Loyola of Los Angeles Law Review

Volume 53
Number 1 *Developments of the Law*

Article 5

Fall 11-1-2019

Procreative Autonomy in Gestational Surrogacy Contracts

Vanessa Nahigian

PROCREATIVE AUTONOMY IN GESTATIONAL SURROGACY CONTRACTS

*Vanessa Nahigian**

With the growing practice of gestational surrogacy, many women bear children with whom they have no genetic relationship, allowing intended parents to have children of their own when they are otherwise unable to do so. This practice, however, creates a ripple in the abortion debate. This Note addresses procreative autonomy in the context of gestational surrogacy agreements, examines the underlying constitutional interests at stake for each party involved, and suggests a solution to fill California's current statutory void.

* J.D. Candidate, May 2020, Loyola Law School, Los Angeles; B.A., International Relations and Global Business, University of Southern California, 2017. Special thanks to Professor Brietta Clark for her patience, encouragement, and invaluable guidance throughout the writing process.

TABLE OF CONTENTS

I. INTRODUCTION

Today, thousands of children in America are born to women with whom they have no genetic relationship.[1] With the help of in vitro fertilization technology, women may bear children for others, who previously could not have children of their own, through the practice of gestational surrogacy.[2] However, as the practice grows more prevalent, the legal uncertainty that comes with it amplifies.

One area of uncertainty concerns the possibility that either the surrogate or the intended parents will change their mind and seek to terminate the pregnancy. Even where a surrogacy arrangement is memorialized in contract, and despite greater regulation of such agreements, conflicts over the surrogate's right to determine whether or not to abort a pregnancy may arise and are fraught with emotion.[3]

Consider a couple that is unable to have a child of their own and enlists the help of a gestational surrogate. The parties enter into a contract that complies with the statutory requirements under current California law, and the intended mother's embryos are implanted in the surrogate. After the surrogate's pregnancy is confirmed, the intended parents experience financial loss. Unable to bear the cost of the surrogacy and the resulting child, they ask the surrogate to terminate the pregnancy, and she refuses.

Alternatively, consider a situation where the same parties enter into a valid surrogacy contract. After the surrogate's pregnancy is confirmed, she expresses intent to terminate the pregnancy for personal reasons. The intended parents oppose the abortion and attempt to require her to carry the pregnancy to term.

The current California statutory scheme for enforcing gestational surrogacy agreements is silent as to what extent the intended parents may control procreative decision making throughout the parties' contractual relationship.[4] Increasingly, parties may try to address these scenarios in the surrogacy agreement, but questions nonetheless arise

1. *See* MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA, 10–11 (2010), http://thetarrytownmeetings.org/sites/default/files/Surrogacy%20in%20America%20Report.

2. *See id.* at 3; Cook v. Harding, 190 F. Supp. 3d 921 (C.D. Cal. 2016).

3. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); C.M. v. M.C., 213 Cal. Rptr. 3d 351 (Ct. App. 2017).

4. *See* CAL. FAM. CODE § 7962 (West 2019).

about whether such provisions are enforceable.[5] Therefore, whether a contract contains provisions purporting to limit the surrogate's right to make procreative decisions, or a contract is silent on the topic, a court in either of the aforementioned scenarios would be forced to determine with which party the ultimate procreative decision should lie.

While federal and state law clearly recognizes a woman's right to procreative autonomy, which includes the right to decide whether to terminate a pregnancy,[6] the scope of this right may be less clear when the woman is a surrogate who contracted to carry another person's child. In such a scenario, both parties attempt to exercise competing procreative rights.

This Note addresses these conflicting interests in gestational surrogacy contracts and examines two gestational surrogacy scenarios: one in which the intended parents seek an abortion, and another in which the surrogate seeks an abortion. This Note analyzes the underlying protections conferred on each party and relevant jurisprudence to determine which party's interests would prevail. California law, coupled with federal law, provides maximum protection for the surrogate's right to decide whether to terminate a pregnancy, regardless of the intended parents' wishes or a contractual obligation. This likely forecloses any legislative or contractual attempt to limit this right. Nonetheless, this Note proposes that California amend its statute to address the current regulatory void, which creates uncertainty about liability for breach of contract in the event a surrogate's decision conflicts with the intended parents' expectations, which can undermine surrogacy arrangements and potentially allow de facto coercion of the surrogate despite her legal rights.

Part II of this Note describes the development of surrogacy law in California, including its statutory scheme for the enforcement of surrogacy contracts. Part III examines the various constitutional interests at stake in conflicts between surrogates and intended parents, including procreative autonomy, bodily integrity, and the right against involuntary servitude, and applies those principles to the gestational surrogacy scenarios.

Finally, Part IV proposes that the California legislature should clarify current surrogacy law and adopt the 2017 Uniform Parentage

5. Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L.Q. 29, 33–34 (2015).

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

Act, while recognizing the potential shortcomings of the act as it attempts to protect the procreative rights of the surrogate. The prominence of surrogacy has complicated the concept of motherhood and the rights associated. Thus, clarification of those rights in the context of gestational surrogacy is necessary to minimize disputes, protect the parties involved, and further the practice as a whole.

