

STUDENT ARTICLES

Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing The Idyllic Infant?

By Jami L. Zehr*

I. Introduction

Twenty years ago a radical feminist criticized surrogacy, stating, “[t]he rise of the surrogate industry does not take place in isolation. It is part of the industrialization of reproduction. It is part of the opening up of the ‘reproductive supermarket.’”¹ Radical feminists contend that surrogacy is an exploitation of women’s reproductive capabilities.² They argue that women become mere fetal containers, controlled by men who have the “vital fluid” needed for production of children, now seen as mere commodities, in order to further a male’s genetic future.³

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¹ DEBORA L. SPAR, *THE BABY BUSINESS* 77 (Harvard Business School Press, 2006) (quoting *RECONSTRUCTING BABYLON: ESSAYS ON WOMEN AND TECHNOLOGY* 131 (H. Patricia Hynes ed. Bloomington, IN: Indiana Univ. Press, 1991)).

² Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children*, 12 *WIS. WOMEN’S L. J.* 113, 161-62 (1997).

³ JANICE G. RAYMOND, *WOMEN AS WOMBS* 31, 35 (HarperCollins Paperback Ed. 1994); Kerian, *supra* note 2, at 154; Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30

Persuasive arguments against these contentions show that they unduly rely on a presumption that women are unable to protect themselves from exploitation. The debate about surrogacy often overlooks the infertile woman who has the ability to create a child but is subsequently unable to carry the child to term.⁴ In 2002 the National Survey of Family Growth data on infertility indicated that two percent of women of reproductive age had an infertility-related doctor's appointment.⁵ Surrogacy may be the infertile woman's only chance at a biological child.⁶

Views toward surrogacy have evolved over the years as new technology emerged so that now both legislatures and courts provide protection for surrogacy contracts.⁷ For example, in 2005 Illinois enacted a controversial new Gestational Surrogacy Act that provides contractual rights to parties involved in gestational surrogacy. Most importantly, it expressly allows for compensation of the surrogate above medical and legal expenses.⁸ In addition, the right to contract is a right women should be allowed to exercise as equal citizens under the Constitution, to affirm they have the same intelligence as men to control their lives, and the same right to privacy and control over their bodies.⁹ This shift in the attitude toward surrogacy indicates that viewing assisted reproductive technology as a market is no longer an unacceptable position.¹⁰ Below is a discussion on what assisted reproductive technologies and procedures entail. The

S. ILL. U. L.J. 169, 190 (2005).

⁴ Kerian, *supra* note 2, at 162.

⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY (ART) SUCCESS RATES 3 (October 2007) available at <http://www.cdc.gov/ART/ART2005/508PDF/2005ART508.pdf> (last visited February 12, 2008).

⁶ Kerian, *supra* note 2, at 162.

⁷ See Court Decisions, *Assisted Conception: No Public Policy Violated by Gestational Surrogacy Contract*, 34 FAM. L. REP. 8, 1087, 1087 (2008) available at <http://pubs.bna.com/NWSSTND/IP/BNA/flr.nsf/SearchAllView/BD19DD84BD4A849D852573BF00798940?Open&highlight=ASSISTED,CONCEPTION> (last visited on February 12, 2008). On December 20th 2007 the Ohio Supreme Court concluded that gestational surrogacy does not violate public policy.

⁸ 750 ILL. COMP. STAT. ANN. 47/25(d)(3)-(4) (West 2007).

⁹ See Kerian, *supra* note 2, at 163; Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 616-18 (2003).

¹⁰ See discussion *infra* Part IV.A.2.

discussion also includes a look at the law that has evolved, both seminal cases and specific statutes, regarding surrogacy. Finally, this article discusses the policy implications concerning infertile couples as consumers and surrogates as economic beings both generally and specific to the Gestational Surrogacy Act of Illinois.

II. Alternative Family Building

A. Assisted Reproductive Technology

Individuals who have the desire to create and raise children of their own but because of medical reasons or alternative lifestyle choices are not able to naturally reproduce must resort to alternative methods of reproduction or adopt.¹¹ The focus of this paper is on the alternative methods which are universally referred to as assisted reproductive technology (“ART”), specifically the technology of in vitro fertilization (“IVF”) surrogacy, also referred to as gestational surrogacy.¹² ART has been defined as any “medical procedure designed to bring about a conception without sexual intercourse” and is often used by heterosexual couples that have infertility issues or homosexual couples unable to biological reproduce.¹³

ART includes artificial insemination, in vitro fertilization, embryo transfer, and third party reproduction (sperm donor, egg donor, and surrogacy).¹⁴ Because surrogacy is one of the key focuses of this article, third party reproduction will be discussed separately.¹⁵ Artificial insemination is the process where “semen is inserted into a woman’s vagina by some means other than intercourse” and can be semen of either the recipient’s husband/partner or a donor.¹⁶ These two types of artificial insemination are called, respectively,

¹¹ Debra J. Braselton & Maxine Weiss Kunz, *Non-Traditional Families and Alternative Family Building: Securing Parental Rights for Intended Parents*, 20 DCBA BRIEF 30, 30 (2007); Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 636 (2005).

¹² Braselton & Weiss Kunz, *supra* note 11, at 30.

¹³ *Id.* at 36.

¹⁴ *Id.*

¹⁵ See discussion *infra* II.B.1.

¹⁶ BLACK’S LAW DICTIONARY 121 (8th Ed. 2004).

homologous artificial insemination and heterologous insemination.¹⁷ Because of public policy, in Illinois, parentage rights of children are carefully decided and worded legally.¹⁸ Under the Illinois Parentage Act if a woman is heterologously artificially inseminated the resulting child is considered the naturally conceived and legitimate child of the woman and her husband.¹⁹ If a woman is homologously artificially inseminated and her husband consents to the insemination then he is considered the natural father of any resulting child as long as the procedure is under supervision of a licensed physician.²⁰

IVF occurs when a woman is given hormones that create a large number of fertilized eggs that are surgically removed, fertilized in a laboratory, and then either implanted in a woman or frozen for later use.²¹ This new technology allows for a three-part process of conception.²² Sperm or egg can now be from the intended individual or couple, or from donors, and then implanted into either the intended mother or a surrogate.²³ IVF is an expensive process, therefore doctors create more pre-embryos than are needed and store them for later use if that particular cycle does not take.²⁴ Embryo transfer is one part of the IVF cycle, and can be done from previous cycles of the removal of and fertilization of a matured egg.²⁵

¹⁷ *Id.*

¹⁸ See 750 ILL. COMP. STAT. ANN. 45/1.1 (West 2007).

¹⁹ See 750 ILL. COMP. STAT. ANN. 40/2.

²⁰ See 750 ILL. COMP. STAT. ANN. 40/3.

²¹ Braselton & Weiss Kunz, *supra* note 11, at 38.

²² SPAR, *supra* note 1, at 78.

²³ See *id.* at 78-79. Intended parent is a person that “enters into a gestational surrogacy contract with a gestational surrogate pursuant to which he or she will be the legal parent of the resulting child.” 750 ILL. COMP. STAT. ANN. 47/10.

²⁴ Braselton & Weiss Kunz, *supra* note 11, at 38-39; IVF average \$8,000 to \$15,000 per cycle of maturation and extraction, however embryo transfer is not as expensive because it does not require the same amount of laboratory process and retrieval of hormonally matured eggs that a full IVF requires. *Id.* at 38.

²⁵ Braselton & Weiss Kunz, *supra* note 11, at 38.

