
The Bun's in the Oven, Now What?: How Pre-Birth Orders Promote Clarity in Surrogacy Law

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Table of Contents

Introduction.....	27
I. The Foundational Aspects of Surrogacy in Assisted Reproduction	29
A. <i>Assisted Reproductive Technology</i>	29
B. <i>Surrogacy</i>	30
i. Traditional Surrogacy	30
ii. Gestational Surrogacy.....	31
II. States Respond Differently to Surrogacy.....	32
A. <i>States That Allow Surrogacy by Statute</i>	33
B. <i>States That Allow Surrogacy by Case Law</i>	41
C. <i>Anti-Surrogacy States by Statute</i>	48
D. <i>Anti-Surrogacy States by Case Law</i>	52
E. <i>States That Remain Silent on Surrogacy</i>	53
III. Pre-Birth Orders Enable Couples to Avoid Conflicts Among State Surrogacy Laws.....	59
A. <i>What Are Pre-Birth Parentage Orders?</i>	60
B. <i>Proposed Acts That Purport to Award Parental Rights in Surrogacy Arrangements Are Not Practicable</i>	62
1. Uniform Parentage Act	62
2. The American Bar Association Model Act Governing Assisted Reproductive Technology	63
C. <i>Pre-Birth Orders Solve Conflict of Laws Issues by Providing Clarity</i>	63
1. The Full Faith and Credit Clause	63
2. Legitimacy of Pre-Birth Orders	64
3. Pre-Birth Orders May Not Be Easy to Obtain, But They Provide the Most Transparency.....	65
4. Survey of States that Allow Pre-Birth Orders.....	67
Conclusion	69

Introduction

Imagine a young woman who dreams of having a family of her own one day. Envisioning what her children will look like, she contemplates how she will care for them: combing her daughter's hair or patching up her son's newest scrape on his knee. She thinks about the laughs that she and her children will share—the ones that only a mother and child truly understand because of their unique bond. She thinks about who they will become in the future. She looks forward to the memories she will make as a mother and eagerly awaits the opportunity to create a life beyond her own. Imagine her dreams shatter in an instant. As she tries to make her dream a reality, she ultimately fails.

Infertility means that a woman fails to become pregnant after a year of trying to become pregnant or to stay pregnant.¹ It plagues women in the United States more often than one would think. In fact, 12% (6.1 million) of women between the ages of 15 and 44 years struggle to get pregnant or to carry a pregnancy to term.² And 1 in 9 women in the U.S. are unable to conceive or carry a child.³

Among these women, many different problems may exist. For example, endometriosis, caused by a build-up of tissue lining the uterus, is a common issue leading to infertility.⁴ Irregular ovulation cycles also contribute to infertility.⁵ Conversely, defects in men's sperm are often the

¹ OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEATH AND HUMAN SERV., *What is infertility?*, WOMENS HEALTH, <https://www.womenshealth.gov/a-z-topics/infertility> (last updated June 12, 2017).

² *See id.* (stating that 6.1 million or 10% of women in the U.S. have difficulty getting pregnant); *Assisted Reproductive Technology*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/whatis.html> (last updated Feb. 7, 2017) (stating that 12% of women have difficulty getting pregnant or carrying a pregnancy to term) [hereafter CDC Assisted Reproductive Technology].

³ *Infographic Gallery*, AM. SOC'Y FOR REPROD. MED., <http://www.reproductivefacts.org/resources/infographic-gallery/updated-the-inability-to-have-a-child-affects-1-in-every-9-women-in-the-usa/> (indicating that this statistic comes from the 2006-2010 National Survey of Family Growth conducted by the CDC).

⁴ *See Endometriosis: Does It Cause Infertility?*, AM. SOC'Y FOR REPROD. MED., <http://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/fact-sheets-and-info-booklets/endometriosis-does-it-cause-infertility/> (last updated 2016).

⁵ *See What Causes Infertility in Women?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/index.htm> (last updated Mar. 30, 2017).

source of the problem.⁶ In 40% of cases, the sperm is the sole or contributing cause of infertility.⁷ Nevertheless, assuming that a couple cannot conceive a child themselves, whether it be a problem with the egg or the sperm, they are not without help. They have many different options from which to choose to make their dream of becoming parents come true.

Assisted reproductive technology (“ART”) enables people who otherwise would be unable to have children, absent adoption, to become parents. Gestational surrogacy, the most prevalent form of ART, occurs when an egg and sperm are united to produce an embryo in a process called in-vitro fertilization, and the embryo is placed in a woman’s uterus.⁸ The woman who carries the child signs an agreement with the prospective parents, and she ultimately delivers the child for them.⁹

Surrogacy law represents a body of principles that differs by jurisdiction. Since differing laws confuse litigants and practitioners, it is essential to know which states allow surrogacy, which do not, and which remain silent on the issue. Although states vary in whether surrogacy is a lawful method of assisted reproduction, pre-birth orders provide a way to circumvent differing state laws and promote clarity in this growing area of family law litigation.

States vary in their treatment of surrogacy because state autonomy remains the central tenet of federalism, and surrogacy represents a controversial topic. While surrogacy has become more widely accepted in society, this article does not purport to be pro-surrogacy. Instead, it suggests that pre-birth orders provide certainty for prospective parents and family law attorneys who deal with this complex issue.

This Article will address the confusion surrounding surrogacy law in the United States and propose a method by which states with differing views can work together to make the current system of surrogacy law more functional. Although constitutional arguments can be made for the

⁶ See *Is Infertility Just a Woman’s Problem?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/index.htm> (last updated Mar. 30, 2017).

⁷ *Id.*

⁸ *In vitro fertilization (IVF)*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/home/ovc-20206838> (last updated Aug. 10, 2017).

⁹ See *Third-party Reproduction: Sperm, egg, and embryo donation and surrogacy*, AM. SOC’Y FOR REPROD. MED., <http://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/fact-sheets-and-info-booklets/third-party-reproduction-sperm-egg-and-embryo-donation-and-surrogacy/> (last updated 2012).

right to procreate under the umbrella of equal protection, this article mainly focuses on conflicts of law, not constitutional law. Part I explains the different kinds of surrogacy arrangements and ART itself. Part II provides an overview of the surrogacy laws in each state. Finally, Part III defines pre-birth orders and attempts to reconcile them within the existing laws of contracts by advocating that they be used to solve conflict of laws issues and provide a clearer way for states to work together within the existing realm of surrogacy law.

I. The Foundational Aspects of Surrogacy in Assisted Reproduction

When couples cannot conceive a child naturally, they often turn to science for answers. Tests can be conducted to detect reproductive problems to treat them. If the problem cannot be treated medicinally, couples resort to assisted reproductive technology (“ART”).

A. Assisted Reproductive Technology

ART describes “all fertility treatments in which both eggs and embryos are handled.”¹⁰ According to the Center for Disease Control, ART treatments do not handle sperm. Processes that handle sperm include artificial insemination, which is also known as intrauterine insemination.¹¹ Nor does ART include medicinal treatments that stimulate egg production.¹² Rather, ART procedures involve surgically removing eggs from a woman’s ovaries and then combining them with a man’s sperm in a laboratory setting.¹³ ART is distinct from other forms of fertility treatments because eggs are removed from the woman’s body.¹⁴

There are several procedures that manipulate a woman’s eggs. The most successful is a process called “in-vitro fertilization,”¹⁵ in which an egg is retrieved from an ovary and placed in a culture dish with sperm.¹⁶ The sperm fertilizes the egg, creating an embryo that is then implanted in the donor’s body or the body of another who will serve as the carrier.¹⁷ Presuming that the intended mother cannot carry the child, the carrier will

¹⁰ CDC Assisted Reproductive Technology, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ MAYO CLINIC, *supra* note 8.

¹⁶ *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 91-92 (2nd ed. 2011).

