

APPLYING MEDIATION TO THE COMPLEXITIES OF SURROGACY AGREEMENTS

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I. INTRODUCTION

In the late part of the twentieth century, assisted reproductive technologies (ART) offered new hope to individuals who were infertile, could not carry a pregnancy, or whose attempts to form non-biological families were rejected.¹ At the same time, advances in ART transformed and strained the traditional notions of family, as well as the legal concepts surrounding it. If utilized for the negotiation of the terms of surrogacy agreements, mediation could provide a creative alternative to time-worn legalistic approaches to solving the problems raised by these complex new family dynamics.

In his seminal work on marriage, American economist Gary Becker stated that, “the obvious explanation for marriages between men and women lies in the desire to raise [one’s] own children,” adding that, “sexual gratification, cleaning, feeding, and other services can be purchased, but not [one’s] own children.”² While some countries such as France, Germany, and Nepal,³ have outlawed all types of surrogacy, it has become an increasingly common practice in the United States. A 2016 Center for Disease Control report found that the number of embryo transfers performed on gestational surrogates nearly tripled in less than a decade—from 1,957 in 2007 to 5,521 in 2015.⁴ The increase in surrogacy has revealed that pregnancy, too, can be “purchased to bear one’s own children.”⁵ While surrogacy has become a common reproductive

¹ Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2267 (2017).

² Piero Montebruno, *Surrogacy in the United States: Exploring the Effects of Legislation and Documenting the Consequences on Marriage, Births, Out-of-wedlock Births and Divorce*, EDITORIAL EXPRESS 6 (quoting Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. OF POL. ECON. 813 (1973)).

³ SURROGATE.COM, *Intended Parents, What are the International Surrogacy Laws by Country?*, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/> (last visited Feb. 23, 2020) [hereinafter *Intended Parents*].

⁴ Centers for Disease Control and Prevention, *2016 Assisted Reproductive Technology: National Summary Report* (Oct. 2018) <https://www.cdc.gov/art/pdf/2016-report/ART-2016-National-Summary-Report.pdf>.

⁵ Montebruno, *supra* note 2, at 6.

practice, it has unleashed a number of issues that the American legal system was not—and is still not—fully prepared to handle.

Without uniformity of surrogacy law between and within the states, those who are intended parents, surrogates, donors, and children are all left vulnerable. Unfortunately, it is too common to find cautionary tales of surrogacy contracts gone wrong. In 2017, Harold Cassidy, the attorney who represented the surrogate in the famous *Matter of Baby M.* case,⁶ advocated for another surrogate before an Iowa District Court in the case of *P.M. v. T.B.*⁷ Cassidy argued that enforcing a surrogacy contract violated the Fourteenth Amendment rights of the surrogate and the unborn child because: (1) the baby has a fundamental liberty interest in having a relationship with the surrogate; and, (2) both the baby and the surrogate have a fundamental liberty interest in not being exploited.⁸ The Iowa District Court dismissed each of these contentions, noting that because the surrogate is not the genetic parent of the child, any potential relationship between the surrogate and child cannot be protected, and, that neither the child nor the surrogate were exploited as the surrogate willingly entered into a surrogacy agreement.⁹ In *Cook v. Harding*,¹⁰ a surrogate in California was asked by the intended father to abort one of the triplets she was carrying. The surrogate carried all three to term but demanded parental rights and custody over the child that the father had wanted her to abort, arguing that it was in the “best interest of the children.”¹¹ Relying on statutory and case law, however, California continued to support the right of intended parents in surrogacy agreements, and continued to find that surrogacy agreements are not impermissibly exploitative

⁶ *Matter of Baby M.*, 109 N.J. 396 (N.J. 1988).

⁷ *P.M. v. T.B.*, 907 N.W.2d 522 (Iowa 2018); *P.M. v. T.B.* is currently pending in the Iowa Supreme Court. See also Defendants-Counterclaimants-Appellants’ Final Brief, *P.M. v. T.B.*, No. 17-0376 (Sep. 7, 2017).

⁸ Ellen Trachman, *Extreme Surrogacy Nightmare Heads to Iowa Supreme Court*, ABOVE THE LAW (June 28, 2017, 4:42 PM), <https://abovethelaw.com/2017/06/extreme-surrogacy-nightmare-heads-to-iowa-supreme-court/>.

⁹ *Id.*

¹⁰ *Cook v. Harding*, 2018 U.S. App. LEXIS 938 (9th Cir. 2018).

¹¹ Ellen Trachman, *I want to put a Baby in you: Triplets Trouble*, ABOVE THE LAW (Mar. 2, 2016, 1:02 PM), <https://abovethelaw.com/2016/03/i-want-to-put-a-baby-in-you-triplets-trouble/?rf=1>.

and dehumanizing of women (as was asserted by the surrogate in *Cook v. Harding*), nor void as against public policy.¹²

Both of these cases reveal a number of issues and tensions that exist in the current surrogacy process, the most obvious being that courts are simply not equipped to handle the complex emotional issues that underlie surrogacy cases. In the case of *P.M. v. T.B.*, the Iowa District Court ruled that any potential relationship between the surrogate and child cannot be protected because the surrogate is not a genetic parent.¹³ Upon scrutiny, this argument cannot stand. If the premise behind protecting a parent-child relationship were their genetic similarities, then one could not hold that the relationship between non-genetically related intended-parents and their child could be protected. Likewise, one could also not hold that the relationship between adoptive parents and their child can be protected. A study published in 2006 found that the “absence of a genetic and/or gestational link between parents and their child does not have a negative impact on parent-child relationships.”¹⁴

Consider the lesson *Horton Hatches the Egg* taught us all at an early age about true parenthood and surrogacy:

“And the people came shouting, ‘what’s all this about...?’ They looked! And they stared with their eyes popping out! Then they cheered and they cheered and they cheered more and more. They’d never seen anything like it before!... It’s an elephant-bird!! And it should be, it should be, it should be like that! Because Horton was faithful! He sat and he sat!”¹⁵

Horton sat on an egg that was not his for fifty-one weeks, caring for it while its mother blithely flew away, until he decided he wanted to keep the egg; to everyone’s surprise, it hatched as a creature half bird and half elephant.¹⁶ While surrogacy agencies and surrogacy agreements try to mitigate the emotional impact of

¹² In October 2018, the United States Supreme Court denied certification in *Cook v. Harding*. See *Cook v. Harding*, 139 S. Ct. 72 (2018). See also Ellen Trachman, *A Supreme Court Article Not About Judge Kavanaugh*, ABOVE THE LAW (Oct. 3, 2018, 4:00 PM), <https://abovethelaw.com/2018/10/a-supreme-court-article-not-about-judge-kavanaugh/>.

¹³ See Trachman, *supra* note 8.

¹⁴ Susan Golombok, et al., *Non-genetic and non-gestational parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3*, 21 HUMAN REPROD. 1918 (July 2006).

¹⁵ DR. SEUSS, *HORTON HATCHES THE EGG* 51 (Random House, 1940).

¹⁶ *Id.*

surrogacy on all the parties involved, the legal system, by ignoring human needs and human psychology, leaves open many questions in its rush to provide procedural ease, at the cost of harming families in the process.

This Note purposes the notion that mediation—tailored to families using the process of surrogacy—could serve as a valuable platform for providing intended parents, surrogates, donors, and their spouses with protections and guidelines to structure their new family dynamics. This is similar to how mediation has been used as a tool in both open adoption and post-adoption cases.¹⁷ Part II discusses the background of surrogacy and outlines the different state laws on the practice. Part III highlights the pitfalls in the current processes used to contract for a surrogate. Finally, Part IV proposes that mediation practices can be utilized to better address surrogacy issues and outlines the main issues a surrogacy agreement should address.

II. BACKGROUND

A. *Expanding the Traditional Nuclear Family and the Role of Motherhood*

United States Family Law is largely based on a patriarchal, heterosexual nuclear family model and familial relationships.¹⁸ The regulated rights, privileges, and benefits among family members and the state are determined by biology, and by marriage.¹⁹ In excluding non-traditional family units, however, the nuclear family model fails to reflect—and even devalues—the reality of many family structures.²⁰ Postmodern families, which include LGBT+ families, single or divorced parents, and step-parent families among many other groupings, do not necessarily have the sanction of marriage or

¹⁷ Corinne Wolfe Children's Law Center et al., *Child Protection Best Practices Bulletin: Open Adoption and Mediated Post-Adoption Contact Agreements (PACA)?*, <http://childlaw.unm.edu/docs/BEST-PRACTICES/0709-OpenAdoptionAndMediatedContactAgreements.pdf> (last visited Feb. 27, 2020) [hereinafter *Child Protection Best Practices Bulletin*].

¹⁸ Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. PUB. L.* 289, 289 (2008).