II. HISTORY AND DEVELOPMENT OF SURROGACY LAW

A. The Growing Practice of Gestational Surrogacy

The concept of surrogacy is hardly a novel one, as stories of surrogacy date back to biblical times.[7] In the book of Genesis, Sarah could not bear children for her husband, Abraham.[8] The couple turned to their servant, Hagar, to bear Abraham's child, and by her, Ishmael was born.[9] This is perhaps the first story of a "traditional" surrogacy, in which the surrogate mother agrees to become impregnated using her own egg.[10] In this context, the surrogate is the "biological, genetic, and gestational mother" of the child.[11] The more modern term for this type of surrogacy is "genetic surrogacy," which is defined by the California legislature as "a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents."[12]

With the help of assisted reproductive technology, however, surrogates may bear children with whom they have no genetic relationship.[13] The practice of surrogacy has drastically evolved with the invention of in vitro fertilization technology (IVF).[14] IVF is believed to be the most effective form of assisted reproductive technology in which mature eggs are fertilized in a lab and implanted in the uterus.[15] The process is used to treat infertility and genetic

7. *Cook*, 190 F. Supp. 3d at 926.
8. *Genesis* 16:2.
9. *Genesis* 16:15.
10. GUGUCHEVA, *supra* note 1, at 6.
11. *Id.*
12. CAL. FAM. CODE § 7960(f)(1) (West 2016).
13. Cook v. Harding, 190 F. Supp. 3d 921, 926 (C.D. Cal. 2016); *see* GUGUCHEVA, *supra* note 1, at 6.
14. *Cook*, 190 F. Supp. 3d at 926.
15. *In Vitro Fertilization (IVF)*, MAYO CLINIC (June 22, 2019), http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905.

problems, but is also used to implant fertilized eggs into a gestational carrier.[16] By this process, intended parents, who are otherwise unable to have their own child, may do so through a gestational carrier.[17] This is referred to as "gestational surrogacy," a term also adopted in California's statutory scheme, and defined as a woman "who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement."[18] California's regulatory scheme refers specifically to gestational carriers, and California courts have interpreted the legislature's failure to mention traditional surrogacy as an indication that traditional surrogacy agreements will not be protected under the law.[19]

While the statistics tracking gestational surrogacy are limited, they reveal that the market for these arrangements is growing exponentially with no signs of slowing.[20] The number of babies in America born via gestational surrogacy doubled between 2004 and 2008, resulting in a total of 5,238 babies.[21] The Center for Disease Control and Prevention estimates that, as of 2007, 19,218 births in California and 137,482 births nationwide have resulted from gestational surrogacy agreements.[22] These statistics continue to rise, despite the risks involved with gestational surrogacy agreements.[23]

In addition to those commonly associated with pregnancy, there are many other potential health risks that come with gestational surrogacy.[24] Throughout the IVF process, surrogates undergo intensive hormonal treatments, which makes it more likely that the surrogate will suffer from harmful side effects.[25] Furthermore, it is common practice during IVF to implant multiple embryos in order to

16. *Id.*

17. *Id.*

18. CAL. FAM. CODE § 7960(f)(2) (West 2016).

19. *Cook*, 190 F. Supp. 3d at 927 n.7; UNIF. PARENTAGE ACT art. 8 (UNIF. LAW COMM'N 2017). In fact, only a very small minority of states expressly allow and statutorily protect traditional, or genetic, surrogacy agreements. UNIF. PARENTAGE ACT art. 8. Those states that do allow the practice distinguish it from gestational surrogacy, impose further restrictions, and allow the surrogate to withdraw consent to the agreement after impregnation. *Id.* (citing D.C. CODE § 16-411 (2017) (permitting withdrawal of consent forty-eight hours after birth) and FLA. STAT. § 63.213 (2012) (permitting withdrawal of consent forty-eight hours after birth)).

20. *See* GUGUCHEVA, *supra* note 1, at 7.

21. *Id.*

22. *Id.* at 10–11.

23. *See, e.g.*, Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435, 435 (2016).

24. GUGUCHEVA, *supra* note 1, at 17–19.

25. *Id.* at 21–22.

improve pregnancy chances, which often results in multiple pregnancies.[26] This heightens the risks associated with pregnancy generally, and threatens the health of the babies that result, as 60 percent of multiple pregnancy babies are delivered prematurely.[27]

Unfortunately, the above-mentioned risks are not the only complications that gestational surrogates face—in conjunction with health risks, there is considerable potential for significant financial and legal liability as well. While legal representation is required for both parties to a surrogacy contract, many surrogates do not have the financial resources for independent counsel; they risk facing the burden of expensive medical procedures, and in some extreme cases, an unwanted child.[28] Despite these risks, parties continue to enter into surrogacy contracts with limited legal protection, leading to conflicts that courts are forced to resolve.

B. California's Legal Framework for Gestational Surrogacy

For the first time, in 1993, the California Supreme Court held that gestational surrogacy agreements are enforceable.[29] The decision came in *Johnson v. Calvert*,[30] in which a married couple entered into a gestational surrogacy contract with another woman.[31] After relations between the parties deteriorated, the surrogate mother threatened to keep and raise the child herself.[32] The intended parents then filed a lawsuit seeking a declaration that they were the legal parents of the unborn child.[33] The *Johnson* court, relying on the Uniform Parentage Act (UPA), found that the surrogate was not the natural mother of the child and granted legal parentage to the intended parents.[34]

California adopted the UPA in 1975.[35] The UPA defined the parent and child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and

26. *Id.* at 23.
27. *Id.*
28. CAL. FAM. CODE § 7962 (West 2019); GUGUCHEVA, *supra* note 1, at 23–24.
29. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
30. 851 P.2d 776 (Cal. 1993).
31. *Id.* at 777–78.
32. *Id.* at 778.
33. *Id.*
34. *See id.*
35. *Id.* at 778–79.

obligations."[36] The UPA created a legal relationship encompassing two types of parents, "natural" and "adoptive."[37] The UPA clearly did not contemplate the existence of gestational parentage, which was made a reality by the development of IVF technology, in gestational surrogacy arrangements.[38] However, the *Johnson* court stated that the UPA facially applies to any parentage determination, including that of motherhood.[39] The court concluded:

> [A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[40]

Thus, the intended mother, or "natural mother," was granted legal parentage.

