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Boss Mom: Why Texas Should Revise Its Legislation to Allow Gestational Surrogacy Contract Enforcement for Social Surrogacies

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ABSTRACT

Career-driven women have consistently been forced to choose between their careers and creating a family. However, with the use of reproductive technology, this is no longer necessary. In recent years, fertile women have been looking to gestational surrogacy as a pregnancy alternative. These women are opting to use surrogates not because they cannot bear a child but because being pregnant is not feasible for their careers. These surrogacies have been termed "social surrogacies." However, surrogacy laws throughout the United States are diverse and complicated, and many do not allow for the enforcement of social surrogacy contracts. These states, particularly Texas, require that the intended mother be unable to bear a pregnancy without risk to herself or her fetus in order to have a legally enforceable gestational agreement.

This Comment discusses the various surrogacy laws throughout the United States and analyzes the trend toward surrogacy acceptance. Specifically, this Comment argues that these surrogacy laws are unconstitutional and do not further any public policy goals by implementing a medical need requirement for intended parents. Thus, this Comment argues that Texas legislators should revise Texas's surrogacy statutes and eliminate the medical need requirement, which in turn would allow enforcement of gestational surrogacy agreements for social surrogacies.

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I. INTRODUCTION

COUPLES are increasingly utilizing reproductive alternatives that do not require a spouse to be pregnant.[1] In 1999, there were 727 gestational surrogacies in the United States.[2] This number increased to 3,432 gestational pregnancies in 2013, resulting in the birth of approximately 18,400 infants through gestational surrogacy in the United States between 1999 and 2013.[3] While surrogacy has become a more pop-

1. *See Assisted Reproductive Technology and Gestational Carriers*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 5, 2016), https://www.cdc.gov/art/key-findings/gestational-carriers.html [https://perma.cc/HV73-9AJL].
2. *Id.*
3. *Id.*

ular alternative for couples, states have different attitudes toward this controversial method.[4] There are no federal regulations governing surrogacy, and many states have not adopted legislation on the matter.[5] Therefore, it is difficult to decipher the various surrogacy laws among states. Currently, California is seen as the most surrogacy-friendly state, expressly permitting surrogacy agreements.[6] On the opposite end, Michigan and Nebraska do not enforce surrogacy agreements and may even subject surrogates and intended parents to criminal fines and penalties.[7] All other states leave intended parents unsure of their reproductive options to varying degrees.[8]

While surrogacy has traditionally been used by women who were medically unable to carry a child on their own, more women are choosing to use surrogates for non-medical reasons.[9] While some women have a desire to be a mother, a nine-month-long pregnancy may not be feasible for them.[10] These women include businesswomen, actresses, models, and professional athletes.[11] Instead of putting their careers on halt for nine months or losing them entirely, some of these women have chosen "social surrogacy," which allows them to keep their careers while still fulfilling their right to motherhood.[12] However, in many states, such as Texas, social surrogacy is not legally enforceable.[13] Texas law requires an intended mother to prove she has a medical necessity in order for a surrogacy agreement to be legally enforceable—an intended mother must be "unable to carry the pregnancy to term and give birth to the child" without serious risk to herself or the fetus.[14] Therefore, the law prevents women from utilizing social surrogacies in the state.[15]

This Comment explores the evolution of surrogacy laws in the United States and the trend toward a more liberalized attitude regarding the enforcement of gestational surrogacy agreements. Most importantly, this

4. *See* Jhonell Campbell, *Gestational Surrogacy Contract Terms Under the 2017 Uniform Parentage Act*, 9 CHILD & FAM. L.J. 1, 15 (2021).

5. *Id*.

6. *See The Most Surrogacy-Friendly States in the US*, EXTRAORDINARY CONCEPTIONS (Oct. 12, 2019), https://www.extraconceptions.com/surrogacy-friendly-states [https://perma.cc/WFJ4-UEQK]; *see also* CAL. FAM. CODE § 7962 (2022).

7. *See* MICH. COMP. LAWS ANN. §§ 722.855–.857 (2022); NEB. REV. STAT. § 25-21,200 (2022); *see also Surrogacy Laws By State*, LEGAL PRO. GRP., https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1 [https://perma.cc/SK36-QJZE]; *Guide to State Surrogacy Laws*, CTR. FOR AM. PROGRESS (Dec. 17, 2007), https://www.americanprogress.org/article/guide-to-state-surrogacy-laws [https://perma.cc/UU7B-WG5F].

8. *See Surrogacy Laws by State*, *supra* note 7.

9. *See* Steven H. Snyder, *Reproductive Surrogacy in the United States of America: Trajectories and Trends*, *in* HANDBOOK OF GESTATIONAL SURROGACY 276, 281 (E. Scott Sills ed. 2016).

10. Sarah Richards, *Should a Woman be Allowed to Hire a Surrogate Because She Fears Pregnancy Will Hurt Her Career?*, ELLE (Apr. 17, 2014), https://www.elle.com/life-love/a14424/birth-rights [https://perma.cc/FSS6-VN29].

11. *Id.*

12. *Id.*

13. *See* TEX. FAM. CODE ANN. § 160.756(b)(2) (2021).

14. *Id*.

15. *See id.*

Comment argues that it is unconstitutional and does not further any public policy goals to implement a medical need requirement for intended parents. Instead, this Comment proposes the Texas legislature revise Texas surrogacy law to mirror New York's legislative framework, which allows for an enforceable gestational surrogacy agreement, regardless of medical need.[16] As technology and society change, state legislatures need to adapt to those changes.

II. SURROGACY: WHAT IS IT?

Surrogacy is a method of reproduction in which a surrogate agrees to bear a child for another individual (or, commonly, a couple), commonly referred to as the intended parents.[17] The two types of surrogacy are traditional and gestational.[18] The main difference between the two is the genetic relationship between the surrogate and the child.[19] "In traditional surrogacy, the surrogate is genetically related to the child she will carry."[20] The intended father's sperm is artificially inseminated into the surrogate's egg, making her and the intended father the biological parents of the child.[21] Thus, in traditional surrogacy, the child could end up looking like the surrogate.[22] This genetic tie has proven to make traditional surrogacies much more controversial, as there is a higher chance the surrogate forms a bond with the child and becomes reluctant to release the child to the intended parents.[23] In gestational surrogacy, by contrast, the surrogate is not biologically related to the child.[24] Instead, the intended parents' sperm and egg are implanted into the surrogate through in vitro fertilization (IVF), or a donor is used.[25] Thus, there can be many variations in the biological link between the intended parents and the child. Either both of the intended parents are the child's biological parents, one is, or neither are, but the surrogate will never have a biological link to the child—her egg is not used in the fertilization process. Given the lack of biological link between the child and surrogate, gestational surrogacy is the far more accepted surrogacy method.[26] Thus, for public policy rea-

16. *See infra* Part IV.

17. *See* Mark Strasser, *The Updating of Baby M: A Confused Jurisprudence Becomes More Confusing*, 78 U. PITT. L. REV. 181, 183 (2016).

18. Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 87 (2015); Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL'Y 279, 280 (2011).

19. *See Strasser*, *supra* note 18, at 88.

20. Emma Cummings, *The [Un]enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 CUMB. L. REV. 85, 85 (2019).

21. Perdue, *supra* note 18, at 280; Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 394 (2012).

22. *Strasser*, *supra* note 18, at 88; *see also In re* Baby M, 537 A.2d 1227, 1236 (N.J. 1988).

23. Elizabeth Nicholson, *Protecting the Alabama Surrogate: A Legislative Solution*, 69 ALA. L. REV. 701, 703–04 (2018); *see In re Baby M*, 537 A.2d at 1236.

24. *Strasser*, *supra* note 18, at 88.

25. London, *supra* note 21, at 394.

26. *Strasser*, *supra* note 18, at 88.

sons, gestational surrogacy agreements are more likely to be enforceable than traditional surrogacy agreements.

A surrogacy agreement is a contract outlining the rights and duties of the intended parents and the surrogate throughout the surrogacy process.[27] This agreement often consists of the agreed-upon payment; medical rights of the surrogate, such as the right to abortion when medically necessary; and most importantly, the "responsibilities, parental rights, and duties pertaining to any child born through surrogacy."[28]

An unenforceable surrogacy agreement could have significant consequences for the intended parents.[29] Mainly, if the agreement is unenforceable, the surrogate could claim parental rights over the intended parents and refuse to surrender the child.[30] Thus, a legally enforceable surrogacy agreement is crucial. Unfortunately, many surrogacy disputes that have appeared in court were rendered unenforceable, resulting in the intended parents losing parental rights to the child.[31] The majority of jurisdictions that refuse to enforce surrogacy agreements have justified this position on moral, ethical, and public policy concerns.[32] However, as society adapts, courts and legislatures have become more accepting of these agreements, creating a diverse set of surrogacy laws throughout the United States.[33]

III. THE JUDICIAL TREATMENT OF SURROGACY CONTRACTS IN THE UNITED STATES

The judiciary played a key role in developing surrogacy regulations and guidance for contract enforceability. As these issues emerged in the 1980s and 1990s, the Supreme Court had not spoken on the subject and the vast majority of states had not implemented any laws or statutory guidance on surrogacy, so the question of whether surrogacy agreements were enforceable was primarily determined by the courts.[34] Courts had different views and rationales when it came to the enforcement of surrogacy agreements; however, no one view gained general acceptance—some refused

27. Campbell, *supra* note 4, at 3.

28. *Id.* at 3, 10.

