A TROUBLESOME GOOD IDEA: AN ANALYSIS OF THE ILLINOIS GESTATIONAL SURROGACY ACT

Jeremy J. Richey*

I. INTRODUCTION

Tiffany and Greg married the week after they graduated from college. They wanted children as soon as possible but decided to wait one year so they would have time to settle into their new home and jobs. When a year passed, they immediately began attempting to create their new family. Several years later, they still had not experienced the joys of parenthood. Their physicians concurred that they would not be able to naturally bear a child, but both of them produced viable sex cells.

When they first encountered the idea of gestational surrogacy, it seemed strange, but yet here they were at their attorney's office making sure they were doing everything by the book. They were honest with themselves –it was hard to trust someone else with carrying their biological child, but once the child was in their arms, it would be worth it. Their attorney told them about a new Illinois statute governing gestational surrogacy. The statute gave them a sense of security and they were glad they came.

For many couples, the ideal family includes children that are their own biological offspring. Unfortunately, some couples cannot naturally give birth to biological children but have healthy sex cells. For these couples, gestational surrogacy provides a way for them to raise children that are biologically their own.

In Illinois, the Gestational Surrogacy Act[1] ("GSA") regulates the gestational surrogacy process for an individual or couple that desires to produce a child in this manner.[2] The GSA became effective on January 1, 2005.[3] The GSA is a mixed blessing–on one hand, it gives intended parents guarantees not available in any other jurisdiction, but on the other, it raises a host of ethical questions.[4]

The GSA is a good law due to the security it provides for intended parents, but ethical concerns surrounding gestational surrogacy, along with other practical

---

* B.S., Greenville College, 2003; J.D. Candidate, Southern Illinois University School of Law, 2006. The author would like to thank Professor Sheila Simon, Krissi Geary-Boehm, Jason Johnson, and David Wood for the suggestions they gave the author while he wrote this article.

1. 750 ILL. COMP. STAT. ANN. 47/1–75 (LexisNexis Supp. 2005).
2. *See id*.
3. *Id*. § 1 (*see* notes).
4. Judith Graham, *State sets standards on surrogate births; Legislation called most liberal in U.S.*, CHI. TRIB., Jan. 2, 2005, at C1.

concerns raised by the statute, suggest that the General Assembly needs to modify the GSA to address some of these concerns. As to security, under the GSA, if the intended parents follow the proper procedures, they will have sole custody of the child when the child is born and be vested with full parental rights. Ethically, surrogacy in general is not universally accepted for various reasons. Furthermore, the GSA skirts particular ethical concerns such as baby selling and women becoming merely fetal containers.

Section II provides background information on surrogacy in general, discusses the substance of the GSA, and explores the GSA's legislative history. Section III compares the GSA with the laws found in other jurisdictions and explores the public policy concerns raised by the GSA. Section IV offers suggestions for future amendments to the GSA.

II. BACKGROUND

A. Overview of Surrogacy

In basic terms, pregnancy requires a sperm, an egg, and a uterus.[5] Due to the marvels of modern medicine, couples unable to produce children naturally have at their disposal donated sperm, eggs, and uteruses.[6] Keeping these basics in mind, two different types of surrogacy exist: gestational surrogacy and traditional surrogacy.[7]

Gestational surrogacy is "[a] pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child."[8] Gestational surrogacy can be broken down into two different types.[9] In one type, the intended parents provide the genetic material that is implanted into the surrogate mother's uterus – i.e., one intended parent provides sperm, and one intended parent provides eggs.[10] The other type of gestational surrogacy is gestational surrogacy with a donor egg.[11] With this type, a clinic unites the intended father's sperm with a donor egg and

5. Daniel L. Stewart, When Should a Couple Consider Surrogacy or a Gestational Carrier? (Feb. 18, 2005), http://www.surrogacy.com/Articles/news_view.asp?ID=12.
6. *Id*.
7. Am. Surrogacy Ctr., Types of Surrogacy (Feb. 19, 2005), http://www.surrogacy.com/Articles/news_view.asp?ID=13.
8. BLACK'S LAW DICTIONARY 1485 (8th ed. 2004).
9. *See* Am. Surrogacy Ctr., *supra* note 7.
10. *Id*.
11. *Id*.

then implants it into the surrogate mother's uterus.[12] With either type of gestational surrogacy, the surrogate does not contribute to the child's genetic makeup.[13]

Traditional surrogacy is "[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."[14] The intended father provides the sperm for the artificial insemination, and the intended mother typically adopts the child after his or her birth.[15]

The infamous *In Re Baby M*[16] case involved traditional surrogacy. There, William Stern formed a surrogacy contract with Mary Beth Whitehead.[17] Stern provided the sperm, and Whitehead provided the egg and uterus.[18] Stern's wife did not want to become impregnated because she feared the pregnancy would have a devastating effect on her health due to her potentially having a serious medical condition.[19] Whitehead turned Baby M over to the Sterns but later fled with the child.[20] Ultimately, the court rejected the contract on public policy grounds, granted custody to Stern, voided the termination of Whitehead's parental rights, and voided the adoption of Baby M by Stern's wife.[21]

The following chart[22] illustrates the different possible gamete and gestation combinations that can lead to the birth of a child. The shaded areas indicate combinations governed by the GSA.[23]

---

12. *Id*.
13. *See id*.
14. BLACK'S LAW DICTIONARY 1485 (8th ed. 2004).
15. Am. Surrogacy Ctr., *supra* note 7.
16. 537 A.2d 1227 (N.J. 1988).
17. *Id*. at 1235.
18. *Id*.
19. *Id*.
20. *Id.* at 1236–37.
21. *Id*. at 1234.
22. John Sheldon created a chart from which this chart is adapted. John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 537 (2001).
23. For an explanation of arrangements excluded by the GSA, including those that are excluded from the GSA even though they fit in a gray shaded area above, see Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 Ill. B.J. 240, 244–45 (2005). An example as to the latter is single men who could obtain a donor egg and a surrogate, but it would be unlikely they would meet the GSA's medical-need requirement. *Id*. at 245. This article also discusses the status of Illinois surrogacy law before the GSA. *See id*. at 240–41.

	Egg from W and gestation by W	Egg from D and gestation by W	Egg from W and gestation by S	Egg from D and gestation by S	Egg from S and gestation by S
Sperm: H	Genetically: H&W	Genetically: H	Genetically: H&W	Genetically: H	Genetically: H (Traditional Surrogacy).
Sperm: D	Genetically: W	Genetically: neither H or W	Genetically: W	Genetically: neither H or W	Genetically: neither H or W

H = husband; W = wife; D = donor; S = surrogate.

