Pace Law Review

Volume 42 | Issue 2 Article 7

August 2022

Surrogacy Law Reformed: Bringing New York Into the Twenty-First Century

Natalie Burke
nburke@law.pace.edu

Recommended Citation
Natalie Burke, *Surrogacy Law Reformed: Bringing New York Into the Twenty-First Century*, 42 Pace L. Rev. 485 (2022)
DOI: https://doi.org/10.58948/2331-3528.2060
Available at: https://digitalcommons.pace.edu/plr/vol42/iss2/7

SURROGACY LAW REFORMED: BRINGING NEW YORK INTO THE TWENTY-FIRST CENTURY

Natalie Burke

TABLE OF CONTENTS

I. INTRODUCTION

Surrogacy, as a form of assisted reproductive technologies ("ART"), has become an indispensable method of conception in our modern world. Historically, women were expected to either accept their infertile fate or proceed with adoption.[1] Through the significant scientific advances and legalization of commercial surrogacy in select states, women and men are no longer obligated to concede to their infertility. Same-sex couples are also disproportionally disadvantaged by the lack of statutory reform; therefore, legalization

1. *See* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 113 (1997).

provides them with realistic legal means of procreation.

ART has become a commonly used reproduction practice throughout the world, especially in the United States. In 2019, 77,998 assisted reproductive live births in the United States made up 2.1% of all children born in the country that year.[2] ART births continue to increase each year as technology in the field further advances.[3] The notion that natural conception is the only acceptable reproductive option ought to be a concept of the past, and outdated legislation embodying this close-minded ideology must move into a new era.[4]

There are two forms of surrogacy: traditional and gestational. Traditional surrogacy occurs when the surrogate is the child's genetic mother, providing her egg for conception.[5] Doctors and legal specialists no longer favor this method as it can lead to legal parentage disputes between bargaining parties following the birth of an ART child.[6] Gestational surrogacy, alternatively, is the more recognized and utilized form of surrogacy today. This refers to when the surrogate, often termed the gestational carrier, is artificially inseminated with a fertilized egg. The egg and sperm are provided by donors; they may be provided by the intended parents or unknown donors.[7] Although gestational surrogacy has only been in practice since the 1980s, the theory of surrogacy has existed since biblical times.[8] Since the beginning of civilization, women have experienced infertility; it is not an exclusively modern issue.

---

2. *See ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2022), https://www.cdc.gov/art/artdata/index.html.

3. *See* Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 464–65 (2015).

4. *See* Victoria R. Guzman, Comment, *A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy?*, 38 HOUS. J. INT'L. L. 619 (2016).

5. *See* Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 247–48 (2012).

6. *See* Rachel M. Kane, *Cause of Action for Determination of Status as Legal or Natural Parents of Children Borne By Surrogate or Gestational Carrier*, *in* CAUSES OF ACTION 2D 687 (originally published in 2011) (2021); *see also In re* Baby M, 537 A.2d 1227 (N.J. 1988); *In re* Baby Girl L.J., 505 N.Y.S.2d 813 (N.Y. Surr. Ct. 1986); *In re* Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Surr. Ct. 1990).

7. *See* Ladomato, *supra* note 5, at 247–48.

8. *See* Worldwide Surrogacy Specialists, *The History of Surrogacy: A Legal Timeline*, WORLDWIDE SURROGACY SPECIALISTS LLC (Apr. 12, 2021), https://info.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline (the first mention of surrogacy was in the "Book of Genesis" within the story of Sarah and Abraham. Sarah was unable to naturally conceive children and sought the help of the family servant, Hagar. Hagar conceived Abraham's child).

Participation in a surrogacy contract, both as an intended parent and as a gestational carrier, can be complicated; it can become even more troublesome when parties are located in states which have not yet dealt with surrogacy on a legislative level. This lack of clarity, whether through case law or legislation, can lead to legal uncertainty.

New York enacted the Child-Parent Security Act ("CPSA") in April of 2020, which legalized commercial surrogacy agreements.[9] The Act provides a much-needed update to

New York's stance on surrogacy, establishing a comprehensive law addressing the necessities of a legal contract under New York law, as well as the rights and protections of intended parents, surrogates, and children born of ART. New York will maintain control over the formation and execution of surrogacy agreements within its borders and with its state citizens. The CPSA is "the nation's most progressive legislation addressing the parentage of those needing the assistance of medical technology to form their families."[10] Therefore, the CPSA should become a model statute. The CPSA not only establishes requirements for the contract itself but also provides protections that each party is entitled to before, during, and after the pregnancy.[11]

Part II of this note provides a brief history of surrogacy law and how New York moved from an absolute prohibition to full acceptance of gestational surrogacy agreements. Part III identifies the different positions that states have taken and explores three surrogacy statutes. Part IV further explores the New York CPSA and describes how it protects the surrogate, the intended parents, and children born of ART. Part V discusses why states should be concerned about surrogacy law reform and how legalizing contractual obligations would be in the state's best interest. Part VI promotes the passage of surrogacy-friendly statutes and discusses why the CPSA is the best model for doing so. Part VII establishes that having a law similar to the CPSA, which progressively addresses every necessary component of a surrogacy agreement, will protect surrogates who are typically the more disadvantaged bargaining party.

---

9. *See* Kathleen Dipaola, *New York Attorneys for Adoption and Assisted Family Formation (NYAAFF) Announces the Child-Parent Security Act as Law*, CISION PRWEB (Feb. 15, 2021), https://www.prweb.com/releases/new_york_attorneys_for_adoption_and_assisted_family_formation_nyaaff_announces_the_child_parent_security_act_as_law/prweb17730361.htm.

10. *Id.*

11. *See* N.Y. FAM. CT. ACT § 581-403 (McKinney 2021).

