

2015

# Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance

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### Recommended Citation

White, Jennifer S. (2015) "Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance," *Belmont Law Review*: Vol. 2 , Article 9.

Available at: <https://repository.belmont.edu/lawreview/vol2/iss1/9>

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# GESTATIONAL SURROGACY CONTRACTS IN TENNESSEE: FREEDOM OF CONTRACT CONCERNS & FEMINIST PRINCIPLES IN THE BALANCE

JENNIFER S. WHITE\*

## INTRODUCTION

Surrogacy is a growing industry, yet it remains largely unregulated in the United States.<sup>1</sup> Though there is no formal collection of statistics that track surrogate births in the U. S., estimates suggest that surrogate births doubled from 2004 to 2008, reaching approximately 1,000 births annually.<sup>2</sup> The law, however, has failed to keep pace with reproductive technology and surrogacy laws vary significantly from state to state.<sup>3</sup> Consequently, the increase in surrogacy arrangements, combined with little to no regulation, creates significant confusion over whether or not varying types of surrogacy are legal from state to state.<sup>4</sup> As a result, individuals seeking to start a family, and surrogates wishing to assist them, are left in legal uncertainty about their individual rights as well as their obligations toward each other.<sup>5</sup> It is time for the Tennessee legislature to address the modern realities of surrogacy. Doing so promptly will allow surrogates and intended parents greater certainty about the legality of surrogacy contracts

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\* J.D., Cum Laude, Belmont University College of Law (2015). I would like to thank my fiancé for all of his support. I would also like to thank the entire *Belmont Law Review* staff for their diligent work and Professor Usman for all of his guidance.

1. Sarah Mortazavi, *It Takes A Village to Make A Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2250 (2012).

2. Magdalina Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS (2010), available at <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevj0a1m.pdf>.

3. Jennifer Ludden, *Who Is A Parent? Surrogate Technology Outpaces Law*, NPR (April 13, 2012), available at <http://www.npr.org/2012/04/14/150586618/legal-debate-over-surrogacy-asks-who-is-a-parent>.

4. Mark Hansen, *As Surrogacy Becomes More Popular Legal Problems Proliferate*, A.B.A. J. MAG., available at [http://www.abajournal.com/magazine/article/as\\_surrogacy\\_becomes\\_more\\_popular\\_legal\\_problems\\_proliferate/](http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/).

5. Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in A Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 342 (2002).

through a balanced legislative approach that safeguards the interests of prospective parents and the surrogates who are assisting them.

Surrogacy arrangements implicate freedom of contract considerations as well as concerns over the potential exploitation of women.<sup>6</sup> Across the country, legislatures have struggled to strike the appropriate balance between allowing infertile couples to enter into these contracts as a means to exercise their right to create a family, while incorporating provisions to protect the rights of the surrogate.<sup>7</sup> Due to the personal nature of surrogacy contracts and the substantial public policy considerations involved, it is vital to craft a comprehensive statute that allows for freedom of contract and protects fundamental constitutional rights.<sup>8</sup> This is a particularly relevant concern in Tennessee since the legislature has recently implemented a statute regulating surrogacy,<sup>9</sup> and two surrogacy cases have recently been argued before the Tennessee Supreme Court.<sup>10</sup> Moreover, the Tennessee Constitution provides for greater privacy protections than the federal Constitution, and the Tennessee judiciary has a history of protecting the expansive privacy rights of Tennesseans.<sup>11</sup> The right to privacy and the right to freedom of contract should be protected, but these rights should be balanced against competing public policy considerations. Applying a feminist lens to the issue of surrogacy contracts in Tennessee is necessary to evaluate concerns over the potential exploitation of women in the surrogate birth process, while balancing these concerns against the rights of men and women to have greater access to reproductive choice.

Drawing upon feminist theory and principles of freedom of contract, this Note proposes a new statutory framework for addressing surrogacy in the state of Tennessee. Part I provides a balanced discussion of why couples choose surrogacy as well as varying types of surrogacy available to individuals. Part II explores the judicial and legislative responses toward surrogacy contracts in the United States and discusses significant surrogacy litigation that continues to shape the public policy arguments surrounding this issue. Part III provides background on

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6. *In re Baby M.*, 537 A.2d 1227, 1241 (N.J. 1988) (stating grounds for voiding contract include questions of voluntary consent in light of the significant compensation); *In re Adoption of Paul*, 550 N.Y.S.2d 815, 819 (1990) (holding surrogate may not be compensated because of the potential for intimidation); see Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 509 (2011).

7. Mortazavi, *supra* note 1, at 2258 (noting the struggle to balance enforcement of contracts with public policy concerns).

8. See Michelle Elizabeth Holland, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 1, 15 (2013).

9. TENN. CODE ANN. § 36-2-402 (2013).

10. *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005); *In re Baby*, 447 S.W.3d 807 (Tenn. 2014).

11. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 12 (Tenn. 2000).

Tennessee's approach to the right to privacy as well as recent surrogacy case law and legislation. Part IV addresses feminist arguments as applied to surrogacy. Part V offers a discussion of the intersection of freedom to contract and public policy concerns that influence the debate about whether or not surrogacy contracts should be legal. Part VI recommends proper statutory language to regulate gestational surrogacy contracts in Tennessee.

## I. BACKGROUND

It is crucial to have a basic familiarity with the medical definitions of surrogacy, as well as the reasons individuals pursue this reproductive method, in order to understand why comprehensive surrogacy legislation is necessary and how legal and feminist principles should contribute to this discussion. The recommendation for a legislative amendment introduced in Part VI is grounded in these definitions of surrogacy and how they should influence regulation of the surrogate birth process in Tennessee.

### A. Choosing Surrogacy

Due to technological advancements and emerging acceptance of surrogate arrangements, surrogacy has become increasingly popular in the United States.<sup>12</sup> In fact, the number of babies resulting from gestational surrogacy has more than doubled in the past seven years.<sup>13</sup> One of the reasons for this increase is the appeal of gestational surrogacy to infertile individuals who desire to start a family. According to Resolve, an organization that advocates on behalf of individuals suffering from reproductive disorders, infertility affects approximately 7.3 million people in the United States.<sup>14</sup> Many infertile couples view surrogacy as an alternative to adoption, which is often a lengthy process that can take one to two years to complete.<sup>15</sup> Demand in the adoption market is increasing, and

12. The Center for Bioethics and Culture Network, *Surrogacy: A 21<sup>st</sup> Century Human Rights Challenge* (last visited January 17, 2015), available at <http://www.cbc-network.org/issues/making-life/surrogacy/>; see also, Jessica Arons, *Future Choices: Assisted Reproductive Technologies and the Law*, Center for American Progress (Dec. 2007), available at <http://www.americanprogress.org/issues/women/report/2007/12/17/3728/future-choices-assisted-reproductive-technologies-and-the-law/> (noting the steady increase in surrogate births).

13. According to the American Society for Reproductive Medicine, there was an increase from 738 births in 2004 to 1,593 births in 2011. Joan Cary, *Surrogate Births Growing in Popularity*, CHI. TRIB. (Oct. 9, 2013), [http://articles.chicagotribune.com/2013-10-09/health/ct-x-1009-surrogate-20131009\\_1\\_illinois-gestational-surrogacy-act-egg-options-shirley-zager](http://articles.chicagotribune.com/2013-10-09/health/ct-x-1009-surrogate-20131009_1_illinois-gestational-surrogacy-act-egg-options-shirley-zager)

14. Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES (Nov. 28, 2008), [http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all&_r=0).

15. Adoptive Families, *Timing of Adoption Update: 2010–2011*, <http://www.adoptivefamilies.com/articles.php?aid=2351> (last visited March 7, 2014); see also Jane E. Brody, *Since Baby M, Much Movement in Surrogacy*, N.Y. TIMES, July 21, 2009, at D7.

currently “for every Caucasian newborn put up for adoption, there are 75 couples wanting to adopt.”<sup>16</sup> This contributes to the long waiting time for intended parents seeking a child, and occasionally results in couples dropping out of the adoption process in favor of surrogacy.<sup>17</sup> Couples struggling with infertility issues may also choose surrogacy because of their desire to create children genetically related to their family.<sup>18</sup>

Individuals may also pursue surrogacy for non-medical reasons. One of the most common non-medical reasons for pursuing surrogacy is an individual’s inability to conceive based on situational reasons.<sup>19</sup> For example, an individual may be single and prefer to raise a child alone, or the intended parents may be a couple in a homosexual relationship.<sup>20</sup> Persons in these situations are unable to give birth to a child without the assistance of reproductive technology. Similar to the rationale expressed by heterosexual married couples, single individuals and same-sex couples may choose surrogacy because they would prefer to have a biological relationship with their child rather than adopt.<sup>21</sup> By contrast to heterosexual married couples, however, it can be extremely difficult for single individuals and same-sex couples to adopt a newborn in the United States, if the intended parents already have a child, are advanced in age, or if they do not have a traditional marriage.<sup>22</sup> Additionally, single individuals<sup>23</sup> and couples in same-sex relationships are often prohibited from adopting internationally.<sup>24</sup> Thus, the unique struggles single individuals and same-sex couples face when trying to adopt may make surrogacy an appealing option.

