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Daniel Rosman
Illinois Department of Human Services

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Surrogacy: An Illinois Policy Conceived

Daniel Rosman*

It is predictable that the precipitous decline in the number of available children for adoption will find many Illinois couples pursuing the surrogate route, as has happened in other states. The current uncertain status of Illinois law regarding surrogate contracts demands legislative focus and direction. To prevent protracted litigation as in other jurisdictions and to prevent injustices to those involved in the surrogate arrangement, "what we do, let us do quickly."1

I. INTRODUCTION

Still relevant today, the above quote speaks to the continued lack of certainty facing many of those interested in surrogacy. Although the modern surrogacy technique has existed for several years,2 and is increasing in popularity,3 a comprehensive statewide approach has not yet emerged in Illinois.

Like many other state legislatures, the Illinois General Assembly has yet to promulgate a comprehensive policy concerning this complex and

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* Assistant General Counsel, Illinois Department of Human Services; B.S. University of Illinois, 1987; J.D. DePaul University, 1991. Mr. Rosman concentrates in labor and employment matters. Previously, Mr. Rosman worked as a Staff Attorney with the Nineteenth Judicial Circuit in Lake County and the Sixteenth Judicial Circuit in Kane County. Mr. Rosman has previously contributed to the Illinois Judicial Symposium Issue. Mr. Rosman wishes to acknowledge the support and direction of Judge Barbara Gilleran Johnson in preparing this Article.


3. As of January 1993, an estimated 5,500 babies have been born in the United States through surrogate parenting since 1979. See Steve Johnson & V. Dion Hayes, Surrogacy Debated, but Still the Answer for Some, CHI. TRIB., Jan. 17, 1993, § 2 (Northwest) at 1. See generally ROBERT LEE HOTZ, DESIGNS ON LIFE (1991). Hotz asserts that "by 1990 there were thousands of people whose conception took place outside the human body. And by the year 2010, such children are expected to number a million or more." Id. at 3.

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controversial issue. Although new legislation does give courts direction on gestational surrogate matters, it fails to address other important surrogate disputes. For instance, the Illinois General Assembly recently enacted Public Act 91-3085 ("P.A. 91-308"), which defines the rights of the parties in certain instances of gestational surrogacy. Although P.A. 91-308 pieces together the perimeter of this jigsaw puzzle, questions still remain in regard to both traditional surrogate arrangements and arrangements where the fetus is created using the egg and/or sperm of an anonymous donor. As a result, these unanswered questions must be resolved indirectly via a patchwork of associated laws and common law doctrines.

Illinois, however, has come further than other states. Most states have either avoided the issue, banned the practice outright, or intentionally left the issue and controversy to the courts. Notwithstanding Baby Louise Brown’s grand debut more than twenty years ago, neither the legislature nor the courts have reached a nationwide consensus.

In most jurisdictions, the law remains a two-dimensional sentry fumbling to contain a three-dimensional problem. Where the legislatures fail to provide guidance, courts struggle to impose a consistent, logical and just framework to resolve surrogate disputes. The lack of legislative direction causes many tribunals to awkwardly analogize to conventional yet inadequate jurisprudence. Assuming that

4. The following states have no surrogacy statute in effect: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and Wyoming.


6. See id. (discussing requirements to establish a parent-child relationship). Gestational surrogacy occurs when the surrogate does not supply the sperm or egg, but only the use of the womb. See id.

7. A traditional arrangement is where the surrogate supplies the egg and womb and is inseminated with the sperm of the intended father.

8. See Steptoe & Edwards, supra note 2, at 366 (discussing Louise Brown’s birth as the first child successfully conceived by in vitro fertilization).

9. One example of such an attempt recently occurred in California regarding the parentage and support of Jaycee Buzzanca. See In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). In this matter, five individuals contributed to Jaycee’s birth, including: an anonymous sperm donor, an anonymous egg donor, the intended mother (Luanne Buzzanca), the intended father (John Buzzanca) and the surrogate (Pamela Snell). See id. at 282. Shortly before Snell gave birth, John filed for divorce. See id. at 282-83. In its decision, the Orange County Superior Court stated that notwithstanding the existence of a surrogacy agreement between the intended parents and the surrogate and her husband: (1) no court had ever established that John was the
no statutory scheme directly applies, courts often look toward principles of contract law, constitutional law, and family law. A contractual analysis typically reviews the agreement between the surrogate and intended parents, focusing on whether the agreement is enforceable or against public policy. A constitutional analysis frequently centers on whether the parties’ substantive due process rights may be abridged. Fundamental rights under the Constitution include the right of privacy and procreational autonomy. A constitutional analysis also focuses on the equal protection issue of whether a suspect classification of individuals has received equal treatment under the law. Lastly, many policymakers resolve surrogate predicaments by employing family law concepts. Typically, this analysis focuses on serving the “best interests” of the child.

In the midst of the struggle, assisted conception technology is maturing and becoming a relatively popular alternative to other surrogacy techniques. Recently developed methods in in vitro
fertilization ("IVF")—including egg donation, embryo adoption, and cryopreservation—give otherwise infertile men and woman significant reproductive options.\(^1\) Reports suggest that for every surrogate debacle worthy of a made-for-TV movie, most arrangements reach completion without incident.\(^1\) In addition, the popularity and availability of these IVF advancements are becoming more accessible and immediate given the recent spawning of advocacy groups, informational groups and organizational Internet web sites.\(^1\)

Reproductive advances are sure to become more accessible as states mandate insurance coverage for infertility and as courts rule that infertility is a disability under the Americans with Disabilities Act ("ADA"),\(^1\) which requires special accommodation. Currently, many states require insurance companies to provide coverage for infertility treatments.\(^1\) Further, several courts have found that reproduction is a

\(10,000\) a year. See Joan Beck, More Questions Than Answers in New Technology, CHI. TRIB., Mar. 20, 1997, § 1, at 27. Further, assisted conception has found its way into the "Hollywood" mainstream. See Betsy Israel & Lorenzo Benet, Two Moms and a Baby, PEOPLE WEEKLY, Feb. 20, 1995, at 51 (discussing actress Deidre Hall’s choice to use a surrogate parent to become a mother); Dean Lamanna & Deidre Hall, What We Did for Love, LADIES HOME J., Dec. 1995, at 74 (describing Deidre Hall’s life after deciding to become a mother with the help of a surrogate).

15. One attorney in the field states:

\[\text{[d]evelopments in the field of egg donation have offered to over 100,000 women in the United States, otherwise unable to produce healthy eggs due to premature ovarian failure, anatomically inaccessible ovaries, abnormal eggs, or lack of ovarian function due to radiation, chemotherapy, or surgery, the opportunity to have a child who has a genetic relationship to her spouse.}\]

Andrew W. Vorzimer & Lori A. Shafton, Egg Donation and the Law; Legal Issues to Consider When Utilizing Egg Donation (last modified June 3, 1997) <http://surrogatelaw.org/ed.htm>; see also Johnson & Hayes, supra note 3, at 1 (reporting that “[a]dvancements in treatment mean that about three-fourths or more of all infertility patients now wind up being able to have babies”).

16. See Johnson & Hayes, supra note 3, at 1 (stating “Ralph Fagan, co-director of the Center of Surrogate Parenting, in Beverly Hills, California contends that [as of early 1993] only 11 of 5,500 surrogacy arrangements have gone to litigation”).


