Conceiving Real Protection: Paternalistic Surrogacy Laws & The Necessity of Massachusetts Legislation that Appropriately Protects the Gestational Surrogate

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I. Introduction

In the United States, social policy has advanced much more slowly than the burgeoning field of reproductive technologies. Since the 1970s, assisted reproductive technologies (“ART”) and surrogacy arrangements have steadily increased, with social discourse following suit. Historically, surrogacy arrangements consisted of intrauterine insemination, in which a woman was artificially impregnated with the sperm of a man (the "intended father"). This arrangement, known as “traditional surrogacy,” has largely been replaced by “gestational surrogacy,” wherein a woman carries a child to whom she is genetically unrelated. Due to advances in ART, gestational surrogacy has enjoyed increased judicial acceptance. That is, courts are more willing to enforce the parental rights of the intended parents when the surrogate is not biologically related to the child. Nevertheless, many states are reticent to enact surrogacy legislation. Aside from California, Massachusetts’ courts have rendered the most surrogacy...
decisions in the nation. However, the state has yet to adopt comprehensive surrogacy legislation. Although Massachusetts’ courts have demonstrated a willingness to honor surrogacy contracts, the lack of guiding legislation on this matter is glaringly apparent.

This paper will first address the competing frames within the contested realm of surrogacy, contrasting the “baby selling” with “gift of life” rhetoric. Through these frames, this paper will compare Illinois and New Hampshire’s respective regulation of surrogacy contracts. Comparing the intended-parent friendly scheme in Illinois with the surrogate mother-friendly posture of the New Hampshire law, this paper will advocate for a sensitive balance in any forthcoming Massachusetts legislation. In envisioning Massachusetts legislation, I will argue that true protection of the surrogate can be achieved by allowing full payment to the surrogate (beyond medical expenses), and banning any post-birth termination provisions. Additionally, I will urge Massachusetts to incorporate mandatory healthcare for the surrogate, and require legal counsel for both parties to the contract. Finally, I will advocate for incentivization of “gestational surrogacy” in light of the ethical (and often religious) concerns that arise from “traditional surrogacy” arrangements. The ethical debate over surrogacy illuminates the societal forces that often stall legislation – these dilemmas are apparent in the New Hampshire and Illinois surrogacy laws. Massachusetts’ lawmakers can no longer punt this hotly contested issue to the courts, contributing to the patchwork of uncertain precedent for families opting for surrogacy arrangements.

II. Privacy, Choice & Families: Competing Frames with the Surrogacy Debate

The competing frames in the surrogacy debate may be accounted for by three deeply engrained American ideals: exhalation of privacy rights, freedom & choice, and protection of families. In 1986, a New Jersey court found itself confronted with these contested ideals in perhaps the most infamous surrogacy case to date, In re Baby M. Baby M illuminated the competing interpretations of surrogacy, and in many ways, has continued to shape the surrogacy debate in the United States. Baby M involved a traditional surrogacy contract, wherein William Stern provided the sperm and Mary Beth Whitehead the egg and uterus. After delivering a baby girl, Ms. Whitehead suffered a change of heart and fled with the infant. In the wake of media coverage, many interest groups and politicians spoke against “commercialization of motherhood,” condemning the implicit “baby selling” in the Stern/Whitehead arrangement. On the other hand, many framed the Baby M debate in terms of Whitehead’s “brave choice” to give the Sterns the gift of life. Ruling in a legal void, the New Jersey court found the Stern/Whitehead contract void as a matter of public policy. In the years following Baby M, the debate has continued, igniting similar rhetorical strategies on both sides of the debate.