The decision to pursue surrogacy is not entered into lightly by prospective parents.<sup>25</sup> Often intended parents choose this option after years of failed fertility treatments or difficulty finding a child to adopt.<sup>26</sup> Surrogacy is a complicated process, yet couples are willing to go through various medical procedures, sign a variety of legal documents, and pay

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16. STACY ZIEGLER, *PATHWAYS TO PARENTHOOD: THE ULTIMATE GUIDE TO SURROGACY* 42 (2005).

17. *See* ZARA GRISWOLD, *SURROGACY WAS THE WAY: TWENTY INTENDED MOTHERS TELL THEIR STORIES* 138 (2006).

18. *See id.* at 268.

19. MARY BRODY MAHOWALD, *BIOETHICS AND WOMEN: ACROSS THE LIFE SPAN* 101 (2006).

20. *Id.* at 92.

21. Brody, *supra* note 15.

22. Ziegler, *supra* note 16, at 42.

23. Children of All Nations, *Single Parent Adoption*, <http://childrenofallnations.com/adoption-programs/singles/> (last visited Jan. 17, 2015).

24. Rachel Stewart Johnson, *A same-sex couple’s struggle to adopt*, *JOHNS HOPKINS MAGAZINE*, Fall 2013, available at <http://hub.jhu.edu/magazine/2013/fall/gay-couple-adoption#>.

25. *See generally* Griswold, *supra* note 17, at 14.

26. *See* Kuczynski, *supra* note 17 (describing years of struggling with infertility and a miscarriage); *see also* Cary, *supra* note 13 (addressing the difficulties of adoption).

significant sums of money simply to experience the joy of having children.<sup>27</sup>

## B. Types of Surrogacy

After the intended parents make the decision to pursue surrogacy, they must choose the woman who will carry their child. This is an intensely personal decision made even more difficult by the accompanying legal complexities. The intended parents must also select the type of surrogacy that best suits their situation.<sup>28</sup>

### i. Voluntary and Commercial Surrogacy

Voluntary surrogacy involves the intended parents contracting for a surrogate birth with a woman they already know.<sup>29</sup> This woman is typically a friend or relative that is willing to gestate the fetus without receiving compensation.<sup>30</sup> Intended parents may prefer voluntary surrogacy because it significantly reduces the cost of the process<sup>31</sup> and may decrease the likelihood of conflict after the birth.<sup>32</sup> The fact that several states have criminalized commercial surrogacy may also lead intended parents to consider voluntary surrogacy in order to comply with state law and avoid civil or criminal penalties.<sup>33</sup>

Alternatively, intended parents may choose to pursue commercial surrogacy. In a commercial surrogacy arrangement, the intended parents contact a surrogacy agency that assists the intended parents in finding an appropriate surrogate.<sup>34</sup> When such an agency is used, the intended parents have no previous relationship with the surrogate, and most often do not wish to have an ongoing relationship with the surrogate after the birth of the child.<sup>35</sup> Once the agency matches a surrogate with the intended parents, legal contracts are drafted detailing the rights and responsibilities of all

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27. *See generally* Griswold, *supra* note 17, at 14.

28. Mahowald, *supra* note 19, at 95 (noting the complex medical and ethical considerations involved in surrogacy).

29. RICHARD HEDGES, *BIOETHICS, HEALTH CARE, AND THE LAW: A DICTIONARY* 200 (1999).

30. *Id.*

31. *See* Ziegler, *supra* note 16, at 47–52; Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES (Dec. 13, 2009), [http://www.nytimes.com/2009/12/13/us/13surrogacy.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/12/13/us/13surrogacy.html?_r=1&pagewanted=all) (noting that the fees paid for the donor eggs and surrogate's time and services are often the largest expenses associated with surrogacy).

32. Caster, *supra* note 6, at 477 (describing a surrogate that attempted to abduct a child born of a voluntary surrogacy agreement).

33. *See infra* notes 51–57.

34. Hedges, *supra* note 29, at 200.

35. *Id.*

parties involved.<sup>36</sup> Commercial surrogacy contracts also specify how medical expenses are to be paid as well as any other compensation provisions.<sup>37</sup> In the United States, a surrogate is typically paid \$20,000-\$25,000, approximately \$3.00 per hour that she is pregnant.<sup>38</sup> Despite the benefits of compensation, there is currently more demand for commercial surrogates than supply.<sup>39</sup>

ii. Traditional v. Gestational Surrogacy

In a traditional surrogacy arrangement, the intended father's sperm, or the sperm of an anonymous donor, is used to fertilize a surrogate's ovum, which the surrogate will then carry to term.<sup>40</sup> This process is called artificial insemination and involves inserting the sperm into the surrogate's uterus to fertilize the surrogate's egg by medical, as opposed to coital, means.<sup>41</sup> Thus, the resulting child is genetically linked to both the intended father, or sperm donor, and the surrogate, but has no genetic ties to the intended mother.<sup>42</sup>

By contrast, in gestational surrogacy, the intended mother's ova are fertilized outside the womb with the intended father's sperm and then implanted in the uterus of the surrogate.<sup>43</sup> Alternately, the sperm and egg for this procedure can be obtained from donors.<sup>44</sup> This procedure is known as in vitro fertilization.<sup>45</sup> In this situation the resulting child may be biologically linked to both intended parents while the surrogate has no genetic ties to the child.<sup>46</sup>

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36. *Id.*

37. Ziegler, *supra* note 16, at 26–39.

38. The Center for Bioethics and Culture Network, *Surrogacy: A 21<sup>st</sup> Century Human Rights Challenge*, available at <http://www.cbc-network.org/issues/making-life/surrogacy/>.

39. *Id.*

40. The term “traditional” is used to indicate the original approach to surrogacy arrangements. Gestational surrogacy was not used in the United States until 1985. See Office of Tech. Assessment, U.S. Congress, *Infertility: Medical and Social Choices* 36 (1988), available at [http://govinfo.library.unt.edu/ota/Ota\\_3/DATA/1988/8822.PDF](http://govinfo.library.unt.edu/ota/Ota_3/DATA/1988/8822.PDF) [hereinafter “Infertility”].

41. *Id.* at 26–28.

42. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567, 574 § 2[a] (2000).

43. *Infertility*, *supra* note 40, at 123.

44. This would result in the intended parents lacking any genetic relationship to the child. F. Zegers-Hochschild et al., *International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009*, 24 HUM. REPROD. 2683, 2686 (2009), available at [http://www.who.int/reproductivehealth/publications/infertility/art\\_terminology.pdf](http://www.who.int/reproductivehealth/publications/infertility/art_terminology.pdf).

45. *Id.*

46. Unless donors are used, the resulting child will be genetically linked to both intended parents. See Mortazavi, *supra* note 1, at 2254 (“At any time, as many as five individuals could be involved: the surrogate, an anonymous sperm donor, an anonymous egg donor, the intended mother, and the intended father. Because of the range of potential genetic relations, gestational surrogacy can present legal problems that are relatively easy

## II. LEGISLATIVE AND JUDICIAL RESPONSES TO THE LEGALITY OF SURROGACY CONTRACTS

An understanding of how other states and legislatures have dealt with surrogacy laws is necessary to formulate the best approach for Tennessee. This section provides a discussion of legislative and judicial responses to surrogacy contracts in other jurisdictions. The disparate approaches utilized in other states, as well as the increasing popularity of surrogacy, suggest that Tennessee should promptly create comprehensive surrogacy legislation.

### A. Legislative Response to Surrogacy Contracts

Since no federal statute addresses surrogacy, regulation of surrogacy contracts is left solely to the discretion of state legislatures.<sup>47</sup> As a result, there are many inconsistencies in the state regulation of surrogacy contracts across the United States.<sup>48</sup> While some states strictly define and regulate surrogacy, others have yet to create any laws pertaining to the matter.<sup>49</sup>

Some states proscribe surrogacy altogether, and penalize individuals that enter into such contracts under criminal or civil sanctions. For example, New York<sup>50</sup> and Michigan<sup>51</sup> both banned surrogacy as violative of public policy. In Michigan, the state with the toughest penalties for surrogacy, individuals that enter into surrogacy contracts may be ordered to pay a fine of up to \$10,000, and sentenced to a year in prison, while those who facilitate a surrogacy arrangement may be subject to penalties five times greater.<sup>52</sup> Other states, including Arizona,<sup>53</sup> Indiana,<sup>54</sup> North Dakota,<sup>55</sup> and Ohio,<sup>56</sup> explicitly proscribe all forms of surrogacy, yet

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(both parents genetically related to the child) or relatively difficult (neither parent genetically related to the child) to resolve, from immigration issues to custody disputes.”).

47. Caster, *supra* note 6, at 504.

48. Darra L. Hofman, “*Mama’s Baby, Daddy’s Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*,” 35 WM. MITCHELL L. REV. 449, 454 (2009).

49. *Id.*

50. N.Y. DOM. REL. LAW § 122 (McKinney 2014).

51. MICH. COMP. LAWS § 722.855 (2011).

52. Facilitators, which could include attorneys and medical professionals, may be subject to pay up to \$50,000 in fines and serve up to five year in prison. *Id.*

53. ARIZ. REV. STAT. ANN. § 25-218 (2007). The Arizona Court of Appeals held that this statute violated the Equal Protection Clause of the U.S. Constitution because it did not allow the intended mother to prove maternity through genetic testing despite allowing intended fathers to prove paternity. *Soos v. Super. Ct. ex rel. Cnty. of Maricopa*, 897 P.2d 1356 (Ariz. Ct. App. 1994).