B. Third-Party Reproduction

1. Donors: Sperm and Egg

Donors, according to the Illinois Gestational Surrogacy Act, are “individuals who contribute a gamete or gametes for the purpose of in vitro fertilization or implantation in another,” i.e. donated eggs or sperm donation which is also used for artificial insemination.²⁶ For artificial insemination men donate their sperm to sperm banks which store the specimen under federal regulation.²⁷ A couple wishing to use donated sperm in conjunction with artificial insemination select a particular donor at a sperm bank which usually charges a fee for the specimen and will show the intended individual or couple a list that reveals some of the donor’s characteristics.²⁸

Men have been donating sperm to commercial sperm banks for over thirty years.²⁹ As in most ART components, sperm donation began in a non-profit capacity but moved to for-profit when it became apparent that there was a demand for artificial insemination from donated sperm for couples where the husband could not produce sperm, where men had genetic diseases, or where single women wanted to raise children.³⁰ Clinics came to realize that by moving sperm banks to a market system, the quantity and quality of the sperm supply could be controlled and improved.³¹ Individuals or couples who chose to use donated sperm as a solution to their infertility problems, along with artificial insemination, no longer had to choose a man to father their child but simply had to choose sperm.³²

Egg donation came about as a result of IVF.³³ While initially IVF was used to create a medical miracle for couples who were

²⁶ 750 ILL. COMP. STAT. ANN. 47/10.

²⁷ SPAR, *supra* note 1, at 37.

²⁸ *Id.* at 37.

²⁹ *Id.* at 35 (explaining that the first for-profit sperm bank opened in 1970 in Minnesota).

³⁰ *Id.* at 36.

³¹ *Id.* at 36.

³² SPAR, *supra* note 1, at 36 (explaining commercial artificial insemination of donated sperm replaced intended parent’s dependence on friends and family with anonymity and quality control).

³³ *Id.* at 42.

capable of producing sperm and egg, but lacked the ability to join the two, doctors and infertile individuals began to see another use for it.³⁴ Egg donation is where the eggs of a woman are taken from her and implanted into another.³⁵ The two women's hormonal systems are coordinated using pharmaceutical hormones, then the eggs are surgically removed, fertilized, and the donor egg is implanted in the infertile woman, a solution to infertility problems that is similar to artificial insemination using donated sperm.³⁶ Both techniques solve an individual or couple's infertility problem using donated gametes.

2. Surrogacy: Traditional and Gestational

With the introduction of artificial insemination, sex was theoretically removed from the process of conception.³⁷ Surrogacy became the contractual deal whereby one woman is impregnated with the intention of giving the child to another individual or couple after carrying to term any child resulting from conception.³⁸ Therefore, surrogacy evolved into a medical procedure where it was possible to be impregnated without sexual intercourse.³⁹

There are two types of surrogacy: traditional and gestational. *Black's Law Dictionary* defines traditional surrogacy as a "pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person."⁴⁰ Before IVF became a reliable option, the only available similar technology for infertile women was artificial insemination of a surrogate.⁴¹ Thus, traditional surrogacy is often called artificial insemination surrogacy.⁴² However, the surrogate has a genetic link to the child because her own egg is used for conception.⁴³ The presumption at law is that the surrogate as birth

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ SPAR, *supra* note 1, at 75.

³⁸ Braselton & Weiss Kunz, *supra* note 11, at 39.

³⁹ SPAR, *supra* note 1, at 75.

⁴⁰ BLACK'S LAW DICTIONARY 1485 (8th Ed. 2004).

⁴¹ Snyder & Byrn, *supra* note 11, at 639.

⁴² Kerian, *supra* note 2, at 114.

⁴³ Snyder & Byrn, *supra* note 11, at 639.

mother and genetic mother of the resulting child has presumptive parental rights.⁴⁴ The intended mother has no genetic link and therefore no presumptive parental rights to the child.⁴⁵ Because the surrogate has preexisting presumptive rights, the intended mother must adopt the child and the surrogate must give up her parental rights.⁴⁶

If the intended father's sperm is used instead of a donor, the intended father, as the biological father, has presumptive legal parental rights.⁴⁷ However, the surrogate's husband also may have presumptive legal parental rights of the child.⁴⁸ The intended father, through his genetic link must establish paternity through his presumptive rights and then the intended mother can establish a legal relationship through stepparent adoption proceedings.⁴⁹ Traditional surrogacy arrangements gave rise to legal conflicts when the biological and birth mother refused to give up the child after coming to regret being a surrogate.⁵⁰ Because the focus of this article revolves around the Illinois Gestational Surrogacy Act and those policy implications, the specific policy problems of traditional surrogacy will be discussed as they relate or contrast to policy implications of gestational surrogacy and are not a separate discussion.

Gestational Surrogacy, also called commercial surrogacy, is where the sperm of the intended father fertilizes the egg of the intended mother outside the uterus.⁵¹ The pre-embryo is then transferred to the gestational surrogate who carries any resulting child to term for the intended parents.⁵² Unlike in traditional surrogacy, the child is usually genetically linked to both intended parents and never to the gestational surrogate.⁵³

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Snyder & Byrn, *supra* note 11, at 639.

⁴⁹ *Id.*

⁵⁰ Larkey, *supra* note 9, at 610.

⁵¹ Kerian, *supra* note 2, at 114.

⁵² *Id.*

⁵³ *Id.*

Under the Illinois Gestational Surrogacy Act, for the contract to be valid, the surrogacy must meet the State's definition of gestational surrogacy.⁵⁴ Illinois defines gestational surrogacy as the "process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has no genetic contributions."⁵⁵ This is often the preferred ART method when an intended mother cannot carry a child. This is because the child then has a genetic link to at least one of the intended parents who desire a biological child, and no relationship to the surrogate.⁵⁶

Additionally, this genetic link with the intended parent(s) creates a stronger presumptive legal parental right for the infertile individuals and a weaker legal argument if the surrogate would wish to change her mind.⁵⁷ Because of the increase in medical options available using IVF and a stronger legal right through genetics when using gestational surrogacy, traditional surrogacy arrangements have become disfavored.⁵⁸ Intended parents, because of their genetic link to the child when using gestational surrogacy, can often establish parentage rights through a single proceeding.⁵⁹ This allows the presumptive parentage rights of a surrogate and her spouse to be nullified.⁶⁰

Commercial surrogacy involves surrogacy agreements that include compensation to the surrogate from the intended parents for the surrogate's service.⁶¹ Often gestational surrogacy is called commercial surrogacy because the contractual reimbursements are contrasted to altruistic family or informal surrogacy arrangements.⁶² Commercial surrogacy compensation generally includes

⁵⁴ See 750 ILL. COMP. STAT. ANN. 47/5 (West 2007).

⁵⁵ 750 ILL. COMP. STAT. ANN. 47/10.

⁵⁶ Larkey, *supra* note 9, at 611.

⁵⁷ *Id.*

⁵⁸ Snyder & Byrn, *supra* note 11, at 640.

⁵⁹ *Id.* at 641.

⁶⁰ *Id.*

⁶¹ Larkey, *supra* note 9, at 608.

