PROTECTING ALL PARTIES IN COMPENSATED GESTATIONAL SURROGACY AGREEMENTS: ADOPTING THE NEW YORK STATE (OF MIND) APPROACH

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At least several thousand children are born annually as a result of surrogacy arrangements. In theory, the intended parents and the surrogate negotiate contractual terms and subsequently execute an agreement outlining each party's respective rights and duties. Ultimately, the intended parents receive the joy of having a child and the surrogate receives monetary compensation for carrying the child. In practice, however, disputes between parties inevitably arise regarding the expected child's medical care, legal parentage, and surrogate compensation.

For the past thirty years, New York State statutorily banned all surrogacy agreements. Not only were surrogacy agreements void and unenforceable as contrary to public policy, but parties to these agreements faced civil and criminal penalties, including imprisonment. But recently New York's law radically changed. On February 15, 2021, New York State enacted the Child-Parent Security Act (CPSA), lifting the ban on compensated gestational surrogacy agreements. The CPSA transformed New York into one of the most—if not the most—surrogacy-friendly states. The CPSA codifies novel provisions unlike any other state's laws: it creates an unalterable Surrogates' Bill of Rights, it requires licensure for surrogacy agencies, it enumerates eligibility requirements for intended parents and surrogates, and it implements a consent-based standard to establish legal parenthood of surrogacy-born children.

A comprehensive analysis of state surrogacy legislation—namely New York, Michigan, and Wisconsin laws—underscores this Comment's assertion that the CPSA creates the gold-standard approach to protect all parties in compensated gestational surrogacy agreements. Though Michigan and Wisconsin each have distinct surrogacy laws, the legislative effect is the same: both states' laws exacerbate surrogate exploitation and preclude clear paths to establish legal parentage of surrogacy-born children. By contrast, the CPSA eliminates exploitation by codifying surrogates' rights and streamlines the process to establish parentage by expanding the traditional definition of "parent." The CPSA exemplifies model legislation for regulating and enforcing gestational surrogacy agreements; this New York State (of mind) approach should be adopted nationwide.

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INTRODUCTION

Christina Bramante refused to take any chances on the day she expected to get pregnant; she put on her lucky socks and a "shirt that read, 'Make It Happen.'"[1] After she finished the final step of the in vitro fertilization (IVF) process—transferring the embryo[2]—she treated herself to french fries, which "according to women's anecdotal experiences, increases the odds of a pregnancy taking [hold]."[3] Christina wholeheartedly adopted the myths other women swore by throughout the

1. Beth Whitehouse, *Two LI Women Among First Gestational Surrogates in NY Since New Law*, NEWSDAY (Nov. 2, 2021), https://www.newsday.com/lifestyle/family/surrogates-long-island-law-1.50404880 [https://perma.cc/65BD-WRCA].

2. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/TP4C-QCXZ].

3. Whitehouse, *supra* note 1.

IVF process; she wanted "to give the embryo implanted in her every possible advantage, as the resulting baby would belong to a New York City couple" who had long hoped for a biological child of their own.[4] Fortunately, the IVF process worked.[5] Christina delivered a healthy baby in April 2022, making her one of the "first gestational surrogates in New York to be financially compensated for carrying a baby that isn't genetically related to her," a surrogacy arrangement that was made possible by New York's recently enacted the Child-Parent Security Act (CPSA).[6]

Before the CPSA, New York banned surrogacy—a prohibition that followed the highly publicized case, *In re Baby M*.[7] For the past twenty-nine years, *all* surrogacy agreements[8] were statutorily banned as contrary to public policy.[9] Surrogacy agreements were not only void and unenforceable, but parties to such agreements were also subject to civil and criminal penalties.[10] But the law recently—and radically—changed.

On February 15, 2021, New York enacted the CPSA, lifting the nearly thirty-year ban on compensated *gestational* surrogacy.[11] The CPSA incorporates unique provisions to establish a framework that regulates, facilitates, and enforces surrogacy agreements including: an unalterable Surrogates' Bill of Rights granting medical, legal, and financial protections to surrogates;[12] mandatory licensure for surrogacy matching programs or agencies;[13] legal and regulatory requirements for

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4. *Id.*

5. *Id.*

6. *Id.*; Tessa Somberg, *'I Want to Do This for Someone Else' Three Women on Carrying Pregnancies After New York Legalized Paid Surrogacy Last Year*, THE CUT (July 28, 2022), https://www.thecut.com/2022/07/surrogacy-new-york-legalized.html [https://perma.cc/RB4P-WTNX].

7. *In re Baby M*, 537 A.2d 1227 (N.J. 1988). For a case summary, see *infra* notes 78–83.

8. This Comment primarily focuses on surrogacy agreements. Throughout the Comment, "surrogacy agreement," "surrogacy contract," and "surrogacy arrangement" are used interchangeably.

9. N.Y. DOM. REL. LAW § 122 (McKinney 2021) (repealed 2021); *NYAAFF Proudly Celebrates the Passage of the Child Parent Security Act*, NYAAFF (Feb. 12, 2021), https://nyaaff.com/public/assets/position-pdfs/2021.02.12-NYAAFF-CPSA-Press-Release-Final.pdf [https://perma.cc/9J68-SRC2] [hereinafter *NYAAFF Celebrates CPSA*].

10. Joseph R. Williams, *New Surrogacy Law Brings Opportunities, but Practitioners Beware*, 93 N.Y. STATE BAR ASS'N J. 20, 20 (2021).

11. *Id.* at 20–21. The CPSA only legalizes *gestational* compensated surrogacy—*traditional* compensated surrogacy (in which the surrogate is impregnated using her own egg via artificial insemination) is still illegal. *See* N.Y. FAM. CT. ACT § 581-101 (2021).

12. *See* § 581-601; *see* Williams, *supra* note 10, at 25.

13. *See* Williams, *supra* note 10, at 23; *New York Update: Child-Parent Security Act*, NYAAFF (Feb. 17, 2021), https://nyaaff.com/public/assets/position-

surrogates and intended parents;[14] and a new standard for establishing legal parentage of children conceived via assisted reproduction.[15] In short, the CPSA is the "gold standard" for surrogacy legislation.[16]

The CPSA transforms New York from one of the least to one of the most surrogacy-friendly states.[17] Namely, the law provides the most extensive protections available to parties in surrogacy arrangements.[18] Moreover, the CPSA resolves common misconceptions about surrogacy by creating and implementing remedies for legislative inadequacies prevalent in other states' surrogacy laws.[19]

A comparative analysis of state laws governing compensated surrogacy agreements underscores the legal significance of the CPSA. [20] Before enacting the CPSA, New York was one of only six states that statutorily prohibited *compensated* gestational surrogacy agreements.[21]

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pdfs/2021.02.17-CPSA-Announcemet.pdf [https://perma.cc/MB2N-7PR8] [hereinafter *CPSA Update*, NYAAFF].

14. § 581-401; Mariette Geldnhuys, *Beyond Surrogacy: Parentage Under the Child Parent Security Act*, 93 N.Y. STATE BAR ASS'N J. 30, 31–32 (2021).

15. §§ 581-201, -406; *see* Williams, *supra* note 10, at 20–21. This Comment uses "legal parentage" to refer to the process of determining the surrogacy-born child's legal parents. *See infra* Section II.B.2. (discussing the distinction between parental responsibility, which governs the child-parent relationship until the child turns eighteen years old, and legal parentage, which extends beyond the child's eighteenth birthday).

16. Alexis L. Cirel, *February 2021 Marks the Implementation of New York State's Child-Parent Security Act*, SSRGA (Dec. 18, 2020), https://ssrga.com/blog/february-2021-marks-the-implementation-of-new-york-states-child-parent-security-act [https://perma.cc/FJP8-WLB6] (stating that the CPSA "sets a new gold standard for the protection of Surrogates . . .").

17. *See* Williams, *supra* note 10, at 25; *NYAAFF Celebrates CPSA*, *supra* note 9.

18. Cirel, *supra* note 16; *see also* Williams, *supra* note 10, at 25 (explaining that no other state in the country has a provision comparable to the Surrogate's Bill of Rights effectively "making New York arguably the most surrogate-friendly and surrogate-protective state in the nation").

19. N.Y. FAM. CT. ACT §§ 581-402, -502, -601 (2021); Emily L. Dundon, Note, *A Puzzling Paradox: Advancements in Reproductive Technology and New York's Ban on Commercial Surrogacy Agreements*, 59 FAM. CT. REV. 171, 175 (2021).

20. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map [https://perma.cc/HMY4-GSDW] (last visited Feb. 15, 2023) [hereinafter CREATIVE FAM., *U.S. Map*]; Aude-Mazarine Lestienne, *Applying Mediation to the Complexities of Surrogacy Agreements*, 22 CARDOZO J. CONFLICT RESOL. 393, 396 (2021); COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4.2, Westlaw (database updated Oct. 2022).

21. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20. Of these other five states, statutes prohibiting surrogacy in Louisiana, Michigan, and Nebraska, explicitly reference compensation, but statutes prohibiting surrogacy in Arizona and Indiana, implicitly reference compensation. *See infra* Section I.B.2 (summarizing the non-surrogacy-friendly laws in these five states).

Of those states, Michigan is the least surrogacy-friendly state[22] because it wholly bans *all* surrogacy agreements (compensated, compassionate, or altruistic)[23] and imposes criminal penalties for certain surrogacy contracts.[24] However, most states fall somewhere between New York and Michigan, with legal and regulatory differences across the map.[25] Alarmingly, these intermediate states underscore the dangers of inadequate surrogacy legislation—dangers that are clearly evidenced in Wisconsin, a state relying *solely* on case law to implicitly permit surrogacy agreements.[26]

New York's legislative approach for regulating and enforcing gestational surrogacy agreements should be enacted nationwide. The CPSA protects *all* parties in surrogacy arrangements and fundamentally modernizes the legal system by affording New Yorkers the right to create their families through gestational surrogacy. Few matters are more emotionally, ethically, and economically disastrous than mismanaged surrogacy agreements. Adopting uniform legislation nationwide can prevent these catastrophic consequences by eliminating exclusionary practices and statutory ambiguities that preclude a modernized view of the family unit. By adopting the CPSA, or at least similar model provisions,[27] other states—namely intermediate states like Wisconsin—can eradicate legislative shortcomings in surrogacy laws.

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22. *See id.*; MICH. COMP. LAWS §§ 722.855, 722.857 (2022) (declaring surrogacy contracts "void and unenforceable as contrary to public policy," prohibiting non-altruistic surrogacy, and making compensated surrogacy a felony punishable by fines, imprisonment, or both.). Notably, four bills were introduced in fall of 2022 in Michigan's House of Representatives to update the state's outdated surrogacy laws. For a summary of the proposed legislation, see *infra* note 313 and accompanying text.

23. *See infra* note 45 (explaining the difference between compensated and compassionate or altruistic surrogacy).

24. All surrogacy contracts, agreements, or arrangements in Michigan are "void and unenforceable as contrary to public policy" and compensated surrogacy contracts are subject to criminal penalties. *See supra* note 22 and accompanying text.

25. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

26. *See Rosecky v. Schissel*, 833 N.W.2d 634 (Wis. 2013) (holding that surrogacy agreements are valid contracts and "largely enforceable").

27. *See, e.g.*, UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017). The Uniform Parentage Act (UPA) (2017) offers model statutory provisions to expand the mechanisms available to nonbiological parents for the purpose of establishing parentage. The Act contains a range of provisions that are consistent with the modernized view of the family unit: de facto parents (someone who has been acting as a parent to a child but is not biologically related to the child) can legally establish parentage, children born through alternative reproductive methods are granted the right to access medical and identifying information regarding any gamete providers, and gender-based distinctions and references are removed from the Act. *Id.* at 1–3. For a comprehensive review of the Act, see Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 597–99 (2018).

For decades, surrogacy opponents have lodged arguments against the general practice of surrogacy; the CPSA's recent enactment notably reignited the debate around surrogacy agreements. Specifically, two arguments have dominated the anti-surrogacy landscape: (1) codifying surrogacy statutorily permits the exploitation of women and commodification of babies because it perpetuates an inherent power imbalance between the surrogate and the intended parents,[28] and (2) the path to legal parentage in surrogacy agreements is complex and unreliable.[29] But unlike surrogacy laws in other states, the CPSA directly addresses—and ultimately resolves—these anti-surrogacy arguments.

Specifically, the CPSA codifies provisions that protect surrogates by eliminating exploitation and paving a clear path to establish legal parentage.[30] The CPSA requires that all gestational surrogacy agreements include an unalterable "Surrogates' Bill of Rights" granting medical, legal, and financial protections to surrogates.[31] Prior to the CPSA, no state had statutorily required surrogate-specific rights.[32] Now, the CPSA offers the most comprehensive surrogate protections to prevent exploitation.[33] Additionally, despite the lack of uniformity in state parentage laws, the CPSA incorporates regulations intended to address common parentage-related issues.[34] Among other requirements, the CPSA requires parties to execute gestational surrogacy agreements *before* the child's conception.[35] The system creates an avenue for the child to be born with the intended parents already identified as his or her legal parents, thereby eliminating a period *after* the child's conception where multiple parties may seek rights to the child.[36]

This Comment examines New York's new statute in the context of other states' surrogacy laws. Part I outlines surrogacy's legal framework including the surrogacy process, state surrogacy laws across the United States, and New York State's storied relationship with surrogacy legislation, from the 1992 surrogacy ban to the recent enactment of the CPSA. Part II summarizes anti-surrogacy arguments to demonstrate that the CPSA creates unique provisions to codify legal protections that outweigh the potential risks of enforcing gestational surrogacy

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28. *See infra* Section II.A (discussing exploitation).

29. *See infra* Section II.B (discussing prohibitive paths to establishing legal parentage).

30. *See* Dundon, *supra* note 19, at 175; N.Y. FAM. CT. ACT §§ 581-402, -502, -601 (2021).

31. § 581-601; *see* Williams, *supra* note 10, at 25.

32. *See* Williams, *supra* note 10, at 25.

33. *See* Dundon, *supra* note 19, at 175; *see also* Williams, *supra* note 10, at 25.

34. §§ 581-201, -406; *see also* Geldnhuys, *supra* note 14.

35. § 581-401; *see also* Williams, *supra* note 10, at 21, 23.

36. § 581-201.

agreements. Part III analyzes the CPSA's novel surrogacy provisions against legislation from other jurisdictions. This Part underscores the extensive protections outlined in the CPSA and highlights the legislative inadequacies in other states' surrogacy laws.[37] Finally, Part IV concludes that mending the fractured surrogacy market requires states to adopt the CPSA (or similar model legislation);[38] such an approach prioritizes a modernized view of the family unit by codifying the most extensive protections for parties in surrogacy arrangements.

