

Ethics, Law, and Commercial Surrogacy: A Call for Uniformity

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Commercial Surrogacy Case Study: Indiana Twins, a South Carolina Surrogate, and a New Jersey Bird

In July of 2005, Indianapolis witnessed streaming headlines in the local newspaper attempting to distill the confusion surrounding the adoption of two premature infants by an adoptive parent. Thirteen articles and opinion pieces introduced the public to a murky legal and ethical transaction. Stating his overwhelming desire to have children, a New Jersey schoolteacher hired the services of a local attorney. The attorney procured a South Carolina woman for a compensated gestational surrogacy contract.¹ Under the contract, the surrogate and the attorney would meet in Indiana to complete the execution of the contract and transfer parental rights via adoption after the birth of the twins.²

Following the premature birth of the twin girls in Indianapolis, an investigation into the adoption petition uncovered several vital legal discrepancies. First, the contract provided that the New Jersey man would adopt the two infants as a manner of transferring parental rights following the surrogacy process. However, under Indiana adoption law, if the adopter is not a genetic parent, then he must be a state resident or the children must be defined as difficult to place in adoption. Difficult to place under the Indiana adop-

tion statute generally refers to medical conditions, such as permanent or severe disabilities which cause children to be more difficult to place. By these criteria, the twins would not be considered difficult to place.³

Second, more information surfaced concerning both the twins' genetic parentage and the adoptive father's residence, calling into question the legal requirements for adoption. Though initial media reports suggested that the New Jersey man was the biological father, further investigation by the *Indianapolis Star* later reported that he had been unable to establish paternity.⁴ According to the *Indianapolis Star*, the two infants were born white, with blue eyes and blonde hair, yet the supposed biological mother was black, suggesting that an egg donor may also have been used.⁵ The issue of parentage becomes important when the biological mother is asked to give up her legal rights to the child. When egg donors are involved, standard medical protocol between the parties typically states that the donor gives up all rights to any resulting offspring. In this case, it was unclear which precedent should legally apply.

Furthermore, court records indicate that, prior to finalization of the adoption, the adoptive father entered the neonatal intensive care unit to visit the twins with a live bird in his pocket and bird feces on his shirt. On a separate occasion, he indicated that he would drive the newborn twins back to New Jersey in his van despite the obvious fact that the twins were still dependent on ventilators and medical intensive care.⁶ Following these bizarre scenes at the hospital, further investigation found that adoption records listed the New Jersey man's Indiana residence as a temporary-stay hotel. After hospital personnel voiced concerns, child welfare workers uncovered the records completed by a child placing agency which he hired to complete the adop-

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tion for his surrogacy contract.⁷ The welfare department found that the child placing agency declared the man's Indianapolis "home" as "adequately furnished and the housekeeping standards were acceptable."⁸ Records also reported that the twin girls were created with the New Jersey man's sperm, referred to the surrogate mother as the biological mother, and stated that she was white.⁹ Child welfare authorities later disputed the information provided by the child placing agency report, thereby undermining the legality of the adoption process.¹⁰

A local court noted that both the attorney and the adoptive father "went to great lengths to circumvent" interstate adoption laws.¹¹ This case demonstrates the complexity and sheer disarray surrounding the execution of commercially arranged surrogacy contracts in the United States: (1) a South Carolina surrogate is requisitioned by a New Jersey man; (2) the source of the sperm and egg are misrepresented; (3) the contract is brokered by an Indiana attorney; and (4) the adoption is facilitated by misleading information in a court with questionable jurisdiction. Even surrogacy contract execution itself has become a nuanced process aligned with the restrictions of Indiana law. In Indiana, commercial surrogacy contracts are allowed without penalty, yet Indiana Code declares the contract itself void.¹² Despite the contract's legal nullity, parental rights in the surrogacy contract may be transferred as intended in this case through adoption, completing the arrangement despite the legal nullity of the contract. Commenting upon the discrepancies in the case, a local Indianapolis judge queried if the events in this case, which evaded state adoption processes, could constitute human trafficking and violate felony child selling laws.¹³

The case raises a number of legal and ethical issues worthy of analysis. This paper concentrates on two major legal and ethical issues. We focus narrowly on the field of fertility agencies that specialize in gestational commercial surrogacy contracts and that utilize the Internet as a means of advertising and attracting business. We define commercial surrogacy as a contractual relationship where compensation is paid to a surrogate and agency, excluding any reasonable medical, legal, or psychological expenses, in exchange for the surrogate's gestational services. We argue, first, that commercial agencies exploit the lack of uniformity in state law surrounding commercial surrogacy. Second, we review and critique how commercial surrogacy agencies attempt to reduce the financial bargaining power of potential surrogates by using both

the disparities in state law and the cultural rhetoric surrounding the value of children.