II. HISTORY OF SURROGACY LAW AND NY'S REFORM

In re Matter of Baby M, a landmark case, began the crucial discussion of surrogacy in the realm of health and family law. In that case, the intended parents agreed to pay a surrogate $10,000 to be inseminated with the intended father's sperm.[12] Following the birth, the surrogate brought a claim for legal rights to the child. The Supreme Court of New Jersey invalidated the surrogacy contract, and articulated that commercial surrogacy is essentially baby-selling, which the court did not wish to condone. Instead, the court decided the case based on the best interest standard and awarded custody to the biological father based on parental fitness.[13]

New Jersey's *Baby M* played an essential role in forming the surrogacy policy in the neighboring state of New York. Before that case, New York had taken a neutral position on surrogacy, neither condoning nor prohibiting it. State legislators attempted to legalize surrogacy but failed following *Baby M*.[14] During this era, traditional and gestational surrogacy contracts were "void and unenforceable."[15] Legislators did not desire to promote "baby-selling" through contractual means.[16] Contracting parties and those who assisted in its formation and execution, including doctors and lawyers, were subject to civil and criminal penalties under New York law.[17]

In re Adoption of Paul assisted in structuring New York's policy, which would remain good law for thirty years. The King's County court determined that payment for adoption was similarly illegal and "[s]uch remuneration to a mother, in exchange for her surrender of the child . . . violate[d] New York's well-established policy against trafficking in children."[18] Likewise, the New York Task Force

---

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

13. *See id.*

14. *See* Mindy Ann Baggish, *Surrogate Parenting: What We Can Learn from Our British Counterparts*, 39 CASE W. RSRV. L. REV. 217, 260–68 (1989) (explaining that legislators had proposed the "Dunne Bill" in order to legalize surrogacy in New York, but it failed).

15. Briana R. Iannacci, Comment, *Why New York Should Legalize Surrogacy: A Comparison of Surrogacy Legislation in Other States with Current Proposed Surrogacy Legislation in New* York, 34 TOURO L. REV. 1239, 1248 (2018).

16. Robert Hanley, *Seven-Week Trial Touched Many Basic Emotions,* N.Y. TIMES, Apr. 1, 1987 at B2; *see* The New York State Task Force on Life and the Law, *Surrogate Parenting: Analysis and Recommendations for Public Policy*, N.Y. STATE DEP'T OF HEALTH (1988).

17. *See* The New York State Task Force on Life and the Law, *supra* note 16.

18. *In re* Adoption of Paul, 550 N.Y.S.2d 815, 817 (1990) (citing *In re* Adoption

articulated that surrogacy agreements should be "void and unenforceable" because the practice was deemed "indistinguishable from the sale of children."[19] Furthermore, the Task Force opined that "surrogacy undermine[s] the dignity of women, children and human reproduction."[20] As a result, surrogacy reform was put on hold.

During this era of New York law, there was no statutory definition of what it meant to be a "parent."[21] Courts now determine legal parentage through "genetics, the act of giving birth, adoption, or marital presumption."[22] Although this was a significant update, it continues to alienate a number of people, including those who procreate through "third-party reproduction" and do not use their egg or sperm.[23] Previously, New Yorkers were required to work with surrogates outside the state if they chose to form a surrogacy contract. Those who chose to execute agreements within the state had to maneuver around the state prohibition, exploiting expensive, technical adoption methods to establish parentage.[24]

III. THE IMPORTANCE OF SURROGACY LEGISLATION

The United States lacks uniform policy regarding the legality of surrogacy agreements, leaving each state to legislate—or not legislate—on the matter.[25] States generally vary but can be categorized as: 1) surrogacy-friendly states, which permit agreements but have not legislated, 2) states that have legislation allowing for agreements to be formed, or 3) states that have banned surrogacy through legislation.[26]

---

of Anonymous, 286 A.D. 161, 166 (N.Y. App. Div. 2d 1955)).

19. The New York State Task Force on Life and the Law, *supra* note 16, at 98, 118.

20. *Id.* at 118.

21. Denise E. Seidelman & Alexis L. Cirel, *The Child-Parent Security Act Is a Game Changer: Here's What You Need to Know*, NEW YORK LAW JOURNAL (Apr. 27, 2020, 11:00 AM), https://www.law.com/newyorklawjournal/2020/04/27/the-child-parent-security-act-is-a-game-changer-heres-what-you-need-to-know/.

22. *Id.*

23. *Id.*

24. *See id.*

25. *See* Guzman, *supra* note 4, at 626.

26. *See* Hanley, *supra* note 16; *see also Surrogacy Laws*, THE SURROGACY EXPERIENCE, https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last visited Feb. 12, 2022).

a. California

California legalized surrogacy in 2013.[27] This recently updated legislation allows Californians to become legal parents regardless of marital status, gender, and sexual orientation.[28] The California law discusses what shall be included in a contract and what is required of the parties. The agreement must include the date upon which the contract was executed, the person who originated the gametes, the identity of the intended parent(s), and how the intended parents anticipate paying the medical expenses of the carrier and the newborn during and after the pregnancy.[29] The intended parents and gestational carrier must be represented by independent legal counsel during negotiations.[30] The fertility procedure may not commence until the agreement is completed and signed by all parties.[31] The intended parents may petition the court for an order of parentage prior to the birth of the child.[32] The court may grant a pre-birth order, which may go into effect once the surrogate gives birth.[33] However, in California, unmarried domestic partners of the intended parent must complete a "second-parent adoption."[34]

b. New Jersey

The New Jersey Gestational Carrier Agreement Act went into

27. *See* CAL. FAM. CODE § 7962 (West 2020) (California was a surrogacy-friendly state before passing legislation, which began in 1993 with the decision in *Johnson v. Calvert*); *see also* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding the intended parents were the legal parents to the child of ART).

28. *See Gestational Surrogacy in California*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/california/ (last visited Jan. 23. 2022).

29. *See* CAL. FAM. CODE § 7962(a)(1)–(4) (West 2020).

30. *See id.* § 7962(b).

31. *See id.* § 7962(d).

32. *See id.* § 7962(e).

33. *See id.* § 7962(a)(4).