I. SURROGACY'S LEGAL FRAMEWORK

Before enacting the CPSA, New York was one of the least surrogacy-friendly states. Today, it is one of the most—if not *the* most—surrogacy-friendly states.[39] This Part offers an overview of surrogacy. Section A describes the surrogacy process, Section B explains the variation in state surrogacy laws, and Section C discusses the evolution of New York's surrogacy legislation.

A. Surrogacy 101: The Process, the Parties, and the Agreement

Modern surrogacy practices were first introduced in the 1970s when the first surrogacy agreement was negotiated and drafted in 1976.[40] There are two types of surrogacy arrangements: traditional and gestational.[41]

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37. Here, it is important to reiterate the novelty of the CPSA, and in turn, to recognize the likelihood that subsequent novel contractual disputes will likely arise "in the coming months and years." Jessica Woodrow, *Compensated Surrogacy: The Child-Parent Security Act Opens Doors for New York Families*, 53 FAM. L. REV. 15, 16–17 (2021). For example, one unique issue that might arise pertains to the CPSA provision requiring the intended parents to execute a will. Specifically, N.Y. FAM. CT. ACT § 581-403(i)(2)(v) requires "the intended parent or parents agree to execute a will, prior to the embryo transfer, designating a guardian for all resulting children and authorizing their executor to perform the intended parent's or parents' obligations pursuant to the surrogacy agreement." *Woodrow*, *supra* note 37, at 18; § 581-403(i)(2)(v). But wills are revocable. What is to stop the parents from revoking the will accidentally or deliberately? Hypothetically, an accidental revocation could occur if the intended parents draft a new will that disposes of their assets, and the new will includes a typical clause revoking all prior wills. Nevertheless, new issues like this one can be explicitly addressed "within the four corners" of the surrogacy contract. *See Kass v. Kass*, 696 N.E.2d 174, 80 (N.Y. 1998) (reiterating that New York State Courts resolve contractual ambiguities "by looking within the four corners of the document, not to outside sources").

38. *See* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017) (discussing model legislation similar to the CPSA).

39. *See* Williams, *supra* note 10, at 25; *see NYAAFF Celebrates CPSA*, *supra* note 9.

40. *See* Dundon, *supra* note 19, at 172.

41. *About Surrogacy: Traditional vs Gestational Surrogacy—What's Best for My Family?*, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-

Initially, most surrogacies were traditional; the surrogate contractually agreed to be impregnated using her own egg (via artificial insemination), such that she was genetically related to the child.[42] However, following the infamous *Baby M* case,[43] described below, the enforcement of traditional surrogacy agreements became frequently litigated and their use waned nationwide. Today, most surrogacies are gestational; the surrogate contractually agrees to undergo IVF, such that she is *not* genetically related to the child.[44] Both surrogacy arrangements, regardless of type, can be either compensated or altruistic.[45]

The surrogacy process involves contributions from several individuals, beginning with the intended parents—the individuals planning to assume legal and financial responsibility for the child after they are born.[46] The intended parents must select a surrogate—the woman who will carry the child to term.[47] Depending on the type of surrogacy pursued, the process may require egg donors or sperm donors.[48] Health care providers monitor the surrogate throughout the pregnancy and

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surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family [https://perma.cc/KV4D-4TYG] (last visited Mar. 6, 2023).

42. Christina Caron, *Surrogacy Is Complicated. Just Ask New York.*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/parenting/pregnancy/surrogacy-laws-new-york.html.

43. For an overview of the case, involving a dispute between parties to a traditional surrogacy agreement, see Section I.C. *See also In re Baby M*, 537 A.2d 1227 (N.J. 1988).

44. *See* Caron, *supra* note 42. "The Centers for Disease Control and Prevention (CDC) reports that more than 80,000 children were born through [AR] in 2017." Douglas NeJaime, *Who Is a Parent?*, AM. BAR ASS'N (May 10, 2021), https://www.americanbar.org/groups/family_law/publications/family-advocate/2021/spring/who-a-parent [https://perma.cc/B8AP-CNVP]. But this report likely undercounts the number of children conceived through assisted reproduction because the CDC only included "children born through in vitro fertilization (IVF), but not through" donor insemination. *Id.*

45. It is important to understand the distinction between compensated surrogacy (in which the surrogate receives monetary compensation from the intended parents) and compassionate or altruistic surrogacy (in which the surrogate does *not* receive funds). However, this Comment focuses primarily on compensated surrogacy agreements. Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard*, 63 VILL L. REV. TOLLE LEGE 1, 4 (2019). Additionally, in this Comment, "compensation" is defined as base pay—in other words, surrogate compensation is a salary paid *in addition to* medical, health, and related expenses.

46. *Id.* at 3.

47. *Id.*

48. *Id.*

perform various health assessments to ensure all parties obtain medical clearance to participate in the surrogacy process.[49]

With so many parties involved in the surrogacy process from the child's conception to birth, establishing legal parentage can be challenging.[50] To circumvent legal complexities and to coordinate everyone's role in the process, standard practice involves executing a surrogacy agreement or a contract that outlines the terms of the arrangement.[51] The surrogacy agreement describes the rights, duties, and responsibilities of the involved parties.[52] Contractual terms vary but often incorporate language addressing medical procedures, parentage rights, insurance coverage, payment of expenses and surrogate compensation, breach of agreement,[53] directives for termination of the pregnancy, and instructions regarding the surrogate's conduct (*e.g.*, restrictions on travel, diet, sexual activity, and the right to terminate the pregnancy).[54]

B. Surrogacy Agreement Laws Throughout the United States

Federal laws are silent on gestational surrogacy; rather, surrogacy legislation is independently governed by state law.[55] The variance in laws affects how states approach the enforcement of surrogacy agreements and ultimately, the requisite criteria for the agreement to be valid and enforceable.[56] While some states have codified statutes detailing surrogacy agreement requirements, other states are statutorily silent on

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49. *Gestational Surrogacy Fact Sheet*, N.Y. STATE DEP'T OF HEALTH, https://health.ny.gov/community/pregnancy/surrogacy/gestational_surrogacy_fact_sheet.htm [https://perma.cc/VX4Y-YTJJ] (Feb. 2021).

50. *See* Ruth, *supra* note 45, at 3–4; *see also infra* Section II.B.2. (discussing the distinction between parental responsibility, which governs the child-parent relationship until the child turns eighteen years old, and legal parentage, which extends beyond the child's eighteenth birthday).

51. *See Gestational Surrogacy Fact Sheet*, *supra* note 49.

52. *Id.*

53. Typically, surrogacy agreements articulate "notice and cure provisions" along with remedies for breaching an agreement. Notice provisions require one party to notify the other party that there has been a breach to the surrogacy agreement, while cure provisions specify a certain time period to fix the breach, if possible. *Surrogacy Agreements—Contract Terms*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT'YS, https://adoptionart.org/assisted-reproduction/intended-parents/gestational-surrogacy/surrogacy-agreements-contract-terms [https://perma.cc/Z4H8-6SS4] (last visited Mar. 7, 2023).

54. *Id.* Many surrogacy contracts, like the one Christina Bramante entered, stipulate additional compensation for "pumping and shipping breast milk" to the intended parents. *See* Somberg, *supra* note 6. Compensation varies, but on average, surrogates are paid "250, or $1 an ounce, per week." *Id.*

55. *See* Dundon, *supra* note 19, at 171, 173, 175.

56. *Id.*

the topic.[57] Broadly, each state fits into one of three general categories: (1) "surrogacy friendly states," which either have statutes recognizing compensated surrogacy agreements or have issued numerous favorable rulings in surrogacy cases; (2) "non-surrogacy friendly states," which do not enforce compensated surrogacy agreements; and (3) gray-area states, which fall somewhere between the two aforementioned categories.[58]

1. SURROGACY AGREEMENT LAWS IN SURROGACY-FRIENDLY STATES

Certain states statutorily permit at least one type (gestational or traditional) of *compensated* surrogacy agreements; so long as parties comply with the requisite criteria, courts uphold the agreement as valid and enforceable. In total, twenty-one states permit gestational surrogacy agreements via statute.[59] Of these, eighteen states expressly reference compensated gestational surrogacy agreements.[60] Comparatively, statutes in Connecticut, North Dakota, and Virginia permit gestational surrogacy agreements but are either statutorily silent on—or narrowly limit—compensation.[61] Since these three states do not explicitly permit *compensated* gestational surrogacy agreements via statute, these states are arguably more similar to gray-area states. Thus, for purposes of this Comment, only eighteen states statutorily permit *compensated* gestational surrogacy agreements.[62]

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57. *See* Ruth, *supra* note 45, at 1, 9–10.

58. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

59. *See* Dundon, *supra* note 19, at 175; CREATIVE FAM., *U.S. Map*, *supra* note 20.

60. The eighteen states that expressly reference compensated *gestational* agreements are California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Illinois, Maine, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

61. *Supra* note 45 and accompanying text (explaining that this Comment uses "compensation," to refer to a salary payment). Connecticut and North Dakota both allow parties to enter *gestational* surrogacy agreements, but each state's surrogacy statute is silent on what, if any, base pay compensation is permitted. *Gestational Surrogacy Law Connecticut*, SURROGATEFIRST, https://surrogatefirst.com/pages/gestational-surrogacy-law-connecticut-1 (last visited Mar. 6, 2023) [hereinafter SURROGATEFIRST, *Connecticut*]; *Gestational Surrogacy Law North Dakota*, SURROGATEFIRST, https://surrogatefirst.com/pages/gestational-surrogacy-law-north-dakota [https://perma.cc/G943-T2R8] (last visited Mar. 7, 2023) [hereinafter SURROGATEFIRST, *North Dakota*]. Lastly, Virginia allows parties to enter *gestational* surrogacy agreements; however, Virginia seemingly limits compensation to medical-related expenses. VA. CODE ANN. § 20-160(B)(4) (2022); *see also Gestational Surrogacy Law Virginia*, SURROGATEFIRST, https://surrogatefirst.com/pages/gestational-surrogacy-law-virginia [https://perma.cc/2LWA-M4FB] (last visited Mar. 6, 2023) [hereinafter SURROGATEFIRST, *Virginia*].

62. This Comment categorizes Connecticut, North Dakota, and Virginia with the gray-area states because the statutorily omitted reference to *compensated* is most

2. SURROGACY AGREEMENT LAWS IN NON-SURROGACY-FRIENDLY STATES

Only five states—Arizona, Indiana, Louisiana, Michigan, Nebraska—retain statutory bans on gestational surrogacy agreements following the enactment of the CPSA.[63] In Arizona, Indiana, and Nebraska, *all* surrogacy agreements are prohibited regardless of compensation, sexual orientation, or marital status.[64] Notably, although compensated gestational surrogacy agreements in Arizona and Indiana are void and unenforceable, gestational surrogacy continues to be practiced and courts uphold parentage orders in certain situations.[65] In Louisiana, *compensated* gestational surrogacy agreements are void and unenforceable; though heterosexual married couples using their own gametes may enter into enforceable *uncompensated* (compassionate or altruistic) agreements.[66] Michigan is the least surrogacy-friendly state

similar to the statutory silence on *gestational* surrogacy agreements in gray-area states. *See* SURROGATEFIRST, *Connecticut*, *supra* note 61; SURROGATEFIRST, *North Dakota*, *supra* note 61; SURROGATEFIRST, *Virginia*, *supra* note 61.

63. *See id.*

64. NEB. REV. STAT. § 25-21,200 (2022) ("(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child. (2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband."); *see also Gestational Surrogacy in Nebraska*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/nebraska [https://perma.cc/9RHF-Y2VJ] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Nebraska*]; IND. CODE § 31-20-1-1 (2022); ARIZ. REV. STAT. § 25-218 (2018). Although surrogacy statutes in Arizona and Indiana are silent on compensation, both states have a general ban on *all* surrogacy agreements, which necessarily includes a ban on *compensated* surrogacy agreements.

65. Dundon, *supra* note 19, at 171, 175 & 182 nn.102 & 105; *see also Gestational Surrogacy in Arizona*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/arizona [https://perma.cc/4SYU-JG4K] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Arizona*]; *Gestational Surrogacy in Indiana*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/indiana [https://perma.cc/F884-MP3B] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Indiana*].

66. LA. STAT. ANN. § 9:2718 (2022) ("[T]he legislature has restricted the range of enforceable gestational surrogacy agreements to those in which the parties who engage the gestational surrogate not only are married to each other, but also create the child using only their own gametes. These compelling state interests justify provisions for filiation to be recognized by a court upon proof that the child is genetically related to both parents, so that the intended parents can bypass the current need to go through extended proceedings to adopt their own child."); *Gestational Surrogacy in Louisiana*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana [https://perma.cc/8GVG-GWDY] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Louisiana*].

nationwide.[67] Michigan prohibits *all* surrogacy agreements, but further supplements its law with criminal penalties for parties who enter compensated surrogacy contracts.[68]

3. SURROGACY AGREEMENT LAWS IN GRAY-AREA STATES

The remaining twenty-five states (like the three states described above which are either statutorily silent on surrogate compensation or narrowly limit surrogate compensation)[69] are statutorily silent on the permissibility of *gestational* surrogacy agreements.[70] It is worth noting that of these gray-area states, three states—New Mexico, Tennessee, and Wyoming—technically have codified laws addressing surrogacy; but the statutes' sole purpose is to state that gestational surrogacy agreements are neither expressly permitted nor prohibited.[71] In the remaining gray-area states, courts deciding whether surrogacy agreements are valid and enforceable must rely exclusively on case law or common law.[72] One

67. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.; *supra* notes 22–24 and accompanying text (explaining Michigan's surrogacy laws).

68. MICH. COMP. LAWS §§ 722.851, 857, 859 (2022); *see also Gestational Surrogacy in Michigan*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/michigan [https://perma.cc/3XD7-3XYT] (last visited Mar. 6, 2023) [hereinafter CREATIVE FAM., *Michigan*].

69. *Supra* note 61 and accompanying text (identifying the two states).

70. The states that are statutorily silent on *gestational* surrogacy agreements are Alabama, Arkansas, Alaska, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Wisconsin, and Wyoming. *See* Dundon, *supra* note 19, at 171, 175, 182; *see also* CREATIVE FAM., *U.S. Map*, *supra* note 20.

71. *Gestational Surrogacy in New Mexico*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-mexico [https://perma.cc/58B5-JRDY] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *New Mexico*]; *Gestational Surrogacy in Tennessee*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/tennessee [https://perma.cc/9RU6-KB55] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Tennessee*]; *Gestational Surrogacy in Wyoming*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/wyoming [https://perma.cc/3M4B-T4YD] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Wyoming*].