Regarding the first issue, no uniform federal legislation exists that regulates the legality or enforceability of commercial surrogacy contracts. Individual state laws are widely disparate. Michigan, for example, provides severe penalties of misdemeanors that are punishable by fines and/or prison, while Arkansas enforces valid surrogacy contracts.¹⁴ Even in Indiana, the effects of a void contract have arguably minimal significance on agencies such as the agency involved in the case above, which continues to facilitate such arrangements across a multi-state consumer base. We describe how such agencies capitalize on differences in state laws regarding commercial surrogacy which, as currently constituted, permit individuals to cir-

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cumvent the customary means of regulating interstate business contracts. The severity of the discrepancies in each state's legislative scheme and the absence of state statutory systems addressing surrogacy have created extensive legal confusion with no federal guidance. In conjunction with these vast inconsistencies in surrogacy law, surrogacy agencies utilize the Internet as a direct means of attracting surrogates and clients from across the United States, exploiting both parties in the process. This creates business across state boundaries and causes direct jurisdictional conflicts and legal confusion as illustrated in this case. Similar to other interstate business transactions, surrogacy agencies induce participation through a generous compensation package. In fact, some commercial surrogacy agencies use the Internet systematically to attract parents to their home state specifically to avoid states with unfavorable legislation.

As to the second issue, we find that surrogacy agencies attempt to manipulate both potential surrogates as well as desperate, prospective parents, in an effort to reduce each party's bargaining power in the surrogacy arrangement. Surrogacy agencies attempt to advertise commercial surrogacy as an attractive means for women to achieve validation and self-worth by performing an altruistic act. Specifically, through promises of emotional fulfillment and legal protection, Internet surrogacy agencies attract surrogates and parents alike

into interstate contracts while simultaneously exploiting the surrogates, the parents, and the law.

Jurisdictional Chaos: State Legislative Discrepancies Addressing Commercial Surrogacy

Only a portion of states have addressed the status of commercial surrogacy through legislation, and with varied conclusions.¹⁵ We briefly overview some examples of statutory schemes which discourage or disallow commercial surrogacy and outline their practical result. Unlike other interstate business transactions, which are generally regulated by a uniform federal standard that is implemented by Congress via interstate commerce principles, no federal legislation addresses commercial surrogacy.

The cases surrounding this topic focus on a variety of claims related to surrogacy contracts; however, few focused on the inequities of the parties' decision-making authority or applicable statutory schemes. Some suits mention state statutes, yet none fully addressed coercive aspects of surrogacy contracts or at best were unclear in their direction.¹⁶ Our examination of the potential for exploitation and coercion of parties to surrogate arrangements arises in the majority of jurisdictions where parties have no standing to bring a contract claim due to the state's legal voidance of the surrogacy contract or where there is a complete lack of relevant statutory guidance. The case above exemplifies this exact circumstance where there were several legal issues regarding parentage and the status of children, but the parties would not have been able to file a suit based on the contractual obligations given the legal status of the contract in Indiana (where surrogacy contracts are void). It is our view that greater specificity, uniformity, and enforcement of legislation would reduce the necessity and frequency of adjudication and provide clearer more consistent guidance for courts that are called upon to render decisions on the fate of surrogate contract participants.

Arkansas and Texas have drafted legislation to clarify the parental rights of the parents and to negate parental rights of the surrogate in order to minimize possible conflicts over determination of parentage or transference of parental rights. Arkansas defines legal parentage based on each party's intent at the time of the gestational contract.¹⁷ Absent evidence to show the contract is voidable, the law assumes each party intended the outcome of the contract: payment for gestation in exchange for parental rights following the birth. Texas focuses on transference of parental rights following birth rather than an assumption based on intent and outlines the process for voluntary relinquishment of parental rights.¹⁸ The statute specifies

each detail of the process, from the time period when parental rights must be transferred, to witnesses, and verification, which binds both the surrogate and parents. The presence of effective parentage declarations combined with the absence of statutes that limit the contractual validity has created an attractive jurisdiction for commercial gestational surrogacy contracts.

Both Kentucky and Indiana declare commercial surrogacy contracts void.¹⁹ In these states, commercial surrogacy contracts are defined as null, without legal significance. Indiana explicitly outlines the definition of a surrogacy agreement as one which induces the surrogate "to relinquish care, custody and control over the child."²⁰ Indiana further outlines that enforcing the terms of the surrogacy contract is against public policy, alluding to societal undesirability of enforcing processes that fulfill the surrogacy contract through any means, such as pre-birth payment for relinquishment.²¹ Defining the parties involved in surrogacy, Kentucky declares that no "person, agency, institution, or intermediary shall be party to a [commercial surrogacy] contract or agreement," indicating a legislative desire to prevent professional facilitation of such agreements as a business enterprise.²²

Yet agencies in both Kentucky and Indiana nevertheless advertise their services on their respective Web sites to facilitate and execute contracts contrary to the language and spirit of these statutes. In Indiana, Surrogate Mothers, Inc.'s Web site displays a flashing board of its business and legal qualifications which reads, "We have been a member of the Better Business Bureau since 1986, with no complaints filed against us."²³ As with the above case, some agencies work around this legislation by using other methods to transfer parental rights, such as the adoption process. Yet in doing so, these agencies disregard Indiana's surrogacy laws by inserting legally binding terms into the surrogacy contracts regarding the transference of parental rights in the adoption process. This seems contrary to Indiana's legislative decision, which states that enforcement of the terms of the contract, including the transference of parental rights, is against public policy.²⁴ Both Surrogate Mothers, Inc. and Kentucky's Surrogate Parenting Associates, Inc. claim they have never had a surrogate change her mind regarding relinquishment of the baby, thereby suggesting that the current legal status of surrogacy contract does not prevent surrogacy agreements from proceeding.²⁵ Nor has a party sought judicial enforcement of a surrogacy contract in either Kentucky or Indiana.

