WOMB FOR RENT: A SURROGATE'S PERSPECTIVE ON SURROGACY AND ITS REGULATION

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Abstract: As a three-time gesational surrogate and a current law student, I have a unique view on surrogacy laws and regulations. The accessibility of commercial surrogacy is surrounded by uncertainty and controversy, which has a great impact on hopeful intended parents and where they choose to begin their surrogacy journey. Additionally, laws regarding using a surrogate for assisted reproductive technology (ART) are rapidly changing, making the decision more complex and confusing. This paper starts with my own experiences with surrogacy in different states to provide a backdrop and some context for why surrogacy regulations matter. I continue with a brief overview of surrogacy in the United States and a couple of the most influential cases. Next, I consider the arguments presented for federal vs. state legislation. I end the paper with suggested legislation for surrogacy contracts at the state level, providing reasoning to overcome many of the common anti-surrogacy arguments. I look to the state of Minnesota to provide background and context. However, the proposed legislation is relevant to many states in a similar position as Minnesota, having no current surrogacy legislation.

Keywords: Surrogate; Surrogacy; Assisted Reproductive Technology; ART; Fertility; Legislation; Minnesota

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INTRODUCTION

Currently, each state regulates surrogacy contracts its own way, leading to a variety amongst states regarding laws, and often leading to uncertainty regarding legal parentage and the enforceability of surrogacy contracts. While federal statutes regarding surrogacy would be ideal, states should enact regulations at the state level governing surrogacy contracts and requirements which would make surrogacy safer for all parties involved. This paper focuses on how a state can legislate surrogacy locally and why it should do so in today's shifting political landscape.

In this paper I will first give a brief introduction to surrogacy, explaining the different types of surrogacies, and why it is still needed and desirable when adoption is an option. Next, I will provide a brief history of surrogacy in the United States and review two of the most influential cases that have shaped American surrogacy laws, followed by an overview of current state of laws within the U.S. I will then provide an overview of arguments for legislating surrogacy at the federal or state level. Finally, I propose legislation and offer reasoning that acknowledges many of the anti-surrogacy arguments. To do this, I will focus on the state of Minnesota, providing reasons why Minnesota should choose to pass legislation on surrogacy, and a brief history of the attempts Minnesota has made to legislate surrogacy in the past. Focusing on Minnesota allows me to provide context and case history. However, many states are in the same position as Minnesota, having no current surrogacy legislation. The proposed legislation in the final section is relevant and applicable to many states in a similar situation.

I. MY PERSONAL SURROGACY EXPERIENCE

I decided to become a surrogate after having my first, and only, child. I felt extremely lucky to have been able to have a child after my husband was diagnosed with cancer at the age of twenty-five. Because of the uncertainties involved, he had to stop his medication for a few months before we could conceive. A couple years later, I knew I wanted to help people that had no other way to have families of their own.

My first two surrogacies occurred while I lived in California. I used a surrogacy agency whose main purpose was to match willing women to couples looking for a surrogate and help them navigate the complicated process of creating a family through surrogacy.[1] My first surrogacy was for a traditional couple, husband and wife, from Florida. She had a medical condition and knew from a young age she could never carry a child. Using a donor egg and the father's sperm, they had a little girl. When they held their baby for the first time and I saw the look on their faces, it was such a fulfilling feeling that I knew I wanted to help another couple become a family. I was quickly matched up with a gay couple from Texas. They used one intended father's sperm and chose an egg donor that resembled the other intended father. They had twin girls.

My third surrogacy was a couple years later when I was living in Minnesota. I was signed up with the agency as an available surrogate but because of the lack of legislation in Minnesota, it took many months before some intended parents were willing to work with me. Due to the Minnesota process requiring a post birth order of parentage, the parents were nervous that I would want to keep the baby and would

[1] A PERFECT MATCH, https://www.aperfectmatch.com (last visited Nov. 18, 2025).

refuse to give up my parental rights as the birth mother after the child was born. We had a successful surrogacy experience, and they had twins, a boy and a girl. However, after they were born, only the father's name could go on the birth certificate. I still had to go through the process of surrendering my rights as a parent so their mother's name could be included on the birth certificates. It felt very strange going through the process of giving up parental rights to children that were never mine to begin with. That experience is ultimately what inspired me to address the topic of surrogacy legislation in Minnesota.

II. BACKGROUND

In general, a surrogate mother ("surrogate") is "a woman who becomes pregnant… for the purpose of carrying the fetus to term for another person or persons."[2] There are two types of surrogacies within the world of assisted reproductive technology ("ART"). A traditional surrogacy is when the surrogate uses her own egg and is impregnated by artificial insemination.[3] This can also be referred to as "genetic surrogacy."[4] Since the child that results from this kind of surrogacy is genetically related to the surrogate mother, a surrogacy contract with a traditional surrogate agreeing to give up her parental rights after the child is born is usually held to be unenforceable in courts in cases where the surrogate mother changes her mind and no longer wants to surrender the child.[5]

A gestational surrogacy is when the surrogate carries a child created from an egg that is not hers and if she is married, sperm not from her husband.[6] The egg and sperm are used to create an embryo in a lab through in vitro fertilization ("IVF").[7] The gestational surrogate, or gestational carrier ("GC"), prepares her body in advance to receive the embryo by taking medications.[8] The embryo is then implanted into her uterus and she carries the fetus to term.[9]

The people entering into contract with a surrogate are referred to as Intended Parents ("IPs"). The couple may be an Intended Mother ("IM") and Intended Father ("IF"), just one IP, two IFs, or two IMs if neither can carry a pregnancy.[10] The resulting embryos can range from being one hundred percent genetically related to the IPs using the IM's egg and IF's sperm, using a donor egg and the IF's sperm, using the IM's egg and donor sperm, or using both donor egg and donor sperm.[11] From a legal perspective, gestational surrogacy is generally considered the safer alternative to traditional

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[2] *Surrogate Mother*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/surrogate%20mother (last visited Mar. 12, 2025).
[3] MAUREEN MCBRIEN & BRUCE HALE, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 137 (3d ed. 2018).
[4] *Id.*
[5] *Id.* at 139.
[6] *Id*.
[7] *Gestational Surrogacy,* CLEVELAND CLINIC (June 7, 2022), https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] MCBRIEN & HALE, *supra* note 3, at 140.

surrogacy, with fewer legal complications because of the lack of genetic connection between the surrogate and baby.[12]

IPs seek out surrogates for many reasons. An IM may be infertile due to a medical issue with her uterus, she may not be able to get pregnant without putting herself or the fetus at risk, or she may have had a hysterectomy.[13] Some IPs may be biologically incapable of bearing a child, such as a single man or a gay couple.[14]

III. SURROGACY OR ADOPTION

The choice to adopt or use a surrogate to grow a family is subjective to the needs and desires of each couple.[15] Adoption is less expensive than surrogacy.[16] However, with a surrogacy, IPs have more control over who is carrying the child and the genetics of the child, whether they are biologically related to either IP or come from a similar gene pool as the IPs.[17]

Many barriers to adoption also make surrogacy a more viable option. With infertility rates rising, the interest in adoption is also rising.[18] According to American Adoptions, one of the largest adoption agencies in the US, there are currently over two million families waiting to adopt a baby.[19] Additionally, the birth mother often chooses who will adopt her baby.[20] Some adoption agencies also place restrictions based on age, geography, and marital status.[21] Simply put, adoption is not always an option for couples to have a baby.

