreed to undertake the arrangement.

The language used in that contract went on to explain that if the surrogate were to suffer from some medical condition during the pregnancy such that she could not make her own medical decisions, then the intended parents would be authorized to make decisions for

her since the life and health of their children were involved. And that contract further stated that even if the surrogate were to be in a vegetative coma, the intended parents would be authorized to make those medical decisions that would sustain the vegetative body of the surrogate sufficiently to allow for the children to be born as healthy as possible.

All of these provisions protected the intended parents and were good for the surrogate to consider before moving forward. However, the extreme nature of the language, including the specter of the surrogate dropping dead or falling into a vegetative coma as a result of the pregnancy, were enough to just about scare the surrogate off all together.

Thus, when drafting and including language, parties should be sensitive to the purpose of the language. It is appropriate for attorneys to apprise parties of the risk and make provisions for what will happen in certain unplanned circumstances. Language that is overly aggressive, however, may only serve to destroy an otherwise potentially cooperative relationship. In the example, the parties may have achieved the same result without the necessity of describing the surrogate dropping dead or into a vegetative coma.

The prefatory provisions are also a good place for language that can help build a positive relationship between the parties. In the sample clauses above, a provision was added to compliment the surrogate for being sympathetic towards the intended parents. Instead of focusing on the dangers of surrogacy, the clause exalts the surrogate for her generous service. The sample clause that begins with “Whereas, the Intended Parents are incredibly appreciative of Surrogate’s willingness to help . . . “ reflects the intended parents’ gratitude towards the surrogate. Parties may also want to mention a specific situation that brought the particular intended parents and surrogate together. The prefatory clauses set the theme and tone for the surrogacy relationship, so infusing them with positivity helps the parties achieve a successful cooperative relationship and feel good in the process.

B. Definitions

Capitalized words are generally words that have specific

definitions assigned to them somewhere in the agreement. In simple agreements, drafters may set forth the definition when they first use a term. Drafters also may put the term in capital letters and parenthesis to show that it is a defined term. In longer, more complex agreements, there is generally a section dedicated to definitions. That section is generally at the beginning of the agreement so that it is easy for the reader to find and understand the terms before reading the contract.

Casual readers of contracts tend to skim over the definition section. Parties should beware not to do this. Sometimes definitions may change the rights or obligations of the parties. For example, the definitions may set forth when an abortion is permissible as shown below.

Example 3-2: Definitions

Permitted Abortion – an abortion in the first twenty weeks of pregnancy (measured from the date of insemination) requested by the Intended Parents or certified to be medically necessary by a Responsible Physician for the life or health of the Surrogate or the Child.

Later in the agreement, the relevant section may only say, “the Surrogate agrees not to have an abortion other than a Permitted Abortion.” Thus, the crux of the agreement on when an abortion is permitted is actually in the definition. In this example, an abortion is essentially not a choice for the surrogate, but is one that is up to the discretion of the intended parents, unless is it medically required as certified by a responsible physician. The definition also sets forth the time frame when an abortion can be requested, in this case, within the first twenty weeks of pregnancy. That time frame may be controversial as well since a surrogate may not want to have an abortion after the first twelve weeks. The definition also determines the date that timeline begins. In this example, that start date is the date of insemination. Some professionals may start counting the twenty weeks at the end of the last menstrual cycle. Thus, the twenty-week period defined by this agreement may actually represent more than twenty weeks to others who would start calculating the time at a different point.

The example definition of *Permitted Abortion* contains several

other defined terms. These terms include *Intended Parents*, *Responsible Physician*, *Surrogate*, and *Child*. To fully understand the primary term, the reader must understand all of the other terms used within the definition.

A definition of a term may not be one of first impression. A term can have additional meanings other than its traditional definition. This warrants caution when drafting surrogacy contracts. For example, without a specific definition, *Intended Parents* commonly means the person or couple seeking to have a child with the surrogate. However, a definition within a contract may also include how to proceed if the *Intended Parents* begin the process as a couple, but then end up separating before the process is complete. In this situation, if the intended parents are a married man and woman who used the husband's sperm to fertilize a donor egg, then the couple may decide in advance that if they split, *Intended Parents* might refer only to the husband.

Surrogate as a term should be straightforward as there is only ever one surrogate. Still, the definition of *Surrogate* may include a statement that it is "the woman who agrees to act as a surrogate under the terms of the agreement, unless she becomes pregnant with a child genetically unrelated to the *Intended Parents*, in which case any rights or privileges she may have had under the agreement do not apply to her." If the intended surrogate actually does get pregnant with a child not genetically related to the *Intended Parents*, then she would presumably no longer be deemed to be the *Surrogate*, as defined in the agreement.

Responsible Physician is a term often used by drafters. The drafter may define *Responsible Physician* as "the obstetrician who will be primarily responsible for the pregnancy and who is consented to by the Intended Parents and the Surrogate, or any subsequent obstetrician whose service is consented to by the Intended Parents and the Surrogate." Alternatively, the drafter may define the term more broadly to be "any physician coordinating, supervising, and attending to any of the procedures involved in getting the surrogate pregnant and monitoring that pregnancy through to child birth."

The definition for the term *Child* could also be different than the plain meaning of the word. The term may be defined to mean "any fetus carried by the Surrogate and any child born as a result of the surrogacy process, but only where that child is genetically linked to the Intended Parents." This definition may be used later in the agreement to say, for example, that the *Intended Parents* will take full

parental responsibility over any *Child* born through the surrogacy process. That statement allows the *Intended Parents* to avoid taking responsibility for any child that is not genetically linked to them. As a result, if the surrogate was in fact impregnated by her husband or any other man, then the *Intended Parents* would not be responsible for the resulting child.

Definitions can be crucial to establishing the rights and obligations of the parties and should not be ignored by drafters or readers. A full understanding is more consistent with full compliance after the agreement is executed. Drafters and parties to the agreement should never let a definition escape their notice.

C. Representations

In most sophisticated contracts there is a section where the parties attest to the truth of a series of representations. The representations are statements of fact that are relevant to the arrangement being contemplated. The other party relies on these statements when entering the agreement. If any representation turns out to be false, then the counterparty may have a legal basis on which to avoid any of his or her obligations under the agreement.

1. Representations of the Surrogate

The intended parents will likely want the surrogate to attest to a variety of facts, some of which may be required by law. The Illinois Gestational Surrogacy Act requires that the surrogate be over twenty-one, have had at least one child before becoming a surrogate, and have received both psychological and legal counseling. Thus, the party drafting the first version of the agreement will include a variety of standard representations that it wants the other party to make, and certain ones that it is willing to make. The parties then review the first version to make sure that all of the representations set forth are actually true. Any misstatement in this section could alleviate the intended parents of their obligations, since those obligations are considered contingent on the representations being true.

Example 3-3: Representations of the Surrogate

The intended parents will want the surrogate to attest to a variety of facts. Some of these may include:

- *that she is of a certain age (over 21 in any event);*
- *that she is either single or married (if married, the spouse will generally be required to sign on to the agreement);*
- *that she is competent to execute the agreement and fully understands the nature of the surrogacy arrangement;*
- *she is healthy and, at least to the best of her knowledge, can carry a child through pregnancy to birth;*
- *that she has had one or more children of her own previously;*
- *whether she has had any miscarriages or other problems with carrying a child to full term and birthing that child;*
- *that she fully understands the risks, both medical and psychological, associated with being a surrogate, becoming pregnant and carrying and birthing a child, including, in the extreme, complications from the pregnancy that could even lead to her own death;*
- *that she has received psychological counseling about the obligations and risks associated with surrogacy; and*
- *that she has received legal counseling about her risks, rights, and obligations as they pertain to surrogacy generally, and also as they are described in the surrogacy agreement.*

Working through the draft agreement and asking the parties to attest to these statements will spark conversations between the parties where there are complicated facts or inaccuracies. For example, there may have been some medical issues that the surrogate had when trying to become pregnant or give birth in the past. The intended parents will want to know about those issues. Having those conversations in the course of the negotiations is crucial to the parties' ability to understand each other before proceeding with the arrangement. It is important that the parties discuss each statement to

make sure that everyone has the same common understanding of the agreement.