⁶² *Id.*

reimbursement for living expenses, medical expenses, life insurance and compensation for gestating the child.⁶³

IVF surrogacy (i.e. gestational or commercial surrogacy) “creat[ed] a substitute with far greater commercial potential” and split conception into a three-part process: sperm, egg, and womb.⁶⁴ Women could sell their eggs without having to become pregnant and could carry and birth children with whom they did not have a genetic relation.⁶⁵ By separating the process into two separate components women became more willing to donate their services to individuals and couples in need of ART.⁶⁶

C. Pre-implantation Genetic Diagnosis

Pre-implantation genetic diagnosis (“PGD”) is used in conjunction with IVF and Intracytoplasmic Sperm Injection (“ICSI”), a method where technicians choose one sperm and implant it into one egg creating an embryo, to give individuals with genetic defects a chance at having a healthy child.⁶⁷ ICSI is used because of its higher success rate in fertility clinics compared to other forms of ART.⁶⁸ PGD combines genetic technology and the basic IVF procedure by creating an embryo outside of a uterus and then testing it for certain genetic defects at the earliest stage possible.⁶⁹

Technicians evaluate a pre-embryo, when the pre-embryo is at an eight-cell stage, by extracting a single cell to test it for certain

⁶³ According to International Assisted Reproduction Center website, whose information is typical of other websites regarding commercial surrogacy, a surrogate is usually reimbursed \$13,000 to \$25,000 for her gestational services on top of program expenses which include everything from mental health evaluations, life insurance, and medical insurance to maternity clothing. http://www.fertilityhelp.com/CM/Surrogacy/Estimated_Expenses_For_Complete_Surrogacy_Program.asp (last visited March 30, 2008).

⁶⁴ SPAR, *supra* note 1, at 78.

⁶⁵ *Id.* at 79 (explaining that now women can donate eggs or can gestate a child without a genetic link verses traditional surrogacy which required a woman to be willing to do both).

⁶⁶ *Id.* at 80.

⁶⁷ *Id.* at 62; G.M. Adam, *Assisted Human Reproduction - Legal Rights of the Unborn in Respect of Avoidable Damage*, 26 MED. & L. 325, 334 (2007).

⁶⁸ SPAR, *supra* note 1, at 62; Adam, *supra* note 67, at 334.

⁶⁹ SPAR, *supra* note 1, at 114; Adam, *supra* note 67, at 335.

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genetic information.⁷⁰ These certain genetic traits that can be determined include a range of diseases, the sex of the pre-embryo, and whether the pre-embryo has Down syndrome.⁷¹ Because the pre-embryo must be implanted within twenty-four hours of the testing, in a PGD procedure, time is limited and room for error limited as well.⁷²

The genetic material available from the intended parents or donors limits the use this technology.⁷³ PGD is also limited by medical advances discussed above, and generally viewed as simply one more option available to individuals who wish to have a biological child but do not wish to pass on certain genetic diseases, it is not the chance to design a perfect child.⁷⁴ For example, infertile individuals or couples who wish to have healthy children use lists available, which contain the genetic traits of the donors, and select certain genetic traits from these egg and sperm donors to determine which traits they hope will create that healthy child.⁷⁵ Similarly, PGD allows for the selection of the healthiest candidate available from the few pre-embryos created by the genetic make-up of the intended individual, parents, or donors.⁷⁶

III. The Law and Surrogacy

A. Seminal Cases

One of the most influential surrogacy cases was *In re Baby M* where the New Jersey Supreme Court decidedly disfavored gestational surrogacy as illegal, possibly criminal, and “potentially degrading to women.”⁷⁷ After this decision state legislatures began banning surrogacy, and it was not until the Supreme Court of California decided *Johnson v. Calvert* that states began to look at

⁷⁰ SPAR, *supra* note 1, at 114-15.

⁷¹ *Id.* at 78.

⁷² *Id.* at 115.

⁷³ COLIN GAVAGHAN, DEFENDING THE GENETIC SUPERMARKET 8 (Sheila A.M. McLean ser. ed. Biomedical Law & Ethics Library 2007).

⁷⁴ *Id.* at 7.

⁷⁵ SPAR, *supra* note 1, at 99.

⁷⁶ GAVAGHAN, *supra* note 73, at 7.

⁷⁷ *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

gestational surrogacy contracts as something other than abhorrent.⁷⁸ Instead of looking at the best interest of the child, as many courts had been for years under an adoption family law principle, the California Supreme Court looked at the intent of the parties involved because surrogacy contracts involved “two informed parties who deal at arm’s length for a mutually beneficial contract” and a contractual analysis with an intent-based standard seemed most suitable for the unique circumstances presented.⁷⁹ The decision by this court that the intent of the parties controlled was precedent setting and the most influential case since the introduction of new technology and *In re Baby M*.⁸⁰ Both seminal cases are discussed in some detail below.

1. *In re Baby M*

In re Baby M is the seminal case regarding compensation for traditional surrogacy where the New Jersey Supreme Court decided that because the “surrogate was both the genetic and birth mother of the child, she was the child’s sole legal mother.”⁸¹ The court determined that because the woman conceived, brought to term, and delivered the child she was the natural mother and to be forever separate her from the child was against public policy.⁸² Therefore, the contract providing for such an “inappropriately called . . . ‘surrogate mother’” was invalid.⁸³

In this case the surrogate was artificially inseminated with the intended father’s sperm, contracted to carry the resulting child to term, deliver the child to the intended parents, and to terminate her parental rights.⁸⁴ Because Mrs. Stern had multiple sclerosis the Sterns determined the risks inherent in her being pregnant were too substantial.⁸⁵ They initially considered adoption but were discouraged by some potential problems involved and looked for

⁷⁸ Kerian, *supra* note 2, at 128.

⁷⁹ *Id.* at 123.

⁸⁰ *Id.*

⁸¹ Snyder & Byrn, *supra* note 11, at 650.

⁸² *In re Baby M*, 537 A.2d at 1234.

⁸³ *Id.*

⁸⁴ *Id.* at 1235.

⁸⁵ *Id.*

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some other means to start a family.⁸⁶ The Sterns decided surrogacy was their best option and contracted with Mrs. Whitehead to be artificially inseminated with Stern's sperm and to terminate her parental rights and give up the child.⁸⁷ The Sterns contracted to pay her ten thousand dollars for her services.⁸⁸

Initially Mrs. Whitehead turned the child over to the Sterns, however she became despondent and convinced the Sterns to let her live with the child for a short period, but thereafter did not hand the child back to the Sterns.⁸⁹ Mr. Stern filed suit seeking to enforce the surrogacy contract.⁹⁰ Eventually the Supreme Court of New Jersey decided that only where a woman voluntarily agrees to be a surrogate mother, without payment or contractual obligations to surrender any resulting child, would the public policy and state statutes not be offended.⁹¹

The surrogate was the natural mother of the child, but custody was given to Mr. Stern in the best interest of the child and the case was remanded to determine the visitation rights of Mrs. Whitehead.⁹² As a result, adoption law policies decide all surrogacy arrangements in New Jersey, even gestational surrogacy.⁹³ While *In re Baby M* was the seminal case regarding traditional surrogacy the court in *Johnson v. Calvert* revisited the issues of surrogacy in the seminal case concerning gestational surrogacy.⁹⁴

2. Johnson v. Calvert

In *Johnson v. Calvert* the Supreme Court of California determined that both the intended mother and the surrogate had shown they had valid parentage claims under state statutes, so the intent of the parties, as shown by the surrogacy contract, controlled

⁸⁶ *Id.* at 1236.

⁸⁷ *In re Baby M*, 537 A.2d at 1236.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1236-37.

⁹⁰ *Id.* at 1237.

⁹¹ *Id.* at 1235.

⁹² *In re Baby M*, 537 A.2d at 1234-35.

⁹³ Snyder & Byrn, *supra* note 11, at 649.