IV. HISTORY OF SURROGACY IN THE US

Two of the most influential surrogacy cases in the US, *In Re Baby M* and *Johnson v. Calvert*, seem to be at opposite ends of the spectrum.[22] *In Re Baby M* from 1988 dealt with a surrogacy contract involving a traditional surrogate.[23] *Johnson v. Calvert* from 1993 considered a surrogacy contract involving a gestational surrogate and contained a vastly different ruling.[24]

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[12] *Id*. at 141.
[13] *Gestational Surrogacy, supra* note 7.
[14] *Id.*
[15] *Surrogacy vs. Adoption*, MODERN FAM. FORMATION L. OFFS., https://www.modernfamilyformation.com/surrogacy-vs-adoption (last visited Nov. 18, 2025).
[16] *Id.*
[17] *Id.*
[18] W. Marshall Prettyman, *The Next Baby M Case: The Need for a Surrogacy Statute*, 18 SETON HALL L. REV. 896, 897 (1988).
[19] *How Many Couples are Waiting to Adopt a Baby?*, *AM. ADOPTIONS*, https://www.americanadoptions.com/pregnant/waiting_adoptive_families (last visited Nov. 18, 2025).
[20] *Id.*
[21] As an example, Catholic Charities of Southern Minnesota requires the adoptive couple live in a certain region, be married at least two years, be under the age of 45, and have experienced infertility and no longer seeking fertility treatments. *See Domestic Infant Adoption*, *CATH. CHARITIES OF S. MINN.*, https://www.ccsomn.org/adoption-program-page/domestic-infant-adoption/ (last visited Nov. 18, 2025).
[22] *See* Susan L. Crockin, Meagan A. Edmonds & Amy Altman, *Legal Principles and Essential Surrogacy Cases Every Practitioner Should Know*, 113 FERTILITY & STERILITY 908, 909, 913 (2020), https://doi.org/10.1016/j.fertnstert.2020.08.030.
[23] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).
[24] *Johnson v. Calvert,* 851 P.2d 776 (Cal. 1993).

In the *Baby M* case, IPs Mr. and Mrs. Stern contracted with Mrs. Whitehead in New Jersey to be a surrogate and have a baby via artificial insemination using Mr. Stern's sperm. Upon delivery of the child, Whitehead would receive $10,000 and all medical bills paid.[25] However, when the surrogate delivered the child, she had second thoughts and wanted to keep the baby girl.[26] She brought her home from the hospital and did not turn her over to the Sterns for three days.[27] The day after she surrendered the child, Whitehead told the Sterns how distraught she was without the baby and could not live without her.[28] Fearing for Whitehead's life, the Sterns turned the baby back over to her upon the promise that she would be returned to them in one week.[29] Instead, Whitehead fled to Florida.[30] Mr. Stern then filed suit for the enforcement of the surrogacy contract.[31] The New Jersey trial court held that the contract was valid and Whitehead's parental rights should be terminated.[32] However on appeal, the New Jersey Supreme Court held that the surrogacy contract was void and unenforceable because it violated New Jersey statutes which prohibited payment in exchange for the adoption of a child, and because surrendering parental rights could only be done after a child is born, not beforehand.[33] As Mrs. Whitehead was the genetic mother and Mr. Sterns the genetic father, the Court determined custody of the child would go to Mr. Sterns using the best interests of the child parameters.[34] As a result of this outcome, Baby M has "has long been held up as a cautionary tale for surrogacy and has had a significant impact in restricting both traditional, genetic surrogacy in many states and compensated surrogacy of any type in a few states."[35]

Johnson v. Calvert is at the other end of the spectrum, with a gestational surrogate instead of a traditional surrogate, and a ruling that favored the IPs and upheld the contract, looking at the intentionality of the parties involved as a key deciding factor in the case.[36] The Calverts contracted with Johnson to be their surrogate using IVF.[37] The embryo was created using Mrs. Calvert's egg and Mr. Calvert's sperm.[38] In return for carrying the child to term for the Calverts, Johnson would receive $10,000 paid in installments.[39] In February 1990, Johnson found out that the embryo transfer was successful and she was pregnant.[40] However, the relationship between the parties deteriorated, and in July 1990, Johnson demanded the balance of the payment, threatening to refuse giving up parental rights to the child.[41] The Calverts then initiated a lawsuit to be declared the legal parents and Johnson responded with her own suit to be declared the legal mother.[42] The trial court upheld the surrogacy contract and

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[25] *Baby M,* 537 A.2d at 1235.
[26] *Id.* at 1236.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1237.
[30] *Id.*
[31] *Baby M,* 537 A.2d at 1237.
[32] *Id.*
[33] *Id.* at 1240.
[34] *Id.* at 1261.
[35] Crockin, *supra* note 22, at 909.
[36] *Johnson v. Calvert,* 851 P.2d at 782.
[37] *Id.* at 778.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Johnson v. Calvert,* 851 P.2d at 778.

declared the Calverts the legal parents of the baby who had been born that September.[43] Upon review by the Supreme Court of California, the decision was upheld.[44] The Court emphasized regarding the Calverts that "[b]ut for their acted-on intention, the child would not exist," and further emphasized that the Calverts had not intended to donate an embryo to Johnson.[45] Regarding the payments made to Johnson, the Court held that the payments were compensation "for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights."[46]

As the earliest reported surrogacy dispute, the decision in *Baby M* is touted as a cautionary tale and warning against surrogacy, and was instrumental in many states banning traditional surrogacy or prohibiting the compensation of surrogates.[47] For example, after *Baby M*, New Jersey common law prohibited traditional surrogacy agreements, and New York refused to hold any surrogacy agreements as enforceable, whether a traditional or gestational surrogate was used.[48] In an article for the *American Journal of Law & Medicine* urging for legal unity and federal legislation of surrogacy, Eric A. Feldman, JD, PhD; Professor of Law and Professor of Health Policy and Medical Ethics at the University of Pennsylvania Law School, wrote, "For the past three decades, the Baby M case has cast a shadow over the regulation of surrogate motherhood in the United States, despite fundamental changes in both science and society."[49]

Since *Johnson v. Calvert,* "[s]everal states by statute or case law have determined that legal parentage can be established for intended parents either prior to the birth of the child... or at, or shortly after, the birth of the child."[50] The case is also still being used as legal precedent in surrogacy disputes, arguing that the intent to have a child should be the deciding factor regarding parenthood.[51]