Groups uncomfortable with the cohabitation of consumer values and baby making, focused their arguments on the sanctity of motherhood and exploitation of women. From this angle, legislators were tasked with protecting women from becoming
"anonymous baby factories."[17] Andrew Kimball, attorney for the National Coalition Against Surrogacy, asserted, "you cannot have a commercial contract for the sale of a baby. You cannot have people turning over their children like they were televisions or tennis rackets."[18] Surrogacy opponents also utilized “choice” rhetoric, arguing that women who enter surrogacy contracts risk “profound erosion of autonomy over their own bodies and over their rights as a genetic parent.”[19] New York Family Court Judge Karen Peters opined that, "by entering into this contract and having the court approve it, [a woman] has to some extent waived the right to control her own reproductive choice."[20]

Among those who sought to legitimize surrogacy contracts, choice, privacy and family values had very different meanings. In the wake of the highly popular “baby selling” rhetoric, surrogacy supporters focused not on the child involved in the arrangement, but rather on the service provided by the gestational carrier. Interest groups in California, for example, emphasized that payment would “be given to a surrogate as ‘compensation for her services,’ and not payment for the child.”[21] Many civil rights organizations quickly adopted the “choice” strategy to promote surrogacy recognition and regulation. National Organization of Women committee member Marsha Elliot opined: “[o]ur bottom line on this issue is that women have the right to control their own bodies – not you, not me, not the legislature, but each individual woman.”[22] Other women’s groups expressed concern over the state’s interference in a surrogate’s reproductive choice, highlighting that the right of procreative choice constitutes a protected activity under the Constitution.[23] Finally, proponents of surrogacy utilized the popular traditional family values rhetoric to emphasize the “gift of life” that a surrogate grants to couples desiring a family. Jan Sutton, spokesperson for the National Association of Surrogate Mothers, testified that the “child born [through a surrogacy arrangement] is not ‘bought,’ ‘rejected,’ ‘abandoned,’ or ‘sold,’ but is ‘planned’, ‘desired,’ ‘loved,’ ‘given,’ and ‘nurtured’ by the adults involved.[24]

Despite making legislative inroads through family, choice and privacy rhetoric, advocates for surrogacy battled a strong frame of female exploitation and commercialization of motherhood in the post-Baby M years. Thus, surrogacy advocates could not fully combat the so-called “moral dilemmas” posed by surrogacy. The ideals of traditional families and motherhood have led to an undeniable compulsion to protect women who chose to become surrogates.

### III. Surrogacy Legislation Within Prevailing Societal Frameworks

Among the states that have regulated surrogacy contracts, Illinois and New Hampshire exemplify the competing frames within the surrogacy debate. Specifically, the Illinois legislature enacted the 2004 Gestational Surrogacy Act (GSA) to “protect . . . all parties involved,” including the legal rights of the child.[25] Illinois’s regulation of surrogacy contracts is sympathetic to intended parents seeking to create a family of their own. Although Illinois purports to protect both parties, the GSA incorporates many paternalistic elements, implicitly supporting the notion that a surrogate lacks the capacity to contract. The New Hampshire
legislature’s 1991 surrogacy legislation more readily addresses the “baby selling” fear. Most explicitly, New Hampshire strictly limits monetary compensation for surrogacy arrangements.[26] New Hampshire’s statute, while purporting to protect the child’s best interest, is considered “so onerous in practice, that it has had the effect of discouraging rather than supporting surrogacy arrangements.”[27] Thus, while both Illinois and New Hampshire have taken admirable steps towards recognizing surrogacy arrangements, both statutory regimes suffer serious flaws, and ultimately go about protecting the surrogate in inappropriate ways.

A. Illinois Gestational Surrogacy Act

Perhaps as a response to the early court battles over surrogacy, the GSA permits surrogacy contracts to be enforceable without court intervention.[28] The GSA requires that the surrogacy agreement be in writing, and that legal counsel separately represent the surrogate and intended parents.[29] All parties must formally receive information regarding the “legal, financial, and contractual rights, expectations, penalties and obligations of the surrogacy agreement.”[30] In addition to a legal consultation, the GSA requires that a surrogate be at least 21 years of age, have given birth at least once before, and have completed a medical and mental health evaluation.[31]