¹⁹ *Id.*

²⁰ Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 *AM. U. J. GENDER & L.* 505, 510 (1998).

of a biological connection.²¹ But, the law has started to enter a phase in which society is seeking to accommodate these new and complex family arrangements.²² Laws governing family formation and dissolution are changing to recognize more than merely biological and marital relationships and extra-legal relationships formed intentionally and consensually are being recognized and increasingly protected.²³

Despite the fact that the law is slowly changing to accommodate postmodern families, the idealized family remains a self-contained unit comprised of a married heterosexual couple.²⁴ Generally speaking, a child cannot under the law have more than two parents.²⁵ For example, when a stepparent adopts a spouse's child, that child's other biological parent is no longer legally recognized as a parent.²⁶ This norm is currently being challenged legally with triad and quad families fighting for equal parenting rights. For example, a Judge in New York's Suffolk County granted joint-tri-custody to three parents for their child.²⁷ Similarly, Minnesota acknowledged its first quad-parent adoption in 2019, twenty years after the Minnesota Court of Appeals first recognized a three-parent arrangement.²⁸ Cases like these are likely to become more common as traditional family norms and formations continue to change and evolve.²⁹

While single parent families are possible, they are not only viewed as "inferior and deficient" in society,³⁰ but also are not legally recognized as a one-parent family since the other parent, if known, retains legal rights and obligations to the child. Although the law does provide for ending and re-creating family units

²¹ Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. PUB. L.* 289, 289 (2008).

²² Appell, *supra* note 18, at 289.

²³ *Id.*

²⁴ Young, *supra* note 20, at 506.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Maire Connor, *Judge Grants Polyamorous Triad Shared Custody Rights*, *VARDA G'S* (Mar. 13, 2017), <https://vardags.com/family-law/new-york-polyamory-tri-custody>.

²⁸ Ellen Galles, *Brainerd 4-Parent Adoption a First in Minnesota*, *WDIO* (Nov. 28, 2019, 12:36 PM), <https://www.wdio.com/news/lexi-schlegel-minnesota-brainerd-four-way-adoption/5565563/>.

²⁹ *Id.*

³⁰ Young, *supra* note 20, at 506.

through, for example, divorce, remarriage, and adoption, it does not often recognize the reality of overlapping families as “each new unit legally annihilates the pre-existing unit.”³¹

Elly Teman described surrogacy as,

“upset[ting] the moral framework in which reproduction is regarded as a “natural fact” grounded in love, marriage, and sexual intercourse. Surrogacy constructs families through the marketplace, making them a matter of choice rather than of fate. By threatening the understanding of families as biological facts, surrogacy reveals instead that families are social constructs.”³²

While social practices have challenged the norms of exclusivity, the law has been slow to respond appropriately.³³ One example of such a social practice is in the case of open adoptions, which allow the birth mother a continuing role with the child—as opposed to a traditional adoption—that severs all links between the biological family and the child.³⁴ Legal norms of exclusivity harm the interests of children, parents, and society as a whole;³⁵ more specifically, they sever children and their parents from certain family members that have an interest in contributing to the lives of children—including stepparents, birth mothers, known gamete donors, and surrogate mothers.³⁶

In addition to threatening the integrity of the family unit, surrogacy threatens the traditional and intrinsic meaning of motherhood.³⁷ Some opponents of surrogacy object to the manner in which various aspects of motherhood, such as genetic, social, legal, or gestational rights and responsibilities, exist separately from one another and are no longer monopolized by a single woman.³⁸ Elly Teman explains that “[g]iving birth to a child for the purpose of relinquishment also defies mainstream assumptions that identify pregnancy with the birth mother’s commitment to the project of

³¹ *Id.* at 507.

³² Alex Finkelstein et al., *Surrogacy Law and Policy in the US: A National Conversation Informed by Global Lawmaking*, COLUMB. L. SCH. SEXUALITY & GENDER L. CLINIC, 41 (2016). *See also*, ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 7 (2010).

³³ Young, *supra* note 20, at 508.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Finkelstein et al., *supra* note 32, at 41.

³⁸ *Id.*

subsequent lifelong social mothering and threatens dominant ideologies in many cultures that assume an indissoluble mother-child bond.”³⁹ The debate over surrogacy extends beyond tangible harms and reaches “normative and ideologically driven judgments about what constitutes harm or risk of harm to society” as a whole.⁴⁰

B. *Distinct Types of Surrogacy*

There are two types of surrogacy—traditional surrogacy and gestational surrogacy.⁴¹ Traditional surrogacy takes place when a woman agrees to be artificially inseminated by either the intended father or a donor.⁴² Through this process, the child is genetically related to both the surrogate (who provides the egg and carries the child) and the intended father or sperm donor.⁴³ Several states have statutes specifically prohibiting the practice of compensated traditional surrogacy and have various penalties—ranging from fines to imprisonment—awaiting those who would dare enter into such a contract.⁴⁴ Other states have no laws explicitly prohibiting the practice of traditional surrogacy.⁴⁵ Given the ambiguities in the law, surrogacy is extremely problematic to proceed with in practice. For example, Rhode Island does not allow for pre-birth orders, which means that a traditional surrogate cannot terminate her parental rights until after the birth of the child, leaving the intended parents open to serious legal and emotional complications with

³⁹ *Id.*

⁴⁰ *Id.* See also Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM.U.J. GENDER SOC. POL’Y & L. 555, 557 (2013).

⁴¹ Human Rights Campaign, *Overview of the Surrogacy Process*, <https://www.hrc.org/resources/overview-of-the-surrogacy-process> (last visited Feb. 23, 2020) [hereinafter HRC].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Namely Arizona, Indiana Kentucky, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Dakota, Washington, and the District of Columbia. GWK staff, *Which States Allow Gay Men to Legally Use Traditional Surrogacy?*, GAYS WITH KIDS (Feb. 28, 2018), <https://www.gayswithkids.com/state-laws-gay-men-traditional-surrogacy-2465988290.html?rebelltitem=3#rebelltitem3> [hereinafter GAYS WITH KIDS].

⁴⁵ Namely, Alaska, Alabama, Arkansas, Colorado, Connecticut, California, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Minnesota, Mississippi, Montana, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming. See GAYS WITH KIDS, *supra* note 44.

regards to the formation of their family.⁴⁶ Other states explicitly permit compensated traditional surrogacy through state statutes or case law.⁴⁷ Still, these states impose restrictions on who can enter into such contracts and obtaining pre-birth orders can remain difficult.⁴⁸

In gestational surrogacy, by contrast, an egg is taken from the intended mother or a donor, fertilized by the intended father or a sperm donor, and the fertilized egg or embryo is subsequently transferred to a surrogate who carries the child to term.⁴⁹ Through this process the child can be biologically related to one or both intended parents or donors but will not be genetically related to the surrogate. Gestational surrogacy appears to be less controversial than traditional surrogacy, largely because the biological relationship between the child and the surrogate in the traditional process can become complicated if the parental rights or the validity of the surrogacy agreement are challenged; this, however, ignores the relationship a surrogate mother may form with the child, regardless of not being genetically related, simply as a result of carrying the child to term.⁵⁰

C. *The Legal Standards for Surrogacy*

In 1985, a woman agreed to be inseminated with a man's sperm and contracted to carry the pregnancy, after which she was to yield her parental rights to the man and his wife.⁵¹ The woman later changed her mind and the New Jersey Supreme Court famously resolved the issue in *Matter of Baby M*.⁵² Although the court granted custody to the father, it invalidated the surrogacy contract, finding that paying a surrogate mother was "illegal, perhaps criminal, and potentially degrading to women."⁵³

⁴⁶ *Id.*

⁴⁷ Namely, Florida, Maine, Maryland, Missouri, New Hampshire, Virginia, and Wisconsin. See *GAYS WITH KIDS*, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ HRC, *supra* note 41.

⁵⁰ *Id.*

⁵¹ Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014) <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

⁵² *Matter of Baby M.*, 109 N.J. 396.

⁵³ *Id.* at 411.

As a result of this case, nearly all surrogacies in America have been gestational⁵⁴—although, as previously stated, some states allow for both traditional and gestational surrogacy, while others have no laws on the books explicitly prohibiting or allowing the formation of traditional surrogacy contracts.⁵⁵ Laws governing gestational surrogacy agreements and a gestational surrogate’s compensation vary by state and individual (depending on sexual orientation and marital status). In California, Connecticut, Nevada, Washington, Maine, New Hampshire, Vermont, Delaware, New Jersey, Rhode Island, the District of Columbia, and New York,⁵⁶ surrogacy is permitted for all parents, pre-birth orders are granted, and both parents will be named on the birth certificate.⁵⁷ There are twenty-nine other states that permit surrogacy but have various laws that could affect final parentage determinations.⁵⁸ For example, Florida’s surrogacy statute allows only legally married couples to participate in such agreements, which are recognized only after the child is born.⁵⁹ In ten other states surrogacy is practiced but the results can be inconsistent or simply unpredictable because of its rare occurrence.⁶⁰ For example, Wyoming, which neither authorizes

⁵⁴ Elizabeth Chuck, *The Long Wait for Legalized Surrogacy May Soon End in New York*, NBC NEWS (Feb. 7, 2019, 4:25 AM), <https://www.nbcnews.com/news/us-news/long-wait-legalized-surrogacy-may-soon-end-new-york-n968541>.

⁵⁵ SURROGATE.COM, *About Surrogacy*, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy/> (last visited Feb. 23, 2020).

⁵⁶ The New York Child Parent Security Act (CPSA), which specifically overturns its long-standing ban on compensated gestational surrogacy and establishes the strongest protections for surrogates, was signed into New York law on April 3, 2020 and will go into effect February 15, 2021. See S. 2071B, Reg. Sess. (N.Y. 2019).