"major life activity" and that infertility is a "disability" under the
ADA.

Conceptive technologies will continue to emerge, disputes will
inevitably present novel and perplexing questions. In many states,
including Illinois, disputes will arise where gaps in policy exist and
their resolution will be unpredictable and often painful.

This Article will examine Illinois law pertinent to a surrogate
arrangement, first focusing on P.A. 91-308 and those issues left
unaddressed by this recent enactment. This Article will then examine
those instances outside the scope of P.A. 91-308 and survey relevant
statutes in the event of a dispute or breach of an agreement. Next, this
Article will discuss case law and legislation outside of Illinois. Finally, this Article will propose legislative suggestions for Illinois.

II. ILLINOIS OVERVIEW

A. Gestational Arrangement under P.A. 91-308

With recent additions to the Illinois Parentage Act of 1984 ("Parentage Act") under P.A. 91-308, the Illinois legislature provides
aspiring parents the opportunity to bypass relevant adoption laws.
P.A. 91-308 allows this bypass to occur without any written agreement
between the parties. Thus, this recent enactment effectively
overwrites the Parentage Act, which requires proof of birth to establish
maternity.

22. See Judy Peres, Custody Tug of War Has Twist, Few Turns: Sperm Donor Fights For Parental Rights, CHI. TRIB., Aug. 5, 1997, § 1, at 1; Judy Peres, Sperm-Donor's Case Challenges Old Laws, CHI. TRIB., Aug. 12, 1997, § 1, at 1 (discussing a Chicago case regarding parental rights and artificial insemination).
23. See infra Part II.A.
24. See infra Part II.B.
25. See infra Parts III, IV.A.
26. See infra Parts III, IV.B.
28. For the statute governing the adoption process, see 750 ILL. COMP. STAT. §§ 50/1 to 24 (West 1998).
29. See 750 ILL. COMP. STAT. § 45/4.
30. See id. The statute states in pertinent part: "[t]he parent and child relationship between a child and (1) the natural mother may be established by proof of her having given birth to the
Under P.A. 91-308, the parties must satisfy six requirements prior to the child's birth in order for intended parents to secure parentage without going through the adoption process. First, the gestational surrogate must certify that she is not the biological mother of the child and that she is carrying the child of the biological father (sperm donor) and the biological mother (egg donor). Second, the surrogate's husband must certify that he is not the biological father of the child and that the child is that of the biological father (sperm donor) and the biological mother (egg donor). Third, the biological mother must certify that she donated the egg that formed the embryo carried by the surrogate. Fourth, the biological father must certify that he donated the sperm that formed the embryo carried by the surrogate. Fifth, a licensed physician must certify that the above four requirements are met. Sixth, all certifications must be in writing and witnessed by two competent adults. Parentage is established upon completion of these six conditions. A judicial or administrative proceeding to ratify paternity upon completion of the above conditions is neither required nor permitted.

Unless otherwise determined by court order, if all of the above requirements are not met before the child's birth, the child is presumed to be the child of the surrogate and the surrogate's husband. This presumption, however, "may be rebutted by clear and convincing evidence."

Although this legislative addition provides direction for aspiring parents, it fails to address all of the issues. For example, what is the outcome where one of the intended parents is infertile and uses the sperm or egg provided by an anonymous donor? Additionally, in gestational arrangements, which surrogate expenses may the intended parents cover? If the parties do enter into a written agreement, which terms are enforceable? What recourse is available for the intended child...

32. See id.
33. See id.
34. See id.
35. See id.
36. See id.
37. See id.
38. See id.
39. See id. (providing the effect of meeting the statutory requirements).
40. Id.
parents if all six conditions are not met before birth? Finally, how does the state’s policy affect traditional arrangements, if at all?

To the legislature’s credit, P.A. 91-308 gives many hopeful parents the opportunity to achieve their goal. Essentially, this approach relies on the acknowledgements of the intended parents, the surrogate, and the surrogate’s husband. All that is required is the fulfillment of the six conditions prior to the child’s birth. Nonetheless, a percentage of couples who are unable to conceive, and turn to either traditional surrogacy or an anonymous donor, must still navigate the maze of statutes that affect the surrogate process.

**B. Arrangements Outside of P.A. 91-308**

For a variety of reasons, aspiring parents may not be able to pursue parentage under P.A. 91-308. For example, when an anonymous donor’s sperm or egg is used, the intended parents cannot represent that he or she supplied the gamete. Likewise, when a traditional surrogate arrangement is used, the intended mother cannot claim to have supplied the egg.

In Illinois, these couples unable to secure parentage under P.A. 91-308 cannot bypass the relevant adoption laws. Prior to the child’s birth, these couples cannot bind the surrogate through the use of acknowledgements and consents. Instead, they must deftly negotiate an assortment of unrelated statutes.\(^1\)

Often, these couples will memorialize their arrangement in an agreement. Both the Illinois Criminal Code\(^2\) and the Illinois Adoption Act\(^3\) restrict the creation of the agreement. Next, assuming that a dispute arises after birth, parentage needs to be determined in accordance with the Parentage Act.\(^4\) Finally, if custody is at issue, the dispute is to be resolved pursuant to the Illinois Marriage and Dissolution of Marriage Act.\(^5\)

1. Creation of Surrogate Agreement

The Illinois Criminal Code contains a specific provision that places parameters on the parties’ contractual relationship. Entitled the Adoption Compensation Prohibition Act\(^6\) (“the Act”), this provision, as

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1. See infra notes 42-45 (identifying the statutory provisions that may apply).
2. 720 ILL. COMP. STAT. §§ 525/0.01 to 5 (West 1998).
3. 750 ILL. COMP. STAT. §§ 50/0.01 to 24.
4. Id. §§ 45/1 to 27.
5. Id. §§ 5/101 to 27.
6. 720 ILL. COMP. STAT. §§ 525/1 to 5.
in most states, prohibits the receipt\textsuperscript{47} and payment of compensation for the "placing out" of a child.\textsuperscript{48} As used in the statute, "the term 'placing out' means to arrange for the free care of a child in a family other than that of the child's parent, stepparent, grandparent, brother, sister, uncle or aunt or legal guardian, for the purpose of adoption or the purpose of providing care."\textsuperscript{49} With limited exception, the Act prohibits a woman from receiving payment or compensation for her surrogate services.\textsuperscript{50}

The "placing out" definition exempts arrangements where placement is to be made in the family of the child's parent, stepparent, grandparent, brother, sister, uncle, or aunt or legal guardian. This suggests that arrangements involving the exempted parties are not subject to criminal liability.