Nebraska law declares commercial surrogacy contracts void and creates a further distinction by declaring them also unenforceable.²⁶ Besides the legal nullity of the contract, this addition indicates the unwilling-

ness on the part of the legislature to force the courts to adjudicate or even recognize the parties' intentions. Yet the statute does not provide further detailed legislative history or reasoning to address the practical application of the statute specifically for the state of Nebraska.²⁷

Louisiana, Michigan, New York, and Washington have deemed commercial surrogacy contracts void, unenforceable, and against public policy, specifically providing a rationale for rejecting the legal validity or enforcement of such contracts.²⁸ Despite these additional distinctions, neither Louisiana nor Nebraska complements these declarations with any penalty, which perhaps detracts from their potential potency. While the legislatures may have intended the legal nullity and unenforceability as a self-regulating measure against contract execution, the self-proclaimed success of agencies in these jurisdictions suggests otherwise.²⁹

Several states attempt to prohibit commercial surrogacy arrangements and outline penalties aimed at dissuading involved parties. Perhaps the most extreme example of a state's desire to regulate and prohibit commercial surrogacy is Michigan. The latter provides separate penalties for participating parties of the contract, classifying such action as a misdemeanor, punishable by a fine of not more than \$10,000, not more than one year in prison, or both.³⁰ Addressing the party who "induces, arranges, procures, or otherwise assists" the parties into the surrogacy contract, Michigan classifies these actions as a felony punishable by a fine of not more than \$50,000, imprisonment for not more than five years, or both.³¹ New York imposes a civil penalty for the parties to the contract, outlining a fine of \$500 or less. The state also imposes civil consequence for the party who "induces, arranges or assists," outlining a fine of \$10,000 or less, forfeiture of the compensation and, if a repeat offender, guilty of a felony.³² Washington similarly provides a punishment for the "person, organization or agency" party to the contract or its formation with penalty of a gross misdemeanor.³³

Clearly, classification of participation in commercial surrogacy contracts as criminal conduct, as with Michigan, suggests that legislators in some states have felt morally responsible for preventing the creation or execution of these transactions. This position stands in stark contrast to the claims of Surrogacy Specialists of America in Texas and Reproductive Options, L.L.C. in Arkansas, which boast their jurisdictions' enforceability and protection of the contract.³⁴ The disparity between categorizing commercial surrogacy as criminal in one state to adamant legal enforcement in others allows the agencies operating across state lines to

utilize the law of the most supportive jurisdictions, and in this way circumvent the federal government's regulation of interstate commerce.

Altruism and the Commercial Attraction of Surrogates

The second portion of our argument is that commercial surrogacy agencies attempt to reduce the relative financial bargaining power of potential surrogates by rhetorically framing the surrogate's act as altruistic and rewarding in and of itself. Agencies attempt to attract women to participate in surrogacy agreements with various forms of compensation. As with any commercial good or service, contracts between surrogates and intended parent(s) generally stipulate the actual value of remuneration allotted for the surrogate's services. The base price paid to a first time surrogate generally ranges between \$13,000 and \$24,000 for a single birth.³⁵ Some agency Web sites provide additional payments for the cost of obtaining sperm and eggs, as well as for expenses such as maternity clothing, lost wages, and medical expenses.³⁶

Several authors have critiqued the basic exchange of money for a surrogate's services, arguing that placing a numerical price on the service creates an "industrialization of reproduction," what Debra Spar refers to as a "reproductive supermarket."³⁷ These medical facilities and legal partnerships have tailored their function to the surrogacy market and created a business enterprise in the advertising, recruitment, and facilitation of commercial surrogacy contracts. Although some agencies specify predetermined fees, other agencies allow the parties to set the fee paid to the surrogate, and many sites advertise to parents both the availability of surrogates and the ability to "negotiate" her fee. Shrybman Law Offices, P.C., for instance, offers the opportunity for the parents to work with "three to eight potential surrogates, sometimes more."³⁸ Edelmann reports a similar phenomenon, where out of 29 women who sought surrogacy arrangements, eight negotiated with two potential surrogates, three negotiated with three, and four with four different surrogates.³⁹ Surrogate Mothers, Inc. runs a price chart with a range of \$0 to \$20,000 for the surrogate's fee; however, the director indicates that the "average fee" is \$13,000.⁴⁰ Unlike other business transactions where such negotiation in an open market is expected, and payment is theoretically protected by contract law, the terms of a surrogacy contract are, in many cases, unenforceable since in Indiana and other states, surrogates have no legal avenue to ensure adequate compensation for their services in the case of a dispute involving the contract.