⁹⁴ Kerian, *supra* note 2, at 131.

who was awarded legal custody of the child.⁹⁵ The intended mother, Crispina Calvert, was not medically able to gestate a child due to a hysterectomy even though her ovaries still had the ability to produce eggs, so Mrs. Calvert and her husband Mark Calvert agreed to a surrogacy arrangement with a woman named Anna Johnson.⁹⁶ All three parties signed a contract that an embryo of the Calverts gametes would be implanted in Ms. Johnson and she would relinquish all her parental rights, and they would take the resulting child home.⁹⁷ The Calverts agreed to pay Ms. Johnson for her services and to pay for a life insurance policy.⁹⁸

However, relations between the Calverts and Ms. Johnson deteriorated and eventually she demanded the payment of the balance due her and threatened to refuse to hand the child over to the Calverts.⁹⁹ Both sides brought a suit seeking to declare themselves the legal parents of the child.¹⁰⁰ At trial the parties stipulated that the Calverts were the genetic parents of the child after a blood test result excluded Ms. Johnson as the biological mother.¹⁰¹

Both Ms. Johnson, as the child's birth mother, and Mrs. Calvert, as the child's genetic mother, could presumptively show that they were the legal mother under state statute.¹⁰² So both women had a valid claim, but under California law only one woman could be recognized as the legal mother of a child.¹⁰³ Because both women presented acceptable proof of their maternal rights, the Court decided that the case could only be decided by looking into the intent of the parties as manifested in the surrogacy contract.¹⁰⁴ The intent of the parties was essential in deciding the case because, but for the intention of the Calverts to have a child, Ms. Johnson would not have had the opportunity to gestate a child and later change her mind, and

⁹⁵ Larkey, *supra* note 9, at 622-23.

⁹⁶ Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Johnson, 851 P.2d at 778.

¹⁰² *Id.* at 779, 781.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 782.

the child would not have been conceived or born.¹⁰⁵ Therefore, under California law the woman who intended to procreate a child and to raise such child as her own is the legal mother.¹⁰⁶ The public policy issues and views spawned by these two seminal cases influenced other states' legislative actions and judicial determinations with regard to traditional and gestational surrogacy.¹⁰⁷

B. State Statutes

Surrogacy contracts have been banned in countries such as Germany and France, as well as, several Australian states and have been restricted in others such as Canada, Israel, and the United Kingdom.¹⁰⁸ However, there is no federal governmental regulation of surrogacy contracts in the United States, and as a result the law has developed state by state in a piecemeal fashion. These varied legal approaches are the result of "competing social, moral, and political interest" with the advent and use of third-party reproduction technologies.¹⁰⁹ Four different theories regarding third-party reproduction assistance drive the public policies behind the different state statutes.¹¹⁰ First, the intent based theory defines the legal mother by the intent of the parties, i.e. the commissioning mother.¹¹¹ The reasoning behind this theory is that but for the intended couple the child would not have been conceived, so the intended mother, as the one who originally wanted the child, should be the mother that raises the child.¹¹² Opponents to the intent theory point out that this theory ignores the best interests of the child and intents often change.¹¹³ A second public policy theory is the genetic contribution theory in which maternity is determined according to biology.¹¹⁴ The woman whose gamete contributed to conception determines the maternity of

¹⁰⁵ *Id.*

¹⁰⁶ *Johnson*, 851 P.2d at 782.

¹⁰⁷ *See Kerian*, *supra* note 2, at 123.

¹⁰⁸ *SPAR*, *supra* note 1, at 71.

¹⁰⁹ *Snyder & Byrn*, *supra* note 11, at 633.

¹¹⁰ *Larkey*, *supra* note 9, at 622.

¹¹¹ *Id.*; *see discussion infra* III.A.2.

¹¹² *Larkey*, *supra* note 9, at 623.

¹¹³ *Id.* at 624.

¹¹⁴ *Id.*

the child.¹¹⁵ A third theory is the gestational mother preference theory in which the woman who gives birth is presumed to have maternity rights.¹¹⁶ Supporters of this theory point out that it safeguards against unfair contract, but opponents argue that it interferes with the individual or intended couples private reproductive affairs.¹¹⁷ The fourth theory is similar to adoption public policy in which the interest of the child is controlling in awarding parental rights.¹¹⁸ However, the problem with this theory is the question of whether courts should decide legal parentage rights based on its decision as to the parental qualification of the parties.¹¹⁹

States have taken different approaches to surrogacy contracts. Some expressly exempt gestational surrogacy contracts from other provisions that criminalize the sale of babies, others refuse to enforce surrogacy contracts, still others refuse to enforce them only if the surrogate receives compensation, and finally some only prohibit payment to intermediaries.¹²⁰

California has no statute governing surrogacy, but it expressly allows for pre-birth maternity and paternity orders if the intended parents are genetically related under *Johnson v. Calvert*.¹²¹ New Jersey has a statute governing surrogacy, but it does not expressly prohibit surrogacy agreements. Instead it contains language that stays all parentage orders until the child's birth at which time parentage is controlled by the decision in *In re Baby M*.¹²² New Hampshire, Virginia, Texas, and Utah have enacted statutes that authorize and regulate surrogacy contracts but require judicial pre-

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 625.

¹¹⁷ Larkey, *supra* note 9, at 625.

¹¹⁸ *Id.* at 626.

¹¹⁹ *Id.*

¹²⁰ Jennifer L. Watson, Note, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 533-35 (2007).

¹²¹ Snyder & Byrn, *supra* note 11, at 643-44; see CAL. FAM. CODE § 7648.9 (West 1975) (stating “[t]his article does not establish a basis for setting aside or vacating a judgment establishing paternity with regard to a child conceived by artificial insemination...or a child conceived pursuant to a surrogacy agreement.”).

¹²² Snyder & Byrn, *supra* note 11, at 649-50; see N.J. STAT ANN. § 9:17-45(e) (West 1998).

authorization before the pregnancy is initiated.¹²³ New Hampshire allows for surrogacy agreements, but the surrogate has seventy-two hours after giving birth to change her mind.¹²⁴ Florida authorizes certain types of surrogacy such as gestational surrogacy for married couples when the intended mother cannot safely gestate a pregnancy so long as the surrogate is uncompensated, in addition, the parentage of the child cannot be determined until after the child's birth.¹²⁵ On the other hand, the District of Columbia, Indiana, Michigan, and New York have statutes prohibiting surrogacy contracts of any type.¹²⁶ These statutes not only prohibit such contracts but also impose fines on compensation agreements, and in some states a second time offense is a felony.¹²⁷ In 2005, Illinois became the first state to enact a statute expressly allowing for compensation in gestational surrogacy contracts.¹²⁸

C. Illinois Statute

Under the Illinois Parentage Act of 1984 public policy recognizes that every child has the right to “physical, mental, emotional, and monetary support” by his or her parent(s).¹²⁹ Therefore, it is imperative that parental rights are determined upon the birth of the child, especially if surrogacy is involved. Public policy demands these children be supported and public policy and law determine who has this responsibility, right, and privilege. Illinois follows the intent of the contracting parties theory because even if the requirements of the Gestational Surrogacy Act are not met

¹²³ Snyder & Byrn, *supra* note 11, at 651; *see* N.H. REV. STAT. ANN. § 168-B (1990); TEX. FAM. CODE ANN. §§ 160.751-63, 756 (Vernon 2001); VA. CODE ANN. §§ 20-156, 158(D) (1991); UTAH CODE ANN. §§ 78-45g-801, 803 (2005).

¹²⁴ Snyder & Byrn, *supra* note 11, at 651; *see* N.H. REV. STAT. ANN. § 168-B:25(IV) (1990).