Notwithstanding the general prohibition against compensation, the Act does allow for payment of certain expenses, if necessary.\textsuperscript{51} Section 4.1 allows for payment of reasonable living expenses incurred by the biological parents during the period of the biological mother's pregnancy and for no more than thirty days after birth of the child.\textsuperscript{52} These living expenses include reasonable costs for lodging, food, and clothing.\textsuperscript{53} Expressly excluded, however, are "expenses for lost wages, gifts, educational expenses, or other similar expenses."\textsuperscript{54} In addition, Illinois law allows adopting parents to pay the reasonable attorneys' fees of the biological parents.\textsuperscript{55} Payment may also be made for the "reasonable and actual medical fees and hospital charges for services rendered in connection with the birth."\textsuperscript{56}

Arrangements falling outside the framework of P.A. 91-308 must also conform to Illinois' adoption laws. Often referred to as the

\begin{footnotes}
\begin{enumerate}
\item See id. § 525/1.
\item See id. § 525/2.
\item Id. § 525/3.
\item See id. § 525/5. The first violation is a Class 4 felony, while any subsequent violation is raised to a Class 3 felony. See id.
\item See id. § 525/4.1. Section 4.1(d) also states that in the event that the biological parents decide not to place the child up for adoption, the adopting parent has no right to seek reimbursement for payments made to the biological parents. See id. § 525/4.1(d).
\item See id. § 525/4.1(a).
\item See id. Court approval must be obtained prior to payment of these expenses. See id. § 525/4.1(b).
\item See id. § 525/4.1(a).
\item See id.
\item Id. § 525/4. An arrangement, however, that does not clearly establish that such payment is only for medical and hospital fees is against public policy. See \textit{In re Adoption of Kindgren}, 540 N.E.2d 485 (Ill. App. Ct. 2d Dist. 1989) (voiding an adoption agreement where a $10,000 payment to the natural mother could not be attributed to valid medical bills).
\end{enumerate}
\end{footnotes}
“adoption default model,” this approach must be followed where no specific surrogate statute is in place. Furthermore, by default, parental ties must be relinquished in accordance with actual adoption laws. Typically, this involves the signing of consents by one or both legal parents.

In a consensual arrangement, the birthing mother must wait at least seventy-two hours after the birth of the child before giving a valid consent. In contrast, the father may sign the consent prior to the birth of the child; however, it only becomes irrevocable seventy-two hours after the birth of the child. Once effective, the consents are generally final and irrevocable, unless the adopting parents or their agents obtained them through fraud or duress. The biological parent has twelve months from the date of execution to contest the validity of the consent. These rules would apply in instances involving traditional surrogacy or an anonymous sperm or egg donor.

2. Parentage

For those instances not governed by P.A. 91-308, where the child is born and the agreement is repudiated, an Illinois court must resort to various statutes to determine each party’s status. Initially and most significantly, the court must resolve the parentage issue. In resolving this issue, courts often turn to the Parentage Act.

Under the Parentage Act, the mother-child relationship is typically established by proof that the woman gave birth to the child. Seemingly, this presumption is irrebuttable and would allow the

57. See H. Joseph Gitlin, "Adoption Model" Does Not Apply To Surrogacy, Court Says, CHI. DAILY L. BULL., May 18, 1998, at 6 (stating the adoption model violates California public policy).

58. See 750 ILL. COMP. STAT. § 50/9 (West 1998).

59. See id.

60. See id. § 50/11.

61. See id.

62. See Johnson & Hayes, supra note 3, at 1 (noting that as of 1993, only 11 out of 5,500 arrangements have gone to litigation). These agreements are most often repudiated when the surrogate decides that she does not want to relinquish parentage. It can also occur where the intended parents reverse their desire to accept and adopt the child.

63. See 750 ILL. COMP. STAT §§ 45/1 to 27 (West 1998). The Illinois Parentage Act of 1984 is not to be confused with the Illinois Parentage Act, 750 ILL. COMP. STAT §§ 40/1 to 3 (West 1998) (concerning children born as a result of artificial insemination).

64. See 750 ILL. COMP. STAT. 45/4 (West 1998); see also People v. Morrison, 584 N.E.2d 509, 513 (Ill. App. Ct. 3d Dist. 1991) (holding that an unwed father must comply with statutory procedures for establishing parentage, or subject himself to prosecution under the Illinois child abduction statute). Maternity may also be established by proof of adoption. See 750 ILL. COMP. STAT. § 45/4.
surrogate a superior claim to maternity over the intended mother. Another section of the Parentage Act, however, suggests that maternity may be determined in the same manner as paternity. Specifically, section 19 of the Parentage Act allows a woman who contributes her genetic material as part of the embryo implanted in the surrogate to establish maternity.

Section 19 states that "[a]ny interested party may bring an action to determine the existence or non-existence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship shall apply to the mother and child relationship . . . ." This section not only acknowledges that there may be uncertainty in determining maternity, but it also intimates that maternity may be established in the same manner as paternity, through blood testing. Therefore, depending on the interpretation, a surrogate could possibly lose her claim to maternity when the intended mother has contributed her genetic material.

Paternity may be established by several methods. First, it may be established through an adversarial proceeding. In the alternative, where the intended father is also the biological father, paternity may be established through the acknowledgment of all interested parties. In either an adversarial proceeding or a proceeding to establish paternity by acknowledgment, where a man other than the intended father is

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65. But see In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 1998). In Buzzanca, the California Court of Appeals, construing a similar statute, found the methods to establish parentage to be non-exhaustive. See id. at 284. Further, the court asserted that the fact that a woman is the birth mother is irrelevant. See id. at 290-91. "Intended mother" refers to a female, often unable to conceive or bear a child, that enters into an agreement to assume parentage to the child given birth by the surrogate.

66. See 750 ILL. COMP. STAT. § 45/11 (West 1998).

67. See id. §45/19.

68. Id.

69. See id. § 45/11.

70. A more in-depth explanation of this reasoning is found in Johnson v. Calvert, 851 P.2d 776, 780-82 (Cal. 1993). The Johnson court reviewed provisions similar to Illinois' Parentage Act and found that maternity could be determined through blood testing. See id. at 781; see also Soos v. Superior Court County of Maricopa, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (holding that a statute banning surrogacy violated the Equal Protection Clause in that men could rebut the presumption of paternity, whereas woman who contribute genetic material could not).

71. See 750 ILL. COMP. STAT. § 45/7 (West 1998) (establishing that actions may be brought by the child, the mother, a person or public agency with custody of the child or who is providing financial support, or another man alleging paternity).

72. See id. § 45/6 (signing and witnessing a voluntary acknowledgment of parentage will establish the parent-child relationship).
presumed to be the biological father, the presumed father must receive notice in accordance with the statute.

3. Custody under the Illinois Marriage and Dissolution Act

Like the parentage issue, certain custody issues also become important issues in arrangements falling outside of P.A. 91-308. When the intended father is also the biological father, paternity is properly established. Specifically, the custody issue arises when the surrogate is declared to be the legal mother and the surrogate agreement is repudiated. In this situation, only the intended (biological) father, and not the intended mother, has standing to make a claim.

As expected, if both legal parents assert a claim of custody, the "best interests of the child" standard guides the court's determination. Section 602 of the Illinois Marriage and Dissolution of Marriage Act sets forth the fundamental considerations that are used to determine "best interests." Enumerated factors include: (1) the wishes of the child's parent or parents; (2) the wishes of the child; (3) the interaction and interrelationship with parents and siblings or any other person; (4) the child's adjustment to the home, school, or community; (5) the mental and physical health of all people involved; (6) any physical violence or threat of physical violence; (7) any domestic violence or threat of domestic violence; and (8) the willingness and ability of each parent to facilitate a close relationship between the other parent and the child. Illinois courts also consider other factors such as race, the work patterns of parents and their availability to children, misconduct

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73. Section 5 of the Parentage Act concerns the circumstances in which a man will be presumed to be the biological father. See id. § 45/5.

