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GESTATIONAL CARRIER AGREEMENTS: MASSACHUSETTS RECOGNITION OF THE PARTIES' CHOICE OF LAWS

I. INTRODUCTION

Generally, if parties to a contract in Massachusetts expressly set forth the governing law within the agreement, the statutory and the common law will uphold the parties' choice as long as the result is not contrary to public policy.¹ In the context of gestational carrier agreements, however, both the federal and Massachusetts legislatures are silent on whether to uphold a choice of law provision.² A gestational surrogacy concerns a form of artificial reproductive technology in which another couple's fertilized embryo is placed in the reproductive organs of a potential birth mother who does not have any genetic connection to the embryo.³ By entering into a gestational carrier agreement, the potential birth mother agrees to carry any resulting child to term on behalf of the biological parents and to surrender all rights to the child after birth.⁴ In *Hodas v. Morin*,⁵ the Supreme Judicial Court of Massachusetts recently addressed the gestational carrier issue by applying traditional choice of law analysis; the court up-

¹ See MASS. GEN. LAWS ch. 106, § 1-105 (2004) (stating parties may agree to choice of law when transaction bears reasonable relation to state); *Steranko v. Inforex, Inc.*, 363 N.E.2d 222, 228 (Mass. App. Ct. 1977) (demonstrating Massachusetts courts will uphold parties' choice as long as result not contrary to public policy); see also *Morris v. Watsco, Inc.*, 433 N.E.2d 886, 888 (Mass. 1982) (highlighting court's recognition of parties' choice of law); *infra* note 50 and accompanying text (explaining how choice of law must not lead to forum shopping).

² See *Hodas v. Morin*, 814 N.E.2d 320, 324-25 (Mass. 2004) (applying general principles of choice of law to gestational carrier agreements); Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Cryopreserved Embryos*, 49 VILL. L. REV. 169, 205 (2004) (highlighting absence of legislation regarding embryo donation generally).

³ Kindregan & McBrien, *supra* note 2, at 178 (describing gestational carrier process); cf. *id.* (contrasting with traditional surrogacy agreements). Traditional surrogacy occurs when the legal mother conceives a child genetically by intrauterine insemination using the sperm of a man other than her husband or partner in order to make the sperm-provider a father and who agrees to carry the child to term in her own womb and to surrender the child after birth. *Id.*

⁴ *Id.* (describing interests of potential birth mother in gestational carrier agreements).

⁵ 814 N.E.2d 320 (Mass. 2004).

held a Massachusetts choice of law provision in a gestational carrier agreement entered into outside of the Commonwealth.⁶

The traditional application of Massachusetts' choice of law analysis in gestational carrier agreements is problematic because gestational carrier agreements involve unique questions of individual safety, health, as well as the general welfare of the parties and unborn child.⁷ Most state legislatures have not addressed the validity and enforceability of gestational carrier agreements.⁸ Other states, however, expressly prohibit these agreements.⁹ The varying state policies regarding gestational carrier agreements demonstrate a strong need to address the use of choice of law provisions in the context of these novel agreements.¹⁰

This note addresses the need for a uniform act regarding choice of law provisions in gestational carrier agreements. Part II provides an overview of the choice of law doctrine because it is important to understand the basic principles of choice of law in written agreements.¹¹ Additionally, Part III analyzes existing uniform and state parentage laws governing gestational carrier agreements in Massachusetts generally.¹²

Part IV addresses Massachusetts' recent recognition of choice of law provisions in the context of gestational carrier agreements under *Hodas*.¹³ Part V analyzes the adverse effect of the *Hodas* decision on other states' conflicting policies toward gestational carrier agreements.¹⁴ Specifically, Part V focuses on the potential risk of forum shopping if a state remains silent on choice of law provisions with respect to gestational carrier agreements.¹⁵ Finally, Part VI addresses the pressing need for a uni-

⁶ *Id.* at 327 (determining trial judge should have applied parties' choice of law). Neither party resided in Massachusetts, yet they contracted for Massachusetts law to govern the agreement to obtain a pre-birth order of legal parentage to the genetic parents. *Id.*; see *infra* notes 48-49 and accompanying text.

⁷ *Hodas*, 814 N.E.2d at 324 (distinguishing gestational carrier agreements from other written agreements).

⁸ *Id.* at 325-26 (illustrating Connecticut's silence on policy towards gestational surrogacy).

⁹ *Id.* (stating New York's policy of voiding gestational carrier agreements while holding them unenforceable).

¹⁰ *Id.* at 327, n.16 (stressing critical role of legislature to address issues related to gestational carrier agreements).

¹¹ See *Hodas*, 814 N.E.2d at 325 (examining established choice of law principles); *infra* notes 16-30 and accompanying text (describing analysis of choice of law provisions in Massachusetts).