¹²⁵ Snyder & Byrn, *supra* note 11, at 655-56; *see* FLA. STAT. ANN. §§ 742, 743.15-16 (West 1993).

¹²⁶ Snyder & Byrn, *supra* note 11, at 656; *see* D.C. CODE ANN. § 16-402(a) (1981); MICH. COMP. LAWS ANN. § 722.855 (West 1988); N.Y. DOM. REL. LAW § 122 (McKinney's 1992); IND. CODE § 31-20-1-1 (1997).

¹²⁷ Snyder & Byrn, *supra* note 11, at 656-57; *see* N.Y. DOM. REL. LAW § 123(2)(b) (McKinney 1992).

¹²⁸ 750 ILL. COMP. STAT. ANN. 47/25(d)(3)-(4) (West 2007).

¹²⁹ 750 ILL. COMP. STAT. ANN. 45/1.1.

a court of competent jurisdiction determines the parentage of the child based on the parties' intent.¹³⁰

Prior to the Gestational Surrogacy Act, the birth mother was presumed to be the mother of a child, and the birth mother's husband was presumed to be the father of the child.¹³¹ The intended parents could establish their parental rights if all parties involved certified that the intended parents were the biological parents of the child, the surrogate was a gestational surrogate, a physician certified that the intended parents were the biological parents, and all of these certifications were recorded before the child was born.¹³² But if these conditions were not met, then the intended parents were forced to file a parentage action to establish the child's biology.¹³³

In 2005, the Illinois legislature wanted to create a statute that provided for the best interests of children with regards to the new ART and who would be responsible for the children's welfare.¹³⁴ It clarified pre-birth parental rights with regards to gestational surrogacy by enacting the Gestational Surrogacy Act.¹³⁵ The Gestational Surrogacy Act also protects parties to a gestational surrogacy contract by providing standards and safeguards to facilitate the use of such contracts.¹³⁶

While, the new act amended the Parentage Act of 1984 slightly, most of the Parentage Act remains unchanged.¹³⁷ For example, a birth mother is still the presumed mother of a child except as under the new Gestational Surrogacy Act.¹³⁸ In the case of gestational surrogacy, the intended mother is the presumed mother, the intended father is the presumed father, and the child is the legitimate child of the intended parent(s) immediately upon the birth of the child.¹³⁹ The intended parent(s) have sole custody upon the

¹³⁰ 750 ILL. COMP. STAT. ANN. 47/25(e).

¹³¹ Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240, 240-41 (2005).

¹³² Ford, *supra* note 131, at 241.

¹³³ *Id.*

¹³⁴ Richey, *supra* note 3, at 178-79.

¹³⁵ 750 ILL. COMP. STAT. ANN. 47/5.

¹³⁶ 750 ILL. COMP. STAT. ANN. 47/5.

¹³⁷ Ford, *supra* note 131, at 243.

¹³⁸ 750 ILL. COMP. STAT. ANN. 47/15(a).

¹³⁹ 750 ILL. COMP. STAT. ANN. 47/15(b)(1)-(4).

birth of the child.¹⁴⁰ Neither the gestational mother nor her husband has any rights to the child.¹⁴¹ This allows the parental rights to be established before the birth of the child.¹⁴² The surrogate and the intended parents must meet and certify that they meet certain eligibility requirements before a contract will be deemed valid.¹⁴³ The surrogate must be at least twenty-one, previously have given birth, completed a mental and medical health evaluation, undergone independent legal consultation, and obtained health insurance.¹⁴⁴ The intended parents also have certain eligibility requirements: at least one must contribute a gamete for gestation, there must be a medical need for the surrogacy, they must undergo health evaluations, and they have consulted with legal counsel.¹⁴⁵

The legal remedies available for breach of a gestational surrogate contract directs the courts to determine the new rights of the surrogate and intended parents if the parties involved have met the eligibility requirements and the contractual requirements of the act.¹⁴⁶ All legal and equitable remedies are available to the surrogate and the intended parent(s) except as provided in the contract, however, the intended parents cannot seek specific performance of the surrogate to be impregnated.¹⁴⁷ The contract as defining the remedies available, notwithstanding the substantive law, further indicates that the intent of the parties is determinative.¹⁴⁸ In addition, any action to invalidate a contract regarding gestational surrogacy must be commenced within one year after the child's birth to avoid revocation of the contract.¹⁴⁹

But the main controversial provisions are that it expressly allows for compensation of a gestational surrogate, and the compensation is to be placed in escrow prior to the implantation of

¹⁴⁰ 750 Ill. Comp. Stat. Ann. 47/15(b)(3).

¹⁴¹ 750 ILL. COMP. STAT. ANN. 47/15(b)(5)-(6).

¹⁴² H. Joseph Gitlin, *Illinois: An International Magnet for Surrogacy?*, 94 ILL. B.J. 48, 48 (2006).

¹⁴³ See 750 ILL. COMP. STAT. ANN. 47/25.

¹⁴⁴ 750 ILL. COMP. STAT. ANN. 47/20(a).

¹⁴⁵ 750 ILL. COMP. STAT. ANN. 47/20(b).

¹⁴⁶ 750 ILL. COMP. STAT. ANN. 47/50(a).

¹⁴⁷ 750 ILL. COMP. STAT. ANN. 47/55, 50(b).

¹⁴⁸ Snyder & Byrn, *supra* note 11, at 655.

¹⁴⁹ 750 ILL. COMP. STAT. ANN. 47/70.

the surrogate by an independent escrow agent.¹⁵⁰ Secondly, that parentage rights are established prior to the child's birth without a court proceeding or judicial overview.¹⁵¹ Additionally, there are no residential requirements to create a valid contract for gestational surrogacy in Illinois.¹⁵² Finally, the act only applies to gestational surrogacy contracts, and specifically states that a birth mother is the presumed mother; therefore, in traditional surrogacy the intended parents risk a later judicial custody dispute.¹⁵³

IV. Infertile Individuals as Consumers and Gestational Surrogates as Economic Beings

A. The Right to Commercial Surrogacy as One ART Procedure

Surrogacy has been described as the "antithesis of mainstream fertility treatment" where most women subject themselves to hormone treatments and ART procedures in order to give birth themselves.¹⁵⁴ The use of commercial surrogacy as ART is the exact opposite; where another woman subjects herself to possible risks inherent in IVF procedures and pregnancy for compensation by a couple that cannot create and/or gestate children themselves.¹⁵⁵ Surrogacy contracts contain provisions where the birth mother voluntarily relinquishes her parental rights, the intended parent(s) pays the surrogate for use of her services, and the intended parent(s) takes custody upon the child's birth.¹⁵⁶ Critiques often call into question the provision that allows gestational surrogacy fees is above expenses involved in pregnancies, legal expenses, and life

¹⁵⁰ 750 ILL. COMP. STAT. ANN. 47/25(a)(4); Ford, *supra* note 131, at 243-44.

¹⁵¹ 750 ILL. COMP. STAT. ANN. 47/35(a); Gitlin, *supra* note 142, at 48; Snyder & Byrn, *supra* note 11, at 654.

¹⁵² Gitlin, *supra* note 142, at 48; *see* 750 ILL. COMP. STAT. 47 (West 2007). This no residency requirement has raised questions as to whether Illinois will become an international draw for couples wishing to have legally binding gestational surrogacy contracts. *See* Gitlin, *supra* note 142, at 48.

¹⁵³ Ford, *supra* note 131, at 244 & n.59.

¹⁵⁴ SPAR, *supra* note 1, at 70.