⁵⁷ Creative Family Connections, *Gestational Surrogacy Law Across the United States*, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Feb. 23, 2020).

⁵⁸ *Id.* Namely Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin, and West Virginia.

⁵⁹ The Surrogacy Experience, *Surrogacy Laws*, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (last visited Feb. 23, 2020).

⁶⁰ Namely, Alaska, Arizona, Iowa, Idaho, Indiana, Montana, Nebraska, Tennessee, Virginia, and Wyoming. Creative Family Connections, *supra* note 57.

nor prohibits gestational surrogacy contracts, has never had a request for a pre-birth parentage order.⁶¹ Finally, Louisiana and Michigan each have statutes or published case law prohibiting compensated surrogacy contracts subject to fines or criminal penalties or, in Louisiana's case, restricting gestational surrogacy to heterosexual married couples using their own gametes.⁶² Without any national consensus on how to deal with surrogacy or federal laws regulating it, surrogacy, like many issues relating to female reproduction, remains a polarized subject.⁶³ This lack of consensus leaves intended parents, surrogates, gamete donors, and children open and vulnerable to the whims of courts and legislatures on a state by state basis.⁶⁴

D. *Legal Standards Versus Societal Perspectives*

The United States is polarized into two major camps when debating surrogacy:⁶⁵ one side arguing that surrogacy should be allowed, subject to various regulations, and the other group urging that surrogacy be prohibited, criminalized, or subject to a supplementary "Mother Option" rule.⁶⁶ With the commercialization of surrogacy, the debate has become even more pointed. Some observers increasingly believe that regulations, laws, and contracts do not protect women and children from abuses and exploitation.⁶⁷ For example, in *Johnson v. Calvert*,⁶⁸ a surrogate mother had

⁶¹ Creative Family Connections, *Gestational Surrogacy in Wyoming*, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/wyoming> (last visited Feb. 23, 2020).

⁶² Creative Family Connections, *Gestational Surrogacy in Louisiana*, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana> (last visited Feb. 23, 2020).

⁶³ *Intended Parents*, *supra* note 3.

⁶⁴ Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sep. 17, 2014), <https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html>.

⁶⁵ Jennifer Lahl, *Contract Pregnancies Exposed: Surrogacy Contracts Don't Protect Surrogate Mothers and Their Children*, PUB. DISCOURSE (Nov. 1, 2017), <https://www.thepublicdiscourse.com/2017/11/20390/>.

⁶⁶ The "Mother Option" rule would grant to the mother "exclusive rights to the child in any case in which she gave birth to a child conceived pursuant to a surrogacy agreement and wished to keep it." Marsha Garrison, *Surrogate Parenting: What Should Legislatures Do?*, 22 FAM. L. Q. 149 (1988).

⁶⁷ Lahl, *supra* note 65.

⁶⁸ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

bonded with the child in her womb and sought recognition of her parental rights.⁶⁹ The California Supreme Court recognized the surrogacy contract, placing great weight on the fact that the intended parents were the genetic parents and concluded that the surrogate was a “genetic stranger” to the child.⁷⁰ Cases such as these reflect the fact that the legal system is not yet equipped to resolve such inherently human complications like maternal-child bonding, or, capable of dealing with non-exclusive family units. We continue to treat surrogacy agreements as simply another method of contracting for products, goods, and services to be exchanged.⁷¹

The larger concern that surrogacy exploits women touches upon two principle ideas. The first is that the practice of surrogacy objectifies women’s bodies, exploiting, as a result, all women who enter into such contracts.⁷² The second is that a specific demographic of women are especially vulnerable to misuse, such as women in developing countries and indigent women of color both within the United States and abroad.⁷³ Focusing on women in developed countries, a study found that the majority of surrogates would not take part in the process without compensation, raising issues of whether or not such compensation renders surrogacy inherently exploitative.⁷⁴ Some feminists, including Gloria Steinem, denounced the recent passing of New York’s Child Parent Security Act as being “coercive to poor women given the sizable payments [surrogacy agreements] can bring.”⁷⁵ On the other hand, American courts have repeatedly held that “paying lower-class women to be surrogates was not exploitative in and of itself.”⁷⁶ Racial disparities between surrogates and intended parents also fall short of following a distinct pattern of exploitation⁷⁷—studies found that in the United States women of color were underrepresented

⁶⁹ *Id.*

⁷⁰ Lahl, *supra* note 65.

⁷¹ *Id.*

⁷² Finkelstein et al., *supra* note 32 at 32-3.

⁷³ *Id.*

⁷⁴ *Id.* at 34 (citing Jessica H. Munyon n.6).

⁷⁵ Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html>.

⁷⁶ *Id.* (citing Jessica H. Munyon n.9).

⁷⁷ *Id.* at 35.

among surrogates as a whole.⁷⁸ Still, beyond explicit economic exploitation, some worry that surrogates will be taken advantage of by larger structural inequalities, such as economic pressures at home.⁷⁹

More generally, some worry that “women will never be able to consent to surrogacy no matter how the industry is regulated” because women hold a unique reproductive role in our patriarchal society.⁸⁰ In our male-dominated society, women are not only taught to “measure their self-worth by their level of sacrifice”⁸¹ for others, but are also taught that women’s value in society is connected primarily to their childbearing abilities.⁸² Gena Corea, for example, argues that since childbearing is such an essential function for which women are valued, it is unsurprising that “some women would feel special when they are pregnant and assert that they love reproducing”⁸³—thereby suffering from a “false consciousness” in which “their ‘choice’ and subsequent positive reporting of their experiences [as surrogates] cannot be given full weight.”⁸⁴ This inherent inability to consent to surrogacy is further linked to the belief that the depth of a woman’s bond with the fetus that she carries throughout pregnancy will never truly be understood, and thus, a surrogate will never be capable of giving voluntary and informed consent in advance of carrying a child to term pursuant to a surrogacy agreement.⁸⁵ Still, as with the potential for exploitation, it is equally unreasonable to ignore or discredit the extensive accounts of woman who found surrogacy to be rewarding and enriching.⁸⁶ Some argue that failing to listen to these women’s experiences and respect their choices amounts to paternalism.⁸⁷

⁷⁸ *Id.* (citing Ciccarelli & Beckman, *supra* note 233 at 31).

⁷⁹ Finkelstein et al., *supra* note 32 at 35.

⁸⁰ *Id.*

⁸¹ *Id.* at 36 (citing Kerian, *supra* note 132 at 160).

⁸² *Id.* (citing Lieber, *supra* note 246 at 215).

⁸³ *Id.* (citing Lieber, *supra* note 242).

⁸⁴ *Id.* (citing Peng, *supra* note 175 at 567).

⁸⁵ Finkelstein et al., *supra* note 32 at 36.

⁸⁶ *Id.* (citing Shapiro, *supra* note 168 at 1352).

⁸⁷ *Id.* (citing Peng, *supra* note 175 at 567).

III. DISCUSSION

A. *The Benefits and Disadvantages of Mediation*

Mediation is a recognized dispute resolution process in which a neutral person helps parties in conflict discuss issues and resolve the dispute at hand.⁸⁸ Mediation has no set procedure and results are based entirely on whether each party agrees to the terms offered.⁸⁹ Particularly, mediation is beneficial because it is substantially less expensive than litigation, is relatively swift, the parties make decisions for themselves in a transparent process that allows for flexible solutions and settlements, with outcomes that tend to be viewed more favorably because they were reached collaboratively rather than forced upon them by a court judgment.⁹⁰ Over the last several decades, mediation has grown in popularity and has been used in many areas of the law, including divorce, separation agreements, pre-nuptial and post-nuptial agreements, open adoptions, gamete donation agreements, custody and visitation, and estate planning.

However, mediation is not always appropriate and can present some disadvantages. Mediation is considered inappropriate in situations where the parties do not have an equal opportunity to advocate for their needs (for example, in cases of domestic violence) or in cases where a party refuses to reveal information necessary to resolve the dispute.⁹¹ Additionally, even in the most ideal of circumstances, parties might not be able to reach an agreement, at which point they would need to go through the time-consuming and costly process of litigation after having already invested time and money in mediation.⁹²

⁸⁸ A.B.A., *Mediation*,

https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/ (last visited Feb. 23, 2020).

⁸⁹ *Id.*

⁹⁰ LawShelf, *Advantages and Disadvantages of Mediation*,

<https://lawshelf.com/courseware/entry/advantages-and-disadvantages-of-mediation> (last visited Feb. 23, 2020).

⁹¹ FindLaw, *What are the Disadvantages of Mediation?*,

<https://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html> (last visited Feb. 23, 2020).

⁹² *Id.*

B. *The Role Law Plays in Mediation*

Mediation is a voluntary process in which the mediator has no power or authority to force the parties to agree and settle.⁹³ The fundamental essence of any mediation is that the outcome is voluntary, consensual, and entirely dependent on the consent of the parties involved.⁹⁴ In this context, it is necessary to understand what role the law plays in mediation and to what extent fairness plays a part in mediation.