The intended parents must demonstrate a medical need for surrogacy and must contribute at least one of the gametes,[32] posing a problem for a couple where neither individual can produce viable gametes.[33] Notably, the GSA’s gamete provision prevents single women who have had a hysterectomy for medical reasons, or single men who are unable to produce viable sperm from entering into surrogacy contracts.[34] If compensation is to be given to the surrogate in return for her services, the GSA requires that payment be placed in escrow prior to commencing any medical procedures.[35] The surrogate and her spouse (if any) are not the legal parents of the child.[36] The intended parents are the legal parents of a child born of the surrogate from the moment of birth, as established by a pre-birth certification by the Illinois Department of Public Health.[37]

The GSA is indeed comprehensive, and addresses many concerns raised by unregulated surrogacy arrangements. Namely, the establishment of a pre-birth order, eliminating the need for post-birth judicial intervention, distinguishes Illinois from other states with no surrogacy legislation. However, the GSA provisions on gamete contribution, payment, and health care are problematic for their rigidity and paternalist undertones.

B. New Hampshire’s Surrogacy Legislation

Prior to insemination, New Hampshire requires judicial preauthorization of a surrogacy agreement.[38] At the hearing, the court must find that all parties to the contract have given their informed consent, that both the surrogate and the intended parents have complied with the 6-month residency requirement, and that the agreement contains no unconscionable terms.[39] The surrogate must be
“medically acceptable,” meaning that she must have had at least one pregnancy and be in good health.[40]

New Hampshire has a rigid eligibility requirement for intended parents. For example, the intended mother must be infertile.[41] Similar to Illinois, one of the intended parents must provide a gamete to be used to impregnate the surrogate, with the caveat that the intended mother or the surrogate must provide the egg.[42] Under the statutory egg restriction, a valid surrogacy arrangement can proceed with (1) the egg from the intended mother and sperm of the intended father; (2) the egg from the intended mother and sperm from a gamete donor; (2) egg of the surrogate and sperm from the intended father – not, an egg from a donor and the sperm of the intended father.[43] New Hampshire allows the surrogate to receive payment, which may include “pregnancy-related expenses; lost wages; health, disability and life insurance; reasonable attorney’s fees and court costs; and counseling fees and costs.”[44] However, the statute expressly prohibits anyone from “financially promoting, soliciting or inducing parties to enter into a surrogacy arrangement.”[45] This payment provision presumably leaves open for interpretation when a sum of money crosses from “reasonable expenses” to “inducement.” Finally, New Hampshire provides that the gestational carrier has the right to keep the child if, within seventy-two hours after the birth of the child, the carrier executes a signed statement of her intent to keep the child and delivers the writing to the intended parents and the attending physician or the hospital medical director or designee.[46] This seventy-two hour waiting period effectively destroys the contractual security for the intended parents.

While on its face New Hampshire regulates and allows surrogacy, the surrogate’s absolute right to keep the child at her election negates the utility of the pre-judicial approval.[47] The New Hampshire law is thus is overly problematic and may have a serious deterrent effect, negating the impact of legislation. Specifically, the rigid provision on gamete & egg donation, the payment provisions, and the potentially contract-voiding seventy-two hour waiting period both infantilize the surrogate and undermine the statute.

C. Neither Illinois nor New Hampshire Effectively Protect the Surrogate

The prevailing desire to protect the surrogate through legislation suggests a deeply rooted concern for “exploitation” and lack of surrogate agency. The GSA was enacted “to safeguard the interests of children born as a result of these technologies...”[48] In practice, however, the GSA regulates the parties actions far before a child results. Similarly, in New Hampshire, the payment provisions suggest a far greater concern for protecting the surrogate than ensuring the best interests of the yet-to-be implanted child. Finally, the 72-hour provision in the New Hampshire statute, wherein a surrogate may elect to keep the child and void the arrangement,[49] indicates a deeply rooted paternalism and distrust of the surrogate’s capacity to contract.

a. Payment Provisions
In both states, surrogacy regulation goes beyond protecting a surrogate’s physical and psychological wellbeing. Both the GSA and New Hampshire surrogacy law have provisions protecting the surrogate’s financial interest. In Illinois, if a surrogate receives any compensation for her services, the money must be placed in escrow prior to commencing any medical procedures. Through this provision, GSA aims to protect the surrogate from a potential monetary breach by the intended parents, and from having to offer her womb out of financial necessity. In other words, viewing the moment of contract as a fragile one for the surrogate, the GSA sought to protect the surrogate from deception and improper inducement to carry a child. Mandating specific performance by the intended parents (that is, full payment in an escrow account prior to a medical procedure) displays an “unnecessary level of paternalism by the legislature and reveals an ongoing presumption that gestational surrogates are incapable of protecting themselves from exploitation by unscrupulous intended parents.”