¹⁵⁵ *Id.*

¹⁵⁶ Larkey, *supra* note 9, at 608.

insurance.¹⁵⁷ Commercial surrogacy, because it involves payment of between ten thousand and fifteen thousand dollars to the surrogate, clearly differentiated from non-commercial surrogacy, usually an informal arrangement between people close to the intended parent(s).¹⁵⁸

The many differing views regarding the ethical, constitutional, and public policy arguments involved in commercial surrogacy contracts center around a few particular points of interest.¹⁵⁹ Some opponents argue that the use of women's reproductive capacities, especially their uteruses, for profit is inconsistent with the concept of human dignity.¹⁶⁰ The major views disputed regarding commercial surrogacy are constitutional rights, exploitation of women verses the right to contract, infertility procedures as a market, and whether PGD will lead to designer babies.

1. Constitutional Rights

The Supreme Court in *Griswold v. Connecticut* guaranteed individuals freedom from governmental interference when making private decisions regarding conception and rearing of children.¹⁶¹ One way to determine parentage is through pre-birth orders, an attempt to formalize commercial surrogacy proceedings for intended parents to have a pre-determined parental right to revise their biological children.¹⁶² The use of pre-birth orders gives the intended parents control over the child and the child's postnatal care, puts them on the original birth records, allows intended parents participation in the child's delivery, and allows the hospital to hand the child over to the intended parents and not the surrogate.¹⁶³ The alternative is post-birth adoption procedures where the surrogate

¹⁵⁷ Watson, *supra* note 120, at 532.

¹⁵⁸ Larkey, *supra* note 9, at 608.

¹⁵⁹ *Id.* at 613; see Kerian, *supra* note 2, at 115.

¹⁶⁰ Kerian, *supra* note 2, at 153.

¹⁶¹ Larkey, *supra* note 9, at 615; see generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding there is a fundamental right to privacy in marriages, and controlling and criminalizing the use of contraceptives, violated this right and was therefore unconstitutional).

¹⁶² Snyder & Byrn, *supra* note 11, at 634.

¹⁶³ *Id.* at 634-35.

terminates her parental rights, the intended parents legally adopt the child, and a new birth certificate is issued.¹⁶⁴ Because public policy gives children the right to be supported by parents, determining who has these parental rights before the child's birth is imperative, the use of surrogacy contracts and pre-birth orders complements public policy and is in line with the intended parents constitutional rights.¹⁶⁵

Opponents argue in return that by entering into such agreements fully informed, the surrogate waives her right to privacy.¹⁶⁶ But surrogacy arrangements and pre-birth orders deserve constitutional protection, because of the private nature of conception and procreative relations of the parties, women should have control over their own bodies, and biological parents have a right to associate with their child.¹⁶⁷ In addition, banning surrogacy denies a woman equal treatment, because she is an individual unable to create a child biologically and she cannot use the form of ART that will allow her that opportunity, while allowing ART procedures where a man is sterile.¹⁶⁸ Women should have control over their bodies, and ignoring the economic power of women's reproductive capacities does a disservice to those who wish for women to enjoy equal standing.¹⁶⁹ It is wholly reasonable that these generous women, as economic equal beings, should be compensated for their service and the intended parents the constitutional right privacy in what procedures they are willing to employ.¹⁷⁰

2. Contractual Rights

Opponents to surrogacy argue that surrogacy is the sale or renting of the womb and this sale exploits women because it is akin to prostitution.¹⁷¹ As in arrangements for prostitution, where a woman sells her sexual services, a surrogate sells her reproductive

¹⁶⁴ Larkey, *supra* note 9, at 611.

¹⁶⁵ See 750 ILL. COMP. STAT. ANN. 45/1.1 (West 2007).

¹⁶⁶ Larkey, *supra* note 9, at 616.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 617.

¹⁶⁹ CARMEL SHALEV, BIRTH POWER 160 (1989); Kerian, *supra* note 2, at 164.

¹⁷⁰ Watson, *supra* note 120, at 552.

¹⁷¹ Kerian, *supra* note 2, at 158; Larkey, *supra* note 9, at 614.

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services for a fee.¹⁷² They argue poor women will flock to be surrogates in order to make money and that if these women have a choice between being poor or being exploited women will choose to be exploited; therefore, there is no real choice.¹⁷³

The fee paid to the surrogate is for her gestational services and not to buy a child; manifestation of the intent of the parties to compensate a surrogate for her services is shown by the fact that the intended parents pay the surrogate in installments over the course of the pregnancy.¹⁷⁴ The fee is not exploitive because women should be compensated when they render services.¹⁷⁵ If surrogates are being exploited it is because they are not being paid enough for a full-time job where the first break comes nine months and a painful delivery later.¹⁷⁶ Because surrogacy fees are significantly lower than even minimum wage rates, it is unlikely most women are motivated to be a gestational surrogate solely because of the financial “incentive”.¹⁷⁷

Commercial surrogacy is a valuable alternative choice that should be available to informed competent adults as consumers.¹⁷⁸ In fact, denying women the right to contract freely only reinforces paternalistic ideas about women’s incapability of making a decision or contracting.¹⁷⁹ Concluding that women do not have the ability to make intelligent decisions about their bodies suggests that women make decisions based on hormones rather than using their minds.¹⁸⁰ Denying women the right to make informed decisions regarding the use of their bodies implies that they need protection legally from a traditionally male-dominated profession to avoid exploitation of their bodies.¹⁸¹ In addition, rather than exploiting women, the choice to engage in commercial surrogacy as a form of employment can be

¹⁷² Larkey, *supra* note 9, at 614.

¹⁷³ *Id.* at 614.

¹⁷⁴ Kerian, *supra* note 2, at 154.

¹⁷⁵ *Id.* at 164.

¹⁷⁶ *Id.* at 164.

¹⁷⁷ Watson, *supra* note 120, at 551.

¹⁷⁸ Kerian, *supra* note 2, at 158.

¹⁷⁹ *Id.* at 163.

¹⁸⁰ *Id.*

¹⁸¹ Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: the Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 597 (1999).

more rewarding than other employment options that exist.¹⁸² The notion that women are exploited when they sell or rent their reproductive capacity is patronizing and reinforces the stereotype that biology is destiny.¹⁸³

Moreover, the purpose of surrogacy is different than that for prostitution, as surrogacy contracts are designed to bring a much-wanted child into the world that could otherwise not be born.¹⁸⁴ Surrogacy should be viewed simply as one method used for the conception of children by consumers in the infertility market.¹⁸⁵ Intended parents do not want a weak woman they are able to exploit, but instead want an intelligent, independent, thinking woman who will take care of her health and the health of the growing child.¹⁸⁶ Also, payment for surrogacy will be further motivation for women to take excellent care of themselves because they are taking care of someone else's child.¹⁸⁷ All parties benefit with the right to contract in the infertility market, and if such contracts are not enforced legal uncertainty would dissuade many people who could benefit from commercial surrogacy.¹⁸⁸

3. The Infertility Market

Opponents to surrogacy argue that it violates the Thirteenth Amendment because it is, in essence, the sale of babies.¹⁸⁹ The idea of selling children is abhorrent and against the constitutional amendment prohibiting slavery and the selling of an individual, and enforcing surrogacy contracts leading to the break-up of a family unity is what people found most repulsive about slavery in the first place.¹⁹⁰ Allowing commercial surrogacy constitutes the sale of children, and surrogate children become commodities.¹⁹¹ Opponents

¹⁸² Kerian, *supra* note 2, at 163.

¹⁸³ *Id.* at 152.