In commercial disputes for example, evaluative mediation is often the model used.⁹⁵ In this approach, the mediator evaluates the parties' claims in light of the relevant precedents and statutes and provides the parties with his or her opinion on what will likely happen if the dispute were to go to court—"this is referred to as 'bargaining in the shadow of the law.'"⁹⁶ Mediators will often alternate between relying on the appropriate law, ignoring the law entirely, or factoring it in to the extent that the law can help guide the parties involved in the agreement. Whether mediation practices should or should not factor in the law—and to what extent—is a complicated issue that will most often depend on the issues and the parties involved, their level of power and understanding, and overall considerations of fairness. Different Bar Associations seem to have conflicting opinions about whether and when a mediator can and should engage in the practice of law and to what extent a mediator may evaluate the merits of a dispute.⁹⁷ A mediator, being a neutral participant, is not meant to give legal advice to a party and should be particularly sensitive to role differences if any party is unrepresented by counsel during the mediation⁹⁸ but may well need to inform participants as to what the law is likely to hold.

⁹³ Conflict Resolution Services Atlantic, *The Mediation Process: The Role of Lawyers. Neither is a "One Size Fits All"*, <http://crsatlantic.com/the-mediation-process-the-role-of-lawyers-neither-is-a-one-size-fits-all/> (last visited Feb. 23, 2020).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ JAMS Mediation Services, *Mediators Ethics Guidelines*, <https://www.jamsadr.com/mediators-ethics/> (last visited Feb. 23, 2020).

⁹⁸ *Id.*

C. Current Legal Process of Surrogacy Agreements

The main difficulty raised in surrogacy is the cession of the surrogate's parental rights in favor of the intended parent(s), which requires a contract and the courts' willingness to enforce such contracts.⁹⁹ Not only is paternity at risk in this process, but maternity is also at risk—because a surrogate mother could have competing interests in keeping the child.¹⁰⁰ For these reasons, there are two key steps involved in the legal process of surrogacy agreements: the creation and execution of the surrogacy agreement between the intended parent(s) and the surrogate; and, the filing of a declaration of parentage for the intended parent(s) to be listed on the child's birth certificate.¹⁰¹

Practitioners involved in drafting surrogacy agreements recommend that legal counsel should be retained by each party early in the process.¹⁰² This is all the more crucial as every surrogacy contract looks somewhat different based on state surrogacy laws, as well as each party's individual needs and circumstances.¹⁰³ Generally, a surrogacy contract should address: (1) finances, including the surrogate's base compensation, as well as additional monies the surrogate may receive for invasive procedures, carrying multiples, going on bedrest, etc.; (2) the risks and liability associated with pregnancy; (3) the surrogate's health and her responsibility to take care of herself and the baby throughout her pregnancy; (4) an agreement on sensitive issues such as selective reduction and termination, should that become necessary; and, (5) who will be present at prenatal appointments and birth.¹⁰⁴ Typically, the contract is drafted by the intended parent(s) and their attorney and then is sent to the surrogate and her attorney for review.¹⁰⁵ What follows is frequently a lengthy negotiation of the terms of the

⁹⁹ Montebruno, *supra* note 2.

¹⁰⁰ *Id.*

¹⁰¹ The Surrogacy Experience, *supra* note 59.

¹⁰² SURROGATE.COM, *Intended Parents: Understanding Surrogacy Contracts*, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/> (last visited Feb. 23, 2020) [hereinafter *Understanding Surrogacy Contracts*].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Conceive Abilities, *Surrogacy Contracts Explained* (Jan. 12, 2017), <https://www.conceiveabilities.com/about/blog/surrogacy-contracts-explained>.

contract until all parties agree.¹⁰⁶ This process can be both costly and time consuming—and that is before any medical procedures and the pregnancy have even begun.¹⁰⁷ For intended parents this legal process alone (their legal representation, the surrogate’s legal representation, pleadings, court filings, etc.) is estimated to cost between \$4,600 and \$11,500, depending on the state of residence and on the parties’ lawyers.¹⁰⁸ On another level, this negotiation process of sending drafts between the parties’ attorney’s also creates an unusual distance between the parties, considering the emotional connection that will ensue.

Unsurprisingly, an increasing number of people are choosing to contract independently by finding generic surrogacy template contracts online.¹⁰⁹ Turning to free sources for such a complex endeavor, however, creates complications, as it may not account for each party’s individual needs and circumstances and might not cover possible outcomes and variables that could affect a surrogacy agreement—including state specific surrogacy laws.¹¹⁰

1. Termination of Surrogate’s Parental Rights and the Marital Presumption

According to the Report on Surrogacy and Gestational Carrier Agreements done by the Hawaii Department of the Attorney General, a “birth mother refers to a woman who carries and delivers a child, and if the woman carries and delivers a child for some other intended parent(s) she is a surrogate but still a birth mother.”¹¹¹ In another report on surrogacy law and policies emanating from Columbia Law School, the terms “surrogate,” “surrogate mother,” and “birth mother” are all used to refer to a woman who agrees to give birth to a child as part of a surrogacy agreement.¹¹² But what does it mean for a surrogate to still be a birth mother? Does it imply that surrogate “birth mothers” should have rights and obligations to

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See also Agency for Surrogacy Solutions Inc., *Anticipated Costs*, <https://www.surrogacysolutionsinc.com/intended-parents/anticipated-costs/> (last visited Feb. 23, 2020).

¹⁰⁸ *Id.*

¹⁰⁹ *Understanding Surrogacy Contracts*, *supra* note 102.

¹¹⁰ *Id.*

¹¹¹ STATE OF HAW. DEP’T OF THE ATTORNEY GEN., REPORT ON SURROGACY AND GESTATIONAL CARRIER AGREEMENTS, 29 State Legis., Re. Sess., at 2 (2018).

¹¹² Finkelstein et al., *supra* note 32, at 5.

the child they give birth to? In the landscape of surrogacy, the terms used to describe parties are often debated and remain a sensitive issue “due to the normative implications about motherhood.”¹¹³

The traditional law of parentage provided that a married woman’s husband was the father of her children.¹¹⁴ This marital presumption (which in the English common law was the “strongest presumption known to the law”¹¹⁵ and could only be defeated by proof that the husband was “beyond the four seas”¹¹⁶) was established for a number of reasons, primarily to minimize accusations of adultery or illegitimacy and to ensure that women and children wouldn’t become a burden on the state. In 1973, all states adopted the Uniform Parentage Act (UPA), which provided a framework to establish the paternity for children of married or unmarried couples.¹¹⁷ The UPA was revised in 2017, after the Supreme Court of the United States legalized same-sex marriage. One of the new provisions included was on the practice of surrogacy and surrogacy agreements.¹¹⁸ The revised UPA includes new methods to establish parentage—for example in section 609, “de facto parents who are not biologically related to the child can be given legal parentage status on a par with biological parents”—that were specifically drafted in gender-neutral terms.¹¹⁹ These revisions to the UPA, however, were not made mandatory for states to adopt.¹²⁰ To date, Washington, Vermont, and California have enacted the 2017 UPA and only Pennsylvania, Connecticut, Rhode Island, and Massachusetts have introduced it.¹²¹ As a result, in a

¹¹³ *Id.*

¹¹⁴ Leslie J. Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 CHIKENT L. REV. 55, 57 (2017).

¹¹⁵ *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 Wash. U. L. Q. 1029, 1039 n.68 (1979).

¹¹⁶ Shari Rudavsky, *Separating Spheres: Legal Ideology v Paternity Testing in Divorce Cases*, 12 SCIENCE IN CONTEXT 123, 127 (1999).

¹¹⁷ Melissa Heining, *What is the Legal Definition of a Parent Under the Uniform Parentage Act?*, LAWYERS.COM <https://www.lawyers.com/legal-info/family-law/paternity/legal-definition-parent-under-uniform-parentage-act.html> (last visited Feb. 23, 2020).

¹¹⁸ UNIF. PARENTAGE ACT, § 8 (2017).

¹¹⁹ Paula Monopoli, *The New Uniform Parentage Act (2017) and Inheritance Law*, TR. & EST. JOTWELL (Jun 8, 2018), <https://trustest.jotwell.com/the-new-uniform-parentage-act-2017-and-inheritance-law/>. See also Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L. J. F. 589 (2018).

¹²⁰ Heining, *supra* note 117.

¹²¹ Monopoli, *supra* note 119.

majority of states, under the 1973 UPA, a woman, including a surrogate, who gives birth to a child is still presumed to be the biological and legal mother of that child; and if she is married, her husband is presumed to be the child's legal father.¹²² Following *Obergefell v. Hodges*,¹²³ some states have extended the marital presumption to same-sex couples. In *Pavan v. Smith*,¹²⁴ the Supreme Court held that "Arkansas's refusal to list a woman on the birth certificate of a child born to her same-sex spouse was inconsistent with its prior declaration in *Obergefell*."¹²⁵ In *Christopher Y.Y. v. Jessica Z.Z.*,¹²⁶ the New York Appellate Division extended the marital presumption to same-sex couples when it held that both female spouses should be treated as the legal parents of a child born during the marriage to one of the spouses.¹²⁷ Regardless of whether or not a pre-birth order is granted declaring the intended parent(s) to be the legal parent(s), a surrogate will need to acknowledge in writing and post-birth that she is not the legal mother of the child.¹²⁸ Therefore, and as the revised UPA provides, a surrogate's spouse (if she has one) should be involved in the surrogacy agreement as it is equally necessary for them to give up their parental rights, claims, and possible obligations.¹²⁹

2. Termination of Sperm and Egg Donors' Parental Rights

State law varies regarding how and if a known sperm donor's parental rights can be terminated. Known sperm donors' parental rights and obligations can depend on a sperm donor contract, as well as how the child was conceived.¹³⁰ Generally, when a child is conceived through artificial insemination, and the donor is not the mother's spouse, he will have no parental rights or obligations—

¹²² SURROGATE.COM, *Intended Parents: Establishing Parentage in Surrogacy*, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy/> (last visited Feb. 23, 2020).