72. *See, e.g.*, *Gestational Surrogacy in Alabama*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/alabama [https://perma.cc/U7YU-XVC5] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Alabama*]; *Gestational Surrogacy in Arkansas*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/arkansas [https://perma.cc/33PY-BXSA] (last visited Mar. 7, 2023); *Gestational Surrogacy in Alaska*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/alaska

state that embodies the typical gray-area approach to surrogacy contracts is Wisconsin, where the validity of gestational surrogacy agreements is implicitly permitted—an implication based *solely* on case law.[73]

Inconsistent state surrogacy laws perpetuate legislative and regulatory inconsistencies that courts must adjudicate to determine the validity of surrogacy agreements.[74] These inconsistencies have persisted for decades, framing the fractured surrogacy market that exists today.[75] However, New York State's recent enactment of the CPSA mends the market by creating a comprehensive, codified approach for enforcing surrogacy contracts.[76]

C. From a Statutory Ban to the CPSA: New York's Legislative Evolution

To analyze the CPSA's influence on the recognition and enforceability of compensated gestational surrogacy agreements, it is necessary to consider New York's stance on the topic immediately preceding the CPSA's enactment. Before the CPSA, New York's surrogacy laws were heavily influenced by societal views on surrogacy following the infamous *Baby M* case.[77] These influences ultimately triggered New York's former ban on surrogacy.

1. *BABY M*'S CRY HEARD 'ROUND THE NATION: NEW YORK'S OLD SURROGACY AGREEMENT LAW

In *Baby M*—the first case to address the enforcement of surrogacy agreements—the intended parents and a surrogate executed a *traditional* surrogacy agreement.[78] Following the birth, both parties claimed legal parentage of the child; ultimately, the intended parents were awarded full custody and the surrogate received visitation rights.[79] The New Jersey Superior Court's seminal opinion condemned the practice of

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[https://perma.cc/GPS7-YFWF] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Alaska*]. *See also* Dundon, *supra* note 19, at 173–75.

73. *See In re F.T.R.*, 833 N.W.2d 634, 647–49 (Wis. 2013) (concluding that surrogacy agreements are valid contracts).

74. *See* Dundon, *supra* note 19, at 171, 173, 175.

75. *See id.* at 172–75.

76. N.Y. FAM. CT. ACT § 581-101 (McKinney 2021); Williams, *supra* note 10, at 20–21.

77. Charles Gili, *Time to Rethink Surrogacy: An Overhaul of New York's Outdated Surrogacy Contract Laws Is Long Overdue*, 93 ST. JOHN'S L. REV. 487, 489 (2020).

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

79. *Id.* at 1234, 1237, 1258, 1261; *In re Baby M*, 542 A.2d 52, 53, 55 (N.J. Super. Ct. Ch. Div. 1988).

compensated surrogacy, unwittingly spurring a national debate over the legal and ethical implications of surrogacy arrangements.[80]

Shortly after *Baby M* was decided, the New York State Task Force on Life and the Law was asked to develop best practice recommendations for surrogacy.[81] The Task Force concluded that surrogacy contracts should be discouraged because they have "the potential to undermine the dignity of women, children and human reproduction by commercializing childbearing."[82] Subsequently, New York codified a statute declaring all surrogacy contracts "void and unenforceable" as a matter of public policy.[83]

2. ALL GROWN UP: MODERNIZATION PAVED A PATH FOR THE CPSA

Over the past thirty years, the evolution of medicine, law, and societal norms have significantly reshaped the surrogacy landscape.[84] Medical advancements have made IVF a common procedure in modern medicine.[85] Seminal court decisions—such as the legalization of same-sex marriage—modernized the concept of family by expanding the meaning of "parent."[86] Evolving customs sparked conversations between individuals and legislatures who sought to bring surrogacy legislation within the purview of modern times. [87] These conversations turned into certainties when New York repealed its statutory ban on surrogacy contracts by enacting the CPSA.[88]

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80. David A. Batista, The Need for Psychological Evaluations in the New York's Child-Parent Security Act 5–6 (Jan. 20, 2021) (Student Work, Seton Hall University), https://scholarship.shu.edu/student_scholarship/1143 [https://perma.cc/4BHG-M2Z5].

81. THE N.Y. STATE TASK FORCE ON LIFE & THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 2 (1988), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf [https://perma.cc/L5W5-7CX5]; *see also* Batista, *supra* note 80, at 6 (summarizing the Task Force's role and recommendations).

82. NEW YORK STATE TASK FORCE ON LIFE & THE LAW, *supra* note 81, at 118 (explaining that the Task Force's conclusion was based on public policy because "the commercial aspects of surrogate parenting pose the greatest potential for harm to individuals and to social attitudes and practices").

83. N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2021) (repealed 2021). Originally enacted in 1992, New York's surrogacy ban was repealed and replaced by the Child-Parent Security Act in 2021. N.Y. FAM. CT. ACT § 581-101 (McKinney 2021).

84. Gili, *supra* note 77, at 496–98.

85. *Id.* at 496–97.

86. *Obergefell v. Hodges*, 576 U.S. 644, 667–68 (2015).

87. *See* Dundon, *supra* note 19, at 177–79.

88. *See* Batista, *supra* note 80, at 2.

The CPSA, which was signed into law on April 3, 2020 (and became effective on February 15, 2021)[89] transformed New York's surrogacy legislation. Article 5-C was added to the Family Court Act legalizing compensated gestational surrogacy in the state.[90] The legislative intent underpinning the CPSA[91] acknowledges that "New York law has failed to keep pace with medical advances in assisted reproduction, causing uncertainty about who the legal parents of a child are upon birth."[92] By legalizing gestational surrogacy agreements, the CPSA extends legal acceptance to individuals with an aim to begin or expand their family via surrogacy; the CPSA grants these individuals the same legal recognition afforded to other "traditionally" formed families.[93]

Specifically, the CPSA establishes a legal framework to govern all parties to surrogacy arrangements. Surrogacy contracts are valid and enforceable *only* if the intended parents and the surrogate satisfy explicit statutory and regulatory requirements.[94] These requirements include fulfilling specific eligibility requirements for surrogates and intended parents,[95] incorporating certain contractual provisions into the agreement,[96] abiding by compensation and fee guidelines,[97] and providing the surrogate with a copy of their unalterable rights.[98] Short overviews of these requirements are detailed below.

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89. N.Y. FAM. CT. ACT § 581-101 (McKinney 2021); Denise E. Seidelman & Alexis L. Cirel, *The Child-Parent Security Act Is a Game Changer*, 263 N.Y. L.J. 4 (2020).

90. The Family Court Act was created to establish a New York State family court to handle cases that fall generally into the area of family law. *Family Court Overview*, NYCOURTS.GOV, https://ww2.nycourts.gov/COURTS/nyc/family/overview.shtml [https://perma.cc/HN64-TT4E] (last visited Mar. 7, 2023). The CPSA is embedded in the Family Court Act under a new article (Article 5-C) entitled "Judgment of Parentage for Children Conceived Through Assisted Reproduction or Pursuant to Surrogacy Agreements." § 581-101.

91. The CPSA's novel provisions were seemingly passed with the legislative intent to remedy harmful outcomes commonly associated with surrogacy agreements. *See* § 581-101.

92. Gili, *supra* note 77, at 505 (quoting N.Y. STATE ASSEMB., A0695 MEMO: N.Y. STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION, https://assembly.state.ny.us/leg/?default_fld=&bn=a6959&term=2017&Memo=Y [https://perma.cc/8TES-MRSF]).

93. *Id.*

94. §§ 581-401 to -402.

95. § 581-402.

96. § 581-403.

97. § 581-502.

98. § 581-403.

a. Eligibility Requirements for Surrogates and Intended Parents

To participate in the surrogacy process as a surrogate or intended parent, strict criteria must be satisfied. Prospective surrogates must be at least twenty-one years old, a United States citizen or lawful permanent resident (LPR), and have "completed a medical evaluation with a healthcare practitioner."[99]To ensure that the surrogate gives her informed consent to enter a surrogacy contract, she must be made fully aware of the various risks of surrogacy (medical, psychological, and psychosocial).[100] Every surrogate must obtain independent legal counsel to represent her throughout the surrogacy process,[101] and every surrogate is further entitled to various protections under the Surrogates' Bill of Rights.[102]

The intended parents must also satisfy specific criteria to enter a valid and enforceable surrogacy contract.[103] One of the intended parents must be at least eighteen years old and a United States citizen or LPR.[104] The residency requirements for the intended parents are determined in tandem with the surrogate's residency requirements, but at least one parent must be a New York resident for at least six months before executing the agreement.[105] Intended parents may be single, married, or unmarried; but unmarried parties must be "intimate partners" to jointly pursue surrogacy.[106] Additionally, the intended parents must obtain

99. § 581-402(a). The CPSA codifies these basic criteria. *Id.* Additional criteria and guidelines are established by the Commissioner of the Department of Health. N.Y. PUB. HEALTH L. § 2599-CC (2022). For example, clinical guidelines "for screening of potential gestational surrogates" include at least one prior uncomplicated pregnancy, no more than five previous deliveries, and a "psychosocial evaluation . . . to assess social supports and relationships that can support the surrogate." *Clinical Guidelines for Assisted Reproductive Technology Service Providers for Screening of Gestational Surrogates,* N.Y. STATE DEP'T OF HEALTH, (Feb. 2021), https://health.ny.gov/community/pregnancy/surrogacy/docs/gestational_surrogacy_guidelines.pdf [https://perma.cc/2N6Y-FHLS] [hereinafter *Guidelines for Assisted Reproductive Technology*].

100. § 581-402(a); Williams, *supra* note 10, at 22.

101. §§ 581-403, -603. Although each party must obtain independent legal counsel, the intended parents are *solely* responsible for the surrogate's attorney fees. *Id.*

102. *Id. See also infra* Section I.C.2.d.

103. § 581-402(b).

104. *Id.* Although international surrogacy is not addressed in this Comment, it is important to note that the LPR requirement for involved parties "means that international surrogacy will not be permissible in New York even if the surrogate is a New York resident." Williams, *supra* note 10, at 22.

105. If only one intended parent has lived in New York for six months, the surrogate must also have been a resident of New York for at least six months. § 581-402.

106. The phrase "intimate partner" is not defined by the CPSA. *See* §§ 581-102, -402. Presumably, "intimate partner" is synonymous with "intimate relationship" which is determined based on enumerated factors in the New York Family Court Act: "The nature or type of relationship, regardless of whether the relationship is sexual in

independent legal counsel, pay for the surrogate's independent legal counsel, and execute a will designating a guardian and an executor to perform the intended parents' obligations as described in the surrogacy agreement.[107]

b. Required Surrogacy Agreement Provisions

In addition to the extensive requirements that all parties to surrogacy agreements must fulfill, the CPSA codifies contractual requirements that the surrogacy agreement itself must satisfy to constitute an "enforceable" surrogacy agreement.[108] The agreement must be executed by all parties before two non-party witnesses, and the execution of the document must occur *before* the surrogate begins surrogacy-related medical procedures—*e.g.*, taking medication, transferring the embryo.[109] All parties must be represented by independent legal counsel and the surrogacy agreement must disclose how the intended parents will pay for the surrogate's medical expenses.[110]

The agreement must also comply with supplemental criteria established by the New York State Department of Health. Namely, any gestational surrogacy program (GSP) or agency involved in the surrogacy arrangement must (1) obtain a license to practice surrogacy in New York State and (2) join the state's Surrogacy Registry (which tracks gestational surrogates statewide).[111] Ultimately, the entire surrogacy agreement must comply with *all* statutory requirements, as a failure to "meet the material requirements . . . [renders] the agreement" unenforceable.[112]

c. Surrogate Compensation

Although intended parents are not required to compensate the surrogate to create an enforceable surrogacy agreement, the CPSA

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nature; the frequency of interaction between the persons; and the duration of the relationship." § 812(1)(e). However, neither casual acquaintances nor ordinary involvement between two individuals in business or social contexts constitute intimate relations. *Id.*

107. § 581-403, -603.

108. Seidelman & Cirel, *supra* note 89, at 8; § 581-403.

109. § 581-403.

110. *Id.*

111. *See infra* notes 221–224.

112. § 581-407. Many of the CPSA's surrogacy agreement requirements are formalities typically required in contractual agreements. For example, the agreement must include the date, city, and state where the agreement was executed and the first and last name and contact information for all parties. § 581-403(h)(1)-(2). Other requirements are more complex because they trigger other areas of law. For example, the intended parents must "execute a will" and designate a guardian "for all resulting children." § 581-403(i)(2).

codifies compensation guidelines.[113] Intended parents' payments to the surrogate, if any, must be based on the "medical risks, physical discomfort, inconvenience and the responsibilities they are undertaking in connection with their participation in the assisted reproduction."[114] The CPSA neither recommends, nor implements thresholds or limits, on the *amount* of compensation.[115] Rather, where compensation is part of a surrogacy agreement in New York, it "must be reasonable and negotiated in good faith between the parties" and may only be paid to the surrogate.[116]

Conversely, for intended parents that choose to compensate their surrogate, the *duration* of payments (unlike the amount) is limited.[117] Payments cannot exceed the duration of the pregnancy, which includes a recuperative period of up to eight weeks after the birth.[118] The CPSA explicitly states that intended parents cannot condition payment on certain factors: the purported quality of the gametes or embryos, the characteristics of the donor, or the traits of any resulting child.[119]

d. Unalterable Surrogates' Bill of Rights

The CPSA codifies a Surrogates' Bill of Rights that all parties must execute.[120] The Bill of Rights clearly outlines the surrogate's absolute rights and must be provided to every surrogate *before* the surrogacy process can begin.[121] These rights include, but are not limited to:

1) The right to make all health and welfare decisions regarding herself and the pregnancy;
2) The right to independent legal counsel paid for by the intended parents;
3) The right to comprehensive health insurance, life insurance, and supportive counseling paid for by the intended parents; and
4) The right to terminate the surrogacy agreement at any time—for any reason and without penalty—prior to becoming pregnant.[122]

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113. § 581-502.
114. *Id.*
115. *Id.*
116. Compensation is not permitted for purchasing gametes, embryos, or for a biological parent to voluntary release his or her parental interest in a child. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. § 581-601; *see also* Williams, *supra* note 10, at 25.
121. Williams, *supra* note 10, at 25.
122. *Id.*

The Bill of Rights cannot be waived or limited in any way, even by agreement of all parties.[123]

II. SURROGACY (DIS)AGREEMENTS: ARGUMENTS AGAINST SURROGACY ARRANGEMENTS

Surrogacy contracts are intended to outline the various rights, roles, and responsibilities of each party before, during, and after the pregnancy. Nevertheless, disputes (between parties) regarding the terms of an agreement are an inherent risk in drafting a surrogacy contract.[124] In surrogacy arrangements, typical points of contention include parentage claims, deciding who has authority to terminate or reduce the pregnancy,[125] and the appropriate amount of compensation for the surrogate.[126] When these issues arise, the subsequent emotional, ethical, and economic consequences are grave; the lack of uniformity in state laws leaves parties to contested agreements vulnerable to the discretion of judges and legislators.[127]

On one hand, modern developments in medicine, the law, and societal norms support the increased use of surrogacy contracts to aid individuals in starting a family.[128] But on the other hand, various groups of legislators, medical professionals, and the general public have vocalized concerns with enforcing surrogacy agreements.[129] Recognizing these surrogacy disagreement, this Part summarizes common arguments made against the permissibility of surrogacy contracts.