As much as the intended parents want certain representations from the surrogate, the surrogate will also likely want the intended parents to make certain representations as well. Some of these representations may also be required by the relevant law. For example, the Illinois Gestational Surrogacy Act also requires intended parents to receive psychological and legal counseling before entering into the arrangement. If, as is often the case, the intended parents provide the initial draft of the agreement, then the surrogate and her attorney may well ask for additional representations to be made by the intended parents beyond those already included in that first draft. The surrogate enters into the arrangement at least in part based on the veracity of these representations. Thus, if any were untrue, then legally her obligations under the agreement may also be avoided. Below are sample representations of the intended parents.

2. Representations of the Intended Parents

Example 3-3: Representations of the Intended Parents

The surrogate will want the intended parents to attest to a variety of facts. Some of these may include:

- that the intended parent(s) is either a single person or that they are part of a couple, married or otherwise (if part of a couple the partner or spouse will generally be required to sign on to the agreement);*
- that they are competent to execute the agreement and fully understand the nature of the surrogacy arrangement;*
- that they are healthy and, at least to the best of their knowledge, the contribution of their genetic material to the surrogate will not create any health risk for the surrogate;*
- that they are healthy and, at least to the best of their knowledge, will be able to raise any children born from the surrogacy through to adulthood;*

- *that if anything should happen to them, including death, and they were not capable of raising any child born as a result of the surrogacy, that they have appointed another named person to be the parent of such child or children and that person has agreed;*
- *that they fully understand the risks, both medical and psychological, associated with surrogacy, including the fact that IVF is not always successful, nor does every pregnancy result in a live birth, due to no fault of the surrogate;*
- *that they have received psychological counseling about the obligations and risks associated with surrogacy;*
- *that they have received legal counseling about their risks, rights, and obligations as they pertain to surrogacy generally, and also as they are described in the surrogacy agreement; and*
- *that they are financially capable of funding their obligations hereunder, have set up an escrow for payments for the surrogate, and understand that overall costs may end up surpassing any initial estimates.*

D. Medical Testing and Agreement to Share Information

After the definitions and representations, the next part of the contract addresses the early stages of what actually happens in a surrogacy arrangement. This section discusses the rights and obligations of the parties with respect to preliminary medical testing.

1. Medical Testing of the Surrogate

In any surrogacy arrangement, one of the first medical steps is the medical and psychological examinations of the surrogate and the intended parents to ensure that they are fit for their role. The intended parents will want certain assurances about the surrogate and the surrogate will want certain assurances about the intended parents.

The intended parents will want to know, to the fullest extent possible, that the surrogate is medically fit to respond to the prescribed medications, become pregnant, and carry children through

to a live birth. In addition, the intended parents will want to be sure that the surrogate is not using narcotics or other drugs that may affect the health of any embryo or fetus. Further, the intended parents will want to know that the surrogate does not have any diseases or infections that could be transmitted to a child carried by her.

Accordingly, the surrogate will likely agree in this section to submit to all relevant medical examinations and tests designed to give the intended parents the assurances they need.

Example 3-4: Testing on Surrogate

Surrogate's Agreement to Submit to Testing. The Surrogate agrees to submit to any and all medical testing deemed prudent or required by any Responsible Physician.

2. Medical Testing of the Intended Parents

As with any contract, there should be parallel rights and responsibilities of all the parties where applicable. In a surrogacy contract, the surrogate will likely want to make sure that the intended parents are healthy and able to raise the children to adulthood. The surrogate will also likely want to make sure that whoever is contributing genetic material to the embryo implanted in her will not be putting her health at risk. As a result, the contract should include a clause similar to the clause set forth above where the intended parents agree to any and all relevant medical tests.

Example 3-5: Testing on Intended Parents

Intended Parents' Agreement to Submit to Testing. The Intended Parents agree to submit to any and all medical testing deemed prudent or required by any Responsible Physician.

3. Psychological Counseling for All Parties

Certain state statutes (including the Illinois Act) require psychological evaluations of the surrogate and the intended parents. The contract needs to have a section where the parties agree to submit to this testing. Any previous clauses may also contain reference to psychological testing or one clause may be used to capture all of these commitments.

Example 3-6: Testing on All Parties

The Parties' Agreement to Submit to Testing. The Surrogate and the Intended Parents agree to submit to any and all medical tests that any Responsible Physician deems prudent or required. In addition, the Surrogate and the Intended Parents agree to submit to a psychological counseling session with a counselor recommended or approved by any Responsible Physician.

4. Agreement to Share Information

Related to the medical and psychological exams that the parties will undergo is the need for each of the parties to have access to the test results of the other party. An additional commitment to share information is generally required from all parties.

Example 3-7: Sharing Information

Agreement to Share Information. The Surrogate and the Intended Parents agree to provide each other and all Responsible Physicians with access to the results of all relevant medical and psychological tests and to execute any additional documents necessary to assure that access.

5. Termination if Testing is Unsatisfactory

There needs to be a clause allowing parties to terminate the relationship if the results from the preliminary testing are unsatisfactory.

Example 3-8: Unsatisfactory Test Results

Termination upon Unsatisfactory Results. If any of the results of the medical, drug, or psychological testing is unsatisfactory to any of the parties, this agreement will terminate with no further obligations due or owing by or to any of the parties.

E. Medical Procedures and Behavior Restrictions

The last section discussed preliminary medical and psychological testing. If any of those test results make proceeding imprudent, then the surrogacy arrangement will terminate. If, however, all goes well with the testing, then the parties will proceed to the next stage. This next stage involves the medical procedures

related to the impregnation, pregnancy, and the birth of the child.

1. Medical Procedures and Assumption of Risk

Once the preliminary testing is done, almost all of the medical procedures and obligations are those of the surrogate. In this stage there are no parallel commitments of the intended parents. Instead, the surrogate agrees to undergo the embryo transfer, pregnancy, and birthing process. The intended parents will likely want to know that the surrogate does acknowledge the risks of those procedures and will not hold them responsible for those risks.

One of the variables involved in the procedure is how many pre-embryos the parties are willing to transfer to the surrogate. Since success rates for IVF are often lower than fifty percent, many intended parents transfer two or three pre-embryos into the surrogate in hopes that at least one will be successful. Of course, the risk of transferring two or three pre-embryos is becoming pregnant with multiple babies, a high-risk situation for both the surrogate and the babies. As a result, this is an issue that the parties need to discuss.

Parties should consult with their physician on how many pre-embryos it is prudent to transfer. This amount may also depend on the success rate at that particular clinic and the surrogate and intended parents involved. It is not uncommon for parties to leave this decision until the day when the transfer will happen. If the pre-embryos are very healthy then the parties will generally transfer fewer. Since the number depends on the viability of the pre-embryos, parties usually agree that they will transfer “up to” a certain number of pre-embryos and fewer if the responsible physician advises otherwise.

The number of embryos the parties want to transfer is a good example of an issue that the parties may not consider unless prompted to do so through the negotiation of a surrogacy agreement. If the parties cannot agree on this issue, it is better for them to part ways early on in the process, and for the intended parents to seek another surrogate.