B. An Overview of the Gestational Surrogacy Act

1. The Purpose of the GSA and Important Definitions

Section 5 of the GSA contains the act's purposes. There, the Illinois General Assembly communicated a twofold purpose.[24] The purpose's first prong protects the parties to gestational surrogacy contracts by creating "consistent standards and procedural safeguards."[25] The second prong confirms "the legal status of the children" resulting from gestational surrogacy contracts.[26] Section 5 further communicates that the standards and safeguards established by the GSA help ensure that gestational surrogacy contracts are used in such a way that they are consistent with Illinois public policy.[27]

24. 750 ILL. COMP. STAT. ANN. 47/5 (LexisNexis Supp. 2005).
25. *Id*.
26. *Id*.
27. *Id*.

The legislature defined several important words and phrases in Section 10 of the GSA.[28] The GSA 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 made no genetic contribution."[29]

The definition of gestational surrogacy can be broken down into five parts. The first part of the definition is "the process by which a woman attempts to carry and give birth to a child," and the second part is "created through in vitro fertilization." In the GSA, in vitro fertilization refers to the medical and laboratory procedures that are needed to fertilize an egg outside of a body.[30] The third part of the definition is "using gamete or gametes." Gametes are sperm and eggs.[31] The fourth part is "of at least one of the intended parents." Intended parents are the people who form the gestational surrogacy agreement with the gestational surrogate and who will be the legal parents of the child when it is born.[32] The final part of the definition of gestational surrogacy is "and to which the gestational surrogate has made no genetic contribution." The gestational surrogate is the woman who agrees to bear the child for the couple or individual providing the sex cells.[33]

2. Rights of Parentage

Section 15 of the GSA discusses the rights of parentage. First, the GSA is special because only within it is a woman who gives birth to a child *not* presumed to be the child's mother "for purposes of State law."[34] Second, as long as parties comply with the other parts of the statute, the intended father and mother will be the parents of the child in the eyes of the State of Illinois when the child is born.[35] Furthermore, upon birth, the child will be considered the intended parents' legitimate child, and they will have sole custody and be vested with parental

28. It defined the following words and phrases: compensation, donor, gamete, gestational surrogacy, gestational surrogate, gestational surrogacy contract, health care provider, intended parent, in vitro fertilization, medical evaluation, mental health evaluation, physician, pre-embryo, and pre-embryo transfer. *Id*. § 10. It did not define "medical need" which is an important phrase in Section 20 of the GSA. Ford, *supra* note 23, at 242. The effect of this is to have the physician providing the required affidavit make a subjective determination of what a medical need is on a case by case basis. *Id*.
29. 750 ILL. COMP. STAT. ANN. 47/10.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*. § 15(a).
35. *Id*. § 15(b)(1–2).

rights.[36] The gestational surrogate and her husband, if applicable, will not be considered the child's parents.[37] Also, Section 30 of the GSA communicates that the intended parents will still have a duty to support the child even if they breach the contract.[38]

Subsection (c) adds some additional interesting material to Section 15. Subsection (c) deals with the situation where the gestational surrogate is impregnated with the wrong pre-embryo.[39] In this situation, the intended parents will still be considered the parents of the child–"unless otherwise determined by a court of competent jurisdiction."[40]

The requirements in the GSA for establishing the parent-child relationship before the child is born are found in Section 35.[41] Subsection (a) in Section 35 can be broken down into two parts. First, the "requirements of Sections 5 and 6 of the Illinois Parentage Act of 1984"[42] must be met.[43] Section 5 deals with the ways in which a "man is presumed to be the natural father of a child."[44] Section 6, among other things, lists seven requirements needed to establish a parent-child relationship "in the event of gestational surrogacy."[45] These must be satisfied

36. *Id*. § 15(b)(3–5).
37. *Id*. § 15(b)(6).
38. *Id*. § 30(b).
39. *Id*. § 15(c).
40. *Id*.
41. *Id*. § 35.
42. 750 ILL. COMP. STAT. ANN. 45/1–27 (LexisNexis 1999 & Supp. 2005).
43. 750 ILL. COMP. STAT. ANN. 47/35(a).
44. 750 ILL. COMP. STAT. ANN. 45/5(a).
45. *Id*. § 6(a)(1)(A–F). The first requirement is that the gestational surrogate must certify "that she is not the biological mother of the child, and that she is carrying the child for the intended parents." *Id*. § 6(a)(1)(A). The second requirement is that the gestational surrogate's husband (if applicable) must certify "that he is not the biological father of the child." *Id*. § 6(a)(1)(B). The third requirement is that the intended mother must certify "that she provided or an egg donor donated the egg from which the child being carried by the gestational surrogate was conceived." *Id*. § 6(a)(1)(C). The fourth requirement is that the intended father must certify "that he provided or a sperm donor donated the sperm from which the child being carried by the gestational surrogate was conceived." *Id*. § 6(a)(1)(D). The fifth requirement is that a licensed Illinois physician must certify "that the child being carried by the gestational surrogate is the biological child of the intended mother or the intended father or both and that neither the gestational surrogate nor the gestational surrogate's husband, if any, is a biological parent of the child being carried by the gestational surrogate." *Id*. § 6(a)(1)(E). The sixth requirement is that "[t]he attorneys for the intended parents and the gestational surrogate [must] certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements of Section 25 of the Gestational Surrogacy Act with respect to the child." *Id*. § 6(a)(1)(E–5). The final requirement communicates that "[a]ll certifications shall be in writing and witnessed by 2 competent adults . . . . Certifications shall be on forms prescribed by the Illinois Department of Public Health, shall be executed prior to the birth of the child, and shall be placed in the medical records of the gestational surrogate prior to the birth of the child. Copies of all certifications shall be delivered to the Illinois Department of Public Health prior to the birth of the child." *Id*. § 6(a)(1)(F).

before the child is born.[46] The second part of Section 35 of the GSA requires the attorneys representing each party to the contract to "certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements of Section 25 [of the GSA] with respect to the child."[47] (Section 25 contains the requirements for the gestational surrogacy contract itself).[48] The required certifications must be on Illinois Department of Public Health forms and must be filed in a manner consistent with the Illinois Parentage Act of 1984.[49]