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123. *Id.* For an in-depth discussion of the Surrogates' Bill of Rights, see *infra* Section III.A.1.a.

124. *See generally* Joseph F. Morrissey, *Surrogacy: The Process, The Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 515–44 (2015) (describing typical points of contention in surrogacy agreements).

125. *Id.* at 531–33. "Reduce the pregnancy" refers to selective reduction or multifetal pregnancy reduction. For example, opting to selectively reduce triplets to twins. *Id.* at 533.

126. *Id.* at 538–42.

127. The lack of uniformity in state surrogacy laws produces various concerning outcomes: parties may enter surrogacy arrangements in good faith, but a court may still find the agreement unenforceable, legislative shortcomings sometimes force parties to litigate custody in family court, and other parties are either limited to altruistic surrogacy or wholly prohibited from executing *any* type of surrogacy agreement. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20; *see generally* Ruth, *supra* note 45, at 2–12 (explaining that inconsistent surrogacy laws nationwide preclude courts from implementing a uniform approach when disputes arise in surrogacy cases).

128. Bethany Bump, *As Surrogacy Debate Heats Up, NY Weighs Ethical, Moral Impacts*, TIMES UNION, https://www.timesunion.com/news/article/As-surrogacy-debate-heats-up-New-York-weighs-13992709.php [https://perma.cc/PY3D-SBEW] (June 14, 2019, 6:33 PM).

129. *Id.*

Surrogacy opponents primarily argue that surrogacy contracts exploit the surrogate by prioritizing financial gains over the surrogate's mental, physical, and social wellbeing[130] and create an unreliable path to parentage that leaves parties vulnerable to judicial determinations regarding the legal parenthood of the child.[131] Accordingly, this Part is divided into two sections: Section A examines surrogate exploitation and Section B describes problematic paths to establishing legal parentage. It should be noted here that while additional anti-surrogacy arguments exist,[132] the two discussed below—exploitation of surrogates and parentage—are the main contentions surrounding modern surrogacy arrangements.

A. Financial Gains Reign: The Exploitation of Surrogates' Wellbeing

Although there are many reasons why a surrogate may choose to enter a compensated surrogacy arrangement,[133] at least in part, surrogates are motivated by financial compensation.[134] Surrogates maintain that compensation makes them financially stable during the pregnancy, but the long-standing counterargument is that surrogates "are attracted to the work because they are financially vulnerable."[135] This vulnerability—or exploitation[136]—which allegedly encourages women to prioritize their financial needs over their health—stems from the combination of two factors: surrogacy costs and the financial needs of surrogates.[137]

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130. David Dodge, *Meet the Women Who Become Surrogates*, N.Y. TIMES (Feb. 15, 2021), https://www.nytimes.com/2021/02/15/parenting/fertility/surrogates-new-york.html; Caron, *supra* note 42.

131. *See* ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 20–21 (2016).

132. *See id.* at 18–41 (identifying common arguments against the practice of surrogacy including the commodification of children, a child's right to know his or her biological parents, implications for international intended parents and surrogates, objectification of disadvantaged women, the rights of intended parents pursuant to constitutional law, and the fragmentation of the traditional concept of family).

133. Many surrogates cite non-financial reasons for choosing to participate in the surrogacy process including supporting the LGBTQIA+ community, helping an infertile relative or close friend start a family, forging relationships with other women, and experiencing the joy in helping others. James A. Grifo & Nazca Fontes, *New York Legalizes Paid Surrogacy, Other States Should Follow*, RAISE (Feb. 15, 2021), https://raisemagazine.com/new-york-legalizes-paid-surrogacy-other-states-should-follow [https://perma.cc/G2D5-J2C6]; *see also* Caron, *supra* note 42.

134. Grifo & Fontes, *supra* note 133.

135. *See* Dodge, *supra* note 130.

136. Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html.

137. *See, e.g.*, Dodge, *supra* note 130.

Gestational surrogacy is expensive. On average, intended parents pay between $60,000 to $150,000 for surrogacy-related expenses—*e.g.*, medical care, attorney's fees, travel.[138] If donor eggs or sperm are needed, the costs rise substantially; donor sperm typically cost hundreds of dollars and donor eggs are approximately $15,000.[139]

Additionally, in New York's compensated surrogacy arrangements, the intended parents must compensate the surrogate. Surrogate compensation varies, but on average surrogate fees are between $20,000 and $55,000.[140] Citing these costs, opponents of commercial surrogacy contend that intended parents are usually privileged and wealthy,[141] while surrogates typically fall into a lower financial class.[142] In turn, the "sizeable payments" offered by compensated surrogacy arrangements coerce poorer women into becoming surrogates.[143] Women who would not otherwise become surrogates[144] can be pressured to put their bodies "at the financial and emotional mercy of wealthier and more privileged individuals."[145] For example, surrogates with significant loan debt[146] or overwhelming costs from their own families assume additional health risks to attain financial security.[147]

Pregnancy inherently takes a physical toll on women's bodies, but gestational surrogacy—which requires IVF—arguably adds unique physical challenges for surrogates that are "above and beyond the risk of normal pregnancy and childbirth."[148] State laws do vary, but surrogates are generally required to undergo an initial screening to ensure they are healthy enough to complete IVF.[149] Once approved, surrogates must administer daily, at-home hormone injections leading up to the embryo

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138. *See* Bump, *supra* note 128.

139. *See* Caron, *supra* note 42 (noting that "[d]onor eggs are often sold in groups of half a dozen" for around $15,000).

140. *Id.*

141. *See* Wang, *supra* note 136; *see also* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 131, at 26–27.

142. *See* Dodge, *supra* note 130.

143. Wang, *supra* note 136.

144. *See* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 131, at 26–27.

145. Wang, *supra* note 136 (quoting Letter from Gloria Steinem to New York Governor Andrew Cuomo, available at https://twitter.com/ZackFinkNews/status/1138467731878158336).

146. *See* Grifo & Fontes, *supra* note 133.

147. *See* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 131, at 27–28.

148. Caron, *supra* note 42 (quoting Dr. Wendy Chavkin); *see also* Dodge, *supra* note 130.

149. *See, e.g.*, Dodge, *supra* note 130.

transfer, which often include side effects such as body aches, nausea, and fatigue.[150]

Moreover, studies have found that, when compared to non-gestational births, gestational surrogates often experience more complications, including higher preterm birth rates, lower birth weights, gestational diabetes, hypertension, and the need for cesarean section delivery at birth.[151] Once the child is born, the surrogate may experience otherwise avoidable psychological harms.[152] Though gestational surrogates are not biologically related to the child, hormonal changes that take place during pregnancy may create an emotional bond between the surrogate and child—an emotional bond that legally terminates when the surrogate relinquishes the child to the intended parents.[153]

Opponents of surrogacy maintain that the combined effect of financial compensation, contractual commitments, and emotional obligations encourage surrogates to assume increased and unnecessary medical risks to fulfill the desires of intended parents.[154] For example, because the embryo transfer process alone is extremely expensive, intended parents might ask surrogates to implant multiple embryos to increase the likelihood of pregnancy.[155] Or, if a routine screening reveals that the fetus has Down syndrome (or a similar medical condition), intended parents may request that the surrogate terminate the pregnancy.[156] Additionally, intended parents may include contractual provisions restricting the surrogate's conduct (*e.g.*, restrictions on travel, diet, sexual activity, or the right to terminate the pregnancy) throughout the pregnancy.[157]

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150. *Id.*

151. *See* Caron, *supra* note 42.

152. *See* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 131, at 30.

153. *Id.*

154. *See* Caron, *supra* note 42.

155. *Id.*

156. For a discussion regarding a recent case example in which the intended parents and the surrogate disagreed regarding the termination of a pregnancy after a multiple embryo transfer, see Katie O' Reilly, *When Parents and Surrogates Disagree on Abortion*, THE ATLANTIC (Feb. 18, 2016), https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323 [https://perma.cc/3GQ2-E2WG]; *see also* Caron, *supra* note 42.

157. *See Surrogacy Agreements—Contract Terms*, *supra* note 53; *see also* Somberg, *supra* note 6 (stating that parties may expressly communicate their preferred contractual restrictions to one another before executing an agreement).

B. Biology or Bust: The Problematic Path to Establishing Legal Parenthood for Non-Genetic Parents

When a child is born, the child's parent assumes two roles: parental responsibility *and* legal parentage.[158] Parental responsibility, which refers to decision-making authority, permits the parent to make day-to-day decisions about the child's care until the child turns eighteen.[159] For example, parental decisions might include the right to decide if the child attends private school or public school, or the right to choose a child's religion.[160] Comparatively, legal parentage refers to legal rights and extends beyond the child's eighteenth birthday.[161] Specifically, for a person to extend certain rights to the child—including citizenship, access to government benefits, and inheritance rights upon the death of a parent—that person must be "legally-recognized as [the] child's parent."[162]

Non-legal parents (those who lack legal recognition) do not have legal decision-making authority over a child.[163] For example, non-legal parents lack authority to consent to medical care for the child, to approve school field trips, to determine custody and visitation arrangements, or to claim the child as a dependent for health insurance.[164] There are also

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158. *See* Alexandra Harland, *Surrogacy, Identity, Parentage and Children's Right—Through the Eyes of a Child*, 59 FAM. CT. REV. 121, 124 (2021) ("Parental responsibility is more limited and does not give the same protections to a child as legal parenthood does."); *see also* Nejaime, *supra* note 44; NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES 1–2, 5–6 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/2AKJ-5JB4].

159. Alexandra Harland, *Surrogacy, Identity, Parentage and Children's Rights – Through the Eyes of a Child*, 59 FAM. CT. REV. 121, 124 (2021); *see also* Sanjana Laguda, *What Are Parental Responsibilities & Rights, When Do They End?* MOMJUNCTION.COM (Jan. 5, 2023), https://www.momjunction.com/articles/parental-responsibility_00484547/#what-is-parental-responsibility [https://perma.cc/F5QS-9VBL]. A child's eighteenth birthday generally serves as the deciding factor in terminating parental responsibility; however, select circumstances may shorten or prolong this responsibility. For example, if the child marries before their eighteenth birthday parental responsibility ends before the child's eighteenth birthday. Or, if the child has "physical or mental disabilities," parental responsibility might extend beyond the child's eighteenth birthday. *Id.*

160. *See Legal Recognition of LGBT Families*, *supra* note 158, at 1; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

161. *See* Laguda, *supra* note 159; *see also* Harland, *supra* note 159, at 124.

162. *See Legal Recognition of LGBT Families supra*, note 158, at 1; *see also* Harland, *supra* note 159, at 124.

163. *See Legal Recognition of LGBT Families*, *supra* note 158, at 1. Notably, before the CPSA was enacted, a "de facto" parent (someone who functions as a child's parent on a day-to-day basis despite having no biological or marital connection to the child) similarly lacked decision-making authority. *Id.*; Geldenhuys, *supra* note 14, at 31.

164. *Id.* at 1.

long-term consequences of being a non-legal parent. Absent "a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative."[165] Thus, establishing both parental responsibility *and* legal parentage of a child is critical to protect the child-parent relationship.

In surrogacy arrangements, the parties share a mutual expectation that the intended parent will assume both of these roles; however, establishing parentage and creating a legally recognized child-parent relationship often requires additional legal action.[166] The three most common legal actions to establish parentage of a child born via surrogacy are a pre-birth order, a post-birth order, and adoption proceedings.[167] The parentage process is governed by the state where the child will be born.[168] Nevertheless, since surrogacy laws vary by jurisdiction,[169] the available legal actions to establish parentage also differ.[170] Surrogacy

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165. *Id.*

166. *See* Harland, *supra* note 159, at 124–27; Nejaime, *supra* note 44; *see also Legal Recognition of LGBT Families*, *supra* note 158, at 2.

167. A pre-birth order is obtained through a legal process that establishes parentage of the intended parents *before* the baby is born (typically during the third trimester of pregnancy). To complete a pre-birth order, a surrogacy attorney will gather and subsequently file documentation (*e.g.*, a fertility doctor's affidavit, the surrogate's signed statement that she is not the genetic mother of the child) in the specific county in which the baby will be born. A post-birth order is similar to a pre-birth order, but the paperwork cannot be filed with the court until *after* the child's birth. Adoption permanently transfers all rights and responsibilities from the biological parents to the adoptive parents. However, the adoption process differs based on the *type* of surrogacy arrangement. In gestational surrogacy arrangements (where neither intended parent is biologically related to the child), both of the intended parents must pursue adoption. In traditional surrogacy arrangements (where one intended parent is the biological parent), only the genetically unrelated intended parent pursues adoption (*e.g.*, a stepparent or second-parent adoption). *What You Should Know About the Surrogacy Legal Process*, HOW TO BE A SURROGATE MOTHER, https://howtobeasurrogatemother.com/about-surrogacy/surrogacy-laws-legal-information/surrogacy-legal-process [https://perma.cc/NU3Z-HSC8] (last visited Mar. 7, 2023); *Intended Parents: Establishing Parentage in Surrogacy*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy [https://perma.cc/6KG7-PNJ7] (last visited Mar. 7, 2023).

168. *What You Need to Know About Surrogacy Laws in the U.S.*, AM. SURROGACY, https://www.americansurrogacy.com/surrogacy/surrogacy-laws-in-the-united-states [https://perma.cc/78FS-K9PP] (last visited Mar. 7, 2023); *see also* Dundon, *supra* note 19, at 175.

169. This Comment's analysis is limited to domestic surrogacy arrangements, but notably these various legal actions are also used in international surrogacy arrangements. Surrogacy arrangements involving parties from different countries who encounter difficulties establishing the child's parentage may have far-reaching legal consequences that affect the child's nationality and immigration status. *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy [https://perma.cc/2EYQ-NJLZ] (last visited Mar. 7, 2023).