V. SURROGACY IN THE UNITED STATES CURRENTLY

Surrogacy contracts are treated differently across the United States.[52] Some states have legislation favorable to surrogacy, while others have legislation prohibiting surrogacy contracts, and many states have no legislation at all regarding ART using surrogacy.[53]

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[43] *Id.*
[44] *Id.*
[45] *Id.* at 782.
[46] *Id.* at 784.
[47] Crockin, *supra* note 22, at 909.
[48] *See* Caitlin Conklin, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation,* 35 WOMEN'S RTS. L. REP. 67, 74, 79 (2013).
[49] Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, 44 AM. J. L. & MED. 7, 8 (2018).
[50] Crockin, *supra* note 22, at 913.
[51] *See, e.g., Mamer v. Weingarten*, 328 Cal. Rptr. 3d 922, 926 (Ct. App. 2025); *Miles v. Gernstein*, 331 Cal. Rptr. 3d 492 (Ct. App. 2025).
[52] *Surrogacy Laws by State,* AM. SOC'Y FOR REPROD. MED., *https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1* (last visited Nov. 19, 2025).
[53] *Id.*

Today, surrogacy is generally permitted and contracts upheld in most of the states.[54] Below is a brief overview of how each state regards surrogacy.[55] However, it is important to remember that even states that expressly permit surrogacy still vary in the restrictions required to do so.[56] Some states allow only gestational surrogacy, require the IPs to be married, or to be contributing both the egg and sperm, to name a few of the more common restrictions.[57]

Have statutes that expressly permit surrogacy by statute		Have no statute but are generally favorable	Have statutes stating surrogacy contracts are unenforceable	Have statutes that neither permit not prohibit surrogacy but are generally favorable
Alabama	Michigan	Alaska	Arizona	Nebraska
Arkansas	Nevada	Georgia	Indiana	New Mexico
California	New Hampshire	Hawaii	North Carolina	Tennessee
Colorado	New Jersey	Maryland		
Connecticut	New York	Massachusetts		
Delaware	North Dakota	Minnesota		
D.C.	Oklahoma	Missouri		
Florida	Rhode Island	Montana		
Idaho	Texas	Ohio		
Illinois	Utah	Oregon		
Iowa	Vermont	Pennsylvania		
Kansas	Virginia	South Carolina		
Kentucky	Washington	South Dakota		
Louisiana	West Virginia	Wisconsin		
Maine				

Wyoming is not included above because it is an outlier in that it has a statute that addresses surrogacy without permitting or prohibiting it, and at the time of writing this paper, there was not enough data available to know where courts stand regarding upholding surrogacy contracts.[58]

In addition to whether surrogacy contracts will be upheld is the issue of how each state views parentage after the child is born.[59] In *Surrogacy: American Style*, Richard Storrow states, "The issue at this point in the surrogacy journey is whether the law will recognize that the surrogate is *not* the legal mother, even though she gestated

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Surrogacy Laws by State, supra* note 52.
[59] Richard F. Storrow, *Surrogacy: American Style*, *in* SURROGACY, LAW AND HUMAN RIGHTS 193, 207 (Paula Gerber & Katie O'Byrne eds., 2015).

the child and may be its genetic progenitor."[60] Whether the IPs are able to obtain a pre-birth order of parentage, which would allow their names to go directly on the child's birth certificate when it is born, or they will have to complete the process with a post-birth order of parentage varies by state.[61] Much of the time, the distinction comes down to who is providing the genetic material or whether the IPs are a heterosexual married couple.[62] For example, in Arizona, if neither IP shares a genetic link to the child, they will need to go through the post-birth order of parentage process, but that same couple can be granted a pre-birth order of parentage if the surrogacy occurs in California.[63]

VI. ARGUMENTS FOR FEDERAL LEGISLATION

Because of the vast difference in laws between the states, many argue that federal legislation should be enacted to regulate surrogacy.[64] Moreso than varying cost, the main reason for choosing a specific state to undergo a surrogacy contract is due to its favorable laws.[65] This "forum shopping" is common with any area of law with inconsistencies across the states, such as tax law or business law, and surrogacy law is no different.[66] As an example of this forum shopping, my own three surrogacies were with IPs from different states (Florida, Texas, and New York) who chose to work with me due to the favorable laws of the state I resided in at the time (California for the first two and then Minnesota). In an article for *The New York Times Magazine*, author Alex Kuczynski wrote about her own surrogacy experience, sharing that part of their decision to use a surrogate who lived in Pennsylvania was so her and husband's names could go directly on the birth certificate as the genetic parents.[67]

Proponents of federal regulation suggest surrogacy can be regulated under the Commerce Clause[68] which states, "Congress shall have the power... to regulate commerce... among the several States."[69] IPs often use surrogates, agencies and IVF centers from multiple states.[70] Additionally, a gestational surrogacy agreement ("GSA") can include payments made to a surrogacy agency, legal fees and expenses, fertility clinic fees and expenses, medical expenses, insurance costs, and the surrogate's fees and expenses.[71] IARC Surrogacy, an agency based in Minnesota, provides a total cost estimate ranging from $124,000.00 to $176,000.00.[72] Thus, forum shopping is a main argument in favor of federal regulation with the reasoning that it "takes large sums of

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[60] *Id.* at 207.
[61] *Id.* at 211.
[62] *See, e.g.*, Crockin, *supra* note 22; Feldman, *supra* note 49; Conklin, *supra* note 48.
[63] *Surrogacy Laws by State*, *supra* note 52.
[64] Storrow, *supra* note 59, at 212.
[65] Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation,* 21 MINN. J. INT'L L. 120, 123 (2012).
[66] *Id.*
[67] Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES MAG. (Nov 28, 2008), https://www.nytimes.com/2008/12/14/magazine/14letters-t-HERBODYMYBAB_LETTERS.html.
[68] Conklin, *supra* note 48 at 90.
[69] U.S. CONST. art. I, § 8, cl. 3.
[70] Conklin, *supra* note 48, at 90.
[71] *Cost Estimates,* IARC SURROGACY, https://iarcsurrogacy.com/cost-estimates/ (last visited Nov. 19, 2025).
[72] *Cost Estimate - Surrogacy with Frozen Transfer (SET),* IARC SURROGACY, (last visited Nov. 19, 2025), https://iarcsurrogacy-com.s3.us-east-2.amazonaws.com/wp-content/uploads/2025/02/cost-estimate.pdf.

money out of state economies."[73] With such a substantial effect on interstate commerce, the Aggregation Principle introduced in *Wickard v. Filburn* would apply. The Court would only require Congress to have a rational basis related to a legitimate government interest for the passed regulation.[74] The World Center of Baby estimates that approximately 750 babies are born through surrogacy each year in the United States.[75] With up to $1.5 million going into the economy each year through surrogacies, under *Wickard*, Congress should only need a rational reason to pass federal legislation, such as the desire to ensure surrogacies are consistently handled safely for both IPs and surrogates, and parentage orders recognized across state lines.