29. *See, e.g.*, Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html [https://perma.cc/JU2X-YMW5].

30. *See* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 461 (2009); *see In re* Baby M, 537 A.2d 1227, 1237 (N.J. 1988).

31. *See, e.g.*, *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Cal. Ct. App. 1994).

32. *See* Perdue, *supra* note 18, at 282; Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 101–02 (2010); *see also, e.g.*, *In re Baby M*, 537 A.2d at 1264.

33. *See* Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, 44 AM. J.L. & MED. 7, 9–10 (2018).

34. *See* A. Paige Miller, *The Silence Surrounding Surrogacy: A Call for Reform in Alabama*, 65 ALA. L. REV. 1375, 1379 (2014).

to enforce surrogacy agreements due to public policy,[35] some used an intent-based standard,[36] and others focused on particular distinctions between gestational and traditional surrogacy.[37] While early surrogacy cases often took a more apprehensive approach to surrogacy agreements, recent years have shown that many courts are developing a more liberalized view of surrogacy and enforcing surrogacy contracts in favor of the intended parents.[38]

A. In Re Baby M

In re Baby M was the first major surrogacy case, wherein the New Jersey Supreme Court voided a traditional surrogacy agreement and held that such agreements were "illegal and invalid."[39] Mary Beth Whitehead and William Stern entered into a traditional surrogacy contract whereby Mrs. Whitehead agreed to become impregnated by Mr. Stern through artificial insemination, deliver the child to Mr. and Mrs. Stern upon birth, and terminate her parental rights in order for Mrs. Stern to adopt the child, in return for $10,000 from Mr. Stern.[40] The psychological examination Mrs. Whitehead underwent prior to the start of her surrogacy revealed that she demonstrated certain traits that could make surrendering the child difficult for her; however, neither the Whiteheads nor the Sterns were informed of this, and the surrogacy was commenced.[41] On March 27, 1986, Baby M was born.[42] Mrs. Whitehead instantly realized she would not be able to release the child to the Sterns.[43] Nonetheless, she handed over Baby M to the Sterns on March 30, despite breaking down at the hospital and indicating she did not want to part with the child.[44] The next day she went back to the Sterns and told them of her distress, and they agreed to let her have the child for a week.[45] Mrs. Whitehead refused to return Baby M and fled to Florida with the child; the Sterns did not receive Baby M until four months later, once a Florida court ordered the child to be forcibly removed from the Whiteheads' custody.[46]

While the trial court held the agreement enforceable, the New Jersey Supreme Court reversed, holding the surrogacy contract was invalid because its "provisions not only directly conflict with New Jersey statutes,

35. *See, e.g.*, *In re Baby M*, 537 A.2d at 1234–35.
36. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
37. *See, e.g.*, *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994); J.F. v. D.B., 879 N.E.2d 740, 742 (Ohio 2007).
38. *See generally* Eric A. Gordon, Comment, *The Aftermath of* Johnson v. Calvert*: Surrogacy Law Reflects A More Liberal View of Reproductive Technology*, 6 St. Thomas L. Rev. 191 (1993).
39. *In re Baby M*, 537 A.2d at 1235.
40. *Id.* at 1235.
41. *Id.* at 1247–48.
42. *Id.* at 1236.
43. *Id.*
44. *Id.*
45. *Id*. at 1236–67.
46. *Id.* at 1237.

but also offend long-established [s]tate policies."[47] The court held the contract conflicted with New Jersey laws pertaining to (1) the prohibition of using money in connection with adoptions; (2) the requirement that a parent must be deemed unfit or proof of abandonment must exist before the termination of parental rights; and (3) the assurance that a surrender of custody decision can be revoked.[48] The court was specifically concerned over the payment for the child, stating that "[t]he evils inherent in baby-bartering are loathsome for a myriad of reasons" and that "[b]aby-selling potentially results in the exploitation of all parties involved."[49] The court noted that surrogacy agreements could exacerbate these baby-buying concerns by "placing and adopting a child without regard to the interest of the child or the natural mother."[50]

As for public policy, the court explained that surrogacy agreements contradicted New Jersey public policy that "the child's best interests shall determine custody" and that "children should remain and be brought up by both of their natural parents."[51] The court was especially deterred from enforcing the agreement due to what they deemed a lack of voluntary consent, explaining,

> [The surrogate] never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary.[52]

Thus, the court's main issue with the surrogacy agreement was the "essential evil" of exploiting a woman's financial situation in the inducement of her surrendering her child.[53]

While the court did award custody to the Sterns, not because of the agreement but because it was deemed in the best interest of the child, the court made its views on surrogacy very clear, stating,

> [Surrogacy] guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this . . . through the use of money.[54]

The *Baby M* case involved a traditional surrogacy agreement wherein the surrogate was the biological mother of the child; thus, the ruling and the court's views should be construed to apply only to traditional surro-

47. *Id.* at 1239–40.
48. *Id.* at 1240.
49. *Id.* at 1241–42.
50. *Id.* at 1242.
51. *Id.* at 1246–47.
52. *Id.* at 1248.
53. *Id.* at 1249.
54. *Id.* at 1250.

gacy agreements and not gestational surrogacy agreements.[55] However, many have argued that the *Baby M* rationale also applies to gestational agreements because baby-selling and exploitation concerns are still present.[56]

B. California's Response

In 1993, five years after *Baby M*, the Supreme Court of California in *Johnson v. Calvert* held that a gestational surrogacy agreement was not against California's public policy, taking a much different approach to the concerns addressed by the *Baby M* court.[57] Mark and Crispina Calvert entered into a surrogacy agreement with Anna Johnson stating that she would allow an embryo, created by Mark and Crispina's gametes, to be implanted into her, carry the child, and relinquish control of the child to the Calverts in return for $10,000 and a $200,000 life insurance policy on Anna's life.[58] However, the relationship between the Calverts and Anna deteriorated, and Anna filed to be declared the mother of the child six months into her pregnancy.[59] Blood tests taken upon the child's birth confirmed that the Calverts were the biological parents and Anna was not the genetic mother.[60]

The court concluded that since the 1975 Uniform Parentage Act allowed (a) genetic relation and (b) giving birth as two means for establishing motherhood, the deciding factor was dependent on the intent of the parties, holding that "she who intended to bring about the birth of a child that she intended to raise as her own[ ]is the natural mother under California law."[61] Thus, the court ruled Crispina the natural mother:

> The parties' aim was to bring Mark's and Crispina's child into the world, not . . . to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary[,] . . . Anna would not have been given the opportunity to . . . deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.[62]

The court went on to address some of the same issues brought up in *Baby M*, such as prohibitions on the payment for adoption, exploitation, and involuntary consent; however, it had a much different outlook.[63] The

55. Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993) (distinguishing the facts from *Baby M* because *Johnson* concerned a gestational pregnancy).

56. *See* Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 Ind. L.J. 1187, 1191 (2012).

57. *See Johnson*, 851 P.2d at 778.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 782.