74. See id. § 45/9.1 (holding notice is required to be served on the presumed father by personal service or mail).

75. By statute, Illinois preserves the superior right of a natural parent by allowing a person other than a parent standing to file a custody petition only where the child is not in the custody of a parent. See 750 ILL. COMP. STAT. § 5/601 (West 1998).

76. Id. § 5/602.

77. See id.

78. See id.

79. See Russell v. Russell, 399 N.E.2d 212, 215 (Ill. App. Ct. 5th Dist. 1979) (affirming the trial court's consideration of race as a factor in determining custody where race was not decisive of trial court's decision).

80. See In re Marriage of Leopando, 435 N.E.2d 1312, 1317 (Ill. App. Ct. 1st Dist. 1982) (determining that the father's lack of knowledge of the daily habits of the child coupled with a work schedule that afforded minimum contact with the child justified awarding custody to the mother), aff'd, 449 N.E.2d 137 (Ill. 1983); In re Marriage of Kush, 435 N.E.2d 921, 922-23 (Ill. App. Ct. 3d Dist. 1982) (noting the inability of mother to spend full time with the child is alone insufficient to award custody to the father as a matter of law, but it is still a factor to be consid-
of a parent, cohabitation, and substance abuse of a parent. As of this writing, Illinois courts have not assessed the impact of a surrogate agreement on a custody decision.

III. Surrogacy Case Law

As suggested earlier, P.A. 91-308 provides a mechanism for the intended parents to bind the surrogate and secure parentage. In situations falling outside of P.A. 91-308, however, where court approval is unavailable, the intended parents will often enter into an agreement and rely on that agreement to secure parentage. An agreement fixes the expectations of the parties and accounts for future disputes. In the event that a dispute arises that is not governed by statute, courts will analyze the agreement using various common law doctrines. As in other jurisdictions, an Illinois court encountering a surrogate dispute would likely resort to principles of contract law, constitutional law, and family law to make its decision.

A. Contract Law

Arguments based in contract arise where the parties enter into a surrogate agreement and the agreement is later repudiated. In these situations, one side will attempt to enforce the agreement as written, whereas the other side will argue that the agreement is invalid in view of some public policy.

82. See In re Marriage of Thompson, 449 N.E.2d 88, 93 (Ill. 1983) (rejecting premise that custodial parent's cohabitation conclusively establishes custodial parent as unfit).
83. See Rizzo v. Rizzo, 420 N.E.2d 555, 559 (Ill. App. Ct. 1st Dist. 1981) (determining that a custodial parent's involvement with alcohol and drugs is relevant to the consideration of custody when it affects the health of the custodial parent or her relationship with the child).
84. The New Jersey Supreme Court addressed this issue in its decision In re Baby M, 537 A.2d 1227, 1255-61 (N.J. 1988). The New Jersey Supreme Court asserted that all circumstances, including behavior of the parties during legal proceedings, should be considered to determine the child's best interests. See id. at 1257-58. Further, the New Jersey court rejected the surrogate's argument that custody should be denied to the intended parents to deter future surrogacy agreements. See id. at 1257.
85. See supra notes 27-38 and accompanying text (outlining the statutory requirements to establish parentage in a surrogate birth).
86. See supra notes 42-43 and accompanying text (indicating that agreements are governed by the Illinois Criminal Code and the Illinois Adoption Act).
87. See supra notes 10-13 and accompanying text (outlining the various analyses a court would use under contract law, constitutional law, and family law).
Under Illinois adoption law, surrogate contracts are rendered ineffective prior to the time that consents are signed and parentage is relinquished. Notwithstanding the status of the law, situations may arise where the parties' surrogate contract is relevant. One such instance is when the intended parents, after insemination and prior to birth, no longer desire custody. In this situation, important concerns arise, such as whether the agreement is enforceable and the extent to which the agreement dictates the outcome. Another important inquiry is whether the surrogate agreement controls in the event that Illinois' adoption law is found to unconstitutionally infringe upon reproductive rights. In these instances, it is instructive to review case law outside of Illinois.

Typically, courts considering contract law in connection with a surrogate dispute review public policy and the enforceability of the agreement. In a traditional surrogate arrangement, a handful of courts have found the agreement to be consistent with public policy in the absence of a legislative pronouncement. In these decisions, however, the agreement is typically reviewed for "unfair advantage, undue influence, or other overreaching." The majority of courts, however, have invalidated these agreements based on a number of policies. For instance, a California court recently found a traditional surrogate agreement to be unenforceable for being in derogation of relevant adoption law. Similarly, in In re Adoption of Paul, a New York Family Court voided a surrogate parenting agreement that violated the statutory prohibition against compensation for the surrender of a child. The New York court noted that the

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88. For the birth mother, Illinois adoption law invalidates consents signed earlier than 72 hours after birth. See 750 ILL. COMP. STAT. § 50/9 (West 1998). For the birth mother's husband, Illinois law allows a consent to be signed before birth; however, it is revocable up until 72 hours after birth. See id.

89. See In re Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 818 (Sur. 1986) (approving surrogacy contract because it did not violate express statutory provisions). Since this opinion was issued, the New York State Legislature has declared surrogacy contracts to be against public policy. See N.Y. DOM. REL. LAW. § 122 (McKinney Supp. 1999) (stating "surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable"); see also In re Petition of M.S.M. for Adoption of Infant, 19 Fam. L. Rep. (BNA) No. 11171, 1563, 1564 (Md. Cir. Ct. Montgomery County, Sept. 20, 1993) (noting that when all parties consent, surrogate contract is valid unless legislative prohibition).

90. Petition of M.S.M., 19 Fam. L. Rep. at 1564 (stating that the court has the authority to review surrogacy contracts where there is evidence of a violation of established contract principles).


93. See id. at 818 (determining that agreement to pay $10,000 surrogate fee violates statutory
participants have a constitutionally protected right to beget a child through surrogacy. The State, however, regulates the adoption aspect. The court indicated that the constitutional right to beget or bear a child does not extend to compensating the surrogate for relinquishing the child.

In re Baby M, a New Jersey case, provides another example of a court finding an agreement for traditional surrogacy to be void in view of public policy. The case involved a surrogate who was artificially inseminated with the sperm of the intended father. In voiding the surrogacy agreement, the New Jersey Supreme Court noted that the contract conflicted with New Jersey laws concerning: (1) evaluation of parental fitness in termination of parentage; (2) revocability of adoption in private placement adoptions; and (3) compensation in adoption situations.

In addition, the Baby M court found the agreement violated a number of public policies including: (1) the favoring of rearing by natural parents; (2) the favoring of equivalent treatment by the natural parents (mother and father are to have equal access to the child); (3) the following of legislative procedures that govern consent to the surrender of a child; (4) the “best interests” of the child as the paramount determinant; and (5) the prohibition of “baby-selling.”

prohibition of payment for child bearing).