The Equal Protection Clause[76] has also been cited as a possibility for Congress to regulate surrogacy.[77] The argument is that when it comes to orders of parentage, women are treated differently than men. An example of this argument appears in *in re TJS* where a New Jersey couple attempted to use the Equal Protection Clause to deem the New Jersey Parentage Act as "facially unconstitutional because they treat differently similarly-situated groups—infertile married men and women—without sufficient justification."[78] Specifically, the law automatically determined a man is the father of a child born to his wife when donor sperm is used, but the inverse was not true if a woman used a gestational surrogate to carry a child from a donated egg.[79] In a 4-3 decision, the Court decided in favor of New Jersey.[80] However, the argument and the split court show this could be a viable argument in the future regarding orders of parentage when a woman is not the carrier of her own child.

Interestingly, on March 11, 2025, a bill entitled the "Access to Family Building Act" was introduced to the US House of Representatives "[t]o prohibit the limitation of access to assisted reproductive technology, and all medical care surrounding such technology."[81] The definition of ART specific to the bill is:

> The term "assisted reproductive technology" means all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and such other specific technologies as the Secretary may include in this definition, after making public any proposed definition in such manner as to facilitate comment from any person (including any Federal or other public agency).[82]

It is unclear whether the definition above would cover the use of surrogacy because it is not explicit in saying so, and an embryo transfer with a gestational

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[73] Conklin, *supra* note 48, at 94.
[74] *Wickard v. Filburn*, 317 U.S. 111, 124 (1924).
[75] Ihor Lanetskyi, *How Many Surrogate Births Per Year: Statistics of Newborn Babies*, WORLD CTR. OF BABY (Apr. 27, 2025), https://worldcenterofbaby.com/blog/how-many-surrogate-births-per-year-statistics-of-newborn-babies/.
[76] U.S. CONST. amend. XIV, § 1. ("No state shall...deny to any person within its jurisdiction the equal protection of the laws.").
[77] Conklin, *supra* note 48, at 89.
[78] *In re* T.J.S., 16 A.3d 386, 390 (N.J. Super. Ct. App. Div. 2011).
[79] *Id*.
[80] *See, in re* T.J.S., 54 A.3d 263, 264 (N.J. 2012).
[81] Access to Family Building Act, H.R. 2049, 119th Cong. (1st Sess. 2025).
[82] 42 U.S.C. 263a–7(1).

surrogacy includes the transfer of an embryo into a woman's uterus rather than an intrafallopian transfer.[83] The current wording of the definition allows for additional circumstances. However, even if surrogacy was more directly addressed, the bill is a proposition to prohibit limiting ART rather than specific legislation to unify state conduct.

VII. SURROGACY LEGISLATION AT A STATE LEVEL

Having each state decide how to deal with GSAs and orders of parentage is supported by the fact that family law is traditionally dealt with at the State level. Article I Section 8 of the US Constitution lists the specific powers of the federal government, "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[84] As stated in the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[85] As a result, laws regarding family relationships such as marriage, divorce, and adoption are dealt with at the state level.[86] Surrogacy falls within the category of family law because it includes an order of parentage by the court, which can come in the form of a pre-birth or post-birth order of parentage.[87] "[E]stablishing parentage for children born from surrogacy is a critical legal component of any surrogacy arrangement."[88]

Another reason for passing surrogacy legislation at the state level is because previously held federal standards can change when cases come before the Supreme Court. This would have a broad impact on surrogacy in the United States.[89] Recent cases demonstrate that social attitudes and political agendas and the makeup of the Supreme Court can change the tide drastically. As an example, in 1973, the Supreme Court through *Roe v. Wade* determined that abortion was a fundamental right due to a person's reproductive autonomy, at least until the fetus was viable.[90] However in 2022, with *Dobbs v. Jackson Women's Health Organization,* the Supreme Court overturned this decision, stating abortion is not a fundamental right, and left the decision to individual states on whether or not to criminalize abortion at any point in the

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[83] *The 5 Step Surrogacy Medical Process*, AM. SURROGACY, https://www.americansurrogacy.com/surrogate/surrogates-medical-process (last visited Nov. 19, 2025).
[84] U.S. CONST. art. I, § 8, cl. 1.
[85] U.S. CONST. amend. X.
[86] *Is Family Laws Federal or State*?, L., (Sept. 16, 2023), https://family.laws.com/family-court/family-courts.
[87] Crockin, *supra* note 22, at 913.
[88] *Id.*
[89] It should be noted that laws can change at the state level as well, but would only affect that particular state rather than having such a broad impact on the entire industry.
[90] *See generally, Roe v. Wade*, 410 U.S. 113 (1973), *overruled* by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

pregnancy.[91] All nine of the Supreme Court Justices in 1973 had been replaced by 2022.[92]

Similarly, *Fisher v. University of Texas at Austin*, a 2016 case that upheld a previous 2003 decision in *Grutter v. Bollinger* allowing colleges to consider race in admissions decisions in order to ensure a diverse student body,[93] was overturned by *Students for Fair Admissions v. Harvard* in 2023.[94] The Supreme Court in 2023 included only four new Justices that were not seated on the Court in 2016.[95] Again, these cases illustrate that while federal legislation would seem ideal in providing broad and uniform standards and practices for surrogacy, even Supreme Court decisions can seem unstable in a shifting political environment.

VIII. REASONS FOR PASSING SURROGACY LEGISLATION IN MINNESOTA

As a result of *Dobbs*, Minnesota passed the Protect Reproductive Options ("PRO") Act in 2023.[96] The PRO Act established "Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health" and includes the right to obtain an abortion as a fundamental right.[97] Upon passing the law, Governor Walz stated:

> Last November, Minnesotans spoke loud and clear: They want their reproductive rights protected – not stripped away...Here in Minnesota, your access to reproductive health care and your freedom to make your own health care decisions are preserved and protected.[98]

For this very same reason, Minnesota should enact legislation surrounding surrogacy which would allow both surrogates and IPs the security of knowing their surrogacy contracts will be upheld in courts, and IPs recognized as the rightful and legal parents of children born through surrogacy through a pre-birth order of parentage. Within its definitions, the PRO Act includes planning and fertility services as part of "reproductive health care."[99] Surrogacy is one way people use ART and fertility services for which specific legislation would give peace of mind to both IPs and surrogates, and direction to courts if an issue did arise. In a 2015 article entitled *Surrogacy: American Style*, Richard Storrow noted, "the legislative trend, if there is one, is toward legalizing surrogacy where it has been illegal, or providing a statutory