62. *Id.*

63. *See id.* at 784.

court first noted that surrogacy and adoption are distinct—in surrogacy, the party voluntarily agrees to become pregnant, unlike in the adoption context, where the party is already pregnant and more susceptible to influence.[64] Further, the payment is for her gestational services, not her termination of parental rights.[65] In regard to exploitation, the court explained that "there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment."[66] Finally, the court noted that the argument that a woman is incapable of making the decision to enter into a surrogacy agreement is the same rationale "that for centuries prevented women from attaining equal economic rights and professional status under the law."[67] The court concluded that Anna, a nurse who had given birth before, had the capability of making the informed decision to enter into the surrogacy contract.[68]

Johnson v. Calvert did not explicitly say that gestational surrogacy agreements were legally binding per se; rather, it held that they were not against public policy and that, in a case where the gestational surrogate and biological mother both claim motherhood, the intended mother, as shown through the surrogacy contract, will prevail.[69] Thus, the enforceability of a traditional surrogacy contract, where there is no biological connection between the intended mother and child, was still undecided. However, *In re Marriage of Moschetta* decided this question by holding that a traditional surrogacy contract was unenforceable due to its incompatibility with California's parentage and adoption statutes.[70] The court explained that since the surrogate mother was both the genetically related mother and the one who gave birth, there was no "tie" in regard to competing claims to motherhood as in *Johnson*; thus, the surrogate mother was the natural mother of the child.[71] The court further declined to construe the surrogacy contract as an adoption agreement because, under the statute, there had to be consent after birth for an adoption agreement to be enforceable.[72] However, the court concluded by noting the disheartening implications of the ruling for the intended parents and asked for legislative guidance.[73] It further expressed its distaste for the default alternative the court was required to use (the Uniform Parentage Act), which the court noted was not written with surrogacy in mind.[74]

Johnson v. Calvert and *In re Marriage of Moschetta* demonstrate that

64. *Id.*
65. *Id.*
66. *Id.* at 785.
67. *Id.*
68. *Id.*
69. *See id.* at 778.
70. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894–95 (Ct. App. 1994).
71. *Id.* at 896
72. *Id.* at 900–01.
73. *Id.* at 903.
74. *Id.*

California's judiciary accepts surrogacy from a public policy standpoint.[75] However, while the courts were able to construe the statutes in favor of enforcing gestational surrogacy contracts, traditional surrogacies did not have the same benefit.[76] Without legislative reform, the courts noted that their hands were tied.[77]

C. Recent Cases

As time has passed, more courts have accepted surrogacy and the idea of enforceable surrogacy contracts.[78] In 2007, the Supreme Court of Ohio held that gestational surrogacy contracts do not violate Ohio's public policy.[79] The court explained that nothing in Ohio's laws prohibits the enforcement of a gestational surrogacy agreement, including provisions requiring the surrogate not to assert parental rights over the child.[80] The court noted that "[a] written contract . . . seems an appropriate way to enter into a surrogacy agreement. If the parties understand their contractual rights, requiring them to honor the contract they entered into is manifestly right and just."[81] However, the court made sure to state that it was not making any conclusions as to whether traditional surrogacies violate Ohio's public policy.[82]

In October 2011, the Connecticut legislature enacted § 7-48a, allowing an intended parent who is party to a valid gestational agreement to become the legal parent without adopting the child and to have their name placed on a new birth certificate.[83] The Supreme Court of Connecticut in *Raftopol v. Ramey* interpreted this statute to "confer parental status on an intended parent who is party to a valid gestational agreement *irrespective* of that intended parent's genetic relationship to the children. Such intended parents need not adopt the children in order to become legal parents. They acquire that status by operation of law."[84] Thus, the court rejected the defendant–state agency's argument that the statute only applied to biologically related parents and concluded that the non-biologically related intended parent could be placed on the child's birth certificate.[85] The court further noted that construing the statute in a manner that only applied to biological intended parents would lead to absurd results—in cases where neither of the intended parents, nor the surrogate, are genetically related to the child (such as when the intended par-

75. *See id.*; Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
76. *See In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894–95.
77. *See id.*; *Johnson*, 851 P.2d at 787.
78. *See, e.g.*, J.F. v. D.B., 879 N.E.2d 740, 741 (Ohio 2007); Raftopol v. Ramey, 12 A.3d 783, 799 (Conn. 2011); *In re* F.T.R., 833 N.W.2d 634 (Wis. 2013); *In re* Gestational Agreement, 449 P.3d 69 (Utah 2019).
79. *J.F.*, 879 N.E.2d at 741.
80. *Id.* at 741–42.
81. *Id.* at 741.
82. *Id.* at 742.
83. Conn. Gen. Stat. Ann. § 7-48a (2022).
84. Raftopol v. Ramey, 12 A.3d 783, 799 (Conn. 2011) (emphasis added).
85. *Id.*

ents use donors for the egg and sperm), the child would have no legal parent at all.[86] Thus, the court veered away from the common method of using biological distinctions to determine parentage.[87]

In 2013, the Supreme Court of Wisconsin also enforced the notion that biology should not be the determinative factor in surrogacy agreements.[88] In the case of *In re F.T.R.*, the court held that a traditional surrogacy agreement was enforceable against a biological surrogate mother, except with respect to the termination of parentage provision.[89] The court held that traditional surrogacy agreements are valid and enforceable unless enforcement would be contrary to the child's best interest.[90] The court explained that the provision requiring the surrogate mother to terminate her parental rights was unenforceable but severable; thus, the custody and child placement provisions were wholly enforceable against the surrogate mother.[91] The court stated "that the interests supporting enforcement of the [agreement] are more compelling than the interests against enforcement,"[92] and explained,

> [E]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life.[93]

Lastly, in 2019, the Supreme Court of Utah took a big step toward surrogacy acceptance when it held unconstitutional its statute requiring an intended mother to show she is medically unable to bear a child.[94] While the court held this requirement unconstitutional because it denied male same-sex couples the ability to satisfy its requirements (there is no female in the partnership that could meet the requirement), it was only able to sever that requirement from the statute because the court determined the statute's ten other required findings were sufficient.[95] One was the medical necessity for the intended mother, but others included residency requirements, home studies, counseling requirements, age requirements, and provisions for healthcare expenses.[96] The court found that taking out the medical requirement did not inhibit the statute's purpose:

> [R]emoval of the intended mother requirement does not undermine the ability of a district court to determine whether the prospective gestational mother can safely carry a child, whether the intended

86. *Id.* at 797.
87. *See id.*
88. *See In re* F.T.R., 833 N.W.2d 634 (Wis. 2013).
89. *Id.* at 648–49.
90. *Id.* at 648.
91. *Id.* at 651.
92. *Id.* at 649.
93. *Id.* at 652.
94. *In re* Gestational Agreement, 449 P.3d 69, 82 (Utah 2019).
95. *Id.* at 83; UTAH CODE ANN. § 78B-15-803 (2008), *amended by* § 78B-15-803 (2020).
96. *In re Gestational Agreement*, 449 P.3d at 84; UTAH CODE ANN. § 78B-15-803 (2008), *amended by* § 78B-15-803 (2020).

parents are fit to raise the child, and whether the parties have carefully considered their decisions to enter the agreement.[97]

Although the Utah Supreme Court invalidated the medical requirement on equal protection grounds, it nevertheless made important points as to why the requirement was unnecessary for the assurance of safe gestational surrogacy.[98] Legislators should look at these judicial explanations when considering whether their state's surrogacy requirements are necessary for the actual goal of protecting the surrogates, intended parents, and the child throughout the surrogacy process.

IV. CURRENT LEGISLATION: ENFORCEABILITY OF SURROGACY CONTRACTS

Since there are no federal laws or regulations governing surrogacy agreements, it has been mostly up to the states and judiciary to create a framework for the enforceability of gestational surrogacy contracts.[99] However, regulatory guidance has been developed for states and judiciaries to use, such as the Uniform Parentage Act,[100] American Bar Association Model Act,[101] and American Society for Reproductive Medicine Recommendations.[102] More recently, many states have passed surrogacy legislation in response to the judiciary's plea for legislative guidance, creating a comprehensive framework for the enforceability of surrogacy contracts.[103]

A. Model Codes

Because there is a lack of official guidance from the federal government and the Supreme Court on the enforceability of surrogacy contracts, model codes have been published in order to guide states when drafting legislation.[104] While these guidelines and recommendations are not binding on states or the judiciary, they are still helpful tools in interpreting the attitudes towards surrogacy in the United States and whether legislation favoring social surrogacies is viable.

1. Uniform Parentage Act

The Uniform Parentage Act (UPA) first included guidance on the en-

97. *In re Gestational Agreement*, 449 P.3d at 84.

98. *See id.*

99. *See generally* Deborah Machalow, *Legislating Labors of Love: Revisiting Commercial Surrogacy in New York*, 90 Ind. L.J. Supp. 1, 4 (2014).

100. Unif. Parentage Act (Unif. L. Comm'n 2017) [hereinafter 2017 UPA].

101. Model Act Governing Assisted Reprod. (Am. Bar Ass'n 2019) [hereinafter 2019 Model Act].

102. Am. Soc'y for Reprod. Med., *Recommendations for Practices Utilizing Gestational Carriers: A Committee Opinion*, Fertility & Sterility e3 (Jan. 6, 2017), https://www.fertstert.org/article/S0015-0282(16)63005-4/pdf [https://perma.cc/8FPU-K4CV].