The court in *Johnson* further held that the agreement was not, on its face, inconsistent with public policy so as to be unenforceable.[41] The surrogate mother argued that the contract violated adoption policies because it constituted a pre-birth waiver of her parental rights.[42] The court was unpersuaded, however, and found that the payments under the contract were meant to compensate the surrogate for her "services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child."[43]

The surrogate and commentators further argued that the contract was unenforceable on several public policy grounds. One argument contended that such contracts tended to "exploit or dehumanize women," particularly those of lower economic status.[44] The court, finding the contrary, reasoned:

---

36. *Id.* at 779.
37. *Id.*
38. Cook v. Harding, 190 F. Supp. 3d 921, 926 (C.D. Cal. 2016).
39. *Johnson*, 851 P.2d at 779.
40. *Id.* at 782.
41. *Id.* at 783.
42. *Id.* at 783–84 ("[The surrogate] urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting the payment for consent to adoption of a child. She argues further that the policies underlying the adoption laws of this state are violated by the surrogacy contract because it in effect constitutes a pre-birth waiver of her parental rights.").
43. *Id.* at 784.
44. *Id.*

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.[45]

In deciding the case, the court in *Johnson* acknowledged that the California legislature ultimately bears the burden of resolving this issue.[46] The landmark decision in *Johnson* laid the groundwork for the legislature to do so in 2012, when it passed California Family Code section 7962.[47]

1. Section 7962

California Family Code section 7962 presently governs gestational surrogacy contracts in California and provides certain specifications to make those contracts enforceable.[48] The statute requires that such contracts contain the following information:

1. The date the contract was executed;
2. The names of the persons from which the gametes (ova and sperm) originated, unless anonymously donated;
3. The name(s) of the intended parent(s); and
4. Disclosure of how the medical expenses of the surrogate and the pregnancy will be handled, including a review of applicable health insurance coverage and what liabilities, if any, that may fall on the surrogate.[49]

It further requires that both the intended parents and surrogate are represented by independent legal counsel and that the agreement must be fully executed in accordance with the statute before any medical preparation or embryo transfer.[50] Upon proof that the agreement complies with section 7962, the court will establish legal parentage of

45. *Id.* at 785.
46. *Id.* at 784.
47. *See* CAL. FAM. CODE § 7962 (West 2019); Cook v. Harding, 190 F. Supp. 3d 921, 925 (C.D. Cal. 2016).
48. CAL. FAM. CODE § 7962.
49. *Id.*
50. *Id.*

the intended parents and terminate all rights and duties of the surrogate without further hearings or evidence, unless a party to the agreement has a good faith, reasonable belief that the contract was not properly executed.[51]

Notably, the statute fails to provide a framework for determining the rights of the surrogate or intended parents to make important healthcare decisions, especially in the event of a conflict.[52] Further, the statute is silent as to the parties' rights to make procreative decisions, as well as the extent to which the surrogacy contract can limit a party's procreative decision making.[53] Recent disputes have exemplified the need for clarity in this area.

2. Abortion Disputes in Surrogacy Contracts

In a recent California case, *C.M. v. M.C.*,[54] an intended father sought the help of a career surrogate to have children.[55] Due to the surrogate's age of forty-seven, three fertilized embryos were implanted in the surrogate at the request of the intended father, and the surrogate became pregnant with triplets.[56] The relationship between the two deteriorated quickly after the intended father requested that the surrogate abort one of the fetuses, otherwise known as a "selective reduction."[57] The surrogate refused, and the intended father alleged that by refusing to reduce, she was in breach of contract and liable for damages thereunder.[58]

This specific issue was not brought before the California courts, and the intended father filed the requisite paperwork to establish his legal parentage.[59] In response, the surrogate filed claims in both state and federal courts, claiming that section 7962 violated her and the babies' due process rights and violated state and federal laws.[60] Ultimately, she sought "the end of recognized, binding surrogacy contracts in the State of California."[61] Both the state and federal courts

51. *Id.*
52. *Id.*
53. *See id.*
54. 213 Cal. Rptr. 3d 351 (Ct. App. 2017).
55. *Id.* at 354.
56. Cook v. Harding, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016).
57. *Id.* at 928–29.
58. *Id.* at 929.
59. *Id.*
60. *Id.*
61. *Id.* at 932.

dismissed the surrogate's claims, with the California Court of Appeal finding that the agreement complied with statutory requirements, thereby precluding the surrogate's claims.[62]

The intended father's claim that the surrogate's refusal to comply with his request for selective reduction constituted a breach of contract begs the question of whether decisions regarding termination of pregnancy can be contracted to. This dispute embodies the sensitive nature of surrogacy agreements and the many issues that can arise.

In practice, surrogacy contracts typically contain provisions governing the termination of the pregnancy, which commonly address anticipated issues, such as birth defects or a multiple pregnancy.[63] For example, in a Connecticut case concerning a surrogate's refusal to terminate a pregnancy, the contract in question contained the following provision:

> Abortion and Selective Reduction due to severe fetus abnormality: The Gestational Carrier agrees to selective fetus [sic] reduction or/and abortion in case of severe fetus [sic] abnormality as determined by 3-dimentional [sic] ultrasound test with following pathology expertise, or by any other procedure or test(s) used to diagnose sever[sic] fetus abnormality.[64]

Further, the contract purportedly limited the surrogate's right to terminate the pregnancy to life-threatening situations.[65] This is also common, as surrogacy contracts typically purport to preclude abortion without the consent of the intended parents.[66] While practitioners generally advocate for the inclusion of such clauses, questions remain as to whether such clauses are enforceable by specific performance or whether breach of these clauses would create liability for damages.[67]

These examples show that the right to terminate a pregnancy becomes increasingly complex in the context of gestational surrogacy agreements. When multiple parties are necessary to produce a child, procreative rights can conflict between those parties. California surrogacy law does not address this kind of conflict. In fact, the court

62. *See* C.M. v. M.C., 213 Cal. Rptr. 3d 351, 354 (Ct. App. 2017); *see also Cook*, 190 F. Supp. 3d at 925 (dismissing the surrogate's claims with prejudice).

63. Forman, *supra* note 5, at 33–34.

64. Forman, *supra* note 5, at 34.

65. *Id.*

66. *Id.*

67. *Id.*

in *Johnson* stated that it "need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy," because the contract at issue specifically reserved the surrogate's right to terminate the pregnancy.[68] In light of the increasing market for gestational surrogacy, as well as recent disputes, California courts and lawmakers will inevitably be forced to make a decision regarding whose rights prevail in the event that one party seeks an abortion at the objection of the other. Specifically, they must decide whether the intended parents may enforce a gestational surrogacy agreement by requiring the surrogate to submit to an abortion against her will, or conversely, may enjoin the surrogate from obtaining an abortion.