Despite the fact that nearly all commercial surrogacy arrangements involve compensation, studies in which

surrogates have been asked about their motivations find that most reject money as motivation for their participation.⁴¹ Even if financial motivation is a factor, only a handful of women mention money as their primary motivation for entering into an agreement.⁴² Vasanti Jadv's research involving 34 surrogates found that only one surrogate mother reported payment as a motivating factor.⁴³ Helena Ragone's interviews of surrogates demonstrated similar themes, with women stating they would not have become a surrogate simply for the money, as it is "never enough" and another woman echoing, "I'm not doing this for the money."⁴⁴

transaction. This rhetoric may serve to reduce the economic bargaining power of the surrogate by defining her motivations as altruistic. By classifying payment to the surrogate as incidental, the process uses psychological and emotional affirmation to induce surrogacy participation. However, unlike most other forms of employment, commercial surrogacy demands a consistent physical labor commitment, 24 hours a day for nine months, and – most importantly – results in the production of a human being

Investigation into the surrogates' demographic background reveals a disparity between the surrogates'

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In contrast, in the case described above, a local newspaper reported that the surrogate mother's interest in being paid for surrogacy services prompted her Internet search for agencies.⁴⁵

Several authors have offered explanations of the psychological motivations of women who participate in commercial surrogacy arrangements. Ragone suggests that participation in a surrogacy program allows surrogates to connect their domestic sphere to the public world of paid employment while reinforcing their own self-definition of being a female, a wife, and a mother.⁴⁶ As Gillian Goslinga-Roy notes, despite deflecting the importance of payment, the act of surrogacy allows surrogates to elevate the traditionally devalued reproductive parts of their identity and be conferred a special status.⁴⁷ Ragone posits that the surrogate "uses the act of reproduction as a means of removing herself from the limitations of the role traditionally assigned to women, caretaking or mothering, by simultaneously employing and transcending that reproductive role. The surrogate chooses pregnancy because she is confident it is a skill she possesses."⁴⁸ Surrogates view their role as a part-time job which enables them to stay home with their children while simultaneously achieving validation by being "employed."⁴⁹ Olga van den Akker's research confirms these notions that surrogates frame the process to produce a sense of enrichment and achievement in the surrogates. One surrogate reported that she "wanted to do something good and worthwhile," while another stated, "I felt I could and wanted to do the job well, with love, compassion and professionalism."⁵⁰ Unlike other work where payment is purely monetary, payment for commercial surrogacy is defined as a deeply emotional

actual income and that of the agency's participation requirements. Bryn Williams-Jones notes that "most surrogate mothers earn just above the poverty line," and 40 percent of surrogates are unemployed, receive financial assistance, or both.⁵¹ van den Akker reports a similar finding, stating that based on income, employment and educational attainment, most surrogates fit into the lower-middle socioeconomic class.⁵² On the other hand, Janice Ciccarelli and Linda Beckman's reviews have shown that most surrogates are white, Christian, and married with children of their own. These authors suggest that the agency screening procedures are specifically employed to prevent conspicuous exploitation of the impoverished.⁵³ The Fertility Institutes Web site portrays a view of surrogates as financially stable, and Surrogate Mothers, Inc. ensures their surrogates are "solidly middle class" and "are never motivated by financial need."⁵⁴ Furthermore, Fertility Futures lists women who receive financial assistance as a screening factor to eliminate participation in the surrogacy program.⁵⁵ Thus, the rhetoric and the reality stand in contrast. Whereas commercial agencies attempt to portray the donor as a financially stable woman motivated by altruism, a sentiment echoed by the surrogates themselves in reported studies, these same sociological studies of surrogates suggest that financial motivation may be a primary factor in the decision to participate in surrogacy; additionally, because of their financial status, commercial surrogates are susceptible to financial inducement and vulnerable to exploitation. If surrogates are relatively poor and unable to negotiate fees due to the stigma of identifying financial motivation, then they are left

without the power to adequately negotiate a fair surrogate contract.

One U.S. study of 28 surrogates from six different programs found that many surrogates firmly stated they were not involved in the process for the money and the remuneration received was “insufficient compensation for nine months of pregnancy.”⁵⁶ Rather than financial motivations, surrogates contend that participation as a surrogate is a vocation or calling to give the ultimate gift of life to another couple.⁵⁷ When elaborating upon this explanation, surrogates often express their motivations in what Ragone refers to as a “scripted” manner to reflect culturally accepted ideals of motherhood, female reproduction, and family.⁵⁸ As one surrogate conveyed, “I wanted to do the ultimate thing for somebody, to give them the ultimate gift. Nobody can beat that. Nobody can do anything nicer for them.”⁵⁹ Jadva’s research of 34 surrogates confirms this sentiment of altruism. The most common rationale provided by the surrogates for their participation reported by 91 percent was, “wanting to help.”⁶⁰ Unlike other circumstances of professional recognition where value of the profession is measured by currency and regulated by market functions, categorization of surrogacy as altruistic, both on the part of the agencies and of the surrogates, may reduce surrogates’ ability to negotiate their terms, since open disclosure of financial motivations may be viewed as socially unacceptable.

Part of the discrepancy between surrogates’ likely economic motivations and their reported denials of seeking surrogacy to obtain financial gain may be explained by our cultural belief that children are priceless.⁶¹ There is an obvious contradiction, laid bare by any surrogacy contract involving the exchange of money, between the widely held sentiment that children are priceless and the surrogate-parent contract, which stipulates a specific price for services rendered. Thus, surrogates’ responses regarding income received from any contract may represent a kind of social response bias, in which surrogates who have been interviewed feel socially pressured to provide a socially acceptable justification for their activity. The surrogates’ responses reinforce the traditional belief that children are priceless gifts, and it is somehow distasteful to place a specific monetary value on them.