103. Linda S. Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality*, 42 U. Balt. L. Rev. 611, 625 (2013).

104. *See, e.g.*, 2017 UPA; 2019 Model Act.

forceability of surrogacy contracts in its 2002 update.[105] The introductory comment to the 2002 UPA notes the need for surrogacy regulation, explaining, "Although legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public."[106] This recognizes that while some may disagree with surrogacy agreements, these agreements are a reality and need realistic regulation.[107]

Section 801 of the 2002 UPA provides guidelines for the validation of surrogacy agreements and concludes gestational agreements are enforceable if validated by a court after certain requirements are met.[108] Section 803(b) outlines five requirements needed before a court may validate an agreement.[109] These requirements include a residency requirement, home study requirement, assurance the agreement was voluntarily entered into, a requirement for a healthcare expense provision, and assurance that payment for the gestational mother is reasonable.[110] However, even if all of these requirements are met, § 803(b) states a court *may* issue a validation order; thus, even if the intended parents satisfy all the requirements, there is no certainty that the court will enforce it—it is up to the court's discretion.[111]

Therefore, looking at § 803(b) of the 2002 UPA, there is no requirement that the intended mother have a medical necessity for the surrogacy agreement to be validated.[112] Two states have adopted legislation based on the 2002 UPA—Texas[113] and Utah[114]—but have added their own additional requirements. In Texas, one of the additional requirements is that the intended mother cannot carry a child on her own.[115]

Because only two states adopted surrogacy legislation based on the 2002 Uniform Parentage Act, the guidelines were revised again in 2017.[116] The introductory comment to Comment 8 of the 2017 UPA explains that the Act is updating the surrogacy provisions "to make them more consistent with current surrogacy practice" and "liberalize[ ] the rules governing gestational surrogacy agreements."[117]

The 2002 UPA provided the same set of requirements for courts to consider when evaluating both gestational and traditional surrogacy

105. *See* UNIF. PARENTAGE ACT § 801 (UNIF. L. COMM'N 2000) (amended 2002) [hereinafter 2002 UPA].
106. *Id.* art. 8 cmt.
107. *See id.*
108. *Id.* § 801(a)–(c).
109. *Id.* § 803(b).
110. *Id.*
111. *Id.*
112. *See id.*
113. TEX. FAM. CODE ANN. § 160.756(b)(2) (2022).
114. UTAH CODE ANN. § 78B-15-803(2) (2020).
115. TEX. FAM. CODE ANN. § 160.756. Utah's similar provision requiring medical necessity on the part of the intended mother was invalidated by *In re* Gestation Agreement, 449 P.3d 69 (Utah 2019). *Supra* text accompanying notes 94–98.
116. 2017 UPA art. 8 cmt.
117. *Id.*

agreements.[118] The 2017 UPA, however, distinguishes between gestational and traditional surrogacies.[119] While additional requirements are implemented for traditional surrogacies, regulation of gestational surrogacies is more lax and no longer requires the agreement to be validated by a court or that a home study be conducted.[120] Section 802(b) states that in order to execute a surrogacy agreement, the intended parents must be at least twenty-one, "complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor," complete a mental health evaluation, and "have independent legal representation."[121] While the comment does not clarify what is meant by "complete a medical evaluation," it is likely meant to ensure that intended parents are in good enough health to create a healthy embryo and to be fit parents, not to establish that an intended mother cannot carry a child on her own—especially because the comment notes that this section was modeled off other legislation which does not impose that requirement.[122] Thus, under the Uniform Parentage Act, there is no requirement that an intended mother be unable to bear a child on her own or show a medical necessity for surrogacy.[123] Therefore, under the UPA, social surrogacies are permissible, and their gestational surrogacy contracts are enforceable.

2. ABA Model Act Governing Assisted Reproduction

In 2008, the American Bar Association (ABA) created the Model Act Governing Assisted Reproductive Technology and addressed the enforceability of surrogacy contracts.[124] The Act gave two alternative procedures: a judicial preauthorization model and an administrative model.[125] Alternative A is similar to the 2002 UPA and states that a gestational surrogacy agreement is enforceable if validated by a court after satisfying five requirements.[126] These requirements include a residency requirement, home study requirement, assurance the contract has been entered into voluntarily, healthcare provisions, and assurance the consideration of the gestational mother is reasonable.[127] Thus, Alternative A of the ABA Model Act does not require a medical necessity for surrogacy.[128]

Under Alternative B, gestational agreements are enforceable; however, it lists multiple requirements for the intended parents.[129] Along with four other requirements, § 702 requires that an intended parent

118. 2002 UPA § 803(b).
119. 2017 UPA art. 8 cmt.
120. *See id.* art 8 cmt., pt. 2 cmt.
121. *Id.* § 802(b).
122. *Id.* § 802 cmt. (citing D.C. CODE § 16-405 (enacted 2017); ME. REV. STAT. ANN. tit. 19-A, § 1931 (enacted 2015); N.H. REV. STAT. ANN. § 168-B:9 (enacted 2014)).
123. *See id.* § 802.
124. MODEL ACT GOVERNING ASSISTED REPROD. TECH. art. 7 (AM. BAR ASS'N 2008) [hereinafter 2008 MODEL ACT].
125. *Id.* art. 7 legis. note.
126. *Id*. [alt. A] § 703(1); *see* 2002 UPA § 803.
127. 2008 MODEL ACT [alt. A] § 703(2)(a)–(e).
128. *See id.*
129. *Id.* [alt. B] § 702(2).

"have a medical need for the gestational carrier arrangement as evidenced by a qualified physician's affidavit attached to the gestational agreement."[130] Therefore, under Alternative B of the 2008 ABA Model Act, surrogacy contracts for social surrogacies would be unenforceable.

In 2019, the ABA revised its Model Act, which included changes to the surrogacy provisions.[131] Under the revised model, there is only one method of enforcing a surrogacy agreement as opposed to the two methods offered in the 2008 Model Act.[132] Gestational surrogacy contracts are enforceable; however, there are still eligibility requirements for the intended parents.[133] The intended parents must undergo a consultation and be represented by independent legal counsel.[134] Section 702 also states that the relevant state may adopt rules "pertaining to the required [m]edical [e]valuations, [c]onsultations, and [m]ental [h]ealth [e]valuations for a [s]urrogacy [a]greement."[135] It further states that if there is no state regulation, then mental health evaluations should be conducted in accordance with the recommendations from the American Society for Reproductive Medicine.[136] However, the need for medical or mental health evaluations is only required for the gestational surrogate, so this likely does not pertain to intended parents.[137] Therefore, the revised 2019 ABA Model Act has created a framework that would allow for the enforcement of contracts for social surrogacies.

3. American Society for Reproductive Medicine

In 2017, the American Society for Reproductive Medicine published a set of recommendations pertaining to surrogacies and the enforcement of surrogacy agreements.[138] The committee stated that the recommendations are intended "to provide guidance for when it is appropriate to consider using a gestational carrier, provide guidelines for screening and testing of" the parties involved, and address the "complex medical and psychological issues" that could come up.[139] In regard to medical needs, the recommendations state that "[g]estational carriers may be used when a true medical condition precludes the intended parent from carrying a pregnancy or would pose a significant risk of death or harm to the woman or the fetus. The indication must be clearly documented in the patient's medical record."[140] Thus, the American Society for Reproductive Medicine would not recommend allowing social surrogacies;[141] however,

130. *Id.*
131. *See* 2019 MODEL ACT. art. 7.
132. *Id.*
133. *Id.* § 702(2).
134. *Id.* § 702(2)(a)–(b).
135. *Id.* at § 702(3).
136. *Id.*
137. *See id.* § 702(1)(c)–(d).
138. Am. Soc'y for Reprod. Med., *supra* note 102.
139. *Id.* at e3.
140. *Id.*
141. *Id.*

these are only recommendations, and it is up to the states to decide what will be enforceable.

B. State Legislation

There are generally four categories of state surrogacy statutes: "(1) those that permit surrogacy contract enforcement; (2) those that permit surrogacy contract enforcement, but with significant restrictions; (3) those that civilly or criminally prohibit surrogacy agreement enforcement; and (4) those that are silent on the issue of surrogacy."[142] Thus, in the United States, the wide range of surrogacy laws has different implications for the allowance of social surrogacies.