¹⁷ *Id.*

become pregnant and carry the child for another couple.¹⁸ The carrier is known as the “surrogate.”¹⁹

B. Surrogacy

The process by which a woman carries a child for another couple, one unable to get pregnant on their own, is called surrogacy.²⁰ It has become widely utilized over the years as scientific endeavors have increasingly expanded the means of reproduction. Historically, surrogacy has been subdivided into two categories based on the identity of the mother and the different ways that these arrangements are carried out.

i. Traditional Surrogacy

Traditional surrogacy occurs when the woman who carries the child is the biological mother to the child.²¹ Not only does the woman carry the child for another couple, but she also bears a genetic connection to the child. Traditional surrogacy first captivated the country in *Matter of Baby M*.²² There, the New Jersey Supreme Court reinstated the surrogate mother, who had contractually agreed to relinquish her parental rights, as the child’s mother and granted her visitation rights.²³ The court agreed with the natural mother that she had a fundamental interest in the companionship of her child, and that fundamental interest was constitutionally protected.²⁴

Although Mrs. Whitehead, the natural mother, had agreed to surrender the resulting baby to the Sterns so they could enjoy the “gift of life” as parents, she failed to anticipate the feelings she would experience in giving up her own child.²⁵ After giving birth, Mrs. Whitehead pleaded with the Sterns and agreed to give up the baby if she could keep the child only for a week.²⁶ Eventually, Mrs. Whitehead and her husband took the child and lived on the run in Florida for four months until the Sterns found them in Mrs. Whitehead’s parents’ home.²⁷

The court in the *Baby M* case reasoned that the bond between a child

¹⁸ *Id.* at 151.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 152.

²² See generally *In re Baby M*, 109 N.J. 396 (1988) (invalidating surrogacy contracts as a matter of public policy).

²³ *Id.* at 411.

²⁴ *Id.* at 450.

²⁵ *Id.* at 413-14.

²⁶ *Id.* at 415.

²⁷ *Id.*

and its natural mother should not be broken.²⁸ Despite the trial court's order terminating Mrs. Whitehead's maternal rights so that Mrs. Stern could legally adopt the child as her own, the New Jersey Supreme Court ruled that the termination was invalid because the termination was based upon contractual provisions, not statutory requirements regarding parental termination.²⁹ Thus, with an invalid termination, no adoption could take place.³⁰ Additionally, the court concluded that payment to a mother was "potentially degrading to women" and illegal.³¹

While traditional surrogacy remains an option for couples pursuing ART, many couples resort to gestational surrogacy to avoid the complications accompanying a biological connection to the surrogate. It is also less common today, as traditional surrogacy agreements are more likely to be held unenforceable if the biological mother refuses to terminate her parental rights.³²

ii. Gestational Surrogacy

Gestational surrogacy is a process that occurs when a woman carries the child of another couple and bears no genetic connection to the child.³³ The child may result from the gametes of the intended parents or of donors.³⁴ Gestational surrogacy is a more popular form of ART because it enables the intended parents to be the biological parents of the resulting child.³⁵ However, many states vary in their approval of such a practice.

While states have an interest in promoting family, and surrogacy makes having a family possible, many opponents assert that surrogacy is harmful to society.³⁶ For example, many people regard surrogacy in terms of social anxieties because it encapsulates more than hope for future parenthood. It represents challenges to traditional notions about a husband as the breadwinner and a wife as a stay-at-home mom.³⁷ Gestational surrogacy allows a woman to spend her child-bearing years working with

²⁸ *See id.* at 435-36

²⁹ *Id.* at 427-29.

³⁰ *Id.* at 427-28.

³¹ *Id.* at 410-11.

³² *See generally* KINDREGAN & MCBRIEN, *supra* note 16, at 153.

³³ *Id.* at 2-26.

³⁴ *Id.*

³⁵ *See generally* Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435 (2016) (concluding that the use of gestational carriers increased greatly from 1999 to 2013).

³⁶ Lisa Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 J. GENDER, SOC. POL'Y & L. 555, 556 (2013).

³⁷ *Id.* at 580.

the consolation that she can have someone else carry her child while she pursues a career or have a child later in life if she freezes her eggs.

To go even further, opponents argue that surrogacy runs counter-current to closely held religious beliefs because it makes it possible for same-sex couples to procreate.³⁸ It also evokes connotations about how people can exploit pregnancy because they think it presents too much of a time-consuming hassle, rather than a miraculous experience.³⁹

Additionally, many opponents of surrogacy fear that it represents a growing trend of commercialized reproduction.⁴⁰ If the law essentially permits parents to purchase their children, the children become just another commodity in America's capitalist structure, thus relegating procreation to an industrial undertaking.

Regardless of criticisms, gestational surrogacy remains the most practicable option for most couples, especially those wishing to involve third parties in their arrangements. While all forms of ART are expensive, and no form is guaranteed, gestational surrogacy nearly assures parents that the resulting child will be their biological offspring or conceived from a gamete donation.

II. States Respond Differently to Surrogacy

States have different perspectives regarding surrogacy, and they comprise a wide spectrum of social and political ideologies that are expressed in either statutory enactments or case law. But some states fail to mention surrogacy in either of these forms. These states leave open the question about whether surrogacy is allowable. Still, couples seeking to use ART to start a family need to know which states permit surrogacy and which make it illegal.

A. States That Allow Surrogacy by Statute

Arkansas

Arkansas has a statute that is very detailed as to the kinds of surrogacy arrangements allowed. If artificial insemination is the method used, the law treats married and single women differently.⁴¹ But if a woman

³⁸ Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 112-15 (2014).

³⁹ Robin Frewell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J. OF L. & MEDICINE 337, 338 (2003).

⁴⁰ See, e.g., Rachel Lu, *The Perils of Surrogacy*, 30 HUM. LIFE REV. 35, 40-44 (2014).

⁴¹ ARK. CODE ANN. §§ 9-10-201(b) & (c) (2018).

is artificially inseminated as a surrogate, then the surrogacy provisions remain the same regardless of the woman's marital status.⁴²

The statute provides that if a married woman is artificially inseminated and gives birth, she is presumed to be the mother of the resulting child, and her husband is presumed to be the father.⁴³ For instance, consider Ricky and Lucy. They are a married couple pursuing artificial insemination. If Lucy is artificially inseminated with Ricky's sperm, then they are considered the legal parents of the child.

Yet, it is a different situation if that married woman is a surrogate who is artificially inseminated and gives birth to a child. In that case, the child belongs to the biological father and the intended mother, if they are married.⁴⁴ If the biological father is not married, the child belongs only to the biological father.⁴⁵ But if an anonymous donor donates his sperm and a married surrogate provides her egg, then the resulting child belongs only to the intended mother in the surrogacy arrangement.⁴⁶

Consider Ricky and Lucy again, but this time they ask Ethel to be their surrogate. Ethel is married to Fred. If Ethel is artificially inseminated with Ricky's sperm, then the child that results presumably belongs to Ricky, the biological father, and Lucy, the intended mother. Imagine that Ricky is not married to Lucy, though. If Ethel is artificially inseminated with Ricky's sperm, and Ricky is unmarried, then Ricky is the only legal parent of the child. But if Ricky and Lucy are married, and neither of them provide their gametes such that Ethel's egg is artificially inseminated with a donor's sperm, then Lucy, the intended mother, would be the only legal parent of the resulting child. Although the statute does not specify, it could further be presumed that Lucy's husband, Ricky, would be considered the child's father because a child born into a marriage is considered the child of the wife's spouse.

While the statute accounts for scenarios in which an unmarried woman is involved, the outcomes remain the same. Thus, if an unmarried woman is artificially inseminated and gives birth to a child, then she is the only parent under law.⁴⁷ But if an unmarried woman is artificially inseminated and gives birth to a child as a surrogate, then the child belongs

⁴² *Id.*

⁴³ *Id.* § 9-10-201(b).

⁴⁴ *Id.* § 9-10-201(b)(1).

⁴⁵ *Id.* § 9-10-201(b)(2).

⁴⁶ *Id.* § 9-10-201(b)(3).

⁴⁷ *Id.* § 9-10-201(c)(1).

to the biological father and intended mother, if they are married.⁴⁸ However, if the biological father is unmarried, then he is presumed to be the only parent of the child.⁴⁹ If an anonymous donor donates his sperm, and an unmarried surrogate is artificially inseminated with that sperm, then the resulting child is presumed to belong only to the intended mother in the surrogacy arrangement.⁵⁰

Despite describing different kinds of surrogacy scenarios, the statute's provisions ensure that the surrogate will not be considered the legal parent of the child.⁵¹ They also guarantee that the child will have at least one legal parent in a surrogacy arrangement.⁵² Furthermore, even though the statute remains silent about whether surrogacy contracts will be recognized, it can be inferred that surrogacy contracts do not violate Arkansas's public policy, because the statute details the different types of surrogacy allowed.⁵³

Additionally, the statute provides instructions on which name should appear on the birth certificate when a surrogate mother gives birth. The woman who gives birth will have her name listed on the birth certificate as the mother of the child, but a court may issue orders to substitute a new birth certificate listing the intended parents' names.⁵⁴

There is no case law that expands or otherwise changes the statute's meaning.