Similarly, New Hampshire’s ban on any promotion, solicitation or inducement of parties to enter a surrogacy arrangement implies an assumption that surrogate brokers, agencies or websites overly exploit potential surrogates. Further, the vague wording in the New Hampshire ban on “inducement” suggests that any monetary compensation for services deemed too high (or “unreasonable”) is illegal. Legal scholars Kindregan & McBride note that, “a reasonable interpretation of the law suggests that the intended couple could pay the surrogate for services rendered, as long as the amount is not such that it appears that its purpose is to induce the surrogate to enter into the arrangement.” This provision is problematic because it directly abrogates a surrogate’s capacity to contract. The surrogate may choose to negotiate a higher monetary fee for her services. If the intended parents consent to the surrogate’s higher fee, the contract may still be unenforceable based on any number of subjective judicial interpretations of inducement. Viewed in this light, the New Hampshire legislature infantilizes the surrogate while simultaneously capping her potential earning capacity.

b. **New Hampshire’s 72-hour Provision**

In *Baby M*, the court feared that forcing a surrogate to part with the child she carried for nine months, to whom she grew emotionally attached, would subject her to adverse psychological consequences. Presumably in response to this fear, New Hampshire requires a surrogacy contract to include a provision that allows a surrogate to keep the child simply by notifying the intended parents in writing within 72 hours of the child’s birth. The aforementioned provision is a dramatic recognition of the potential adverse psychological consequences of becoming a surrogate.

However, much of the psychological literature has, thus far, found no adverse consequences to surrogacy. In 2005, social scientists Janice Ciccarelli and Linda Beckman conducted a review of psychological and social science literature on surrogacy, finding that “surrogates are primarily motivated by altruistic concerns ... running counter to the notion that they are being exploited.” Further, Ciccarelli
& Beckman found that “surrogates are quite satisfied with their roles and experiences as surrogates even five and ten years after giving birth.”[59] A 2003 study conducted by The Centre for Family Research at Cambridge University supports the above conclusion. The study found:

[O]verall, surrogacy appears to be a positive experience for surrogate mothers. Rather than experiencing psychological problems, ‘surrogate mothers often reported a feeling of self-worth.’ This is not to say that there were no difficulties. While none of the surrogates reported ‘experienc[ing] any doubts or difficulties whilst handing over the baby,’ there were some surrogates (32%) who reported some difficulty in the weeks following delivery. However, within a few months that number fell to only 15%, and by one year after delivery 94% of surrogates reported no difficulties.[60]

While further research is needed, the data significantly delegitimizes the fear of adverse psychological affects on the surrogate. Thus, the New Hampshire provision allowing a surrogate to keep the child at her election is both outdated and unnecessarily paternalistic. The New Hampshire law suggests that a surrogate can never fully have the wherewithal to contract to carry a child, and may be coerced into having a child against their will. This conception of a surrogate is both degrading as well as patently misguided, as evidenced by the psychological literature.

IV. Massachusetts’ Need for Legislation

Massachusetts has historically been at the forefront of genetic technologies, but has yet to enact any statutes regulating surrogacy.[61] State court rulings on the enforceability surrogacy contracts nevertheless provide a blueprint for legislation. In terms of gestational surrogacy arrangements, three Massachusetts cases are of note.