1. States that Permit Surrogacy Contract Enforcement

Currently, many jurisdictions expressly permit gestational surrogacy contract enforcement without strict eligibility requirements.[143] Such jurisdictions include California,[144] the District of Colombia,[145] Delaware,[146] Maine,[147] New Hampshire,[148] New Jersey,[149] Nevada,[150] Rhode Island,[151] Vermont,[152] and Washington.[153] These states have minimal eligibility requirements for the intended parents, which usually only require that the intended parents complete a mental health consultation and a "legal consultation with independent legal counsel regarding the terms of the gestational carrier agreement" to advise them "of the potential legal consequences of the gestational carrier agreement."[154] Even the most restrictive provisions in these statutes only add to the requirements that the intended parents undergo a medical examination to determine parental fitness, complete mental health evaluations, and verify they are at least twenty-one years of age.[155] California has the most inclusive surrogacy laws in the United States, requiring only that the intended parents and gestational surrogates be represented by separate, independent legal counsel.[156] Thus, contracts for social surrogacies would be expressly per-

142. Campbell, *supra* note 4, at 15.
143. *Surrogacy Laws by State*, *supra* note 7; *The United States Surrogacy Law Map*, Creative Fam. Connections, https://www.creativefamilyconnections.com/us-surrogacy-law-map [https://perma.cc/3ZEQ-QBGJ].
144. Cal. Fam. Code § 7962 (2022).
145. D.C. Code Ann. § 16-404 (2022).
146. Del. Code Ann. tit. 13, § 8-807 (2022).
147. Me. Rev. Stat. Ann. tit. 19-A, § 1932 (2022).
148. N.H. Rev. Stat. Ann. § 168-B:10 (2022).
149. N.J. Stat. Ann. § 9:17-65 (2022).
150. Nev. Rev. Stat. Ann. § 126.750 (2021).
151. 15 R.I. Gen. Laws Ann. § 15-8.1-802 (2021).
152. Vt. Stat. Ann. tit. 15C, § 802 (2022).
153. Wash. Rev. Code Ann. § 26.26A.755 (2022).
154. N.H. Rev. Stat. Ann. § 168-B:8 (2022); *accord* Del. Code Ann. tit. 13, § 8-806 (2022); Nev. Rev. Stat. Ann. § 126.740; N.J. Stat. Ann. § 9:17-64.
155. Me. Rev. Stat. Ann. tit. 19-A, § 1931 (2022); D.C. Code Ann § 16-405 (2022.); 15 R.I. Gen. Laws Ann. § 15-8.1-801; Vt. Stat. Ann. tit. 15C, § 801; Wash. Rev. Code Ann. § 26.26A.705.
156. Cal. Fam. Code § 7962(b) (2022).

mitted among these states.[157]

It is important to note that many of these states have only recently implemented statutes expressly permitting gestational surrogacy.[158] For example, New Jersey and Vermont's statutes did not become effective until 2018,[159] Washington in 2019,[160] and Rhode Island in 2021.[161] Further, many of these states were against surrogacy up until the passage of these recent statutes.[162] In 1988 New Jersey made its views on surrogacy explicitly clear in *Baby M*, where the court noted its firm disapproval of surrogacy agreements and outlined the many "evils" it believed these contracts created.[163] Not until 2012, twenty-four years after *Baby M*, was a bill introduced to the New Jersey legislature which would enforce gestational surrogacy contracts.[164] However, although the New Jersey legislature did pass this bill, Governor Christie vetoed it,[165] and it took six more years until New Jersey enacted a law enforcing gestational surrogacy agreements.[166] Similarly, until Washington, D.C. enacted its statute permitting surrogacy, it had one of the strictest bans on surrogacy agreements, declaring "all surrogacy agreements void and unenforceable and imposed harsh penalties such as a $10,000 fine or one year in prison for anyone who violated the law."[167] Even New York, which has been known for its strict prohibition of surrogacy, recently passed a bill allowing gestational surrogacy agreements and social surrogacy agreements.[168]

Thus, it is clear that more legislatures are beginning to discuss the importance of gestational surrogacy contracts and are growing more accepting of them. Therefore, it is hopeful and likely that states with strict prohibitions or stringent requirements for intended parents will revise their laws.

2. States that Prohibit Surrogacy Contract Enforcement

There are still a few states with complete prohibitions on surrogacy,

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157. *See id.*; D.C. CODE ANN. § 16-404; DEL. CODE ANN. tit. 13, § 8-807; ME. REV. STAT. ANN. tit. 19-A, § 1932; N.H. REV. STAT. ANN. § 168-B:10; N.J. STAT. ANN. § 9:17-65; NEV. REV. STAT. ANN. § 126.750; 15 R.I. GEN. LAWS ANN. § 15-8.1-802 (2021); VT. STAT. ANN. tit. 15C, § 802; WASH. REV. CODE ANN. § 26.26A.755.

158. *See Surrogacy Laws by State*, *supra* note 7.

159. *See* N.J. STAT. ANN. § 9:17-64; VT. STAT. ANN. tit. 15C, § 801.

160. *See* WASH. REV. CODE ANN. § 26.26A.705.

161. 15 R.I. GEN. LAWS ANN. § 15-8.1-801.

162. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1241 (N.J. 1988); Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard*, 63 VILL. L. REV. TOLLE LEGE 1, 9 (2018).

163. *See In re Baby M*, 537 A.2d at 1241.

164. Machalow, *supra* note 99, at 5.

165. *Id.* at 6.

166. *See Surrogacy Laws by State*, *supra* note 7; N.J. STAT. ANN. § 9:17-64 (enacted 2018).

167. Ruth, *supra* note 162, at 9.

168. N.Y. FAM. CT. ACT § 581-402 (McKinney Supp. 2022); *see also* David Crary, *No Longer an Outlier: New York Ends Commercial Surrogacy Ban*, ASSOCIATED PRESS (Feb. 14, 2021), https://apnews.com/article/new-york-surrogacy-laws-a5e4323f6b1fb82b424c272ee791d90a [https://perma.cc/SV2L-2TDL].

including Arizona,[169] Michigan,[170] Nebraska,[171] and Indiana.[172] In these states, surrogacy contracts are void and unenforceable, whether gestational or not. Arizona law explicitly prohibits entering into a surrogate agreement.[173] Indiana declares these agreements void as a matter of public policy.[174] And in Michigan—one of the strictest surrogacy states in the country—anyone who knowingly enters into a compensated surrogacy contract "is guilty of a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than 1 year, or both" and anyone "who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than $50,000 or imprisonment for not more than [five] years, or both."[175] However, as noted above, many states that had extreme prohibitions against surrogacy now have surrogacy-friendly statutes.[176] Following suit, Indiana has proposed legislation that would hold gestational surrogacy contracts enforceable and, with minimal requirements for intended parents, would allow social surrogacies.[177]

3. States that are Silent on the Issue of Surrogacy

Many states have no statutes or published case law specifically prohibiting or enforcing surrogacy agreements. These states include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Minnesota, Mississippi, Montana, North Carolina, Oregon, and South Dakota.[178] However, this does not necessarily mean surrogacy agreements are not enforceable in these states.[179] Many of these states are still considered surrogacy friendly, and courts are typically favorable toward the agreements.[180] These courts will often grant parentage orders if one of the intended parents is genetically related to the child, or at the least, they often give second-parent adoptions.[181] The main issue in these states is that enforce-

169. ARIZ. REV. STAT. ANN. § 25-218 (2022), *preempted by* Soos v. Sup. Ct. *in re* County of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994). *Soos* invalidated the statute's bar against the intended mother seeking legal parentage as unconstitutional in violation of the Equal Protection Clause. *Soos*, 897 P.2d at 1361. Now, intended parents may seek legal parentage, though it is up to the judge's discretion whether to grant it. *See Surrogacy Laws by State*, *supra* note 7.

170. MICH. COMP. LAWS ANN. § 722.859 (2022).

171. NEB. REV. STAT. § 25-21,200 (2022).

172. IND. CODE ANN. § 31-20-1-2 (2022).

173. ARIZ. REV. STAT. ANN. § 25-218.

174. *See* IND. CODE ANN. § 31-20-1-2.

175. MICH. COMP. LAWS ANN. § 722.859(3).

176. *See, e.g.*, N.Y. FAM. CT. ACT § 581-402 (McKinney Supp. 2022); D.C. CODE ANN. § 16-405 (2017); N.J. STAT. ANN. § 9:17-65 (2018).

177. H.R. 1104, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

178. *See Surrogacy Laws by State*, *supra* note 7; *The United States Surrogacy Law Map*, *supra* note 143.

179. *See Surrogacy Laws by State*, *supra* note 7.

180. *See id.*; *The United States Surrogacy Law Map*, *supra* note 143.

181. *Surrogacy Laws by State*, *supra* note 7; *The United States Surrogacy Law Map*, *supra* note 143.

ment is up to the individual court's discretion; thus, results can vary widely by venue and specific judge, leaving intended parents unsure of their surrogacy outcomes. However, since there is no statutory guidance for the enforcement of the surrogacy agreements, social surrogacies are not prohibited in these states and will likely be looked at favorably due to the intended mother's genetic link to the child.