34. *What You Need to Know About Surrogacy Laws in California*, AM. SURROGACY, https://www.americansurrogacy.com/surrogacy/california-surrogacy-laws (last visited Feb. 12, 2022); *see also What Is Second Parent Adoption, and Why Do I Need it?*, CONSIDERING ADOPTION, https://consideringadoption.com/adopting/can-same-sex-couples-adopt/second-parent-adoption/ (lasted visited Feb. 12, 2022) (noting that second-parent adoption is an option for same-sex unmarried couples, but it is less common because of marriage equality laws that emerged following *Obergefell v. Hodges*. However, it is still a requirement if unmarried people wish to engage in surrogacy).

effect in May of 2018.[35] The Act established that as long as the involved parties adhere to the stipulated guidelines, a surrogacy agreement will be binding and enforceable.[36] The state allows for all parties to enter into an agreement regardless of marital status or sexual orientation.[37] The New Jersey law addresses healthcare and legal protections for the surrogate and the legal parentage defense for the intended parents.

Before initiating a surrogacy agreement, a gestational carrier must meet specific standards[38] and must undergo a medical evaluation. Intended parents must have a psychological evaluation to determine their "suitability to participate in the gestational carrier agreement."[39] Once the evaluations are completed, an agreement may be executed. The contract must include the right of the gestational carrier to have medical care for the duration of "the pregnancy, labor, delivery, and postpartum recovery," which shall be provided by a medical professional of their choosing.[40] Intended parents must compensate the carrier for "reasonable expenses,"[41] which includes healthcare costs.

Prior to the birth but after the surrogate becomes pregnant, the intended parents may file for an order of parentage, which will establish legal parental rights upon birth.[42] The Act requires the gestational carrier to "waive any and all rights to the intended child" and for the intended parents to "assume all [parental]

35. *See* N.J. STAT. ANN. § 9:17-60 (West 2018) (Before the New Jersey Gestational Carrier Agreement, there was plenty of case law establishing New Jersey as a surrogacy-friendly state, including the case of *Baby M*.).

36. *See Gestational Carrier Agreement Act Passed in New Jersey*, ARCHER ATT'YS AT L. (June 2018), https://www.archerlaw.com/wp-content/uploads/2018/06/Client-Advisory-Gestational-Carrier-Agreement-Act-Passed-in-New-Jersey.pdf.

37. *See Gestational Surrogacy in New Jersey*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-jersey/ (last visited Jan. 22, 2022).

38. *See* N.J. STAT. ANN. § 9:17-64(a) (West 2018).

39. *Id.* § 9:17-64(b)(1).

40. *Id.* § 9:17-65.

41. *Id.*; *see also id.* § 9:17-62 ("'Reasonable expenses'" means medical, hospital, counseling or similar expenses incurred in connection with the gestational carrier agreement, reasonable attorney fees and costs for legal services in connection with the gestational carrier agreement, and the reasonable living expenses of the gestational carrier during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and during the period of postpartum recovery.").

42. *See* S. B. 482, 218th Leg. First Ann. Sess. (N.J. 2018).

responsibilit[ies],"[43] which protects the legal interests of the parties.

c. Rhode Island

Rhode Island became a surrogacy-friendly state with the enactment of the Rhode Island Uniform Parentage Act.[44] The Rhode Island law sets out the requirements of the parties and what the contract must include. The prospective gestational carrier and intended parents must undergo medical and psychological evaluations before a contract is executed.[45]

Once the parties have completed their evaluations, the law sets forth what must be included in the contract. The agreement must recognize that the gestational carrier will have no legal claim to any conceived children; the intended parents, alternatively, must accept full legal and financial responsibility of the resulting children. To protect their legal rights, the intended parents may file a pre-birth order. Further, the agreement must encompass a payment schedule for reimbursement of the surrogate's reasonable expenses, which must be "negotiated in good faith between the parties."[46] Moreover, the intended parents are financially responsible for all unpaid healthcare costs of the carrier, including "assisted reproduction, prenatal care, labor, and delivery."[47] The gestational carrier must remain in control of her body and her pregnancy; the bill requires the carrier to be given decision-making ability regarding "all health and welfare decisions."[48]

IV. NEW YORK'S CHILD-PARENT SECURITY ACT ("CPSA")

The ratification of the CPSA has reformed and modernized New York's position on surrogacy, now permitting gestational carrier agreements to be legally formed and enforced. When drafting the CPSA, legislators applied recommendations from both the American Bar Association and the New York Health Department's Task Force on Law and Life.[49] The Act was a significant accomplishment for

43. *Gestational Carrier Agreement Act Passed in New Jersey*, *supra* note 36.
44. *See* Tit. 15. R.I. Gen. Laws Ann. § 15-8.1-101 (West 2021).
45. *See id.* §15-8.1-801(a)(2)–(3), (b)(2).
46. *Id.* § 15-8.1-802(c).
47. *Id.* § 15-8.1-809(a).
48. *Id.* § 15-8.1-802(d).
49. *See The Child-Parent Security Act in New York*, FAMILYEQUALITY, https://www.familyequality.org/resources/child-parent-security-act-new-york/

surrogacy advocates, following an eight-year campaign for its passage.[50] Supporters of the bill urged New York to stay up-to-date on recent technological advances in assisted reproduction, as many other states have done. The main objective of the Act was to establish an ART child's relationship to his or her parent or parents at the moment of birth.[51] Further, it "legalize[d] gestational surrogacy and provide[d] a simple path to establish legal parent rights."[52] Although other states have addressed surrogacy efficiently, the CPSA expands on the objectives of other state legislators.

The Act outlines what is expected of the parties prior to forming the contract in great detail. The surrogate must:

> (1) [be] at least twenty-one years of age; (2) . . . [be] a United States citizen or a lawful permanent resident . . . (3) . . . ha[ve] not provided the egg used to conceive the resulting child; (4) . . . ha[ve] completed a medical evaluation with a health care practitioner relat[ed] to the anticipated pregnancy . . . (5) . . . ha[ve] given informed consent for the surrogacy after [a] licensed health care practitioner inform[ed] them of the medical risks . . . (6) . . . have been represented throughout the contractual process and the duration of the contract and its execution by independent legal counsel of their own choosing . . . (7) . . . ha[ve] or the surrogacy agreement stipulates that the person acting as surrogate will obtain a comprehensive health insurance policy . . . (8) . . . [have] a life insurance policy . . . .[53]

The intended parents must also prove eligibility:

> At least one intended parent [must be] a United States citizen or a lawful permanent resident and was a

(last visited Feb. 12, 2022).