54. IND. CODE § 31-20-1-1(1)-(8) (2009).

55. N.D. CENT. CODE § 14-18-05 (2013). This statute states that surrogacy contracts are void and that the surrogate and her husband will be considered the lawful parents of a child born as a result of a surrogacy contract.



do not impose penalties for entering into surrogacy contracts; rather, these states refuse to enforce such contracts.

Taking a somewhat more moderate approach, four states ban only commercial surrogacy and authorize surrogacy contracts that do not involve compensation. Since Kentucky,<sup>57</sup> Louisiana,<sup>58</sup> Nebraska,<sup>59</sup> and Washington<sup>60</sup> only proscribe surrogacy for compensation, uncompensated surrogacy is presumed to be legal in these states, though statutory provisions do not provide a regulatory scheme.

On the other hand, a few states have explicitly authorized non-commercial surrogacy and provided for its regulation, including: Arkansas,<sup>61</sup> Florida,<sup>62</sup> Nevada,<sup>63</sup> New Hampshire,<sup>64</sup> and Virginia.<sup>65</sup> For example, Florida requires: all parties must be at least 18 years of age and undergo counseling; the intended mother cannot gestate the pregnancy; the surrogate must agree to “reasonable medical evaluation;” the intended parents must agree to accept all legal parental rights; and the gestational surrogate must agree to relinquish all parental rights.<sup>66</sup> Virginia also imposes stringent statutory requirements on non-commercial surrogacy contracts: the intended mother must be infertile; the intended parents must be married; all parties must undergo counseling; and the surrogate must have given birth to a live child at least once before.<sup>67</sup> Additionally, both Florida<sup>68</sup> and Virginia<sup>69</sup> require judicial approval of non-commercial surrogacy contracts.

Only three states explicitly permit commercial surrogacy: Illinois,<sup>70</sup> Texas,<sup>71</sup> and Utah.<sup>72</sup> The Illinois surrogacy statute establishes notable restrictions on commercial surrogacy arrangements, and remains the most comprehensive regulatory framework in the country.<sup>73</sup> Under Illinois law, only gestational surrogacy is sanctioned; the intended parents and the

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56. OHIO REV. CODE ANN. § 3111.01 (West 2001). This statute also allows the surrogate to obtain custody of the child born as a result of the surrogate birth process.

57. KY. REV. STAT. ANN. § 199.590 (West 2005).

58. LA. REV. STAT. ANN. § 9:2713 (1987).

59. NEB. REV. STAT. § 25-21,200 (2008).

60. WASH. REV. CODE § 26.26.230 (2014).

61. ARK. CODE ANN. § 9-10-201 (1987).

62. FLA. STAT. § 742.15 (2014).

63. NEV. REV. STAT. § 126.710 (2013). In 2013, this statute was amended to allow unmarried persons to enter into non-commercial surrogacy contracts. Commercial surrogacy is still prohibited.

64. N.H. REV. STAT. ANN. § 168-B:16 (2014).

65. VA. CODE ANN. § 20-160 (2010).

66. FLA. STAT. § 742.15.

67. *See* VA. CODE ANN. § 20-160.

68. FLA. STAT. § 742.16 (2010).

69. VA. CODE ANN. § 20-160.

70. 750 ILL. COMP. STAT. § 47/25(b)(4) (2011).

71. TEX. FAM. CODE ANN. § 160.756 (2014).

72. UTAH CODE ANN. § 78B-15-803 (West 2012).

73. 750 ILL. COMP. STAT. § 47/25(b)(4).

surrogate must submit to psychiatric assessments; and surrogacy contracts may only be entered into when the intended parents cannot otherwise conceive.<sup>74</sup> Texas<sup>75</sup> and Utah<sup>76</sup> also place physical and mental fitness restrictions on intended parents and surrogates. Additionally, Texas and Utah only allow surrogacy if the intended mother cannot gestate the fetus to term and also require a home study of the intended parents' residence.<sup>77</sup>

Over thirty states do not have any laws directly governing surrogacy.<sup>78</sup> States without surrogacy legislation may look to the 1975 Uniform Parentage Act ("UPA") as persuasive authority for guidance on how to interpret surrogacy contracts.<sup>79</sup> The UPA authorizes commercial gestational surrogacy agreements only when the intended mother establishes that she is unable to gestate a fetus to term.<sup>80</sup> Additionally, states may look to the American Bar Association's model surrogacy statute for guidance in surrogacy cases.<sup>81</sup> This model statute permits commercial surrogacy and establishes that intended parents are the legal parents of the resulting child.<sup>82</sup> As of yet, no state has adopted this model statute.<sup>83</sup>

## B. Judicial Response to Surrogacy Contracts

The enforceability of both traditional and gestational surrogacy contracts has generated heated discussion by legal scholars and legislators.<sup>84</sup> Since many states do not have laws that adequately address surrogacy, it is often left up to the courts to determine whether or not the contracts should be enforced.<sup>85</sup> Two famous cases brought the issue of surrogacy contracts to national public attention: *In re Baby M* and *Johnson v. Calvert*.<sup>86</sup> Both cases addressed the enforceability of surrogacy contracts

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74. *Id.*

75. TEX. FAM. CODE ANN. § 160.756.

76. UTAH CODE ANN. § 78B-15-803.

77. *See* 750 ILL. COMP. STAT. § 47/25(b)(4).

78. Mortazavi, *supra* note 1, at 2261.

79. *Id.*

80. Uniform Parentage Act § 803(b)(2) (1975) (amended 2002).

81. ABA Model Act Governing Assisted Reprod. Tech. (Feb. 2008), *available at* <http://apps.americanbar.org/family/committees/artmodelact.pdf>; *see also* Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 2576–82 (2010).

82. ABA Model Act Governing Assisted Reprod. Tech., *supra* note 81.

83. Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 111 (2010).

84. Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 329–30 (2005).

85. Mortazavi, *supra* note 1, at 2258.

86. *Id.* at 2262–65; *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (*en banc*).

and dealt with public policy arguments that highlighted the complex nature of surrogacy.

i. *In re Baby M.*

*In re Baby M* required a U.S. court to address the enforceability of a commercial surrogacy contract for the first time in the nation's history.<sup>87</sup> The case involved a traditional surrogacy contract between the surrogate, Mary Beth Whitehead, and the intended father, Mr. Stern.<sup>88</sup> Mrs. Whitehead signed a contract, which stated that in exchange for \$10,000 and payment of all costs incurred during pregnancy, she would bear a child for the Sterns and agree to terminate her parental rights.<sup>89</sup> After Mrs. Whitehead was artificially inseminated, however, she changed her mind and decided to retain custody of the child.<sup>90</sup>

The New Jersey Supreme Court held that surrogacy contracts were invalid and unenforceable on public policy grounds.<sup>91</sup> Specifically, the court found that surrogacy contracts were void because they violated policies concerning the consent of the surrogate to surrender the child.<sup>92</sup> According to the court's reasoning, a woman could not give full and informed consent to the contract before it was performed since she would be incapable of knowing how pregnancy would affect her.<sup>93</sup> The court also held that surrogacy contracts contravened public policy because they sought to permanently separate a child from its birth mother.<sup>94</sup> Additionally, the court expressed concerns that enforcing such contracts would lead to the exploitation of economically disadvantaged women.<sup>95</sup> Finally, the court compared surrogacy to "baby-selling," arguing that state laws prohibiting the sale of babies also applied to surrogacy contracts.<sup>96</sup>

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87. 537 A.2d at 1227.

88. *Id.* at 1235 (Mr. Stern was married, but his wife was not a party to the contract despite the fact that she intended to be the child's adopted mother).

89. *Id.*

90. *Id.* at 1236.

91. *See id.* at 1246–48.

92. *In re Baby M*, A.2d at 1247–48.

93. Mortazavi, *supra* note 1, at 1247–48 ("Under the contract, the natural mother is irrevocably committed before she knows the strength of the bond with her child. She never makes a totally voluntary, informed decision."). The court relied on this rationale despite the fact that the surrogate had already successfully given birth to at least one child. *Id.* at 1236.

94. *Id.* at 1246–47 ("To the extent possible, children should remain with and be brought up by both of their natural parents.").

95. *Id.* at 1248.

96. *Id.* ("This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.").

Even before the New Jersey Supreme Court reached this decision, other state legislatures had grappled with this divisive issue. *See* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 117 (2009). In fact, twenty-

ii. *Johnson v. Calvert*

Five years after the *In re Baby M* decision, the enforceability of a commercial surrogacy contract was again litigated in *Johnson v. Calvert*.<sup>97</sup> By contrast, this dispute involved gestational surrogacy.<sup>98</sup> In *Johnson v. Calvert*, Mr. and Mrs. Calvert agreed to pay the gestational surrogate, Mrs. Johnson, \$10,000 in cash and buy her a \$200,000 life insurance policy in exchange for her agreement to gestate the fetus and relinquish all parental rights.<sup>99</sup> Mrs. Johnson signed the contract and underwent successful in vitro fertilization four days later.<sup>100</sup> The relationship between the parties became strained, however, when the Calverts learned that Mrs. Johnson had previously experienced miscarriages and stillbirths.<sup>101</sup> Additionally, the Calverts did not obtain the life insurance policy as promised.<sup>102</sup> Frustrated by this lack of payment, Mrs. Johnson insisted on immediate payment of the life insurance policy or she would retain custody of the child.<sup>103</sup>

In upholding the surrogacy contract, the California Supreme Court reasoned that a surrogate with no genetic ties to a child could not have parental rights.<sup>104</sup> Moreover, the court refuted public policy arguments against surrogacy based on potential psychological harm to the surrogate, fears of exploiting or dehumanizing women, and the possibility that surrogacy contracts could encourage society to view children as commodities.<sup>105</sup> While the court conceded that some of these harms were possible, it did not find sufficient evidence of these harms to warrant invalidating the surrogacy contract.<sup>106</sup> Finally, the court concluded it was not the job of the judiciary to make policy decisions regarding the appropriateness of surrogacy contracts and reiterated the need for legislative guidance.<sup>107</sup>

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seven states considered anti-surrogacy legislation, and six state legislatures ultimately created laws banning commercial surrogacy arrangements because of similar public policy concerns. *Id.*; DIEDERIK PRETORIUS, *SURROGATE MOTHERHOOD: A WORLDWIDE VIEW OF THE ISSUES* 55 (1994).