Recognizing this sentiment, surrogacy agencies exploit this perception in their online material by reassuring prospective parents of the surrogates’ willingness to participate (“You will soon have that beautiful bundle of joy safe and sound at home!”) as well as making reference to surrogates’ feelings of altruism.⁶² Family Formation asserts that “in addition to feeling good about what they did, they [surrogates] were later able to make many wonderful things possible

for their families.”⁶³ Surrogacy Specialists of America, L.L.C. claims that “it takes a very special woman who desires to help a couple achieve their dream” and the Robert Nichols, Esq. P.C. agency declares that “almost every gestational carrier finds it to be one of the most rewarding experiences of their lives.”⁶⁴ The social pressure to provide surrogacy services under the cover of altruism makes it difficult to determine the actual role of financial motivation.

Attracting a Multi-State Consumer Base: Agency Inducement of Parents to the Forum

Similar to the nuanced methods of recruiting surrogates, surrogacy agencies systematically attract parents by creating an environment on their Web sites that portrays a specialized business transaction that can be performed with ease. Surrogate Mother, Inc. classifies itself under this category, advertising that it is a “full service agency,” coordinating “all medical, travel, and legal expenses” for the surrogacy process: a one stop boutique.⁶⁵ Florida’s Loving Donation similarly promotes their agency as full service and outlines how they coordinate all “Psychological, Medical, Travel, Financial and Legal procedures for you.”⁶⁶

Some agencies outline pricing lists to itemize costs for each area of service. Surrogate Mothers, Inc., Loving Donation, and Fertility Futures each provide a link which parents may click on to upload an expense roster.⁶⁷ Under the service and amount allocated, these price charts also include specific details regarding each service and precisely how the payments are spent. Surrogate Mothers, Inc. details legal expenses of \$12,500, which includes all “contract preparation; surrogate selection and monitoring; escrow account supervision; final preparation of the adoption decree, and any other legal work necessary.”⁶⁸ Recognizing other contingencies, Fertility Futures provides in even more minute detail which expenses the parents will be responsible for under the contract. Under the monthly expenses allowance for “other travel” expenses, the price chart specifies exactly which costs the parents must pay, down to the specification of miles the surrogate must travel to receive “travel expenses” when visiting her doctor.⁶⁹ Fertility Futures also allots a payment of \$2500 to the surrogate for loss of the uterus as a result of delivering the child.⁷⁰ This attention to detail and recognition of contingencies appear to suggest to prospective parents that no hidden payments may arise.

Additionally, the agencies employ the Internet to create a sense of ease to erase state boundaries in forming business relationships. Specifically, agencies use the Internet as a method to advertise their specific claims and bridge physical distances, allow-

ing consumers to select the most desirable service regardless of the consumer's location in the country. Fertility Futures advertises they are one of the "oldest and largest professional surrogacy agencies in the world"⁷¹ while Surrogacy Specialists of America claim they are the "oldest and most experienced"⁷² agency in the Southwest. Several agencies such as The Fertility Institutes operate offices in different cities (Los Angeles, Las Vegas, and Guadalajara, Mexico) to increase availability to consumers.⁷³ Several Web sites also offer toll-free hotlines which parents may call, suggesting a contract negotiation is only a free phone call away.⁷⁴ The Everything Surrogacy Web site even provides an online directory of surrogacy agencies and contact information by state, evoking the image that the surrogacy agency is simply another business listed in the yellow pages.⁷⁵ These agencies specifically open their consumer base across the United States, with not only the recognition that interstate exchanges will result, but with the direct intention to attract clients from across the United States.

Some surrogacy agencies explicitly advertise their states' favorable surrogacy laws. Family Formation states, "All of our gestational carriers reside in California, so we are able to utilize California as our forum state. This allows us to benefit from favorable laws concerning who may be declared the parents of the child and enforceability of gestational surrogacy contracts."⁷⁶ Surrogacy Specialists of America provides a similar claim: "Texas is the best jurisdiction in the U.S. for couples interested in third party assisted reproduction. With the most progressive parentage legislation of any state, court-approved 'gestational agreements' between intended parents and their gestational mothers (surrogates) are valid and enforceable in Texas."⁷⁷ Reproductive Options, L.L.C. echoes an identical inducement, stating "the Arkansas legislature enacted the first legislation that finally recognizes and supports the intent of the parties to a surrogacy contract."⁷⁸ These respective assertions attempt to allay parental doubts of legal interference in the process while promising certainty in adherence to the contractual intentions.

With payments totaling over \$65,000 for the execution and completion of the process, advertising the jurisdiction's legal standing serves specifically as a type of "product warranty."⁷⁹ Even Surrogate Parenting Associates, Inc. located in Kentucky (which declares commercial surrogacy contracts void) reassures parents their agency is dutifully operating within legal boundaries and that none of their couples have experienced legal difficulty with a surrogate mother, thereby eliminating the need for actual enforcement of the contract for parents' success.⁸⁰ Through the use of the Internet, surrogacy has become a distinct interstate

business, competitively inducing forum-shopping consumers from a multi-state and multi-national base.