III. PROCREATIVE RIGHTS IN GESTATIONAL SURROGACY CONTRACTS

A. Relevant Constitutional Interests at Stake in Conflicts Between the Surrogate and Intended Parents

In 1942, the Supreme Court recognized the right to procreate as a fundamental human right in *Skinner v. Oklahoma ex rel. Williamson*.[69] The Supreme Court later acknowledged a woman's right to procreative autonomy as vital to the right of privacy under the Constitution in its landmark decision in *Roe v. Wade*.[70] The California courts and legislature have further expanded this right to provide even broader protections of procreative autonomy.[71] Thus, California citizens enjoy the protection of both the rights to procreate and not to procreate.

Surrogacy arrangements are a means to exercise one's right to procreate. However, when one party seeks to terminate the ensuing pregnancy, but the other does not, the constitutional interests of both parties compete. Thus, in order to determine which party should retain the right to choose whether to terminate the pregnancy, the question becomes which party's rights prevail over the other's. This inquiry encompasses procreative autonomy, bodily integrity, and risks against involuntary servitude. Further, the analysis depends on which party seeks to terminate the pregnancy.

68. Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).
69. *See* 316 U.S. 535, 541 (1942).
70. 410 U.S. 113, 153 (1973).
71. *See* Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 800–05 (Cal. 1997).

1. Procreative Autonomy

In *Roe v. Wade*, the Supreme Court of the United States overturned a Texas law that effectively banned abortions in all but life-threatening situations and recognized that the right of privacy, implicit in the Constitution, encompasses a woman's decision to terminate her pregnancy.[72] This central holding in *Roe* was later affirmed by the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[73] which adopted a clear test for assessing the constitutionality of state laws that regulate abortion.[74] The Court recognized that the state has a profound interest in potential life and accommodated that interest by adopting the "undue burden" analysis, which makes a law invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[75]

While the decision in *Casey* narrowed the *Roe* holding at the federal level, California courts have adhered to an abortion framework more consistent with the decision in *Roe*.[76] In *American Academy of Pediatrics v. Lungren*,[77] the California Supreme Court noted that the California Constitution contains, in article I, section 1, an explicit guarantee of the right to privacy, which is markedly broader than that provided by the United States Constitution.[78] Thus, in the gestational surrogacy scenario, the surrogate retains an even broader protection of procreative autonomy under California law.

a. Subjecting procreative decisions to third parties

Importantly, the courts in both *Casey* and *Lungren* examined the constitutionality of statutes that condition the right to receive an abortion on the consent of a third party.[79] These decisions have significant implications in the context of gestational surrogacy.

Courts have repeatedly been faced with the question of whether a woman's procreative decisions may be subject to an approval or veto

72. *Roe*, 410 U.S. at 154, 164.
73. 505 U.S. 833 (1992).
74. *See id.* at 878–79.
75. *Id.* at 878.
76. *See Lungren*, 940 P.2d at 808.
77. 940 P.2d 797 (Cal. 1997).
78. *Id.*
79. *See Casey*, 505 U.S. at 893–95 (finding statutes requiring spousal notification unconstitutional); *Lungren* 940 P.2d at 800.

by another party, such as the pregnant woman's spouse, or the parents of a pregnant minor.[80] The Court in *Casey* stated:

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[81]

The *Casey* Court addressed statutes requiring spousal approval and categorically held that spousal notification or consent provisions are likely to prevent a significant number of women from obtaining an abortion, creating an undue burden.[82] However, the Court reaffirmed that a state may require a minor seeking an abortion to obtain the consent of a parent or a judicial bypass of such a requirement.[83]

In contrast, the California Supreme Court, applying its broader protection of the right of privacy, struck down a law requiring parental consent in *Lungren*.[84] The court in *Lungren* noted that a provision that would condition a woman's right to obtain an abortion on the consent of another person, spouse or otherwise, "clearly would intrude upon the woman's right, as an individual, to retain personal control over the fundamental autonomy interests involved in the decision whether to continue or to terminate her pregnancy."[85] Thus, significantly, California's broad protection of procreative autonomy precludes other parties from controlling abortion decisions.

b. Extending procreative autonomy to non-pregnant parties

The protection of procreative autonomy was originally recognized in the context of a woman who was pregnant or would become pregnant.[86] Some state courts have, however, extended that protection to parties other than a pregnant woman.[87] This is especially

80. *See Casey*, 505 U.S. at 893–95; *Lungren*, 940 P.2d at 800.
81. *Casey*, 505 U.S. at 877.
82. *Id.* at 893.
83. *Id.* at 899.
84. *See Lungren*, 940 P.2d at 814.
85. *Id.* at 813.
86. *See* Roe v. Wade, 410 U.S. 113, 120–21 (1973).
87. *See In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018); *see also* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that the preferences of both progenitors must be considered when resolving disputes regarding the pre-embryos produced by in vitro fertilization).

prevalent in the context of pre-embryo disposition cases.[88] For example, in *In re Marriage of Rooks*,[89] a married couple had cryogenically preserved pre-embryos for the purpose of impregnating the wife through IVF but never made an agreement as to the disposition of those embryos in the event that they divorced.[90] When the couple did later file for divorce, they battled over the use of those pre-embryos.[91] The wife, believing she could no longer have children naturally, sought to preserve the pre-embryos for future implantation, whereas the husband wished to discard them, as he did not want more children from the marriage.[92] The Supreme Court of Colorado acknowledged the difficulty of resolving the dispute, noting that "it pits one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation."[93] The court held that, absent an agreement between the parties, courts should follow an interest balancing approach to determine the disposition of the pre-embryos, noting that this approach is informed by the underlying principle of autonomy over reproductive decisions.[94] Significantly, under this framework, the court gave equal weight to one party's right not to procreate and the other party's right to procreate, stating that both spouses have equally valid, constitutionally based interests in procreative autonomy.[95]