97. 851 P.2d 776 (Cal. 1993) (*en banc*).

98. *Id.* at 778.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Johnson*, 851 P.2d at 778.

103. *Id.* at 778.

104. *Id.* at 782. The court also pointed out that the child would not have been born but for the efforts of the intended parents. *Id.*

105. *Id.* at 784–85.

106. *Id.* at 785 (“The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.”).

107. *Johnson*, 851 P.2d at 787. (“It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.”).

### III. THE STATE OF SURROGACY LAW IN TENNESSEE

While the first gestational birth in the United States occurred thirty years ago,<sup>108</sup> many states have not adapted their laws to appropriately address the issue of surrogacy.<sup>109</sup> In the wake of prominent surrogacy decisions, many states have dealt with surrogacy directly, by either making the practice legal<sup>110</sup> or criminalizing certain types of surrogacy agreements,<sup>111</sup> while others have yet to substantively address the issue.<sup>112</sup> Tennessee recently authorized traditional surrogacy contracts, but failed to explicitly address gestational surrogacy contracts, relegating them to a quasi-legal status.<sup>113</sup> Surveying current Tennessee jurisprudence, an attorney would discover that limited case law and imprecise statutes are her only guide when assisting clients who desire to enter into surrogacy contracts.

#### A. The Right to Privacy under the Tennessee Constitution

Though the Tennessee Constitution and the U.S. Constitution are similar in form and purpose, they are not necessarily coextensive.<sup>114</sup> Tennessee's Constitution ensures Tennesseans do not have fewer rights than those outlined in the U.S. Constitution.<sup>115</sup> The Tennessee Supreme Court has stated, "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution."<sup>116</sup> Indeed, the Tennessee Constitution guarantees more extensive freedoms in some instances.<sup>117</sup> When the federal and state constitutional provisions are similar, however, the Tennessee Supreme Court has recognized the value of

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108. *Infertility*, *supra* note 40, at 36.

109. Mortazavi, *supra* note 1, at 2258.

110. Such as Texas, Utah, and Illinois. TEX. FAM. CODE ANN. § 160.756 (2014); 750 ILL. COMP. STAT. § 47/25 (2011); UTAH CODE ANN. § 78B-15-803 (West 2012).

111. Examples include Kentucky, Louisiana, Nebraska, and Washington which all proscribe commercial surrogacy arrangements. KY. REV. STAT. ANN. § 199.590(4) (West 2006); LA. REV. STAT. ANN. § 9:2712 (2005); NEB. REV. STAT. § 25-21-200 (2008); WASH. REV. CODE § 26.26.230 (2010).

112. Mortazavi, *supra* note 1, at 2258.

113. TENN. CODE ANN. § 36-2-402 (2013).

114. *See* Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992).

115. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000) (“[N]o Tennessee law, whether statute, rule, or constitution, may operate to deprive a Tennessean any right afforded by the federal constitution.”).

116. *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991).

117. *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 13.

looking to case law interpreting the U.S. Constitution as a guide to interpreting Tennessee constitutional provisions.<sup>118</sup>

The line of U.S. Supreme Court decisions establishing a right to privacy began with *Meyer v. Nebraska*<sup>119</sup> and *Pierce v. Society of Sisters*,<sup>120</sup> where, respectively, the Court held that parents have a constitutionally derived right to control the upbringing and education of their children.<sup>121</sup> Next in this line of cases is *Skinner v. Oklahoma*, which called into question the constitutionality of Oklahoma's practice of sentencing habitual criminals to compulsory sterilization.<sup>122</sup> Since Oklahoma's statute restricted procreation and was applied unequally,<sup>123</sup> the Court found the statute unconstitutional on equal protection grounds and held that the right to procreate is "one of the basic civil rights."<sup>124</sup> Following these cases establishing procreative freedoms, *Griswold v. Connecticut* established a right to privacy for married couples, specifically allowing married couples access to contraceptives.<sup>125</sup> Relying on this precedent, the Supreme Court later held that the right to privacy also includes the right of single persons to access contraceptives<sup>126</sup> as well as a woman's right to manage and control various aspects of her pregnancy, including the right to terminate a pregnancy.<sup>127</sup>

In a relatively recent line of cases, the Tennessee Supreme Court has suggested that the right to privacy may be more extensive under the state constitution than under the federal constitution.<sup>128</sup> For example, in *Davis v. Davis* the Tennessee Supreme Court noted that the right to privacy under the Tennessee Constitution is similar to the protections provided by the federal constitution.<sup>129</sup> Specifically, the court stated:

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118. *Id.* at 12 ("[A]nalysis of case law interpreting the federal constitution is often a first step in interpreting provisions of our own constitution that are similar in wording, intent, or purpose.").

119. 262 U.S. 390 (1923).

120. 268 U.S. 510 (1925).

121. *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 534–35.

122. 316 U.S. 535, 541–42 (1942).

123. *Id.* White-collar criminals were not subject to forced sterilization and the policy was apparently grounded solely in eugenics.

124. *Id.* at 541.

125. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Justice Goldberg emphasized the private nature of contraceptive decisions, noting "Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Id.* at 495 (J. Goldberg concurring).

126. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (holding that providing "dissimilar treatment for married and unmarried persons who are similarly situated" violates the Equal Protection Clause).

127. *Roe v. Wade*, 410 U.S. 113 (1973).

128. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 10 (Tenn. 2000) (citing other recent privacy decisions in Tennessee).

129. 842 S.W.2d 588, 600 (Tenn. 1992) (recognizing that the right to privacy exists under the Tennessee constitution).

Undoubtedly, that right to privacy incorporates some of the attributes of the federal constitutional right to privacy and, in any given fact situation, may also share some of its contours. As with other state constitutional rights having counterparts in the federal bill of rights, however, there is no reason to assume that there is a complete congruency.<sup>130</sup>

Accordingly, the court recognized the right to procreational autonomy is a fundamental right protected by the federal constitution as well as the state constitution, while not specifically foreclosing the possibility that the right to privacy may indeed be greater in the state of Tennessee.<sup>131</sup>

Eight years later, in *Planned Parenthood v. Sundquist*, the Tennessee Supreme Court reaffirmed the approach it utilized in *Davis*.<sup>132</sup> Here, the court specifically rejected the privacy analysis advocated by the U.S. Supreme Court in *Casey v. Planned Parenthood*.<sup>133</sup> The court reasoned, “a woman’s right to terminate her pregnancy and an individual’s right to procreational autonomy are similar in nature” and accordingly applied the standard used in *Davis*.<sup>134</sup> Thus, the court again suggested, without fully developing the legal theory, that Tennesseans enjoy greater privacy protections. Since boundaries of the right to privacy in Tennessee apparently exceed those federally protected, the outer limits of this right should extend far enough to include the right to enter surrogacy contracts.

Due to Tennessee’s heightened privacy protections, it follows that this state would have an interest in protecting gestational surrogacy contracts.<sup>135</sup> These contracts seek to assist couples in exercising their procreational autonomy, which the Tennessee Supreme Court has held to be a fundamental constitutional right in *Davis* and *Planned Parenthood*. Currently, however, there is no comprehensive statutory regulation scheme for surrogacy contracts in Tennessee. An examination of the current law is necessary to understand how a properly drafted statute could ensure that Tennesseans can fully enjoy the procreational autonomy explicitly protected in this state.

## B. Surrogacy Case Law in Tennessee

It is difficult to derive legal precedent from surrogacy litigation. Typically, the holdings in such cases are narrowly tailored and exceedingly fact specific.<sup>136</sup> Two Tennessee cases, *In re C.K.G.*<sup>137</sup> and *In re Baby*,<sup>138</sup>

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130. *Id.*

131. *Id.*

132. *Id.* at 12.

133. *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 12.

134. *Id.*

135. *See id.* at 12.

136. Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1226–27 (1997).

focused on the enforceability of surrogacy arrangements, yet failed to provide clear precedent.

i. *In re C.K.G.*

The Tennessee Supreme Court was first presented a disputed surrogacy arrangement in 2005.<sup>139</sup> In this unusual case, the intended mother gave birth to triplets who were not genetically related to her.<sup>140</sup> The triplets were created using the egg of a donor and the sperm of the intended father, who was the intended mother's boyfriend.<sup>141</sup> Thus, due to her lack of genetic connection to the children she gave birth to, the intended mother in this case was effectively in the legal position that a gestational surrogate would normally occupy.<sup>142</sup> When the relationship between the intended mother and father deteriorated, the intended mother filed a parentage action seeking custody and child support from the intended father.<sup>143</sup> However, the intended father of the children claimed the intended mother had no standing under Tennessee law since she lacked a genetic connection to the children.<sup>144</sup>

The court noted "Tennessee's parentage and related statutes do not contemplate many of the scenarios now made possible by recent developments in reproductive technology."<sup>145</sup> At that time, the Tennessee parentage statute defined "mother" as "the biological mother of a child born out of wedlock,"<sup>146</sup> and "parent" was defined as "the biological mother or biological father of a child, regardless of the marital status of the mother and father."<sup>147</sup> Noting that neither of these statutory definitions nor a review of legislative history provided guidance in the case at hand, the court looked to case law from other jurisdictions that had faced similar disputes.<sup>148</sup> The court ultimately adopted a four-factor test to use in determining parentage in a surrogacy arrangement, and found the intended

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137. *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005).

138. *In re Baby*, 447 S.W.3d 807 (Tenn. 2014).

139. *In re C.K.G.*, 173 S.W.3d at 714.

140. *Id.* at 717–18.

141. *Id.*

142. *Id.* at 720 ("Our case is closer in kind to 'gestational surrogacy with egg donation' where a woman carries and gives birth to a child as a result of fertilization and implantation of a third-party donor's egg." Citing Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567, 574 § 2[a] (2000)).

143. *Id.* at 716.

144. *In re C.K.G.*, 173 S.W.3d at 716.

145. *Id.* at 721.

146. TENN. CODE ANN. § 36-2-302(4) (2001).

147. TENN. CODE ANN. § 36-2-302(5) (2001).

148. *In re C.K.G.*, 173 S.W.3d at 724–27.



mother was the legal mother of the triplets.<sup>149</sup> Finally, the court called upon the legislature to enact a “broadly applicable rule” to help resolve future surrogacy conflicts.<sup>150</sup>

ii. *In re Baby*

*In re Baby* was the first case that required Tennessee courts to interpret new legislation that defined surrogacy, while not explicitly authorizing surrogacy contracts.<sup>151</sup> In this case, the surrogate successfully gave birth to a child, and all parties agreed it was best for the surrogate to nurse the child for a few days before the child traveled back to the intended parents’ home in Italy.<sup>152</sup> Six days after the child’s birth, however, the surrogate filed an ex parte restraining order and sought an injunction to prohibit the child from international travel.<sup>153</sup> After the juvenile court denied the surrogate’s motion and awarded custody of the child to the intended father, the surrogate filed a motion to alter the juvenile court’s original order of parentage.<sup>154</sup> The surrogate argued that no surrogate birth took place since the intended parents were not married at the time of the birth.<sup>155</sup> Then existing Tennessee law defined surrogacy as a process that could only be entered into by intended parents if they were married.<sup>156</sup>

In an unpublished opinion, the Tennessee Court of Appeals upheld the disputed surrogacy contract despite the fact that the parties were not in full compliance with statutory mandates.<sup>157</sup> Specifically, the court held that the surrogate could not keep the child simply because she changed her mind at the last minute.<sup>158</sup> The court reasoned that it would be unjust and contrary to the intent of the legislature to abrogate a surrogacy contract solely because the intended parents were not married until after the child’s

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149. *Id.* at 727 (factors to be considered include genetics, intent, gestation, and the lack of controversy between genetic contributor and gestator).

150. *Id.* at 733. The legislature later enacted a statute that defined both traditional and gestational surrogacy, but stated the surrogate birth process was not authorized in Tennessee. TENN. CODE ANN. § 36-1-102(48) (2010).

151. *In re Baby*, 447 S.W.3d 807 (Tenn. 2014); TENN. CODE ANN. § 36-1-102(48)(C) (2010); a more detailed discussion of this statute is provided *infra*.

152. *In re Baby*, 447 S.W.3d at 812, 816.

153. *Id.* at 816.

154. *Id.* at 816–17. The juvenile court previously entered a final order declaring that the surrogate and her husband terminated all parental rights.

155. *Id.* at 817 (noting the intended parents were married twenty days after the child’s birth).

156. *Id.* at 820–21.

157. The TN statute governing surrogacy contracts has since been amended, as discussed *infra*. *In re Baby*, 2013 WL 245039, at \*5, *aff’d in part and rev’d in part by* 447 S.W.3d 807. At time of publication, the TN Court of Appeals decision was still unpublished. Only the unofficial citation is available.

158. *In re Baby*, 2013 WL 245039, at \*5 (“Surrogate’s last-minute change of heart does not provide a reason to invalidate the final judgment approving the surrogacy contract.”).

birth.<sup>159</sup> Significantly, the court further asserted that it would continue to enforce surrogacy contracts because such agreements do not violate public policy.<sup>160</sup>

Recently, the Tennessee Supreme Court granted the surrogate's petition for appeal.<sup>161</sup> According to the court's holding, public policy does not prohibit the enforcement of traditional surrogacy contracts, but it does impose restrictions.<sup>162</sup> Specifically, the court stated "compensation to a traditional surrogate should not be contingent upon her surrender of the child or the termination of her parental rights."<sup>163</sup> The court also held that the parental rights of a legal parent may only be terminated subsequent to a judicial determination of what is in the best interest of the child.<sup>164</sup> Thus, a surrogate, if deemed a legal parent, would maintain the same rights as any other parent (i.e. visitation rights etc.) unless a court determined her an unfit parent.<sup>165</sup>

### C. Surrogacy Legislation in Tennessee

Both *In re C.K.G.* and *In re Baby* established the need for legislative action. In each case, a clear, revised regulatory framework would have allowed for easier contractual interpretation.

The legislation adopted in 2010 unambiguously defined both traditional and gestational surrogacy.<sup>166</sup> Notably, the intended parents were defined as "husband" and "wife," which gave rise to the disputed surrogacy claim in *In re Baby*.<sup>167</sup> Further, the legislation provided for automatic termination of the surrogate's parental rights and, thus, obviated the need for the intended parents to adopt the resulting child.<sup>168</sup> This legislation, however, created significant confusion by stating that the statutory definitions of surrogacy "should not be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly."<sup>169</sup> By not legalizing surrogacy contracts,

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159. *Id.* ("It would be absurd to adopt the position that this was not a surrogate birth because the Intended Parents were married 20 days after the birth of the child. The obvious intent is for the child to be raised in a stable, loving home by committed parents.").

160. *Id.* at \*4 ("Because such contracts violate no law, we will enforce them until the legislature instructs otherwise.").

161. *In re Baby*, 447 S.W.3d 817 (Tenn. 2014).

162. *Id.* at 826.

163. *Id.*

164. *Id.* at 828.

165. *Id.* at 833. ("Finally, termination of parental rights in an involuntary proceeding may not occur absent a finding that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated.").

166. TENN. CODE ANN. § 36-1-102(48)(A) (2014).

167. *Id.*

168. *Id.* at § 36-1-102(48)(B).

169. *Id.* at § 36-1-102(48)(C).

this legislation placed some Tennessee families in a legal gray area and set the stage for future litigation over surrogacy contracts.<sup>170</sup>

In 2013, the legislature attempted to resolve this situation by passing an amendment to the statute that further defines surrogacy.<sup>171</sup> This amendment provides more detailed definitions that address the complexities of the traditional surrogacy process.<sup>172</sup> Significantly, this amendment does not require that the intended parents be a married couple.<sup>173</sup> This means an unmarried or a same-sex couple can now legally enter into a traditional surrogacy contract in Tennessee. Since this language expanded the number of persons who may enter a traditional surrogacy contract<sup>174</sup> and the Tennessee Supreme Court recently found a traditional surrogacy contract enforceable, it seems that traditional surrogacy is now clearly legal in Tennessee.<sup>175</sup> Gestational surrogacy contracts, however, are still not explicitly authorized in Tennessee as this amendment fails to address them and such contracts have not been addressed by Tennessee courts.<sup>176</sup>

Even if a Tennessee state court approves of gestational surrogacy contracts, there will still be a significant need for a comprehensive surrogacy statute. Without any regulation of such agreements, it is possible that parties could enter into quasi-legal gestational surrogacy contracts that include unconscionable terms and exploit surrogates. Legislation that allows for freedom of contract while protecting surrogates is necessary to create greater opportunities for infertile couples to start families and allow surrogates to provide needed services.

#### IV. FEMINIST VIEWS ON SURROGACY CONTRACTS

Feminist scholars are among a vocal group of advocates that support allowing women greater access to reproductive choices.<sup>177</sup> At the same time, however, feminists are concerned the surrogate birth process could be used to exploit women.<sup>178</sup> It is important to address these feminist concerns in drafting surrogacy legislation in order to create provisions that allow women access to more reproductive options, while protecting all parties from entry into unconscionable contracts.

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170. *See In re Baby*, 447 S.W.3d at 835.

171. *See* TENN. CODE ANN. § 36-2-402 (2013).

172. *Id.* (defining embryo, embryo parentage, embryo relinquishment, embryo transfer, legal embryo custodian, and recipient intended parent).

173. *Id.* at § 36-2-402(6) (“‘Recipient intended parent’ means a person or persons who receive a relinquished embryo and who accepts full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer.”).

174. *Id.*

175. *In re Baby*, 447 S.W.3d at 817.

176. TENN. CODE ANN. § 36-1-102(48)(C) (2014).

177. Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 211 (1993).