Example 3-9: Submission to Medical Procedures

Medical Procedures. The Surrogate agrees to receive the transfer of [only one pre-embryo] [up to a maximum of two pre-embryos] [up to a maximum of three pre-embryos] created through IVF and then, if a pregnancy results, to carry the resulting fetuses to term and to deliver

them under the direction of a Responsible Physician. The Surrogate further agrees to cooperate fully with any Responsible Physician to assure that these procedures have the highest chance of success.

Assumed Risks. The Surrogate acknowledges that she understands the medical and psychological risks associated with these procedures, including in the extreme, the possibility of her death due to complications, and agrees not to hold the intended parents responsible for any of those risks.

2. Behavioral Restrictions

Beyond agreeing to undergo the procedures, the surrogate also will need to acknowledge she will be required to restrict her behavior in order to ensure successful procedures and pregnancy so that any children born have the best chance of being healthy. This means that at the beginning stage of embryo transfer the surrogate must refrain from sexual intercourse of any sort for a certain amount of time before and just after the transfer. This ensures that any baby born is the result of the transferred embryos.

Additional restrictions throughout the process include the surrogate refraining from drinking alcohol or using certain drugs or amphetamines. Amphetamines may include prescription medications. If the surrogate takes any of these medications, then the parties will need to discuss the situation with their physician. It is possible that the intended parents will want to work with a different surrogate.

Having these conversations early on in the process may save the parties time and energy. Parties may also want to include a clause that clearly states the consequences of violating the behavioral restrictions. These consequences may include termination of the agreement. However, if the surrogate is already pregnant when the violation occurs, then the intended parents will probably not want to terminate the agreement as they will likely still want to take parental rights over any child born. In this situation there may be financial penalties for the surrogate. The intended parents need to have flexibility to make the decision about what to do if the surrogate violates the behavioral restrictions. As a result, the agreement may specify that any violation of the behavioral restrictions represents a material breach of the agreement by the surrogate and would give the intended parents the option to terminate their obligations under the

agreement.²¹¹

Example 3-10: Behavioral Restrictions

Behavioral Restrictions. The Surrogate also agrees to follow the behavioral guidelines of any Responsible Physician in order to assure the highest degree of success with the procedures. This includes taking any medication as it is prescribed, attending appointments, allowing testing and blood draws. It also includes refraining from sexual intercourse for a certain amount of time before and after the embryo transfer. It further includes refraining from behavior that could harm the Child. This includes smoking cigarettes, drinking alcohol or taking certain proscribed drugs throughout the process, beginning a certain amount of time before the embryo transfer and extending through to childbirth. In the later months of pregnancy it also includes restrictions on travel. Any violation of this provision will be deemed a material breach of the agreement by the surrogate and will allow the Intended Parents the option to terminate their obligations hereunder or to reduce payments as they deem reasonable.

3. Committing to a Certain Number of Embryo Transfer Cycles

The parties may also want to include in the contract what will happen if an embryo transfer does not result in a pregnancy. This includes whether they want to work together to attempt another cycle and how many cycles they are willing to commit to. Intended parents may not want to invest their time and energy into a relationship with a surrogate who is only willing to attempt one cycle. With success rates of IVF often lower than fifty percent, several cycles may be necessary before a successful pregnancy is achieved. Accordingly, it is common for parties to agree up front that they will undertake at least two or three cycles until a successful pregnancy is achieved. Alternatively, parties can enter into a new agreement or extend their old one if they want to continue on with a new cycle after an unsuccessful one. Going through a cycle helps parties get to know each other, and either the surrogate or the intended parents may end up not wanting to go through another cycle. It may, therefore, be best to see how the first cycle transpires before committing to additional

211. The intended parents should try to avoid this situation through careful assessment of the surrogate. It is still important for drafters to include a clause in the contract that covers the behavioral restrictions.

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cycles. If both parties are still happy after the first cycle so that they want to go through a second or third cycle then they can agree to continue at that point.

Tales from the Field: Behavioral Violations and Subsequent Cycles

In one situation, the parties to a surrogacy agreement had committed in advance to work together for at least two embryo transfer cycles. The first cycle was abandoned because the surrogate did not regularly take the medications as prescribed by the physician. As a result, the intended parents decided not to work with the surrogate for a second cycle.

At that point, the surrogate demanded that they do so since they had agreed to that in their contract. The intended parents did not oblige since they viewed the surrogate's behavior as a breach, voiding any obligation on their part. Nonetheless, having that clause gave the surrogate a potential argument to pressure the intended parents to continue to work with her against their better instincts.

If the parties decide that they want to commit to at least two cycles in advance then the contract language needs to reflect this decision.

Example 3-11: Number of Cycles

Number of Cycles: The parties agree to work together through a second embryo transfer cycle if the first embryo transfer cycle does not result in a successful pregnancy.

F. Pregnancy Instructions and Who Can Decide

This section will address some of the controversial issues that are specifically related to what can happen during the pregnancy. These issues are complicated and uncomfortable for most people to think about and discuss. It is for exactly that reason that they must be addressed in advance, and their inclusion in the draft agreement will prompt the conversation. As with other controversial areas, if the surrogate and the intended parents cannot agree on these provisions, it may be best for the parties not to work together.

1. Possible Termination of the Pregnancy

The parties must confront whether and when they would want to

terminate a pregnancy. It is crucial that the parties agree on this because courts cannot compel a surrogate to have an abortion. Thus, if the intended parents believe that there are certain extreme medical conditions that would lead them to want to terminate the pregnancy, then they need to be able to make that decision and have the surrogate follow their wishes. Even if the terms in the agreement are not specifically enforceable by courts, including the expectations of the parties in the agreement serves as a prompt for their conversation about the possibility of terminating the pregnancy.

If the intended parents believe there are circumstances when they would want to terminate the pregnancy and the surrogate expresses some hesitation about following their wishes, the intended parents may want to work with a different surrogate to avoid the chance that the surrogate's hesitation develops into full-blown resistance after three months of pregnancy. If the surrogate does not terminate the pregnancy, at least one of the intended parents will still be the biological parent and will likely be responsible for child support for any child born even if the intended parents refuse to take custody.

If the intended parents would never want to terminate a pregnancy under any circumstances, then they need to make sure that their surrogate agrees with them. Their surrogate should be prepared to carry a child through to childbirth even if it may have severe birth defects or other extreme medical conditions.

The surrogate will also need to be sure that the intended parents share her views about terminating a pregnancy. If she would not want to abort a pregnancy under any circumstance then she will likely not want to work with intended parents who would want her to have an abortion, even if it is only under certain limited circumstances.

There are rare occasions when continuing a pregnancy would put the surrogate's life at risk. If this is the case, then generally the parties will defer to the surrogate to make the decision about whether to proceed with or terminate the pregnancy.

Example 3-12: Possible Termination of the Pregnancy

Terminating the Pregnancy: The parties hereto agree that because any Child born will belong to the Intended Parents, that the Intended Parents can make a decision to terminate the pregnancy [for any reason] [only if there are certain extreme medical circumstances] up until the [12th] [20th] week of pregnancy, as measured from the date of insemination. Understanding that such provision is not specifically

enforceable, the Surrogate agrees to follow the wishes of the Intended Parents in this regard.

In any event, the parties agree that if any Responsible Physician advises that continuing the pregnancy puts the Surrogate's life or health at risk, then the Surrogate shall have the right to decide to terminate the pregnancy at any time.

2. Selective Reduction

Another important issue to address is whether the parties would agree to a selective reduction in the event that the surrogate becomes pregnant with multiples. Such a pregnancy is risky for the surrogate and the babies, and raising multiple children is considerably more difficult for the intended parents. This discussion is closely related to the discussion of how many embryos to transfer. There is an increased risk of multiples with more embryos that are transferred. However, even the transfer of one embryo could end up in multiples if that embryo splits. If the intended parents and the surrogate are not comfortable with multiples, then they should consider only transferring one embryo.