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[91] *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").
[92] *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 19, 2025).
[93] *See generally, Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016), *overruled by Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).
[94] *See generally, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).
[95] *Justices 1789 to Present*, *supra* note 92.
[96] MINN. STAT. § 145.409 (2023).
[97] MINN. STAT. § 145.409 Subd. 3.
[98] *Governor Walz Signs Reproductive Freedom into Law*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN (Jan. 31, 2023), https://mn.gov/governor/newsroom/press-releases/#/detail/appId/1/id/562506.
[99] MINN. STAT. § 145.409 Subd. 2.

framework for it where it has been practiced with minimal guidance."[100] A decade later, Minnesota is still in that latter category and it is time to provide that statutory framework. As such, the possibility remains that different courts can produce different outcomes, even when the facts of the case are exactly the same.[101]

In addition to not having statutory regulation, Minnesota does not have any published court cases to set a precedent over how future cases involving a surrogacy contract or order of parentage as a result of surrogacy may be decided. The following two unpublished cases decided by the Minnesota Court of Appeals suggest that the courts are permissive with surrogacy contracts but cannot be relied on by surrogates or IPs should questions arise within their own surrogacy journey. These cases also illustrate why legislation on the enforceability of surrogacy contracts and parentage orders in the case of surrogacy would be beneficial.

Decided in 2010*, A.L.S. v. E.A.G*. involved a traditional surrogacy contract. The surrogate, E.A.G., used her own egg, fertilized by artificial insemination, with the intent of delivering a baby for a same-sex couple.[102] She then refused to give up her parental rights after the child was born.[103] The Court determined that she was the legal mother of the child because she did not fit the definition of an egg donor under the Minnesota Parentage Act, and therefore the prohibition of an egg donor being a parent did not apply.[104] However, the Court then determined that the father of the child, A.L.S, would have sole custody of the child based on the best interests of the child standard under Minn. Stat. § 518.17.[105] In this case, the Court specifically declined to address the enforceability of surrogacy contracts in general, or the question as to whether or not they violate public policy.[106] This case was highly fact- and circumstance-based. Had the facts been different and with no legislation on surrogacy contracts, the Court may easily have found in favor of sole or joint custody with the birth mother in a traditional surrogacy.

P.G.M. v. J.M.A is also an unpublished decision but gives a slightly better insight into how Minnesota courts view GSAs. In *P.G.M.*, the niece of an HIV-positive gay man from New York offered to act as his gestational surrogate.[107] He at first declined the offer, but later accepted, and drafted a contract based on others he had found online.[108] The contract specified that it would be governed by Illinois rule of law where the "sperm-washing" process and embryo transfer would occur, and included provisions regarding the reimbursement of expenses to the surrogate, J.M.A.[109] In an oral modification P.G.M. agreed to pay J.M.A. $20,000 and did so in December

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[100] Storrow, *supra* note 59, at 198.
[101] Conklin, *supra* note 48, at 85 (providing an example in Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011), where a same-sex couple was initially denied birth certificates listing both parents after the birth of twins via surrogacy, despite having used the same surrogate in a prior pregnancy and having been able to put both of their names on the birth certificate).
[102] A.L.S. v. E.A.G., No A10-443, 2010 Minn. Ct. App. LEXIS 1091, at *2 (Oct. 26, 2010).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at *15-16.
[107] *P.G.M. v. J.M.A. (In re Baby Boy A.*), No. A07-452, 2007 Minn. App. LEXIS 1189, at *2-3 (Dec. 11, 2007) [hereinafter P.G.M. v. J.M.A.].
[108] *Id.* at *3.
[109] *Id.* at *3-4.

2004.[110] Over the summer of 2005 while J.M.A. was pregnant, the parties had a falling out and J.M.A. demanded additional payment in the amount of $120,000 and threatened to abort the fetus if her demand was not met.[111] J.M.A. delivered the child in Minnesota in December 2005 without telling P.G.A.[112] P.G.A. filed a paternity action once he learned of the child's birth.[113] The Court of Appeals of Minnesota upheld the choice of law provision to use Illinois law as stipulated in the contract.[114] The Court also deemed that the contract did not violate public policy because there was "no Minnesota statute or case law that prohibits GSAs and the legislature has expressly protected the rights of individuals who use assisted-reproduction technologies." [115] As the biological father of the child, P.G.A. was granted parental rights and sole custody of the child.[116] This case illustrates how the guidance of Illinois legislation was helpful to the Court in having a structure to determine whether the GSA should be upheld but leaves room for doubt regarding a parentage order in cases where donor eggs or sperm, or both, are used.

The uncertainty created by the lack of legislation leaves IPs unsure of the outcome in many aspects of their GSAs[117], even in Minnesota, which is generally considered friendly toward surrogacy contracts. I had the opportunity to interview reproductive law attorney Taylor Rolf, who is Owner and Managing Partner of Steven H. Snyder & Associates, one of Minnesota's largest reproductive law firms.[118] 99 percent of the work Rolf does is related to surrogacy or other forms of ART.[119] Having been part of over 1,000 GSAs, the firm has a one hundred percent success rate which she credited as being due to all parties being fully informed of the process, and having comprehensive contracts with each party represented by individual counsel.[120] Even so, one of the largest concerns of IPs is due to the post-birth order of parentage required by Minnesota[121] under the Uniform Parentage Act, which requires that any parental order must be stayed until after the birth of the child.[122] Rolf noted that if IPs have the option to choose a surrogacy in Minnesota with a post-birth order of parentage, or California with a pre-birth order of parentage, many will prefer and choose the California process.[123] Currently, Minnesota makes use of a process by which the IPs can take the baby home from the hospital through a temporary designation of guardianship/parental power of attorney which is set up in advance of the birth.[124]

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[110] *Id.* at *4.
[111] *Id.* at *5.
[112] *Id.*
[113] P.G.M. v. J.M.A. at *5.
[114] *Id.* at *7 ("The record contains no evidence that, by selecting Illinois law, the parties acted in bad faith or with intent to evade Minnesota law. First, Minnesota law does not address—mush less prohibit—GSAs...Illinois law, unlike Minnesota law, provides a clear statutory structure for interpretting GSAs.").
[115] *Id.* at *16.
[116] *Id.* at *22.
[117] Conklin, *supra* note 48, at 93.
[118] Zoom Interview with Taylor Rolf, Owner & Managing Partner, Steven H. Snyder & Assocs. (Mar. 14, 2025).
[119] *Id*.
[120] *Id.*
[121] *Id.*
[122] MINN. STAT. § 257.57 Subd. 5 (2024).
[123] Rolf, *supra* note 118.
[124] MINN. STAT. § 257.57 Subd. 5.