In *Davis v. Davis*,[96] the Supreme Court of Tennessee followed this approach in a similar dispute, in which, after divorce, the wife sought to use pre-frozen embryos against the will of her husband.[97] In adopting the interest balancing test, the court noted that procreative autonomy is "composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[98] Because the court treated the rights as equal, it considered the effects and subsequent burdens of barring each party's procreative autonomy.[99] The court

88. *See In re Marriage of Rooks*, 429 P.3d at 581; *Davis*, 842 S.W.2d at 604.
89. 429 P.3d 579 (Colo. 2018).
90. *Id.* at 581–83.
91. *Id.* at 583.
92. *Id.*
93. *Id.* at 581.
94. *Id.* at 593.
95. *See id.* at 594.
96. 842 S.W.2d 588 (Tenn. 1992).
97. *Id.* at 589.
98. *Id.* at 601.
99. *Id.* at 603–04.

considered the use to which the parties intended to put the embryos, and contemplated the fact that the wife did not intend to use the embryos for self-implantation, but rather sought to donate them to another couple.[100] The court stated that refusal to permit the donation of the pre-embryos would impose on the wife the burden of knowing that the lengthy IVF process she endured was futile, and that her pre-embryos would never become children.[101] While recognizing that this was a substantial emotional burden, the court found that it was not as substantial as the husband's interest in avoiding parenthood.[102] Ultimately, the husband was awarded custody of the pre-embryos; however, the court noted that the case would have been different if the wife wished to use the pre-embryos herself, but only if she could not otherwise achieve parenthood.[103]

While California courts have yet to address this issue, the court in *Hecht v. Superior Court*[104] relied on *Davis* in other regards, and noted that the *Davis* balancing test would be pertinent if conflicting intent was present as to the disposition of pre-embryos.[105] In a surrogacy scenario, this is significant when the intended parents seek to terminate the pregnancy, as was the case in *C.M. v. M.C.*, when the intended father attempted to assert a right not to procreate by requesting that the surrogate terminate one of the three pregnancies.[106]

2. Bodily Integrity

In addition to procreative autonomy, the right to bodily integrity is crucial to the discussion of the right to choose whether to terminate a pregnancy. This fundamental right guarantees to every individual "the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[107] It thus effectively protects a person from being forced to undergo any medical or surgical procedure against his or her will.[108]

100. *Id.* at 604.
101. *Id.*
102. *Id.*
103. *Id.*
104. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
105. *See id.* at 858–59 n.9 (relying on *Davis* as to the characterization of preserved sperm and noting that, while it was premature to rely on the *Davis* interest balancing test, the test would be pertinent if the intent of the parties conflicted).
106. *See* C.M. v. M.C., 213 Cal. Rptr. 3d 351, 356 (Ct. App. 2017).
107. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).
108. *See id.* at 257.

In *Union Pacific Railway Co. v. Botsford*,[109] the Supreme Court recognized the right to bodily integrity and held that a woman could not be forced to undergo a surgical examination.[110] Similarly, the court in *McFall v. Shimp*[111] refused to order the defendant to donate bone marrow in order to save the plaintiff's life, stating that "[t]he common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue."[112] The right to bodily integrity has been further recognized by the California Supreme Court in *Thor v. Superior Court*,[113] which held that an inmate could not be forced to undergo lifesaving medical treatment after making a competent, informed decision to refuse such treatment.[114] The right to bodily integrity is especially significant in the context of a gestational surrogacy contract, where the surrogate provides a service with her body.

B. Application of These Principles in Each Conflict Scenario

1. A Surrogate's Right to Deny an Abortion

Consider the scenario in which the intended parents wish to terminate the pregnancy, but the surrogate refuses. Here, there are several competing interests at stake. While the intended parents may argue that they have a right not to procreate, the surrogate has a competing right to bodily integrity.[115]

a. The intended parents' right not to procreate

In this scenario, the situation can be compared to the aforementioned pre-embryo disposition disputes, where courts have deemed the right to procreate equal to the right not to procreate.[116] If the procreative autonomy rights of the intended parents are considered equal to that of the surrogate's, a California court resolving this

109. 141 U.S. 250 (1891).
110. *Id.* at 251.
111. 10 Pa. D. & C.3d 90 (1978).
112. *Id.* at 91.
113. 855 P.2d 375 (Cal. 1993).
114. *See id.* at 386–87.
115. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976); *In re* Marriage of Rooks, 429 P.3d 579, 586–87 (Colo. 2019); *see also In re* A.C., 573 A.2d 1235, 1245 (D.C. 1990) (noting that the right to bodily integrity inludes the right to refuse medical treatment).
116. Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

dispute may turn to balancing the interests of the parties. Under this test, a court may find that the intended parents' interests outweigh the surrogate's, as she has no genetic relationship to the fetus and, thus, does not have a parentage interest, like the wife in *Davis*.[117]

However, this dispute is necessarily complicated by the fact that the opposing party in this scenario is pregnant and "disposal" in this context would mean the termination of the pregnancy, a reality which the *Davis* balancing interests test does not confront. In fact, the court in *Davis* qualified the apparent "equivalence" of the parties' procreative autonomy by recognizing that, in this pre-embryo context, "none of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."[118] With surrogacy, these concerns about a woman's bodily integrity are in fact applicable. Accordingly, if courts impute the right not to procreate onto the intended parents in this situation, this right must be balanced against the right to bodily integrity of the pregnant surrogate.

b. A surrogate's right to bodily integrity

The right to bodily integrity works to protect the surrogate from being subject to unwanted medical procedures, including abortion. As the court noted in *Davis*, this right has "previously precluded men from controlling abortion decisions."[119] Thus, it is essential to consider this protection against the intended parents' right to avoid procreation. The law places an extreme importance on the right to bodily integrity; however, as the court noted in *Thor*, while the right to bodily integrity is fundamentally compelling, it is not absolute.