50. *See id.* (the "Protecting Modern Families Coalition" was formed to promote the passage of the CPSA; this "Coalition" has brought ideas from various "LGBTQ+, women's, religious, and infertility" to advocacy organizations).

51. *See* N.Y. Legis. Assemb. 6959-A. Reg. Sess. 2017-2018 (2017), https://legislation.nysenate.gov/pdf/bills/2017/A6959A.

52. FAMILYEQUALITY, *supra* note 49.

53. N.Y. FAM. CT. ACT § 581-402(a)(1)–(8) (McKinney 2021).

> resident of New York state for at least six months; (2) . . . [must] ha[ve] been represented throughout the contractual process and the duration of the contract and its execution by independent legal counsel of his, her or their own choosing . . . and (3) he or she is an adult person who is not in a spousal relationship, or adult spouses together, or any two adults who are intimate partners together, except an adult in a spousal relationship is eligible to enter into an enforceable surrogacy agreement without his or her spouse if: (i)they are living separate and apart . . . ; or (ii)they have been living separate and apart for at least three years prior to execution of the surrogacy agreement.[54]

The contract must be signed by the intended parent or parents and the surrogate, as well as the spouse of the surrogate, if applicable.[55] Negotiations and execution of the contract must be fully completed before the surrogate may undergo any medical treatment "in the furtherance of embryo transfer."[56] The payment of compensation to the person acting as the surrogate must be included, and it must be reasonable.[57] The intended parents are required to pay medical expenses of the surrogate and any children conceived as a result of the procedure.[58] The Act also requires the parties to provide some qualifying information in the contract to be fully enforceable under New York law.[59]

The Act uniquely stipulates measures to protect the intended

---

54. *Id.* § 581-402(b)(1)–(3).

55. *See id.* § 581-403(a)(1)–(2).

56. *Id.* § 581-403(b).

57. *See id.* § 581-403(f).

58. *See id.* § 581-403(g).

59. *See id.* § 581-403(h) ("[I]t shall include the following information: (1) the date, city and state where the surrogacy agreement was executed; (2) the first and last names of and contact information for the intended parent or parents and of the person acting as surrogate; (3) the first and last names of and contact information for the persons from which the gametes originated, if known. The agreement shall specify whether the gametes provided were eggs, sperm, or embryos; (4) the name of and contact information for the licensed and registered surrogacy program handling the surrogacy agreement; and (5) the name of and contact information for the attorney representing the person acting as surrogate, and the spouse of the person acting as surrogate, if applicable, and the attorney representing the intended parent or parents . . . ").

parents, the surrogate, and the child born as a result of the ART procedure.

a. Protection of the Intended Parents

A prospective parent in a surrogacy agreement is most concerned with the health of the baby as well as the legal claim to that child. Once a surrogate becomes pregnant, intended parents must file for a pre-birth order, which will establish legal parentage the moment the child is born.[60] Distinctly, the CPSA not only protects married couples who wish to become parents but also permits those who intend to co-raise a child to become legal parents upon birth, regardless of marital status.[61]

Under the CPSA, a gestational carrier will have no legal entitlement to the child.[62] One way in which New York adequately safeguards this right is by requiring that neither the egg nor sperm be provided by the gestational carrier or her partner. A donor egg and donor sperm will always be used for the procedure; however, neither donors will be considered legal parents.[63] These donors will similarly have no claim to any resulting children of the ART procedure.[64] The egg or sperm may be provided by the intended parents, if they wish to do so, in which case they will be considered the legal and biological parents, but predominantly through the pre-birth order. Furthermore, the surrogate must "agree to surrender custody of all resulting children to the intended parent or parents immediately upon birth . . . ."[65]

b. Protection of the Gestational Carrier

The CPSA not only protects the interest of the intended parents in the surrogacy process but also extensively safeguards the gestational carrier before, during, and even after the pregnancy.[66] The bill exclusively includes the "Surrogate Bill of Rights," which

60. *See* FAMILYEQUALITY, *supra* note 49.

61. *See* FAMILYEQUALITY, *supra* note 49.

62. *See* N.Y. FAM. CT. ACT § 581-403(i)(1)(ii).

63. *See id.*

64. *See* FAMILYEQUALITY, *supra* note 49 (explaining that there will be an assurance to the intended parents that the egg or sperm donor will not be a parent under the law as long as there is proof of donor intent).

65. N.Y. FAM. CT. ACT § 581-403(i)(1)(ii).

66. *See* FAMILYEQUALITY, *supra* note 49.

incorporates the health and legal rights the carrier is entitled to under NY law. A person intended to act as a carrier is permitted to terminate the agreement without consequence if done so before she becomes pregnant.[67] A surrogate also "has the right to make all health and welfare decisions regarding them-self and their pregnancy . . . ."[68] The surrogate is entitled to a health insurance policy provided to her by the intended parents, which shall include the use of psychological counseling for issues arising from involvement in the procedure.[69] Moreover, the surrogate is permitted to obtain a life insurance policy that may begin "prior to taking any medication or commencement of treatment to further embryo transfer" that may extend "throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage . . . or termination of the pregnancy . . . ."[70] The surrogate may also obtain disability insurance.[71] Both life insurance and a disability policy are intended to protect the surrogate and her family.

The surrogate shall not be concerned with the legal transfer of the child. Intended parents are required to accept full custody of the child[72] and must "agree to assume responsibility for the support of all resulting children immediately upon birth."[73]

c. Protection of the ART Child

Most states that have addressed surrogacy through legislation do not address a crucial party to the agreement—the child born of ART.

---

67. *See* N.Y. FAM. CT. ACT § 581-607; *see also* FAMILYEQUALITY, *supra* note 49.