A Proposal of Uniformity

In interstate business transactions defined by compensation and inducement of business across state lines, federal legislation provides some uniformity to temper disparate state legislation. For example, the National Organ Transplant Act stipulates that organ donation, also an altruistic, market-regulated activity, "shall be unlawful for any person to knowingly acquire, receive, or transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."⁸¹ This section also outlines specific penalties such as fines and/or imprisonment in order to urge adherence.⁸² Similar to the transaction of organ donation, commercial surrogacy is viewed as an altruistic act that necessarily involves transactions across state lines. Commercial surrogacy agency businesses clearly involve interstate commerce, since agencies explicitly induce parents to their forum state by promising the most supportive legislation or the best service. The commercial surrogacy process mirrors the exchange of "valuable consideration" and interstate commerce outlined for comparable transactions, yet no corresponding federal legislation exists.

Legal variation between states allows the surrogacy agencies to circumvent unsupportive jurisdictions and escape penalty. This "piecemeal and highly disparate"⁸³ approach to addressing surrogacy fuels further legal confusion and renders some jurisdictions' efforts impotent on a large scale, ultimately impacting the rights and respect of potential surrogates. The case described above demonstrates how disparate state legislation results in confusing surrogacy activities. In that jurisdiction, the Indiana legislature's attempt to undermine contractual significance by declaring commercial surrogacy contracts void failed to prevent the legal and ethical confusion in that case, thus impacting not only the potential adoptive parent but the children conceived through the process.

A range of federal regulatory solutions exists to address the current statutory discrepancies, each leading to differing results. It is our view that a uniform federal standard should be implemented, and that other existing laws, such as adoption procedures, should also be enforced. We believe that federal regulation would go a long way in preventing the kind of chaotic legal landscape which can be exploited, wherein some cases result in the coercion and artificial devaluation of the surrogates' services. We examine three different solutions – from the least to most permissive – along a spectrum of regulation, outlining the goal of the solu-

tion, providing an example of a federal scheme, and describing the likely effect of each standard. The goals of the three solutions are to provide a uniform regulatory scheme which protects all parties in the surrogacy arrangements.

The first solution would be to outlaw surrogacy arrangements brokered by commercial for-profit agencies. This proposal emphasizes the greatest possible regulation and prevention of commercial arrangements with the goal of diminishing exploitation of the current state statutory scheme and the parties involved. This solution would make surrogacy arrangements involving surrogacy fees illegal and could be codified much like Michigan's current legislative scheme. In this system, federal regulation would address each party involved in the agreement and outline prohibited action for the agency, the parents, and the surrogate. Following the model of Michigan's legislation, any agency which "induces, arranges, procures, or otherwise assists" the parties to a commercial surrogacy contract would be subject to felony prosecution, punishable by fine of not more than \$50,000, imprisonment for not more than five years, or both.⁸⁴ Similarly, such a statute must outline separate penalties for participating parties of the contract, such as the parents and surrogate, and could classify such actions as a misdemeanor, punishable by a fine of not more than \$10,000, not more than one year in prison, or both based on the Michigan model.⁸⁵ Criminalization of agency participation appears to create a strong disincentive for agency arrangement of commercial surrogacy contracts since, at least at the time of writing, there are no commercial surrogacy agencies based in Michigan which advertise their services on the Internet. Imposition of a federal standard would likely impact the interstate market in a similar manner to reduce the number of agencies which solicit commercial contracts and operate based on the profit from these arrangements. Proponents of this solution may also assert the following: elimination of payment to the agency and to the surrogate; minimization of psychological and economic coercion of surrogates; and possible assurance that surrogate participation is truly based on altruism rather than payment.

The second proposed regulatory scheme focuses on regulating the exchange of payment and prohibiting payment to the surrogate or agency above reasonable expenses. This type of statute would not criminalize commercially-brokered surrogacy arrangements, but would prohibit fees for the service. Following Florida's model, such a federal statute would permit a gestational surrogacy agreement and bind the prospective parents to pay only all reasonable living, medical, legal, and psychological expenses for the surrogate

associated with the pre-natal and post-partum periods.⁸⁶ Adopting parents would be financially responsible for all practical associated expenses such as hospital bills, maternity clothing, and travel expenses. To ensure clarity in the interpretation of the federal statute, a separate provision would explicitly prohibit the exchange of any other compensation from the parents to the gestational surrogate or to the agency. It would also forbid compensation provided to the surrogate for her gestational services and production of a child, as well as any agency fees for facilitating the arrangement. By eliminating the "additional" compensation, the inducement and manipulation of the various parties would decrease with the assumption that their actions were based on accumulating the greatest possible profit. As a method of enforcing the legislative prohibition of commercialization, a civil penalty such as a fine should be implemented against any party who infringes upon the federal statute.

An alternative and less proscriptive regulatory scheme focusing on the issue of payment would attempt to protect the surrogate and parents from agency exploitation or coercion by defining permissible payment to the surrogate above reasonable expenses and by creating an industry standard fee for agency services. This model would set a federal formula to determine reasonable compensation ascertained by each state based on a cost of living adjustment calculation. As in the previous solution, such a framework would also bind the parents by contract to pay all additional reasonable living, medical, legal, and psychological expenses for the surrogate associated throughout the pre-natal and post-partum periods. Similarly, particular costs could be assessed by region to ensure that each surrogate receives compensation for necessary services related to her gestational agreement. To mandate enforcement as in the previous solution, each party would be subject to a civil fine for over- or underpayment that deviates from the permissible range.