170. *See Legal Recognition of LGBT Families*, *supra* note 158, at 2–3.

opponents contend that this lack of uniformity leaves children and intended parents in limbo by creating unnecessary legal disputes.[171] To contextualize this anti-surrogacy argument, state parentage procedures are summarized below.

1. ESTABLISHING LEGAL PARENTAGE IN SURROGACY-FRIENDLY STATES

As noted in Part I, twenty-one states permit *gestational* surrogacy agreements.[172] All of these states, except for Florida[173] and Virginia,[174] permit pre-birth orders.[175] Eleven of these surrogacy-friendly states permit pre-birth orders without additional caveats.[176] That said, other states have supplemental pre-birth order requirements. In California, Delaware, District of Columbia, New York, and Washington, pre-birth orders only become effective at the moment of birth.[177] For a pre-birth order to be valid in Oklahoma, the gestational surrogacy agreement must be executed by all parties before the embryo is transferred;[178] in Rhode

171. *See The Parentage/Surrogacy Project*, *supra* note 169.

172. *Supra* notes 60–63 and accompanying text. Eighteen states (California, Colorado, Delaware, District of Columbia, Florida, Illinois, Maine, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia) statutorily reference compensated gestational surrogacy agreements. Three states (Connecticut, North Dakota, and Virginia) statutorily permit gestational surrogacy agreements but are either statutorily silent on compensation or narrowly limit compensation. *Id.*

173. Florida's surrogacy statute limits the child's birth certificate from being issued until after the baby is born. Generally, courts do not grant pre-birth orders, but exceptions have been made to authorize the intended parents to make medical decisions for the child. *See Gestational Surrogacy in Florida*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/florida [https://perma.cc/BR7D-YVPW] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Florida*].

174. Virginia's surrogacy statute does not permit pre-birth orders. The statute offers two other methods to establish parentage: (1) a court hearing requiring "home studies on all parties [and] the appointment of a guardian ad litem for the unborn child," or (2) a non-court route, requiring the parties to "wait until at least the 4th day after birth for the [surrogate] to sign the birth certificate amendment paperwork, and then file a Surrogate Consent Form." *See Gestational Surrogacy in Virginia*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/virginia [https://perma.cc/UN7F-SGCX] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Virginia*].

175. *Supra* notes 59–62 and accompanying text.

176. Colorado, Connecticut, Maine, Nevada, New Hampshire, New Jersey, North Dakota, Texas, Utah, Vermont, and West Virginia require additional caveats. For an overview of each state's parentage laws see CREATIVE FAM., *U.S. Map*, *supra* note 20.

177. *See id.*

178. *Gestational Surrogacy in Oklahoma*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/oklahoma

Island, a pre-birth order is only valid if at least one intended parent is an LPR or United States citizen.[179]

Of all the surrogacy-friendly states, Illinois has one of the most lenient paths to parentage.[180] So long as the parties satisfy all the statutory requirements for executing a surrogacy contract, neither a pre- nor post-birth order is required to establish parentage.[181] Rather, the intended parents can immediately obtain a birth certificate naming them as the child's legal parents.[182]

2. ESTABLISHING LEGAL PARENTAGE IN NON-SURROGACY-FRIENDLY STATES

Like surrogacy-friendly states, the five non-surrogacy-friendly states—Arizona, Indiana, Louisiana, Michigan, Nebraska—employ different legal actions to determine parentage of a surrogate child. Louisiana and Indiana only acknowledge pre-birth orders for married, heterosexual couples using their own egg and sperm.[183] Additionally, Louisiana requires parties to obtain court approval for the pre-birth order before the embryo is transferred.[184] Arizona technically permits pre-birth orders, but courts generally wait until *after* the child's birth before

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[https://perma.cc/2Y3E-RMHL] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Oklahoma*].

179. *Gestational Surrogacy in Rhode Island*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/rhode-island [https://perma.cc/U8J5-4U7E] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Florida*]. Notably, in 2021 Rhode Island passed the Rhode Island Uniform Parentage Act (RIUPA) to update the state's process for establishing legal parentage of surrogacy-born children. Under RIUPA, birth and non-birth parents must jointly execute a Voluntary Acknowledgment of Parentage (VAP) to affirm that both parties agree that the intended parents are the legal parents of the child and that there are no other competing parentage claims. 15 R.I. GEN. LAWS § 15-8.1-301 (2022). Although RIUPA is a significant step forward in Rhode Island's surrogacy legislation, it still lacks provisions comparable to the CPSA's Surrogate's Bill of Rights and the supplemental requirements requiring licensure for surrogacy agencies.

180. *See Gestational Surrogacy in Illinois*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/illinois [https://perma.cc/V95V-JGPD] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Illinois*].

181. *Id.*

182. *Id.*

183. CREATIVE FAM., *Louisiana*, *supra* note 66; *see also* CREATIVE FAM., *Indiana*, *supra* note 65.

184. *See* CREATIVE FAM., *Louisiana*, *supra* note 66.

entering an order.[185] In Michigan and Nebraska, both pre- and post-birth orders are prohibited.[186]

3. ESTABLISHING LEGAL PARENTAGE IN GRAY-AREA STATES

Although the remaining twenty-six states are statutorily silent on gestational surrogacy agreements,[187] they too use varying processes to establish legal parentage of surrogacy-born children. Nearly half of these gray-area states permit pre-birth orders without limitations.[188] Notably, South Carolina only grants *temporary* pre-birth orders; the final parentage order is issued within thirty days of the child's birth.[189]

The remaining gray-area states lack uniformity regarding pre- and post-birth orders. Hawaii, Idaho, Missouri, and Wyoming only grant post-birth orders,[190] while Alabama, Maryland, Minnesota, Ohio, and Pennsylvania only grant pre-birth orders in some counties.[191] Meanwhile, of all the gray-area states, Iowa and Wisconsin have the most restrictive

185. *See* CREATIVE FAM., *Arizona*, *supra* note 65.

186. *See* CREATIVE FAM., *Michigan*, *supra* note 68 (courts may grant pre-birth order in compassionate surrogacy); *see also* CREATIVE FAM., *Nebraska*, *supra* note 64 (post-birth orders are allowed in very limited circumstances).

187. Alabama, Arkansas, Alaska, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Wisconsin, and Wyoming are statutorily silent on gestational surrogacy agreements. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

188. States permitting pre-birth orders without limitations include Arkansas, Alaska, Georgia, Kansas, Kentucky, Massachusetts, Mississippi, Montana, North Carolina, Oregon, and South Dakota. For an overview of each state's parentage laws see *id.*

189. *Gestational Surrogacy in South Carolina*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/south-carolina [https://perma.cc/3MSN-9MDS] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *South Carolina*].

190. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

191. *Id.* For example, in Minnesota, counties allow intended parents to *file* pre-birth parentage pleadings with the court, but intended parents cannot *establish* actual parentage until after the child's birth. Comparatively, counties in Ohio are stricter; counties that refuse to grant pre-birth orders prohibit parties from filing pre-birth parentage pleadings. Other states rely on judicial discretion. In Pennsylvania, some counties require parties to attend a hearing to obtain a pre-birth order while other counties leave the decision whether to grant a pre-birth order to the judge's discretion. *Id.*

paths[192] while New Mexico creates one of the most lenient paths to parentage.[193]

In Iowa, the gestational surrogate is the presumed legal mother; therefore, only the intended father (in heterosexual couples) or the biological father (in same-sex couples) may obtain a pre-birth order.[194] The non-biological parent is forced to pursue second-parent adoption.[195] In Wisconsin, pre-birth orders are only guaranteed to be granted in select counties and circumstances, namely, "when the intended parents are a married heterosexual couple who are both genetically related to the child or when [the case involves] a single parent who is genetically related to the child."[196] Even if intended parents successfully obtain a pre-birth order, it's only temporary—a post-birth order must be issued after the child's birth, which typically requires intended parents to appear in court to obtain the final birth order.[197] Comparatively, in New Mexico, both intended parents may be immediately listed on the child's initial birth certificate.[198]

Citing states' inconsistent approaches to establishing parentage in surrogacy arrangements, surrogacy opponents argue that the path to parentage is ambiguous.[199] Surrogacy contracts cannot fully account for every potential effect of vague parentage laws.[200] Rather, surrogacy opponents claim that an integral feature of surrogacy—that the intended parent will have *full* parental rights of the child while the surrogate (and the spouse if any) will have *no* parental rights or responsibilities of the

192. *See Gestational Surrogacy in Iowa*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/iowa [https://perma.cc/5NK7-Z4FE] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Iowa*]; *Gestational Surrogacy in Wisconsin*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/wisconsin [https://perma.cc/TFU6-VYQZ] (last visited Mar. 7, 2023) [hereinafter CREATIVE FAM., *Wisconsin*].

193. *See* CREATIVE FAM., *New Mexico*, *supra* note 71.

194. CREATIVE FAM., *Iowa*, *supra* note 192.

195. *Id.*

196. *Gestational Surrogacy Law Wisconsin*, SURROGATEFIRST, https://surrogatefirst.com/pages/gestational-surrogacy-law-wisconsin [https://perma.cc/F4D7-CKMM] (last visited Mar. 7, 2023) [hereinafter SURROGATEFIRST, *Wisconsin*].

197. *See* SURROGATEFIRST, *Wisconsin*, *supra* note 196. Similarly, most gray-area states require intended parents to appear in court to obtain the final birth order. *See* CREATIVE FAM., *U.S. Map*, *supra* note 20.

198. CREATIVE FAM., *New Mexico*, *supra* note 71.

199. *See The Parentage/Surrogacy Project*, *supra* note 169; *see also* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 132, at 8–11, 17–18.

200. *See* Ruth, *supra* note 45, at 12; *see also* FINKELSTEIN, DOUGALL, KINTOMINAS & OLSEN, *supra* note 132, at 8–11, 17–18.

child[201]—is upended. Ultimately, the intended parent and the child are left vulnerable to the court's discretionary determination of the child's legal parentage.[202]

III. A (BABY'S) CRY FOR A UNIFORM APPROACH: A COMPARATIVE ANALYSIS OF STATE SURROGACY LAWS TO REMEDY SURROGATE EXPLOITATION AND PROBLEMATIC PATHS TO LEGAL PARENTAGE

As discussed in Part II, two main issues commonly associated with surrogacy contracts are surrogate exploitation and unreliable paths to establishing legal parentage. Stressing these issues, surrogacy opponents argue that all surrogacy contracts should be void and unenforceable, at least in part because legislative pitfalls persist.[203] Yet opposite these concerns, supporters assert that the CPSA's novel provisions remedy these valid concerns.[204]

This Part juxtaposes the CPSA and other states' surrogacy laws to boost this Comment's assertions that the CPSA is the gold standard of surrogacy legislation. Unlike the CPSA, surrogacy laws in Michigan and Wisconsin—a non-surrogacy-friendly state and a gray-area state, respectively—illustrate the two main issues linked to surrogacy arrangements.[205] A holistic review of the CPSA makes it clear that the legislative approach employed by New York has effectively resolved legislative shortcomings of surrogacy legislation and should be adopted nationwide.

A. Surrogate Exploitation: The CPSA Versus Michigan and Wisconsin Legislation

Surrogacy opponents maintain that compensated surrogacy arrangements exploit surrogates by prioritizing monetary payments over

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201. *See generally About Surrogacy: What is Gestational Surrogacy?*, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-gestational-surrogacy [https://perma.cc/83MV-JWSZ] (last visited Mar. 7, 2023).

202. *See* Ruth, *supra* note 45, at 4–9 (explaining that inconsistent surrogacy laws nationwide preclude courts from implementing a uniform approach when disputes arise in surrogacy cases).

203. *See, e.g.,* Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 J. WOMEN CULTURE & SOC'Y 618, 618 (1993); Seidelman & Cirel, *supra* note 89, at 4; *see also* Williams, *supra* note 10, at 22.

204. Seidelman & Cirel, *supra* note 89, at 4.

205. *See* MICH. COMP. LAWS §§ 722.851, 722.855, 722.857, 722.859 (2022); *see also* CREATIVE FAM., *Wisconsin*, *supra* note 192.

surrogates' mental, physical, and social wellbeing.[206] Acknowledging these concerns, New York codified legal safeguards to prevent exploitation. Specifically, as discussed in greater depth below, three particular aspects of the CPSA extend the "strongest legal and health protections" available to surrogates nationwide.[207] Comparatively, surrogacy laws in Michigan and Wisconsin fail to extend comparable legal protections to surrogates, instead reinforcing legislative schemes that perpetuate surrogate exploitation.[208]

1. THE CPSA'S REMEDIAL PROVISIONS: RIGHTING THE SURROGATE EXPLOITATION WRONG TO PROTECT SURROGATES' WELLBEING

To combat surrogate exploitation in compensated surrogacy arrangements, New York codified statutory provisions to safeguard surrogates' wellbeing. Specifically, the CPSA created (1) the Surrogate's Bill of Rights, (2) addendum requirements for surrogacy agencies, and (3) surrogate selection criteria.[209] The protections extended by each provision are summarized below.

a. The Surrogate's Bill of Rights

Regarded as "one of the most unique aspects" of the CPSA, the Surrogate's Bill of Rights codifies "concrete medical, legal and financial protections" to prevent surrogate exploitation.[210] The Surrogate's Bill of Rights—*which cannot be waived or limited in any way*—affords surrogates robust rights[211] that inherently prioritize their own well-being over financial compensation. First, the surrogate maintains the right to make all health and welfare decisions regarding herself and the

206. *See infra* Section II.A (discussing exploitation); *see also* Dodge, *supra* note 130; *see also* Wang, *supra* note 136.

207. *NYAAFF Celebrates CPSA*, *supra* note 9.

208. *See* MICH. COMP. LAWS §§ 722.851, 722.855, 722.857, 722.859 (2022); *see* CREATIVE FAM., *Wisconsin*, *supra* note 192.

209. N.Y. FAM. CT. ACT §§ 581-402, 581-601 (McKinney 2021); *The Child-Parent Security Act: Gestational Surrogacy*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/community/pregnancy/surrogacy [https://perma.cc/JP69-RZLV] (last modified Oct. 2022) [hereinafter N.Y. STATE DEP'T OF HEALTH].

210. Williams, *supra* note 10, at 25; Alton L. Abramowitz, *Parentage Problem Solving for Families in the Age of Surrogacy*, N.Y. L.J. (Feb. 9, 2021, 12:45 PM), https://www.law.com/newyorklawjournal/2021/02/09/parentage-problem-solving-for-families-in-the-age-of-surrogacy [https://perma.cc/CT9R-GK2G] ("The 'Surrogates' Bill of Rights' found at Part 6 of Article 5-C contains some of the most far reaching, compassionate and important provisions for the protection of the surrogate. These provisions take precedence over 'any surrogacy agreement, judgment of parentage, memorandum of understanding, verbal agreement or contract to the contrary'….").