IX. PREVIOUS ATTEMPTS TO LEGISLATE SURROGACY IN MINNESOTA

Proponents of surrogacy in Minnesota have been attempting to have surrogacy officially legalized and legislated. In 2008, S.F. 2965 passed both the House and Senate and would have granted legislation for gestational surrogacy contracts. However, then Governor Pawlenty vetoed the bill, stating it was controversial and there were bipartisan objections.[125] The Minnesota Star Tribune reported that among his reasons for vetoing the bill were the "lack of protections for women who contract to carry and deliver children for others, including failure to establish the surrogate mother's right to make her own medical decisions while she's pregnant."[126]

Attempts to pass legislation regarding GSAs were made again in 2010, 2013, 2014, 2015 and 2016, but none made it past the Senate, and some not making it past the House.[127]

In 2024, the Minnesota Parentage Act was updated to include orders of Parentage when ART is used.[128] Minn Stat. 257E.15(a) states, "If the court determines that an individual is a parent under this chapter, either because the individual gave birth to the child or the individual is a consenting intended parent under section 257E.23, the court shall adjudicate the individual to be a parent of the child." At first glance, this section seems to imply that pre-birth orders can now be granted in Minnesota so that IPs using surrogates can have their names on their child's birth certificate without having to go through the post-birth order of parentage process. However, in the Definitions section, "Assisted Reproduction" includes an extra note that makes it clear that surrogacy contracts are not included:

> Assisted reproduction does not include a pregnancy under a surrogacy agreement, the pregnancy of a surrogate, the transfer of an embryo to a surrogate, or when a child is conceived pursuant to a surrogacy agreement. For purposes of this subdivision, "surrogate" means an individual who agrees to become pregnant but who does not intend to be legally bound as a parent of the child.[129]

Additionally in 2024, another bill was introduced to legislate surrogacy with H.F. 5453, but got stuck in the Judicial Financial and Civil Law Committee and did not go anywhere.[130] The proposed bill was comprehensive and long, consisting of eleven pages and nine subsections.[131] While some of the proposed legislation was good, much of it would have been disadvantageous to surrogates, intended parents, and the agencies that help them arrange the complicated process. The bill was a proposal for gestational

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[125] Journal of the Senate 10378-79 (85th Minn. Leg. May 16, 2008).
[126] Kevin Duchschere, *Pawlenty Vetoes Bills on Sick-leave Use, Surrogacy Contracts,* STAR TRIB. (May 17, 2008, 12:09 AM), https://www.startribune.com/pawlenty-vetoes-bills-on-sick-leave-use-surrogacy-contracts/19013079.
[127] Legislative Commission on Surrogacy, *Overview of Cases and Legislative Activity in Minnesota; Key Policy Issues,* 2-3 (June 28, 2016).
[128] MINN STAT. 257E.
[129] MINN. STAT. 257E.10, Subd 2.
[130] H.F. 5453, 93rd Leg., 2024 Reg. Sess. (Minn. 2024).
[131] *Id.*

surrogacy agreements and specified that traditional surrogacy agreements would be invalid.[132]

Some of the beneficial proposals include eligibility requirements for a surrogate that mirror those used by agencies, a requirement that the parties are each represented by independent counsel, and provisions detailing that parental rights would be vested in the IPs upon birth of the child.[133]

Among the disadvantageous specifications was a requirement that a GSA could only contain a single-embryo transfer.[134] This is disadvantageous because the age of the provider of the egg and whether fresh or frozen embryos are used affects the quality of the embryo and success rate of a live birth after an embryo transfer.[135] For example, an intended mother aged forty-two using her own eggs, could have a lower embryo quality with only a thirteen percent chance of a successful live birth.[136] H.F. 5453 also would have prohibited IPs from being eligible to participate in a GSA in Minnesota unless at least one of them contributes a gamete, they have been married at least two years, have completed a mental health evaluation, and have a proven medical necessity to use a surrogate.[137] These restrictions would seem to violate a person's fundamental right to reproduce as declared by the Supreme Court in *Skinner v. Oklahoma* which declared, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[138] Admittedly, *Skinner* was not addressing the use of ART for reproduction. But if the right to reproduce is acknowledged as a fundamental right, why should the method of reproduction be restricted based on marital status or any other qualification? Prettyman pointed out that

> While the exact scope and nature of [the rights of familial privacy and reproduction] has been neither clearly nor consistently elucidated by the [United States Supreme] Court, its opinions have consistently found a "right of the individual to be free from unwarranted governmental intrusion into the decision whether to bear or beget a child." The decision to engage in surrogate parenting, thus, would appear to fall within the ambit of constitutional protection.[139]

Additionally, Attorney Rolf mentioned that the medical necessity aspect of surrogacy is often a touchy subject for the IM because she has often already been through so much herself.[140] Forcing a person to prove medical necessity for surrogacy,

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Zhao Li, et al., *Comparison of Embryo Quality and Pregnancy Outcomes Using a New Grading System for Embryo Morphology in an In Vitro Fertilization (IVF) Program*, 1 *Fertility & Sterility Reps.* 264, 267 (2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC8244281/.
[136] *Id.*
[137] H.F. 5453, 93rd Leg., 2024 Reg. Sess. (Minn. 2024).
[138] *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).
[139] Prettyman, *supra* note 18, at 901 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977)).
[140] Rolf, *supra* note 118.

as proposed in the bill[141], is not only hurtful and degrading, but could be used as a way to exclude same-sex couples from entering surrogacy agreements in Minnesota.

H.F. 5453 also proposed that surrogacy agencies be non-profit agencies only.[142]

Having so many restrictions on GSAs could ultimately result in less surrogacies taking place in Minnesota due to the forum shopping already common by IPs seeking a surrogate.

X. GSAS IN CALIFORNIA

In Comparison, California is the most surrogate friendly of any state, with the most liberal laws.[143] The following is a brief overview of California's statutes regarding assisted reproduction and surrogacy contracts. There are few restrictions or barriers IPs must overcome when seeking to start a family through ART in California. Cal. Fam. Code § 7962 governs GSAs, orders of parentage, confidentiality, and presumption of validity all within the same statute which includes the following:

- "Intended parent" means an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.[144] Notice there are no restrictions on who can be an IP based on marital status, sexual orientation, or any other stipulations.

- GSAs must include the date the agreement is executed, the persons from whom the gametes originate (unless a donor is being use), the identity of the IPs, and how the IPs intend to cover medical costs of the surrogate and newborn(s).[145]

- The surrogate and IPs must each be represented by independent counsel.[146]

- The GSA must be notified or witnessed.[147]

- The medical process must not begin until the contract is fully executed.[148]

- An action to establish the parent/child relationship may be filed before birth.[149]

- The GSA shall rebut any presumptions that the surrogate or spouse is a legal parent.[150]

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[141] H.F. 5453, 93rd Leg., 2024 Reg. Sess. (Minn. 2024).
[142] *Id.*
[143] Karine Bogoraz, *Student Project: Surrogacy Research Guide: California,* PACE UNIV. L. LIBR. RSCH. GUIDES (March 29, 2023), https://libraryguides.law.pace.edu/c.php?g=452971&p=3156883.
[144] CAL. FAM. CODE § 7960(c) (West 2025).
[145] CAL. FAM. CODE § 7962(a) (West 2025).
[146] CAL. FAM. CODE § 7962(b).
[147] CAL. FAM. CODE § 7962(c).
[148] CAL. FAM. CODE § 7962(d).
[149] CAL. FAM. CODE § 7962(e).
[150] CAL. FAM. CODE § 7962(f).