The first, Culliton v. Beth Israel Deaconess Medical Center, involved an uncontested gestational surrogacy agreement where the intended parents petitioned the court to enter declare them the legal parents in order have their names on the child’s birth certificate.[62] In Culliton, the court vested jurisdiction in the Family and Probate Court and recommended declaring the intended parents the legal mother and father of the child.[63] In Hodas v. Morin, the court reiterated its holding in Culliton, which permitted courts to issue a pre-birth judgment of parentage where the intended parents are the genetic parents, the gestational surrogate agrees, and no one contests.[64] In Hodas, none of the parties to the surrogacy agreement resided in Massachusetts.[65] Nevertheless, the court held that the parties to a surrogacy agreement are permitted choose the governing law as long the forum bears some relationship to the transaction, and as long as the result is not contrary to public policy.[66] Finally, in R.R. v. M.H., the Massachusetts Supreme Judicial Court invalidated a traditional surrogacy arrangement because the child was the biological child of the surrogate.[67] Concerned with enforceability of traditional surrogacy arrangements, the R.R. court listed several factors, that, “if satisfied, may alleviate the court’s concerns with regard to enforcing traditional surrogacy agreements: (1) that there be no compensation beyond pregnancy-related expense;
that the surrogate have time after the child’s birth to decide whether to surrennder the child for adoption; (3) that the surrogate’s husband consent; (4) that all parties be evaluated for their soundness of judgment and capacity; (5) that the intended mother not be able to safely bear a child herself; (6) that the intended parents be suitable parents; and (7) that all parties have legal representation.” [68] Altogether, the R.R. factors are a suitable starting-point for Massachusetts legislation. In fact, many of the R.R. factors are mirrored by the Illinois and New Hampshire surrogacy laws.

Under the current case law, Massachusetts’ courts clearly have a familiarity, and arguably a growing comfort, with enforcing at least gestational surrogacy arrangements. The social forces that have thus far prevented any surrogacy legislation must soon give way to the rising tide of ART and surrogacy in Massachusetts, both from within the state as well as from outside its borders, as in Hodas. In adopting legislation, I would caution Massachusetts lawmakers from adopting the aforementioned 1998 R.R. factors, which mirror many of the problematic provisions of the New Hampshire and Illinois laws, respectively.

A. Recommendations for Massachusetts

As mentioned above, the R.R. factors, Illinois’s GSA and the New Hampshire’s surrogacy laws are outdated and reflect a problematic undercurrent of paternalism. In order to appropriately protect the gestational surrogate, recognizing her as a woman of agency whose capacity to contract is not diminished by her ability to carry a child, I recommend the following:

(1) Full payment to the surrogate based on negotiations
(2) A comprehensive health care package for the gestational surrogate
(3) Abolishing any post-delivery contract termination provisions; and
(4) Legal counsel for both parties in a surrogacy arrangement

Many states ban payment to the surrogate or strictly limit the types of payment in a surrogacy contract. [69] As discussed previously, limiting payment to the surrogate falls squarely within the “baby selling” view of surrogacy, [70] and attempts to protect a woman from undergoing a 9-month medical arrangement strictly for monetary reasons. This concern is misguided, and only diminishes the surrogate’s rights as a party to the contract. It is important to require payment for related medical and legal expenses for the surrogate, but I urge Massachusetts to allow for payment beyond medical compensation. A surrogate (and her attorney) should be given full rights to negotiate with the intended parents for additional compensation for services provided.

In addition to adequate payment, comprehensive healthcare coverage for the surrogate (both during and for a reasonable time after pregnancy) is essential to protecting the surrogate’s best interest. The Illinois GSA requires the surrogate to have a health insurance policy that covers the pregnancy. [71] Notably, the GSA allows the insurance policy to be procured either by the surrogate or the intended
parents on behalf of the surrogate, pursuant to the contract. Rather than paternalistic, requiring healthcare coverage is fundamental to ensuring the health of the surrogate (as well as the child). Pursuant to negotiations, either party must have the option of providing health insurance coverage for the surrogate.