94. See id.
95. See id.; see also Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. 1981) (noting that the state has a valid interest in regulating surrogacy contracts because application of state adoption laws gives legal custody).
96. See Adoption of Paul, 550 N.Y.S.2d at 818.
98. See id. at 1246-47.
99. See id. at 1235.
100. See id. at 1243-44. New Jersey law requires that “where there has been no written surrender . . . termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect.” Id. at 1243.
101. See id. at 1245-46. Although she was not a party to the contract, the wife of the intended father was to adopt the baby after birth. See id. at 1235.
102. See id. at 1240-41. The intended father agreed to pay the surrogate $10,000. See id. at 1235.
103. See id. at 1246-47.
104. See id. at 1247. The court found that this agreement’s effect was to “give the father the exclusive right to the child by destroying the rights of the mother.” Id.
105. See id.
106. See id. at 1246-48.
107. See id. at 1248-50; see also Belsito v. Clark, 644 N.E.2d 760, 765 (Ohio C.P. 1994). While the Belsito court acknowledged the policy against private contracts to surrender parental rights, it ruled against the gestational surrogate by holding that the intended parents have a ge-
Courts considering gestational-type arrangements rather than a traditional surrogate arrangement have demonstrated greater lenience. For example, in *Johnson v. Calvert*, the parties entered into a gestational surrogacy agreement whereby the intended parents contributed their genetic material to be implanted in the surrogate. In reviewing the surrogate's action to be declared the child's mother, the California Supreme Court found that the gestational contract did not violate the public policy expressed in California adoption statutes. Further, the *Johnson* court rejected the notion that gestational surrogate agreements dehumanize women and, therefore, violate public policy.

The *Johnson* court's approval of the gestational arrangement reflects the legal significance of both the genetic bond between the intended parents and the child, as well as the parental intent to beget the child. Indeed, the *Johnson* court placed great emphasis on the intended parents' desire to procreate and raise the child and, as such, awarded parentage to the intended parents.

In another recent California case, *In re Marriage of Buzzanca*, the intended parents entered into an agreement with the surrogate where neither the intended parents nor the surrogate were genetically related to the child. Both the sperm and egg were contributed by anonymous donors and, subsequent to the insemination, the intended parents divorced. After several proceedings at the trial and appellate level, the California Appellate Court found that the intent of the couple at the time of the agreement was sufficient to establish parentage. Relying on the parties' intentions, rather than the biological relationship, the California Court of Appeals determined that even in the absence of a written surrogate agreement and where only an oral agreement is in
place, parentage should be attributed to the intended parents, as they made the necessary arrangements to beget the child.\textsuperscript{118}

\underline{B. Constitutional Law}

Undoubtedly, an Illinois court sorting through a surrogacy dispute will encounter constitutional arguments. Although Illinois case law considers individual constitutional rights,\textsuperscript{119} generally no published cases specifically delineate rights associated with surrogacy.

In defining the constitutional parameters of a surrogacy agreement, courts outside of Illinois have applied various principles, including the scope of the right to privacy and procreational autonomy,\textsuperscript{120} substantively recognized in the Due Process Clause, as well as equal protection concerns.\textsuperscript{121}

Protections afforded under the substantive due process doctrine are found in the Fifth and Fourteenth Amendments of the United States Constitution.\textsuperscript{122} Under the Substantive Due Process doctrine, the right of privacy protects persons against unlawful government invasion.\textsuperscript{123} While not expressly stated in the Constitution, the United States Supreme Court has declared the right to privacy a fundamental right.\textsuperscript{124}

\textsuperscript{118} See \textit{id.} at 291.

\textsuperscript{119} See Helvey \textit{v. Rednour}, 408 N.E.2d 17, 21 (Ill. App. Ct. 5th Dist. 1980). The Fifth District noted that "certain personal rights have been deemed fundamental to the concept of ordered liberty and worthy of constitutional protection. Among these are the rights to marry, procreate, use contraceptives, undergo abortion, engage in family relationships and rear and educate children." \textit{Id.}

\textsuperscript{120} See \textit{Doe v. Kelley}, 307 N.W.2d 438, 440-41 (Mich. Ct. App. 1981) (holding that the right to bear children is a fundamental interest protected by the right of privacy); \textit{Davis v. Davis}, 842 S.W.2d 588, 600 (Tenn. 1992) (holding that the right to procreate is an integral part of a person's right to privacy).


\textsuperscript{122} See U.S. CONST. amend. V; U.S. CONST. amend XIV. In pertinent part, the Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment similarly states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Finally, the Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." \textit{Id.}

\textsuperscript{123} See \textit{Griswold v. Connecticut}, 381 U.S. 479, 482 (1965) (striking down a Connecticut statute that prohibited the use of contraception).

\textsuperscript{124} See \textit{id.} at 483, 486 (creating the right to privacy under the penumbra of rights that coincide with those in the Bill of Rights).
This right affords protection in certain areas including pro-
creation, contraception, family relationships, and child
rearing. This right cannot be abridged unless a powerful
countervailing interest exists.

In surrogate disputes, the parties will assert these rights toward the
ends that will best serve their interests. For instance, couples hoping to
enforce an agreement will assert that the fundamental right to privacy
protects their procreation choices and cannot be impinged upon by state
public policy. The surrogate, seeking to disavow the agreement, will
argue that she has a fundamental right to beget and enjoy the
companionship of the child.

A number of state courts have considered these rights. For instance,
in Doe v. Kelley, a Michigan appellate court refused to extend the
right of privacy to surrogate arrangements that involve compensation.

In a brief opinion, the court refused to allow the parties to circumvent
Michigan adoption statutes. Similarly, in In re Adoption of Paul, a
New York court found no constitutionally protected right to participate
in a compensable surrogate agreement that avoids relevant adoption

125. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). "If the right of privacy means any-
thing, it is the right of the individual, married or single, to be free from unwarranted governmen-
tal intrusion into matters so fundamentally affecting a person as the decision whether to bear or
beget a child." Id. at 453.
126. See Griswold, 381 U.S. at 485-498 (reversing the criminal convictions of a doctor and
executor of Planned Parenthood who gave advice regarding contraceptive use because the Con-
necticut statute barring contraception use constituted an undue invasion of the marital privacy
protected under the Bill of Rights).
127. See Bellotti v. Baird, 443 U.S. 622, 634 (1979) (stating that the family is unique to soci-
ety and, therefore, the Constitution must be applied flexibly to meet the needs of a parent and
child).
128. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that a state cannot
arbitrarily enter into the privacy of family life).
129. See Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (recognizing that the
countervailing interest rule has become deeply entrenched in the law through prior United States
Supreme Court decisions).
ples has a fundamental right to bear or beget a child, this right did not protect decisions to com-
pensate the surrogate for her services).
131. See id. at 441.
132. See id.
laws. The court found no right to participate in an arrangement that allows for the sale of a child in violation of state law.

In another Michigan case, the Michigan Court of Appeals acknowledged fundamental rights in matters of childbearing. The court noted, however, that compelling state interests existed to justify Michigan’s regulation of surrogacy. Doe v. Attorney General involved a challenge to Michigan’s Surrogate Parenting Act, which voided surrogate parenting agreements and criminalized paid surrogate arrangements. In upholding the act, the court found that the interests expressed in the act were sufficiently “compelling” to justify infringing on the right to privacy. Specifically, the court found sufficiently compelling interests existed in: (1) keeping children from becoming commodities; (2) addressing the best interests of the child; and (3) stopping the exploitation of women.