- Confidentiality of the agreement.[151]
- The GSA is presumed valid.[152]
- All funds must go through an escrow account, or a trust account maintained by an attorney if they are not being paid directly to a medical facility.[153]

In a discussion with one of the fathers of the twin girls I had for a gay couple from Texas, he stated, "[w]ere if not for the favorable practice of law in San Diego, we wouldn't have had such a great experience."[154]

XI. PROPOSED LEGISLATION FOR MINNESOTA

The following addresses how Minnesota may pass legislation to regulate GSAs, yet not outright ban traditional surrogacies. I propose that Minnesota adopt regulation similar to that of California as I will outline below. Legislation should be protective of both surrogates and IPs but should not dictate how a surrogacy is done.[155]

Surrogate Eligibility:

Although California code does not specify eligibility requirements for surrogates,[156] Minnesota could benefit from codifying specific requirements even though most surrogacy agencies already have requirements a surrogate must meet before she is eligible to act as a surrogate.[157]

The following proposed minimum requirements for surrogates reflect the eligibility requirements already in place at most surrogacy agencies. Not every surrogacy arrangement originates with an agency, as often a close friend or family member will act as a surrogate for a loved one.[158] However, including these requirements in legislation could help alleviate fears and misconceptions surrounding surrogacy and allow for the bill to be passed rather than stuck in a committee due to the opinions of outspoken opponents. "Well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists."[159]

1. Minimum age of 21

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[151] CAL. FAM. CODE § 7962(g)-(h).
[152] CAL. FAM. CODE § 7962(i).
[153] CAL. FAM. CODE § 7961 (West 2025).
[154] Telephone interview with David [last name withheld] (Mar. 25, 2025).
[155] Rolf, *supra* note 118.
[156] *See generally,* CAL. FAM. CODE § 7962 (West).
[157] *See, e.g., Surrogate Requirements & Qualifications*, IARC SURROGACY, https://iarcsurrogacy.com/surrogacy/surrogate-requirements/ (last visited Apr. 15, 2025); *Gestational Carrier (GC) Requirements*, SURROGACY CTR. OF AM., https://surrogacycenter.com/carriers/ (last visited Apr. 15, 2025); *Surrogate Requirements*, CIRCLE SURROGACY, https://www.circlesurrogacy.com/surrogates (last visited Apr. 15, 2025).
[158] Rolf, *supra* note 118.
[159] Feldman, *supra* note 49, at 12 (quoting Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 146 (2009)).

2. Have at least one child of her own
3. Pass a medical screening[160]
4. Healthy BMI
5. No significant history of depression or mental health illness
6. No tobacco or recreational drug use
7. Pass a psychological test
8. Not on government aid

Common arguments against surrogacy are that surrogacy treats unborn children as commodities that are bought, sold, and discarded.[161] Surrogacy opponents also claim that surrogacy agencies prey upon vulnerable women who end up in coercive situations with short- and long-term emotional trauma.[162] Contrary to that belief, studies have not found that surrogates in the U.S. are being exploited or being coerced into signing surrogacy contracts.[163] Though the surrogate will likely not be as well off financially as the IPs, "[f]inancial inequality...does not necessarily lead to financial exploitation."[164] The proposed legislation for surrogate qualification is aimed at combatting some of these arguments by adding safeguards that would make exploitation much more difficult.

Requirements one through seven address the concerns of the physical and mental health of the surrogate. It is important to know in advance if a woman can safely deliver a child with no medical complications.[165] A person's weight and drug, alcohol, or tobacco use can bring additional complications to a pregnancy.[166]

Requirement eight addresses the concern of economic stability of the surrogate. One of the major arguments against surrogacy is that it is baby selling.[167] One of the ways to combat the presumption that a surrogate is "only in it for the money" is ensure that the surrogate is not under financial hardship. Agencies will also disqualify a woman from being a surrogate if she is on government aid for two reasons. First, it is of utmost importance to ensure that the surrogate is in a stable living environment and can "fully

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[160] *Medical Screening for Surrogacy: Understanding the Process*, EXTRAORDINARY CONCEPTIONS (Oct. 3, 2023), https://www.extraconceptions.com/surrogate-medical-screening-process-in-2022/. Medical screenings include a medical history, physical exam, pap smear, urine test, and blood tests to check for infectious diseases, drug use and certain hormones. Blood type and RH factor are also checked to ensure the surrogate will be compatible with the genetics of the fetus she will carry.
[161] *Surrogacy*, MINN. CATHOLIC CONF., https://www.mncatholic.org/surrogacy (last visited Apr. 15, 2025).
[162] *Id.*
[163] Feldman, *supra* note 49, at 13.
[164] *Id*.
[165] *Medical Screening for Surrogacy: Understanding the Process, supra* note 160.
[166] *Id.*
[167] Feldman, *supra* note 49, at 14.

focus on her pregnancy without financial stress."[168] Additionally, a compensated surrogacy would likely negatively affect the surrogate's eligibility to receive benefits such as cash assistance, housing, or welfare.[169]

Intended Parent Eligibility:

I propose that there not be any minimum requirements for IPs. Minnesota should instead adopt a definition for "Intended Parent" similar to California's, focusing on the intent of a person to become a parent.[170] "There is no reason why marital status or sexual orientation should be disqualifying for surrogacy, just as they are not disqualifying for same-sex couples seeking to adopt, or unmarried couples choosing to conceive."[171] Including any sort of medical necessity requirement would also be superfluous. Attorney Rolf mentioned that in her years as a lawyer, she has never encountered an IP that simply did not want to go through pregnancy.[172]

Gestational Surrogacy Agreement Provisions:

1. Parties must have independent legal representation.

2. Compensated surrogacy permissible.

3. Surrogate compensation to be paid in installments.

4. Any funds to the surrogate must go through a third-party escrow account.

5. An action to establish the IPs as the parents may be filed before the birth of the child.

6. Follow the guidelines provided by the American Society for Reproductive Medicine ("ASRM") regarding the number of embryos to transfer.

7. GSAs must include the date of execution, identify the source of the gametes (unless a donor is being used), and include how the IPs intend to cover costs.

8. The GSA must be notified or witnessed.

9. The medical process may not begin until the contract is fully executed.

10. The GSA shall rebut any presumption that the surrogate or spouse is a legal parent.

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[168] *Why Can't I Become a Surrogate if I'm on Public Assistance?*, FAM. SOURCE CONSULTANTS, https://www.familysourceconsultants.com/faq-items/cant-become-surrogate-im-public-assistance/#:~:text=Gestational%20Surrogates%20are%20required%20to,Section%208%20housing (last visited Apr. 16, 2025).
[169] *Id.*
[170] *See,* CAL. FAM. CODE § 7960(c) (West 2025).
[171] Feldman, *supra* note 49, at 15-16.
[172] Rolf, *supra* note 118.