3. Eligibility Requirements for Gestational Surrogates and Intended Parents

Section 20 of the GSA discusses the eligibility requirements for gestational surrogates and intended parents. In order for a woman to become a gestational surrogate, she must meet six requirements "at the time the gestational surrogacy contract is executed."[50] The first four are that she is required to be no younger than twenty-one years old, to have previously given birth, and she must complete medical and mental health evaluations.[51] The fifth requirement is that she must consult an independent attorney in order to discuss "the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy."[52] Finally, she must obtain a health insurance policy that meets certain stated requirements – but only if the gestational surrogacy contract does not require the intended parents to obtain it for her.[53]

In order for people to become intended parents, four requirements must be met contemporaneously with the execution of the gestational surrogacy contract.[54] First, if only one person is involved, that person must provide one of the gametes that will be used to form the pre-embryo, and if a couple is involved, at least one of the two individuals must provide a gamete.[55] Second, the intended parent or parents must "have a medical need for the gestational surrogacy."[56] This medical need must be supported by a qualified physician's affidavit.[57] Third, the intended

---

46. *Id*. § 6(a)(1).
47. 750 ILL. COMP. STAT. ANN. 47/35(a) (LexisNexis Supp. 2005).
48. *See id*. § 25.
49. *Id*. § 35(b).
50. *Id*. § 20(a).
51. *Id*. § 20(a)(1–4).
52. *Id*. § 20(a)(5).
53. *Id*. § 20(a)(6). In particular, the health insurance policy must cover, "major medical treatments and hospitalization . . . [and must extend] throughout the duration of the expected pregnancy and for 8 weeks after the birth of the child . . . ." *Id*.
54. *Id*. § 20(b).
55. *Id*. § 20(b)(1).
56. *Id*. § 20(b)(2).
57. *Id*.

parent or parents must undergo a mental health evaluation.[58] Finally, the intended parent or parents must submit to the same sort of legal consultation that the gestational surrogate must undergo.[59]

4. The Gestational Surrogacy Contract

Section 25 of the GSA contains several requirements for the gestational surrogacy contract.[60] If a contract fails to meet these requirements, a court will look to the parties' intent and decide parentage accordingly.[61]

An interesting part of section 25 is subsection (c), which communicates that, among other things, the contract must contain a provision for the gestational surrogate to "surrender custody of the child to the intended parent or parents immediately upon the birth of the child."[62] If she is married, her husband must also agree to the same.[63] Furthermore, the intended parents must agree both to accept custody of the child and to take full responsibility for his or her support when he or she is born.[64]

Subsection (d) communicates what provisions the contract can contain and still be valid.[65] First, a contract containing a provision where the gestational surrogate agrees to "undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommended for the success of the pregnancy" is valid.[66] Second, the contract can contain a provision for the gestational surrogate to abstain from activities that, in the reasonable belief of the intended parents or the physician, could harm the "pregnancy and future health of the child."[67] Third, the intended parents can agree "to pay the gestational surrogate reasonable compensation."[68] Under subsection (b) if compensation is paid, it must be put in escrow before any medical procedures are commenced, except those dealing with

---

58. *Id*. § 20(b)(3).
59. *Id*. § 20(b)(4).
60. *See id*. § 25.
61. *Id*. § 25(e).
62. *Id*. § 25(c)(1)(ii).
63. *Id*. § 25(c)(2)(ii).
64. *Id*. § 25(c)(4)(i–ii).
65. *Id*. § 25(d).
66. *Id*. § 25(d)(1).
67. *Id*. § 25(d)(2). These harmful activities include, but are not limited to, "smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational surrogate's pregnancy, exposure to radiation, or any other activities proscribed by a health care provider." *Id*.
68. *Id*. § 25(d)(3).

eligibility.[69] Finally, the contract can contain a provision for the intended parents to pay the gestational surrogate's reasonable expenses related to the gestational surrogacy contract and procedure.[70]

5. Other Interesting Provisions

There are some other miscellaneous provisions in the GSA that are of interest. First, one may wonder if a gamete donor will have a duty to support a child born by gestational surrogacy. Section 30 says, with exceptions, the answer is "no."[71] The donor will have a duty to support a child "only if he or she fails to enter into a legal agreement with the intended parent[s] . . . in which the intended parent[s] . . . agree to assume all rights and responsibilities for any resulting child, and the gamete donor relinquishes his or her rights to any gametes, resulting embryos, or children."[72] In other words, egg and sperm donors will not have a duty to support a child as long as they have a legal agreement with the intended parents where the intended parents agree to assume parental rights and responsibilities, and where the donor relinquishes his or her rights to the child.

Second, various provisions deal with breaches and remedies. Noncompliance results when a party to the gestational surrogacy contract breaches a provision in it.[73] When noncompliance occurs with section 15(d)[74] of the GSA, it is up to the courts to determine what rights and obligations belong to the parties.[75] Section 55 communicates that all legal and equitable remedies will be available to intended parents and gestational surrogates unless otherwise stated in the gestational surrogacy contract.[76] Interestingly, section 55 does not mention Section 50(b).[77] Section 50(b) states that "there shall be no specific performance remedy available for a breach by the gestational surrogate of a gestational surrogacy contract term that requires her to be impregnated."[78] In other words, a

---

69. *Id*. § 25(b)(4).
70. *Id*. § 25(d)(4).
71. *Id*. § 30(c).
72. *Id*.
73. *Id*. § 45.
74. "The parties to a gestational surrogacy shall assume the rights and obligations [given in the GSA] . . . if: (1) the gestational surrogate satisfies the eligibility requirements . . .; (2) the intended parent or parents satisfy the eligibility requirements . . .; and (3) the gestational surrogacy occurs pursuant to a gestational surrogacy contract meeting the [necessary] requirements . . . ." *Id*. § 15(d).
75. *Id*. § 50(a).
76. *Id*. § 55(a–b).
77. *See id*.
78. *Id*. § 50(b).

court cannot make the gestational surrogate hold up her end of the deal by forcing her to become pregnant. Thus, it appears that all equitable and legal remedies are available except for the specific performance remedy of forced pregnancy.