¹² See *infra* notes 31-47 and accompanying text (highlighting absence of Massachusetts legislation regarding gestational carrier agreements).

¹³ See *infra* notes 48-60 and accompanying text (analyzing *Hodas* holding).

¹⁴ See *infra* notes 61-79 and accompanying text (describing conflicting policies of Massachusetts, Connecticut, and New York law with respect to gestational carrier agreements).

¹⁵ See *infra* notes 72-89 and accompanying text (recognizing intent of parties in *Hodas* to choose Massachusetts law for favorable judgment).

form statute to create a consistent standard public policy regarding gestational carrier agreements.

II. CHOICE OF LAW PRINCIPLES

When parties to a transaction specify which state's law governs their agreement, Massachusetts courts will generally uphold the parties' choice, assuming the choice fulfills two requirements.¹⁶ First, the chosen state must have some substantial relationship to the parties or the transaction.¹⁷ Second, the state's law must not be contrary to the fundamental public policy of a state that otherwise has a materially greater interest in determining the particular issue, yet the chosen law could still be the applicable law in the absence of an effective choice by the parties.¹⁸

¹⁶ See MASS. GEN. LAWS ch. 106, § 1-105 (2004) (stating when transaction bears reasonable relation to state, parties may agree to choice of law); *Morris v. Watsco*, 433 N.E.2d 886, 888 (Mass. 1982) (illustrating right of parties to transaction to select law governing their relationship); *Steranko v. Inforex, Inc.*, 362 N.E.2d 222, 260 (Mass. App. Ct. 1977) (recognizing parties' choice of New York law because of parties' specific intent as to governing law and no contradiction to public policy); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1989) (stating parties' choice of law will be applied unless state does not have substantial relation to parties or transaction and application of chosen state law will be contrary to fundamental policy of another state with materially greater interest); *infra* notes 17-18 and accompanying text (describing two choice of law requirements).

¹⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1989) (illustrating substantial relationship as where performance by one of parties is to take place, where one of parties is domiciled or has principal place of business, or where contracting occurs).

¹⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1989) (refusing to allow parties' choice of law to protect fundamental policy of another state with materially greater interest). It further states:

The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties. The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law. Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188, would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue. The forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue.

Id. Under § 188, the state of otherwise applicable law includes the place of contracting, place of negotiation, place of performance, location of subject matter of contract, and domicile, residence, nationality, place of incorporation, and place of business of the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

Prior to 2004, Massachusetts courts were silent on the issue of choice of law provisions in gestational carrier agreements.¹⁹ Massachusetts courts had, however, analyzed choice of law provisions in the context of traditional surrogacy agreements.²⁰ In *R.R. v. M.H.*,²¹ the Supreme Judicial Court of Massachusetts considered the validity of a traditional surrogacy parenting agreement between the plaintiff father and defendant mother.²² The court analyzed the validity of a Rhode Island choice of law provision within the surrogacy agreement.²³

In *R.R. v. M.H.*, despite a Rhode Island choice of law provision, the court applied Massachusetts law because of the legal significance of its provisions rather than an interpretation of the agreement.²⁴ The parties did not raise the application of Rhode Island law during litigation, but instead agreed to the application of Massachusetts law.²⁵ The parties, however, could have invoked Rhode Island law based on the parties' sufficient contacts with the state.²⁶

Despite these contacts, the court chose to apply Massachusetts law because Massachusetts had a more substantial interest in determining the validity of the agreement.²⁷ While Massachusetts has enacted legislation relating to parentage in general and some states have adopted uniform acts related to gestational carrier agreements, the Massachusetts legislature has not passed any laws directly related to gestational carrier agreements.²⁸

¹⁹ See *Hodas*, 814 N.E.2d at 324 (demonstrating Massachusetts' first approach to using established choice of law provisions in gestational carrier agreement although this type of agreement implicates unique questions of individual safety, health, and general welfare of various states).

²⁰ See *R.R. v. M.H.*, 689 N.E.2d 790, 795-96 (Mass. 1998) (recognizing choice of law as issue in traditional surrogacy agreement); *supra* note 3 and accompanying text (defining gestational surrogacy agreements in contrast to traditional surrogacy agreements).

²¹ 689 N.E.2d 790 (Mass. 1998).

²² *Id.* at 791 (illustrating conception through use of intrauterine insemination of defendant mother by plaintiff father's sperm).

²³ *Id.* at 795 (identifying governing law among issues to be resolved at trial).

²⁴ *Id.* (distinguishing use of Rhode Island law in interpreting agreement with use of Massachusetts law in determining legal significance of agreement). The agreement provided that "Rhode Island law shall govern the interpretation of this agreement." *Id.* Rhode Island did not have any statutory law applicable to the issue of surrogacy agreements. *Id.* at 795, n.7. In contrast, the Massachusetts legislature had enacted adoption statutes that this court would apply to the validity of this surrogacy agreement. *Id.* at 795, n.7; see MASS. GEN. LAWS ch. 210, §§ 2, 11A (1998).