Many states that do not have statutes pertaining to whether surrogacy agreements are enforceable do, however, address the enforceability of surrogacy agreements through published case law, which can help resolve surrogacy disputes. Some of these states include Idaho,[182] Maryland,[183] Massachusetts,[184] Ohio,[185] Pennsylvania,[186] South Carolina,[187] Tennessee,[188] and Wisconsin.[189] While most of these states are seen as surrogacy-friendly states, case law may not be viewed as accepting of social surrogacies. The Supreme Judicial Court of Massachusetts has twice held gestational agreements enforceable, noting the state's interest in "'establishing the rights and responsibilities of parents . . . as soon as practically possible' and 'furnishing a measure of stability and protection to children born through such gestational surrogacy arrangements.'"[190] However, these cases involved intended mothers who could not bear a child on their own.[191] In *R.R. v. M.H.*, which both cases cited, the court noted that certain conditions should be considered when deciding the enforceability of a surrogacy agreement, including that "the father's wife be incapable of bearing a child without endangering her health."[192] Thus, without legislation, it is currently unclear if Massachusetts would uphold a social surrogacy agreement. Other states that do not statutorily permit or prohibit surrogacy and that are seen as favorable to the enforcement of gestational agreements have similar case law that does not mention whether the intended mother has a medical necessity for the surrogacy.[193] Thus, there is no precedent or statute explicitly prohibiting social surrogacies in these states.

Tennessee and Idaho (both of which are seen as unfriendly to surrogacy) case law makes harsh distinctions between the genetic relationship

182. *See In re* Doe, 372 P.3d 1106 (Idaho 2016).

183. *See In re* Roberto, 923 A.2d 115 (Md. 2007).

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

185. *See* J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007).

186. *See* J.F. v. D.B, 897 A.2d 1261 (Pa. Super. Ct. 2006).

187. *See* Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757 (D.S.C. 2003).

188. *See In re* Adoption of Male Child A.F.C., 491 S.W.3d 316 (Tenn. Ct. App. 2014).

189. *See In re* F.T.R., 833 N.W.2d 634 (Wis. 2013).

190. Hodas v. Morin, 814 N.E.2d 320, 326 (Mass. 2004) (quoting Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1139 (Mass. 2001)).

191. *See id.*; *Culliton*, 756 N.E.2d at 1136.

192. R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998); *see also Culliton*, 756 N.E.2d at 1136; *Hodas*, 814 N.E.2d at 326.

193. *See In re* Roberto, 923 A.2d 115 (Md. 2007); J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007); J.F. v. D.B, 897 A.2d 1261 (Pa. 2006); Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757 (D.S.C. 2003); *In re* F.T.R., 833 N.W.2d 634 (Wis. 2013).

of the intended parents to the child.[194] In Idaho, a non-genetic intended parent must go through the adoption process to become the legal parent and cannot receive a parentage order.[195] Likewise, in Tennessee, unless both the intended parents use their own gametes to create the embryo, the gestational mother will be named on the birth certificate.[196] However, neither state distinguishes between whether or not the intended mother has a medical condition that requires surrogacy.[197] Thus, Tennessee and Idaho represent two additional states where the possibility for social surrogacy is not yet eliminated.

4. States that Permit Surrogacy Contract Enforcement, but with Significant Restrictions

There are currently four states that permit gestational surrogacy contract enforcement but explicitly require that the intended mother have a medical necessity for the surrogacy in order to be eligible. These states include Texas,[198] Illinois,[199] Virginia,[200] and Florida.[201] The Texas statute states that in order for the court to validate the gestational agreement and for it to be enforceable, the court must find that

> the medical evidence provided shows that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give birth to the child without unreasonable risk to her physical or mental health or to the health of the unborn child.[202]

The other states use almost identical language;[203] however, Florida allows an exception only for the risk of physical health to the mother and not mental health.[204] Thus, other than the few states with complete prohibitions on surrogacy agreements, these four states are the only ones that explicitly state that agreements for social surrogacies are unenforceable. However, the wording of the Texas statute is strikingly similar to the language of the old Utah law, which has been declared unconstitutional by the Supreme Court of Utah.[205] Therefore, it is only a matter of time until these statutes are either rendered unconstitutional or legislatures follow

194. *See In re* Adoption of Male Child A.F.C., 491 S.W.3d 316, 321–22 (Tenn. Ct. App. 2014); *In re* Doe, 372 P.3d 1106 (Idaho 2016).

195. *See Surrogacy Laws by State*, *supra* note 7; *The United State Surrogacy Law Map*, *supra* note 143.

196. *See In re Adoption of A.F.C.*, 491 S.W.3d at 321–22; *Surrogacy Laws by State*, *supra* note 7.

197. *See In re Adoption of A.F.C.*, 491 S.W.3d at 321–22; *Surrogacy Laws by State*, *supra* note 7.

198. TEX. FAM. CODE ANN. § 160.756(b)(2) (2022).

199. 750 ILL. COMP. STAT. ANN. 47/20(b)(2) (2022).

200. VA. CODE ANN. § 20-160(B)(8) (2022).

201. FLA. STAT. ANN. § 742.15(2)(a) (2022).

202. TEX. FAM. CODE ANN. § 160.756(b)(2).

203. *See* VA. CODE ANN. § 20-160(8); 750 ILL. COMP. STAT. ANN. 47/20(b)(2); FLA. STAT. ANN. § 742.15(2)(a).

204. FLA. STAT. ANN. § 742.15(2)(b).

205. *In re* Gestational Agreement, 449 P.3d 69, 82 (Utah 2019).

the path of almost all the other states and liberalize their surrogacy statutes to enforce social surrogacy agreements.

V. ARGUMENT: TEXAS SHOULD ELIMINATE THEIR MEDICAL NEED REQUIREMENT FOR INTENDED PARENTS

Texas's requirement that the intended mother must have a medical necessity to be eligible for an enforceable gestational surrogacy contract must be eliminated for a variety of reasons. First, the requirement invokes many constitutional concerns that almost certainly render it unconstitutional. Second, even if the requirement could withstand constitutional scrutiny, this requirement does not further public policy goals, but instead, the requirement does more harm than good.

A. Constitutional Implications

The Texas requirement that an intended mother be unable to carry a child has many constitutional defects. The requirement infringes upon the constitutional rights afforded in *Obergefell v. Hodges*[206] and *Skinner v. Oklahoma*[207] and thus should be held unconstitutional under strict scrutiny review.

1. Disparate Treatment of Same-Sex Married Couples

In *Obergefell*, the Supreme Court held that denying benefits to same-sex married couples that are given to similarly situated opposite-sex couples is unconstitutional.[208] The Texas surrogacy statute does precisely this when requiring that the intended parents be married and the intended "mother" be medically unable to carry a child.[209] As previously explained, the Utah Supreme Court found its requirement that "medical evidence shows that the intended mother is unable to bear a child" or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child unconstitutional under *Obergefell*.[210] The court explained that "[i]t is impossible for married same-sex male couples to meet this requirement since neither member is a 'mother' under the statute;" thus, the court held the requirement unconstitutional since it "works to deny certain same-sex couples a marital benefit freely accorded to opposite-sex couples."[211] The Texas statute also uses gendered language, explicitly referring to the "intended mother," with the only difference between the two statutes being that the Texas statute uses the words "unable to carry a pregnancy to term"[212] rather than "unable to bear a

206. Obergefell v. Hodges, 576 U.S. 644 (2015).
207. Skinner v. Oklahoma, 316 U.S. 535 (1942).
208. *Obergefell*, 576 U.S. at 681.
209. Tex. Fam. Code Ann. §§ 160.754(b), 160.756(b)(2) (2022).
210. *In re Gestational Agreement*, 449 P.3d at 73, 82.
211. *Id.* at 82.
212. Tex. Fam. Code Ann. §160.756(b)(2).

child."[213] Therefore, it is clear that the Texas requirement is also unconstitutional under this rationale.

2. Infringement on the Right to Procreate

In *Skinner*, the Supreme Court established that procreation is a fundamental right and "fundamental to the very existence and survival of the race."[214] While the debate is not settled, some argue that surrogacy contracts fall within the right to procreate established in *Skinner*;[215] thus, when a state imposes limits for eligibility to an enforceable surrogacy contract, such as a medical need, they are hindering this fundamental right. Therefore, these limits should be subject to strict scrutiny. A law is unconstitutional under strict scrutiny review unless it is narrowly tailored to serve a compelling governmental interest.[216] Here, the medical necessity requirement does not further a compelling state interest, nor is it narrowly tailored to one. While there is little information available regarding the intent of the Texas legislature, multiple courts have explained that the government's interest in surrogacy regulation is to protect the well-being of the surrogate, ensure the intended parents are fit to parent, and prevent the exploitation of surrogates.[217] While these are compelling interests, requiring that an intended mother have a medical need for surrogacy does not serve these interests, and it is undoubtedly not narrowly tailored to them.