Third, challenges to the gestational surrogacy or rights of parentage must be made within one year of the child's birth.[79] After a year, they will be irrevocable.[80]

C. Legislative History

The GSA started its life out as H.B. 4962.[81] This bill passed both the Illinois House and Senate rather easily. On its third reading in the Illinois House, the bill received 113 yeas and zero nays.[82] Similarly, during its third reading in the Illinois Senate, the bill received fifty-three yeas and zero nays.[83]

Democrat Barbara Flynn Currie,[84] the chief sponsor of the GSA, stated that the GSA's main purpose "is to assure some degree of parental security for children born through this relatively new technology."[85] The General Assembly wanted to "settle questions of parenthood through the statutes" rather than have the courts settle those issues.[86]

In the transcription of the House debate, Rep. Currie stated H.B. 4962 came about because the Illinois Supreme Court was concerned about "emerging reproductive technologies."[87] The court wanted the General Assembly to enact laws that addressed issues raised by these technologies.[88] It wanted this done so that the law would protect the interests of children born via these technologies.[89] Rep. Currie stated that the GSA strives to accomplish that.[90] She suggested it

79. *Id*. § 70.
80. *Id*.
81. H.B. 4962, 93d Gen. Assem. (Ill. 2004).
82. H.R. Roll Call, H.B. 4962, 93d Gen. Assem., Third Reading (Ill. 2004), *available at* http://ilga.gov/legislation/votehistory/93/house/09300HB4962_03292004_007000T.pdf.
83. S. Vote, H.B. 4962, 93d Gen Assem., Third Reading (Ill. 2004), *available at* http://ilga.gov/legislation/votehistory/93/senate/09300HB4962_05172004_002000T.pdf.
84. As of the writing of this article, Ms. Currie is the House Majority Leader in the Illinois House of Representatives. She represents the 25th District.
85. Letter from Barbara Flynn Currie, House Majority Leader, Illinois House of Representatives (Feb. 22, 2005) (on file with author).
86. *Id.*
87. House of Representatives Transcript of Debate, Ill. 93d Gen Assem. 22 (Mar. 29, 2004) (statement of Rep. Currie), http://ilga.gov/house/transcripts/htrans93/09300111.pdf.
88. *Id*.
89. *Id*.
90. *Id*.

clarifies that the intended parents are the people "who are responsible for the care, nurture, feeding, and rearing of the children" born via gestational surrogacy.[91] She indicated that the bill passed the judiciary committee with a 19–0 vote and urged her fellow representatives "to join the 21st century" so that Illinois children "are protected and . . . cared for."[92]

Also, in the above transcription, Republican William Black[93] indicated that he thought that the bill was a good one, but he had a question.[94] Black mentioned that, in the past, the birth mother could at the last moment say, "I don't wanna go through with this. I'm gonna change my mind."[95] He asked whether the surrogate parents would "have any extraordinary rights" in such a situation.[96] Currie responded with a "no."[97] She highlighted that gestational surrogacy is different than traditional surrogacy.[98] "In a situation where the birth mother . . . provided the egg . . . there's no way you cannot grant her the opportunity to change her mind at the eleventh hour or within the first 72 hours after birth. But the woman in the gestational surrogacy program . . . has no biological connection to the child that results."[99]

Black also communicated that the bar association supported the bill because "it plays everything out clearly so that all parties know where they stand."[100] Currie responded, "Exactly. That's exactly the point."[101] Black stated that it "makes eminent good sense" and expressed his hope that the bill will minimize litigation and its corresponding heartbreak.[102]

---

91. *Id*.
92. *Id*.
93. As of the writing of this paper, Mr. Black is the Deputy Republican Leader. He represents the 104th District.
94. House of Representatives, *supra* note 87, at 23 (statement of Rep. Black).
95. *Id.*
96. *Id*.
97. *Id*. (statement of Rep. Currie).
98. *Id*.
99. *Id*.
100. *Id*. (statement of Rep. Black).
101. *Id*. (statement of Rep. Currie).
102. *Id*. at 23–24 (statement of Rep. Black).

III. ANALYSIS

The notion that the GSA is a troublesome good idea is brought to life by comparing the GSA to the law in other jurisdictions and exploring relevant public policy concerns.

A. Comparison With Laws In Other Jurisdictions

1. Illinois Law Establishes the Parent-Child Relationship Before Birth

H. Joseph Gitlin[103] believes that the GSA may make Illinois a "magnet" for surrogacy contracts.[104] Reasons for this include that the GSA allows the parent-child relationship to be legally formed prior to the child ever being born and that a "relatively simple procedure for obtaining a birth certificate" exists.[105] "Though other states have codified gestational or traditional surrogacy procedures, none has made obtaining a birth certificate as easy as the Illinois statute."[106] Court proceedings are not necessary for intended parents to receive a birth certificate.[107]

Another state regulating surrogacy by statute is New Hampshire.[108] According to the New Hampshire statute, the birth certificate must not be completed for seventy-two hours after the child is born.[109] During that time, the gestational surrogate can exercise her right under § 168-B:25(IV).[110] If she does so, she and her husband, if applicable, will be named on the birth certificate; if she does not exercise her right under § 168-B:25(IV), then the intended parents will be named on the birth certificate.[111] Section 168-B:25(IV) provides that the surrogate has a right to keep the child if she executes a document communicating her

---

103. Mr. Gitlin is a prominent figure in surrogacy law and a leading authority in Illinois family law.
104. H. Joseph Gitlin, *New Law Makes Illinois Friendly for Surrogacy*, CHI. DAILY L. BULL., Nov. 22, 2004, at 6.
105. *Id*.
106. *Id*.
107. *Id*.
108. *See* N.H. REV. STAT. ANN. § 168-B:1–32 (LexisNexis 2001).
109. *Id*. § 168–B:26.
110. *Id*.
111. *Id*.

intention to maintain possession of the child and if she delivers it to "the intended parents, the attending physician, or the hospital medical director or designee."[112]

The GSA allows the parent-child relationship to be legally formed prior to the child ever being born. In contrast with this, New Hampshire keeps intended parents in limbo for seventy-two hours. Thus, the Illinois statute provides intended parents a great deal more security than the New Hampshire statute does. On the other hand, the Illinois statute, unlike the New Hampshire statute, does not allow the gestational surrogate to change her mind. Even if the child is not hers genetically, no one can deny that she has an intimate connection with the child.

Florida is another state that statutorily allows surrogacy contracts.[113] After the birth of the child, the intended parents[114] must "petition a court of competent jurisdiction for an expedited affirmation of parental status."[115] This petition must occur within three days.[116] When the hearing is over, the court will determine whether the parties executed a binding and enforceable contract and whether at least one of the intended parents is the child's genetic parent.[117] If the answer is "yes" to both of these inquiries, "the court shall enter an order stating that the commissioning couple are the legal parents of the child."[118]

Again, the Illinois statute is more advantageous to intended parents than the Florida statute. In Illinois, the intended parents can legally establish the parent-child relationship prior to the child ever being born, but in Florida they must endure a hearing[119] after the child is born. Given the choice between the two jurisdictions, Illinois is more attractive as the magnet metaphor suggests.