Delaware

By statute, the state of Delaware expressly permits surrogacy agreements.⁵⁵ The statute does not distinguish between gestational surrogacy and traditional surrogacy agreements but does expressly discuss agreements to conceive by means of assisted reproduction.⁵⁶ Since assisted reproduction excludes artificial insemination, and traditional surrogacy is a product of artificial insemination, it seems as if only gestational surrogacy is allowed. Additionally, the statute allows agreements to take place "between a woman and another person, an unmarried couple, and a married couple." These terms specifically describe the parties that are authorized to enter into these agreements with a surrogate. Since the terms are gender-

⁴⁸ *Id.* § 9-10-201(c)(1)(A).

⁴⁹ *Id.* § 9-10-201(c)(1)(B).

⁵⁰ *Id.* § 9-10-201(c)(1)(C).

⁵¹ KINDREGAN & MCBRIEN, *supra* note 16, at 161.

⁵² *See id.* at 16-21.

⁵³ *Id.*

⁵⁴ ARK. CODE ANN. § 9-10-201(c)(2).

⁵⁵ DEL. CODE ANN. tit. 13 § 8-103(d) (2017).

⁵⁶ *See id.*

neutral yet relationship-specific, the statute seems to extend the use of gestational surrogacy beyond heterosexual couples and beyond married couples.⁵⁷

District of Columbia

The District of Columbia has quite the history with surrogacy laws. For years, it was known as a place that criminalized surrogacy. But, as of April 7, 2017, surrogacy agreements were authorized.⁵⁸ Indeed, there is a statute that delineates the parentage in different scenarios of collaborative reproduction.⁵⁹ For instance, both gestational surrogacy arrangements⁶⁰ and traditional surrogacy arrangement⁶¹ are recognized as permissible reproductive practices. Additionally, the statute provides instructions for when intended parents bear no genetic connection to the child resulting from a surrogacy agreement.⁶² In that scenario, they are considered the legal parents under law.⁶³

Florida

In Florida, there is a statute that expressly announces gestational surrogacy contracts as enforceable documents.⁶⁴ The state only permits gestational surrogacy. Because it remains silent about traditional surrogacy, it may be inferred that traditional surrogacy is prohibited.

Illinois

In Illinois, gestational surrogacy contracts are permitted by a statute called the Gestational Surrogacy Act.⁶⁵ Compensation for gestational surrogacy is also allowed.⁶⁶ In addition to the requirements imposed by the Gestational Surrogacy Act enacted in 2005, requirements found in another statute must be satisfied to create a parent-child relationship between the intended parents and the resulting child.⁶⁷

Moreover, both the gestational surrogate⁶⁸ and the gestational

⁵⁷ *See id.*

⁵⁸ D.C. CODE ANN. § 16-404 (2017).

⁵⁹ *Id.*

⁶⁰ *See id.* § 16-407(a)(1).

⁶¹ *See id.* § 16-407(b)(1).

⁶² *See id.* § 16-407(a)(1).

⁶³ *See id.*

⁶⁴ FLA. STAT. § 742.15 (2017).

⁶⁵ 750 ILL. COMP. STAT. § 47/25 (2005) (listing the requirements for a gestational surrogacy contract to be enforceable in Illinois).

⁶⁶ *See id.* § 47/25(b)(4).

⁶⁷ *See id.* § 46/709(a) (2017).

⁶⁸ *See id.* § 46/709(a)(1).

surrogate's husband⁶⁹ must certify that they did not provide their own gametes to create the child that the gestational surrogate carries. In addition, each intended parent must certify that the gestational surrogate carries a child created by one of their gametes.⁷⁰ The statute's title, Gestational Surrogacy Act, intimates that traditional surrogacy is not permitted. To corroborate what the gestational carrier and her husband certify, as well as the intended parents' certifications, the doctor who performs the ART procedure must certify that the child results from the gametes of one of the intended parents.⁷¹

Louisiana

By statute, Louisiana recognizes gestational carrier contracts as enforceable agreements.⁷² According to the legislature's statutory statement of intent, it sought to memorialize the biological and legal connections that exist between intended parents and their children.⁷³ However, the statute places restrictions on the kinds of gestational surrogacy agreements that may arise.⁷⁴

For example, a couple that wants to use ART to conceive a child must be married, and both spouses must use their own gametes in the gestational surrogacy arrangement.⁷⁵ The reasoning behind this unambiguous statutory requirement is that Louisiana has a compelling state interest in legally recognizing the parentage of children who are the product of assisted reproduction.⁷⁶ By requiring a genetic connection between the intended parents and the child that results from a gestational surrogacy agreement, the statute justifies this interest and its procedural safeguards.⁷⁷

Besides gestational surrogacy, the state does not allow much else. Specifically, Louisiana prohibits traditional surrogacy.⁷⁸ Its statutes require that the surrogate agree to the implantation of an embryo created by the gametes of the intended parents.⁷⁹ This qualification precludes the possibility that the surrogate could provide her own egg and thus have a

⁶⁹ See *id.* § 46/709(a)(2).

⁷⁰ See *id.* § 46/709(a)(3).

⁷¹ See *id.* § 46/709(a)(4).

⁷² LA. STAT. ANN. § 9:2720 (2016).

⁷³ *Id.* § 9:2718.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* § 9:2719.

⁷⁹ *Id.* § 9:2719 (describing a contract for a genetic gestational carrier as null). See also *id.* § 9:2720.2(A)(1) (expressly stating that a gestational carrier must agree to carry a child created from another couple's gametes).

genetic connection with the resulting child. Additionally, Louisiana prohibits compensating surrogates,⁸⁰ except for payments for medical expenses,⁸¹ mental counseling services,⁸² lost wages,⁸³ travel costs,⁸⁴ and settlements or judgments rendered to the surrogate if something were to go wrong in the pregnancy and damage her reproductive capabilities.⁸⁵

There is no case law that expands on the statutory provisions allowing gestational surrogacy and prohibiting traditional surrogacy as well as compensated gestational surrogacy.

Maine

Maine's statutes permit gestational carrier agreements to be made.⁸⁶ Despite this authorization, the statutes impose several requirements on gestational carrier agreements. For starters, a gestational carrier agreement must be in writing and include the signatures of the intended parents, the gestational carrier, and the gestational carrier's husband, if she has one.⁸⁷ Additionally, the parties must satisfy other almost boilerplate provisions, including that at least one party be a resident of the state⁸⁸ and that the agreement be notarized.⁸⁹

Subsections within the statute require certain express provisions in the agreement.⁹⁰ For instance, the agreement must stipulate that the gestational carrier possesses no claim to a child that results from the agreement⁹¹ and that she acknowledges that the intended parents are the child's parents for all intents and purposes.⁹² These provisions extend to the gestational carrier's spouse as well.⁹³ Regarding the intended parents, the agreement must explicitly state that they are "the exclusive . . . parents and accept parental rights and responsibilities of all resulting children immediately upon birth regardless of the number, gender, or mental or

⁸⁰ *Id.* § 9:2720.5(B)(3).

⁸¹ *Id.* § 9:2720.5(B)(3)(a).

⁸² *Id.* § 9:2720.5(B)(3)(b).

⁸³ *Id.* § 9:2720.5(B)(3)(c).

⁸⁴ *Id.* § 9:2720.5(B)(3)(d).

⁸⁵ *Id.* § 9:2720.5(B)(3)(e).

⁸⁶ ME. REV. STAT. ANN. tit 19-A, § 1932 (2016).

⁸⁷ *Id.* § 1932(3)(A).

⁸⁸ *Id.* § 1932(3)(C).

⁸⁹ *Id.* § 1932(3)(I).

⁹⁰ *Id.* § 1932(3)(J).

⁹¹ *Id.* § 1932(3)(J)(1)(b) (providing clarity about who is considered a legal parent and who is not).

⁹² *Id.* § 1932(3)(J)(1)(c).