One approach to managing multiples is to only perform a selective reduction if there are three or more developing embryos. This is not likely if only transferring one or two embryos in the first place. If there are three or more developing embryos, then the parties may agree only to terminate those embryos that have the lowest chance of survival, as determined by a responsible physician, and allow two to remain and develop. The parties need to discuss their intentions to make sure they agree on what to do if there are multiples.

In addition, a prudent drafter will include a provision explaining that selective reduction may also occur if the life or health of the surrogate is at risk. This is similar to the provision included in the termination of pregnancy clause discussed above.

Example 3-13: Selective Reduction

Selective Reduction: The parties hereto agree that if the Surrogate becomes pregnant with [two] [three] or more embryos, that the Intended Parents will have the right to request a selective reduction up until the [12th][20th] week of pregnancy, as measured from the date

of insemination. If such a request is made, then the Responsible Physician will identify the embryos with the lowest chance of survival and will terminate that or those embryos, allowing the most viable to remain and develop. Understanding that such a provision is not specifically enforceable, the Surrogate agrees to respect and follow the wishes of the Intended Parents in this regard.

In any event, the parties agree that if any Responsible Physician advises that continuing to be pregnant with multiples puts the Surrogate's life or health at risk, then the Surrogate shall have the right to decide to terminate any or all of the embryos at any time.

G. Birth Procedures, Rights, and Obligations

After discussing the preliminary testing and issues related to the pregnancy, the next stage to consider is the actual birthing of the child and the separation of the child from the surrogate at birth. It is in connection with this stage that the parties should affirm the intended parents' commitment to acknowledge full parental responsibility and take custody. The surrogate should likewise agree that neither she nor her partner or spouse, if there is one, will attempt to assert any parental rights or to take custody. Those affirmations are at the crux of the surrogacy relationship and their importance cannot be minimized.

This section may also contemplate issues like what to do in the rare event that a child born is not related to the intended parents or not related to any of the parties at all. Finally, the drafter may also include provisions addressing what may happen if the intended parents separate or if one or both of the intended parents die during the pregnancy and before the birth.

1. Intended Parents Affirmation of Parental Rights and Custody

Central to the surrogacy arrangement is the intended parents' commitment to take full parental responsibility and custody of any child born. There is a risk that a surrogate will attempt to assert parental rights and take custody of any child born as shown in the *Baby M* and *In re Baby Boy A* cases. Most surrogates, however, are worried that the intended parents may change their minds and not want any child born so that the surrogate will feel compelled to raise that child or children. It is crucial for parties to discuss all of the possibilities and be absolutely certain that the intended parents are

committed to raising the child or children. This also means that parties need to contemplate the notion that a child born may actually have health concerns, birth defects, or a debilitating disease.

The logical conclusion of the intended parents having full parental rights upon birth is that they also have the unfettered right to make medical decisions on behalf of their child immediately at birth. This is not necessarily true. Parties need to address this in the agreement since, in many states, the surrogate, as a birth mother, will be considered to be the legal mother until a court rules otherwise. This means that the surrogate will have the legal right to make healthcare decisions for any child she delivers.

Example 3-14: Intended Parents Responsible for Child

Intended Parents Commit to Full Parental Responsibility. The Intended Parents commit to take full parental responsibility and custody of any child born through the surrogacy process immediately upon the birth of such child. This commitment shall be unwavering, regardless of any medical condition or affliction that may affect any such child.

Surrogate [and her partner or spouse] agree[s] not to assert any claim to parental rights or custody and agrees to cooperate to the fullest extent to support and enforce the parental rights of the Intended Parents, including cooperating in any necessary legal proceedings.

Intended Parents Make All Medical Decisions After Birth. Accordingly, the Intended Parents shall also have the full and absolute right to make any medical decisions on behalf of any such child immediately upon their birth. Surrogate agrees to cooperate to the fullest extent to make sure that Intended Parents have those full and absolute rights, including executing a medical power of attorney in their favor if necessary.

2. Child Born Unrelated to Intended Parents

The agreement should also address what the parties would do if any child born to the surrogate through the process is not actually genetically related to the intended parents. The parties need to discuss this so that they know the actions they would take in this circumstance. The risk of this happening may also make the parties more carefully follow the medical protocols designed to ensure that

any child born is indeed a child of the intended parents.

For example, the parties may agree that if the child is not related to the intended parents, but is genetically linked to the surrogate, then the surrogate would have the first right to parent the child and the intended parents would have no obligation to assert parental rights. If the child is not genetically linked to either the intended parents or the surrogate, as the case would be if the incorrect embryos were implanted in the surrogate, then the parties may agree that the intended parents would have the first right to become the legal parents of the child, but would not be obligated to do so. If the intended parents decline that option, then the surrogate would have the option to assert her legal parental rights. If neither the intended parents nor the surrogate wants to be the legal parents, then the child could be put up for adoption. Below are sample clauses that contemplate the situation where the child is unrelated to the intended parents.

Example 3-15: Unrelated Child

Child Born Unrelated to Intended Parents.

(a) If, after relevant medical tests, it is determined that any child born is not genetically related to the Intended Parents, then the Intended Parents shall be under no obligation to assume any parental rights over such child.

(b) In such a case described in paragraph (a), if the child is genetically linked to the surrogate, then the surrogate shall have the first option to assume her parental rights and take custody of the child. If the Surrogate declines that option, then the Intended Parents may choose to adopt the child and the Surrogate agrees to cooperate fully with that choice. If the Intended Parents do not so choose, then the child may be put up for adoption by a third party.

(c) In such a case described in paragraph (a), if the child is not genetically linked to any of the parties, then the Intended Parents will have the first option to adopt the child and the Surrogate agrees to cooperate fully with that choice. If the Intended Parents decline that option, then the Surrogate may choose to adopt the child. If the Surrogate does not so choose, then the child may be put up for adoption by a third party.

3. Changed Circumstances for the Intended Parents

The parties need to discuss and come to an agreement concerning what would happen if there is a change of circumstances with the intended parents.²¹² For example, if the intended parents are a couple, they may separate or divorce during the course of the surrogacy arrangement. Alternatively, one or both of intended parents may die.

For example, if a couple splits up, then the party who is genetically linked may be chosen to remain the sole intended parent. If one of the intended parents dies, then the other would likely want to remain the sole intended parent. However, if both of the intended parents die, then the intended parents must specify who will become the legal parent or parents of the child born through the process. Thinking through these possibilities, like so many of the uncomfortable issues described already, helps the parties understand what they would do if that unthinkable circumstance occurred.

Example 3-16: Change in Intended Parents' Circumstances

Changed Circumstances for the Intended Parents.

(a) [Paragraphs (a) and (b) here are only applicable if the intended parents are part of a couple.] If the Intended Parents separate or divorce during the course of the surrogacy arrangement, but before the birth of the child, then the sole Intended Parent shall be A. [This is because it is A who will be genetically linked to the child since it is A's sperm that is being used to create the pre-embryos that will be transferred to the surrogate.]²¹³

(b) If one of the intended parents dies, then the sole intended parent shall be the surviving intended parent.

(c) If [both intended parents die] [the intended parent dies], then the

212. See Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, Sept. 18, 2014, at A1 (quoting Andrew W. Vorzimer, a surrogacy lawyer, who said that he knows of eighty-one cases in which intended parents have changed their minds during the surrogacy arrangement).

213. It is not necessary to include this language. It is only added here to explain why the parties may choose one intended parent over the other. Each set of intended parents who are part of a couple at the time of executing a surrogacy agreement will need to work through this scenario and come up with their own consequences for any separation.

intended parent[s] want[s] to make known [his] [her] [their] intention that parental rights and custody be vested in [the chosen person or couple. That person or couple] has discussed this matter with the Intended Parents and has agreed to become the parent or parents of any child born in such event.