178. *Id.*

### A. Feminist Legal Theory

It is imperative to note there are many differences within feminism. These differences in approach, emphasis, and objectives make sweeping generalizations about this theoretical framework difficult.<sup>179</sup> However, it is possible to determine broad concepts of feminist legal theory. As a whole, feminists are “concerned with the implications of historic and contemporary exploitation of women within society, seeking the empowerment of women and the transformation of institutions dominated by men.”<sup>180</sup> In addition to identifying areas for female advancement, feminism integrates practice and theory to bring about such changes.<sup>181</sup> According to noted historian Linda Gordon, feminism is “an analysis of women’s subordination for the purpose of figuring out how to change it.”<sup>182</sup> This integration of practice and theory has led many female lawyers to study legal reform and take action to advocate equal treatment for women under the law.<sup>183</sup> For the purposes of this Note, feminist legal theory is defined as “that subset of ideas involving women and the law that is concerned with improving the condition or status of women.”<sup>184</sup>

Surrogacy is of particular concern to feminists because society has historically defined women by their ability to bear children.<sup>185</sup> While some feminist scholars and commentators view surrogacy in a positive light, as a technology that gives women more reproductive choices,<sup>186</sup> other feminists argue surrogacy is simply another way to exploit women and continue to define them by their biological capacities.<sup>187</sup> One commonality among the varying feminist viewpoints on this issue, however, is the acknowledgment

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179. Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL’Y & L. 13 (2005).

180. *Id.* at 14.

181. *Id.*

182. Linda Gordon, “*The Struggle for Reproductive Freedom: Three Stages of Feminism*,” in *Capitalist Patriarchy and the Case for Socialist Feminism* 107 n.1 (Zillah R. Eisenstein ed., 1979).

183. See Susan J. Carroll, Gender Symposium, *The Politics of Difference: Women Public Officials as Agents of Change*, 5 STAN. L. & POL’Y REV. 11, 12–13 (1994) (noting the impact women in public office are having on public policies).

184. Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL’Y 325, 328 (1995) (citing Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116 (“[W]hat does feminism ‘in law’ mean? I suggest, here too, an inclusive definition: Let us refer to feminist work in litigation, legislation, legal teaching, and legal theories to advance rights and opportunities for women.”)).

185. Norma Juliet Wikler, *Society’s Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1043 (1986) (stating that the social role of women has been controlled by their capacity to give birth).

186. See, e.g., Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 167, 168 (Lawrence O. Gostin ed., 1990) (presenting the feminist argument that reproductive “developments added up to the freedom to be a surrogate”).

187. Wikler, *supra* note 185, at 1043–44.

that one of the underlying purposes of the feminist movement is to allow women more control over their reproductive choices.<sup>188</sup>

### B. Feminist Arguments in Favor of Surrogacy

Historically, the increase in reproductive choices available to women has played an important role in the development of women's rights.<sup>189</sup> As a result of celebrated Supreme Court decisions, women now have the right to access contraceptives, the right to use artificial insemination, the right to control the progress of pregnancy, and the right to end a pregnancy through abortion.<sup>190</sup>

Feminist scholars in favor of surrogacy argue that surrogacy arrangements give women more reproductive options.<sup>191</sup> Noted feminist scholar Shulamith Firestone asserts that new reproductive options like surrogacy allow for a reevaluation of the role of women in society.<sup>192</sup> Firestone posits that surrogacy is a positive step in reproductive technology because it allows for another reproductive option, thus granting women further control over the biological processes that have historically defined them.<sup>193</sup> Moreover, Ms. Firestone frames the feminist argument for surrogacy forcefully stating new reproductive technologies have the potential to "free women and the entire human species from the tyranny of biological destiny."<sup>194</sup> Firestone's argument is premised on the idea that new reproductive technologies like surrogacy will redistribute the emotional, psychological, and physical strains of pregnancy resulting in societal rejection of the notion that all women are meant to give birth.<sup>195</sup>

Pro-surrogacy feminists also draw comparisons between surrogacy and sperm donation.<sup>196</sup> When men donate sperm they are permitted to contractually declare they will not retain legal ties to any child that may result from the use of their sperm.<sup>197</sup> By contrast, a surrogate's choice to relinquish all legal rights to the child she gestates is sometimes viewed as

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188. *See id.* at 1043.

189. Lieber, *supra* note 177, at 212.

190. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (upholding the constitutional right to an abortion); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (recognizing that the right to an abortion flows from the right to privacy); Roe v. Wade, 410 U.S. 113 (1973) (establishing the right of women to access abortions); Griswold v. Connecticut, 381 U.S. 479 (1965) (asserting the implied fundamental right of married couples to access contraceptive devices).

191. *See* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY, 146-47 (Yale Univ. Press 1989) (discussing feminist arguments in favor of surrogacy).

192. *Id.* at 147.

193. *Id.*

194. *Id.* at 146.

195. *Id.* at 147 (describing Firestone's view that new reproductive choices present opportunities for the re-examination of women's roles in society).

196. Andrews, *supra* note 186, at 170.

197. *Id.*

“baby [-] selling” or a form of reproductive prostitution.<sup>198</sup> According to many feminists, the progress of reproductive freedom should not be limited because of societal perceptions about the role of motherhood.<sup>199</sup> Moreover, courts and legal scholars question whether or not a woman has the capacity to even relinquish all rights to a child she gestates because of supposed maternal ties that will never abate, while it is widely accepted that a man is capable of signing away any potential rights to a child born of his sperm.<sup>200</sup> This inconsistency illustrates how societal concepts of motherhood affect the analysis of surrogacy arrangements by assigning more agency to men than women in making procreational choices.<sup>201</sup>

### C. Feminist Arguments Against Commercial Surrogacy Contracts

Though some feminists advocate for surrogacy as simply another advancement of reproductive technology that offers women more procreative choices, other feminists warn that surrogacy presents significant potential for economic and social exploitation.<sup>202</sup> Noted radical feminist Andrea Dworkin, for example, argued that surrogacy is analogous to prostitution in that both are ways for society to put a price on women’s bodies—something that is not typical of the way society views men’s bodies.<sup>203</sup> Dworkin suggested that the purpose of surrogacy is to separate the idea of the womb from the woman giving birth, effectively turning the womb into a commodity.<sup>204</sup> The commodification of child bearing will lead society to value women solely for their reproductive capabilities according to Dworkin.<sup>205</sup>

Dworkin also argued that societal control over women exists in two forms that can be described as the brothel model and the farming model.<sup>206</sup> These are defined as follows:

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198. SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 55 (1994).

199. Andrews, *supra* note 186, at 168 (arguing that lawmakers should not infringe on women’s reproductive rights in deference to the interests of potential children).

200. See Lorillard, *supra* note 81, at 247.

201. Shalev, *supra* note 191, at 120–21.

202. Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL’Y 139, 147–48 (1990) (“[O]ne strains to see female liberation in a practice that pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage.”); Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. Rev. 127, 144, 152 (1987) (comparing economic exploitation of surrogates to slavery).

203. See ANDREA DWORKIN, *RIGHT-WING WOMEN* 182 (1983).

204. *Id.* at 187.

205. *Id.*

206. Shalev, *supra* note 191, at 148 (analyzing Dworkin’s view of the two models of subjugation under patriarchy).

The brothel model relates to prostitution, narrowly defined; women collected together for the purposes of sex with men; women whose function is explicitly non-reproductive . . . . The farming model relates to motherhood, women as a class planted with the male seed and harvested.<sup>207</sup>

In Dworkin's view, new reproductive technologies are shifting the method of exercising control over women from the farming model to the brothel model by separating the process of child bearing from the act of sexual intercourse.<sup>208</sup> Under Dworkin's analysis, this separates the womb from the women, leaving society with a fragmented picture of womanhood.<sup>209</sup> The ability to pay to rent a womb will result in the exploitation of women and the commercialization of women's bodies, according to anti-surrogacy feminists.<sup>210</sup> Similar to Dworkin's analysis, other feminists argue that surrogates could potentially become a separate class of breeders resulting in society relegating them to, at least an ideological, "reproductive brothel."<sup>211</sup>

According to feminists that oppose surrogacy, the decision to relinquish custody of a child is never truly voluntary.<sup>212</sup> Indeed, some researchers believe that given the relational complexities of surrogacy agreements and the fact that "social implications of surrogacy are largely unknown, it seems difficult if not impossible for a potential surrogate to give informed consent."<sup>213</sup> Many feminists advance this logic as the main reason that surrogacy arrangements should not be enforced, specifically; a contract without fully informed consent should not be enforced as it violates public policy.<sup>214</sup> This argument is based on the belief that hormonal changes during pregnancy are unpredictable and may cause a woman to change her mind about relinquishing all parental rights to her

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207. *Id.*

208. *Id.*

209. Dworkin, *supra* note 203, at 187.

210. Shalev, *supra* note 191, at 149; Lieber, *supra* note 177, at 211 (explaining that feminists view surrogacy as a form of prostitution or slavery which exploits the surrogate through "the enticements of money, the social expectation of self-sacrifice, or both."). Some feminist scholars fear that surrogates will be hired as a result of their beauty, intelligence or race and women will eventually be valued for nothing more than their external attributes and their reproductive capacities. John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 639-44 (1994).

211. Gena Corea, *The Reproductive Brothel*, MAN-MADE WOMEN 38 (Gena Corea et al. eds. 1987); References to the dangers of surrogacy and artificial insemination have been featured in prominent futuristic literature. See, e.g., MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985) (presenting a society in which the criminalization of abortion and the banning of women from the workforce led to institutionalized surrogacy as a form of slavery).