To further abolish the outdated conception of surrogacy and uphold the surrogate’s agency, Massachusetts must avoid any post-birth termination provision(s). As discussed previously, the provisions allowing a surrogate to terminate an arrangement and keep a child to whom she is often biologically unrelated speaks to the engrained notion that a surrogate does not fully comprehend the contract to which entered. Following Baby M, the fear that surrogacy psychologically harms a gestational carrier was presumably legitimate. Notably, Mary Beth Whitehead was a traditional surrogate, and thus was genetically related to the child. Given the steady rise in gestational surrogacy as well as the studied psychological effects on gestational carriers, a termination provision lacks foundation – particularly in gestational arrangement. Arguably, post-birth termination provisions delegitimize the surrogate’s original intention and perpetuate the assumption that a surrogate lacks the capability to determine her actions, in either a gestational or traditional arrangement. However, in order to incentivize gestational surrogacy in Massachusetts, lawmakers may consider allowing post-birth termination provisions only when the surrogate is biologically related to the child (traditional surrogacy). Thus, similar to New Hampshire, the termination provision for traditional surrogacy would make this option so onerous that it would strongly incentivize gestational arrangements in Massachusetts.

Many of the aforementioned recommendations require pre-insemination negotiations, and a full understanding of the risks and consequences in a surrogacy arrangement. Thus, perhaps the most effective means of minimizing the fear of exploitation of either party is to require adequate independent legal counsel for both parties – a requirement adopted in Illinois. Finally, in drafting surrogacy legislation, I would caution Massachusetts from using the term “gestational mother,” as appears in many other state laws as well as the Uniform Parentage Act (amended in 2000). This term perpetuates the assumption that the surrogate is in fact the mother of the child, which in gestational surrogacy, is not the case. In the same vein, Massachusetts should refrain from referring to the “man and the woman” (or “husband and wife”) as the intended parents. As in other states, using the terms “husband and wife” creates an inappropriate presumption that surrogacy contracts are only meant for heterosexual couples who are legally married, which should not be the case.

Massachusetts has the unique opportunity to undertake forward-thinking surrogacy legislation. Given the steady rise in surrogacy contracts in the United States, Massachusetts can no longer afford to remain silent on this issue. Massachusetts’ case law provides somewhat of a blueprint for legislation. However, the legislature should be cautious in adopting outdated provisions that further the paternalistic undertones of existing legislation. Namely, R.R’s first two provisions, that “there be no compensation beyond pregnancy related expenses and that the surrogate have time after the child’s birth to decide whether to surrender the child for adoption,”
reflect a misguided attempt to protect a surrogate from exploitation. In enacting legislation in 2014, Massachusetts should instead protect the surrogate’s right to contract, with the help of independent legal counsel, adequate payment and comprehensive health care.

V. Conclusion

Embedded within discussions of surrogacy arrangements are significant questions about agency, commodification, privacy, choice, and families. The prevailing frames within the surrogacy debate suggest a willingness to view a surrogate as “giving the gift of life” and providing a valuable service to infertile parents who wish to have a family of their own. Nevertheless, there remains an underlying societal fear that a surrogate requires protection from having to “sell their babies,” and “commodify their bodies.” New Hampshire most clearly addresses the fear of baby selling by strictly limiting payment to the surrogate and providing a 72-hour post-birth termination provision. In Illinois, the GSA requires that payment to the surrogate be placed in escrow prior to commencing any medical procedures.

Many aspects of the Illinois and New Hampshire surrogacy laws are problematic, as they perpetuate the assumption that a surrogate cannot fully understand the risks and complications of a surrogacy arrangement. However, the provisions that require independent legal counsel for both parties as well as mandatory health care for the surrogate remain essential to protecting the surrogate, child, and intended parent’s best interest. Thus, in order to truly protect the surrogate, modern surrogacy legislation should abolish any post-birth termination provisions in gestational surrogacy arrangements. As well, Massachusetts should allow full payment to the surrogate based on negotiations. As state legislatures and society at large continue to question “what makes a family, who should and can be a parent, how important mothering is in women’s lives, and what responsibility the state has in encouraging and sustaining particular family forms,” it is essential that Massachusetts address the issue of surrogacy. The unpredictable surrogacy regulation in the United States harms infertile couples seeking a surrogate to complete their family. Massachusetts has an opportunity to enact legislation that both clarifies surrogacy arrangements and appropriately protects all parties to the contract.