211. Williams, *supra* note 10, at 25.

pregnancy.[212] These rights include choosing whether to consent to a cesarean section or multiple embryo transfer, choosing her own health care provider(s), deciding whether to terminate or continue the pregnancy, and choosing whether to reduce or retain the number of embryos or fetuses she is carrying.[213] Lastly, the CPSA allows "the surrogate to back out of the surrogacy agreement, without penalty, prior to becoming pregnant and there is no specific performance remedy offered."[214]

Second, the surrogate is entitled to comprehensive health, life, and disability insurance, which covers preconception care, prenatal care, major medical treatments, hospitalizations, behavioral health care, and psychological counseling to address any issues resulting from the surrogate's participation in the surrogacy arrangement.[215] The intended parents are solely responsible for covering all health insurance costs, including "all co-payments, deductibles, and any other out-of-pocket medical costs associated with the pregnancy; [including] all unreimbursed expenses."[216] Additionally, all insurance policies must be effective from *before* the embryo transfer and extend for either one year after the birth of the child or for one year after a stillbirth, a miscarriage, or termination of the pregnancy.[217]

Third, the surrogate is entitled to independent legal counsel of her own choosing.[218] The attorney must execute "a separate retainer agreement clearly stating that the attorney-client relationship lies only with the surrogate, not with the intended parent(s)."[219] Additionally, the Surrogate's Bill of Rights requires the intended parent(s) to pay the surrogate's legal fees.[220]

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212. § 581-602; Williams, *supra* note 10, at 25.

213. § 581-602.

214. Elizabeth Nakamura, *The Child-Parent Security Act*, 45 WESTCHESTER BAR J., 169, 170 (2020).

215. §§ 581-604, 581-605; *New York's Novel Surrogate's Bill of Rights Provides Unprecedented Protection for Gestational Surrogates*, WEISS ZARRETT (Mar. 17, 2021), https://weisszarett.com/new-yorks-novel-surrogates-bill-of-rights-provides-unprecedented-protection-for-gestational-surrogates [https://perma.cc/4YAV-B9AZ]; *see also* Natalie Burke, *Surrogacy Laws Reformed: Bringing New York into the Twenty-First Century*, 42 PACE L. REV. 485, 505–07 (2022) (discussing the value in providing psychological counseling to protect surrogates' emotional well-being).

216. *New York's Novel Surrogate's Bill of Rights Provides Unprecedented Protection for Gestational Surrogates*, *supra* note 215.

217. *Id.*

218. § 581-603. The intended parents are responsible for paying for the surrogate's attorney. Affording further autonomy, the CPSA permits the surrogate to independently select any attorney of her choice. *Id.*

219. Williams, *supra* note 10, at 22; § 581-402(6).

220. § 581-603.

b. The New York Department of Health's Supplemental Requirements for Surrogacy Agencies

By enacting the CPSA, New York became the first state to require surrogacy agencies to obtain a surrogacy license.[221] Under the CPSA, New York's Department of Health is charged with regulating agencies and administering licenses to qualifying entities.[222] The licensure process statutorily protects the surrogate's health and ensures that the surrogacy agreement is ethical.[223] Once licensed, surrogacy agencies must enroll in the state's Surrogacy Registry.[224] The Registry tracks gestational surrogates statewide,[225] and it creates a confidential complaint process for reporting unlicensed gestational surrogacy programs (GSPs) and agencies.[226] The state Department of Health is then responsible for investigating the complaints.[227] To extend additional safeguards to the surrogate, only surrogacy agencies—not surrogates—are required to enroll in the Registry.[228]

c. Surrogate Selection Criteria Disqualifies Unfit Candidates from Participating in the Surrogacy Process

To be a surrogate, women must satisfy statutory *and* regulatory requirements.[229] Potential surrogates must satisfy eligibility requirements

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221. N.Y. STATE DEP'T OF HEALTH, *supra* note 209; NYAAFF, *CPSA Update, supra* note 13.

222. *See* Williams, *supra* note 10, at 23.

223. N.Y. STATE DEP'T OF HEALTH, *supra* note 209. Surrogacy agencies must renew their license annually and report any material changes (for example, ownership) to the State's Department of Health within thirty days. Rivkin Radler, *NYS Legalizes Gestational Surrogacy: Changes for Health Care Providers*, JD SUPRA (Apr. 8, 2021), https://www.jdsupra.com/legalnews/nys-legalizes-gestational-surrogacy-4508042 [https://perma.cc/8ADB-B28Q]. In addition to submitting the application (and fees), the agency must also submit agency documents including but not limited to administrative policies and procedures, a conflict-of-interest policy, informed consent form, copies of documents provided to surrogates about the optional surrogacy registry, a background investigation report and credit report of the agency's owners, and training materials for staff regarding how they will comply with the CPSA. *Id.*

224. N.Y. STATE DEP'T OF HEALTH, *supra* note 209. For a comprehensive list of GSPs licensed in New York State, see *Licensed Gestational Surrogacy Programs*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/community/pregnancy/surrogacy/licensed_programs.htm [https://perma.cc/K4D2-XG37] (Jan. 2023).

225. N.Y. STATE DEP'T OF HEALTH, *supra* note 209.

226. *See Gestational Surrogacy Program Complaint Process*, N.Y. STATE DEP'T OF HEALTH, https://www.health.ny.gov/community/pregnancy/surrogacy/complaint_process.htm [https://perma.cc/HG8B-QJ2L] (Aug. 2021).

227. *Id.*

228. N.Y. STATE DEP'T OF HEALTH, *supra* note 209.

229. Williams, *supra* note 10, at 21–22.

codified in the CPSA.[230] The person must: (1) be twenty-one years of age or older; (2) be a United States citizen or LPR; (3) be a New York resident for at least six months (unless one of the intended parents resides in New York); (4) complete a medical examination with a physician; (5) have a health insurance policy and life insurance policy; and (6) not be biologically related to the child.[231]

Additionally, surrogates must follow requirements promulgated by multiple authorities. For example, New York's Department of Health established mandatory regulations for all surrogates.[232] These regulations require surrogates to "receive a medical evaluation . . . to assess any potential medical risks" of surrogacy, be notified of all potential "medical, psychological, or psychosocial risks" of surrogacy, and "provide informed consent to engage in a surrogacy arrangement."[233] Surrogates are also required to follow regulatory guidelines published by the American Society for Reproductive Medicine (ASRM) and American Congress of Obstetrics and Gynecologists (ACOG) and adopted by the New York State Department of Health.[234]

Combined, the statutory requirements of the CPSA and the regulatory guidelines of the ASRM and ACOG mean that few surrogate applicants make it through the screening process.[235] A surrogate may be disqualified for failing to satisfy even one of the many requirements, including: age, health of prior pregnancies, financial wellbeing, psychological screening (which examines a candidate's motivations to

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230. *Id.* at 21.

231. N.Y. FAM. CT. ACT § 581-402 (McKinney 2021). Notably, the surrogate's right to have the intended parent(s) pay for the health insurance policy may be waived only if the surrogate is not receiving compensation. § 581-402(7).

232. Williams, *supra* note 10, at 21–22.

233. *Id.* at 22.

234. *See supra* note 99 and accompanying text (explaining that the Commissioner of the Department of Health establishes additional criteria based on best practice recommendations from ASRM and ACOG).

235. *See* Dodge, *supra* note 130. Lisa Wippler, who manages the surrogacy screening process for an agency, offered a glimpse into the extensive surrogate vetting process. Wippler explained that "reputable agencies" must comply with numerous requirements. However, in addition to the CPSA's statutory requirements and the regulatory guidelines of the ASMR and ACOG, her agency imposes its own supplemental standards to qualify as a surrogate. "Out of the 300 to 400" surrogate candidate applications received monthly, "only 1 to 1.5 percent are accepted." *Id.* The most common reason for a candidate's disqualification is the health screening, though Wippler notes that there are numerous factors that preclude someone from qualifying as a surrogate. For example, applicants "who are deemed overly dependent on the compensation provided, including those who receive government assistance, are screened out as surrogates." *Id.* Wippler explains that the reasoning behind the compensation limits is based on a "'do no harm mentality,' [so] . . . if a candidate receives food stamps or Medicaid, the payment provided for surrogacy would in many cases cause them to lose eligibility for those benefits." *Id.*

pursue work as a gestational carrier), and familial relationships that suggest a lacking support system.[236] Ultimately, the CPSA creates a legal landscape that carefully selects surrogates to ensure that surrogacy arrangements prioritize surrogates' mental, physical, and social well-being over potential compensation for serving as a surrogate.[237]

2. HARMFUL LEGISLATION IN MICHIGAN AND WISCONSIN: REINFORCING SURROGATE EXPLOITATION VIA STATUTORY LANGUAGE

Compared to the CPSA, other states' surrogacy legislation fails to extend comparable surrogate protections. For example, Michigan and Wisconsin—a non-surrogacy-friendly state and a gray-area state, respectively—exemplify how explicit statutory language (or lack thereof) encourages surrogate exploitation.[238] Michigan and Wisconsin each have markedly different surrogacy laws, yet the effects are the same: health and welfare protections for surrogates are statutorily omitted.

a. Michigan: Statutory Surrogacy Ban Creates an Exploitative Loophole

Like New York, Michigan enacted surrogacy legislation shortly after the *Baby M* case.[239] The Michigan Surrogate Parenting Act is unique; *all* surrogacy contracts are prohibited under Michigan law.[240] Any "contract, agreement, or arrangement in which a female agrees to . . . surrogate gestation" is void and unenforceable.[241] If an arrangement involves compensation, the involved parties face criminal penalties.[242]

Yet, surrogacy is still practiced in the state.[243] Although surrogacy agreements are unenforceable, parties may enter *uncompensated*

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236. *Id.*; *See Guidelines for Assisted Reproductive Technology*, *supra* note 99.

237. *See supra* Section II.A. (discussing exploitation); *see also* Dodge, *supra* note 130; Wang, *supra* note 136.

238. *See generally* CREATIVE FAM., *Wisconsin*, *supra* note 192; CREATIVE FAM., *Michigan*, *supra* note 68.

239. Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html; *see* MICH. COMP. LAWS §§ 722.851–863 (2022) (enacting the Surrogate Parenting Act in 1988 after the *Baby M* case in 1985).

240. §§ 722.851–859.

241. §§ 722.853(i)–855. Parties to the agreement can be found guilty of a misdemeanor with a fine of up to $10,000 and/or imprisonment of up to one year. § 722.859. Any person other than a party, who assists or otherwise participates in a surrogacy contract for compensation, is subject to a felony with a possible fine of up to $50,000 and/or imprisonment of up to five years. *Id.*

242. § 722.859.

243. Ellen Trachman, *Will This Case Be the Tipping Point for Michigan to Change Its Harmful Surrogacy Laws?*, ABOVE THE L. (Feb. 10, 2021, 3:15 PM), https://abovethelaw.com/2021/02/will-this-case-be-the-tipping-point-for-michigan-to-

gestational surrogacy arrangements.[244] When the child is born, the parties can seek judicial intervention to legalize the arrangement—judges may grant a request by the intended parents to be named the child's legal parents or formally adopt the child.[245]

Michigan's surrogacy law shares the same legislative intent that underpinned New York's surrogacy statute before the CPSA was enacted: a desire to ban all forms of surrogacy to prevent exploitation.[246] However, a loophole permitting *uncompensated* gestational surrogacy emerged, which directly exacerbates surrogate exploitation in Michigan.[247] The Michigan Surrogate Parenting Act established a legal environment with "no oversight or regulation of transactions between surrogates and intended parents."[248]

Where states like New York codify statutory rules to govern the time before, during, and after a surrogate pregnancy,[249] Michigan is silent.[250] The effect of Michigan's statutory silence is stark. Hypothetically, if parties in New York and Michigan entered into identical compensated surrogacy arrangements, the outcomes would be drastically different. In New York, the surrogate would be compensated for her time and effort, and the intended parents would receive the joy of a child.[251] But in Michigan, the surrogate would retain legal parentage of a child to whom she was not biologically related, and the intended parents would face imprisonment.[252]

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change-its-harmful-surrogacy-laws [https://perma.cc/7UH2-9T2M] (summarizing the impact of Michigan's outdated law on parties who enter into uncompensated gestational surrogacy arrangements).

244. *Id.*

245. *Id.*

246. Chelsea VanWormer, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 923–24 (2012). *See also* §§ 722.851–863. *Supra* note 83 (discussing New York's former surrogacy law which was repealed and replaced by the CPSA).

247. VanWormer, *supra* note 246, at 924, 926.

248. *Id.* at 924.

249. *See, e.g.*, N.Y. FAM. CT. ACT § 581-403 (McKinney 2021).

250. *See* MICH. COMP. LAWS §§ 722.851–863 (2022); VanWormer, *supra* note 246 at 924, 926.

251. N.Y. FAM. CT. ACT § 581-502 (McKinney 2021).

252. *See* MICH. COMP. LAWS §§ 722.857–861 (2022).

b. Wisconsin: Statutory Silence Preserves an Unregulated Surrogacy Market

Unlike New York or Michigan, Wisconsin has no statute specifically prohibiting surrogacy agreements.[253] Rather, in Wisconsin, surrogacy arrangements are permitted by case law.[254] In *Rosecky v. Schissel*,[255] the Wisconsin Supreme Court held that surrogacy contracts were enforceable, so long as the agreement (1) was in the "best interests of the child" and (2) did not mandatorily terminate the surrogate's parental rights.[256] *Rosecky* marked a legal milestone for Wisconsin because the case was a matter of first impression.[257] Before *Rosecky*, Wisconsin's surrogacy landscape was nonexistent. But now, this case stands as the primary authority governing the validity and enforceability of Wisconsin surrogacy agreements.[258]

The court began its analysis by noting that no Wisconsin statute specifically addressed surrogacy.[259] Next, the court applied the basic elements of contract law (offer, acceptance, and consideration) to determine the legitimacy of the surrogacy agreement.[260] The court held

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253. Thomas J. Walsh, *Viewpoint: Wisconsin's Undeveloped Surrogacy Law*, WIS. LAW. (Mar. 1, 2012), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=85&Issue=3&ArticleID=2445.

254. *See id.*; Thomas J. Walsh, *Surrogacy Law Still Uncertain*, WIS. LAW. (Mar. 1, 2014), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11410.

255. 833 N.W.2d 634 (Wis. 2013).

256. *Id.* at 642, 651 (concluding that a surrogacy agreement is "a valid, enforceable contract unless enforcement is contrary to the best interests of the child").

257. *Id.* at 655.