212. Andrews, *supra* note 186, at 171-72.

213. M. M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers*, 35 J. MED. ETHICS 171 (2009).

214. See Andrews, *supra* note 186, at 172.

child after he or she is born.<sup>215</sup> Both of these arguments, however, disregard the meaning of informed consent in the contract context. In any other contract, one party may not spontaneously disregard his or her contractual obligations simply because he or she had a change of heart.<sup>216</sup> These arguments are particularly dangerous because they imply that women are incapable of entering legally binding contracts.<sup>217</sup> Indeed, this rationale that women lacked legal capacity was advanced in the nineteenth century to support laws that prevented women from owning property or voting.<sup>218</sup> Feminist proponents of surrogacy respond to anti-surrogacy feminists by arguing that failure to enforce surrogacy contracts based on this rationale suggests by virtue of being born female, a woman cannot truly consent to certain contracts.<sup>219</sup>

In light of the above considerations, surrogacy contracts present courts, legislatures, and lawyers with a unique tension between the ideals of allowing freedom of contract and the desire to protect women from exploitation. While there are still potential risks associated with surrogacy, proper legislation can provide a regulatory framework that balances feminist concerns with freedom of contract principles.

#### V. THE INTERSECTION OF FREEDOM TO CONTRACT & PUBLIC POLICY CONSIDERATIONS

Surrogacy contracts implicate the bodily integrity of the surrogate as well as the rights of the intended parents to procreate.<sup>220</sup> There is a tension between allowing the intended parents to contract freely, and ensuring surrogacy contracts do not violate public policy by exploiting women or encouraging unconscionable contracts.<sup>221</sup> It is necessary to explore these concerns to understand how appropriately drafted surrogacy legislation can provide for greater freedom of contract while balancing important public policy objectives.

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215. Lieber, *supra* note 177, at 216.

216. *See generally id.*

217. *Id.*

218. Andrews, *supra* note 186, at 173 (arguing that the lack of informed consent in contracting argument is a step backward for women's equality); *see also* ANNE M. BENJAMIN, A HISTORY OF THE ANTI-SUFFRAGE MOVEMENT IN THE UNITED STATES FROM 1895–1920: WOMEN AGAINST EQUALITY 263–64 (1991).

219. Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 76 (1988); *see also* Ruth Macklin, *Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57, 60 (1988) (“Feminists who oppose surrogacy presume to speak for all women. But what they are really saying is that those who elect to enter surrogacy arrangements are incompetent to choose and stand in need of protection.”).

220. *See* Lieber, *supra* note 177, at 226–27.

221. *See* Ohs, *supra* note 5, at 355–56.



### A. Freedom of Contract Principles as Related to Surrogacy

Since it is a well-established principle of contract law that a court may choose not to enforce a contract that violates public policy, it is imperative to closely examine the public policy concerns raised by surrogacy contracts.<sup>222</sup> Surrogacy contracts are unique in that they involve one or more persons contracting for the provision of labor that implicates the bodily integrity of a third party.<sup>223</sup> Some legal scholars see this as nothing more than a contract for a womb, or even as analogous to the selling of one's body as a prostitute, and thus argue that these contracts should not be enforced since they violate public policy.<sup>224</sup> Conversely, other legal practitioners contend that surrogacy contracts should be enforced, but caution that such contracts should be carefully drafted and provide for the many complex situations surrogacy arrangements create.<sup>225</sup>

Professor Richard Epstein argues a surrogate's freedom to contract should be respected.<sup>226</sup> He notes that simply because the contract involves giving birth does not necessarily mean that the surrogate loses her autonomy, or is subject to exploitation.<sup>227</sup> Specifically, he posits:

To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor. Full control over their own bodies and labor is what autonomous individuals have before they contract. The process of contracting always requires a surrender of some portion of autonomy, but only in exchange for things that are thought to be more valuable.<sup>228</sup>

Epstein goes on to argue that a clear legal framework would lead to greater certainty about the enforceability of surrogacy contracts and result in a more comprehensive understanding of the surrogate's rights and obligations vis-à-vis those of the intended parents.<sup>229</sup> According to Epstein, full disclosure of objectives, risks, and compensation would alleviate confusion

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222. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (2d ed. 2000) (discussing two rationales for using public policy to invalidate a contract: (1) a court "may see its refusal as an appropriate sanction to discourage undesirable conduct" or (2) it "may regard enforcement of the promise as an inappropriate use of the judicial process to uphold an unsavory agreement.").

223. See Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2317-18 (1995).

224. See Wilson, *supra* note 84, at 330.

225. See Epstein, *supra* note 223, at 2317.

226. *Id.* at 2335.

227. *Id.*

228. *Id.*

229. See *id.* at 2339.

between the contracting parties and result in fully informed consent of all parties and, ultimately, a viable contract.<sup>230</sup>

Legal scholars, foremost among them Richard Posner, advance an economic efficiency argument in support of free market adoptions that also supports the enforcement of surrogacy contracts.<sup>231</sup> Posner describes trading monetary compensation for a child as efficient, since the parties would not agree to it “if they did not think it would make both of them better off.”<sup>232</sup> This analysis, like Epstein’s, relies on the classic economic model of the rational actor and suggests individuals should be allowed to contract efficiently for their personal benefit.<sup>233</sup>

Both Posner and Epstein advocate for greater opportunities for childless couples to become parents and ground their arguments in freedom to contract and economic efficiency principles. By making surrogacy arrangements faster and easier to enter into, surrogates will be able to aid childless couples or individuals in having a family of their own. As long as these contracts are not violative of public policy, they should be enforced.

#### **D. Public Policy Concerns: Comparisons to Prostitution and Human Trafficking**

Vocal opponents of surrogacy argue against enforcement of such contracts and predict that attempts to enforce these arrangements will lead to exploitation of women and the weakening of American families.<sup>234</sup> Two of the most frequently invoked public policy arguments against surrogacy analogize surrogacy to prostitution<sup>235</sup> and human trafficking.<sup>236</sup> It is necessary to examine these contentions to discover if they are valid, and whether or not proper legislation could address these concerns while allowing surrogates and intended parents to freely contract.

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230. Epstein, *supra* note 223, at 2318.

231. Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 64 (1987) (in which Posner compares the adoption of children to the sale of other goods) [hereinafter “*Regulation of the Market*”].

232. *Regulation of the Market*, *supra* note 231, at 60.

233. See Epstein, *supra* note 223, at 2331 (citing Posner’s arguments in *The Economics of the Baby Shortage*, n.95 *supra*, favorably in support of the enforcement of surrogacy contracts).

234. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2350 (1995), available at [http://works.bepress.com/lori\\_andrews/37](http://works.bepress.com/lori_andrews/37).

235. Lieber, *supra* note 177, at 213 (“Many feminists have also likened surrogacy to prostitution.”); see also, Michelle Ford, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 98–99 (2008).

236. Mortazavi, *supra* note 1, at 2268 (noting that surrogacy detractors compare surrogacy arrangements to human trafficking).

### i. Comparison to Prostitution

Some scholars and commentators view surrogacy as a form of adultery or prostitution.<sup>237</sup> They point out that both prostitutes and surrogates sell their bodies for money, typically out of economic necessity.<sup>238</sup> These scholars conclude that since prostitution is illegal for moral reasons, surrogacy should also be proscribed.<sup>239</sup>

This argument is unavailing for two reasons. First, the enforcement of contracts should not be blocked merely because non-parties to the contract disapprove of the agreement.<sup>240</sup> According to Professor Epstein, morality is not a sufficient reason to criminalize surrogacy contracts.<sup>241</sup> Additionally, in regard to reproductive rights the Supreme Court has explicitly stated that morality alone cannot be the basis for a law:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.<sup>242</sup>

Moral concerns alone should not control the enforcement of surrogacy contracts.<sup>243</sup> Accordingly, surrogacy contracts should be upheld as long as they do not violate existing law or significant public policy objectives.<sup>244</sup>

Second, the goals of surrogacy contracts are vastly different from that of prostitution. It is important to evaluate why individuals seek prostitutes versus why individuals seek surrogates. While the use of a woman's body is implicated in each arrangement, the goal of a transaction with a prostitute is sexual gratification.<sup>245</sup> By contrast, the result of contracting with a surrogate is the birth of a child the intended parents seek to raise as their own.<sup>246</sup> Moreover, individuals seeking to become parents through surrogacy desire to expand their family and exercise their

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237. David R. Bromham, *Surrogacy: Ethical, Legal, and Social Aspects*, 12 J. OF ASSISTED REPROD. AND GENETICS 509, 510–11 (1995).

238. See Hill, *supra* note 210, at 641–42.

239. *Id.*

240. Epstein, *supra* note 223, at 2341.

241. *Id.*

242. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

243. *See id.*

244. See Farnsworth, *supra* note 222, at § 5.1.

245. See Hill, *supra* note 210, at 641.

246. *Id.*

constitutionally protected right to be a parent,<sup>247</sup> while individuals seeking prostitutes cannot claim any constitutionally protected right. Accordingly, these transactions appear too disparate to warrant any substantial comparison.

ii. Comparison to Human Trafficking

Another common argument against surrogacy is that the process is tantamount to human trafficking or black-market adoptions.<sup>248</sup> This argument, however, fails to take into account the motivations of the parties and the legal framework of many states that provides for freedom of contract while safeguarding women from exploitation in both adoption and surrogacy arrangements.