¹²³ *Obergefell v. Hodges*, 135 S Ct. 2584 (2015).

¹²⁴ *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

¹²⁵ Monopoli, *supra* note 119.

¹²⁶ *Christopher Y.Y. v. Jessica Z.Z.*, 159 A.D.3d 18 (N.Y. App. Div. 2018).

¹²⁷ *Id.* at 34.

¹²⁸ SURROGATE.COM, *supra* note 122.

¹²⁹ Monopoli, *supra* note 119.

¹³⁰ Sarah Tipton, *Does a Known Sperm Donor Have Any Parental Rights or Obligations?*, LEGALMATCH (last modified, June 28, 2018, 1:42 PM), <https://www.legalmatch.com/law-library/article/sperm-donor-parental-rightsobligations.html>.

based on the presumption that a donor gives up his parental rights by proceeding with an artificial insemination.¹³¹ If the child was conceived through intercourse, the known sperm donor was likely to be held as the legal father of the child and afforded parental rights and obligations (such as child support).¹³² However, in California, any person who provides sperm used for assisted reproduction is automatically considered a sperm donor, without any parental rights.¹³³ In such cases, if the donor intended to be a parent to the child conceived, a written contract would need to recite that before conception occurs.¹³⁴ In Pennsylvania, on the other hand, genetics determines legal parentage, which means that even if a known donor is not on the birth certificate, he will be held as the legal father if it can be proven that he is genetically connected to the child through DNA testing.¹³⁵ Most states consider the best interest of the child before allowing a genetic parent to terminate their parental rights and obligations.¹³⁶ If the mother of the child is married or in a legally recognized relationship, courts are likely to allow such surrender to the mother's spouse or partner.¹³⁷ If the mother is a single parent, however, with no other party assuming the surrendered parental rights, the known donor will not be allowed to terminate his rights and obligations (whether or not there is a written contract to do so), which means that he would be able to sue for custody or visitation rights, while the mother could sue for child support.¹³⁸

Similar to sperm donation, state laws vary on how and if known egg donors' parental rights can be terminated. The outcome in some case relates to the enforceability of valid contracts in which a known donor provided gametes on the condition that their parental rights and obligations to the child would be terminated.¹³⁹ In *Kesler*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Tipton, *supra* note 130.

¹³⁷ *Id.*

¹³⁸ *Id.* See also Ellen Trachman, *Parental Rights in New York To Graduate from the Dark Ages, Hopefully*, ABOVE THE LAW (Apr. 10, 2019, 12:15 PM), <https://abovethelaw.com/2019/04/parental-rights-in-new-york-to-graduate-from-the-dark-ages-hopefully/?rf=1>.

¹³⁹ Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. J. L. & SOC. POL'Y 167, 172 (2008).

v. Weniger,¹⁴⁰ a Pennsylvania court ruled that even if a sperm donor agreement had existed between the parties, the father would retain legal obligations to the child because “a child’s right to support from a natural father cannot be bargained away by the child’s mother.”¹⁴¹ If one were to follow the court’s reasoning, a child’s right to support could not be extinguished through a fertility agreement, either before or after the child’s conception and birth.¹⁴² The Superior Court of Pennsylvania applied *Kesler* four years later in the case of *Ferguson v. McKiernan*,¹⁴³ finding that although the parties had contracted for the release of the father from any support obligations as an anonymous sperm donor, the agreement was unenforceable and child support was ordered.¹⁴⁴ The most important factor that most courts consider when terminating or upholding an egg donor’s parental rights and obligations is the intention of the parties, which is most easily discerned from a written contract.¹⁴⁵ These Pennsylvania cases are important because they demonstrate that any pre-conception release of a child’s right to support can be invalidated as being prejudiced against the child’s best interests—a standard to which, as previously stated, most states adhere.¹⁴⁶

Egg donors, compared to sperm donors, face an additional risk of being held responsible for child support and other obligations because they are not protected under the 1973 UPA.¹⁴⁷ The Act

¹⁴⁰ *Kesler v. Weniger*, 744 A.2d 794 (Pa. Super. Ct. 2000).

¹⁴¹ *Id.* at 795.

¹⁴² *Id.* at 796 (“It cannot be bargained away before conception any more than it can be bargained away after birth, nor can it be extinguished by principles of estoppel.”).

¹⁴³ *Ferguson v. McKiernan*, 855 A.2d 121 (Pa. Super. Ct. 2004).

¹⁴⁴ In 2007, the father successfully appealed the Superior Court’s decision, arguing that its order was a violation of his equal protection rights by holding him responsible for child support when anonymous sperm donors are not subject to such liabilities. See *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007).

¹⁴⁵ LegalMatch, *Egg Donor’s Parental Rights/Obligations*, <https://www.legalmatch.com/law-library/article/egg-donors-parental-rightsobligations.html> (last visited Feb. 23, 2020).

¹⁴⁶ Terman, *supra* note 139, at 173.

¹⁴⁷ *Id.* at 174 (The states that have enacted the 1973 version of the Uniform Parentage Act in some form are as follows: Alabama, ALA. CODE §§ 27-16-1 to 26-17-22 (1984); California, CAL. FAM. CODE §§ 7600-7730 (West 1975); Colorado, COLO. REV. STAT. §§ 19-4-101 to 19-4-130 (West 1977); Hawaii, HAW. REV. STAT. §§ 584-1 to 584-26 (1975); Illinois, 750 ILL. COMP. STAT. 45/1 to 45/28 (1984); Kansas, KAN. STAT. ANN. §§ 38-1110 to 38-1138 (1985); Minnesota, MINN. STAT. §§ 257.51 to 257.75 (1980); Missouri, MO. REV. STAT. §§ 210.817 to 210.852 (1987); Montana, MONT. CODE ANN. §§ 40-6-

states that a “donor of semen provided . . . for use in artificial insemination . . . is treated in law as if he were not the natural father of a child thereby conceived,” thus protecting men, regardless of whether they are known to the intended mother; no similar provision protects egg donors.¹⁴⁸ Without a provision specific to egg donors, the Act also leaves intended parents vulnerable to an egg donor claiming her right to parenthood. Some “courts have held that egg [donors] have standing to assert parentage under the [Act] and that waivers of parental rights may be irrelevant to the court’s determination of parenthood.”¹⁴⁹ Ohio, for example, has ruled strongly for egg donors’ rights, allowing them to fight for custody whether or not a valid contract waiving their parental rights had previously been signed.¹⁵⁰ On the other hand, California has repeatedly held that when two means of establishing parentage under the Act do not coincide in one woman, the woman who “intended to bring about the birth of the child that she intended to raise as her own” is the mother of the child under California law.¹⁵¹ Section 702 of the 2000 amended version of the Act provides that “a donor is not a parent of a child conceived by means of assisted reproduction,”¹⁵² defining a donor as someone who produced either an egg or sperm used for assisted reproduction. By broadening its definition of gamete donors, this provision would control parentage determinations in both egg and sperm donor arrangements.¹⁵³ Thus far, six states have adopted the 2000 amended Act, but no court in these states has yet to interpret and apply the new donor provision.¹⁵⁴

101to 40-6-105 (1975); Nevada, NEV.REV.STAT.§§126.011 to 126.371 (1979); New Jersey N.J. STAT. ANN. §§ 9:17-38 to 9:17-59 (West 1983); New Mexico, N.M. STAT. §§40-11-1to 40-11-23 (1986); Ohio, OHIO REV. CODE. ANN. §§ 3111.01 to 3111.19 (West 1982); Rhode Island, R.I. GEN. LAWS §§ 15-8-1to15-8-27(1979); Texas, TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (Vernon 2001)).

¹⁴⁸ Terman, *supra* note 139, at 174 (quoting UNIF. PARENTAGE ACT § 5(a) (1973)).

¹⁴⁹ *Id.* at 175.

¹⁵⁰ LegalMatch, *supra* note 145.

¹⁵¹ Terman, *supra* note 139, at 176-7, (quoting *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993)).