H. Financial Issues, Including Insurance

The financial issues are likely to be paramount in each of the parties' minds. The intended parents are concerned due to the high overall cost of surrogacy and they will likely want to keep those costs within what they are able to pay. The surrogate cares about financial issues because compensation is one of the central reasons why she is agreeing to be a surrogate in the first place. This is not to undermine the altruism inherent in being a surrogate, but, in short, money matters.

1. Base Compensation

There is a base compensation that the intended parents will pay to the surrogate. Currently, base compensation in the United States can range from \$10,000 to \$40,000 or more. Some surrogates do not charge at all because they are a friend or relative of the intended parents while others may charge more if they are able to negotiate for a higher amount. The parties will negotiate a base compensation that makes them all comfortable, or perhaps all slightly uncomfortable, with the intended parents feeling like they are paying somewhat more than they would like, and the surrogate feeling like she is getting slightly less than she would like.

Crucial to the discussion of base compensation, however, is the timing of the compensation. The intended parents do not want to pay a large portion of the fee unless the pregnancy is viable and children will result from it. As a result, compensation is generally paid over time, with smaller amounts paid in the initial phases and larger amounts paid as the pregnancy continues. The surrogate often does not receive a significant amount of the money until the successful delivery of one or more children.

Naturally, delayed compensation is not ideal for the surrogate. The surrogate will be going through major medical treatments early and throughout the pregnancy and may argue that she should be paid at least as much in the early stages as later on in the process. Moreover, if the pregnancy is not successful, the surrogate will not

receive very much for her efforts if early payments are small. Thus, the parties will need to negotiate a payment schedule that seems fair to all parties.

The payment schedule should be keyed to clear milestones so that all of the parties understand when payment is due. If the intended parents are paying the surrogate through escrow, then the escrow agent who will disburse the payments needs to know exactly when amounts are due. The sample language below presents one possible schedule for payments.

Example 3-17: Base Compensation

Base Compensation. The Intended Parents agree to pay Surrogate for her services a base compensation of [\$25,000].

Timing of Base Compensation Payments. The base compensation is payable according to the following schedule.

\$1,000 – at the start of medications preparing surrogate for embryo transfer;

\$1,000 – at the time of embryo transfer;

\$2,000 – at confirmation of a viable pregnancy at 8 weeks after embryo transfer;

\$2,000 – every 4 weeks thereafter, provided that the pregnancy is still viable;

The remaining balance due will be payable upon the successful delivery of one or more children who survive childbirth.

2. Expense and Reimbursement Payments

Parties often focus on and negotiate the base compensation for the surrogate and spend surprisingly little time on the other costs and expenses that that should rightly be paid by the intended parents. The surrogate will need to make sure that, in addition to her base compensation, any and all out-of-pocket expenses related to the surrogacy arrangement are paid for, or reimbursed by, the intended parents. The intended parents, by contrast, will want to include a

limit on those expenses to ensure that they are manageable. The sample language below covers expenses and reimbursements.

Example 3-18: Expenses and Reimbursements

Expense and Reimbursement Payments. The Intended Parents also agree to pay directly, if possible, or else to reimburse Surrogate for, any and all out-of-pocket expenses related to the surrogacy arrangement that are not covered by any applicable insurance. These expenses include, but are not limited to, expenses for:

- medical testing;*
- psychological counseling;*
- any medications or vitamins recommended or required by any Responsible Physician;*
- [if Surrogate has other children] any child care required by surrogate to facilitate her service and attendance at appointments, not to exceed a total of [\$1,000];*
- reasonable costs for maternity clothes, not to exceed a total of [\$1,000]; and*
- any actual lost wages resulting from work surrogate is required to miss because of the pregnancy (as certified by any Responsible Physician), not to exceed [\$5,000].*

Timing of Expense and Reimbursement Payments. Any such expense or reimbursement payment is due at the time when it is incurred.

3. Additional Compensation

The parties should think through the financial implications of any complications that may arise during the course of the pregnancy, like carrying multiples, having a miscarriage, or a mandatory Cesarean section for the delivery. These complications also include any health problems that the surrogate may acquire as a result of the surrogate agreeing to help the intended parents. The intended parents should expect to assist the surrogate with additional compensation if

those complications arise. The sample clauses below address additional compensation for the surrogate.

Example 3-19: Additional Compensation

Additional Compensation. Intended Parents shall provide surrogate with additional compensation in the following amounts for the events listed:

\$1,000 – for an abortion requested by the intended parents, or recommended or required by any Responsible Physician;

\$1,000 – for any selective reduction requested by the Intended Parents or recommended or required by any Responsible Physician;

\$1,000 – for a caesarian section recommended or required by any Responsible Physician;

\$5,000 – for each additional child beyond one if there are multiple live births;

\$5,000 – for a partial or full hysterectomy recommended or required by any Responsible Physician as a result of the surrogacy.

Timing of Additional Compensation. Any such compensation is due to Surrogate whenever the event that triggers the compensation occurs.

All of these expenses can be quite significant, and potentially exceed an additional \$10,000 or more. The intended parents will want to review all of these provisions closely to make sure that they are comfortable with these additional payments if incurred.

4. Escrow Arrangements

Parties may want to establish a payment system that involves an escrow account managed by an escrow agent. That account will be funded in advance by the intended parents. This reassures the surrogate that the costs will be covered and paid when due. The escrow agent will make payments from that account upon proof that the payment is due. Any amount remaining in the account at the

conclusion of the surrogacy arrangement will revert back to the intended parents.

The downside to the escrow arrangement is that it adds an additional layer of complexity to the relationship between the surrogate and the intended parents. There will also be a fee associated with establishing and maintaining an escrow account of approximately \$1,000 or more. If an escrow arrangement is desired, the parties will likely need to negotiate and execute a more detailed escrow agreement. This process will take time and increase the parties' attorneys fees. The money put into escrow should be sufficient to cover all the potential costs of the intended parents, including expenses, reimbursements, and additional compensation that may become due. The sample provision below addresses the use of an escrow account.

Example 3-20: Possible Escrow

Escrow. The parties agree to establish an escrow account that will be managed by, X, as the escrow agent. The Intended Parents will fund the escrow account with [\$40,000] to cover any and all possible payments to surrogate. The escrow agent will make disbursements from the escrow account to the surrogate when presented with proof that the amount is due and owing. The escrow agent will notify the intended parents of any such disbursement, giving them 5 business days to contest such payment before payment is actually made. Any fees associated with the escrow will be payable by Intended Parents.

5. Medical and Life Insurance

Insurance can help cover the medical costs and expenses associated with surrogacy. However, many insurance policies do not cover surrogacy. In this case, the intended parents may opt to pay all of the costs and expenses themselves. There is a risk that the expenses will skyrocket if there are extraordinary medical complications.

a. Insurance Covering Surrogacy

To address this situation, there are now insurance companies that offer medical coverage that pays for the medical costs and expenses incurred by a surrogate, including amounts triggered by extraordinary medical complications. The cost for that kind of insurance is currently roughly around \$20,000. That amount is likely more than

the out-of-pocket expenses associated with a routine pregnancy and delivery. Still, the intended parents may wish to consider purchasing a policy to cover themselves in the event of extraordinary medical expenses.

b. Life Insurance

In addition, it is now common for surrogates to request that intended parents purchase life insurance that would cover the life of the surrogate and pay her family in the event of her death. While death is highly unlikely, life insurance gives the surrogate added comfort that insurance would help provide for her family if she were to die.