⁹³ *Id.* §§ 1932(3)(J)(2)(b) & (c) (holding the gestational carrier's spouse to the same requirements as imposed upon the gestational carrier herself).

physical condition of the child or children.”⁹⁴

Maine’s statutes remain silent on traditional surrogacy, and the state’s case law does not expand on the topic.

Nevada

By statute, Nevada permits gestational surrogacy agreements to be made and carried out.⁹⁵ Additionally, when an error occurs where the wrong embryo is implanted, then the intended parents are presumed to be the legal parents of the child, even though the child is not genetically related to them or the donor.⁹⁶

New Hampshire

In New Hampshire, the legislature enacted a statute recognizing the enforceability of gestational carrier agreements.⁹⁷ It lists minimum requirements for such a contract to be enforceable,⁹⁸ including that it must be in writing,⁹⁹ must be executed prior to implantation,¹⁰⁰ and must state how reasonable compensation will be paid to the surrogate.¹⁰¹

Tennessee

In Tennessee, a statute defines a surrogate birth as follows:

- (i) The union of the wife’s egg and the husband’s sperm, which are then placed in another woman, who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights to the child to the biological parents pursuant to the terms of the contract; or

- (ii) The insemination of a woman by the sperm of a man

⁹⁴ *Id.* § 1932(3)(J)(4)(a) (necessitating strict requirements in order for a gestational carrier agreement to be enforced as a lawful arrangement).

⁹⁵ *See* NEV. REV. STAT. § 126.710(1) (2016) (requiring the gestational carrier, the gestational carrier’s spouse or domesticated partner, the intended parents, and the donor(s) to enter into a written agreement that provides the carrier’s agreement to become pregnant by ART, the carrier and the carrier’s spouse or partner relinquishment all parental rights, and the legal recognition of the intended parents as the parents of the child). *See also id.* § 126.750 (setting forth the specific requirements that the written gestational surrogacy agreement must meet in order to be enforced).

⁹⁶ *Id.* § 126.720(2).

⁹⁷ N.H. REV. STAT. ANN. § 168-B:10 (2018).

⁹⁸ *See id.* § 168-B:11.

⁹⁹ *Id.* § 168-B:11(I).

¹⁰⁰ *Id.* § 168-B:11(II).

¹⁰¹ *Id.* § 168-B:11(IV)(d).

under a contract by which the parties state their intent that the woman who carries the fetus shall relinquish the child to the biological father and the biological father's wife to parent.¹⁰²

Subsection (i) describes gestational surrogacy while subsection (ii) describes traditional surrogacy. However, further along, the statute states that the definition of "surrogate birth" does not expressly authorize surrogacy birth in Tennessee.¹⁰³ A surrogacy contract must first be approved by the courts or by the general assembly before it is enforced.¹⁰⁴ The statute explains that neither adoption by the intended parents nor termination of parental rights by the surrogate is required for the intended parents to become the legal parents of the child born subject to a surrogacy contract.¹⁰⁵

Texas

By statute, Texas expressly authorizes gestational surrogacy contracts¹⁰⁶ and prohibits traditional surrogacy contracts.¹⁰⁷ With regard to gestational carrier agreements specifically, the statute provides that the gestational mother, the gestational mother's husband, if she has one, each donor, and each of the intended parents must sign a written agreement.¹⁰⁸

The agreement must include the gestational mother's agreement to pregnancy by assisted reproduction;¹⁰⁹ the relinquishment of all parental rights by the gestational mother, the gestational mother's husband if she has one, and each donor;¹¹⁰ a statement that the intended parents will be the legal parents of the child in question;¹¹¹ and an agreement between the gestational mother and the intended parents to exchange information about their health.¹¹² Additionally, the intended parents must be married to one

¹⁰² TENN. CODE ANN. § 36-1-102(50)(A) (2017).

¹⁰³ *Id.* § 36-1-102(50)(C). Prior to 2017, subsection (C) of subdivision (50) referred to the subdivision as subdivision (48); however, this appears to be a typographical error. Before the statute was revised in 2016, it included the surrogate birth provision in subdivision (48), which now defines a sibling relationship. It has since been corrected to refer to subdivision (50).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 36-1-102(50)(B).

¹⁰⁶ *See generally* TEX. FAM. CODE ANN. § 160.754 (2003).

¹⁰⁷ *Id.* § 160.754(c).

¹⁰⁸ *Id.* § 160.754(a).

¹⁰⁹ *Id.* § 160.754(a)(1).

¹¹⁰ *Id.* § 160.754(a)(2).

¹¹¹ *Id.* § 160.754(a)(3).

¹¹² *Id.* § 160.754(a)(4).

another.¹¹³ The statute explains other provisions regarding physician care and timing of the implantation of the embryo as well.¹¹⁴

Utah

By statute, Utah authorizes gestational surrogacy agreements to be made and enforced.¹¹⁵ However, Utah does not allow gestational surrogacy by both an egg donor and sperm donor.¹¹⁶ This means that at least one intended parent must provide his or her gametes. Also, the statute expressly prohibits traditional surrogacy as a lawful reproductive alternative.¹¹⁷

Virginia

By statute, Virginia allows surrogacy contracts to be made.¹¹⁸ However, a court must review and approve surrogacy contracts for them to be enforced.¹¹⁹

Washington

Pursuant to newly passed legislation that went into effect on January 1, 2019, Washington permits gestational surrogate and traditional surrogate parenting contracts.¹²⁰ Contrary to states that simply declare surrogacy contracts enforceable without any explanation, Washington's statutes cover a wide spectrum of concepts concerning surrogacy.¹²¹

For instance, Washington allows compensation for surrogacy.¹²² Further, state law explicitly acknowledges that the gestational carrier and her husband are not the child's parents.¹²³ Additionally, the gestational carrier's marriage or divorce subsequent to initiating the surrogacy agreement does not affect the validity of the agreement.¹²⁴ Likewise, an intended parent's subsequent marriage or divorce does not affect the validity of the surrogacy agreement.¹²⁵ In either case, the new spouse is not

¹¹³ *Id.* § 160.754(b).

¹¹⁴ *See id.* § 160.754(d)-(e).

¹¹⁵ *See generally* UTAH CODE ANN. § 78B-15-801 (West 2017).

¹¹⁶ *Id.* § 78B-15-801(5).

¹¹⁷ *Id.* § 78B-15-801(7).

¹¹⁸ *See* VA. CODE ANN. § 20-159 (2017).

¹¹⁹ *See id.* § 20-160 (2017).

¹²⁰ *See* WASH. REV. CODE ANN. § 26.26A.700 (2019). Although subsection (1) defines a term called "genetic surrogacy," it effectively describes traditional surrogacy. This is just a synonymous term.

¹²¹ *Id.* §§ 26.26A.705 - 26.26.715 (2019).

¹²² *Id.* § 26.26A.715(2)(a) (2019).

¹²³ *Id.* § 26.26A.740(2) (2019).

¹²⁴ *Id.* § 26.26A.720(1) (2019).

¹²⁵ *Id.* § 26.26A.720(2) (2019).

considered a parent, and his or her consent is not required.¹²⁶

B. States That Allow Surrogacy by Case Law

California

While California has a statute that permits assisted reproduction,¹²⁷ there is no express statutory authority approving surrogacy agreements. There is, however, expansive case law on the subject.

In *Johnson v. Calvert*, the Supreme Court of California declared that the intended parents in a gestational carrier arrangement were considered the legal parents of the child in question.¹²⁸ The Calverts wanted a child but were unable to procreate naturally because Mrs. Calvert was forced to have a hysterectomy.¹²⁹ Fortunately for them, Mrs. Calvert's coworker Anna Johnson offered to serve as the surrogate.¹³⁰ The three signed a contract, stating that an embryo created from Mr. Calvert's sperm and Mrs. Calvert's egg would be implanted into Johnson's uterus; that the child would live with the Calverts as their child; and that Johnson agreed to relinquish her parental rights to the child.¹³¹

However, Johnson's relationship with the Calverts soon deteriorated, and she threatened to keep the child if she did not receive the balance of the payments promised to her.¹³² The Calverts filed a lawsuit seeking a declaratory judgment, and Johnson countersued to be declared the legal mother of the child.¹³³ Ultimately, the court declared that surrogacy agreements do not facially violate public policy.¹³⁴ In evaluating parentage under surrogacy arrangements, judges may "feel free to take into account the parties' intentions, as express in the surrogacy contract."¹³⁵ It pronounced, "she who intended to procreate the child . . . is the natural mother under California law."¹³⁶ Therefore, the decision affirmed the legal recognition of the Calverts's parental rights and effectively established a "rule of intentions."¹³⁷

¹²⁶ *Id.* § 26.26A.720 (2019).