Utah, until recently, statutorily prohibited surrogacy contracts.[120] Before the change in law, one could not be a party to a surrogacy contract "for profit or gain."[121] Furthermore, even surrogacy contracts lacking consideration were unenforceable.[122] The surrogate mother and her husband were considered the legal

---

112. *Id*. § 168-B:25(IV).
113. *See* FLA. STAT. § 742.15–16 (2004).
114. The statute uses the phrase "commissioning couple," which means "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents." *Id*. § 742.13(2).
115. *Id*. § 742.16(1).
116. *Id*.
117. *Id*. § 742.16(6).
118. *Id*.
119. The intended parents do not actually have to show up at this hearing–their attorney can appear for them. *Id*.
120. UTAH CODE ANN. § 76-7-204 (2003) (repealed 2005).
121. *Id*. § 76-7-204(1)(a).
122. *Id*. § 76-7-204(2).

parents of the child.[123] Custody dispute decisions were based on the best interests of the child.[124]

Now, surrogacy contracts are allowed in Utah.[125] The Utah statute contemplates a scheme where the gestational surrogacy contract is validated by a court.[126] The court must find that certain requirements have been met in order to validate the contract.[127] "If the requirements . . . are satisfied, a tribunal may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the agreement."[128] After the child is born, the intended parents must notify the court of the child's arrival.[129] Once the notice has been received, the court will "[confirm] that the intended parents are the parents of the child."[130] It will also "[direct] the Office of Vital Records to issue a birth certificate naming the intended parents as parents of the child."[131] Genetic testing is to be ordered if a dispute arises as to whether the child is a product of assisted reproduction.[132] Thus, while Utah changed its law to allow surrogacy contracts, intended parents under its law will not be as certain of their rights as quickly as intended parents under the GSA, and unlike Illinois, a court proceeding is necessary for the issuing of a birth certificate.

Virginia also governs gestational surrogacy by statute.[133] It has "a pre-birth procedure whereby the intended parents can have the surrogacy contract affirmed and be listed on the first birth certificate immediately after the birth of the child. The procedure, however, is fairly invasive and expensive."[134] The Virginia statute provides two paths to parentage–one with a surrogacy contract that has been approved by the court and one without a surrogacy contract approved by the court.[135] In regards to the former, "[a]fter approval of a surrogacy contract by the court and entry of an order . . . the intended parents are the parents of any resulting child."[136]

---

123. *Id*. § 76-7-204(3)(a).
124. *Id*. § 76-7-204(3)(b).
125. UTAH CODE ANN. § 78-45g-801(1) (Supp. 2005).
126. *Id*. § 78-45g-801(4).
127. *Id*. § 78-45g-803(2)
128. *Id*. § 78-45g-803(1).
129. *Id*. § 78-45g-807(1).
130. *Id*. § 78-45g-807(1)(a).
131. *Id*. § 78-45g-807(1)(c).
132. *Id*. § 78-45g-807(2).
133. *See* VA. CODE ANN. § 20-158 (2004).
134. Gitlin, *supra* note 104, at 6.
135. VA. CODE ANN. § 20-158(D–E).
136. *Id*. § 20-158(D).

The approval process is elaborate. First, all parties join in a petition.[137] Next, the court appoints "a guardian ad litem to represent the interests of any resulting child and . . . counsel to represent the surrogate."[138] The court also orders a home study that must be completed before the petition will be heard.[139] After the hearing, the court will approve the surrogacy contract.[140] During the hearing, the court is permitted to "discharge the guardian ad litem and attorney for the surrogate upon finding" a number of listed requirements have been met.[141]

After the child is born, the intended parents have a week to give the court written notice of that fact.[142] If the court finds "that at least one of the intended parents is the genetic parent of the resulting child," it will order that a new birth certificate be issued that names "the intended parents as the parents of the child."[143]

The Virginia statutory scheme is a good deal more complicated than the Illinois scheme. "Comparing the Illinois pre-birth procedures to those of Virginia is like comparing the local corn maze to the mythical Labyrinth."[144]

Texas is another state that regulates gestational surrogacy by statute.[145] The Texas statute allows the intended parents and the gestational mother to validate their gestational surrogacy contract via a court proceeding.[146] If validated, the court will declare that the intended parents will be the parents of the child when it is born.[147] At the hearing to validate the contract, various requirements must be met.[148] These requirements include such things as medical evidence supporting the necessity of reproducing via gestational surrogacy and that the jurisdictional requirements have been complied with.[149] After the child is born, the intended parents have to notify the court of the child's birth.[150] The court will order that the child belongs to the intended parents, that the gestational mother physically give the child to the intended parents, and that the state issue a birth certificate with the

---

137. *Id*. § 20-160(A).
138. *Id*.
139. *Id*.
140. *Id*. § 20-160(B).
141. *Id*.
142. *Id*. § 20-160(D).
143. *Id*.
144. Gitlin, *supra* note 104, at 6.
145. *See* TEX. FAM. CODE ANN. § 160.751–63 (Vernon 2004–2005).
146. *Id*. § 160.755.
147. *Id*. § 160.756(c).
148. *See id*. § 160.756(b).
149. *Id*. § 160.755(b)(1–2).
150. *Id*. § 160.760(a).

intended parents' names on it.[151] The Texas statute is similar to the Illinois statute in that the intended parents can be listed on the original birth certificate, but unlike the Illinois statute, it still requires court involvement.[152]

Some states, such as California[153] and Massachusetts, govern surrogacy by case law instead of by statutes.[154] While intended couples may receive a favorable outcome in these states, the lack of statutes creates uncertainty.[155] Illinois and its GSA are thus a more attractive choice for future intended parents.[156]

One Massachusetts case is *Hodas v. Morin*.[157] There, the issue was whether the trial court could "issue prebirth judgments of parentage . . . where neither the genetic parents nor the gestational carrier . . . reside in Massachusetts, but where the contract specifies that the birth occur at a Massachusetts hospital[.]"[158] The intended parents were a married couple who resided in Connecticut, and the gestational carrier lived in New York.[159] The contract signed between the two parties contained a provision where the baby would be born at a Massachusetts hospital.[160] They did this "in part to facilitate obtaining a prebirth order."[161] The court held that, under these circumstances, the intended parents were entitled to "a prebirth order establishing their legal parentage."[162]