¹⁵² Terman, *supra* note 139, at 176 (quoting UNIF. PARENTAGE ACT § 702, 9B U.L.A. 299-376 (2000) (revised 2002)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (Delaware, DEL. CODE ANN. tit. 13, §§ 8-101 to 8-904 (2004); North Dakota, N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (2005); Texas, TEX. FAM. CODE ANN. §§ 160.001 TO 160.763(Vernon2001); Utah, UTAH CODE ANN. §§ 78-45g-101 to 78-45g-901 (2004); Washington, WASH. REV. CODE §§

In *Matter of J.*,¹⁵⁵ decided in New York in 2018, light was shown on another issue—when the single intended parent is the father.¹⁵⁶ In that case, the biological father of the child wanted the court to grant his petition to adopt his son born from gestational surrogacy in order to be the sole legal parent on his birth certificate, and eliminate the surrogate’s name.¹⁵⁷ The court, in its opinion, concluded that it did not have the authority to approve the petition because petitioner was trying to use the adoption statute for a purpose other than for which it was intended.¹⁵⁸ The court seemed to tiptoe around the idea that it would be inconceivable for a child not to have a named “birth mother.” Historically speaking, a mother’s parental status was rarely disputed as the “mother-child relationship was established by proof of giving birth.”¹⁵⁹ In a series of cases involving unmarried fathers challenging the termination of parental rights under the 14th Amendment, the United States Supreme Court “affirmed the constitutional protection of a father’s parental rights when he has established a substantial relationship with his child.”¹⁶⁰ But courts have repeatedly limited fathers’ ability to obtain parental rights. For example, in *Parham v. Hughes*,¹⁶¹ the Supreme Court rejected the father’s equal protection claim because “mothers and fathers of illegitimate children are not similarly situated . . .” and the differences between women and men justify legal distinctions between mothers and fathers, even when the father has had a parental relationship with the child.¹⁶² In *Lehr v.*

26.26.011 to 26.26.913 (2002); Wyoming, WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2003)).

¹⁵⁵ *Matter of J.*, 59 Misc.3d 937, 72 N.Y.S.3d 811 (N.Y. Fam. Ct. 2018).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 938.

¹⁵⁸ *Id.* at 938.

¹⁵⁹ NeJaime, *supra* note 1, at 2280. See, e.g., UNIF. PARENTAGE ACT § 3 (UNIF. LAW COMM’N 1973); John Lawrence Hill, What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. REV. 353, 370 (1991) (“[T]his principle reflects the ancient dictum mater est quam gestation [sic] demonstrat (by gestation the mother is demonstrated).”).

¹⁶⁰ Children’s Bureau, *The Right of Unmarried Fathers* (Aug. 2017), <https://www.childwelfare.gov/pubPDFs/putative.pdf>.

¹⁶¹ *Parham v. Hughes*, 441 U.S. 347 (1979).

¹⁶² NeJaime, *supra* note 1, at 2281 (quoting *Parham v. Hughes*, 441 U.S. 347, 348-49, 359 (1979) (plurality opinion)). See the Court rejected the father’s due process claim because the case involved a right to damages after a child’s death, rather than “the freedom of a father to raise his own children.” *Hughes*, 441 U.S. at 358-59.

Robertson,¹⁶³ the Court stated that “the mother carries and bears the child, and in this sense her parental relationship is clear. [But] [t]he validity of the father's parental claims must be gauged by other measures.”¹⁶⁴

In *Miller v. Albright*,¹⁶⁵ and again in *Nguyen v. INS*,¹⁶⁶ the Court considered the constitutionality of a statutory scheme that made it more difficult for a child born abroad to obtain citizenship when the non-married citizen parent was the father.¹⁶⁷ However, when the citizen parent was the mother, the child easily acquired the mother’s nationality status at birth.¹⁶⁸ In both cases, a sharply divided Court found no equal protection violation on account that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.”¹⁶⁹ Barring any appeals in *Dvash-Banks*,¹⁷⁰ the marital presumption extended to same-sex couples may finally extend to citizenship issues and force the State Department to change its treatment of children born to married same-sex couples, which until now were treated, as a matter of policy, as if they were born out of wedlock.¹⁷¹

¹⁶³ *Lehr v. Robertson*, 463 U.S. 248 (1983).

¹⁶⁴ *NeJaime*, *supra* note 1, at 2281 (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) quoting *Caban v. Mohammed*, 441 U. S. 380, 397 (1979)).

¹⁶⁵ *Miller v. Albright*, 523 U.S. 420 (1998).

¹⁶⁶ *Nguyen v. INS*, 533 U.S. 53 (2001).

¹⁶⁷ *NeJaime*, *supra* note 1, at 2282 (citing *Fiallo v. Bell*, 430 U.S. 787, 799-800 (1977) where the Court “rejected an equal protection claim to an immigration scheme excluding nonmarital father-child relationships from preferential status”; citing 8 U.S.C. § 1409(c) (2012). Section 1409(c) additionally requires that “the mother ha[s] previously been present in the United States or one of its outlying possessions for a continuous period of one year.”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (quoting *Nguyen v. INS*, 533 U.S. 53, 63 (2001)).

¹⁷⁰ One same-sex couple fathered twins using surrogacy, each contributing sperm so both would end up having a genetically related child. But because only one of the spouses was a United States citizen, only his biological child was granted citizenship. In February 2019, a District Court applied *Pavan v. Smith* and *Obergefell v. Hodges* to the case at hand finding that both twins are United States citizens. *Andrew Mason Dvash-Banks v. Pompeo*, 2019 U.S. dist. LEXIS 30525 (C.D. Cal. Feb. 21, 2019).

¹⁷¹ Frank J. Bewkes, *Unequal Application of the Marital Presumption of Parentage for Same-Sex Parents*, CTR. FOR AM. PROGRESS (Nov. 25, 2019, 9:03AM), <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/11/25/477923/unequal-application-marital-presumption-parentage-sex-parents/>.

Like male same-sex couples, single fathers wanting to form single-parent families through ART seek to displace surrogates and egg donors as legal parents.¹⁷² A Texas appellate court refused to declare that the gestational surrogate, who had no genetic connection to the children, was not a legal parent, even though Texas law allowed such a result when a married different-sex couple used a gestational surrogate.¹⁷³ In making its decision, the court noted that the biological father “seeks a declaration that he is the sole parent and [that] the children have no mother.”¹⁷⁴ Because the egg donor was not seeking parental rights over the child, the court determined that the surrogate, having given birth to the child, had to take on such obligations.¹⁷⁵ The fact that many courts refuse to allow surrogates or egg donors to relinquish their parental rights if no other woman is seeking to adopt the child is a troubling result.¹⁷⁶ This reiterates views about motherhood and fatherhood that harm both women, men, and children and makes it impossible for single fathers—or anyone breaking from traditional family norms—to create the family they desire.¹⁷⁷

3. Second-Parent Adoption

Where one of the intended parents is not genetically related to a surrogate child, a second-parent adoption is required in states that do not allow for pre-birth orders.¹⁷⁸ Second-parent adoption laws vary from state to state but are often a simplified process, as opposed to full adoption proceedings. In states that do not clearly allow for surrogacy, second-parent adoptions are of great importance, especially for same-sex couples. Particularly, same-sex couples are recommended to complete a second-parent adoption

¹⁷² NeJaime, *supra* note 1, at 2331.

¹⁷³ *In re M.M.M.*, 307 S.W.3d 846 (Tex. App. 2010).

¹⁷⁴ NeJaime, *supra* note 1, at 2331 (quoting *In re M.M.M.*, 428 S.W.3d 389, 392 (Tex. App. 2014)).

¹⁷⁵ *Id.* (quoting *In re M.M.M.*, 428 S.W.3d 389, 392. *But cf.* *In re Roberto d.B.*, 923 A.2d 115, 126 (Md. 2007) (holding that it is “within a trial court’s power to order the [Maryland Division of Vital Records] to issue a birth certificate that contains only the father’s name”).

¹⁷⁶ *Id.* (citing Marla J. Hollandsworth, *Gay Men Creating Families Through Surrogate Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 235-38 (1995)).

¹⁷⁷ *Id.*

¹⁷⁸ SURROGATE.COM, *supra* note 122.

even if both are named on the child’s birth certificate because not all states recognize same-sex couples’ rights.¹⁷⁹ Second-parent adoption for both heterosexual and same-sex couples provides many benefits—financial prospects such as inheritance rights and insurance claims, having medical authority and obtaining medical records, and the feeling of permanence.¹⁸⁰ A Queens County Family Court judge in New York recognized a second-parent adoption created by in-vitro fertilization with the biological parent’s sperm, an anonymous egg donor, and a gestational surrogate in India.¹⁸¹ The judge summarized the issue as follows:

“[I]t is troublesome that when using a surrogate, a birth parent who provides [their] genetic material is a legal parent to the child, yet their partner may not be able to achieve legal parentage through adoption. Worse yet, in cases where neither partner has furnished their genetic material . . . neither parent could be deemed the legal parent of a child through adoption. Although such scenarios are consistent with statutes . . . such results are inconsistent with the Legislature’s intent that ‘each adoption should be judged upon the best interests of the child based upon a totality of the circumstances.’”¹⁸²

The judge based his decision on the basis of the best interests of the child but could have come to an opposite conclusion, since until recently New York had strictly banned compensated surrogacy and had made surrogacy agreements legally unenforceable. For intended parents, having to undergo the emotional turmoil, expense, and inconvenience of adopting their own child is an unfair process that can feel humiliating and alienating.¹⁸³

¹⁷⁹ Brian Esser, *Are Second-Parent Adoptions Necessary?*, L. OFF. BRIAN ESSER PLLC (Nov. 18, 2013), <https://www.esserlawoffice.com/blog/2013/11/18/second-parent-adoptions-necessary/>.

¹⁸⁰ Considering Adoption, *Why Adopt a Stepchild?*, <https://consideringadoption.com/adopting/types-of-adoption/what-is-stepparent-adoption> (last visited Feb. 24, 2020).

¹⁸¹ *Matter of J.J.*, 984 N.Y.S.2d 841 (N.Y. Fam. Ct. Apr. 2014).