Such a formulaic model for determining surrogate and agency fees would eliminate coercive bargaining between the parents, surrogate, and agencies and ensure that each party under the contract is protected against unfair bargaining. Set fees would prevent bid shopping for surrogates among several prospective parents, which currently reduces surrogate bargaining power. Under this third proposal, a surrogate would not decrease her fee in an attempt to secure a gestational contract with parents claiming to have five other potential surrogates to perform the same service at a lower cost. Similarly, payment to commercial agencies would be within a prescribed range similar to other reproductive technology pricing scales determined by market factors or insurance coverage by state.⁸⁷

The fourth proposed regulatory scheme, and the most permissive, would permit commercial surrogacy arrangements by statute at the federal level, thus eliminating the state-by-state variation which is currently used in an exploitative way by commercial agencies. It also allows states to maintain their disparate adoption laws intended to protect the children resulting from the surrogacy arrangements. Such a federal statute would define the parameters of commercial surrogacy contracts and protect the parties involved from coercion or unfair practice but allow market forces to determine compensation. This standard would require each state to recognize contracts as binding and to enforce execution of contracts similar to other business transactions, as well as to provide a penalty for breach where individual performance of an act is involved. To achieve this standard, the federal mandate would supersede any existing state prohibitions on commercial surrogacy or statements of legislative rejection of contractual faith and enforcement, such as Indiana's own declaration of voidness.

A free market theory presumes that each party entering into the contract is an autonomous agent in an economic market and would possess the freedom to explore her personal and economic value decisions unhampered by legislation. Chaos from an inconsistent statutory scheme would be irrelevant since every state would uphold and enforce other states' gestational contracts. Such regulations are intended to prevent the kind of maneuvers commercial agencies currently use that may reduce the bargaining power of potential surrogates, and reduce the potential for complicated interstate arrangements, which attempt to capitalize on the laws of permissive states and circumvent the restrictive laws of others.

Conclusion

Commercial surrogacy is a matter of interstate commerce involving compensation and multi-state transactions which must be addressed on the federal level. Commercial agencies misuse popular American values to frame surrogacy participation as solely altruistic, while simultaneously limiting potential surrogates' bargaining power during these contract negotiations. Agencies' portrayal of surrogacy as a safe and secure method of procuring a baby results from their ability to effectively manipulate the legal framework for a singular commercial advantage to the agencies. As a result of state statutory disparities addressing commercial surrogacy, agencies have clustered in favorable jurisdictions and manipulate the legal framework for commercial advantage. Surrogates (and prospective parents) are left in many cases without legal recourse should disputes arise, since several states define such

contracts as null and/or void. These agencies employ Internet advertising specifically to attract parents to their selected forum state and utilize creative avenues to work around legislative attempts at undermining contractual significance, thus circumventing less permissive states.

The absence of uniform federal legislation provides fertile ground for the kind of chaotic surrogacy and adoption situations as seen in the case above. In addition to implementing a federal standard based on one of the proposed models, existing laws supporting commercial arrangements such as adoption laws are suitable for federal regulation. Uniform federal standards would prevent harmful jurisdictional-forum shopping by decreasing the possibility for agencies to exploit potential surrogates, parents, and discrepancies in the law for their own financial gain.

References

1. This paper only addresses commercial surrogacy defined where the surrogate is compensated above reasonable expenses, and agreements are facilitated by reproductive services agencies such as medical or legal facilities. All mention of surrogacy throughout this paper refers to this definition. All facts mentioned in this article with respect to case example were derived from the *Indianapolis Star* coverage unless otherwise noted.
2. K. Corcoran, "Adoption Deal Questioned," *Indianapolis Star*, July 31, 2005, at A1.
3. *Id.*
4. *Id.*
5. *Id.*; R. Holladay, "Lawyer: N.J. Man Isn't Biological Father," *Indianapolis Star*, August 7, 2005, at B1.
6. K. Corcoran, "Adoption Deal Questioned," *Indianapolis Star*, July 31, 2005. The premature twins were being cared for in the neonatal intensive care unit (NICU) during this incident. According to the *Indianapolis Star*, it would not be medically advisable to remove the twins from the NICU because one twin was breathing with the assistance of oxygen.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. K. Corcoran, "Judge Asks Feds to Review Surrogacy," *Indianapolis Star*, August 2, 2005, at A1. Each element listed is based on a local judge's professional opinion of the case as discussed in the *Indianapolis Star*.
12. IC 31-20-1-1 (1997).
13. K. Corcoran, "Judge Asks Feds to Review Surrogacy," *Indianapolis Star*, August 2, 2005; K. Corcoran, "Adoption Deal Questioned," *Indianapolis Star*, July 31, 2005, at A1.
14. M.C.L.A. 722.859 (1988); A.C.A. § 9-10-201 (1989); see also A.C.A. 9-9-207 (2005).
15. J. C. Ciccarelli and J. K. Ciccarelli, "The Legal Aspects of Parental Rights in Assisted Reproductive Technology," *Journal of Social Issues* 61, no. 1 (2005): 127-137, at 132.
16. Courts have adjudicated varied questions regarding the legal status of the contract; the enforceability of the contract; public policy issues; parentage determinations; and the best interest of the resulting child; they arrived at different results. See *Johnson v. Calvert*, 851 P.2d 776 (1993); *Surrogate Parenting Associates, Inc. v. Com. Ex. Rel. Armstrong*, 704 S.W.2d 209 (1986); *Doe v. Attorney General*, 487 N.W.2d 484 (1992).
17. A.C.A. 9-10-201 (1989).
18. V.T.C.A., Family Code § 161.103 (2003).
19. IC 31-20-1-1 to IC 31-20-1-3 (1997); KRS § 199.590 (2005).