2. Michigan Has Prohibited Surrogacy

The GSA's scheme of regulating gestational surrogacy is in stark contrast to Michigan's prohibition[163] of surrogacy contracts. Michigan's Surrogate Parentage Act plainly communicates that "[a] surrogate parentage contract is void and unenforceable as contrary to public policy."[164] Furthermore, it is a misdemeanor for one to knowingly enter into a surrogacy contract involving compensation, and it is a felony for a person who is not a party to the contract to arrange a surrogacy

---

151. *Id*. § 160.760(b)(1–3).
152. Gitlin, *supra* note 104, at 6.
153. *See In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410 (Cal. Ct. App. 1998).
154. Gitlin, *supra* note 104, at 6.
155. *Id*.
156. *Id*.
157. 814 N.E.2d 320 (Mass. 2004).
158. *Id*. at 321.
159. *Id*. at 322.
160. *Id*.
161. *Id*.
162. *Id*. at 321–22.
163. MICH. COMP. LAWS ANN. § 722.851–63 (West 2002).
164. *Id*. § 722.855.

involving compensation.[165] Despite the statutory refusal to recognize surrogacy contracts, if individuals enter into one anyway and a custody dispute arises, the court will look to the best interests of the child in order to determine who should have custody.[166]

Intended parents in Michigan wanting to reproduce via gestational surrogacy might face undesirable consequences if they try to form surrogacy contracts under their own laws. For example, they could lose custody of their genetic offspring or face criminal sanctions. Due to this, Illinois will be an attractive location for them to enter into the contract. This is particularly true due to Michigan's close proximity to Illinois.

3. The Illinois Reasonableness Test for Compensation Is Too Gray

Under the GSA, a surrogacy contract is valid even though the intended parents promise to pay the gestational surrogate reasonable compensation for her services.[167] Furthermore, a gestational surrogacy contract can require the intended parents "to pay for or reimburse the gestational surrogate for reasonable expenses (including, without limitation, medical, legal, or other professional expenses) related to the gestational surrogacy and the gestational surrogacy contract."[168] The language used by the legislature is broad and does not provide much guidance. The contract will be enforceable as long as the intended parents pay *reasonable* compensation and pay for the gestational surrogate's *reasonable* expenses.[169] The only list provided for the expenses contains the broad categories of medical, legal, and professional expenses–and the list is qualified by the phrase "without limitation."[170] Other states have done a better job of addressing this issue.

New Hampshire, for example, more clearly limits the fee a surrogate can receive.[171] Any compensation must fall within five listed categories.[172] First, the fee can include "[p]regnancy-related medical expenses," which includes expenses arising from complications that occur up to six weeks after the child is born "and expenses related to the medical evaluation."[173] Second, the surrogate can be paid

165. *Id*. § 722.859(2–3).
166. *Id*. § 722.861.
167. 750 ILL. COMP. STAT. ANN. 47/25(d)(3) (LexisNexis Supp. 2005).
168. *Id*. § 47/25(d)(4).
169. *Id*. § 47/25(d)(3–4).
170. *Id*. § 47/25(d)(4).
171. *See* N.H. REV. STAT. ANN. § 168–B:25(V) (LexisNexis 2001).
172. *Id*.
173. *Id*. § 168–B:25(V)(a)

compensation for lost wages if the attending physician recommends that the surrogate miss work.[174] Third, the surrogate can be compensated for health and disability insurance that is effective during the pregnancy and up to six weeks after the child is born.[175] Fourth, the surrogate can receive "[r]easonable attorney's fees and court costs."[176] Fifth, the surrogate can be compensated for any required home studies and for fees and costs stemming from the nonmedical evaluations.[177]

Florida limits payment to "reasonable living, legal, medical, psychological, and pshychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods."[178] Thus, compensation in Florida must fall within certain categories, and even those categories are limited by a "directly related" test in addition to a reasonableness test.

The Illinois reasonableness standard is too gray and uncertain. It will be interesting to see how courts address excessive compensation if the issue arises in the future. Rather than have such a scenario arise, it would be better if the General Assembly set some clear boundaries. They could do this either in the statute itself or by delegating the task to an administrative agency. Either way, future intended parents and gestational surrogates would have good guidelines and boundaries to reference when drafting their gestational surrogacy contracts.

4. Illinois Should Adopt a Termination Section Like Texas

Under the GSA, if a gestational surrogate breaches the contract, the intended parents are entitled to all legal and equitable remedies.[179] The one exception is that the General Assembly has proscribed the specific performance remedy of forced impregnation.[180] In contrast with this, Texas allows the future gestational surrogate to terminate the contract as long as she has not become pregnant,[181] and the gestational surrogate will not be held liable for terminating the contract.[182] The Texas approach is more desirable because it allows the gestational surrogate to end the contract without liability. In Illinois, the gestational surrogate can be held liable, and as such, the GSA serves to coerce gestational surrogates to follow

174. *Id*. § 168–B:25(V)(b).
175. *Id*. § 168–B:25(V)(c).
176. *Id*. § 168–B:25(V)(d).
177. *Id*. § 168–B:25(V)(e).
178. FLA. STAT. § 742.15(4) (2004).
179. 750 ILL. COMP. STAT. ANN. 47/55(a) (LexisNexis Supp. 2005).
180. *Id*. § 47/50(b).
181. TEX. FAM. CODE ANN. § 160.759(a) (Vernon 2004–2005).
182. *Id*. § 160.759(d).

through on their gestational surrogacy contracts even if they would rather not. It is more desirable to have all the parties to the contract enter into it without coercive influences.

5. Illinois Should Consider Addressing Abortion

The GSA does not address the issue of abortion. New Hampshire's statutory scheme does address this issue.[183] It states that the gestational surrogate cannot be forced to have an abortion or be prevented from having an abortion.[184] While it is beyond the scope of this paper to discuss the constitutional issues involved with inserting a provision addressing abortion, it is still something the General Assembly should consider. New Hampshire's scheme is consistent with a woman having complete autonomy over her body. However, when a gestational surrogate aborts a fetus, she is aborting the genetic child of the intended parents that she conceived through a very deliberate and intentional process. The GSA's scheme is set up in such a way that it gives security to the intended parents. A provision in it forbidding a gestational surrogate from aborting a child–except when the gestational surrogate's health is in serious risk–would be consistent with the GSA's scheme of giving security to intended parents.