In In re Baby M, the New Jersey Supreme Court addressed the right of procreation in the context of surrogacy. The court noted that the right of procreation did not necessarily entitle a biological father and his wife, the intended non-genetic mother, to the custody of a child born pursuant to a surrogate agreement. Further, the court held the mother’s right to companionship with her child is a constitutionally protected interest. The court, however, declined to decide whether the surrogate arrangement would cause a deprivation of this right. Rather, the court invalidated the agreement and conducted a “best interests” analysis. The court found that the best interests of the child

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134. See id. at 818. In Paul, the parties agreed that in exchange for $10,000, the surrogate would be inseminated with the intended father’s sperm and that after birth, the surrogate would relinquish parentage to the intended father and his wife. See id. at 815. Upon review, the court voided the agreement, holding that the right to bear or beget a child does not extend to violating state adoption laws that prohibit compensation. See id. at 818.

135. See id. at 818.


137. See id. at 486-87.


139. See id. at 489.

140. See id. at 487.

141. See id. at 486-87.


143. See id. at 1254.

144. See id. at 1255.

145. See id.

146. See id. at 1255-56.
justified awarding custody to the father and his wife and allowing the mother visitation.\textsuperscript{147}

In \textit{Johnson v. Calvert}, the California Supreme Court addressed a variety of constitutional concerns with respect to a gestational surrogate agreement.\textsuperscript{148} First, the \textit{Johnson} court noted that the gestational surrogate has no equal protection claim over the loss of custody.\textsuperscript{149} In determining that the surrogate was not the legal mother, the \textit{Johnson} court also rejected the gestational surrogate's claim to a right of companionship with the child.\textsuperscript{150} Lastly, the \textit{Johnson} court rejected the surrogate's claim to a right of privacy on procreational matters under California's Constitution.\textsuperscript{151}

As exemplified in \textit{Johnson}, courts also consider equal protection arguments in determining surrogacy disputes. The Equal Protection Clause appears in the Fourteenth Amendment of the United States Constitution as well as Article I, Section 2 of the Illinois Constitution.\textsuperscript{152} Under an equal protection argument, one side asserts that a suspect classification, such as race, gender, age, or national origin, is receiving disparate treatment under the law in a similar circumstance.

In the context of reproductive rights, one state court voided its statute banning surrogacy on the basis that it violated the Equal Protection Clause. In \textit{Soos v. Superior Court County of Maricopa},\textsuperscript{153} the Arizona Court of Appeals found that the prohibitive statute treated similarly situated men and woman differently.\textsuperscript{154} Specifically, the court noted that the statute permitted men who were not the husband of the delivering mother to rebut the presumption of paternity.\textsuperscript{155} In contrast,

\begin{itemize}
    \item \textsuperscript{147} See \textit{id.} at 1258-59.
    \item \textsuperscript{148} See \textit{Johnson v. Calvert}, 851 P.2d 776, 785-87 (Cal. 1993).
    \item \textsuperscript{149} See \textit{id.} at 785. The \textit{Johnson} court stated, "a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting child." \textit{Id.} at 785.
    \item \textsuperscript{150} See \textit{id.} at 786 (reasoning that although the surrogate was the birth mother, her companionship rights were not the traditional type because she agreed to gestate and deliver a child for someone else).
    \item \textsuperscript{151} See \textit{id.} at 786-87. "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 (by definition) any expectation that she will raise the resulting child as her own." \textit{Id.} at 787.
    \item \textsuperscript{152} See U.S. CONST. amend. XIV; ILL. CONST., art. I., § 2.
    \item \textsuperscript{153} Soos v. Superior Court County of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994).
    \item \textsuperscript{154} See \textit{id.} at 1361.
    \item \textsuperscript{155} See \textit{id.} at 1360.
\end{itemize}
however, the statute allowed women who contributed their genetic materials to the child to establish a maternal link.\textsuperscript{156} The Arizona court applied a strict scrutiny standard, according to which only a countervailing compelling interest can justify the abridgment of the fundamental right to decisions in matters of childbearing. The court found no such compelling interest and, consequently, found the statute to be void.\textsuperscript{157}

\textit{C. Family Law}

At its core, surrogacy disputes focus on placement of the child. In making a decision, many courts refuse to consider the intentions of the parties (i.e., as apparent in a surrogacy agreement). Instead, they consider the "best interests" of the child. In this approach, some of the considerations include the wishes of the child, the wishes of the parents, interactions with parents and siblings, adjustment to home, school, and community, and the mental and physical health of those individuals involved.\textsuperscript{158}

In Illinois, the "best interests" of the child is a primary, if not dispositive standard. Most likely, courts would consider the "best interests" of the child to resolve surrogacy custody disputes. The emphasis on "best interests" is found in the Illinois Marriage and Dissolution of Marriage Act\textsuperscript{159} as well as the Illinois Adoption Act.\textsuperscript{160}

Courts outside of Illinois considering surrogate disputes have also employed the "best interests" analysis in varying manners. In \textit{Belsito v. Clark},\textsuperscript{161} where the parties entered into a gestational surrogate agreement, the Ohio court rejected an analysis that allowed the parties' contractual intent to control.\textsuperscript{162} Rather, the \textit{Belsito} court emphasized the "best interests" of the child.\textsuperscript{163} In awarding parentage to the intended parents, the court found the child's best interest required parentage to be

\textsuperscript{156} See \textit{id.}
\textsuperscript{157} See \textit{id.} at 1361 (holding that a mother's rights were impinged because while a biological father could prove paternity, a mother could not and therefore was dissimilarly treated without any reasonable justification).
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} 750 ILL. COMP. STAT. § 50/20a (West 1998) (holding the "best interests and welfare" to be the paramount consideration in interpreting the Adoption Act).
\textsuperscript{161} Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994).
\textsuperscript{162} See \textit{id.} at 766.
\textsuperscript{163} See \textit{id.}. 
awarded to the party with the strongest genetic link, the intended parents.164

Similarly, in *In re Baby M*, after invalidating the parties’ traditional surrogacy agreement, the New Jersey Supreme Court resorted to a “best interests” determination.165 The court ruled in favor of the biological father after considering all of the factors including the surrogate’s misconduct throughout the legal proceedings.166

In *Baby M*, the court based its “best interest” analysis on all the circumstances related to the child’s best interest.167 In doing so, it focused on the favorable circumstances involving the child’s father and his wife as well as the unfavorable circumstances surrounding placement with the surrogate and her husband.168 With respect to the father, the court noted his stable family life, secure financial situation, happy marriage, and supportive friends.169 With respect to the surrogate, the court looked at the unstable family situation and troublesome financial situation.170 Also, the court considered the surrogate’s actions during the legal proceeding, including her flight to Florida with the child in violation of an earlier court order, her telephone threats to kill “Baby M,” her threats to accuse the father of sexual abuse, and her threat to kill herself.171

IV. LEGISLATION

As noted earlier, in passing P.A. 91-308, the Illinois General Assembly has given hopeful parents some direction by exempting them from the adoption process.172 Even with the recent enactment of P.A. 91-308, however, many gaps still exist with respect to surrogacy arrangements. In crafting a comprehensive policy, it is useful to review existing statutes in other states.
A. National Legislation

Several states, including Arkansas, Florida, and Nevada, have enacted pro-surrogate legislation.\textsuperscript{173} In addition to expressly sanctioning variations of surrogacy, these states have taken measures to allay some of the legal complications connected with the process.\textsuperscript{174} In Arkansas, for example, when the intended mother is biologically unrelated to the child, it is not necessary to conduct a stepparent adoption.\textsuperscript{175} Also, the marital status of the biological father and/or the intended mother is typically irrelevant in determining a presumption of parenthood.\textsuperscript{176}