²⁵ *R.R. v. M.H.*, 689 N.E.2d at 795 (illustrating parties' recognition that Rhode Island law does not apply).

²⁶ *Id.* at 791 (rationalizing parties' choice of Rhode Island law). Plaintiff (father) resided in Rhode Island and plaintiff's counsel, who drafted the surrogacy agreement, worked in Rhode Island. *Id.*

²⁷ *Id.* at 795 (upholding Massachusetts law because child was conceived and born in Massachusetts and defendant mother resided in Massachusetts).

²⁸ See MASS. GEN. LAWS ch. 209C, §§ 1-24 (2004) (addressing issue of children born out of wedlock); MASS. GEN. LAWS ch. 210, §§ 1-14 (2004) (addressing issue of adoption of

Furthermore, no state has adopted a uniform act that speaks directly to choice of law provisions.²⁹ *Hodas* is the first case in the nation where a state's highest court directly responded to the issue of choice of law in gestational carrier agreements.³⁰

III. LEGISLATION IN MASSACHUSETTS REGARDING GESTATIONAL CARRIER AGREEMENTS

Gestational carrier agreements must be distinguished from traditional contracts because of the unique issues surrounding gestational surrogacy.³¹ Gestational carrier agreements not only involve contracts and the exchange of money for reproductive products and services, but also strangers in procreation.³² Thus, hotly debated issues surrounding gestational

children); UNIF. PARENTAGE ACT § Refs. & Annots. (amended 2002), 9B U.L.A. 1 (2000) (listing four states besides Massachusetts that have passed Uniform Parentage Act); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § Refs. & Annots., 9B U.L.A. 1 (Supp. 1994) (listing two states besides Massachusetts that have passed Uniform Status of Children of Assisted Conception Act); UNIF. PARENTAGE ACT § Refs. & Annots., 9B U.L.A. 1 (1973) (listing fifteen states besides Massachusetts that have passed Uniform Parentage Act); see also Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 26-27 and 31-41 (Winter 2003) (contending limited state adoption of uniform parentage legislation may be related to federal and state legislatures' continuing moral and constitutional struggle with related abortion issue); Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 38-39 (2000) (describing lack of state and federal legislation on modern reproductive technology).

²⁹ See UNIF. PARENTAGE ACT § 805 (amended 2002), 9B U.L.A. 1 (2000) (discussing only jurisdictional issues of gestational carrier agreements, but not choice of law provisions); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201, 9B U.L.A. 1 (1997) (describing state jurisdiction of child custody disputes, but not choice of law); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6, 9B U.L.A. 1-2 (1988) (defining only jurisdiction of state where intended parents reside, but otherwise silent on choice of law); see also *Johnson v. Calvert*, 851 P.2d 776, 778-79 (Cal. 1993) (describing passage of Uniform Parentage Act). The Uniform Parentage Act was part of a package of legislation introduced in 1975 as Senate Bill No. 347 to eliminate the legal distinction between legitimate and illegitimate children. *Id.* The Uniform Parentage Act was not meant to resolve surrogacy disputes specifically, but it does not expressly prohibit use of surrogacy agreements. *Id.* at 779; see also John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaption of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 559 (2001) (describing pragmatism of Uniform Parentage Act in recognizing its use in surrogacy agreements).

³⁰ See *Hodas*, 814 N.E.2d at 324 (ruling specifically on validity of choice of law provisions in gestational carrier agreements).

³¹ See Andrews & Elster, *supra* note 28, at 40 (describing criticism and debate over use of carrier agreements).

³² *Id.* (illustrating new commercial nature of family). According to Radhika Rao, it has been argued that:

When families are assembled by means of arm-length transaction between individuals who purchase and sell raw materials with which to produce a child, this

carrier agreements include whether such agreements are harmful to women, children, or families, and whether gametes, embryos, children and women who serve as surrogates are nothing more than commodities.³³

Several forum mechanisms could regulate gestational carrier agreements.³⁴ Some nations have created specific agencies to deal with reproductive technologies and their attendant agreements.³⁵ The United States, however, has chosen to regulate family law primarily through three areas: federal legislation, state legislation and common law, and uniform acts.³⁶

Although no federal legislation exists regarding gestational carrier agreements, at least twenty-three states have adopted surrogacy laws that prohibit upholding carrier agreements under traditional principles of contract law.³⁷ Generally, these statutes refuse to honor all compensated surrogacy agreements, but differ in how to determine the legal parentage of

dramatically reveals the commercial nature of the family, blurring the boundary between the realm of the family and the realm of the market.

Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 961, 961 (1996), *quoted in* Andrews & Elster, *supra* note 28, at 40.

³³ See Andrews & Elster, *supra* note 28, at 40 (describing debated issues surrounding gestational carrier agreements).

³⁴ *Id.* at 44 (describing structural agency mechanisms used in other nations for assessing genetic and reproductive technologies); *id.* at 50-51 (describing inadequate federal regulation of reproductive technology, but maintaining family law primarily regulated by state law); Sheldon, *supra* note 29, at 556-57 (highlighting use of state statutes and uniform acts to address gestational carrier agreements).

³⁵ See Andrews & Elster, *supra* note 28, at 44 (describing existing regulatory scheme in Great Britain and inability of United States to follow suit related to issues of family values and surrogacy consumerism). Lori B. Andrews and Nanette Elster further state:

In Great Britain, the Royal College of Obstetricians and Gynecologists organized the Interim Licensing Authority to scrutinize research and clinical services involving in vitro fertilization, such as genetic testing on embryos, and to determine whether such interventions should be offered at all, and if so, whether particular physicians and clinics should be allowed to offer these services. In 1991, the Human Fertiliz[ation] and Embryology Authority, a government agency took over supervision and licensing of research involving human embryos...In the United States, however, the dominant social value can be described as "show me the money." As a result, a range of reproductive technologies, some of dubious value, are offered in a variety of settings with little regulation.

Id. at 44-45. *But cf. id.* at 44 (noting lack of regulation recently addressed by several groups, including New York State Task Force on Life and the Law, Assisted Reproductive Technologies and Genetics Committee of American Bar Association, and Institute for Science, Law and Technology's Working Group on Reproductive Technologies).

³⁶ *Id.* at 50-51 (describing existing inadequate federal regulation of reproductive technology, but maintaining that family law primarily regulated by state law); Sheldon, *supra* note 29, at 556-57 (highlighting use of state statutes and uniform acts to address gestational carrier agreements).

³⁷ See Andrews & Elster, *supra* note 28, at 41-42 (highlighting use of family law approach in determining best interests of child over contractual law approach).

the child.³⁸ Other states implicitly legalize carrier agreements, excluding them from the statutes that criminalize baby-selling, but provide no standards for determining parental rights and responsibilities when someone enters into such a contract.³⁹

The Massachusetts legislature, like many other state legislatures, has yet to address the issues surrounding gestational carrier agreements, including the use of choice of law provisions within these agreements.⁴⁰ The legislature may be hesitant to address assisted reproductive technology and gestational carrier agreements because of the complex and constantly changing field of assisted reproductive technology, changing climate of traditional family forms, and abortion-related issues.⁴¹ Reproductive technologies challenge established cultural, religious, ethical and legal perceptions of the family, resulting in ethical, legal, political and social debates.⁴² For numerous reasons, regulating the area of human reproduction based on heightened political sentiments is dangerous.⁴³

The National Conference of Commissioners on Uniform State Laws (NCCUSL), a non-profit unincorporated association comprised of state commissions on uniform laws from each state, studies and reviews state laws to determine what areas of law should be uniform.⁴⁴ The NCCUSL addressed gestational carrier agreements and choice of law provisions generally as part of the *Uniform Parentage Act of 2000*, but the relevant sections did not provide much guidance for the states, and left the courts to determine choice of law issues and the general validity of gestational car-

³⁸ *Id.* at 42 (demonstrating diversity in state statutes regarding gestational carrier agreements).

³⁹ See Sheldon, *supra* note 29, at 556-57 (demonstrating absence of regulation in determining parental rights related to carrier agreements).

⁴⁰ See Hodas, at 324-25 (applying general principles of choice of law to gestational carrier agreements due to lack of legislative authority directing otherwise); Kindregan & McBrien, *supra* note 2, at 205 (noting absence of legislation regarding embryo donation generally).

⁴¹ See Alvaré, *supra* note 28, at 34 (recognizing hesitation to regulate constitutional protection afforded to parents in familial privacy rights in substantive due process cases). Alvaré maintains, "Reflecting on the sum of current regulations, what is not regulated is more remarkable than what is." *Id.* at 31.

⁴² See Andrews & Elster, *supra* note 28, at 65 (describing difficulties in regulating reproductive technologies).