This notion that bodily integrity is not absolute has been particularly prevalent in maternal-fetal decision-making cases.[120] While California courts have not directly addressed the issue in the context of maternal-fetal decision-making, cases from other states guide the assumption that, in order to overcome the right to bodily integrity, the state's interests must be extraordinarily substantial.[121] For example, in *Jefferson v. Griffin Spalding County Hospital*

117. Cook v. Harding, 190 F. Supp. 3d 921, 926–27 (C.D. Cal. 2016).

118. *Davis*, 842 S.W.2d. at 601.

119. *Id.*

120. *See* Thor v. Superior Court, 855 P.2d 375, 383 (Cal. 1993); *In re* A.C., 573 A.2d at 1242–43; Jefferson v. Griffin Spalding Cty. Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981).

121. *See In re A.C.*, 573 A.2d at 1246; *Jefferson*, 274 S.E.2d at 458.

Authority,[122] the Supreme Court of Georgia denied a motion to stay an order which ordered a pregnant woman to submit to a cesarean section, considered necessary to save the life of the unborn child, despite her lack of informed consent.[123] The court found that the state's interest in protecting the life of the unborn child outweighed the interests of the mother, where the operation would not be dangerous to the mother.[124]

In a similar case, the court in *In re A.C.*[125] noted that fetal cases may present an exception to the right to bodily integrity because a woman who has chosen to carry a pregnancy to term has a duty to ensure the welfare of the fetus.[126] While the court did not ultimately decide the issue of when the state's interest can prevail over the mother's interest, it noted that a patient's wishes should control in virtually all circumstances, except in such a situation with truly extraordinary or compelling reasons to "justify a massive intrusion into a person's body, such as a cesarean section, against that person's will."[127]

Here, the intended parents' right to procreate competes with the surrogate's right not to procreate and right to bodily integrity. Thus, the issue is whether the state may constitutionally deny the surrogate's right to terminate the pregnancy in favor of the intended parents' right to procreate by enforcing a contractual provision or resolving the dispute in a way that effectively strips the surrogate of the right to obtain an abortion.

c. The intended parents' right to procreate

As mentioned above, the Supreme Court recognized the right to procreate as a fundamental right in *Skinner*, when it struck down an Oklahoma law ordering the sterilization of habitual criminals.[128] Additionally, when the California Supreme Court approved gestational surrogacy contracts in *Johnson*, it gave legal protection to those enlisting the help of surrogates in order to exercise that right to procreate.[129] However, California law remains silent on the strength

122. 274 S.E.2d 457 (Ga. 1981).
123. *Id.* at 460.
124. *Id.*
125. 573 A.2d 1235 (D.C. 1990).
126. *Id.* at 1244.
127. *Id.* at 1252.
128. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536 (1942).
129. Johnson v. Calvert, 851 P.2d 776, 786 (Cal. 1993).

of that right in order to control the decisions of the surrogate during gestation.

In its decision in *Johnson*, the court used a parentage framework to determine the enforceability of the surrogacy contract at hand.[130] The court applied the UPA in order to determine the "natural mother" of the child that resulted from the surrogacy arrangement.[131] The court recognized that the intended mother was the natural mother of the child, reasoning:

> [A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[132]

The court's recognition that the natural mother is the party who intended the procreation, and is thus the party exercising her right to procreate, seems to suggest that she may retain the right to make procreative decisions throughout the gestational period, including the decision of whether to terminate the pregnancy. However, the later codification of the case in section 7962 is silent as to the intended parents' rights throughout gestation.[133]

California Family Code section 7962 sets forth the contractual elements necessary to establish legal parentage of the child.[134] Importantly, the statute is silent as to the intended parents' relationship to the fetus during gestation, and only concerns the custody of the resulting child.[135] The statute does not expressly confer a right to make procreative decisions throughout the gestational period to the intended parents.[136] This may be construed to mean that the intended parents' rights regarding the child do not materialize until the birth of the child, and consequently, the power to decide whether to terminate the pregnancy remains with the surrogate. However, given the lack of clarity on the matter, the statute sheds little light as to whether the

130. *Id.* at 89.
131. *Id.* at 90.
132. *Id.* at 93.
133. CAL. FAM. CODE § 7962 (West 2019).
134. *Id.*
135. *Id.*
136. *Id.*

intended parents retain the power of procreative decision making. Consequently, this analysis turns on whether the state may constitutionally enforce the intended parents' decision on the matter.

d. A surrogate's procreative autonomy and bodily integrity

The position of the intended parents in this scenario can be likened to that of a pregnant woman's spouse seeking to veto an abortion, as both parties may attempt to assert their right to procreate. As noted, the California Supreme Court held in *Lungren* that a statute that restricts a pregnant individual's ability to decide on her own whether to continue or to terminate her pregnancy unquestionably implicates a constitutionally protected privacy interest.[137] By categorically striking down any statute that would require spousal approval before abortion, it can be understood to mean that California courts implicitly recognized that a pregnant woman's right to terminate her pregnancy outweighs her spouse's right to procreate. Thus, it follows that a surrogate's right to terminate her pregnancy should not be conditioned on the approval of the intended parents under California law.