¹²⁷ CAL. FAM. CODE § 7613 (West 2017).

¹²⁸ *Johnson v. Calvert*, 851 P.2d 776, 782 (1993).

¹²⁹ *Id.* at 778.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 777-78.

¹³⁵ *Id.*

¹³⁶ *Id.* at 782.

¹³⁷ *Id.* at 778. See also KINDREGAN & MCBRIEN, *supra* note 16 at 162.

The state court of appeals distinguished *Johnson* the next year in a case concerning a traditional surrogate. In *In re Marriage of Moschetta*, the court declared that traditional surrogacy agreements were unenforceable.¹³⁸ It refused to hold *Johnson* as precedent to legally enforce a traditional surrogacy agreement. It held that *Johnson* only determined that gestational agreements did not facially offend public policy; thus, gestational surrogacy agreements provided a proper basis on which to ascertain intent.¹³⁹ *Moschetta*, on the other hand, involved a surrogate who bore a genetic connection to the child and wanted to keep her biological child, despite agreeing to terminate her parental rights.¹⁴⁰ For the intended mother, Cynthia, to become the legal parent of the child, she would have to initiate adoption proceedings.¹⁴¹ Nevertheless, the court took notice that intended parents have a lot to lose in surrogacy arrangements, and no law has been promulgated to protect them.¹⁴²

An interesting turn of events occurred four years later in *In re Marriage of Buzzanca*, which concerned a child that was unrelated to her intended parents and her surrogate.¹⁴³ The Buzzancas, the intended parents, contracted with a surrogate to implant an embryo created from a donor egg and a donor sperm. Thus, the child that resulted, Jaycee, was unrelated to them. The couple decided to split up, fighting over custody. The trial court ruled that “Jaycee had no lawful parents.”¹⁴⁴ Fortunately for Jaycee, the state court of appeals overruled that finding and held that because the Buzzancas initiated and consented to a surrogacy agreement, they were considered the lawful parents of Jaycee.¹⁴⁵ Although the Buzzancas proceeded under the artificial insemination statute,¹⁴⁶ “courts must construe statutes in factual settings not contemplated by the enacting legislature.”¹⁴⁷ The court reasoned that even though the legislature did not consider surrogacy agreements where neither the intended parents nor the surrogate bore a biological connection to the child born, the crux of the issue is the intention, not the biological connection.¹⁴⁸ Additionally, it did not matter

¹³⁸ *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 901 (Cal. Ct. App. 1994).

¹³⁹ *Id.* at 900.

¹⁴⁰ *Id.* at 895.

¹⁴¹ *Id.*

¹⁴² *Id.* at 903.

¹⁴³ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 293.

¹⁴⁶ *See id.* at 288; CAL. FAM. CODE § 7613 (West 2017).

¹⁴⁷ *Buzzanca*, 72 Cal. Rptr. 2d at 285-86 (quoting *Johnson v. Calvert*, 851 P.2d 776, 779 (1993)).

¹⁴⁸ *Id.* at 286.

that the intended mother did not give birth because parenthood is created when a mother and father agree to a medical procedure that will result in a child.¹⁴⁹

Maryland

Maryland has no statutes that address surrogacy. However, the Court of Appeals of Maryland decided a case of first impression for the state and determined parentage in a gestational surrogacy agreement.¹⁵⁰ In *In re Roberto D.B.*, a single father contracted with a gestational carrier to carry an embryo created from his sperm and a donor's egg.¹⁵¹ The circuit court found that it was in the best interest of the child that the carrier's name be listed as the mother on the birth certificate.¹⁵² Despite the fact that the carrier joined the father's petition to remove her name, the circuit court rejected the request because of "health reasons" and lack of precedent to take such an action.¹⁵³

In contrast, the court of appeals held that the "best interest of the child" standard was inappropriately applied under the circumstances because there was no contest over parental rights or any allegations that a parent was unfit.¹⁵⁴ In pertinent part, the court held that surrogacy contracts are illegal in Maryland.¹⁵⁵

Using a criminal statute outlawing the sale of children¹⁵⁶ and a family law statute prohibiting payments for children,¹⁵⁷ the court reasoned that the exchange of money for a child amounted to child selling.¹⁵⁸ It also stated that it has enforced these statutes before, citing cases concerning

¹⁴⁹ *Id.* at 288.

¹⁵⁰ *In re Roberto D.B.*, 923 A.2d 115, 117 (Md. Ct. App. 2007).

¹⁵¹ *Id.*

¹⁵² *Id.* at 119.

¹⁵³ *Id.* at 118-19.

¹⁵⁴ *Id.* at 130. For more about custody disputes using the "best interest of the child" standard in Maryland, see generally *Schroeder v. Broadfoot*, 790 A.2d 773 (Md. Ct. Spec. App. 2002) (applying the "pure best interests" standard in a "no initial name" case to determine a child's surname when his unmarried parents disagreed about which name should be given to the child); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. Ct. App. 2004) (requiring the proponent of the name change to satisfy the "extreme circumstances" standard and vacating the lower court's judgment, which hyphenated a child's name so that he could carry his mother's and father's names respectively, because the parents had agreed before his birth that the mother's name would be used); *McDermott v. Dougherty*, 869 A.2d 751 (Md. Ct. App. 2005) (holding that the best interest standard is improper in custody disputes when third parties attempt to gain custody unless the parents are found to be unfit).

¹⁵⁵ *Id.* at 130-31.

¹⁵⁶ See MD. CODE ANN., CRIM. LAW, § 3-603 (West 2017).

¹⁵⁷ See MD. CODE ANN., FAM. LAW, § 5-3B-32 (West 2017).

¹⁵⁸ *Roberto D.B.*, 923 A.2d at 130-31.

payments in adoption.¹⁵⁹

Massachusetts

Under Massachusetts statutory law, there is no surrogacy provision. However, under its case law, gestational surrogacy agreements are permitted. In *Culliton v. Beth Israel Deaconess Medical Center*, the Supreme Judicial Court of Massachusetts in Essex determined that twins born to a gestational surrogate were actually the children of the intended parents whose gametes were used to procreate, recognizing gestational surrogacy as a lawful method of procreation.¹⁶⁰ In *Culliton*, the intended parents entered into a contract with a gestational carrier in which all parties agreed that an embryo created by the Cullitons' gametes would be implanted into the surrogate, and the surrogate would deliver a child and give the intended parents full physical and legal custody.¹⁶¹

The court declared, “[w]hile the twins technically were born out of wedlock, because the gestational carrier was not married when she gave birth to them, it is undisputed that the twins were conceived by a married couple. In these circumstances the children should be presumed to be the children of marriage.”¹⁶² While the court inconclusively addressed the legality of issuing pre-birth orders to determine parentage of children born as a result of a gestational carrier agreement, it acknowledged reproductive advances that “eliminated the necessity of having sexual intercourse in order to procreate,” thus implying that gestational surrogacy contracts are enforceable agreements.¹⁶³

Additionally, the Supreme Judicial Court of Massachusetts in Worcester had previously recognized surrogacy agreements as prevalent and enforceable in *R.R. v. M.H.* in 1998.¹⁶⁴ There, the court presented

¹⁵⁹ *Id.* at 131. See generally *State v. Runkles*, 605 A.2d 111 (Md. Ct. App. 1992) (holding that Article 27, § 35E was not limited to payments connected with an adoption, but also included the relinquishment of custody of a child for money); *In re Adoption No. 9979*, 591 A.2d 468 (Md. Ct. App. 1991) (holding FL § 5-327 barred payments made by the adopting parents directly to the birth mother to cover the cost of maternity clothing).

¹⁶⁰ *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Md. 2001) (agreeing with the lower court that the intended parents ought to notify the registrar of the nature of the birth by gestational carrier rather than seek a pre-birth order, yet declaring the intended parents to be the legal parents of the twins in question since all parties stipulated the facts and registrar concerns were addressed).