Assuming the government's justification is to protect the well-being of the surrogate, requiring a medical need for the intended mother hardly accomplishes this. If there was indeed a concern for the surrogate's health and a belief that surrogacy was hurtful to her, that risk would not change regardless of whether the intended parents medically required her service or not and it should be banned entirely.[218] As some proponents of surrogacy enforcement have noted, "If surrogacy has a significantly detrimental impact on the participants thereto, then it must be banned as a family-creating alternative altogether."[219] Arbitrary distinctions between intended parents that have nothing to do with the surrogate's health will not remedy this issue.

Moreover, if the justification is to prevent the exploitation of women for surrogacy, a medical need requirement does not satisfy or accomplish

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213. UTAH CODE ANN. § 78B-15-803 (2008), *amended by* § 78B-15-803 (2020).

214. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

215. Carroll, *supra* note 56, at 1194–96; Amanda Grau, *A Well-Rounded Argument: How* Skinner *and* Obergefell *Make Medical Requirements for Surrogacy Contracts Unconstitutional*, 28 AM. U. J. GENDER SOC. POL'Y & L. 441, 450 (2020).

216. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) ("The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . ." (quotations and alterations omitted)).

217. *See In re* Baby M, 537 A.2d 1227, 1242–1252 (N.J. 1988); *In re* Gestational Agreement, 449 P.3d 69, 84 (Utah 2019).

218. *Cf.* Carroll, *supra* note 56, at 1202.

219. *Id*.

this objective. States that have implemented statutes to protect against exploitation have required far more than Texas's statute. For example, New York's surrogacy statute outlines nine requirements for the surrogate.[220] The New York statute requires that the surrogate: be at least twenty-one; be a United States citizen or lawful permanent resident in order to prevent gestational tourism and ensure poor women of other countries are not being exploited; consent, which cannot be given until a licensed health care provider has informed her of all medical risks; be represented by independent counsel and remain represented throughout the entire contractual process to ensure she is not taken advantage of; and have her health insurance and a life insurance policy paid for by the intended parents.[221] Thus, it is clear that the New York legislature took great lengths to ensure women were protected from exploitation. However, the Texas statute merely requires that the surrogate agree voluntarily, have given birth before, be informed of potential risks, and reside in the state for ninety days before seeking to validate the agreement.[222] Therefore, if the legislature's true intention was to protect against exploitation, adopting a statute like New York's would accomplish this objective but requiring medical need does not.[223] An intended parent who medically needs a surrogate and one who does not could exploit the surrogate in equal ways; thus, the requirement is not narrowly tailored.

Lastly, if the state's interest is to ensure that the intended parents are fit to raise a child, then whether the intended parents have a medical need or not makes no difference. Just because a woman does not wish to be pregnant does not mean she will be any less fit to be a mother. On the contrary, often, women who choose to have a social surrogacy do so in order to keep their jobs and build a secure foundation to create a better life for their family and child.[224] Moreover, the Texas statute already includes the requirement that "an agency or other person has conducted a home study of the intended parents and has determined that the intended parents meet the standards of fitness applicable to adoptive parents."[225] This requirement alone would ensure the fitness of the parents. An intended parent with a medical need can be found unfit through a home study just as an intended parent without one could; therefore, the statute is not narrowly tailored to the governmental interest. Further, the Supreme Court of Utah already stated the medical need requirement was unnecessary to accomplish the purpose of their statute, which also included a home study requirement.[226] The court explained that the "[r]emoval of the intended mother requirement does not undermine the

220. N.Y. FAM. CT. ACT § 581-402(a) (2022).

221. *Id.*

222. TEX. FAM. CODE ANN. § 160.754–.755 (2022).

223. *See* Grau, *supra* note 215, at 466–67.

224. *What is Social Surrogacy?*, CONCEPTUAL OPTIONS, https://www.conceptualoptions.com/what-is-social-surrogacy [https://perma.cc/Y5F3-VPB7].

225. TEX. FAM. CODE ANN. § 160.756(b)(3).

226. *In re* Gestational Agreement, 449 P.3d 69, 83 (Utah 2019).

ability of a . . . court to determine whether the prospective gestational mother can safely carry a child, whether the intended parents are fit to raise the child, and whether the parties have carefully considered their decision to enter the agreement."[227]

Therefore, it is clear that the Texas statute is not narrowly tailored to a compelling governmental interest—it bans perfectly fit mothers who cannot be pregnant for various reasons as well as anyone without a uterus. However, even if the medical need requirement could pass constitutional review, it is evident that requiring medical need for intended parents does not further any public policy goals and should be revised by legislatures.

B. Public Policy

As stated, there are no public policy concerns that are amplified by the allowance of social surrogacies. The main issues that opponents of surrogacy are concerned with are the exploitation of women and the risk to the surrogate's health and well-being.[228] While these are legitimate concerns, requiring that an intended parent have a medical need to use a surrogate does not prevent these issues and can instead further exasperate them.

1. Exploitation

From the first significant surrogacy dispute case up until now, the concern that surrogacy exploits economically poorer women remains a considerable concern for legislatures and the public.[229] However, it is important to note that exploitation in the United States has not been found in most surrogacies.[230] Studies have been conducted that reveal that "surrogates are generally [W]hite, often married, and usually financially stable" and "surrogate mothers are mature, experienced, stable, self-aware, extroverted non-conformists who make the initial decision that surrogacy is something that they want to do."[231] Even in the famous *Baby M* case, the surrogate mother stated she wanted to help due to "her sympathy with family members and others who could have no children" and because she "wanted to give another couple the 'gift of life,"—the court even noted that the intended parents were not wealthy and the surrogate family was not poor.[232] Further, the court in *Johnson* explained that "there has been no proof that surrogacy contracts exploit poor women to any greater degree than an economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable em-

227. *Id.* at 84.

228. *See, e.g.*, Grace Melton & Melanie Israel, *How Surrogacy Harms Women and Children*, Heritage Found. (May 5, 2021), https://www.heritage.org/marriage-and-family/commentary/how-surrogacy-harms-women-and-children [https://perma.cc/WJD5-P7XW].

229. *See id.*; Anita L. Allen, *The Black Surrogate Mother*, 8 Harv. Black Letter J. 17, 30 (1991); *In re* Baby M, 537 A.2d 1227, 1242 (N.J. 1988).

230. Feldman, *supra* note 33, at 13

231. *Id.* (internal quotations omitted).

232. *See In re Baby M*, 537 A.2d at 1236, 1249.

ployment."[233] However, the exploitation of women is still a serious concern, and legislators should enact legislation that would actually prevent exploitation rather than provoke it.

The requirement that intended parents have a medical condition to be eligible for an enforceable surrogacy agreement will do nothing to prevent the exploitation of women but will likely exasperate it. The arbitrary ban will only encourage intended parents to forum shop for the most favorable regulations and contribute to the problem of gestational tourism.[234] Gestational tourism is when intended parents go abroad looking for less stringent surrogacy requirements, which are often found in economically undeveloped countries.[235] In this case, the chances that the surrogate will be taken advantage of due to desperation—or even worse, will be forced into the agreement against her will—are much higher.[236] Gestational tourism, along with the increase in cross-state surrogacy transactions and forum shopping, demonstrates the need for uniform, realistic surrogacy regulation, as suggested by the 2017 UPA.[237]

As previously explained, if Texas wishes to protect against the exploitation of women, it should enact legislation that actually has the effect of doing so. Texas should pass legislation similar to New York's or legislation recommended by the 2017 UPA, which does a more effective job of preventing the exploitation of women while not enforcing a medical requirement on intended parents.[238] Texas should ensure that only fair compensation is awarded, the surrogate has independent legal representation, the surrogate is of age to effectively consent, and the surrogate is informed of all medical and phycological risks; this would prevent exploitation much more than inhibiting fertile women and same-sex couples from utilizing surrogacy.[239]

2. Health and Well-Being of the Surrogate

Many opponents to surrogacy cite the health and phycological risks of being pregnant for someone else as a pitfall to surrogacy agreements.[240] They argue that a woman taking on these risks in exchange for money is the commodification of children and that a woman is not able to give proper consent to the contract before becoming pregnant and experiencing these difficulties.[241] However, there are many issues with this line of thinking. Intended parents are not paying for children as they would be in the adoption context; they are merely paying for the surrogate's service in

233. Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).
234. *See* Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTH POL'Y 111, 111 (2015).
235. *Id.*
236. *See id.*; Feldman, *supra* note 33, at 13.
237. *See* Campbell, *supra* note 4, at 16.
238. *See* N.Y. FAM. CT. ACT § 581-402 (McKinney Supp. 2021); 2017 UPA.
239. *See* Grau, *supra* note 215, at 466–67.
240. *See, e.g.*, Melton & Israel, *supra* note 228.
241. *See id.*; *In re* Baby M, 537 A.2d 1227, 1247 (N.J. 1988).