Further, the right to bodily integrity is also significant here. As previously discussed, surrogates face many health risks that accompany the complicated IVF process, in addition to those normally associated with pregnancy. The court in *Lungren* emphasized that the right to choose whether to "terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health" and "her interest in retaining control over the integrity of her own body."[138] Therefore, this right encompasses a surrogate's interest in being free from health risks and bodily changes associated with the gestational surrogacy process.

e. Waiving procreative rights

Intended parents in this scenario may argue that, by virtue of entering into a binding gestational surrogacy contract, the surrogate has waived her broad right to privacy as protected by the United States and California Constitutions. It is important to consider the underlying rationales applied by the federal and California courts in establishing

137. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 814 (Cal. 1997).
138. *Id.* at 813.

a pregnant woman's right to an abortion. For example, in categorically striking down the spousal veto, the Court in *Casey* emphasized the dangers such a requirement would pose, namely, the dangers of domestic abuse.[139] The Court noted that many women who are subject to psychological and physical abuse at the hands of their husbands have "very good reasons for not wishing to inform their husbands of their decision to obtain an abortion."[140] Importantly, the Court also declared that when a woman marries, she does not lose her constitutionally protected liberties.[141]

However, these concerns may not be present in the case of gestational surrogacy, in which the parties have a contractual relationship premised on producing a child. While it is possible that a surrogate may suffer abuse at the hands of the intended parents, especially if the relationship between the parties has soured, it is less plausible that she has good reasons for not wishing to inform them of the abortion, seeing as this would effectively terminate the contractual relationship between the parties. Thus, an intended parent veto may not fall within the same vein as the spousal veto. However, it is important to note how such a veto power would manifest itself.

f. Risks of involuntary servitude

If the intended parents are vested with a "veto" power, the surrogate may be forced to unwillingly carry a pregnancy to term. Such a situation would run afoul of public policy considerations that have driven concern over surrogacy contracts.

Among other public policy arguments, the court in *Johnson* confronted the argument that gestational surrogacy contracts may violate "prohibitions on involuntary servitude," contained in both the United States and California Constitutions.[142] "Involuntary servitude has been recognized in cases of criminal punishment for refusal to work," or compulsory service in payment of a debt.[143] The Ninth Circuit articulated that "[t]he essence of a holding in involuntary servitude is the exercise of control by one individual over another so

139. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897, 901 (1992).
140. *Id.* at 893.
141. *Id.* at 898.
142. Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (citing U.S. CONST. amend. XIII; CAL. CONST. art. I, § 6).
143. *See* Bailey v. Alabama, 219 U.S. 219, 243 (1911).

that the latter is coerced into laboring for the former."[144] Thus, the freedom to choose whether or not to work is important to consider in determining whether involuntary servitude is at issue.

In the context of surrogacy contracts, once the surrogate is impregnated, it is possible that she would choose not to complete the service and terminate the pregnancy. Stripping her of the choice to terminate the pregnancy would strip her of the freedom to choose whether to perform, thereby subjecting her to involuntary servitude. While the *Johnson* court found that surrogacy contracts did not facially violate prohibitions on involuntary servitude, it noted:

> [A]lthough at one point the contract purports to give [the intended parents] the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.[145]

This language, in conjunction with the court's discussion concerning involuntary servitude, suggests that a surrogacy arrangement that deprives the surrogate of her right to terminate the pregnancy would, in fact, violate prohibitions against involuntary servitude.

While the intended parents have a right to procreate, and California law allows them to enlist the help of surrogates in doing so, the competing rights of the surrogate weigh in favor of granting her the choice to decide whether to terminate the pregnancy. A decision to the contrary would violate her right to privacy, broadly protected by the California Constitution, and subject her to conditions tantamount to involuntary servitude.

IV. THE FUTURE OF CALIFORNIA'S GESTATIONAL SURROGACY STATUTORY SCHEME

While California's surrogacy statute legitimizes the practice of gestational surrogacy, it does not address any rules that may apply in the event of a surrogate's termination, or refusal to terminate, the

144. United States v. Mussry, 726 F.2d 1448, 1452 (9th Cir. 1984).
145. *Johnson*, 851 P.2d at 784.

pregnancy.[146] The parties' contract may purport to limit such decisions; however, the preceding analysis demonstrates that such a contractual term would likely be unenforceable. Given the increasing popularity of assisted reproduction and recent disputes surrounding this issue, the California legislature should adopt a more thorough statutory scheme which addresses the enforceability of provisions regarding procreative decision making. An example of such a scheme can be found in the updated Uniform Parentage Act ("2017 UPA").[147]

A. Uniform Parentage Act (2017)

Since the UPA was originally promulgated in 1973, it has been updated several times.[148] In 2017, the Uniform Law Commission updated the UPA again in light of changing familial structures.[149] Many of these changes have contributed to assisted reproductive technology, and the Commission modernized the UPA to address the resulting familial structures more thoroughly.[150]

Surrogacy agreements were first recognized in the 2002 version of the UPA, which states were very reluctant to adopt.[151] The 2002 UPA permitted both genetic (or traditional) and gestational surrogacy, and regulated both types identically.[152] The 2017 UPA differs by regulating the two practices differently and, in turn, liberalizes the practice of gestational surrogacy.[153] As the official comment suggests, the updates in the 2017 version reflect developments in the practice in the fifteen years since the 2002 version and are intended to align with current practices and laws in states which permit surrogacy agreements.[154]

1. Rules Applicable to Breach of Surrogacy Agreement

Significantly, the 2017 UPA is the first version to address the rules that apply in the event of a breach of a surrogacy agreement.[155] Section 812(c) of the 2017 UPA states broadly that if the agreement is

146. CAL. FAM. CODE § 7962 (West 2019).
147. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).
148. *Id.*
149. BARRY R. FURROW ET AL., HEALTH LAW 1222 (8th ed. 2018).
150. UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2017).
151. UNIF. PARENTAGE ACT art. 8, cmt. at 72 (UNIF. LAW COMM'N 2017).
152. *Id.*
153. *Id.*
154. *Id.*
155. UNIF. PARENTAGE ACT § 812, cmt. at 86 (UNIF. LAW COMM'N 2017).

breached by either interested party, the "non-breaching party is entitled to the remedies available at law or in equity."[156] The 2017 UPA then qualifies this by stating that "specific performance is not a remedy available for breach by a gestational surrogate of a provision in the agreement that the gestational surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."[157]

In short, the 2017 UPA would preclude a court from enforcing a provision requiring or precluding an abortion by ordering specific performance of the provision. This effectively places the ultimate decision whether to terminate the pregnancy with the surrogate. This approach is in line with the surrogate's federal and state constitutional rights, as discussed above. In fact, the official commentary to the 2017 UPA notes that a court order requiring a surrogate to terminate, or not terminate a pregnancy, may violate her constitutional rights.[158]

Thus, the 2017 UPA should be incorporated into California's statutory scheme for enforcing surrogacy agreements. This would ensure that the rights of surrogates are protected and lend clarity to the issue of procreative decision making in gestational surrogacy. However, this provision alone may not be enough to fully protect those rights guaranteed under California law.