¹⁶¹ *Id.* at 1135.

¹⁶² *Id.* at 1137.

¹⁶³ *Id.*

¹⁶⁴ *R.R. v. M.H.*, 689 N.E.2d 790, 797 (Md. 1998) (declining to enforce a traditional surrogacy agreement that compensated the carrier, which potentially influenced her to relinquish her parental rights).

several characteristics of an enforceable surrogacy agreement in which a woman would help a couple conceive a child if the intended mother were infertile.¹⁶⁵ But the court held that traditional surrogacy agreements that provided compensation were unenforceable.¹⁶⁶ This supports the proposition that traditional surrogacy agreements could be enforceable contracts in Massachusetts if they contain certain prerequisites. Regardless, the court advocated for a surrogacy statute to validate such assisted reproductive methods.¹⁶⁷

New Jersey

There are no surrogacy statutes in New Jersey. There is, however, an abundance of case law. In *Matter of Baby M*, the Supreme Court of New Jersey concluded that compensated surrogacy contracts amount to baby-selling.¹⁶⁸ Further, the court asserted that according to New Jersey's public policy, "children should remain with and be brought up by both of their natural parents."¹⁶⁹

In this case, Mrs. Whitehead served as a traditional surrogate for Mr. and Mrs. Stern, thus bearing a genetic connection to the child in question.¹⁷⁰ Because the surrogacy contract required Mrs. Whitehead to relinquish her rights to her biological child, the court declared that it violated New Jersey laws and refused to enforce the agreement.¹⁷¹ The court primarily expressed concerns about how money could influence a woman to effectively sell her child.¹⁷² Particularly, in dicta, the court agreed that low-income women are more likely to become surrogates.¹⁷³ The court, therefore, held that

¹⁶⁵ *Id.* (listing acceptable requirements like informed consent from surrogate's husband; that the surrogate be an adult who has given birth at least once; that the surrogate, surrogate's husband, and intended parents be evaluated for sound judgment and capacity; that the intended mother be incapable of giving birth without risk to her health; and that intended parents are suitable persons to assume custody).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (arguing that a statute would provide guidance to judges, lawyers, prospective intended parents, and potential surrogates).

¹⁶⁸ *In re Baby M*, 537 A.2d 1227, 1241-42 (1988).

¹⁶⁹ *Id.* at 1246-47.

¹⁷⁰ *Id.* at 1235.

¹⁷¹ *Id.* at 1241-43 (advocating for adoption, rather than surrogacy contracts).

¹⁷² *See id.* ("The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. [citation omitted] The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary.")

¹⁷³ *Id.* at 1249 ("Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.")

traditional surrogacy contracts purporting to compensate the surrogate and to purchase irrevocability are void and unenforceable.¹⁷⁴ Because the court reviewed traditional surrogacy contracts providing compensation, there is room to argue that without compensation and without genetic connection between the surrogate and the child, a surrogacy contract would be permissible.

The Superior Court of New Jersey, Chancery Division, Family Part, in Bergen County addressed the idea of gestational carrier contracts in *A.H.W. v. G.H.B.*¹⁷⁵ There, the court seemingly disregarded any differences between traditional surrogacy discussed in the *In re Baby M* case and gestational surrogacy agreements. Although the court refused to delineate what rights, if any, a gestational carrier would have with the child she delivered, it recognized that “a bond is created between a gestational mother and the baby she carries in her womb for nine months.”¹⁷⁶ Additionally, by determining that the Parentage Act’s recognition of an infertile husband and not an infertile wife did not violate the Equal Protection Clause in *In re T.J.S.*,¹⁷⁷ the Superior Court of New Jersey, Appellate Division, implied that gestational surrogacy contracts are permissible, enforceable agreements.

To summarize, it appears that New Jersey’s courts willingly enforce gestational surrogacy contracts. While a case could be made for uncompensated traditional surrogacy contracts, courts seem to take issue with the fact that a surrogate possesses a genetic connection to the child. Regardless, New Jersey’s courts adamantly prohibit compensation for traditional and gestational surrogacy arrangements.

Ohio

No Ohio statutes address surrogacy. However, *J.F. v. D.B.*, recognized that surrogacy is not against the state’s public policy.¹⁷⁸

¹⁷⁴ *Id.* at 1250. It is important to notice that the court repeatedly calls the agreement between the Sterns and Mrs. Whitehead “*this* surrogacy contract,” specifically when declaring it violative of New Jersey statutory law. *Id.* (emphasis added) It makes one think that the court classifies only this specific type of surrogacy contract as unenforceable.

¹⁷⁵ See generally *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (holding that (1) prior to legislative action to allow pre-birth orders explicitly by statute, parents should follow current statutes and (2) that a gestational surrogate mother has seventy-two hours to surrender the child she delivered, which is forty-eight hours before the birth certificate is prepared).

¹⁷⁶ *Id.* at 953.

¹⁷⁷ *In re T.J.S.*, 16 A.3d 386, 393 (N.J. Super. Ct. App. Div. 2011).

¹⁷⁸ See generally *J.F. v. D.B.*, 879 N.E.2d 740, 741-42 (Ohio 2007) (“We conclude, therefore, that Ohio does not have an articulated public policy against gestation-surrogacy contracts. Consequently, no public policy is violated when a gestational-surrogacy contract is entered into.”)

Specifically, the Supreme Court of Ohio declared that gestational surrogacy contracts are enforceable agreements, even when contractual provisions forbid the gestational surrogate from asserting any parental rights toward the child she delivers.¹⁷⁹ The court, however, reserves judgment on the legality of traditional surrogacy contracts because the surrogacy would involve the surrogate's own egg.¹⁸⁰

South Carolina

In South Carolina, there are no statutes about surrogacy. But, in a federal case called *Mid-South Insurance Company v. Doe*, the district court of the Charleston Division held that for insurance purposes, a child born to a surrogate is a dependent of the biological father, not the surrogate's husband.¹⁸¹ Despite addressing a controversy involving insurance coverage, the court impliedly regarded surrogacy agreements as permissible, enforceable contracts.¹⁸² So, for parents who seek to use a surrogate to have a child, this case likely supports the validity of their contract.

Wisconsin

There is no statute or case law regarding surrogacy in Wisconsin. Yet, the Supreme Court of Wisconsin upheld a surrogacy contract in *In re F.T.R.* as an enforceable agreement.¹⁸³ There, the court analyzed statutory and case law, but it concluded that there was no authority to guide them in addressing a surrogacy arrangement.¹⁸⁴ The court ultimately refused to issue a public policy declaration regarding surrogacy,¹⁸⁵ instead, it enforced the surrogacy agreement because it was in the best interest of the child.¹⁸⁶

C. Anti-Surrogacy States by Statute

¹⁷⁹ *Id.* at 741.

¹⁸⁰ *Id.* at 742.

¹⁸¹ *Mid-South Ins. Co. v. Doe*, 274 F.Supp.2d 757, 766 (D.S.C. 2003).

¹⁸² *See id.* at 762-63.

¹⁸³ *In re F.T.R.*, 833 N.W.2d 634, 653 (Wis. 2013), *rev'd sub nom.* *Rosecky v. Schissel* (involving a traditional surrogacy arrangement in which a woman served as the traditional surrogate for her sister and thus the child thus bore a genetic connection to her and her sister's husband) (*id.* at 637-38)).

¹⁸⁴ *Id.* at 645-47. *See, e.g.*, WIS. STAT. ANN. § 891.40(1) (2017) (stating that a person's spouse is the parent of the child produced when the person is artificially inseminated by sperm from a sperm donor); *Torres v. Seemeyer*, 207 F.Supp.3d 905, 914 (W.D. Wis. 2016) (holding that Wis. Stat. Ann § 891.40(1) must be construed in gender neutral terms to account for same-sex couple); WIS. STAT. ANN. § 48.81 (2017) (listing different scenarios in which adoption is allowed to conclusively establish parentage); WIS. STAT. ANN. § 48.415 (2017) (determining when parental rights can be voluntarily terminated).

¹⁸⁵ *See F.T.R.*, *supra* note 183, at 652.

¹⁸⁶ *Id.* at 653.