I. Miscellaneous Provisions

Finally, as with any contract, there are boilerplate provisions that are typically found at the end of the contract. Most of these provisions are not worth negotiating and are not unique to a surrogacy arrangement. For example, there will likely be a severability clause. There will also likely be a provision simply identifying addresses of the parties for purposes of any communications. As straightforward as these provisions are, the parties should read all of the boilerplate clauses and discuss them with their attorney to make sure they understand the implications of each. However, some so-called boilerplate provisions are unique to surrogacy and are worth considering here.

1. Choice of Law and Venue

A section about which state's law will govern the parties' agreement and which venue will hear any disputes should be included in these provisions. Choice-of-law and venue provisions are important in most contracts, and are all the more important with surrogacy arrangements since not all jurisdictions support and enforce surrogacy agreements.

In addition to the choice-of-law provision, a contract can contain a choice-of-venue provision. Parties should expressly agree that certain courts should and can take jurisdiction over any dispute arising under the contract. With a surrogacy arrangement, the courts of the place where the birth will occur should take jurisdiction over the matter. The sample clause below addresses choice-of-law and venue issues.

Example 3-21: Choice of Law and Venue

Choice of Law and Venue. The parties hereto agree that any disputes hereunder will be subject to the laws of [Illinois] and agree to submit their dispute to the [courts of Illinois].

2. Confidentiality

The parties may each have their own wishes with regard to whether or not the surrogacy process is disclosed to others. The intended parents may want to control whether and when to discuss the surrogacy arrangement with their child or children born from the process. The surrogate also may or may not want to be known to the child or children born for fear of being more involved in their lives than she wants to be. These issues need to be discussed between the parties and their understanding should be set forth somewhere in the agreement.

The parties may include a confidentiality provision at the end of the overall agreement with the other boilerplate provisions. Attorneys need to draft the provision according to the parties' specific needs. Below is one sample provision, but, as with all of the samples set forth here, it is not appropriate for all situations.

Example 3-22: Confidentiality

Confidentiality. The Intended Parents agree not to disclose the identity of the Surrogate to any third party, including any child born from the process, without her consent. Likewise, the Surrogate agrees not to disclose the identity of the Intended Parents she is working with pursuant to this agreement with any third party without their consent. Notwithstanding the foregoing, the parties acknowledge that this provision does not apply to disclosures made to any of the professionals involved in the surrogacy process [or any other specific individuals the parties may want to name].

The surrogacy agreement is a roadmap for the surrogacy arrangement and contains the commitment of the parties on a wide array of issues related to that arrangement. Discussing the agreement allows the parties to work through the issues and prevent conflicts by ensure effective communication and cooperation.

PART IV: THE EGG DONOR CONTRACT

Part III illustrated just how complex the relationships involved in a surrogacy arrangement are. This part will explore the issues involved with egg donors and work through the important provisions of an egg-donor agreement. Like the surrogacy agreement, the egg-donor agreement will follow a basic format, including prefatory clauses, representations, and commitments from the parties related to the various stages of egg donation, and boilerplate provisions.

The same basic contracting principles that applied to surrogacy contracts apply to egg-donor contracts. This means that the drafters should draft the provisions clear, plain English and avoid any unnecessarily complex sentences or legalese. Discussing and agreeing on each issue helps ensure that the parties keep their promises and makes formal dispute resolution unnecessary.

A. Prefatory Clauses

The prefatory paragraphs, as mentioned with respect to the surrogacy agreement, set the stage for the agreements to come and create a tone for the relationship between the parties. Like surrogates, egg donors are generally compensated for their contribution, but they are also often motivated by a desire to help others who cannot have children without their help.

Tales from the Field: A Super Donor

One egg donor recounted having donated for seven different sets of intended parents and having had seven sets of twin boys as a result.²¹⁴ She herself had three boys of her own with her husband. At the time of writing this, she was in the process of what she described as her last donation and was donating to a same-sex couple from another country.

When asked how she felt about having been the biological mother to seventeen boys, she responded with a bit of a grin. "I know it seems weird, and in some ways it is true that I am biologically linked to seventeen boys, but I don't really consider the boys born from my donations to be my children. They are truly the children of their

214. Interview with Anonymous Egg Donor.

intended parents and I simply helped those parents to have them.”

She had worked through an agency to connect with her intended parents but felt very strongly that what she and the agency were doing was all about helping people start or build their families and not about the money involved. In fact, in at least one situation when the intended parents did not get pregnant with her first donation, she was prepared to donate again and waive any fee. However, those intended parents decided to try a different donor in hopes of increasing their chances of success.

In the first seven donations she was anonymous. The intended parents had seen her profile and pictures, but never knew her name or how to contact her. Likewise, she did not know the names or contact information of her intended parents

But for the current donation she was proceeding as an “open donor.” In other words, she is being open about who she is to the intended parents and they are open with her about who they are. She was particularly excited about this situation, as getting to know the intended parents has made her all the more excited and satisfied about her ability to help them realize their dream.

She is now thirty-one and is sure that this will be her last egg donation. Interestingly, though, she is now considering the possibility of being a surrogate.

As the experience of this particular egg donor illustrates, many egg donors are participating out of a desire to help others. Egg donors themselves may have been born through a type of assisted reproductive technology or have some other personal reason for wanting to help in this regard. The spirit of this generosity can be captured in the prefatory clauses, which in many ways mirror those in the surrogacy agreement. The provisions below show sample prefatory clauses.

Example 4-1: Prefatory Clauses

Whereas: the Intended Parents are unable to have natural children of their own and seek to work with Egg Donor to have one or more

biologically related children; and

Whereas: the Egg Donor is sympathetic to the needs of the intended parents, and seeks to help the intended parents have one or more children by embarking on the egg-donation arrangement described herein; and

Whereas: as a result, the Intended Parents are incredibly appreciative of Egg Donor's willingness to help and commit to compensate her as outlined in this agreement; and

Whereas: the parties understand that all the medical procedures associated with this egg donation arrangement, including hyperstimulation of the ovaries and egg retrieval are inherently risky; and

Whereas: notwithstanding those risks, the parties to this agreement herein set forth with specificity their mutual intention that the Egg Donor (i) take medication to hyperstimulate her ovaries, (ii) submit to a procedure to retrieve her eggs; and (iii) donate those eggs to the intended parents for their use as described herein;

Whereas: the Intended Parents will take full parental responsibility for, and custody of, any children born with the donated eggs; and the Egg Donor [and her partner or spouse] waive any parental rights that they may have to the children so born;

Now therefore, the parties agree

B. Definitions

Readers should pay careful attention to the definition section of an egg-donor agreement because, as with surrogacy agreements, rights and obligations are often determined through those defined terms.

Example 4-2: Definitions

Permitted Use – the Intended Parents shall have the right to fertilize the donated eggs and transfer one or more of the resulting embryos into a gestational surrogate in hopes of having one or more children;

they may also freeze any resulting embryos, donate them at no cost to another person or couple to use them to become parents, donate them at no cost for scientific research, or allow them to be destroyed.

Notice with this definition that the parties specified what the donated eggs can be used for. This is one of the major issues confronting egg donors and intended parents. Egg donors may only want their eggs to be used by the particular intended parent or parents who they are familiar with through their agency. The egg donor may not know the identity of the intended parents, but she would likely want to have a general understanding about who the intended parents are. For example, the egg donor may want to know whether the intended parents are financially stable, well educated, and able to provide for any children who are produced out of the agreement. The egg donor may also not agree to allow the intended parents to donate her eggs.