68. N.Y. FAM. CT. ACT § 581-602 (this includes but is not limited to "whether to consent to a cesarean section or multiple embryo transfer, to utilize the services of a health care practitioner of their choosing, whether to terminate or continue the pregnancy, and whether to reduce or retain the number of fetuses or embryos they are carrying.").

69. *Id.* § 581-605. *See also id.* § 581-604 (this includes "preconception care, prenatal care, major medical treatments, hospitalization and behavioral health care for a term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child, a stillbirth, a miscarriage resulting in termination of pregnancy, or termination of the pregnancy . . . ").

70. *Id.* § 581-606 (this is to be paid for by the intended parents).

71. *See id.* § 581-403(i)(1)(x).

72. *See id.* § 581-403(i)(2)(i) (the intended parents must accept custody "regardless of number, gender, or mental or physical condition and regardless of whether the intended embryos were transferred due to a laboratory error without diminishing the rights, if any, of anyone claiming to have a superior parental interest in the child.").

73. *Id.* § 581-403(i)(2)(ii).

Under the CPSA, children born through ART procedures are considered a party to the contract and are therefore protected under the law. Although the child is unborn when the process commences, their rights are just as important when establishing parentage. The New York law makes certain to allow ART children to identify their legal parents and determine who is financially responsible for their care.[74] Through this path, the child can be assured that although they may have been born through third-party reproductive methods, they will be protected as extensively as would be natural-born children. When the intended parents file for and are awarded legal custody under the pre-birth order, they are legally and financially responsible for the "health and welfare of the child"[75] presumably until they reach adulthood.

V. STATES SHOULD CARE

As previously stated, there is no uniform federal regulation addressing surrogacy as United States legislators have allowed states to determine what is in the best interest of their citizens but this could pose a challenge in the future. Following the appointment and subsequent confirmation of Supreme Court Justice Amy Coney Barrett, artificial insemination and surrogacy law may become affected on a federal level. During Justice Barrett's confirmation hearing, she avoided questions regarding her position on In Vitro Fertilization ("IVF"). Although Justice Barrett successfully evaded questions on this topic, she is known to be affiliated with anti-choice groups, many of which do not support assisted reproductive technologies.[76] This concerns family law attorneys, particularly assisted reproductive specialists, who believe that posed with the opportunity, Barrett may rule that "embryos are entitled to the same constitutional rights as [living] people."[77] Although Supreme Court

74. *See id.* § 581-303–07.

75. FAMILYEQUALITY, *supra* note 49; *see also* N.Y. FAM. CT. ACT § 581-403(i)(2)(i)–(ii).

76. *See* Andrea Michelson, *Experts Say Amy Coney Barrett's Nomination Could Threaten IVF. Here's Why.*, INSIDER (Oct. 19, 2020, 4:33 PM), https://www.businessinsider.com/amy-coney-barretts-nomination-could-threaten-ivf-experts-explain-2020-10.

77. Ellen Trachman, *Is Amy Coney Barrett the Beginning of the End for IVF?,* ABOVE THE LAW (Oct. 7, 2020, 11:13 AM), https://abovethelaw.com/2020/10/is-amy-coney-barrett-the-beginning-of-the-end-for-ivf/?fbclid=IwAR0hJLHpJ5YCrXSdwQi0QSPI-0uvszTXXMICGxdpJBj0LiitnrRlOU7l0dI.

Justices are expected to vote by applying the Constitution, Barrett's opinions could come into play during her tenure on the Court.

Justice Barrett's placement on the Supreme Court bench following the death of Justice Ruth Bader Ginsburg has put a six-to-three conservative weight on the Court. Experts do not believe IVF will be outlawed entirely by Barrett's appointment and heavy right-wing Court, but it may prove more challenging for parties and performing physicians.[78] Because of the extensive medical and legal process required for surrogacy and IVF, a Supreme Court decision against either could hurt what states are attempting to accomplish.

State representatives are expected to consider their constituents when creating legislation. These drafters should endorse the legalization of commercial surrogacy because it will benefit a large number of people in their jurisdiction. An unfortunate reality of starting a family for some people is the impossibility of conception; same-sex couples, infertile couples, and infertile individuals can attest to this struggle. Enacting a statute that permits surrogacy on a state level would provide necessary clarity for state citizens and protect against possible federal intervention.

a. Same-Sex Couples

Same-sex couples benefit considerably from ART, specifically surrogacy, as it provides this community with the means to create families when natural conception is unattainable. The Supreme Court legalized same-sex marriage in 2015 with the decision of *Obergefell v. Hodges*.[79] To many, "the right to marry is not complete without the right to have children."[80] The *Obergefell* decision not only instituted the legal ability of same-sex couples to marry but also provided equal protection of the benefits of marriage, including procreation.[81] Barring adoption, most same-sex couples must resort to surrogacy or another form of ART if they wish to create a family. Prohibiting surrogacy as a means to prevent same-sex couples from procreating violates the majority decision in *Obergefell*, which is binding law in the

78. *See* Michelson, *supra* note 76.

79. *See* 576 U.S. 644 (2015).

80. Evie Jeang, *Reviewing the Legal Issues That Affect Surrogacy for Same-Sex Couples*, L.A. LAW., July-Aug. 2016, at 12 (2016).

81. *See* Charles Gili, Note, *Time to Rethink Surrogacy: An Overhaul of New York's Outdated Surrogacy Contract Laws Is Long Overdue*, 93 ST. JOHN'S L. REV. 487, 501 (2019).

U.S.

A ban on surrogacy disproportionally disadvantages same-sex male couples; men cannot reproduce independently, requiring female involvement.[82] Furthermore, based on the fact that most statutes do not allow surrogates to provide their egg for the pregnancy, a male-only couple must also obtain a donor egg.[83] These restrictions lead to more expenses, with surrogacy contracts already costing upwards of $100,000,[84] putting a financial strain on a couple's ability to have children. Although the process can be costly, a complete prohibition is not the solution.