The fees paid in commercial surrogacy agreements are better understood as compensation for services, rather than payment for a child.<sup>249</sup> Paying a surrogate for her services should be viewed as similar to paying a reproductive center for artificial insemination or other fertility treatments that are commonly used to assist couples in conceiving a child.<sup>250</sup> Despite the fact that paying a surrogate may be controversial, payment may be necessary to a functioning surrogacy system.<sup>251</sup> It is likely that the number of women willing to be surrogates would drop precipitously if there were no possibility of compensation.<sup>252</sup> Thus, although controversial, payment for surrogacy is a necessary aspect of a thriving surrogacy regime.<sup>253</sup> When viewed as payment for services, and not payment for a child, the human trafficking comparison becomes tenuous at best. Consequently, since surrogacy is not equivalent to human trafficking, surrogacy arrangements should not be banned on this ground.

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247. See *supra* notes 119–127 for Supreme Court cases discussing the constitutional right to procreate.

248. Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L., 601, 616 (2009).

249. Rae, *supra* note 198, at 30.

250. *Id.*; see also Kuczynski, *supra* note 14, at 7 (describing one couple's experience: "We were not disturbed by the commercial aspect of surrogacy. A woman going through the risks of labor for another family clearly deserves to be paid. To me, imagining someone pregnant with the embryo produced by my egg and my husband's sperm felt more similar to organ donation, or I guess more accurately, organ rental. That was something I could live with.").

251. Kindregan, *supra* note 248, at 616–17.

252. Christine A. Bjorkman, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 148 (2008).

253. See *id.*

## VI. CAN STATUTORY PROVISIONS BALANCE COMPETING CONCERNS?

While scholars such as Epstein and Posner focus on the ability of parties to enter into agreements that result in a net benefit to society, feminist scholars are primarily concerned with preventing the exploitation of women. Properly drafted legislation can ensure that individuals enjoy greater freedom to contract while protecting significant public policy interests. These concerns are addressed by the proposed legislation *infra*.

### A. Proposed Surrogacy Statute for Tennessee

The following is a proposed statute to amend Tennessee's current provisions regulating surrogacy. It combines elements from other state statutes around the country to create a comprehensive statutory surrogacy framework. This proposed legislation explicitly authorizes various surrogacy arrangements, while providing for regulation to prevent exploitation and advance legitimate public policy goals.

#### Article 1: Definitions

- (1) Surrogate: A woman who agrees to enter a surrogacy contract.<sup>254</sup>
- (2) Intended Parent(s): A person or persons seeking to conceive a child via assisted reproductive technologies who enter a surrogacy contract. Such person(s) will be considered the legal parents of the resulting child upon birth. The term shall include the intended mother, intended father, or both.<sup>255</sup>
- (3) Traditional Surrogacy: The Surrogate or intended mother is artificially inseminated with sperm belonging to either the intended father or an anonymous donor. The egg used in the procedure belongs to the Surrogate.<sup>256</sup>
- (4) Gestational Surrogacy: The process by which a woman seeks to carry and give birth to a child for the intended parents. This process occurs when: (1) a fertilized ovum, created from an egg of the intended mother or that of an anonymous donor, and the sperm of the intended father or that of an anonymous donor; (2) is placed in the Surrogate's uterus.<sup>257</sup>

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254. 750 ILL. COMP. STAT. § 47/10 (2011).

255. *Id.*

256. Campbell, *supra* note 42, at 574.

257. 750 ILL. COMP. STAT. § 47/10.

Article 2: Authorization of Surrogacy Contracts

Surrogacy contracts are explicitly authorized, and as such legally enforceable. This includes traditional, gestational, commercial, and non-commercial arrangements. All such agreements are subject to the limitations listed in Article 3.

Article 3: Limitations and Guidelines

The validity of all surrogacy contracts will be based on judicial determination that:

- a. All parties to the contract are over 18 years of age.<sup>258</sup>
- b. All parties to the agreement have voluntarily entered such agreement and understand the terms.<sup>259</sup>
- c. None of the parties have a criminal record<sup>260</sup> of child abuse or violent crime.
- d. Intended parent(s) have the financial means to provide for the resulting child.<sup>261</sup>
- e. Intended parent(s) are unable to conceive a child.<sup>262</sup>
- f. Surrogate has previously conceived, and gestated a fetus, which resulted in a live birth.<sup>263</sup>
- g. All parties have undergone a physical and psychological evaluation.<sup>264</sup>
- h. The contract includes a detailed payment schedule.<sup>265</sup>

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258. FLA. STAT. § 742.15 (2014); VA. CODE ANN. § 20-160 (2010).

259. TEX. FAM. CODE ANN. § 160.756(b)(4) (2014).

260. *See* Mortazavi, *supra* note 1, at 2287 (suggesting that “ethical and criminal conflicts may be avoided by implementing criteria to vet surrogates and intended parents.”).

261. N.H. REV. STAT. ANN. § 168-B:18(III) (2014).

262. *Id.*

263. TEX. FAM. CODE ANN. § 160.756(b)(5). This is also a common consideration with most fertility clinics.

264. FLA. STAT. § 42.15(2), (3)(b) (2014); ILL. COMP. STAT. § 47/20 (2011); N.H. REV. STAT. ANN. § 168-B:18(III).

265. I developed this specific language based on the provisions in the Illinois statute requiring that the “compensation shall have been placed in escrow.” 750 ILL. COMP. STAT. § 47/20(b)(4).

- i. The intended parent(s) and the surrogate have consulted with separate legal counsel.<sup>266</sup>
- j. The parties are engaging in this process through a validly licensed reproductive clinic.

### **B. The Proposed Statute Allows for Greater Freedom of Contract While Addressing Public Policy Concerns**

The goal of this legislative provision is to maximize the number of surrogacy contracts while preventing exploitation of women. This legislative amendment protects the reproductive rights of men and women in Tennessee. The choice to hire a surrogate is innately linked to the right of reproductive choice and grounded in the right to privacy as well as the freedom to contract. Under the Tennessee Constitution, Tennesseans arguably enjoy greater privacy protections than guaranteed in the federal Constitution.<sup>267</sup> In keeping with the spirit of allowing greater privacy protection, this legislation explicitly authorizes traditional, gestational, commercial, and non-commercial surrogacy so that individuals will not be unduly limited in exercising their right to procreative decision-making.

Though it is vital to protect reproductive freedoms and privacy rights, these rights should not lead to the exploitation of others. Under the existing surrogacy legislation in Tennessee, a couple could potentially enter a surrogacy contract with a seventeen year-old girl in desperate need of money without working with a validly licensed fertility center. Such a situation might involve coercion, duress, or entering into a contract with unconscionable terms. When such a complicated medical procedure is involved, there should be greater safeguards to ensure the wellbeing of all parties. Predicating entry into a surrogacy contract on an age requirement as well as physical and psychological evaluations allows all parties greater knowledge of extenuating circumstances that could affect the pregnancy, and helps to ensure that the surrogate can give informed consent. By creating specific legal parameters for these contracts, this proposed legislation permits contracts that will equitably achieve the goals of all parties.

Though this statute allows for commercial surrogacy contracts, which may concern some feminists who see potential for base commercialization of women's bodies, allowing payment for surrogacy within a legal framework can protect women in these situations.<sup>268</sup> If solely non-commercial surrogacy is authorized, this could incentivize intended parents to illicitly pay women for these services. Since demand for

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266. *Id.* at § 47/20(b)(3).

267. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 12 (Tenn. 2000).

268. Lieber, *supra* note 177, at 230.

surrogates currently exceeds supply,<sup>269</sup> it is plausible that some form of commercial inducement would occur if commercial surrogacy were not authorized. Moreover, there is significant concern that without proper regulation, surrogacy may become a black market industry that provides insufficient legal recourse for those who may be exploited.<sup>270</sup> Allowing commercial surrogacy and regulating these arrangements will ideally quell potential illicit transactions. This legislative amendment would allow women who wish to become surrogates to offer a needed service to infertile couples and establish legal parameters for such contracts that take into account important public policy considerations by ensuring that all parties to the contract give informed consent.

## VII. CONCLUSION

In Tennessee, gestational surrogacy is not expressly authorized. This means that while gestational surrogacy arrangements are not subject to civil or criminal penalties, gestational surrogacy remains an area of the law that the legislature has declined to regulate. The lack of clear law on this matter is a disservice to the public. As the proposed legislation in this Note suggests, a comprehensive surrogacy statute should clearly define the legal parameters of surrogacy contracts and provide for the protection of all parties involved. Gestational surrogacy should be explicitly authorized in Tennessee to permit greater freedom of contract and allow for more reproductive choice, especially in light of Tennessee's enhanced protections for the right to privacy. Even if the legislature does not enact new surrogacy legislation, surrogacy arrangements will likely continue and ultimately the judiciary will be left with the task of interpreting these contracts. In the past, this has led to inconsistent results as well as judicial requests for legislative action. Adopting a new statute will inform the public as to what types of surrogacy are legal and regulate who can enter into such agreements. In conclusion, by regulating surrogacy, Tennessee can further the significant public policy goals of allowing expanded reproductive options while simultaneously permitting greater freedom of contract.

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269. The Center for Bioethics and Culture Network, *supra* note 12.

270. See CHRISTINE OVERALL, *ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS* 129 (1987).