⁴³ See Kindregan & McBrien, *supra* note 2, at 203 (demonstrating dangerous attractiveness of politically favored doctrines). There is a long history of state involvement in regulating human reproduction based on prevailing morality. *Id.* at 204. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁴ See The National Conference of Commissioners on Uniform State Laws, NCCUSL Web-Introduction, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 18, 2005). The commissioners of all fifty states, including the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, have formed the National Conference to promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. *Id.* No uniform law is effective until a state legislature adopts it. *Id.*

rier agreements.⁴⁵ Furthermore, the Uniform Parentage Act does not bind Massachusetts because the Massachusetts legislature has not presently adopted it.⁴⁶ Until the Massachusetts legislature speaks directly to the issues surrounding gestational carrier agreements, the courts can only consider the issues on a case by case basis.⁴⁷

IV. MASSACHUSETTS BREAKS THE SILENCE

In 2004, in *Hodas v. Morin*, the Supreme Judicial Court upheld a Massachusetts choice of law provision in a gestational carrier agreement between genetic parents domiciled in Connecticut and a gestational carrier domiciled in New York.⁴⁸ Neither party resided in Massachusetts, yet they contracted for Massachusetts law to govern the agreement so as to obtain a pre-birth order of legal parentage to the genetic parents.⁴⁹ The Massachu-

⁴⁵ UNIF. PARENTAGE ACT § 103 (amended 2002), 9B U.L.A. 1 (2000) (addressing scope of Act and choice of law but not providing any real guidance). The Uniform Parentage Act states:

The court shall apply the law of this State to adjudicate the parent-child relationship. The applicable law does not depend on: (1) the place of birth of the child; or (2) the past or present residence of the child...This [Act] does not authorize or prohibit an agreement between a woman and a man and another woman in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the man and other woman become the parents of the child. If a birth results under such an agreement and the agreement is unenforceable under [the law of this State], the parent-child relationship is determined as provided in [Article] 2.

Id.; see Sheldon, *supra* note 29, at 557 (describing NCCUSL's attempt to address gestational carrier agreements); see also *id.* at 560-61 (highlighting court's role in validating agreements on case by case basis).

⁴⁶ See *supra* note 28 and accompanying text (noting Massachusetts not among states to adopt *Uniform Parentage Act of 2000*).

⁴⁷ See Jacqueline Ceurvels, *Reproductive Medicine & Legal Parentage: Breaking the Silence on the Legal Rights of Genetic and Gestational Parents*, 27 AM. J.L. & MED. 491, 493 (2001) (describing lack of legislation causing adjudication on specific facts and circumstance of each case).

⁴⁸ *Hodas*, 814 N.E.2d at 327. Plaintiff genetic parents brought an equity action against defendant hospital, seeking a declaration of paternity and maternity and a pre-birth order. *Id.* at 321-22.

⁴⁹ *Id.* at 324 (highlighting determination whether Massachusetts Probate and Family Court could apply Massachusetts law to grant pre-birth judgments of parentage to intended genetic parents and pre-birth record of birth where neither genetic parents nor gestational carrier reside in Massachusetts). The contract specified that the birth must occur at a Massachusetts hospital and provided for application of Massachusetts law. *Id.* at 321. Jurisdictional issues arose concerning whether Massachusetts Probate and Family court had jurisdiction to grant relief, but the court settled in the affirmative due to its subject matter jurisdiction over questions of law and equity relating to parentage. *Id.* at 323; see MASS. GEN. LAWS ANN. ch. 215, § 6 (2004) (upholding Probate and Family Court equity jurisdiction relating to parentage); see also Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d

setts Probate and Family Court denied relief, fearing forum shopping, and the Appeals Court enjoined the hospital from issuing a birth certificate for a child born of the gestational carrier.⁵⁰ The Supreme Judicial Court, however, upheld the choice of law provision, remanded the case to the Probate and Family Court, and directed the court to issue a pre-birth judgment of parentage and pre-birth record of birth to genetic parents.⁵¹

Absent any statute regulating the interpretation of gestational carrier agreements in Massachusetts, the Supreme Judicial Court applied Massachusetts' traditional choice of law principles – whether Massachusetts had a substantial relationship to the parties or the transaction and whether the parties' choice of law contravened the public policy of another state with a materially greater interest.⁵² As to the first prong, the Court held that Massachusetts had a substantial relationship to the transaction because the parties' negotiated for the birth to occur at a Massachusetts hospital, the gestational carrier's received prenatal care at a Massachusetts hospital, and the parties anticipated the delivery to occur at a Massachusetts hospital.⁵³ The Supreme Judicial Court further recognized that Massachusetts had material interests in establishing the rights and responsibilities of parents of children born in Massachusetts.⁵⁴

1133, 1137-39 (Mass. 2001) (finding Probate and Family Court's jurisdiction to order pre-birth judgment based upon Massachusetts legislation).