There is a market for unused frozen embryos where intended parents with excess frozen embryos sell them to subsequent intended parents as a way to hedge the costs associated with surrogacy.²¹⁵ Note that selling embryos is not a *Permitted Use* in the sample definition above. In that definition, only subsequent donations of unused embryos were allowed, but not sales of unused embryos. It is important for the parties to pay careful attention to the definitions because they may address major rights and obligations of the parties.

C. Representations

Both the intended parents and the egg donor will want certain assurances from their counterparty before entering into the transaction. These representations are quite analogous to the representations that the parties make in a surrogacy agreement. For example, both parties will want to know whether the other party fully understands their commitments and the risks associated with the process. The parties may insist that each party has undergone psychological and legal counseling in connection with the egg donation.

215. See I. Glenn Cohen & Eli Y. Adashi, *Made-to-Order Embryos for Sale—A Brave New World?*, 368 NEW ENG. J. MED. 2517 (2013) (examining the risks associated with the sale of “made-to-order embryos”).

1. Representations of Egg Donor

One important representation that the intended parents should consider is whether the egg donor has been a successful donor previously. Success is measured by resulting childbirth. One of the primary reasons intended parents may choose a particular donor is because she has a successful history of donating.

The other reason why intended parents may choose one egg donor over another is related to her profile. Generally egg donors fill out profiles by supplying information about themselves including their physical attributes, talents, hobbies, medical history, and information about their family medical history. Profiles generally include a variety of pictures of the donor at different ages and possibly members of her family, including any children she has had.

Intended parents will want assurances that the information in the profile is accurate and not misleading. Agencies and IVF clinics that find donors for intended parents generally try to verify the information supplied, but a representation in the egg-donor agreement can supplement any agency or clinic's effort to verify that information.

Representations of the Egg Donor

The intended parents will want the egg donor to attest to a variety of facts. Some of these may include:

- that she is of a certain age (over twenty-one in any event, but under thirty-one),²¹⁶*
- that she is either single or married (if married, the spouse will generally be required to sign on to the agreement);*
- that she is competent to execute the agreement and fully understands the nature of the surrogacy arrangement;*
- she is healthy and, at least to the best of her knowledge, can successfully undergo the egg donation procedures;*

216. Most IVF clinics recommend that egg donors be older than twenty-one years old, but younger than thirty or thirty-one in order to donate the most viable eggs.

- *[if true] that she has been a successful egg donor previously in that [out of x donations y] donations have resulted in a live birth;*
- *that the information in her Donor Profile is accurate and not misleading in any way;*
- *that she fully understands the risks, both medical and psychological, associated with being an egg donor, including possible infections, and, in the extreme, complications that could even lead to her own death;*
- *that she has received psychological counseling about the obligations and risks associated with egg donations; and*
- *that she has received legal counseling about her risks, rights, and obligations as they pertain to surrogacy generally, and also as they are described in this Egg Donor Agreement.*

2. Representations of the Intended Parents

Similarly, the egg donor will want to know that they are working with intended parents who are competent enough to enter into the arrangement and who understand all the risks, including the fact that egg donations do not always result in live births even after appropriate fertilization and implantation into a gestational surrogate. The egg donor will want to ensure that the intended parents understand that the egg donor's responsibilities are limited to her donation. The box below contains some sample representations of the intended parents.

Representations of the Intended Parents

The egg donor will want the intended parents to attest to a variety of facts. Some of these may include:

- *that the intended parent is either a single person or that they are part of a couple, married or otherwise (if part of a couple the partner or spouse will generally be required to sign on to the agreement);*

- *that they are competent to execute the agreement and fully understand the nature of the surrogacy arrangement;*
- *that they fully understand the risks, both medical and psychological, associated with egg donation, including the fact that a wide range in the number of eggs retrieved is possible, and that an IVF procedure with donor eggs is not always successful, nor does every pregnancy result in a live birth, due to no fault of the egg donor;*
- *that they have received psychological counseling about the obligations and risks associated with egg donation; and*
- *that they have received legal counseling about their risks, rights, and obligations as they pertain to the egg donation generally, and also as they are described in this Egg Donor Agreement.*

D. Medical Testing and Agreement to Share Information

As with the surrogate, the intended parents and the responsible physicians will likely want to run a number of medical tests on the egg donor. In particular, the physician will screen the egg donor to determine whether she is a carrier of any genetic diseases that may be passed on to a child born from her eggs. The physician will also screen the egg donor to assure that she is physically capable of undergoing the egg donation procedures. The egg donor must share the results of the tests with the intended parents. The intended parents have a right to terminate the arrangement if the results indicate any risk from proceeding with that egg donor. Some sample clauses regarding testing on an egg donor are listed below.

Example 4-3: Testing on Egg Donor

Egg Donor's Agreement to Submit to Testing. The Egg Donor agrees to submit to any and all medical, psychological, and genetic testing deemed prudent or required by any Responsible Physician.

Agreement to Share Information. The Egg Donor agrees to provide the Intended Parents and all Responsible Physicians with access to the results of all relevant medical, psychological, and genetic tests and to

execute any additional documents necessary to assure that access.

Termination Upon Unsatisfactory Results. If any of the results of the medical, psychological, or genetic testing is unsatisfactory to the Intended Parents, this agreement will terminate and the Intended Parents will have no further obligations due or owing.

E. Medical Procedures, Behavior Restrictions, and Assumption of Risk

Once the preliminary testing is done, the medical procedures begin. These include hyperstimulation of the ovaries to produce multiple eggs, sometimes as many as twenty, and egg retrieval. In accord with the earlier representation, the egg donor must affirmatively acknowledge that she understands all the related risks and still agrees to undergo the procedures. Sample clauses regarding an egg donor's submission to the medical procedures are listed below.

Example 4-4: Submission to Medical Procedures

Medical Procedures. The Egg Donor agrees to undergo all the procedures related to the Egg Donation, including taking medication to hyperstimulate her ovaries and then have the resulting eggs retrieved through a surgical procedure. The Egg Donor further agrees to cooperate fully with any Responsible Physician to assure that these procedures have the highest chance of success.

Assumed Risks. The Egg Donor acknowledges that she understands the medical and psychological risks associated with these procedures, including in the extreme, the possibility of her death due to complications, and agrees not to hold the intended parents responsible for any of those risks.

As with the surrogate, the egg donor must also agree to follow any behavioral restrictions advised by a responsible physician in connection with the egg donation. For example, the hyperstimulation of the egg donor's ovaries creates additional risks of natural pregnancy through sexual intercourse. A responsible physician is likely to advise the egg donor to use particular forms of contraception during the process or avoid sexual intercourse completely. A sample clause that outlines potential behavioral restrictions is listed below.

Example 4-5: Behavioral Restrictions

Behavioral Restrictions. The Egg Donor also agrees to follow the behavioral guidelines of any Responsible Physician in order to assure the highest degree of success with the procedures. This includes taking any medication as it is prescribed, attending appointments, allowing testing and blood draws. It also may include refraining from sexual intercourse for a certain amount of time before the Egg Donation or using a particular kind of contraception. Any violation of this provision will be deemed a material breach of the agreement by the Egg Donor and will allow the Intended Parents the option to terminate their obligations hereunder. Any child the Egg Donor may conceive due to hyperstimulation of her ovaries will be the child of the Egg Donor and the Intended Parents will have no parental responsibility for such child.

F. Parental Rights and Obligations

The agreement between the parties that any child born from the donated eggs will be the child of the intended parents and not the egg donor or the egg donor's spouse is central to the surrogacy arrangement. Thus, there are two sets of commitments that must be made: the Intended Parents' commitment to take full parental responsibility and custody of any children born from the donated eggs, and the egg donor's commitment not to assert any such parental rights. The box below lists sample clauses regarding the parental responsibility for any child born as a result of the egg donation process.