258. *See id.* at 655–56.

259. *Id.* at 645, 647. Although four Wisconsin statutory provisions contemplated relief for intended parents, the Wisconsin Supreme Court explained that based on the facts of the case, "none of the statutory schemes neatly answer[ed]" the issue before the court. *Id.* at 645–47. For reference, the four statutes the court considered were WIS. STAT. § 69.14(1)(h) (2019–20) (describing the birth certificate registration process), § 891.40 (providing that when a woman is artificially inseminated with semen donated by a man who is not her husband, the donor has no rights regarding the child), § 767.41 (authorizing a court to make custody and placement decisions in non-surrogacy family matters and in reaching that decision, the court must consider sixteen enumerated factors), and § 48.41 (governing the termination of parental rights). *Rosecky*, 833 N.W.2d at 645–46.

260. *Id.* at 649.The court was forced to rely on contract law because Wisconsin's statutory provisions related to surrogacy, paternity, and birth certificates were scarce. *Surrogacy Agreement Generally Enforceable as a Contract*, AM. BAR ASS'N (Aug. 1, 2013), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/august-2013/surrogacy-agreement-generally-enforceable-as-a-contract [https://perma.cc/GY5C-L3SW]. The court reviewed many

that the agreement was in the best interest of the child because the "interests supporting enforcement . . . [were] more compelling than the interests against enforcement," and therefore, the contract promoted "stability and permanence in family relationship[s]."[261] Finally, the court held that the clause terminating the surrogate's parental rights was unenforceable because "there is no legal basis for involuntary termination" under contract law.[262] However, the provision was severable, so the remainder of the agreement was deemed valid.[263] The court concluded its opinion by citing a need for legislative action governing surrogacy agreements: "We respectfully urge the legislature to consider enacting legislation regarding surrogacy. Surrogacy is currently a reality in our Wisconsin court system. Legislation could 'address surrogacy agreements to ensure that when the surrogacy process is used, the courts and the parties understand the expectations and limitations under Wisconsin law.'"[264]

The court expressed concern about the legislative gap nearly a decade ago, but, as Chief Justice Shirley Abrahamson's concurring opinion explained,[265] many questions remain unanswered. Yet, despite scarce legislation governing Wisconsin surrogacy arrangements, parties continue to execute agreements in the post-*Rosecky* world.[266] Examining

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sections of the law (including private custody, adoption, and termination), but none specifically addressed surrogacy. *Id.*

261. *Rosecky*, 833 N.W.2d at 649. Although a "circuit court is bound by a surrogacy contract 'unless enforcement is contrary to the best interests of the child,'" the Wisconsin Supreme Court reasoned that in custody and placement matters, circuit courts have "discretion to make a determination of what is in a child's best interests." *Id.* at 652, 663 (cleaned up).

262. *Id.* at 651. Ultimately, in holding that surrogacy agreements were enforceable, the court found that public policy more strongly supported stability and permanence for children. *See id.* at 649–50; *Surrogacy Agreement Generally Enforceable as a Contract*, *supra* note 260 ("Enforcing surrogacy agreements, provided they are not contrary to the best interests of the child, promotes safety and permanence because it allows the intended parents to plan for the child's birth and would tend to reduce [contentious] litigation that might disrupt a child's life.").

263. *Rosecky*, 833 N.W.2d at 651–52. Ultimately, the Roseckys were awarded permanent custody and placement of the child. *Id.*

264. *Id.* at 653 (cleaned up) (quoting Walsh, *supra* note 253).

265. *Id.* at 654, 654 n.2.

266. *See, e.g.*, Daniel Bice, *'Activist Judge' Compares Surrogacy to Human Trafficking*, MILWAUKEE J. SENTINEL (July 24, 2016), https://archive.jsonline.com/watchdog/noquarter/surrogacy-case-brings-couple-yearlong-expensive-struggle-b99766406z1-388076972.html [https://perma.cc/NQ3V-LMJY] (discussing a surrogacy agreement executed in 2016); Stephanie Grady, *'Wisconsin Is Kind of Old School:' Some Say 'the Law Has Not Kept Up with the Science' of Surrogacy*, FOX6 MILWAUKEE (Nov. 19, 2018), https://www.fox6now.com/news/wisconsin-is-kind-of-old-school-some-say-the-law-has-not-kept-up-with-the-science-of-surrogacy [https://perma.cc/LR3N-NV6D] (discussing a surrogacy agreement executed in 2018).

these unresolved questions with the *Rosecky* decision in mind underscores that—absent statutory law—parties to Wisconsin surrogacy agreements operate in a largely unregulated world.[267]

First, the court failed to specify criteria that a surrogacy agreement must satisfy to be deemed enforceable. The court broadly held that surrogacy agreements are valid if (1) the agreement is in the "best interests of the child" and (2) the agreement does not purport to terminate parental rights.[268] At face value, these two requirements regulate Wisconsin surrogacy arrangements. Yet in practice, these two requirements are largely undefined.

In *Rosecky*, the court confirmed that circuit court judges have some discretion when making custody and placement determinations.[269] When these determinations apply to *non-surrogacy-born children*, Wis. Stat. § 767.41 mandates[270] that courts "shall consider all facts relevant to the best interest of the child," including consideration of sixteen statutorily enumerated factors.[271] But when these determinations apply to *surrogacy-born children*, the court conceded that Wis. Stat. § 767.41—including the enumerated factors—does not apply.[272] Since "there is no final review by a court nor a determination that the [surrogacy] process has protected" the child's best interests,[273] what ultimately satisfies the "best interests" standard in a Wisconsin surrogacy agreement is abstruse.

Additionally, the *Rosecky* court failed to (1) articulate selection criteria requirements—like those in New York—that intended parents or surrogates must satisfy to enter surrogacy arrangements,[274] (2) provide surrogate compensation guidelines, or (3) specify the legal implications for surrogates who enter surrogacy arrangements.[275] Rather, the court generally held that "surrogacy agreement[s]" are valid, enforceable contracts.[276] In sum, the *Rosecky* decision facially represents a

267. Grady, *supra* note 266.

268. *Rosecky*, 833 N.W.2d at 642, 653.

269. *Id.* at 652–53.

270. *Id.* at 645.

271. WIS. STAT. § 767.41(5).

272. *Rosecky*, 833 N.W.2d at 647.

273. Walsh, *supra* note 253.

274. *See Rosecky*, 833 N.W.2d 634; N.Y. FAM. CT. ACT § 581-402 (McKinney 2021); *see also* Walsh, *supra* note 253 (juxtaposing Wisconsin's statutory requirements for adoption with the absence of codified requirements for surrogacy).

275. *See Rosecky*, 833 N.W.2d 634. Notably, however, Wisconsin has statutory guidelines regarding compensation in adoption matters, which is an analogous process. *See* Walsh, *supra* note 253.

276. *Rosecky*, 833 N.W.2d at 642.

progressive approach to Wisconsin surrogacy agreements, but in practice, it was at best a baby step (pun intended)[277] in the right direction.

B. Paths to Legal Parentage: The CPSA Versus Michigan and Wisconsin Legislation

The second issue surrogacy opponents raise pertains to legal parentage of the child. Unreliable paths to parentage leave parties—particularly the intended parents and surrogacy-born child—vulnerable to judicial discretion.[278] Recognizing the unique challenges in establishing parentage, the CPSA explicitly incorporates remedies to extend the rights of legal parentage to *all* prospective parents regardless of sexual orientation or marital status. Conversely, Michigan and Wisconsin bar clear paths to parentage for many parents, including those who are unmarried or in same-sex relationships.

1. THE CPSA'S CORRECTIVE PROVISIONS: CREATING A STRAIGHTFORWARD PATH TO LEGAL PARENTAGE

To combat obstacles for establishing legal parentage in surrogacy arrangements, New York statutorily incorporated provisions to create clear paths to parentage for surrogacy-born children. Specifically, the CPSA defines "parent" to include *all* parents: single, married, unmarried, heterosexual, and same-sex.[279] The CPSA also restricts donors' ability to assert parental rights.[280] These protections are summarized below.

a. Redefining "Parent" to Simplify the Process for Establishing Legal Parentage of Surrogacy-Born Children

In recent years, the traditional understanding of "parent," which was commonly understood to be "the mother/father nuclear family," has evolved.[281] To ensure that the law protects *all* families, the CPSA creates

277. *See generally* Joshua J. Bryant, *A Baby Step: The Status of Surrogacy Law in Wisconsin Following* Rosecky v. Schissel, 98 MARQ. L. REV. 1729 (2015).

278. *See infra* Section II.B.2 (discussing prohibitive paths to establishing legal parentage); *see generally* Ruth *supra* note 45 (explaining that inconsistent surrogacy laws nationwide preclude courts from implementing a uniform approach when disputes arise in surrogacy cases).

279. *See* Geldenhuys, *supra* note 14, at 31; *see also* Nakamura, *supra* note 214, at 169, 171. Before the CPSA, New York lacked a statutory definition for the term "parent." Wendy B. Samuelson, *Recent Legislation, Cases and Trends in Matrimonial Law*, N.Y. ST. BAR ASS'N FAM. L. REV. 33, 33 (2020).

280. Nakamura, *supra* note 214, at 171.

281. *See* Harland, *supra* note 158, at 122.

a streamlined process to establish parentage of surrogacy-born children.[282] Under the CPSA, "[b]iology is no longer the sole basis for determining parentage in New York."[283]

Now, parentage is based on "intent and consent."[284] The CPSA expands the means by which intended parents may establish consent.[285] For example, if spouses express their intent and consent to conceive a child via surrogacy, both are presumed to be the child's legal parents.[286] But parentage does not hinge on marriage; unmarried parents can prove consent by establishing an electronic "record" of consent—*e.g.*, "birth announcements naming both parents, documents the intended parents signed at a fertility clinic, emails to family and friends announcing the pregnancy and birth, or text messages between the parents."[287]

New "intent and consent" standards also govern donors (persons who donate gametes or embryos).[288] Any donor who has "donative intent" and participates in the surrogacy process, is *not* presumed to be a parent.[289] Unknown donors are required to offer "proof of consent and *donative* intent" to participate in the donation process.[290] Comparatively, to establish donative intent in surrogacy arrangements using known donors, additional steps must be taken. The known donor and the intended parents must execute a record before a "notary, two witnesses or a health care practitioner."[291] But even in situations where donative intent of known donors is not properly established via notarized record, the CPSA *still* protects the intended parents and the child.[292] The intended parents may submit "clear and convincing evidence" to establish that prior to conception the donor agreed that they have no parental or proprietary interest in the embryos or gametes.[293]

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282. *See* Geldenhuys, *supra* note 14, at 32, 33.

283. *Id.* at 31.

284. *Id.*

285. *Id.*

286. *Id.* The CPSA's definition of "spouse" includes partners in a civil union or domestic partnership. The presumption is not applicable in certain situations: if the parties signed a separation agreement, have lived apart for three years, or if it is shown by clear and convincing evidence that a spouse conceived a child through assisted reproduction without the consent of the other parent. *Id.*

287. *Id.* If the unmarried, non-genetic parent cannot establish a "record," the CPSA permits the non-genetic parent to show consent by clear and convincing evidence. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* (emphasis added).

291. *Id.* For example, a typical Donor Agreement or standard consent document executed by all parties would meet these requirements. *Id.*

292. *Id.* at 32 (emphasis added).

293. *Id.*

In addition to modernizing the law to protect *all* families, the CPSA amended New York's procedure for obtaining a "judgment of parentage."[294] Parentage orders offer finality; because they are issued by a court of law, they "are therefore entitled to recognition and enforcement anywhere in the United States under the full faith and credit clause of article IV, section 1, of the United States Constitution."[295] Although a "judgment of parentage is not [required] to establish parentage" (as parties can rely on the aforementioned means to establish consent and thereby prove parentage), it is an added measure that "proves parentage when parents travel or move to states where their parentage is not acknowledged by the laws of that jurisdiction."[296]

A "judgment of parentage" may benefit all families, "but it offers important protection particularly for same-sex couples, whose parentage of a child may be questioned if they travel or move to another state or country where a non-genetic parent's parentage is questioned or not recognized."[297] Ultimately, the CPSA codifies a smooth process for establishing parentage.[298] Per the statutory language, so long as the petition for a Judgment of Parentage satisfies the requirements, the court "shall adjudicate" the intended parents to be the parents of the child. Thus, judicial discretion to determine parentage is not permitted where the provisions of the CPSA are met.[299]

2. PROHIBITIVE LAWS IN MICHIGAN AND WISCONSIN: PRECLUDING PARENTS' PATHWAY TO LEGAL PARENTAGE

Unlike the inclusive parentage provisions of the CPSA, surrogacy laws in other states create ambiguous, complex paths for establishing parentage of surrogacy-born children. For example, Michigan and Wisconsin—a non-surrogacy-friendly state and a gray-area state, respectively—demonstrate how statutory language (or lack thereof)

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294. *Id.* Note that "judgment of parentage" and "parentage order" are used interchangeably throughout this Comment.

295. *Id.* (citing U.S. CONST. art. IV, § 1).

296. *Id.* at 31–32. The CPSA permits pre- and post-birth judgments of parentage. Pre-birth orders establishing parentage before a child is born are particularly significant. Not only do these orders offer non-genetic parents peace of mind about who will "assume parental responsibilities for the child," but they are "particularly important if the gestating intended parent is unable to act or dies." *Id.* at 32.

297. *Id.*

298. *Id.* The CPSA encourages a simple and smooth process for establishing parentage; not only does the CPSA limit judicial discretion for granting parentage, but the CPSA does not require the parties to appear in court. Comparatively, many states—including Wisconsin—require parties to appear in court to obtain a pre-birth order, post-birth order, or both. *See supra* notes 196–197 and accompanying text.

299. Geldenhuys, *supra* note 14, at 32; *see also* N.Y. FAM. CT. ACT § 581-202(c) (McKinney 2021).

prevents parents from establishing legal parentage of children born via surrogacy. Though the surrogacy laws in Michigan and Wisconsin are distinctly different, the negative effects on parentage are similar: intended parents are forced to adopt their own children.

a. Michigan: Statutory Surrogacy Ban Forces Parents to Adopt Their Own Children to Establish Legal Parentage

As noted above, *all* surrogacy contracts are prohibited under Michigan law; however, a statutory loophole permits parties to practice *traditional* surrogacy by entering uncompensated surrogacy arrangements.[300] This informal system of surrogacy forces intended parents—even those that are biologically related to their child—to pursue adoption to establish legal parentage of their child.[301] Intended parents seeking to formally legalize their surrogacy arrangement require judicial consent, and such requests may typically only be made *after* the birth of the child.[302] Unlike New York law, which limits judicial discretion to establish legal parentage,[303] Michigan judges are not required to honor an intended parents' requests.[304]

The additional hurdles faced by intended parents in Michigan—including both married couples and single individuals—are best exemplified by the case of Jordan and Tammy Myers, a Michigan couple that delivered twins via gestational surrogacy in January 2021.[305] Following their twins' birth, the Myerses' presented the court with affidavits from the surrogate, the surrogate's husband, and the fertility doctor, attesting that the Myerses were the twins' biological parents.[306] Nevertheless, two Michigan judges denied the Myerses' request to be

300. *See generally* MICH. COMP. LAWS §§ 722.851 to 722.863 (2022); *see e.g., Is Surrogacy Legal in Michigan?*, FAMILY INCEPTIONS, https://familyinceptions.com/state/michigan [https://perma.cc/3AX2-ZLZD] (last visited Mar. 7, 2023) [hereinafter FAMILY INCEPTIONS, *Michigan*].