Nevada law defers to the agreement of the parties and sanctions a gestational surrogate arrangement.\textsuperscript{177} Compensation for the surrogate’s services, however, is prohibited.\textsuperscript{178} Under Nevada law, the intended parent is to be treated as the natural parent “under all circumstances.”\textsuperscript{179}

Florida’s legislative scheme distinguishes between traditional surrogacy\textsuperscript{180} and gestational surrogacy.\textsuperscript{181} Gestational agreements are binding and enforceable.\textsuperscript{182} In contrast, traditional surrogate

\begin{itemize}
  \item \textsuperscript{175} See \textsc{Ark. Code Ann.} § 9-10-201(b)(1), (c)(1)(A) (stating that in the case of a surrogate, the biological father and the intended mother will be the parents of the child).
  \item \textsuperscript{176} See \textsc{id.} § 9-10-201(b), (c)(1) (stating that in the case of a surrogate arrangement, the child shall belong solely to the biological father if he is unmarried and the child shall belong to the intended mother when artificial insemination occurred with an anonymous sperm donor).
  \item \textsuperscript{177} See \textsc{Nev. Rev. Stat.} § 126.045 (stating that a married couple “may enter into a contract with a surrogate for . . . a pregnancy resulting when an egg and sperm from the intended parents are placed in” the surrogate).
  \item \textsuperscript{178} See \textsc{id.} § 126.045(3). Nevada, however, allows for reimbursement of medical and necessary living expenses. See \textsc{id.}
  \item \textsuperscript{179} See \textsc{id.} § 126.045(2) (concluding that “an intended parent in a contract” with a surrogate “must be treated in law as a natural parent under all circumstances”).
  \item \textsuperscript{180} See \textsc{Fla. Stat. Ann.} § 63.212 (West 1997 & Supp. 1999) (defining “intended mother” as a female who “intends to have the parental rights and responsibilities for a child conceived through a fertility technique, regardless of whether the child is biologically related to the female”).
  \item \textsuperscript{181} See \textsc{id.} § 742.13 (defining “gestational surrogate” as “a woman who contracts to become pregnant by means of assisted reproductive technology without the use of an egg from her body”).
  \item \textsuperscript{182} See \textsc{id.} § 742.15(1) (requiring a binding contract to be made between the intended parents and the gestational surrogate prior to engaging in gestational surrogacy).
\end{itemize}
arrangements may be terminated at any time. For traditional arrangements, however, Florida allows for "preplanned adoptions." Interestingly, Florida’s statutes on both traditional and gestational surrogacy require the intended parents to accept custody and assume full parental responsibility notwithstanding any impairment to the child.

Although some states have not articulated a comprehensive scheme, they are receptive to surrogacy to the extent that such arrangements are exempt from prohibitive “baby-selling” statutes. While many states allow the payment of reasonable expenses, the expenses that are considered “reasonable” vary greatly. Lastly, a few states have created a statutory presumption favoring the intended parents as the legal parents, unless the expecting or delivering mother changes her mind within a stated period of time.

Other states with comprehensive schemes have additional noteworthy provisions. For instance, Florida requires the mother to adhere to reasonable medical instructions, while New Hampshire allows the surrogate to voluntarily terminate the pregnancy. In several instances, the parties to the agreement must submit to various suitability

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183. See id. § 63.212(1)(i)(2)(i) (stating that the preplanned adoption agreement must provide "[t]hat the agreement may be terminated at any time by any of the parties").

184. See id. § 63.212(1)(i). Essentially, pre-planned adoption agreements are surrogacy arrangements that are subject to regulation and are voidable. See id.

185. See id. §§ 63.212(1)(i)(2)(g), 742.15(3)(d).

186. See ALA. CODE § 26-10A-34 (1992); IOWA CODE ANN. § 710.11 (West 1993); W. VA. CODE § 48-4-16(e)(3) (Lexis 1999).


188. For example, in Virginia, a surrogate is only entitled to reasonable medical expenses and ancillary costs. See VA. CODE. ANN. §§ 20-160(b)(5), 20-162(B)(3); see also id. § 20-156 (defining "reasonable medical and ancillary costs"). In New Hampshire, in addition to medical expenses, attorney fees, and court costs, the surrogate may receive actual lost wages, counseling costs, and payments for health, disability, and life insurance. See N.H. REV. STAT. ANN. § 168-B:25(V).

189. See FLA. STAT. ANN § 63.212(2)(a); N.H. REV. STAT. ANN. §§ 168-B:23(IV), 168-B:25(IV); VA. CODE ANN. §§ 20-158(D), 20-161(B).

190. See FLA. STAT. ANN. §§ 63.212, 742.15; N.H. REV. STAT. ANN. § 168-B:1 to 32; VA. CODE ANN. §§ 20-156 to 165.


tests. Lastly, some jurisdictions require the intended mother to represent that she is unable to bear a child.

In contrast, several states are hostile toward certain aspects of surrogacy. Many jurisdictions will not enforce paid surrogate agreements. Terms such as "paid," "compensation," and "expenses," vary depending on the jurisdiction, and there is much variety in which payments are prohibited. Several jurisdictions void both paid and unpaid surrogate agreements. A handful of states expressly prohibit compensation for an intermediary setting up a surrogate arrangement.

B. An Illinois Approach

Consistent with the national trend, the Illinois General Assembly has expressed a policy allowing gestational surrogate arrangements. The recent enactment favors a genetic tie over a maternal tie in certain instances.

Basing family rights on genetic kinship is logical for several reasons. Most prominent is that genetic kinship offers a unique and profound relationship. Such a relationship always endures even when the family unit is modified in instances of death, divorce, or remarriage. Knowledge of lineage is important to the child's identity, continuity, and security. Also, knowledge of blood lineage is important in addressing health issues and family medical tendencies. Lastly, a genetic-based preference favors and honors reproductive decisions by

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193. See id. at §§ 168-B:18, B:19; VA. CODE ANN. §§ 20-160(B)(7), (11).
194. See FLA. STAT. ANN. § 742.15(2)(a); N.H. REV. STAT. ANN. § 168-B:17; VA. CODE ANN. § 20-160(B)(8).
196. See supra note 188 and accompanying text (discussing the various definitions of reasonable expenses among jurisdictions).
198. See D.C. CODE ANN. § 16-402(b); FLA. STAT. ANN. § 63.212(1)(i)(5); KY. REV. STAT. ANN. § 199.590(4); MICH. COMP. LAWS ANN. § 722.859; N.H. REV. STAT. ANN. § 168-B:16(IV); N.Y. DOM. REL. LAW § 123(1); UTAH CODE ANN. § 76-7-204(1)(b) (1999); VA. CODE ANN. § 20-165; WASH. REV. CODE ANN. § 26-26.230.
200. See id.
the parties, such as the intended parents’ decision to beget the child and the surrogate’s decision to bear the child.

In discussing gestational arrangements, courts not only recognize the significant bond that exists between the genetic parents and the child, but also the minimal bond between the surrogate and the child. One court has determined that the surrogate’s role is limited to gestation. The court further concluded that the gestational surrogate normally does not contribute any genetic material to the fetus.