¹⁸² *Id.* at 843-44.

¹⁸³ Richard Vaughn, *2nd-Parent Adoption Remains Best Protection for LGBT Parents*, INT’L FERTILITY L. GROUP, <https://www.iflg.net/2nd-parent-adoption-protects-lgbt-parents/> (last visited Feb. 25, 2020).

4. Full Faith and Credit Clause

Full faith and credit must also be considered when discussing full adoption. Since a surrogate mother is considered the legal mother of the child to whom she gives birth, the adoption process in surrogacy cases still allows a surrogate to change her mind and keep the intended parents' genetic child.¹⁸⁴ Article IV of the Constitution provides that "full faith and credit shall be given in each state to the public act, records, and judicial proceedings of every other state."¹⁸⁵ When it comes to a person's legal status, however, each state can make its own rules, and sister states do not necessarily have to recognize that status—especially when considering parental and marital presumptions. Some states, like New York, apply the Full Faith and Credit Clause. In *D.P. v. T.R.*¹⁸⁶ a New York State court upheld a California pre-birth order and judgment of paternity for twins conceived through gestational surrogacy,¹⁸⁷ concluding that the "full faith and credit clause trumps New York's public policy barring surrogacy."¹⁸⁸ *V.L. v. E.L.*,¹⁸⁹ however, is one of many cases that reflects state resistance to the application of the Full Faith and Credit Clause. In that case, the non-biological parent in a same-sex female couple adopted their child in Georgia.¹⁹⁰ Later, after moving to Alabama and separating, the biological mother argued that the Georgia adoption order shouldn't be recognized in Alabama.¹⁹¹ After the Alabama court agreed with the biological mother, the Supreme Court of the United States clarified the full faith and credit obligation in their appellate review of the case.¹⁹² In spite of the Court's judgment some states continue

¹⁸⁴ Ellen Trachman, *I'm Sorry, Your (Full Faith And) Credit is No Good Here*, ABOVE THE LAW (Aug. 2, 2017, 3:44PM), <https://abovethelaw.com/2017/08/im-sorry-your-full-faith-and-credit-is-no-good-here/>.

¹⁸⁵ HERITAGE.ORG, *The Heritage Guide to the Constitution*, <https://www.heritage.org/constitution/#!/articles/4/essays/121/full-faith-and-credit-clause> (last visited Feb. 25, 2020).

¹⁸⁶ *D.P. v. T.R.*, F-04079-10.

¹⁸⁷ Rick Vaughn, *Full Faith and Credit Given to California Parentage Order by New York Court*, INT'L FERTILITY L. GROUP (Oct. 29, 2019, 5:27 PM), <https://www.iflg.net/full-faith-and-credit-given-to-california-parentage-order-by-new-york-court/>.

¹⁸⁸ *Id.*

¹⁸⁹ *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

¹⁹⁰ *Id.* at 1019.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1020-22.

to disregard parentage orders from other states, largely due to “bias against how people became parents.”¹⁹³

IV. A PROPOSAL FOR MEDIATION

Even though laws have expanded to accommodate a diverse range of parental and familial configurations, many people who hold themselves out as “parents on social grounds—because they are the intended parent, function as a parent, or are married to the biological parent at the time of the child’s birth—discover that in the eyes of the law they are [mere] strangers to their children.”¹⁹⁴ Determination of these issues will remain challenging; courts and legislatures will continue to face difficult questions about parental relationships and complex familial dynamics.¹⁹⁵ The traditional approach to form a surrogacy agreement will most likely continue to be time consuming, costly, and alienating to the parties involved. These inefficiencies coupled with potentially ineffective lawyers eager to settle are all the more inappropriate when dealing with surrogacy agreements due to their highly personal nature. “For surrogacy contracts where emotional issues flourish easily, validity, enforcement and renegotiation of contracts can all be extremely complex and difficult to solve.”¹⁹⁶ The complexities of surrogacy agreements will also often be more difficult to solve when such agreements are made independently among the intended parent(s) and the surrogate, and end up being litigated. For these reasons, mediation may well be a better forum in which to craft surrogacy agreements, and should become a working solution for parties to remain out of court, to prevent “burdens [from] fall[ing] systematically on those historically subject to exclusion,”¹⁹⁷ for all parties to be involved (whether they have a legally cognizable claim to the child involved), and to allow parties to invest the time and effort to work out details that a court would not necessarily address while taking into consideration the parties’ emotional state.

Mediation is increasingly used to help people resolve family-related disputes, such as divorces, open adoptions, and post-adoptions controversies, precisely because it is a process capable of

¹⁹³ Trachman, *supra* note 184.

¹⁹⁴ NeJaime, *supra* note 1, at 2332.

¹⁹⁵ *Id.*

¹⁹⁶ Monteburano, *supra* note 2, at 29.

¹⁹⁷ NeJaime, *supra* note 1, at 2332.

handling complex family structures. If mediated surrogacy agreements were to follow the framework of open adoption agreements, the process could specifically embrace all the parties involved; this could mean mediating with the intended parents, the surrogate, the surrogate's spouse or partner, the egg donor, the egg donor's spouse or partner, the sperm donor, and the sperm donor's spouse or partner, as needed. If mediated surrogacy agreements were to follow the framework of post-adoption agreements, the process would ensure that each party involved were able to voice and discuss the level of intimacy and amount of ongoing contact they each would want with the child in a more cost-efficient and time-efficient healing environment.¹⁹⁸

A. *Mediation's Potential Role in Surrogacy Agreements*

The traditional manner by which surrogacy agreements are drafted is with the intended parent(s) working with their attorney to draft the initial contract, after which the surrogate works with her attorney to review the initial contract and negotiate for her requests and interests to be represented.¹⁹⁹ A process that ideally should be a collaborative effort in the creation of a family becomes, through this process, a tiresome and competitive back-and-forth between attorneys. Intended parent(s) and surrogates are persistently warned to each have their own independent attorneys to negotiate the contract and to ensure that each have an ally in the negotiation room. Intended parent(s) and surrogate are told that without independent counsel, they would have to negotiate directly, which would be a “stressful and damaging [process] to their relationship.”²⁰⁰ Each side gearing up with attorneys is not, however, the only process available for intended parents and surrogates to craft a proper surrogacy agreement. Mediators are skilled at going through facts, emotions, and reconciling individual interests to guide the parties to a fair and workable outcome.²⁰¹ It is a mediator's duty to be unbiased when conducting mediations, ensuring that all parties have

¹⁹⁸ Mummert Law, *Common Questions About Adoption Mediation*, <https://www.mummertlaw.com/blog/2016/07/common-questions-about-adoption-mediation/>.

¹⁹⁹ *Understanding Surrogacy Contracts*, *supra* note 102.

²⁰⁰ *Id.*

²⁰¹ Finra Dispute Resolution Services, *Role of a Mediator*, FINRA, <https://www.finra.org/arbitration-mediation/role-mediator> (last visited May 22, 2020).

an ally and an opportunity to be heard.²⁰² It should be noted that parties to a mediation can have individual counsel to advise them outside of mediation (or if the parties wish, to be present during the mediation as an additional ally).

Most mediated agreements will include a dispute resolution clause.²⁰³ Adding such a provision would be valuable in surrogacy agreements, especially where all parties involved may not have a legally cognizable claim. An example of such a provision is as follows:

“[The parties agree that, except where time is of the essence], all claims, disputes, and controversies arising out of or in relation to the [meaning], interpretation, or enforcement of this Agreement [or with respect to any other right or obligation arising under this Agreement], shall be referred to mediation before, and as a condition precedent to, the initiation of any adjudicative action or proceeding.”²⁰⁴

With the assistance of a mediator, intended parents and surrogates could have the opportunity to engage in fruitful and open discussions directly among themselves before drafting a contract, while ensuring that their relationship not only remains undamaged, but has the opportunity to flourish and remain outside the court system.

B. *Parties Who Should Be Involved in Mediating Surrogacy Agreements*

The fact that one party may not automatically have legal remedies through the courts is a frequent issue in mediation, and one that is not limited to surrogacy issues. But mediation allows all those who need to be involved to be part of the conversation to resolve issues outside and—regardless of—their legal “standing” and despite the fact that they are not the parties who would sign the final agreement. Surrogacy agreements inherently involve a number of people who have a different type of connection with the child—whether it is a biological connection, a gestational connection, or a

²⁰² *Id.*

²⁰³ See, e.g., *Sample Mediation Clause*, USA&M, <https://usam.com/sample-mediation-clause/> (last visited May 24, 2020). See also *Dispute Resolution Specialists*, <http://www.mediates.com/drssmpl.html> (last visited May 24, 2020) [hereinafter *Dispute Resolution Specialists*].