301. *See* § 722.855; *see also* Trachman, *supra* note 243; Cramer, *supra* note 239.

302. *See* Trachman, *supra* note 243; FAMILY INCEPTIONS, *Michigan*, *supra* note 300.

303. Geldenhuys, *supra* note 14, at 32.

304. § 722.855; *see* Trachman, *supra* note 243.

305. *See* Cramer, *supra* note 239 (explaining that Ms. Myers, 39, was diagnosed with breast cancer, so she harvested her eggs "before undergoing multiple surgeries, including a partial hysterectomy and a bilateral mastectomy" and subsequently delivered twins via a gestational surrogate).

306. *Id.*

declared the legal parents of their twins.[307] The Myerses' only recourse was to establish legal parentage of their twins via formal adoption.[308]

Adoption is a comprehensive, time-consuming, and expensive process that requires numerous formalities to demonstrate parental fitness: the intended parents must be fingerprinted, undergo criminal background checks, obtain character reference letters, and participate in home visits by a social worker.[309] Until the two-year-long process concluded, the surrogate and her husband were listed as the legal parents on the twins' birth certificates, and the Myerses were only permitted to keep their biological twins in their physical custody under a "temporary permission" order executed by the surrogate.[310]

Michigan's outdated surrogacy law is a double-edged sword. The statutory loophole permits intended parents to enter altruistic surrogacy arrangements,[311] but the law fails to recognize and extend legal parental rights to the intended parents.[312] Intended parents are barred from pursuing straightforward paths to legal parentage; in turn, like the Myerses, intended parents in Michigan are forced to pursue adoption to obtain basic parental rights of their own children.[313]

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307. *Id.* In part, their request was denied because "Michigan law does not automatically recognize babies born to surrogates as the legal children of their biological parents." *See* Abramowitz, *supra* note 210.

308. *See* Cramer, *supra* note 239.

309. *Id.* Despite the biological relationship between the Myerses and their twins, the state of Michigan "does not automatically recognize babies born to surrogates as the legal children of their biological parents . . . [so] the birth certificates for the twins, a boy named Eames and a girl named Ellison, list the surrogate and her husband as the parents, not Jordan and Tammy Myers." *Id.* In other words, the Myerses must undergo an invasive and comprehensive adoption process to demonstrate that they are "fit to adopt their own children." *Id.*

310. *Id.* On December 8, 2022—nearly two years after the birth of their twins—the Myerses legal battle concluded. A Michigan judge finalized the adoption and officially recognized the Myerses as their "biological twins' legal parents." Rachel Burchfield, *Mich. Parents Officially Adopt Their Biological Children After Lengthy Legal Battle: 'It's a Great Day*,*'* PEOPLE (Dec. 8, 2022, 10:49 AM), https://people.com/human-interest/mich-parents-officially-adopt-their-biological-children-after-legal-battle [https://perma.cc/CV9P-F8TD].

311. *See supra* note 45 (explaining the difference between compensated and compassionate or altruistic surrogacy).

312. *See generally* SURROGATE PARENTING ACT, MICH. COMP. LAWS §§ 722.851 to 722.863 (2022); *see* Cramer, *supra* note 239.

313. *See* Cramer, *supra* note 239. Although the Myerses journey has concluded, the Myerses continue to advocate "for the passage of four bills introduced [in the Michigan House of Representatives] that will update the state's surrogacy laws." *See* Burchfield, *supra* note 310. The four bills, introduced in September 2022, are as follows: (1) S.B. 1177, 101st Leg., Reg. Sess. (Mich. 2022) (proposing to repeal and replace the SURROGATE PARENTING ACT, MICH. COMP. LAWS § 722.855 (2022) with a "gestational surrogacy parenting act" permitting gestational surrogacy agreements); (2) S.B. 1178, 101st Leg., Reg. Sess. (Mich. 2022) (proposing a legal process to list the intended parents

b. Wisconsin: Statutory Silence on Surrogacy Agreements Requires Intended Parents to Pursue Adoption to Establish Legal Parentage

As described above, there is no statute expressly prohibiting surrogacy agreements in Wisconsin; parties are permitted to enter surrogacy agreements *solely* based on case law.[314] This deficient surrogacy legislation creates an informal and largely unregulated surrogacy landscape.[315] Intended parents may rightfully enter surrogacy arrangements in Wisconsin, but as the Wisconsin Supreme Court forewarned, the limitations of the law are not clearly articulated to intended parents.[316]

If Michigan's surrogacy law is a double-edged sword, Wisconsin's surrogacy legislation is, at best, a landmine. Although case law permits intended parents in Wisconsin to enter surrogacy arrangements, the case law is silent on two key factors affecting the contracting parties.[317] First, the *Rosecky* Court refused to mandate the termination of the biological mother's (who was also the surrogate) parental rights.[318] Wisconsin courts presume that the biological mother (the woman who birthed the child), "is presumptively [the child's] legal mother."[319] Until the biological mother voluntarily terminates her rights, she is recognized as the child's legal mother.[320] Second, Wisconsin case law fails to distinguish the type of surrogacy arrangement that parties are permitted to enter: traditional, gestational, or both.[321] Thus, no legal barriers exist to prohibit parties in Wisconsin from executing traditional surrogacy

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"on the [birth] certification form" at birth); (3) S.B. 1179, 101st Leg., Reg. Sess. (Mich. 2022) (proposing changes to Michigan's criminal code, which currently classifies compensated gestational surrogacy agreements as a Class E felony); and (4) S.B. 1180, 101st Leg., Reg. Sess. (Mich. 2022) (proposing a comprehensive process to establish parentage of children born via surrogacy). *See Democrats Working to Update Surrogacy Laws, Keep Families Together*, MICH. HOUSE DEMOCRATS (Sept. 21, 2022), https://housedems.com/democrats-working-to-update-surrogacy-laws-keep-families-together [https://perma.cc/EMC9-2CD7].

314. *See Rosecky v. Schissel*, 833 N.W.2d 634, 647 (Wis. 2013).

315. *See* Walsh, *supra* note 253.

316. *Rosecky*, 833 N.W.2d at 653 ("Legislation could address surrogacy agreements to ensure that when the surrogacy process is used, the courts and the parties understand the expectations and limitations under Wisconsin law.") (cleaned up) (quoting Walsh, *supra* note 253).

317. Joanna L. Grossman, *A Matter of Contract: The Wisconsin Supreme Court Rules Traditional Surrogacy Agreements Are Enforceable,* VERDICT (Aug. 6, 2013), https://verdict.justia.com/2013/08/06/a-matter-of-contract-the-wisconsin-supreme-court-rules-traditional-surrogacy-agreements-are-enforceable [https://perma.cc/49MS-VETZ].

318. *Rosecky*, 833 N.W.2d at 649.

319. *Id.*

320. *See* Grossman, *supra* note 317.

321. *See* Walsh, *supra* note 253; *Rosecky*, 833 N.W.2d at 638.

agreements—the same type of arrangement that spurred litigation in both the *Rosecky* case and the *Baby M* case.[322]

The *Rosecky* decision effectively encourages unsettling outcomes for intended parents. So long as the biological mother is considered the legal mother, the intended parents cannot adopt the child.[323] For example, consider the *Rosecky* case: the child's birth mother is *Monica*, not *Mrs. Rosecky*.[324] Thus, legal parentage resides with *Monica* and *Mr. Rosecky*—not *Mrs. Rosecky* and *Mr. Rosecky*.[325] *Monica* is permanently prohibited from winning custody or placement of the child (since the court upheld the remainder of the agreement); but, she won the right to retain legal parentage of the child.[326] Per Wisconsin case law, *Monica* may voluntarily terminate her parental rights, permitting *Mrs. Rosecky* to establish legal parentage of the child via formal adoption.[327] But if *Monica* retains her parental rights, *Mrs. Rosecky* has no recourse to establish legal parentage of the child despite being awarded custody and placement.[328]

Like Michigan's adoption process discussed above, adoption is a lengthy and time-consuming process in Wisconsin.[329] Adoption requires intended parents to appear in court at least once to establish parentage of the child.[330] Further, court appearances present the additional hurdle of

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322. *Rosecky*, 833 N.W.2d at 638; *see In re Baby M*, 537 A.2d 1227, 1254–55 (N.J. 1988). Consider, for example, a modern surrogacy arrangement similar to *Baby M.* Intended parents and a surrogate execute a surrogacy contract. The contract states that the intended father's sperm and the surrogate's egg will be used to impregnate the surrogate. However, after the surrogate is impregnated, the relationship between the parties deteriorates and the surrogate claims parental rights of the child. Despite executing a surrogacy contract, Wisconsin courts may permit the surrogate to retain legal rights of the child.

323. Grossman, *supra* note 317; *see Rosecky*, 833 N.W.2d at 644, 646.

324. *Rosecky*, 833 N.W.2d at 646 (emphasis added).

325. *Id.* (emphasis added).

326. *Id.* at 651 (emphasis added).

327. *See* Grossman, *supra* note 317; *see* CREATIVE FAM., *Wisconsin*, *supra* note 192 (emphasis added).

328. *See Is Surrogacy Legal in Wisconsin? Surrogacy Law in Wisconsin*, FAMILY INCEPTIONS, https://familyinceptions.com/state/wisconsin [https://perma.cc/YG7C-DCNG] (last visited Mar. 7, 2023) [hereinafter FAMILY INCEPTIONS, *Wisconsin*]; *see also supra* Section II.B.2 (explaining that certain rights—including citizenship, access to government benefits, and inheritance rights upon the death of a parent—only extend from a parent to their child if the parent retains legal parentage of the child).

329. *See, e.g.*, *Wisconsin Adoption Finalization*, AM. ADOPTIONS, https://www.americanadoptions.com/wisconsin-adoption/finalize-your-adoption-in-wisconsin [https://perma.cc/F5QS-9VBL] (last visited Mar. 7, 2023).

330. *See id.*; *see also* FAMILY INCEPTIONS, *Wisconsin*, supra note 328 (noting that typically "only one court hearing" is required for a Wisconsin court to issue a parentage order). Comparatively, the CPSA frontloads the legal efforts of establishing

preferential and discriminatory treatment: depending on the judge and county assigned to a case, married and heterosexual couples are more likely to obtain a final order for a birth certificate.[331]

Wisconsin's statutory silence not only complicates the landscape of surrogacy, but by leaving parental determination to the courts, it presents unique concerns of bias against same-sex couples and unmarried individuals.[332] Subsequently, intended parents are precluded from pursuing direct paths to establish legal parentage of their child.[333] Like the Myerses in Michigan,[334] without legislation, intended parents in Wisconsin must pursue adoption to obtain basic legal rights of their biological children born via surrogacy.[335]

CONCLUSION

New York's enactment of the CPSA simultaneously lifted the nearly thirty-year ban on compensated gestational surrogacy and created a modernized framework to regulate, facilitate, and enforce surrogacy arrangements. In response to legislative inadequacies prevalent in other states' surrogacy laws—specifically, surrogate exploitation and prohibitive paths to establishing parentage—the CPSA transformed New York from one of the least surrogacy-friendly states to the *most* surrogacy-friendly state. To remedy the anti-surrogacy concerns discussed above, the CPSA codifies novel provisions unlike any other state's laws: it requires parties to execute a Surrogates' Bill of Rights granting nonwaivable protections to surrogates,[336] it mandates GSPs and agencies be licensed,[337] it enumerates legal and regulatory requirements for surrogates and intended parents to enter surrogacy arrangements,[338] and it simplifies the process for establishing legal parentage of surrogacy-born children.[339]

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parenthood, necessarily lessening the need for courtroom appearances. *See supra* Section I.C. 2.

331. *See* FAMILY INCEPTIONS, *Wisconsin*, supra note 328; CREATIVE FAM., *Wisconsin*, *supra* note 192.

332. *See id.*

333. *Id.*; *see also* SURROGATEFIRST, *Wisconsin*, *supra* note 196.

334. *See* Cramer, *supra* note 239.

335. *See* FAMILY INCEPTIONS, *Wisconsin*, *supra* note 328.

336. N.Y. FAM. CT. ACT § 581-601 (McKinney 2021); Williams, *supra* note 10, at 25.

337. Williams, *supra* note 10, at 23; *see also CPSA Update*, NYAAFF, *supra* note 13.

338. § 581-401 Geldenhuys, *supra* note 14, at 31–32.

339. §§ 581-201, -406 *see* Williams, *supra* note 10, at 24. This Comment uses "legal parentage" to refer to the process of determining the surrogacy-born child's legal parents. *See supra* Section II.B.2 (discussing the distinction between parental

As the gold standard for surrogacy legislation, the CPSA proffers other states model legislation to mend the fractured surrogacy market. Namely, in states like Michigan and Wisconsin—a non-surrogacy-friendly state and a gray-area state, respectively—surrogacy legislation is conspicuously flawed. Despite the dangers of the existing surrogacy landscape, parties like the Myerses and Roseckys still enter surrogacy arrangements, highlighting the need for implementing a uniform approach to protect parties to surrogacy agreements.

In Michigan and Wisconsin, parties are left vulnerable. These states' approaches (1) exacerbate surrogate exploitation by permitting parties to enter unregulated surrogacy arrangements and (2) preclude paths to establishing legal parentage by requiring parties to adopt their own children. Comparatively, the CPSA protects *all* parties: the surrogate, the intended parents, and the child. New York's surrogacy legislation encourages a modernized view of the family unit that balances the needs of parents—single, married, unmarried, heterosexual, and same-sex—with the rights of surrogates. Ultimately, the CPSA codifies the New York state (of mind) approach and advances model legislation for other states seeking to modernize their surrogacy legislation and extend equal rights to *all* parents.

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responsibility, which governs the child-parent relationship until the child turns eighteen-years-old, and legal parentage, which extends beyond the child's eighteenth birthday).