delivering their own genetic child.[242] Whereas in the adoption context, a woman could purposely get pregnant in the hopes of selling the child to someone else after delivery. Thus, there is no proof of the commodification of children in the surrogacy context, as noted in *Johnson*.[243] Moreover, the argument that women cannot decide to enter into these contracts due to pregnancy's risks and possibility of emotional distress is quite troublesome. As the court in *Johnson* pointed out, this argument is based on outdated ideology, and there is no reason to assume women are incapable of making informed decisions about whether to enter a contract.[244] People frequently enter employment contracts that have high risks and the possibility of injury—consider members of the military and deep-sea fishermen, for example.[245] Thus, the legislature should not dictate whether a woman can make an informed decision to become a surrogate. Other advocates for surrogacy have even suggested this decision can be empowering for women and "gives women the option to control their bodies by making the choice of whether to act as a gestational carrier for others. Being able to carry a child for someone who is unable to do so can be empowering, and helping someone to have a child may also be viewed as a rewarding gift."[246]

Moreover, whether the intended parent has a medical condition does not exasperate any of these issues. Intended parents that are not infertile but still wish to use a gestational surrogate are paying a surrogate for her gestational services, for their own genetic child, in an agreement that the surrogate knowingly and voluntarily entered.[247] Nothing changes with the distinction between medical needs versus non-medical needs. Thus, again, if legislators wish to fix these public policy concerns, making sure that the surrogate is well-informed and has the resources to make an informed decision would better propel the goal of protecting the surrogate's health and ensuring her proper consent.

3. Best Interest of the Child

A last apparent public policy concern about surrogacy is the child's best interest.[248] Many opponents of social surrogacies argue that if a woman isn't willing to become pregnant, then she is clearly not willing to make sacrifices for her child and shouldn't become a mother at all.[249] However,

242. Campbell, *supra* note 4, at 24.
243. *See* Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).
244. *Id.*
245. *See generally* PETER DORMAN & LES BODEN, ECON. POL'Y INST., RISK WITHOUT REWARD: THE MYTH OF WAGE COMPENSATION FOR HAZARDOUS WORK (2021).
246. Ruth, *supra* note 162, at 14.
247. *See* Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 838 (2012).
248. Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 522 (2011).
249. *See, e.g.*, Paula Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 J.L. MED. & ETHICS 179, 182 (2015); Jenny Kleeman, *Having a Child Doesn't Fit into these Women's Schedules: Is This the Future of Surrogacy?*, GUARDIAN (May 25, 2019), https://

this is a faulty rationale. As job equality is becoming more accessible to women, many are choosing to have children later in their life or not choosing to have children at all due to the infeasibility of balancing pregnancy with their careers.[250] Social surrogacy can provide an option for these women to accomplish both, but without it, many will make the difficult decision not to have a child.[251] Thus, the argument that if a woman is unwilling to sacrifice her career for a child, she shouldn't have one assumes that it would be in the better interest of the child not to exist than to have a career-driven mother.[252] Due to the value our society places on families and procreation, it does not seem like this message reflects society's true intentions and nor should it be something legislatures promote.

Moreover, if a woman does choose a child over her career, there could be significant consequences. Many women are put on bed rest during pregnancy or suffer from debilitating morning sickness; if these women lose their jobs because of this, they may face a severe dilemma over how they will survive financially and afford a child after losing their career.[253] Creating an unstable environment for the child upon birth is not inherently better for the child.

Further, if a woman chooses to balance her career and pregnancy, there can be many unnecessary potential consequences and factors detrimental to the health of the fetus.[254] Stress from attempting to balance both a high-profile career and pregnancy can have serious consequences for the fetus's development and result in an unhealthy pregnancy.[255] Moreover, many women have very physically demanding jobs.[256] Proponents of social surrogacy have noted that these women "are faced with a constant concern of hurting the baby by exceeding their physical limit and possibly forcing themselves into dangerous premature labor."[257] One woman contemplating surrogacy explained the debilitating anxiety she had over the thought of hurting her baby due to her physically demanding job.[258] Another option for women is to wait until they are older to have

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www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy [https://perma.cc/4TY3-DCQK].

250. Ashley Stahl, *New Study: Millennial Women Are Delaying Having Children Due to Their Careers*, FORBES (May 1, 2020, 10:40 AM), https://www.forbes.com/sites/ashleystahl/2020/05/01/new-study-millennial-women-are-delaying-having-children-due-to-their-careers/?sh=7bd30e54276a [https://perma.cc/FX37-CUPV].

251. *What is Social Surrogacy?*, *supra* note 224.

252. *See* Kleeman, *supra* note 249.

253. *What is Social Surrogacy?*, *supra* note 224; Avra Siegel, *The Brutal Truth About Being a Pregnant Worker in 2016: It's Pretty Awful*, FORTUNE (July 11, 2016, 5:00 AM), https://fortune.com/2016/07/11/workplace-pregnant-sick-leave [https://perma.cc/US2W-UER6].

254. *See* Meera Jagannathan, *Working in a Strenuous Job while Pregnant Can Lead to a Range of Health Risks During and After Childbirth*, MRKT. WATCH (Oct. 8, 2019, 5:43 AM), https://www.marketwatch.com/story/working-in-a-strenuous-job-while-pregnant-can-lead-to-a-range-of-health-risks-during-and-after-childbirth-2019-10-08 [https://perma.cc/M5C5-CX2N].

255. *See id.*; *What is Social Surrogacy?*, *supra* note 224.

256. *What is Social Surrogacy?*, *supra* note 224.

257. *Id.*

258. Richards, *supra* note 10.

children and their careers are established enough to balance both. However, once a woman reaches thirty-five, a pregnancy is already considered high-risk.[259] Thus, due to some women's careers, balancing pregnancy and their jobs is not a feasible option.

Social surrogacies, however, can be the solution. There is no reason that women should have to make the heartbreaking decision to choose a child or career. As one proponent stated, women "shouldn't have to choose between building a secure foundation for themselves, [being] better parents later, and actually being able to have that family after they succeed in that journey."[260] One doctor explained his feelings toward the subject stating, "somebody wants to be a parent. I'm facilitating that. I understand that it's controversial . . . but put yourself in the shoes of a [twenty-six]-year-old model who is making her living by modeling swimsuits. . . . is it that unethical, to say let's not destroy this woman's career?"[261] Other supporters have made the argument that social surrogacies would benefit woman and society, stating surrogacy would allow reproduction "to no longer be a hindrance to women's careers, possibly allowing more women the opportunity to enter the upper echelons of government and business by making their parenting role analogous to a father's."[262] Thus, the allowance of social surrogacies would allow women to achieve the same benefits as men when it comes to valuing their career and their strong desire to start a family.

However, it is important to note that some surrogates may not feel comfortable being a surrogate for a mother that does not have a medical need,[263] and this is perfectly valid. A consequence of stringent rules requiring a medical need is that intended parents will make up one to slide by the requirement.[264] One doctor explained that he "ha[d] no qualms about 'defining medical reasons broadly,'" and another doctor who owns her own fertility clinic and surrogacy agency explained that surrogates do not usually know, nor are they entitled to know, the medical reasons of the intended parents.[265] Thus, surrogates who would not otherwise consent agree to bear a child and take on a significant risk due to a medical condition that may or may not exist. Therefore, by taking away this requirement, surrogates will know better if there is a medical need or not because the parents will not be inclined to hide it, thus allowing the surrogate to make an informed decision.

If a surrogate is willing after being fully informed of the risk she is taking and anything else needed to make an informed decision to enter into the agreement, there is no reason that she should not be able to voluntarily enter into an agreement with an intended parent that does not

259. *What is Social Surrogacy?*, *supra* note 224.
260. *Id.*
261. Kleeman, *supra* note 249.
262. Machalow, *supra* note 99, at 22.
263. *See* Richards, *supra* note 10.
264. *See* Kleeman, *supra* note 249.
265. *Id.*

have a medical condition. Doing so would not exasperate any public policy concerns regarding surrogacy.

VI. CONCLUSION

The laws regarding surrogacy are diverse and confusing. Thus, providing a cohesive regulatory system to enforce surrogacy contracts would benefit surrogates, intended parents, and future children. While the laws throughout the United States are moving toward a more liberalized standard, there is still more work to be done, especially for Texas and the other states that continue to enforce arbitrary eligibility requirements. While there is no doubt surrogacy is a controversial topic, the reality is that intended parents will go to great lengths to create a family, and the lack of realistic legislation will only exasperate the policy issues legislatures seek to prevent. Texas legislators should look to New York's newest surrogacy legislation as helpful guidance in drafting a statute that ensures the well-being of the surrogate, protects women from exploitation, and allows fit intended parents with no medical need to create a family.