⁵⁰ See *Hodas*, 814 N.E.2d at 321-23 (outlining procedural history of *Hodas*). A pre-birth order could not be issued based on precedent of *Culliton*. *Id.* at 327; see *Culliton*, 756 N.E.2d at 1141 (denying relief in issuing a pre-birth order of parentage). Forum shopping is essentially one party's attempt to attain a strategic advantage in litigation through any number of angles – location, judge, jury, or in this instance, law. See BLACK'S LAW DICTIONARY 666 (7th ed. 1999). Normally forum shopping occurs because litigants suing outside their own jurisdiction believe that the law of another jurisdiction is more favorable to their case than their own jurisdiction's law, and use the other jurisdiction's law to supplant its own jurisdiction's policies. See *id.*

⁵¹ *Hodas*, 814 N.E.2d at 321-23 (granting plaintiffs relief in form of judgment of paternity and maternity and pre-birth order of legal parentage).

⁵² *Id.* at 324; see *supra* notes 16-18 and accompanying text (describing *Restatement* analysis of choice of law provisions); see also *Hodas*, 814 N.E.2d at 325-26 (applying *Restatement* principles).

⁵³ *Hodas*, 814 N.E.2d at 325 (applying first step of choice of law test based upon Massachusetts choice of law principles and recognizing relationship between Massachusetts and gestational carrier agreement); see RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2)(a) (1989) (indicating state chosen by parties must have substantial relationship to parties or to transaction); see also *Hodas*, 814 N.E.2d at 325 (demonstrating Massachusetts' substantial relationship with agreement and court's influence by *R.R. v. M.H.* holding); *R.R. v. M.H.*, 689 N.E.2d at 795 (illustrating where parties chose to be governed by Rhode Island law, but court held Massachusetts would be governing law because child was conceived and born in Massachusetts).

⁵⁴ *Hodas*, 814 N.E.2d at 326 (recognizing Massachusetts' interest in providing stability and protection to children born through gestational carrier agreements); see *Culliton*, 756 N.E.2d at 1139 (establishing Massachusetts' interest in all children born in-state).

With the second prong, the Court recognized that Connecticut and New York were the only states that potentially conflicted with the application of Massachusetts law.⁵⁵ While Connecticut law was silent on the issue of gestational carrier agreements, New York law expressly prohibited these agreements.⁵⁶ The court weighed the various interests of Connecticut, New York, and Massachusetts, but the court determined that no state had a materially greater interest than the others because their interests were so dispersed.⁵⁷ Instead, the court focused on which state's law would apply in the event the agreement lacked a choice of law provision.⁵⁸ Connecticut, New York, and Massachusetts could each use its own applicable law if the agreement's choice of law provision had not existed because the parties and the agreement had significant contacts with each state.⁵⁹ Based upon the court's analysis of both prongs, it honored the application of the Massachusetts choice of law provision.⁶⁰

V. ERRORS AND IMPLICATIONS OF THE *HODAS* HOLDING

By upholding the parties' choice of law provision, the Supreme Judicial Court erred because it overlooked the trial court's concern with fo-

⁵⁵ *Hodas*, 814 N.E.2d at 325-26 (introducing Connecticut and New York as potential states with materially greater interests because intended parents lived in Connecticut while gestational carrier and her husband lived in New York).

⁵⁶ *Id.* (illustrating potential policy problems of upholding Massachusetts choice of law). Connecticut did not expressly prohibit gestational carrier agreements, but New York's law clearly stated, "Surrogate parentage contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable." N.Y. DOM. REL. LAW § 122 (McKinney 2004).

⁵⁷ *Hodas*, 814 N.E.2d at 325-26 (listing contradicting interests by upholding parties' choice of law provision in agreement, but avoiding to determine which state's interest is greater). The intended parents resided in Connecticut, while the gestational carrier and her husband resided in New York. *See infra* note 59 and accompanying text.

⁵⁸ *Hodas*, 814 N.E.2d at 325-26 (determining which law would apply if agreement had been silent on choice of law); *see supra* note 18 and accompanying text (illustrating importance of whether another state has materially greater interest); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1989) (stating chosen state must also be state of applicable law in absence of effective choice of law by parties).

⁵⁹ *Hodas*, 814 N.E.2d at 326 (recognizing difficulty in determining applicable state law). It is unclear where the contract was negotiated or signed, although presumably Connecticut, New York, or both. *See id.* The contract was most likely performed in Massachusetts, where the prenatal care and birth was to take place. *See id.* The location of the subject matter of the contract and domicile of the parties were presumably Connecticut, New York, or both. *Id.*; *see supra* note 18 and accompanying text (listing applicable factors in determining state of otherwise applicable law).