6. The GSA Lacks a Residency Requirement

Another reason why Illinois might become a "magnet" for gestational surrogacy contracts is that the GSA does not have any residency requirements that intended parents must meet.[185] This is not true for other states. For example, in Texas, either the prospective gestational surrogate or the prospective intended parents must live in Texas for the ninety days immediately before they file the petition to validate the contract.[186]

The significance of the lack of a residency requirement is illustrated by *In re Adoption of Samant*.[187] There, the Samants entered into a traditional surrogacy relationship with the surrogate mother.[188] The surrogate mother was from

183. *See* N.H. REV. STAT. ANN. § 168–B:27 (LexisNexis 2001).
184. *Id*.
185. Gitlin, *supra* note 104, at 6.
186. TEX. FAM. CODE ANN. § 160.755(b)(1). In Utah, another example, "[a] petition to validate a gestational agreement may not be maintained unless either the mother or intended parents have been residents of this state [Utah] for at least 90 days." UTAH CODE ANN. § 78-45g-802(2) (Supp. 2005)
187. 970 S.W.2d 249 (Ark. 1998).
188. *Id*. at 249.

California, and the Samants were from New York.[189] Mrs. Samant sought to adopt the child in Arkansas, and "they were in Arkansas solely for the purpose of the adoption . . . because the California law required a six-month presence as a prerequisite to adoption and because New York, their home state, did not permit surrogacy contracts."[190] Before Mrs. Samant filed the adoption petition, both she and the child lived in a Little Rock hotel for thirty days.[191] The issue involved whether the Arkansas courts had jurisdiction, which the *Samant* court addressed affirmatively.[192]

Although the *Samant* case involved traditional surrogacy, it still illustrates the notion that intended parents are willing to seek out jurisdictions whose laws will be advantageous to the legal formation of their new families. If the Samants decided today to have a child via gestational surrogacy, then Illinois would be an attractive jurisdiction for them. Mrs. Samant was willing to spend thirty days in an Arkansas hotel so that an Arkansas court would have jurisdiction; she would not have to do this under the GSA.

B. Public Policy Concerns

In this paper's introduction, the point was made that traditional surrogacy is different from gestational surrogacy, which is the type of surrogacy regulated by the GSA. As a general rule, the ethical questions surrounding surrogacy are applicable regardless of what type of surrogacy one discusses.[193]

1. The Industry

Some bioethicists do not paint the assisted reproduction industry in a favorable light. Boston University bioethicist George Annas describes the assisted reproduction industry as "the Wild West . . . mated with American commerce and modern marketing."[194] A look at the industry reveals "a number of very highly

189. *Id*. at 249–50.
190. *Id*. at 250.
191. *Id*.
192. *Id*. at 250–51.
193. Richard A. McCormick, *Surrogacy: A Catholic Perspective*, 25 CREIGHTON L. REV. 1617, 1618 (1992).
194. *Frontline, Making Babies* (PBS television broadcast June 1, 1999)(transcript of interview with George Annas), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/fertility/interviews/annas.html.

successful clinics viciously competing for patients. And the . . . clinics describe [the patients] as being desperate to get a baby."[195] Furthermore, there are no strict regulations on new procedures–"[in] general, when you want to do a new procedure in assisted reproduction, you just do it."[196] The industry lacks regulation and resists regulation being imposed upon it.[197]

Children are not the industry's top priority.[198] No clinic has publicly stated that children are its top priority.[199] "[T]hey always put the interest of infertile couples and the physicians first, and the interests of the children second."[200] With that said, there are not many known horror stories from the industry, but a lack of inspections and mandatory reporting make it less likely that horror stories will be revealed.[201]

2. Baby Selling

One of the more troubling aspects of surrogacy is when the intended parents pay the gestational carrier. In the 1980s, British media displayed an extreme distaste for "the idea of paying a price for a human being."[202] It runs afoul of constitutional and public policy grounds to deal with children like one deals with commodities.[203] The Thirteenth Amendment of the U.S. Constitution provides, "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."[204] In other words, the Constitution forbids "the buying of and selling of human beings."[205] Furthermore, it is fundamental that "the right not to be bought or sold" is among the inalienable rights possessed by individuals.[206]

---

195. *Id*.
196. *Id*.
197. *Id*. *See also* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 614, 617 (2003) (noting that the fertility industry is largely unregulated and that assisted reproductive technologies get used despite the lack of safety testing).
198. *Frontline*, *supra* note 194.
199. *Id*.
200. *Id*.
201. *Id*. One notable known horror story involved a single person who killed his child born of a surrogate. *Id*.
202. Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 17 J. CONTEMP. HEALTH L. & POL'Y 432, 438 (2001).
203. *Id*.
204. U.S. CONST. amend. XIII, § 1.
205. Gostin, *supra* note 202, at 438.
206. *Id*.

Paying a gestational carrier for the services she provides can be distinguished from baby selling.[207] "Surrogacy contracts are equivalent to 'baby selling' if they essentially offer payment for the delivery of an uncluttered title to the child."[208] This can be avoided if a state does not allow fees to be tied into the termination of a gestational carrier's parental rights.[209] Instead, the fee should be for the services she provides and the health care expenses she incurs.[210] "The 'women's work' of conception, gestation, and birth is arduous, and has high social worth. For the state to prohibit payment for such work would deprive women of compensation for valued labor."[211]

3. Women as "Fetal Containers"

Some argue that surrogacy exploits the poor and treats women merely as a container used to grow a fetus.[212] For example, if an affluent couple uses a poor woman as a surrogate, in a sense, the poor woman becomes the affluent couple's reproductive servant.[213] In reality, the situation appears to be different. While money may be a consideration for many surrogates, it is not the primary reason why women choose to become surrogates.[214] Some surrogates gain inspiration from infertile relatives, and others simply enjoy parenting and want to make parenthood possible for infertile couples.[215] "Some are making up for past experiences, such as abortion or adoption, and want another chance to give life to a child."[216] And yet still others feel empowered by creating life, a male impossibility.[217]

---

207. *Id*. at 441.
208. *Id*. at 442.
209. *Id*.
210. *Id*.
211. *Id*. at 439.
212. James Levitt, *Biology, Technology and Geneology: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451, 459 (1992).
213. *See id*. at 460.
214. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2353 (1995).
215. *Id*. at 2353–54.
216. Levitt, *supra* note 212, at 461.
217. *Id*.