In contrast, similar arguments cannot be made with a traditional surrogate arrangement because the surrogate has a profound genetic tie to the child. The child is created using the egg of the surrogate. Thus, this distinction presents a sensible line of demarcation in designing surrogate policy.

Based on this distinction, the legislature should fashion a broad, reliable framework that affords protection to couples pursuing a gestational arrangement. In addition to the recently enacted adoption “by-pass” statute, the legislature should structure the contractual relationship between the parties. As for traditional surrogacy, the legislature should treat this arrangement as a “preplanned adoption” and limit the parties’ relationship in a manner similar to Florida’s model.

1. Gestational Arrangements

With respect to gestational arrangements, several improvements could be made to Illinois’ existing legislation. The statutes should be broadened to permit the use of anonymously donated eggs or sperm.

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201. See Belsito v. Clark, 644 N.E.2d 760, 761-62, 766 (Ohio C.P. 1994). The Belsito court noted:

[t]here is abundant precedent for using the genetics test for identifying a natural parent. For the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent. The genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits. Because that test has served so well, it should remain the primary test for determining the natural parent, or parents, in nongenetic-providing surrogacy cases.

Id. at 766.

202. See id. at 761-62. In Belsito, the court noted:

[t]he fetus placed in the carrier sets up an entirely separate system from the carrier. The uterus provides only a means of nourishment to and a means of carrying waste away from the baby’s system. The uterus provides a “filtering system” for the child. Blood between the carrier and the fetus is not exchanged during the pregnancy, absent some complication. According to [a physician], there would be no genetic or blood tie to the surrogate host.

Id.

203. See id.

This would enlarge the alternatives for infertile couples, allow the couple to maintain a genetic tie to the child, and maintain the surrogate’s minimal bond with the child. In addition, these proceedings should be closed to the public.

Assuming that the parties enter into a gestational agreement, certain stipulations and limitations should be incorporated. The following terms should be integrated into the agreement: (1) the intended parents agree that the gestational surrogate will have the sole power of consent regarding clinical intervention and management of the pregnancy; (2) the gestational surrogate agrees to submit to reasonable medical evaluation and to comply with reasonable medical instructions; (3) the gestational surrogate agrees to forfeit all parental rights upon the child’s birth and will cooperate with any necessary judicial proceedings; and (4) the intended parents agree to accept custody and assume full parental rights and responsibilities regardless of any impairment to the child.\textsuperscript{205} The parties should be over the age of eighteen to assure competency to contract. Further, expenses paid by the intended parents to a gestational surrogate should be limited to reasonable living, legal, medical, psychological, and psychiatric expenses related to the prenatal, intrapartal, and postpartal periods. Lastly, the court should be given authority to invalidate the agreement if it is not in the best interests of the child.

2. Traditional Surrogacy

As for traditional surrogacy, Illinois should consider legislation based on the Florida model.\textsuperscript{206} Under Florida law, a “preplanned adoption” arrangement must be clearly identified as such and be approved by the court.\textsuperscript{207} The preplanned arrangement needs to be based upon an agreement.\textsuperscript{208} The agreement should include the following terms: (1) an agreement by the “volunteer mother” or surrogate to become pregnant, to bear the child, and to terminate any parental rights subject to the seven-day right of rescission after birth of the child; (2) an agreement by the surrogate to submit to reasonable medical evaluation and treatment and comply with reasonable medical instructions; (3) an agreement by the surrogate to assume parental rights and responsibilities for the child if the intended parents terminate the

\textsuperscript{205} These recommendations are largely based on Florida’s gestational surrogate statute. \textit{See} FLA. STAT. ANN. § 742.15(3).
\textsuperscript{206} \textit{See} FLA. STAT. ANN § 63.212.
\textsuperscript{207} \textit{See id.} § 63.212(1)(i).
\textsuperscript{208} \textit{See id.}
agreement before final transfer of custody or if the agreement is not approved by the court; (4) where the intended father is also the biological father, an agreement by the father to assume parental rights and responsibilities if the agreement is terminated by any party; (5) an understanding by the intended parents that they will not receive parentage if the agreement is terminated prior to transfer of custody or if the surrogate rescinds during the seven-day period; (6) an agreement by the intended parents to accept custody and assume parentage upon birth regardless of any impairment to the child; and (7) an agreement by all parties that the agreement may be terminated at any time.

Further, under the Florida model, a preplanned adoption agreement cannot contain any provision that reduces payment to the surrogate if the child is stillborn or impaired, or that requires termination of the surrogate’s pregnancy. Florida's statute on preplanned adoptions provides a thoughtful legislative model for traditional surrogacy, by forcing parties to confront potential problems before they arise.

V. CONCLUSION

Although the Illinois General Assembly has spoken on the surrogacy issue, gaps in policy still remain. Most likely, the controversial and complex nature of this issue has prevented the General Assembly from enunciating a comprehensive workable policy.

Notwithstanding the lack of direction in some areas, technology continues to advance. Within the last several years, the "future" has become the present with advancements in cloning, cryopreservation, artificial insemination, and genetic engineering. In addition, clinics are making this technology available on a

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209. See id. § 63.212(1)(i)(2).
210. See id. § 63.212(1)(i)(3).
211. "Dolly the Sheep" is but one example of recent advances in cloning. See Steve Kloehn & Paul Salopek, Humanity Still at Heart, Soul of Cloning Issue: Scientists and Theologians Agree We Are Our Own Persons, CHI. TRIB., March 2, 1997, § 1, at 1.
212. The freezing and storing of eggs and embryos, or cryopreservation, allows for assisted conception to take place over a period of time. This improves the chances for conception by allowing physicians to implant embryos and eggs at a physiologically optimal time. See GEOFFREY SHER ET AL., IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES 170-71 (1998).
213. Several in vitro techniques have improved the odds of those seeking to conceive. GIFT, (gamete intrafallopian transfer) for example, is a gamete-related technique that consists of injection of one or more eggs mixed with treated sperm directly into the fallopian tube(s) in the hope that fertilization will occur in vitro and that a healthy pregnancy will follow. Similar to GIFT is ZIFT (zygote intrafallopian transfer). ZIFT involves the placement of one or more zygotes into the outer third of the fallopian tube(s) in the hope that the resulting embryo will travel to the uterus and be successfully implanted. See id. at 150-53, 202, 215.
widespread basis and individuals continue to pursue these arrangements.

Inevitably, these disputes will be brought to the courts and will present questions of first impression. Regardless of what one thinks of the advancing reproductive technologies, science will continue to advance. Given the predictable future litigation, it is essential that the General Assembly carefully evaluate the issues and promulgate a comprehensive legislative policy. With a definitive policy in place, Illinois courts could be spared the cumbersome burden of crafting surrogate policy one decision at a time.

214. Presently, more than 320 clinics throughout the country offer in vitro services. See id. at xiii (providing statistics as to the growth of in vitro fertilization programs since the first successful test tube birth in 1978).

215. One of the more unusual examples occurred in late 1993, when an aspiring surrogate mother used a billboard facing a busy Houston highway to announce her “Womb for Rent.” See Hundreds Call About “Womb for Rent” Ad, CHI. TRIB., Nov. 16, 1993, § 1, at 18.