⁶⁰ *Hodas*, 814 N.E.2d at 326-27 (upholding parties' choice of Massachusetts law to govern agreements and also focusing on other considerations, such as uniformity of result, maintenance of interstate order, and simplification of judicial task); *see Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 670 (Mass. 1985) (upholding parties' choice of law although other states carry material interests due to importance of uniformity of law).

rum shopping to avoid New York's strict prohibition against surrogate parentage contracts in general and an uncertain Connecticut outcome.⁶¹ Forum shopping is an attempt to attain a strategic advantage in litigation, such as use of a choice of law provision in this instance.⁶² Although the court recognized that the parties, specifically the intended parents, chose Massachusetts law to obtain a pre-birth order of parentage for the genetic parents and not the carrier, and to avoid adoption or other costly, lengthy procedures, it did not apply these findings in its reasoning.⁶³

The court instead applied traditional choice of law principles to the parties' choice of Massachusetts law provision in the gestational carrier agreement.⁶⁴ Although Massachusetts did have a substantial relationship to the parties and the transaction, the court incorrectly determined that the parties' choice of law would not contravene the public policy of either New York or Connecticut.⁶⁵ Massachusetts law contradicted the public policy of New York because New York expressly prohibited gestational carrier agreements to protect women from exploitation as gestational carriers and to protect their potential parental rights.⁶⁶ Based on this existing policy, New York arguably had a materially greater interest in preserving the gestational carrier's potential parental rights relating to the issuance of a Massachusetts pre-birth order of judgment because the gestational carrier and her husband lived in New York.⁶⁷ As such, the Supreme Judicial

⁶¹ See *supra* note 51 and accompanying text (illustrating holding by Supreme Judicial Court that parties did not attempt to forum shop). The trial judge feared that the parties forum shopped for a state that would likely uphold the gestational carrier agreement and issue a pre-birth order of parentage. *Hodas*, 814 N.E.2d at 327; see *infra* notes 64-67 and accompanying text (arguing court erred because parties specifically chose Massachusetts believing they would be able to obtain pre-birth order).

⁶² See *supra* note 50 and accompanying text (highlighting use of choice of law provisions to forum shop for more favorable law).

⁶³ *Hodas*, 814 N.E.2d at 322 n.5 (stating plaintiffs also believed they would be able to obtain pre-birth order in Massachusetts and that they would not have to adopt their own genetic child or go through other costly and lengthy procedures).

⁶⁴ *Id.*; see *supra* notes 52-60 and accompanying text (arguing court erred in applying traditional choice of law principles to gestational carrier agreement because in doing so, court contradicted New York's fundamental policy in protecting carrier's parentage rights).

⁶⁵ See *supra* notes 52-60 and accompanying text (applying first two steps of choice of law analysis to *Hodas* gestational carrier agreement).

⁶⁶ N.Y. DOM. REL. LAW § 122 (McKinney 2004) (stating surrogate agreements as void and unenforceable); *Hodas*, 814 N.E.2d at 325-26 (describing New York's clear public policy against gestational carrier agreements); see Andrews & Elster, *supra* note 28, at 51-52 (illustrating potential risks to carriers in making reproductive decisions bound by contractual law); *supra* notes 52-60 and accompanying text (applying first two steps of traditional choice of law analysis to *Hodas* gestational carrier agreement); see also *supra* note 56 and accompanying text (stating New York law expressly prohibited gestational carrier agreements to protect women against exploitation as gestational carriers and to protect carrier's potential parental rights).

⁶⁷ See N.Y. DOM. REL. LAW § 122 (McKinney 2004) (illustrating New York's intent to protect gestational carriers against exploitation); *supra* note 51 and accompanying text

Court undermined New York's public policy by applying Massachusetts law and ordering a pre-birth order of parentage for the intended genetic parents.⁶⁸

Despite the unique questions of individual safety, health and general welfare of the parties and unborn child, the Supreme Judicial Court treated the gestational carrier agreement as any other written agreement in applying traditional choice of law principles.⁶⁹ Ignoring both the issues of forum shopping and New York's arguably materially greater interest in protecting the gestational carrier's parental right, the court instead applied traditional contractual principles because the Massachusetts legislature has not addressed this issue by statute or by adopting any uniform acts related to gestational carrier agreements.⁷⁰ Until the Massachusetts legislature addresses the gestational carrier agreement issue, including the use of choice of law provisions in these agreements, similarly erroneous results like that in *Hodas* allows the courts to ignore forum shopping and of other states' policies regarding these agreements.⁷¹

The state legislature is best suited to address the issues raised by reproductive technology in a comprehensive fashion.⁷² Historically, state legislation has governed family law and related areas of the law.⁷³ If each state regulates gestational carrier agreements, however, this will produce varying results because each state will weigh the various interests involved differently.⁷⁴ Although the states should weigh their own interests related to gestational carrier agreements and legislate accordingly, the specific

(determining no state had materially greater interest and no policy would operate to overrule parties' choice of law absent a choice of law provision).

⁶⁸ See *supra* notes 66-67 and accompanying text.

⁶⁹ See *Hodas*, 814 N.E.2d at 324 (distinguishing gestational carrier agreements from other written agreements).