2. Remedies Available at Law or Equity

While the aforementioned provision precludes specific performance as a remedy and allows a surrogate to make the ultimate procreative decision, a problem exists in the form of the intended parents' other available remedies. Section 812(c) of the 2017 UPA provides the intended parents with "remedies available at law or in equity" for breach of the contract by the surrogate.[159] Several states that allow gestational surrogacy, including Maine and Nevada, have adopted identical provisions.[160] Consequently, though a surrogate may not be ordered by a court to terminate or not terminate a pregnancy, she may be coerced by the threat of other available remedies.

156. UNIF. PARENTAGE ACT § 812(c) (UNIF. LAW COMM'N 2017).
157. UNIF. PARENTAGE ACT § 812(d) (UNIF. LAW COMM'N 2017).
158. UNIF. PARENTAGE ACT § 812 cmt. at 86 (UNIF. LAW COMM'N 2017).
159. UNIF. PARENTAGE ACT § 812(c) (UNIF. LAW COMM'N 2017).
160. UNIF. PARENTAGE ACT § 812 cmt. at 86 (UNIF. LAW COMM'N 2017).

For example, consider a surrogate who wishes to terminate her pregnancy in contravention of the contract and against the will of the intended parents. The surrogate must make the decision whether to terminate the pregnancy, facing the potential liability for a broad range of damages, such as reimbursement of medical costs or consequential damages. If the surrogate is unable to bear such costs, the threat of those damages may suffice to prevent her from obtaining the abortion. Consequently, by providing the intended parents with a broad range of remedies for breach, the UPA may inadvertently place a substantial obstacle in the way of the surrogate exercising her right to privacy and may therefore be unconstitutional.

The California Supreme Court noted in *Lungren* that a California statute which hindered a woman's right to obtain an abortion "impinges upon a fundamental autonomy privacy interest" and must therefore be evaluated under the compelling interest standard.[161] Under this standard, it must be demonstrated that the statute is necessary to further an extremely important and vital state interest.[162] Here, section 812 of the 2017 UPA, which provides damages to the parties after breach, arguably serves to advance the state's interest in protecting the intended parents' right to procreate, as well as the parents' contractual obligations upon entering a surrogacy agreement. However, as previously discussed, a surrogate's right to privacy likely outweighs the rights of the intended parents, and thus the state's interest in protecting those rights likely does not rise to the level of "extremely important and vital" to justify the intrusion on the right to privacy.

Accordingly, the California legislature should tailor the provision such that it does not bar the surrogate from obtaining an abortion. For example, the damages available to intended parents could be limited to liquidated damages and could expressly preclude liability for a penalty. The 2017 UPA itself does this in section 814(c), in dealing with termination of a genetic surrogacy agreement.[163] Thus, the intended parents would retain a remedy for breach without

161. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 817–18 (Cal. 1997).

162. *Id.* at 819.

163. UNIF. PARENTAGE ACT § 814(c) (UNIF. LAW COMM'N 2017) (noting that "except in cases of fraud" the genetic surrogate is not liable for a penalty or liquidated damages for terminating the surrogacy agreement).

substantially intruding upon the surrogate's right to privacy and procreative decision making.

By adopting such rules applicable to breach of a gestational surrogacy agreement for a surrogate's termination or refusal to terminate the pregnancy, the California legislature would bring security to the practice of surrogacy and protect the fundamental right to privacy as guaranteed by the California Constitution.

V. CONCLUSION

Though far from new, the practice of surrogacy remains controversial.[164] Given the intimate nature of such arrangements, the disputes that arise from surrogacy agreements confront some of the most fundamental and contested legal rights. In considering the scenarios in which a surrogate seeks to terminate or refuses to terminate the pregnancy against the will of the intended parents, one must weigh the right to procreate against other vital rights, such as the right to privacy and bodily integrity.

This practice has continued in California after the decision in *Johnson* and subsequent codification in California Family Code section 7962. While there exists a legal framework for establishing parentage from surrogacy arrangements, the California courts and legislature have yet to address the court's ability to enforce a surrogacy agreement that purports to limit the surrogate's right to choose whether to terminate the pregnancy. However, an examination of the competing rights of each party in such scenarios indicates that the ultimate decision should remain with the surrogate, and the state cannot constitutionally compel the surrogate to act either way.

The 2017 UPA recognizes the shortcomings of previous law in the area and clarifies the issue of procreative rights in surrogacy arrangements by promulgating express rules applicable to breach of such agreements.[165] These rules indicate that a court may not order a surrogate to comply with a term requiring her to terminate, or not terminate, a pregnancy.[166] The rules do, however, provide the intended parents with other available remedies for the breach, which may have the effect of substantially deterring the surrogate's choice in obtaining

164. UNIF. PARENTAGE ACT art. 8, cmt. at 72 (UNIF. LAW COMM'N 2017).
165. UNIF. PARENTAGE ACT § 812 (UNIF. LAW COMM'N 2017).
166. UNIF. PARENTAGE ACT § 812 cmt. at 86 (UNIF. LAW COMM'N 2017).

an abortion.[167] Thus, California should adopt the rules promulgated by the 2017 UPA but limit those damages available to intended parents to ensure the surrogate is not coerced into complying with the contract.

As the California Supreme Court noted in *Johnson*, the decision to enter into a surrogacy agreement is a personal economic choice on the part of the surrogate mother and provides a valuable option to wanting parents who may have no other means of producing a child of their own genetic stock.[168] By clarifying the rights of the parties involved with respect to procreative decision making, the California legislature can further this valuable practice and protect the fundamental rights guaranteed to all women.

167. *See* UNIF. PARENTAGE ACT § 812(c) (UNIF. LAW COMM'N 2017).
168. Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).