Same-sex male couples are not the only ones harmed by a ban or lack of legislation on surrogacy law. Women in same-sex relationships that resort to surrogacy to conceive children without including a known sperm donor will not become legal parents until the birth of the child, even if one is providing the egg. Without assurance that both women will have a legal relationship with their child upon birth, more issues will naturally arise.[85] Some states rely on second-parent or stepparent adoption; however, this can be avoided by expanding surrogacy law.

b. Infertile Couples and Individuals

Infertility, as noted above, is not an unfamiliar concept in our culture, and as long as infertility exists—which it always will—surrogacy (legal and illegal) will be practiced. Surrogacy is a vital option for infertile couples or individuals, essentially a means to "cur[e] female infertility."[86]

The fundamental right of privacy was extended to the right to bear children. According to the Supreme Court, bearing children is part of a marriage, which is considered very intimate.[87] Fundamental

82. *See* Jenna Casolo et. al. eds., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 344 (2019).

83. *See id.* at 344.

84. *See Surrogate Mother Costs*, WEST COAST SURROGACY INC., https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost#:~:,vary%20from%20state%20to%20statetext=The%20average%20cost%20of%20surrogacy (last visited Feb. 12, 2022).

85. *See* Gili, *supra* note 81, at 500.

86. Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1885 (2009).

87. *See* Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); *see also* U.S. CONST. amend. XIV § 1; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Soc'y.

rights under the Constitution are intended to be the rights of individuals; therefore, the right to procreate is a right of an individual, not of a couple. Under that notion, not only should infertile couples be permitted to use surrogacy as a method to cure their infertility, unmarried men and women should be able to do so as well. Infertility is an exceeding common medical issue for both men and women. According to the Centers for Disease Control ("CDC"), "[a]bout 10 percent of women (6.1 million) in the United States ages 15-44 have difficulty getting pregnant or staying pregnant . . . ."[88] Infertility affects men as well; in addition to the ten percent of women who struggle with infertility, one-third of fertility issues arise due to male infertility.[89] ART provides a means for struggling couples and individuals to start families which they otherwise could not have had.

VI. STATES SHOULD LEGALIZE SURROGACY, AND THE CPSA IS THE BEST MODEL

When a state chooses not to permit or to prohibit surrogacy through case law or legislation, state governments miss out on the opportunity to supervise their citizens, effectively leading to illegal contracts to be formed.[90] In Washington, for example, state legislators had not spoken on the legality of these contracts and, as a result, residents used "underground arrangements" outside of the state.[91] In response, Washington now recognizes intended parents as legal parents on the condition that the parties comply with state provisions and legal counsel represents each party.[92]

Other states, alternatively, have passed legislation, but the requirements create obstacles or barriers for certain individuals to maneuver. In Florida, the egg or sperm must come from the intended parents. The statute only permits a donor egg or sperm to be used when a party is determined to be medically incapable of natural

---

of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

88. *Infertility*, OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/a-z-topics/infertility#:~:text=What%20is%20infertility%3F-,Infertility%20means%20not%20being%20able%20to%20get%20pregnant%20after%20one,process%20that%20has%20many%20steps (last updated Apr. 1, 2019); *see also ART Success Rates*, *supra* note 2.

89. *See Infertility*, *supra* note 88.

90. *See* June Carbone & Christina O. Miller, *Surrogacy Professionalism*, 31 J. AM. ACAD. MATRIM. LAW. 1, 1–2 (2018).

91. *Id.* at 9.

92. *See id.*

conception.[93] Under Florida law, medical incapability must be established by a licensed physician who must conclude "(a) [t]he commissioning mother cannot physically gestate a pregnancy to term; (b) [t]he gestation will cause a risk to the physical health of the commissioning mother; or (c) [t]he gestation will cause a risk to the health of the fetus"[94] for eligibility. These provisions limit particular people from participating in the surrogacy process for other reasons besides medical incapability.

In modern society, many women put off having children to focus on building a successful career. By the time these women wish to conceive children, they may have reached the age where their eggs are considered geriatric, leading to medical issues both for the mother and fetus. According to the Mayo Clinic, some risks involved with pregnancy after age thirty-five include gestational diabetes, low birth weight or a premature baby, chromosomal abnormalities, and a higher risk of pregnancy loss, to name a few.[95] Women posed with this dilemma may look to surrogacy as a solution to their concerns. Under Florida law, however, these women would be considered capable of natural conception and would be required to use their own eggs or venture out of the state and risk future legal issues. Furthermore, Florida only permits surrogacy between "legally married couples"[96] and therefore, unmarried men and women would be excluded altogether.

The failure of states to create legislation "constitutes a refusal to place the imprimatur of the state on the practices"[97] and leaves prospective parties in a state of perplexity, and as such, ambiguous as to whether legal authorities would affect their chosen method of conception. Legal uncertainty not only affects intended parents but also may affect the children born of ART. Surrogacy-born children may struggle to understand who their legal parents are once they

93. *See* FLA. STAT. ANN. § 742.15(2) (2021); *see also* Martha A. Field, *Compensated Surrogacy in the Age of Windsor*, 89 WASH. L. REV. 1155, 1161 (2014); FLA. STAT. ANN. § 742.12 (2021) (marriage between couples of the same gender are not recognized in Florida in any matter).

94. FLA. STAT. ANN. § 742.15(2)(a)–(c).

95. *See* Mayo Clinic Staff, *Pregnancy After 35: Healthy Moms, Healthy Babies*, MAYO CLINIC (July 30, 2020), https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/pregnancy/art-20045756.

96. *Surrogacy Laws*, THE SURROGACY EXPERIENCE, https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last visited Feb. 6, 2022); *see also* FLA. STA. ANN. § 742.12 (again same-sex couples, even married are not considered under this standard).

97. Carbone & Miller, *supra* note 90, at 3.

become aware of how they were conceived. If not settled through legislation, this can lead to unequal treatment of children born through third-party reproductive methods.[98]

States that strictly prohibit commercial surrogacy should reconsider authorizing citizens to legally form gestational carrier agreements under state guidelines. New York has provided an excellent example of how a state can completely revamp its position and move toward a new technological era of assisted reproduction.