11. Include a confidentiality provision.

12. The GSA shall be presumed valid.

Provision one stating that each party be represented by independent legal counsel is the most important aspect that needs to be addressed, regardless of other requirements.[173] In reference to separate legal counsel, Feldman states:

> Such representation can be paid for by agencies offering services, with the cost passed through to intended parents. By guaranteeing that surrogates are able to consult with attorneys who can help them to understand the terms of their surrogacy contracts, advocate for adequate compensation, and help to protect their individual rights, opportunities for the exploitation of surrogates will be greatly reduced.[174]

Having independent legal counsel also nullifies the argument that a surrogate is being coerced into a contract. It is the duty of legal counsel to fully inform their client, whether the surrogate or the IPs, of the risks of surrogacy, both medical and legal.[175] The Model Rules of Professional Conduct for lawyers, requires that a lawyer be competent in the area of law they are practicing[176] give candid advice,[177] and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[178]

Provisions two through four address compensation for surrogates. In written testimony provided to the Legislative Commission on Surrogacy in 2016, a previous surrogate provided the following statement:

> These women are being paid a reasonable amount for their time, obligations, expenses, and services during the process of becoming pregnant and carrying the intended parents' pregnancy for them. This is no different than legislators like you, being paid above and beyond your primary employment for your time and services in performing the duties for the people of Minnesota. Just as you are performing a civic duty by serving in the legislature (for which you should be paid despite the primarily altruistic nature of your motivation), I performed a service from the heart for my intended parents (and women like me should be paid despite the primarily altruistic nature of our motivation).[179]

The comparison of being paid for service even when it is altruistic in nature, similar to the civic duty of legislators was a theme that appeared in many of the letters.[180] Feldman responds to the worry that compensation of surrogates is equal to

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[173] Rolf, *supra* note 118.
[174] Feldman, *supra* note 49, at 14.
[175] Rolf, *supra* note 118.
[176] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).
[177] *Id.,* r. 2.1.
[178] *Id.*, r. 1.4(b).
[179] Letter from Ann Estes, gestational carrier, to Rep. Anna Wills & Sen. Greg Clausen, Minn. Legislative Comm'n on Surrogacy (July 15, 2016), in SURROGATE TESTIMONIALS, at 29, https://www.lcc.mn.gov/inactive/lcs/meetings/07192016/surrogate_testimonials.pdf.
[180] *Id.*, at 32, 41, 44, 49,64, 68, 78, 106, and 113.

baby selling by pointing out that "those who support surrogacy most decidedly do not support baby selling."[181] Furthermore, baby selling is putting a price on the child as a good for sale, whereas "[s]urrogacy arrangements...focus on paying surrogate mothers for their medical care, lost wages, health insurance, and more."[182] Attorney Steven H. Snyder emphatically responded to an editorial that likened surrogacy to baby selling by stating:

> Surrogacy is not "baby-selling." The actual genetic or intended parents of the child create their own embryo with their genetic material before it is ever entrusted to the surrogate for her temporary care and gestation. It is not the surrogate's child when the embryo is first created; it is not the surrogate's child while she receives and expressly agrees to gestate it solely for the intended parents' benefit; it is not the surrogate's child when she gives birth and returns the child to the child's actual parents. You cannot sell something that never belonged to you in the first place.[183]

Prohibiting payments to surrogates would also likely result in fewer women willing to go through the long and arduous surrogacy process.[184]

Funds provided to the surrogate should go through a third-party escrow account and paid in installments. This allows the IPs and the surrogate to have a relationship free from stressful discussions about money. For this reason, Attorney Rolf mentioned that she encourages her clients not to talk about money at all and let any needed discussions regarding compensation or reimbursement be addressed by the parties' lawyers.[185] Making payments in installments also combats the argument that surrogacy is baby selling. The surrogate is not handed a lump sum when she hands over the baby but is paid throughout the pregnancy as compensation for her service. This also harkens back to the *Johnson v. Calvert* case in which Judge Panelli distinguished a compensated surrogate paid in installments as different from being paid to give up parental rights.[186]

Provision five addresses the parental rights of the IPs. Storrow points out that IPs do not want to go through a process similar to that of adoption to be recognized as their child's parents, and want "the assurance that they will be legally recognized as the child's sole parents immediately upon its birth."[187] This can also be accomplished by amending the Minnesota Parentage Act to include the use of surrogates in ART by removing the additional language from Minn. Stat. 257E 10, Subd. 2 which specifically excludes surrogacy in the definition of ART.

Provision six regarding the number of embryos to transfer is in response to the most recent surrogacy bill introduced in 2024 trying to limit all surrogacy contracts to a single-embryo transfer.[188] The goal should be to have one healthy child. However, a

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[181] Feldman, *supra* note 49, at 15.
[182] *Id.*
[183] *Alternative Facts and Surrogacy*, STEVEN H. SNYDER & ASSOCS. (Feb. 13, 2017), https://www.snyderlawfirm.com/blog/2017/02/alternative-facts-and-surrogacy/.
[184] MCBRIEN & HALE, *supra* note 3, at 142.
[185] Rolf, *supra* note 118.
[186] *Johnson v. Calvert*, 851 P.2d at 784.
[187] Storrow, *supra* note 59, at 200.
[188] H.F. 5453, 93rd Leg., 2024 Reg. Sess. (Minn. 2024).

single-embryo transfer is not the medically correct call for every situation.[189] Following the guidelines provided by ASRM regarding the number of embryos to transfer would allow for circumstances where the embryo quality is not as high to still have a good chance of a successful pregnancy and birth.

Provisions seven through twelve address typical contract situations such as the execution date and confidentiality.

CONCLUSION

Even though Minnesota and many other states are known to be "surrogacy friendly," legislation should still be enacted which would safeguard both GCs and IPs, limiting the statutes to regulate gestational surrogacies. Feldman points out that "the legal system is well-equipped to manage surrogacy. A more permissive legal stance toward surrogacy requires that contracts between surrogate mothers and intended parents be encouraged and enforced."[190] For this reason, legislation should include minimum requirements for surrogates and contracts. The minimum requirements would provide confidence to the parties, guidance for courts, and help to alleviate some fears or misconceptions of surrogacy by showing that the state has thought through these various circumstances.

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[189] *See generally*, Practice Comm. of the Am. Soc'y for Reprod. Med. & Practice Comm. of the Soc'y for Assisted Reprod. Techs., *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 116 FERTILITY & STERILITY 651 (2021), https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/guidance_on_the_limits_to_the_number_of_embryos_to_transfer.pdf.

[190] Feldman, *supra* note 49, at 12.