¹⁸⁴ Watson, *supra* note 120, at 546.

¹⁸⁵ Kerian, *supra* note 2, at 152.

¹⁸⁶ Watson, *supra* note 120, at 545.

¹⁸⁷ *Id.* at 549.

¹⁸⁸ Kerian, *supra* note 2, at 152.

¹⁸⁹ *Id.* at 153.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 154.

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argue that delivering the “product” becomes the bottom line, and because final payment is dependent upon the surrogate handing over the child, commercial surrogacy is baby selling.¹⁹² Because a substantial portion is paid for the surrogate’s willingness to waive her maternal rights, money is held in escrow until these rights are terminated, and if she miscarries or has a stillborn the fee is less.¹⁹³ Such evidence indicates the surrogate is selling the baby to the intended parents.¹⁹⁴

One author, an opponent of surrogacy, argues that because the commercial surrogate has neither money nor vital fluids the surrogate “contributes mere egg and environment” and is merely stock that is purchased and viewed as raw material from which a child is manufactured.¹⁹⁵ Eventually surrogacy will re-institutionalize a male genetic destiny where the primary market is a spermatic one and the new definition of fatherhood is created by the capability to ejaculate.¹⁹⁶ It is argued that commercial surrogacy violates public policy by placing a market value on women’s reproductive capabilities and the children born as a result of surrogacy.¹⁹⁷ Women are used as fetal containers, which exploits the poor because opponents of surrogacy assume only poor women will want to be surrogates and only because of the fee they will be paid.¹⁹⁸ Although persons who purchase fertility services are participants in a commercial market, they likely do not view themselves in such a way.¹⁹⁹ Rather, they are on a quest to find a fertility service or procedure that allows them the joy of creating a child.²⁰⁰ And women who receive a fee for their fertility service not only consider the economic value of their choice but usually their primary reason for

¹⁹² *Id.*

¹⁹³ Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood* 64 (Praeger, 1994).

¹⁹⁴ *Id.*

¹⁹⁵ RAYMOND, *supra* note 3, at 31 (arguing that *In re Baby M* created a spermatic market because the father, as a sperm contributor, was given custody; and, because a man has both money and the vital fluid that determines who is awarded custody, his sperm are the liquid assets that give him control).

¹⁹⁶ RAYMOND, *supra* note 3, at 35.

¹⁹⁷ Kerian, *supra* note 2, at 154.

¹⁹⁸ Richey, *supra* note 3, at 190.

¹⁹⁹ SPAR, *supra* note 1, at 49.

²⁰⁰ *Id.*

choosing to become surrogates is the desire to help an individual or couple who desperately want a child.²⁰¹ Many women feel empowered with the ability to create life and the assumption that they are being exploited is demeaning to surrogates who view their role as positive.²⁰²

While sperm donation has been a commercial market since the 1970s, the market for women's reproductive capabilities is newer and unreasonably far more controversial.²⁰³ IVF is now appropriately being used to source donor eggs for infertile individuals or couples, just as artificial insemination relied on donated sperm.²⁰⁴ In addition, the ability to differentiate between surrogate and egg provider (rather than finding one woman willing to contribute both, and with whom the intended individual or couple were satisfied) increased the price of eggs, giving women yet another incentive to contribute to the ART market.²⁰⁵ As long as egg donation remained truly altruistic, it experienced severe shortages, because a healthy young woman is hardly willing to put herself at risk to help an infertile stranger.²⁰⁶ The motivation to help others is complex and compensating women for their help makes common and economical sense.

Similarly, commercial surrogacy reduces the legal and emotional risks traditionally associated with surrogacy by using IVF to remove the traditional tie connecting egg, womb, and mother.²⁰⁷ Therefore, women become more willing to provide for the ART market, allowing it to flourish.²⁰⁸ This willingness permits the supply of both eggs and wombs to increase for those in desperate need of them.²⁰⁹ Commercial surrogates are merely carrying another individual or couple's child, rather than genetically contributing to the creation and gestation of a child, and as a result are compensated for a very different type of service.²¹⁰ As in compensation for

²⁰¹ Richey, *supra* note 3, at 190.

²⁰² *Id.*; Watson, *supra* note 120, at 545.

²⁰³ SPAR, *supra* note 1, at 36, 41.

²⁰⁴ *Id.* at 42.

²⁰⁵ *Id.* at 81.

²⁰⁶ *Id.* at 43.

²⁰⁷ *Id.*

²⁰⁸ SPAR, *supra* note 1, at 43.

²⁰⁹ *Id.* at 80.

²¹⁰ *Id.*

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donated eggs, women do not have an inherent incentive to endure the physical and emotional consequences of gestational surrogacy for complete strangers, it makes sense to pay and seek women who want to and are willing to participate.²¹¹

B. PGD: Another Hope for Healthy Children

PGD is troubling to some because it takes the infertility market to a new level; eventually, it could be used for couples that are not infertile, not genetically at-risk, beyond even savior siblings.²¹² One concern of those opposed to PGD is whether the use of such a procedure will lead to rich people designing perfect children, while the poor would be consigned to chance.²¹³ But potential parents should not be consigned to throwing a genetic dice because of potential problems that cannot even be realized at this time.²¹⁴

Choices about the genetic composition of future children of individuals and couples, who desperately want a child, should be left to the prospective parents as their right to privacy.²¹⁵ This perspective acknowledges that the outcome of a person's reproductive choice impacts that person or persons more significantly than any other person involved and in addition respects that individual or couples reproductive liberty.²¹⁶ Respecting people's reproductive private rights means a person is free from having to ask to create a wanted child.²¹⁷ Before the State takes the choices about conception and child rearing away from the prospective parents, good policy reasons should be required, otherwise liberty from state control and an advocacy of neutrality, when it comes to the use of PGD and other types of ART, should be the policy of the state because this is an area of life that concerns an individual's right to autonomy.²¹⁸

²¹¹ *Id.* at 87.

²¹² *Id.* at 119.

²¹³ SPAR, *supra* note 1, at 100.

²¹⁴ *Id.* at 114.

²¹⁵ GAVAGHAN, *supra* note 73, at 4.

²¹⁶ *Id.* at 207.

²¹⁷ *Id.* at 39.

²¹⁸ *Id.* at 4, 39.

Another argument against PGD is the “slippery slope” one; opponents argue that the use of PGD will lead toward a world where parents choose to create perfect children, a concern of some who fear that the use of PGD will lead to the horrific results of Hitler’s eugenic ideas.²¹⁹ However, the reason intended parents go through the arduous process of using several different ART procedures is that they want children who look like them, not some Aryan ideal formulated by a mad dictator.²²⁰ The use of PGD involves an expensive and intricate process that people are unlikely to use in order to have a child with a certain color of eyes, especially when they have at least a one in four chance of doing so the natural way, given the choice “most people would rather have sex.”²²¹

In addition, people cannot pass on genes they do not have; people cannot “design” babies, they can only choose the best candidate from pre-embryos created from their own gametes.²²² The use of PGD by individuals should be a private decision; therefore, it would be different from attempts by a State to control its citizens by espousing the supposed desirability of the perfect person.²²³ The solution to ethical concerns surrounding PGD does not need to be extreme, but rather a differentiation between PGD that selects against undesired genetic mutations and PGD that selects for preferred genetic characteristics.²²⁴ In order to control future “ethically unacceptable genetic consumerism” some guidelines need to be established, as they have been in Illinois, setting out policy statements and implications for gestational surrogacy that are acceptable.²²⁵

V. Illinois Implications In Particular

Illinois’ Gestational Surrogacy Act is a special statute because if a woman meets the eligibility requirements she is not presumed to

²¹⁹ Abstract, *Wolfram Henn, Consumerism in Prenatal Diagnosis: A Challenge for Ethical Guidelines*, 26 *Med. Ethics* 444 (2000), 16 *ISSUES L. & MED.* 298, 298 (2001).