VII. SURROGATES NEED PROTECTION

"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."[99] Women who choose to become gestational carriers provide a selfless gift to prospective parents and therefore deserve to be protected as extensively as the state can permit.

The surrogacy process is long and begins with the signing of the contract by the parties. Once an agreement is fully executed, the in vitro medical procedure may commence. Typically, for a successful pregnancy, the physician will prescribe fertility medication before the embryo transfer occurs. The medication will continue to be prescribed throughout the pregnancy.[100] The embryos will then be transferred to the surrogate's uterus, typically done in a fertility clinic; the surrogate must remain in the clinic for some hours following the transfer and may require bed rest for a period of several days after insemination. The surrogate will only begin receiving payments once the pregnancy is confirmed.[101] Once pregnant, the carrier must engage in regular medical appointments, as any pregnant woman would; she must be required to take prenatal medication and support the baby's growth by caring for her own body. When a pregnancy comes to term, the surrogate will give birth and will then be required to hand over the child to the intended parents immediately, as they are the legal parents.

The surrogacy process is honorable and legitimate, and therefore

98. *See* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014).

99. Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 478 (2015).

100. *See Surrogates: The Six Steps of the Surrogacy Process*, SURROGATE.COM, https://surrogate.com/surrogates/becoming-a-surrogate/the-six-steps-of-the-surrogacy-process/ (last visited Feb. 6, 2022).

101. *See id.*

gestational carriers should be protected under the law. A surrogate should not be required to maintain or terminate a pregnancy where she would be placed in a situation worse than before entering the service. Furthermore, the surrogate should not be required to pay out-of-pocket medical expenses for that which arise from the contract, including but not limited to, medical treatment, medication, and other fertility services. If the carrier requires legal assistance or psychological counseling during or after the pregnancy as a result of the procedure, states should require this to be included in the agreement. In New York, surrogates are protected by what legislators titled the "Surrogate's Bill of Rights,"[102] which extensively protects the surrogate before, during, and after the birth of the ART child.

a. Equal Bargaining Power

Women who choose to become surrogates often do so for the financial benefits that the process provides. Some surrogates require the extra income in order to support their own families, but it often comes with a cost. Surrogates are typically of lower socioeconomic status than the prospective legal parents, thereby making them vulnerable and prone to the possibility of being in a situation where they are taken advantage of by more powerful parties. The average cost of a surrogacy procedure in the United States is between "$90,000 [and] $130,000 depending on the individual arrangements."[103] Therefore, those who are commissioning the procedure are usually in a higher economic bracket which makes them the more powerful party.

Surrogates often enter agreements with the idea that it is an excellent opportunity to support themselves and their families. However, having a lower socioeconomic status may lead surrogates to have less information about what they are entitled to and less inclined to speak up for themselves during negotiations. Surrogates may be unaware of what their individual state law requires of the surrogacy contract and may settle for less than that to which they are entitled. These selfless women may become a target of bullying; the intended parents may take advantage of the surrogate's lack of legal knowledge and their need for the compensation which may in turn lead the surrogate to accept less than what they deserve.

---

102. N.Y. FAM. CT. ACT §§ 501-601–07.

103. *Surrogate Mother Costs*, *supra* note 84.

Intended parents, alternatively, having the means to afford the surrogacy procedure, may be able to afford other supportive services that benefit themselves, such as experienced assisted reproductive attorneys. With the assistance of a talented and knowledgeable lawyer who specializes in surrogacy contracts, they are able to craft a contract that meets their goals first and foremost. An experienced attorney will provide the party with a better understanding of what is minimally required of them and how they can obtain the best result for them at the lowest price.

This provides an apparent inequality of bargaining power between contracting parties. A statute must efficiently address this clear imbalance before the execution of the contract. The law must establish a system for bargaining parties to be on a level playing field during the negotiation process. Requiring all parties to obtain legal counsel is essential in addressing the inequality; however, mandating parties to obtain legal services does not solve the issue. The statute should require the intended parents to pay for legal counsel for both themselves and the surrogate and to allow the surrogate to select their lawyer. This allows both parties to obtain attorneys who best suit their needs and can properly advocate for their best interests without restricting them to only counsel that they can afford. If a surrogate is unable to afford counsel knowledgeable in the practice of surrogacy, their choices could be severely limited in that they are being placed under an unfair burden both financially and a lack of qualified representation.

The New York CPSA does address the imbalance by requiring the surrogate to have "the right to be represented throughout the contractual process and the duration of the surrogacy agreement and its execution by independent legal counsel of their own choosing. . . ."[104] The law explicitly mandates that the intended parents provide financial support in order for the surrogate to obtain legal counseling through negotiations until the execution of the agreement. As a result, both parties are protected by attorneys of their choosing who can advocate and negotiate for a fair contract on behalf of their client. Adequately protecting the legal interests of all parties to any kind of contract is essential, and a contract should not be formed if one party is not legally knowledgeable or does not have legal assistance. The method which the CPSA employs addresses the apparent inequalities between surrogates and commissioning parents and mends the

104. N.Y. FAM. CT. ACT § 581-603.

imbalance by establishing fair legal representation.

b. Psychological Counseling

Child-rearing is a critical and emotional time in a woman's life. An emotional bond begins forming between a woman and her baby before birth.[105] The fetus learns its gestational mother's voice and movements while growing in vitro.[106] Prenatal attachment is considered a healthy practice during pregnancy,[107] but can also be challenging to surrogates who are carrying another's baby. Gestational carriers are required to have experienced their own pregnancy prior to entering into a surrogacy agreement, but this does not prevent a natural bond from forming. To protect the baby and form a bond with the prospective parents, an emotional transfer from the surrogate mother to the intended parents should occur. Although this assists the baby in attaching to its intended parents upon birth, the surrogate is often left emotionally troubled as she is required to give up a baby which she held for nine months in her uterus and has formed an attachment with, whether intentional or not.