[3] In gestational surrogacy, the intended parents provide the genetic material that is implanted into the surrogate’s uterus. Sometimes one intended parent provides their own gamete, and a donor gamete provides the additional egg or sperm. The surrogate does not contribute to the child’s genetic makeup. Am.


[7] Id.


[10] In traditional surrogacy the surrogate is biologically related to the child. Kindregan & McBride supra, note ii at 151-52.


[13] Id. at 1236-37.


[15] Id.


[17] Carol Lawson, “Surrogate Mothers Grow in Numbers Despite Questions,” New York Times, October 1, 1986, C:1; See also, Markens, supra note viii at 83.


750 ILL. COMP. STAT. ANN. 47/5 (V) (West 2009).


*Kindregan & McBride, supra* note 2 at 183; see generally N.H. REV. STAT. ANN. §168-B:16(b) (2010).

*Kindregan & McBride, supra* note 2 at 171.

750 ILL. COMP. STAT. ANN. 47/25 (b)(1) and (3) (West 2009).

Id. 47/25 (b)(3.5).

Id. 47/20(a)(1)-(5). Mental health evaluations are also required for the intended parents. Id. 47/20(b)(1)-(4).

Id. 47/20(b)(1)-(4).


Id. at 810.

ILL. COMP. STAT. 47/25(b) (2009).

Id. 47/15 (2009).

Id. 47/35.


Id. § 168-B:16(b); 168–B:23 (III)(a)-(b) (2010).

Id. §168-B:17(V).

“The intended mother shall be medically determined to be physiologically unable to bear a child without risk to her health or to the child’s health.” Id. § 168-B:17(II).
See Markens, supra, note 2 at 184.

N.H. REV. STAT. ANN. §168-B:17(IV).

See Markens, supra, note 2 at 185.


Id. §168-B:16(IV).

Id. §168-B:25(IV).

See Markens, supra note 2 at 185.


ILL. COMP. STAT. 47/25(b) (2009).

Arshagouni, supra, note 33 at 811.

“No person or entity shall promote or in any other way solicit or induce for a fee, commission, or other valuable consideration, or with the intent to expectation of receiving the same, any party or parties to enter into a surrogacy arrangement.” N.H.REV.STAT. ANN. § 168-B:16(IV) (2002).

Kindregan & McBride, supra, note 2 at 184.


Arshagouni, supra, note 33 at 828.


Id. at 31.


Kindregan & McBride, supra note 2 at 175.


This case applies specifically to married heterosexual parents who use their own gametes in gestational
surrogacy. See Beth Israel Deaconess Med. Ctr., 756 N.E.2d at 1133; Markens, supra note 2 at 178.


[65] Hodas, 814 N.E.2d at 320 (citing to Culliton, 756 N.E.2d at 1138).

[66] Id. at 321.


[70] Markens, supra note 8 at 83.


[72] Id.

[73] Id.


[75] Baby M, 537 A.2d at 1135-36.

[76] See Jadva supra, note 60 at 2203-4, 2200; Ciccarelli & Beckman, supra, note 58 at 30.

[77] By incentivizing gestational surrogacy, Massachusetts would unfortunately exclude infertile couples who cannot afford a donor egg.

[78] Arshagouni, supra, note 33 at 828.


[80] UNIF. PARENTAGE ACT § 801(a) (amended 2002).

[81] With traditional surrogacy, this position may have some legitimacy; with gestational surrogacy, it does not. See Arshagouni supra, note 33 at 827; see also Stephen Wilkinson, The Exploitation Argument Against Commercial Surrogacy, 17 BIOETHICS 169 (2003).
“The man and the woman who are the intended parents must both be parties to the gestational agreement.” UNIF. PARENTAGE ACT § 801(c) (amended 2002).


R.R., 689 N.E.2d at 797.

Markens, supra, note 8 at 105.

See, Baby M, 537 A.2d at 1234.


ILL. COMP. STAT. 47/25(b) (2009).

Id. 47/25(b)(4) (2009).

Id. 47/20(a)(6) (2009).

Markens, supra, note 8 at 50.

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