20. IC 31-9-2-127 (1997).
21. IC 31-20-1-1 (1997). Declaring enforcement of the terms of the contract as against public policy is distinct from classifying the surrogacy contract itself against public policy as implemented by the Louisiana, Michigan, New York, and Washington statutes. By stating the entire contract is against public policy, this suggests a more fervent statement of legislative opinion.
22. KRS § 199.590 (2005).
23. Surrogate Mothers, Inc., *available at* <<http://www.surrogatemothers.com>> (last visited April 11, 2007).
24. IC 31-20-1-1 (1997).
25. See Surrogate Mothers, Inc., *supra* note 23; Surrogate Parenting Associates, Inc., *available at* <<http://www.babies-by-levin.com>> (last visited April 11, 2007).
26. Neb.Rev.St. § 25-21, 200 (1988).
27. *Id.*
28. LSA- R.S. 9:2713 (1987); M.C.L.A. 722.855 (1988); McKinney's DLR § 122 (1992); West's RWCA 26.26.240 (1989).
29. See Surrogate Mothers, Inc., *supra* note 23; Surrogate Parenting Associates, Inc., *supra* note 25.
30. M.C.L.A. 722.859 (1988).
31. *Id.*
32. McKinney's DLR § 123 (1992).
33. West's RWCA 26.26.250 (1989).
34. Surrogacy Specialists of America, *available at* <<http://www.ssa-agency.com>> (last visited April 11, 2007); Reproductive Options, L.L.C., *available at* <<http://www.geocities.com/sullivanlawfirm@sbcglobal.net>> (last visited July 12, 2006).
35. See Surrogate Mothers, Inc., *supra* note 23; Fertility Futures, *available at* <<http://www.surrogatweb.com>> (last visited April 11, 2007).
36. *Id.*
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39. R. J. Edelmann, "Surrogacy: The Psychological Issues," *Journal of Reproductive and Infant Psychology* 22, no. 2 (2004): 123-136, at 126.
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41. H. Ragone, *Surrogate Motherhood: Conception in the Heart* (Boulder: Westview Press, 1994): at 57; J. C. Ciccarelli and L. J. Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy," *Journal of Social Issues* 61, no. 1 (2005): 21-43, at 30.
42. *Id.*
43. V. Jadva et. al., "Surrogacy: The Experiences of Surrogate Mothers," *Human Reproduction* 18, no. 10 (2003): 2196-2204, at 2199.
44. See Ragone, *supra* note 41, at 57; see also B. Williams-Jones, "Commercial Surrogacy and the Redefinition of Motherhood," *Journal of Philosophy, Science & Law* 2 (2002), *available at* <http://www.psljournal.com/archives/papers/comsur_williamsjones.cfm> (last visited July 18, 2006).
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49. See Williams-Jones, *supra* note 44.
50. See van den Akker, *infra* note 52, at 150; see also Ciccarelli and Beckman, *supra* note 41, at 32.
51. See Williams-Jones, *supra* note 44.
52. O. van den Akker, "Genetic and Gestational Surrogate Mothers' Experience of Surrogacy," *Journal of Reproductive and Infant Psychology* 21, no. 2 (2003): 145-161, at 156.
53. See Ciccarelli and Beckman, *supra* note 41, at 31.
54. The Fertility Institutes, *available at* <<http://www.fertility-docs.com>> (last visited April 11, 2007); see Surrogate Mothers, Inc., *supra* note 23.
55. See Fertility Futures, *supra* note 35.
56. See Williams-Jones, *supra* note 44.
57. See van den Akker, *supra* note 52, at 146; see also Ragone, *supra* note 41, at 62.
58. See Ragone, *supra* note 41, at 52.
59. *Id.*, at 59.
60. See Jadva et. al., *supra* note 43, at 2199.
61. See Ragone, *supra* note 41, at 5.
62. Affordable Surrogacy Options, *available at* <<http://www.affordablesurrogacyoptions.com>> (last visited July 12, 2006). Between the time the paper was drafted and final review for publication, the website had been taken down.
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79. See The Fertility Institutes, *supra* note 54.
80. See Surrogate Parenting Associates, Inc., *supra* note 25.
81. 42 U.S.C.A. § 274e (1988); see also 18 U.S.C.A. § 2421 (1998) and 18 U.S.C.A. § 2422 (2003), which outline interstate regulation of prostitution, another business venture that compensates the service of the body.
82. 42 U.S.C.A. § 274e (1988).
83. See Spar, *supra* at 71.
84. *Id.*
85. M.C.L.A. 722.859 (1988).
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