²⁰⁴ *Dispute Resolution Specialists*, *supra* note 203.

functional connection, and those who will have different levels of involvement in the child's ongoing life. As discussed, state laws vary to such a dramatic degree that the same suit over legal parentage of a child between the intended parent(s), the surrogate, and the gamete donor could come out entirely differently based on where the contract is signed, and the lawsuit is brought. Some states, like California, would find the intended parent(s) to be the legal parent(s) of the child.²⁰⁵ Other states, like North Dakota, would find the surrogate (and therefore her spouse if she has one) to be the legal parent(s) of the child.²⁰⁶ Other states, like Nebraska, would find the gamete donor (and therefore their spouse if they have one) to be the legal parent(s) of the child.²⁰⁷ Other states would determine parentage based on the best interest of the child.²⁰⁸ In order to minimize future conflicts between the intended parent(s), the surrogate and their potential spouse, and gamete donors and their potential spouse, this Note proposes that all of the stakeholders should be involved in the mediation of the surrogacy agreement. A surrogate's spouse should certainly be involved in the discussions in any state that still applies the marital presumption, as they would also need to give up their parental claims to the child. But other considerations, both emotional and functional, are important and necessary for any surrogate's spouse to know and understand, regardless of their legal "status." These can include restrictions on intimacy (while taking fertility medications, during the embryo transfer and potentially later on, especially if complication occur), restrictions on other activities and diet, and even whether a surrogate's spouse would be allowed to come to doctor appointments.²⁰⁹ A surrogate's spouse can also be a good advocate and ally for the surrogate herself.

²⁰⁵ Elaine A. Lisko, *California Appellate Court Holds Divorcing Spouses Who Were Intended Parents of Child Resulting from Anonymous Egg and Sperm Donors and Brought to Term by Surrogate to be Legal Parents of Child*, HEALTH L. & POL'Y INST. (Apr. 8, 1998), <https://www.law.uh.edu/healthlaw/perspectives/Reproductive/980408Child.html>

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ SURROGATE.COM, *Surrogates*, <https://surrogate.com/surrogates/people-involved-in-your-surrogacy/how-surrogacy-may-affect-your-significant-other/> (last visited Feb. 27, 2020).

For similar reasons, a known sperm or egg donor and their spouse should also be involved in the mediation process. Additionally, intended parents may want to follow a post-adoption structure whereby known gamete donors and surrogates would have various degrees of contact with the child, while ensuring the same limits to their rights and obligations, as opposed to the traditional model of ensuring surrogates and gamete donors relinquish all access and contact with the child once they have relinquished their rights and obligations. Mediation would be the most effective way to help parent(s) and other parties who might be in conflict to allow them to be heard and reach decisions about how they would wish to resolve the legal issues and practical issues on their own terms, before opening themselves up to the possibility of facing endless, damaging litigation.

C. Freedom to Contract and Children's Rights

A surrogacy agreement that ends up in litigation will require a court to determine and recognize two parents per child.²¹⁰ Another reason for surrogacy agreements to be handled through mediation is when the parties wish for the agreement to follow a similar framework as post-adoption contracts, keeping in mind the best interest of the child. In the adoption arena, the general movement has shifted towards greater transparency regarding parental origins, and ongoing relationships between children and their genetic parents; more state laws now allow children to discover their genetic parents' identities.²¹¹ There are also long existing concerns regarding interracial adoptions that child-welfare groups protest "in the name of children's needs to connect with the culture of their genetic kin."²¹² There is uncertainty, however, as to the rights of children born through the surrogacy process and gamete donors to know about their own biology and heredity, especially in the majority of cases where a child born to a surrogate mother would

²¹⁰ Elisabeth A. Sheff, *Multiple Parents Legally?*, PSYCHOLOGY TODAY (Nov. 26, 2017),

<https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201711/multiple-parents-legally>.

²¹¹ Helene Alvaré, *Do Children Have a Right to Know Their Biological Families?*, INST. FOR FAM. STUD. (Aug. 9, 2016), <https://ifstudies.org/blog/do-children-have-a-right-to-know-their-biological-families>.

²¹² *Id.*

share no biological connection with her.²¹³ In addition to allowing gamete donors and surrogates to contract out of any obligations to their offspring,²¹⁴ state laws allow gamete donors to remain anonymous so “children [would] have no legal recourse to discover their biological origins without change in public policy.”²¹⁵ When courts rely on a best interest of the child analysis, this does not include the biological connection between any parent and the child²¹⁶ and courts will not explore whether or not a child should have a right to a relationship with his or her biological parent(s) regardless of any decision as to the identity of the legal parent(s).²¹⁷ Some scholars suggest that the overall well-being, happiness, and needs of children should be balanced with the interest of adults regarding parenting and privacy.²¹⁸ In fact, the overall benefits of post-adoption and open-adoption agreements²¹⁹ should be extended to families using ART; whether or not state laws provide for this, through mediation of the surrogacy agreement, intended parents, surrogates, and gamete donors can provide for whatever level of ongoing contact each of the parties involved needs to maintain between the child and their biological and gestational parent(s).²²⁰ This keeps in mind not only the best interest of the child but also the child’s interest and right in knowing and having a relationship with their biological—and gestational—parent(s).²²¹

D. *Choice of Law Clauses*

Looking back to the discussion of the Full Faith and Credit Clause, mediators helping to work out surrogacy agreements should also ensure the parties include a choice of law (or governing law) clause to ensure that a pro-surrogacy state law will govern the

²¹³ Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, 20 (May 2016).

²¹⁴ See UNIF. PARENTAGE ACT, § 9 (2017).

²¹⁵ Alvaré, *supra* note 211.

²¹⁶ In *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 955 (Vt. 2006), the court “specifically pointed to the deprivation a child born of artificial insemination would face if denied access to its, second non-biological parent.” Alex Finkelstein et al., *supra* note 213, at 21.

²¹⁷ *Id.* at 20.

²¹⁸ Alvaré, *supra* note 211.

²¹⁹ *Child Protection Best Practices Bulletin*, *supra* note 17.

²²⁰ Alvaré, *supra* note 211.

²²¹ *Id.*

arrangement, a choice of venue clause so that if a dispute arises the parties have already expressly agreed as to which court should hear it, and an alternative dispute resolution provision ensuring that if a dispute arises between the parties, unless time is of the essence, they go back to mediation before any action is brought in court.²²² A Minnesota state court considered whether to enforce a surrogacy agreement that contained a choice of law clause using Illinois law, and concluded that agreements with choice of law clauses are “freely entered into by the parties [and] are enforceable unless they are a bad faith attempt to evade Minnesota law.”²²³ Although choice of law standards differ among states, courts generally respect choice of law clauses in adopted by parties to a contract, when the parties are acting in good faith and not trying to evade the laws or policies of the state in which the court sits.²²⁴ In *Hodas v. Morin*,²²⁵ the Massachusetts Supreme Judicial Court, in determining that Massachusetts had a substantial relationship to the transaction because the child was to be born there, applied the Restatement (Second) of Conflicts of Law, which presumes that the choice of law clause will stand unless,

“(a) the chosen state has no substantial relationship to the parties or transaction . . . and (b) application of the law of the chosen state would be contrary to the fundamental policy of a state with a materially greater interest than the chosen state and is the state whose laws would apply in the absence of a choice of laws by the parties.”²²⁶

Mediators could ensure that intended parent(s) should try, whenever possible, to proceed in a pro-surrogacy state (choose a surrogate who lives in a pro-surrogacy state or mediate and sign the surrogacy contract in a pro-surrogacy state).²²⁷ This will ensure that

²²² Academy of Adoption & Assisted Reproduction Attorneys, *Surrogacy Agreements—Contract Terms*, <https://adoptionart.org/assisted-reproduction/intended-parents/gestational-surrogacy/surrogacy-agreements-contract-terms/> (last visited Feb. 27, 2020).

²²³ Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 506 (Dec. 9, 2015, 1:20 PM).

²²⁴ Morrissey, *supra* note 223, at 508.

²²⁵ *Hodas v. Morin*, 442 Mass. 544, 814 N.E.2d 320 (2004).

²²⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2); Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 100 (Jan. 1, 2009).

²²⁷ Morrissey, *supra* note 223, at 504.

a court would not refuse to hear the case based on a lack of substantial connection to the subject of the contract, should the dispute resolution clause of the contract prove ineffective.

V. CONCLUSION

Surrogacy is not inherently a legal matter, but becomes one when the parties' enter into a contract to guarantee that all will follow through on their commitments—the intended parent(s) to pay, and the surrogate to carry the child to term, and most importantly, relinquish the child to the intended parent(s) as soon as he or she is born.²²⁸ These agreements provide special rules of parentage²²⁹ that the legal system has had a hard time addressing, particularly where family law lacks uniformity between the states. This leaves parties involved vulnerable to costs associated with the judicial system, including financial burdens, emotion strains, and worst of all the loss of a child's best interest.

Mediation is a proven, economically efficient and individually sensitive practice that could be of tremendous aid to the many parents, donors, and surrogates who are now going through this process. Meditating the surrogacy agreements underlying the arrangements would allow all the people involved to craft their new family dynamics how they best see fit (whether they would have a legal cause of action or standing), provide for safeguards against unfavorable state laws, and present an opportunity for parties involved to avoid the trauma and uncertainty of the traditional legal practices and of the court system. Mediation will help post-modern families through the complexities of the legal world in a fair and open manner as well as assist the court system in becoming a more flexible and modern space for new concepts of the family unit.

²²⁸ Joanna L. Grossman, *End of an Era: New Jersey Legalizes Surrogacy, 29 Years After Baby M*, VERDICT (June 5, 2018), <https://verdict.justia.com/2018/06/05/end-of-an-era-new-jersey-legalizes-surrogacy-29-years-after-baby-m>.

²²⁹ *Id.*