4. Harm to Surrogates and Children

Some argue that surrogacy will psychologically harm the surrogate when she gives up the child to the intended parents.[218] They make comparisons to the psychological damage suffered by mothers who give up their children in an adoption process.[219] This analogy is questionable because less than one percent of surrogates try to keep the child they bear as opposed to seventy-five percent of women in the adoption context.[220] Furthermore, women in the adoption context conceive their children without the expectation of giving them to others and often would like to keep the children but choose not to for various reasons; surrogates enter the surrogacy process knowing that they are carrying the children for others.[221]

There are also concerns about the health and safety of children born as a result of surrogacy.[222] Some fear that the surrogate will not treat the pregnancy properly because the child is not her child.[223] Surrogacy advocates answer this fear by pointing out that surrogate mothers treat the surrogacy very seriously precisely because they are carrying another couple's child.[224] Others fear a child will be "psychologically damaged by knowing how he or she was conceived."[225] Surrogacy advocates point out that the children born via surrogacy are not accidents.[226] Instead, they were intentionally conceived, and their intended parents can sincerely communicate to them that they are wanted and loved.[227]

It is possible that the children born of surrogacy will think their mothers are in the business of selling surrogate children and that they could be next.[228] Surrogacy advocates counter this fear by suggesting "the surrogate's children's reactions to the arrangement [will be] influenced by their mother's reaction."[229]

---

218. Andrews, *supra* note 214, at 2351.
219. *Id*.
220. *Id*.
221. *Id*. at 2351–52.
222. *See id*. at 2354–58.
223. *Id*. at 2354.
224. *Id*.
225. *Id*. at 2357.
226. *Id*. at 2358.
227. *Id*.
228. *Id*.
229. *Id*. at 2359.

5. Roman Catholic Viewpoints

Donum vitae (*Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*) contains the official Roman Catholic view on surrogacy.[230] *Donum vitae* instructs that using a gamete from someone outside the marriage violates a couple's reciprocal commitment to each other and disregards marital unity.[231] "After noting that the child must be the fruit and sign of the mutual self-giving of the spouses, of their love and fidelity, it states: 'The fidelity of the spouses in the unity of marriage involves reciprocal respect of their right to become a father and a mother only through each other.'"[232] *Donum vitae* views sexual intercourse as the only appropriate means of reproducing.[233]

Priest and University of Notre Dame ethicist Richard McCormick argues that gamete donation and surrogate gestation infringes conjugal exclusivity, and jointly raising a child does not justify that infringement.[234] Couples view in vitro fertilization as an extension of their sexual intimacy, and as such, the "third party presence (via egg or sperm) is presence of another in the intimacy itself, a thing that ought not to be."[235] When a couple relaxes the marital exclusivity, harm results to the child and marriage.[236] For example, genetic asymmetry can cause psychological harm, and conflicts with a surrogate can damage the marriage.[237]

6. The GSA

George Annas gives a less than stellar review of the GSA.[238] He argues that under it the possibility exists for motherhood to become simply a commercial transaction and the surrogate child a product.[239] For example, Annas suggests this would be the case where a gay man finds an egg donor, fertilizes the egg, and then hires a surrogate to bear the child.[240] In other words, the GSA would be allowing

---

230. McCormick, *supra* note 193, at 1617.
231. *Id*. at 1620.
232. *Id*. at 1620–21.
233. *Id*. at 1621.
234. *Id*.
235. *Id*. at 1622.
236. *Id*.
237. *Id*.
238. Graham, *supra* note 4, at C1.
239. *Id*.
240. *Id*. Annas' example is problematic because it is doubtful that a single male, regardless of his sexual orientation, would be able to take advantage of the GSA due to the GSA's medical need requirement. *See* Ford, *supra* note 23, at 245. However, Ford argues that single men should be able to take

a commercial transaction to take place where a woman is used as a fetal container, and a human being is sold. One answer to this criticism is to take a hard-line civil liberties approach and argue that a surrogate should be compensated for her services and that "a woman has a privacy right to determine how she will use her own body."[241]

The Illinois legislature dove into murky ethical waters when it enacted the GSA, and it is difficult for one to say whether it was right in doing so. But it is its job to make tough decisions, and since it has made the decision it has, the wisest course of action is for it to proceed carefully from this point on.

IV. PROPOSED RESOLUTION

The GSA is a good law because it provides a way for the child-parent relationship to be legally formed before the surrogate child is born. This provides security for intended parents undergoing the gestational surrogacy process. With that stated, the GSA would be better if the General Assembly addressed four problem areas.

First, the reasonableness criteria in the area of compensation for the gestational surrogate needs to be modified. It is too gray and uncertain, and ethically, the legislature needs to be careful that baby selling is not occurring, and instead, the gestational surrogate is being compensated for her services and expenses. Accordingly, the General Assembly should set clear boundaries in either the statute itself or delegate the task to an administrative agency. Ideally, the General Assembly should enumerate certain categories of compensation and then carefully limit those categories with specific language. The New Hampshire and Florida statutes discussed above can serve as a starting point in producing these boundaries.

Second, the statute entitles intended parents to all legal and equitable remedies. The GSA should be modified so that the gestational surrogate can breach the contract without liability before she becomes pregnant. By adding a provision of this nature, the legislature will ensure that the process is free of coercion.

Third, Section 55 does not mention Section 50(b). Section 55 permits all legal and equitable remedies whereas Section 50(b) proscribes forced impregnation. For

---

advantage of the GSA, and if an amendment of this nature were to come before the General Assembly, Annas' concerns regarding the commercialization of motherhood would be something that the General Assembly would need to consider. *Id.*

241. Gostin, *supra* note 202, at 440–41.

the sake of clarity, the General Assembly needs to explicitly state that Section 50(b) is an exception to Section 55.

Fourth, the General Assembly needs to address the abortion issue. The GSA provides security for intended parents, so it would be consistent for the General Assembly to forbid abortion unless the gestational surrogate's health is in serious risk. But regardless of the provision the General Assembly would decide to adopt, this is the sort of complex legal issue the General Assembly should address.

If the General Assembly addresses these four problem areas, the GSA will be a much better statute.

V. CONCLUSION

With gestational surrogacy, unlike traditional surrogacy, the surrogate does not have a genetic connection to the child. Under the GSA, at least one of the intended parents must have a genetic connection to the resulting child. As such, it seems appropriate to provide the intended parents with a measure of security, and this is what the GSA does. The GSA provides security for intended parents through legally establishing their parental rights before the gestational surrogate gives birth to the child. Regardless of whether gestational surrogacy is ethical, intended parents and surrogates are in fact undergoing this process. The Illinois legislature ventured into murky waters, made tough decisions which needed to be made, and ended up with a decent law. With a few modifications, the GSA can be even better.