Indiana

In Indiana, a statute pronounces surrogacy contracts as against public policy.¹⁸⁷ Additionally, surrogacy agreements are regarded as void.¹⁸⁸

Kentucky

By statute, Kentucky forbids certain practices regarding the parentage of children.¹⁸⁹ Such forbidden practices include advertising that solicits the adoption or custody of children,¹⁹⁰ the sale of children for adoption purposes,¹⁹¹ the placement of children for adoption by any person or entity other than a child-placing agency,¹⁹² compensation for artificial insemination contracts,¹⁹³ and the payment to a person or entity that brought prospective parents together with the biological parents in an adoption proceeding.¹⁹⁴

The statute does not use ordinary surrogacy terminology to describe the types of relationships it addresses. Yet, the meaning behind the ambiguous language can be reasonably inferred. For instance, when the statute states that contracts compensating women for artificial insemination and termination of their parental rights are void, it refers to traditional surrogacy.¹⁹⁵ But the statute does not address contracts for traditional surrogacy when the surrogate is not paid.¹⁹⁶ Thus, it remains unclear if uncompensated traditional surrogacy arrangements would be permissible. Nevertheless, the statute proscribes compensating an attorney to facilitate a traditional surrogacy agreement that purports to compensate a woman for subjecting her body to artificial insemination and the subsequent termination of her parental rights.¹⁹⁷

As for gestational surrogacy, the statute's language leaves much to the imagination. It is not clear which kinds of gestational carrier arrangements are lawful under Kentucky law. The statute prohibits the sale

¹⁸⁷ IND. CODE § 31-20-1-1 (2017) (Subsection (1) refers to traditional surrogacy because it prohibits a surrogate from donating an egg, while subsection (2) generally refers to both traditional and gestational surrogacy because it prohibits a surrogate from agreeing to become pregnant).

¹⁸⁸ IND. CODE § 31-20-1-2 (2017).

¹⁸⁹ KY. REV. STAT. ANN. § 199.590 (West 2017).

¹⁹⁰ *Id.* § 199.590(1).

¹⁹¹ *Id.* § 199.590(2).

¹⁹² *Id.* § 199.590(3).

¹⁹³ *Id.* § 199.590(4).

¹⁹⁴ *Id.* § 199.590(5).

¹⁹⁵ *See id.* § 199.590(4).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

of children for adoption, but it expressly states that this subsection does not apply to “in-vitro fertilization.”¹⁹⁸ The statute defines in-vitro fertilization as “the process by which an egg is removed from a woman, and fertilized in a receptacle by the sperm of the husband of the woman in whose womb the fertilized egg will thereafter be implanted.”¹⁹⁹ This definition clearly refers to a situation in which prospective, intended parents use an egg donor to become pregnant. The child is genetically related to the intended father, but the intended mother serves only as the birth mother, not the child’s biological mother.

What would happen if these roles were reversed? Imagine if the intended mother’s egg were extracted, fertilized in a receptacle by the intended father’s sperm, and placed inside another woman. In this instance, the woman whose womb carries the fertilized egg serves as the gestational carrier and possesses no biological connection to the resulting child. By expressly defining “in-vitro fertilization” by a limited circumstance, which is egg donation, the statute makes readers wonder if that definition is exclusive. Therefore, presumably, gestational surrogacy may take place until a court renders a judgment that describes the arrangement as against Kentucky’s public policy, or the legislature amends the statute and explicitly bans gestational surrogacy.

Michigan

In Michigan, a statute declares surrogate contracts as void and unenforceable agreements.²⁰⁰ It specifically states that such agreements “are contrary to public policy.”²⁰¹ Michigan criminalizes compensated surrogacy for the surrogate and for the person who helped with the arrangement.²⁰²

If a woman, other than an unemancipated minor or a woman who is intellectually disabled, mentally ill, or developmentally disabled, knowingly enters into a surrogate parenting contract for compensation, then she is guilty of a misdemeanor punishable by a fine up to \$10,000, imprisonment for not more than one year, or both.²⁰³ If a person induces, arranges, procures, or otherwise assists in forming a surrogate parenting contract for compensation, then he or she is guilty of a felony punishable by a fine up to \$50,000, imprisonment for not more than five years, or both.²⁰⁴

¹⁹⁸ *Id.* § 199.590(2).

¹⁹⁹ *Id.*

²⁰⁰ MICH. COMP. LAWS ANN. § 722.855 (West 2018).

²⁰¹ *Id.*

²⁰² *Id.* § 722.859(3).

²⁰³ *Id.* § 722.859(2).

²⁰⁴ *Id.* § 722.859(3).

Nebraska

By statute, surrogacy contracts are void and unenforceable in Nebraska.²⁰⁵ The statute defines a surrogacy contract as one “by which a woman is to be compensated for bearing a child of a man who is not her husband.”²⁰⁶ The statute does not elaborate beyond this definition, but much can be inferred from its brief description.

If a woman cannot be compensated for bearing the child of another man, this prohibition excludes both compensated traditional and gestational surrogacy. It excludes traditional surrogacy arrangements because a woman would bear a child created by her egg and the intended father’s sperm. Thus, the child would come from a man other than her husband. It also excludes gestational surrogacy arrangements because the surrogate would carry a child created by an egg from the intended mother, or an egg donor, and the sperm from the intended father, or a sperm donor. Even though the surrogate would have no genetic connection to the child, she would still bear the child of another man.

Because the statute does not address uncompensated traditional surrogacy contracts or gestational surrogacy contracts, it remains unclear whether enforcement hinges on compensation. If this is so, then uncompensated surrogacy contracts may be permissible. In addition, the statute states, “the biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.”²⁰⁷ This statement suggests that when a surrogate gives birth to a child of a man who is not her husband without being compensated, that man, the biological father, possesses all parental rights to the child.

New York

New York expressly prohibits surrogacy by statute.²⁰⁸ The statute specifically declares surrogate parenting contracts as void and unenforceable because they are contrary to New York’s public policy.²⁰⁹ The statutory definition of a surrogate parenting contract is “any agreement, oral or written” in which a woman agrees either to be artificially inseminated by or to be implanted with an embryo created by the sperm of

²⁰⁵ NEB. REV. STAT. ANN. § 25-21,200 (2018).

²⁰⁶ *Id.* § 25-21,200(2).

²⁰⁷ *Id.*

²⁰⁸ N.Y. DOM. REL. § 122 (Consol. 2017).

²⁰⁹ *Id.* See also the Practice Commentaries (stating that “surrogate parenting contracts are ... specialized adoption agreements”).

a man who is not her husband.²¹⁰ Also, the contract must include provisions in which a woman relinquishes her parental rights to the child that results from the agreement.²¹¹ Consequently, both traditional surrogacy and gestational surrogacy are prohibited.

North Dakota

By statute, North Dakota prohibits surrogacy agreements.²¹² It declares surrogacy agreements as void, and it recognizes the gestational carrier as the child's mother and the gestational carrier's husband as the child's father.²¹³ However, there is a statute entitled "gestational carrier agreements" that purportedly validates gestational surrogacy contracts.²¹⁴

These statutes in the North Dakota Code seemingly contradict one another. In reconciling them, it becomes clear that the state is willing to permit the creation of gestational carrier agreements as long as the gestational carrier is declared as the child's mother. Further, the state refuses to grant the parental rights of the resulting child to anyone else.

D. Anti-Surrogacy States by Case Law

Arizona

In Arizona, there is a statute that prohibits surrogate parentage contracts entirely.²¹⁵ According to the statute, surrogacy agreements will not be legally recognized.²¹⁶ It defines a "surrogate parentage contract" as "a contract, agreement, or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child."²¹⁷ Thus, Arizona forbids traditional and gestational surrogacy.

However, part of the statute was declared to be unconstitutional in 1995.²¹⁸ In *Soos v. Superior Court in and for County of Maricopa*, the state court of appeals held that subsection (C) violated the Equal Protection

²¹⁰ *Id.* § 121(4)(a).

²¹¹ *Id.* § 121(4)(b).

²¹² *See* N.D. CENT. CODE ANN. § 14-18-05 (2018).

²¹³ *Id.*

²¹⁴ *Id.* § 14-18-08.

²¹⁵ ARIZ. REV. STAT. ANN. § 25-218 (2017), *overruled by* *Soos v. Super. Ct.*, 897 P.2d 1356, 1357 (1994).

²¹⁶ *Id.* § 25-218(B)-(C).

²¹⁷ *Id.* § 25-218(D).