Example 4-6: Parental Responsibility for Any Child Born

Intended Parents Commit to Full Parental Responsibility. The Intended Parents commit to take full parental responsibility and custody of any child born from the donated eggs immediately upon the birth of such child. This commitment shall be unwavering, regardless of any medical condition or affliction that may affect any such child.

Egg Donor Waives Any Parental Rights. Egg Donor [and her partner or spouse] agree[s] to waive any parental rights they may have with respect to any children born from the egg donation and not to assert

any claim to parental rights or custody. Egg Donor [and her partner or spouse] also agrees to cooperate to the fullest extent to support and enforce the parental rights of the Intended Parents, including cooperating in any necessary legal proceedings.

G. Permitted Uses

Defining the permitted uses for the donated eggs and any resulting embryos is not sufficient alone to create a binding commitment between the parties. Thus, there must be specific section addressing the permitted uses. This section will likely follow the section explaining parental rights. The language need not use specifically defined terms, but it must identify what the egg donor is willing to accept as the permitted uses for her donation. The possibilities include the following: the fertilization and then implantation of the resulting embryo into a gestation surrogate in an attempt to have a resulting child or children; the cryopreservation of any resulting embryos not used immediately upon their creation; the donation at no cost for scientific research or donation at no cost to another potential intended parent; the sale to another intended parent; or destruction of the resulting embryos. Some form agreements include all of the above options and require the parties to initial the acceptable choices. A negotiated agreement, on the other hand, will state affirmatively what options are permitted by the egg donor as a condition of her donation. The drafter can use defined terms if desired, but the affirmative commitment is still essential.

Example 4-7: Permitted Uses

Permitted Uses. The parties agree that the Intended Parents may use the donated eggs for any Permitted Use.

H. Financial Issues

The financial issues involved with egg donations tend to be more straightforward than in surrogacy arrangements. Generally, the intended parents pay the fee up front either directly to the egg donor or through the agency or IVF clinic. Payments through agencies or clinics include any additional fee charged by the agency or clinic. Fees for egg donations vary considerably, but most range between \$5,000 and \$15,000. Agency fees can double this amount, while fees charged by clinics tend to be much lower though still significant.

Sample clauses on compensation are below.

Example 4-8: Fees and Expenses

Base Compensation. The Intended Parents agree to pay the Egg Donor for her services base compensation of [\$10,000]. [This amount is payable to the Agency or IVF Clinic and should be paid together with the Agency Fee or the IVF Clinic Fee.]

Timing of Base Compensation. The Base Compensation is due upon execution of this Egg Donor Agreement.

1. Expense and Reimbursement Payments

The intended parents often make financial commitments to pay for any and all medical costs and any other out-of-pocket expenses that the egg donor may have, including legal fees. It is also not uncommon for intended parents to find an egg donor who does not live in the state where the IVF clinic is located. Thus, the intended parents typically pay for or reimburse the egg donor for travel expenses for the donor and a companion. The egg donor may also ask the intended parents to pay for medical costs related to any complication caused as a direct result of the egg donation. These expenses and reimbursements can significantly increase the overall costs of egg donation. Below are two sample clauses regarding expenses and reimbursements.

Example 4-9: Expenses and Reimbursements

Expense and Reimbursement Payments. The Intended Parents also agree to pay directly, if possible, or else to reimburse Egg Donor for, any and all out-of-pocket expenses related to the Egg Donation that are not covered by any applicable insurance. These expenses include, but are not limited to, expenses for:

- medical testing;*
- psychological counseling;*
- medical procedures;*
- any medications or vitamins recommended or required by any Responsible Physician;*

- *medical fees for any complications that are directly caused by the Egg Donation;*
- *reasonable legal fees payable to her attorney;*
- *[if Egg Donor has other children] any child care required by Egg Donor to facilitate her service and attendance at appointments, not to exceed a total of [\$200]; and*
- *[if Egg Donor will travel from another city] any reasonable travel expenses for herself and one companion, including coach airfare if Egg Donor will fly to accommodate the Intended Parents' choice of IVF Clinic, two nights at a three star hotel or better, and a \$100 per diem for miscellaneous expenses and meals.*

Timing of Expense and Reimbursement Payments. Any such expense or reimbursement payment is due at the time when it is incurred.

I. Miscellaneous Provisions

Boilerplate provisions should be read and understood thoroughly. The choice-of-law and venue provisions will likely reflect the same law and venue chosen for the surrogacy agreement, but parties should seek advice of counsel for this decision. Unique to the egg donor arrangement, however, is the special issue of confidentiality.

As the anecdote above described, egg donors can be anonymous, as is often happens, or they can be open donors. For an anonymous egg donation, the intended parents review the profile of the egg donor, but never learn her name or her contact information. With an open donor, the intended parents learn the donor's name and are in direct communication with her. An open donor arrangement is typically the case when the egg donor is either a friend or family of the intended parents. Normally, agencies and clinics help intended parents find egg donors, but the donor remains anonymous. This approach requires the parties to make certain commitments regarding the confidentiality of the process.

When considering confidentiality, it is important to also consider

that certain medical situations may arise for a child born from the egg donation. For example, the parties need to consider when it would be helpful for the child to be able to contact the egg donor to obtain information about her family's medical background or request a blood, organ, or tissue donation from the egg donor or someone in the egg donor's family. In the egg-donor agreement, the egg donor may agree to be contacted in that event.

Further, any child born from an egg donation may simply want to meet their egg donor at some point. The parties may agree on what happens in this circumstance, like perhaps allowing the child to meet the donor when the child reaches a predetermined age. The sample language set forth below addresses the possibility of contact for medical purposes or for a method to meet if agreed upon by all parties.

Example 4-10: Confidentiality

Confidentiality. The parties agree to proceed with the Egg Donation anonymously and not to seek out the identity of their counterparties. If any of the parties inadvertently learn the identity of a counterparty, they agree to keep such identity confidential.

Notwithstanding the foregoing, if any Child born as a result of the Egg Donation has a medical need to contact the Egg Donor, then the Intended Parents or such Child may attempt such contact through the Agency or the IVF Clinic. In such case, the Agency or the IVF Clinic will contact Egg Donor who shall cooperate to allow the contact to the extent such contact is medically important for the Child.

If any Child born as a result of the Egg Donation is simply curious to meet Egg Donor, then after such Child's 18th birthday, such Child can request that the Agency or the IVF Clinic contact Egg Donor and make a request for contact. Egg Donor will have sole discretion in that case to decide whether to proceed with such contact.

Egg Donor [and her partner or spouse] agree[s] not to initiate any contact with the intended parents or with any child born from the egg donation under any circumstances.

CONCLUSION

Surrogacy is centered on the creation of families for parents who otherwise may not be able to do so. The surrogacy process involves a web of relationships, including relationships between the intended parents, surrogates, egg and sperm donors, agency professionals, medical professionals, and attorneys. A successful surrogacy arrangement involves carefully structuring those relationships so that everyone is empowered to contribute with a minimum amount of risk and uncertainty. Those relationships must be developed and nurtured, and the intangible emotional aspects of participating in those relationships cannot be forgotten. However, those relationships also must be arranged in accord with the relevant law. The blueprints for those relationships and the issues that the parties will need to confront are contained in the relevant contracts.

This article has attempted to provide attorneys, intended parents, surrogates, egg donors, and others needed guidance to make the surrogacy process more transparent and allow all the relevant parties to make informed and intelligent choices about whether and how to proceed. Key to that success is open and effective communication between and among the parties so that everyone's hopes, expectations, and responsibilities are clear. Nonetheless, the journey can be full of setbacks, some that are possible to foresee and some that just are not. I hope that this article will give parties the courage to take the risks involved, manage those risks effectively, and potentially achieve nothing short of miraculous results.