⁷⁰ See MASS. GEN. LAWS ch. 209C (2004) (legislating children born out of wedlock but not children born out of gestational carrier agreements specifically); MASS. GEN. LAWS ch. 210 (2004) (legislating adoption of children but not children born out of gestational carrier agreements specifically); see also *supra* notes 28-29, 37-43 and accompanying text (illustrating lack of common law or statutory precedent in this area).

⁷¹ See *supra* notes 52-60 and accompanying text (describing case by case analysis thus far).

⁷² *Hodas*, 814 N.E.2d at 327 n. 16 (illustrating court's recognition of Massachusetts legislature as proper medium to form policies regarding gestational carrier agreements); see *Culliton*, 756 N.E.2d at 1139 (recognizing role of legislature to regulate issues relating to and surrounding reproductive technology in Massachusetts).

⁷³ See *Andrews & Elster*, *supra* note 28, at 48 (recognizing states as proper forum to address family building issues). The authors maintain that states must resolve disputes with statutory guidance. *Id.* Generally, states must attempt to apply existing laws, such as parentage acts, which were drafted without contemplation of these new forms of family building. *Id.*

⁷⁴ See *Sheldon*, *supra* note 29, at 556-57 (listing varying responses by states to gestational carrier agreements from criminalization to acceptance); see also *Alvaré*, *supra* note 28, at 26 (listing various interests such as private intent, commercial fraud, health, nascent human life, and parental assignment).

issue of choice of law within these agreements is one that must be uniform from state to state to prevent erroneous case by case determinations of a state's materially greater interest as the Supreme Judicial Court's holding in *Hodas*.⁷⁵

The NCCUSL comes together to study and review the law of the states to determine which areas of law should be uniform.⁷⁶ The commissioners promote the principle of uniformity – drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.⁷⁷ As the Massachusetts Supreme Judicial Court demonstrated in *Hodas*, the interpretation and enforceability of choice of law provisions in gestational carrier agreements is an area where uniformity between the states is needed to prevent recurring instances of forum shopping.⁷⁸ The NCCUSL should promulgate a Uniform Act regarding these provisions and strongly advocate the states to adopt the act.⁷⁹

VI. CONCLUSION

Under both statutory and common law, Massachusetts courts generally uphold the parties' choice of law in written agreements, but do not recognize the parties' choice if it is contrary to the policy of another state with a materially greater interest. Many state legislatures have yet to form a public policy regarding gestational carrier agreements generally. There is even more uncertainty in determining the weight of each state's interest in gestational carrier agreements that are potentially governed by the laws of multiple states. In addition, there is a lack of choice of law analysis that exists within these types of agreements. As a result, the lack of public policy is highly problematic.

Although each state may form a policy regarding the validity of gestational carrier agreements by passing distinct legislation or adopting a uniform act, the states should adopt a uniform provision regarding the enforceability of choice of law provisions concerning these agreements. As *Hodas* demonstrated, without uniform legislative direction, state courts can only determine choice of law provisions in gestational carrier agreements on a case by case basis. In *Hodas*, the Supreme Judicial Court relied on traditional choice of law analysis despite the unique issues of individual safety, health, and general welfare of the parties and unborn child. In doing so, the Court ignored the issue of forum shopping and the arguably

⁷⁵ See *supra* notes 68-74 and accompanying text (illustrating need to uniformly regulate choice of law provisions in gestational carrier agreements to prevent forum shopping and blatant contradiction of another state's public policy).

⁷⁶ See *supra* note 44 and accompanying text (highlighting purpose of NCCUSL).

⁷⁷ *Id.*

⁷⁸ See *supra* note 73 and accompanying text (describing need for uniform act).

⁷⁹ See *supra* note 44 and accompanying text (describing organization and methodology of NCCUSL in drafting and promoting uniform acts).

materially greater interest of New York's prohibition against compensated surrogacy agreements to protect the carrier's interests and parental rights.

The absence of legislation also leads to disparate holdings where parties can forum shop for a favorable judgment and ignore conflicting public policies of other states that have stronger public policy claims. In *Hodas*, the parties chose Massachusetts law to govern their agreement because they believed that Massachusetts courts would likely issue a pre-birth order of parentage, while New York courts would not uphold the agreement and a Connecticut court's holding was uncertain. Without any legislative guidance, the Supreme Judicial Court upheld the agreement and remanded the case to the Probate and Family Court to order a pre-birth judgment of parentage, despite New York's arguably material interest in the agreement and its policy against recognizing gestational carrier agreements to specifically protect the carrier's parental rights. Although the Massachusetts court broke the silence on gestational carrier agreements and choice of law provisions within these agreements, the *Hodas* holding demonstrates a larger cry for uniform state legislation regarding choice of law provisions within gestational carrier agreement.

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