²²⁰ GAVAGHAN, *supra* note 73, at 8; SPAR, *supra* note 1, at 105.

²²¹ SPAR, *supra* note 1, at 127.

²²² GAVAGHAN, *supra* note 73, at 8.

²²³ SPAR, *supra* note 1, at 124.

²²⁴ *Id.* at 126.

²²⁵ Abstract, *supra* note 219, at 298.

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be the mother even though she gives birth to the child.²²⁶ The act does not provide for the gestational surrogate to change her mind, which is troublesome on the one hand.²²⁷ However, because intent of the parties controls under the act the parties receive what they expected when entering into the agreement, after full disclosure and consultation regarding the IVF procedure before implantation of the embryo.²²⁸ Knowing the legal ramifications, and knowing these will always be the same ramifications, will ensure that the consuming parties thoroughly process what the procedure entails, and this benefit outweighs potential change of intent.²²⁹

In addition, the gestational mother would not be birthing the child but for the individual or couple, as it was not her gametes that contributed to the conception, and surrogates should be thoroughly screened before impregnated ensuring their mental health allows them to complete the procedure as intended.²³⁰ Disallowing gestational surrogacy because a few sensational cases highlight an unusual retraction of a prearranged agreement is more harmful than allowing people the right to privacy and to be consumers of all ART procedures available in the conception and raising of their children.

Another concern is that the Illinois act expressly allows for reasonable compensation to the surrogate for her services, where other states are very specific about what the surrogate can be compensated for or disallow compensation.²³¹ However, allowing payment effectively recognizes the surrogate's time and effort spent furthering the efforts of the intended parents' quest for a biological child.²³² The commercial context of surrogacy exists as part of the contract but the idea of commodifying women or children is not

²²⁶ Richey, *supra* note 3, at 173.

²²⁷ Snyder & Byrn, *supra* note 11, at 654.

²²⁸ *Id.* at 655.

²²⁹ Less than one percent of surrogate mothers later want to change her mind and keep the child. Richey, *supra* note 3, at 191. For such infertile individuals and couples and the women who surrogate their child, certainty in the law is a desired objective. H. Joseph Gitlin, *New Law Makes Illinois Friendly for Surrogacy*, 11/22/04 CHI. DAILY L. BULL. 6, at ¶ 28 (2004).

²³⁰ Richey, *supra* note 3, at 179.

²³¹ 750 ILL. COMP. STAT. 47/25(d)(3)-(4) (West 2007); Richey, *supra* note 3, at 185.

²³² Behm, *supra* note 181, at 602.

inherently part of that contract.²³³ Reasonable compensation as part of a contract should be enforceable as “based on the notion of autonomous responsible persons making binding promises” before the conception of the child.²³⁴

A third major concern is the ease that a pre-birth parent-child relationship is established and the process of acquiring a birth certificate compared to other states, such as New Hampshire, where a birth certificate cannot be signed until seventy-two hours after the child’s birth, which gives the surrogate time to change her mind.²³⁵ The provisions of the Illinois act are more easily met because it requires no state residency, parental rights can be determined before birth, and the birth certificate can be issued without a court proceeding.²³⁶ But, as stated above, a gestational surrogate has no genetic relation to the child, and her right to change her mind therefore lessens and is overshadowed by the ability of all infertile couples to have the chance to create a biological child through procedures available to them on the infertility market. A state statute recognizing that surrogacy is a generous service some women provide that should be generously compensated for aids the availability of gestational surrogacy as an ART procedure.

VI. Conclusion

In conclusion, Illinois’ Gestational Surrogacy Act is an enlightened view regarding women’s right to use their bodies as they see fit, even if that involves being paid to give birth to someone else’s child. The fear opponents have regarding exploitation and possible slippery slopes of commodification do not stand up to thoughtful analysis regarding infertile individual and couple’s consumer rights to use assisted reproductive technology including technology that gives them the best chance of having a healthy child (such as PGD), their right to privacy regarding conception and raising their biological children, and the surrogate’s right to contract and her right to privacy regarding the use of her reproductive capabilities. As long as states carefully regulate such reproductive technologies so that public policy, i.e. children have the right to parental care, is not violated, people should have the right to create children through commercial

²³³ SHALEV, *supra* note 169, at 166.

²³⁴ *Id.*

²³⁵ Richey, *supra* note 3, at 180.

²³⁶ Gitlin, *supra* note 229, at ¶ 2.

procedures available to them. Also, women, as economic beings should have the right to assist such individuals and couples. Prohibiting surrogacy would result in women's concession to governmental infringement on matters that are best left to the individual.²³⁷

Gestational contracts are written as other contracts are, in order to arrange an exchange, this exchange can be seen either as a commodity or a gift, and surrogacy contracts can be written so that the resulting child is seen as a precious gift one woman gives another.²³⁸ Legislatures can regulate surrogacy contracts so that the child is a gift, but the surrogate's gestation of the child is a service to the couple; this avoids commodification of children and does not violate public policy.²³⁹ The fee should be for the service a surrogate provides and the expenses she incurs, but the fee should not be tied to the termination of her parental rights so that women are not deprived of compensation for a valued service, but the fee should not be tied to the termination of her parental rights, therefore if she has no parental rights, as in Illinois, she cannot terminate them.²⁴⁰ In fact, such contracts reaffirm public policy because they definitively articulate, before the child is born, who will support the child as it grows up. Illinois' Gestational Surrogacy Act is a good example of such legislation, the gestational surrogate does not give up parental rights, in fact she is presumed not to have any, and it expressly allows compensation for the service she does provide.²⁴¹

The fears that opponents to surrogates raise are very similar to fears opponents to contraceptive devices had in 1938.²⁴² Back then contraception devices were the surrogate motherhood debates of today; birth control was viewed as an "aberration of nature," however, the demand for contraception was too strong and a market subsequently evolved.²⁴³ Such a market for commercial surrogacy is and should evolve in the future. The ability to use PGD, to choose among genetic combinations, to choose the types of ART procedures

²³⁷ Kerian, *supra* note 2, at 165.

²³⁸ Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 522-24 (1990).

²³⁹ Richey, *supra* note 3, at 190.

²⁴⁰ *Id.*

²⁴¹ 750 ILL. COMP. STAT. 47/15(a), 25(d)(3)-(4) (West 2007).

²⁴² SPAR, *supra* note 1, at 231-32.

²⁴³ *Id.* at 232.

they want to consume, how to conceive, as well as choosing the results, are the possibilities that people desire and the control over their private lives they deserve.²⁴⁴

In addition, viewing assisted reproductive technology as a market allows the state to impose rules that enable such a market to create a gift without incurring some of the obvious risks inherent in the technology.²⁴⁵ Regulation of surrogacy keeps such procedures from going underground on a black market and increases the likelihood that troubling aspects of such technology is controlled for public policy reasons.²⁴⁶ And finally, because all these ART procedures are only technical and social methods in which parents acquire children that they subsequently raise and love above and apart from the way their children are conceived.²⁴⁷

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 197.

²⁴⁶ Behm, *supra* note 181, at 598; Dolgin, *supra* note 238, at 549.

²⁴⁷ SPAR, *supra* note 1, at 207.