Most pregnant women experience emotional attachment to their baby while the baby is growing in the womb and a surrogate mother is no different. However, they carry a child or children that they are not intending to keep and, therefore, emotional bonding can be difficult to avoid and complicated to handle. Furthermore, they may find it hard to separate themselves emotionally from something that has been physically connected to them. Even more, some surrogates, like regular mothers, fantasize about the child they are carrying, for example, questioning "how she/he would look."[108] All of the emotional bonding experiences can lead to a gestational carrier having a hard time moving on from the surrogacy process following

105. *See Emotional Connection With a Child Born by a Surrogate Mother*, CAN. MED. CARE, https://surrogacycmc.com/blog/emotional-connection-with-a-child-born-by-a-surrogate-mother/#:~:text=During%20the%20life%20of%20the,are%20connected%20by%20strong%20bonds.&text=Studies%20have%20shown%20that%20attachment,all%20nine%20months%20of%20pregnancy (last visited Feb. 12, 2022).

106. *See Intended Parents: How to Emotionally Transfer a Baby Born via Surrogacy*, SURROGATE.COM, https://surrogate.com/intended-parents/raising-a-child-born-from-surrogacy/how-to-emotionally-transfer-a-baby-born-via-surrogacy/ (last visited Feb. 12, 2022).

107. *See id.*

108. Mahboubeh Taebi et al., *The Experiences of Surrogate Mothers: A Qualitative Study*, 9 NURSING & MIDWIFERY STUD. 51, 54 (2020).

the transfer. A study conducted in India showed that surrogates often experience a higher level of depression than mothers having their own children.[109] "[L]ow social support during pregnancy, hiding surrogacy, and criticism from others" were key indicators of depression for surrogates before and after the birth of the child.[110] Moreover, in another qualitative study, it was found that surrogates often experience "emotional suffering" and "suffering caused by others," which causes the surrogate to hide their pregnancy from their family and oftentimes needing to explain why they no longer have the child which they had previously been carrying.[111]

As a response to many of the psychological challenges that surrogates face, many states require carriers to be inseminated with eggs that have been fertilized outside of the womb and are not that of the surrogate. This step ensures that the gestational carrier will not be the biological mother of any resulting children, regardless of whether the child or children will be biologically related to the intended parents. Although this requirement does address part of the issue, it only scratches the surface of the surrogates' underlying dilemma during and after the pregnancy. If the root of the problem itself is not understood and addressed, psychological problems will continue to take an emotional toll on women in the surrogacy process. This issue may also cause fewer women to choose to become surrogates, causing the procedure to become even more costly as demand is greater than supply.

Dissociating a woman from the life she is growing is nearly impossible; however, there are methods that can be imposed to alleviate the psychological stressors that she may face. Providing quality counseling during and after the pregnancy is an excellent path toward constructively addressing issues a surrogate may experience. Counseling can become a pathway for surrogate mothers to discuss and resolve their emotional issues with assistance from a licensed mental health professional or in groups with similarly situated women. The Indian study discussed above concluded that psychological support for surrogates, particularly during the

109. *See* N. Lamba et. al., *The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates*, 33 HUMAN REPRODUCTION 646, 649 (2018) (during pregnancy, 36% of surrogates obtained scores above the cut-off point for severe depression compared with 13.8% of expectant mothers).

110. *Id.* at 646.

111. *See* Taebi et al., *supra* note 108, at 54.

pregnancy, may help with psychological management.[112]

The CPSA specifically addresses issues such as counseling and provides surrogates with "the right to obtain a comprehensive health insurance policy that covers behavioral health care and will cover the cost of psychological counseling to address issues resulting from their participation."[113] Further, the CPSA requires that expenses incurred from such counseling be included in costs paid for by the intended parents.[114]

Surrogacy statutes must address the needs of all parties involved for success, in particular the surrogate mother who is carrying the child. Women have been known to become emotionally bonded with the fetus and it is no different for surrogate mothers. Although some surrogates may avoid purposefully bonding with the fetus, emotional bonding may be uncontrollable. In order to protect surrogates from psychological harm, state statutes should include counseling as part of the extensive healthcare costs intended parents are expected to provide. Psychological counseling during and after the pregnancy allows the carrier to express feelings and obtain feedback in handling these emotions. The mental health of a surrogate should not decline during the term of the surrogacy agreement and, by providing extensive counseling, carriers in a return to their previous lives and maintain adequate mental health.

VIII. CONCLUSION

Surrogacy as a method of ART has become more prevalent in the United States and its use will likely continue to increase as infertility and other health concerns relating to conception arise. For men, the risk of infertility can increase for different reasons, including age and being categorized as overweight or obese.[115] In the United States, 73.7% of men are considered overweight or obese,[116] so infertility may continue to be a problem for men. For women, the risk of infertility has been linked to age, weight gain or loss, and even

112. *See* Lamba et al., *supra* note 109.

113. N.Y. FAM. CT. ACT § 581-605.

114. *See id.*

115. *See Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last updated April 13, 2021).

116. *See Overweight & Obesity Statistics*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity (last visited Feb. 12, 2022).

physical or emotional stress.[117] Similar to men, women 66.9% of women in the U.S. are considered overweight or obese.[118] Men and women are also choosing to start families at later stages in their lives, possibly leading to fertility problems. Since conception at an older age can be dangerous for both the mother and the fetus, couples and individuals may continue to explore other, safer methods of forming a family.

Surrogacy and other forms of assisted reproductive technologies provide a pathway for the health concerns of men and women to be minimized by the use of a third party. In order to continue to gain traction in this advancing reproductive field, the practice should be monitored on a state level. Commercial surrogacy contracts should be bound by rules stipulated in a state statute so that all parties are adequately protected. States should look to New York's Child-Parent Security Act as a model when forming their own policies. The CPSA provides the best model for protecting the concerns and issues of each party, providing certain criteria for the negotiation process, the contract itself, as well as the treatment of the parties before, during, and after the pregnancy.

117. *See Infertility FAQs*, *supra* note 115.

118. *See Overweight & Obesity Statistics, supra* note 116.