²¹⁸ *Soos*, 897 P.2d at 1361.

Clause of the Fourteenth Amendment to the U.S. Constitution.²¹⁹ It determined that the statute allowed natural fathers “to rebut the presumption of legal paternity” by proving that they are fathers, but it failed to provide the same opportunity for women.²²⁰ Because the state presented no compelling interest to satisfy a strict scrutiny evaluation of a fundamental right,²²¹ the statute’s provision amounted to dissimilar treatment, thereby violating the Equal Protection Clause.²²² Biological mothers would not be afforded the procedural process by which they could legally establish their maternity.²²³ Rather, the surrogate would be presumed to be the mother, and the biological mother would have to initiate adoption proceedings.²²⁴

The opinion in *Soos* never discussed surrogacy beyond these grounds, though. Since the court only held part of the statute unconstitutional due to disparate treatment between natural mothers and fathers, the rest of the statute stands and is validly enforced. Therefore, surrogacy agreements remain illegal.

E. States That Remain Silent on Surrogacy

Alabama

There is no statute that explicitly recognizes surrogacy as lawful or illegal in Alabama. Yet, there is a statute that prohibits payment for the placement of minors for adoption.²²⁵ The statute expressly states that it does not cover surrogacy, which implies that compensated surrogacy arrangements are legal.²²⁶ There is a fine line, however, between payment to a surrogate for her services and payment to a mother to influence her into giving up her child. Intended parents must be aware of the terms of their arrangement with a surrogate so that it does not seem as if they are engaging in an adoption business. Since there is no statute in place, surrogacy is neither statutorily prohibited nor permitted. There is no case law either. Therefore, it is presumable that surrogacy may take place in Alabama unless a court declares that it is against the state’s public policy.

Alaska

There is no statute or any case law on surrogacy in Alaska. Since

²¹⁹ *Id.* at 1360.

²²⁰ *Id.*

²²¹ *Id.* at 1359-61.

²²² *Id.* at 1360.

²²³ *Id.*

²²⁴ ARIZ. REV. STAT. ANN. § 25-218(B) (2017).

²²⁵ ALA. CODE § 26-10A-33 (2017).

²²⁶ *Id.*

there is no authority on the subject, it is presumable that surrogacy is permitted until a court declares the practice as contrary to Alaska's public policy.

Colorado

Colorado has no statute expressly prohibiting or permitting surrogacy, but there is a statute allowing ART.²²⁷ The ART statute provides that a wife who consents to ART with sperm donated by a man who is not her husband is considered the legal mother, and her husband is considered the legal father.²²⁸ If the roles were reversed, the outcome remains the same.²²⁹ If a wife consents to ART with a donated egg, and she gives birth, she and her husband are considered the child's legal parents.²³⁰

The ART statute explicitly states that if there is an egg donor, the wife must give birth, not a surrogate.²³¹ This may bar gestational surrogacy with an egg donor, but if a surrogate carries an embryo created by the wife's egg, it seems as if this arrangement could be permissible.

Connecticut

There is no statute specifically addressing surrogacy, but there is a statute allowing the replacement of a birth certificate "if the birth is subject to a gestational agreement."²³² Since this section of the Connecticut Code recognizes the existence of gestational agreements and provides procedures should they occur, it could be inferred that gestational agreements are allowed.

In *Raftopol v. Ramey*, the Supreme Court of Connecticut held that its analysis begins by assuming that a gestational agreement is valid.²³³ In construing § 7-18a, it is a matter of statutory interpretation whether a non-biological parent could become a legal parent pursuant to a valid gestational agreement without first adopting the child.²³⁴ The court asserted that § 7-48a does not define "gestational agreement"²³⁵ and that it remains ambiguous about what the legislature meant.²³⁶ The court ultimately confines its review to gestational agreements that are already valid because this case "highlights the fact that our existing statutes addressing parentage

²²⁷ COLO. REV. STAT. § 19-4-106 (2017).

²²⁸ *Id.* § 19-4-106(1).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² CONN. GEN. STAT. § 7-48a (2017).

²³³ *Raftopol v. Ramey*, 12 A.3d 783, 794 (Conn. 2011).

²³⁴ *Id.*

²³⁵ *Id.* at 794-95.

²³⁶ *Id.* at 795.

do not address the public policy concerns raised by modern assisted reproductive technology.”²³⁷

Because the legislature offers no further explanation by statute, and the highest state court already presumes the validity of gestational agreements, it is likely that gestational surrogacy is allowed.

Georgia

There is no statute regarding surrogacy in Georgia. There is not any case law either. In *Brown v. Gadson*, the Georgia Court of Appeals enforced a contract for sperm donation that was made in Florida, holding that it did not violate Georgia’s public policy to do so.²³⁸ This case suggests that gestational surrogacy contracts are not facially unenforceable agreements.

Granted, this case involved artificial insemination in which the intended mother was impregnated.²³⁹ It did not involve surrogacy. Further, the court enforced the agreement contracting for sperm donation because it was a valid contract under Florida law.²⁴⁰ Thus, if a reproductive agreement were made under Georgia law, it remains unclear if it would be permissible. The court’s repeated use of the phrase “under these circumstances”²⁴¹ supports this contention. Here, the circumstances involved a contract properly made pursuant to Florida’s statute and receiving reciprocal treatment in the neighboring state of Georgia.²⁴² Other than those facts discussed in *Brown*, any inference made beyond those circumstances may not be so straightforward.

Nevertheless, because the state court of appeals looked favorably upon an artificial insemination contract, it could possibly have the same look upon a surrogacy contract. Perhaps it is a stretch to compare the two reproductive practices in this way and assert that this case approves surrogacy in Georgia. While the case does not expressly authorize surrogacy, it represents hope for family law practitioners and prospective parents that surrogacy could one day be permitted in Georgia.

Hawaii

Hawaii has no statutes or case law prohibiting or permitting surrogacy. Presumably, since there is no prohibition, surrogacy may be allowed until a court declares it as against the state’s public policy.

²³⁷ *Id.* at 801.

²³⁸ *Brown v. Gadson*, 654 S.E.2d 179, 180 (Ga. App. 2008).

²³⁹ *Id.* at 179.

²⁴⁰ *Id.* at 180.

²⁴¹ *Id.* at 180-81.

²⁴² *Id.* at 180.

Idaho

There is no statute or case law in Idaho about surrogacy. Because no law exists about surrogacy, it is assumed that surrogacy may take place until a court declares that it violates the state's public policy.

Iowa

In Iowa, there are no statutes specifically about surrogacy. Yet, there is a criminal statute forbidding the sale of human life that expressly excludes surrogacy agreements.²⁴³ This specific exclusion allows for the possibility that surrogacy is permissible. There is also an administrative regulation that allows intended parents to amend a birth certificate following a live birth that was subject to a gestational surrogacy agreement.²⁴⁴ Although the regulation does not explicitly allow surrogacy, it implies that it is permitted.

Kansas

There is no statute or case law addressing surrogacy in Kansas. Since there is no authority addressing surrogacy, it is presumed that surrogacy may take place until a court declares it contravenes Kansas's public policy.

Minnesota

There is no statute that expressly permits surrogacy in Minnesota, but there is an intestate succession statute that implicitly allows assisted reproduction.²⁴⁵

Mississippi

There is no statute or case law regarding surrogacy in Mississippi. Because no authority exists about whether surrogacy is an acceptable practice, it is permitted until a court rules that it violates the state's public policy.

Missouri

Missouri has no statute or case law about surrogacy. Since there is nothing to guide prospective parents or practitioners, surrogacy is permitted until a court declares that the practice is against Missouri's public policy.

Montana

In Montana, there is no statute or case law about surrogacy. Because no authority exists to determine whether surrogacy may occur in Montana,

²⁴³ IOWA CODE § 710.11 (2017).

²⁴⁴ IOWA ADMIN. CODE § 641-99.15(144) (2017).

²⁴⁵ MINN. STAT. ANN. § 524.2-120 (2017) (establishing a parent-child relationship between a child conceived by assisted reproduction and the birth mother, the birth mother's husband if he provided the sperm or consented with the intent to act as the father, and the birth mother's former spouse if the former spouse consented).

it is an acceptable practice until a court announces that it violates the state's public policy.

New Mexico

New Mexico remains in murky water regarding surrogacy. The legislature promulgated a statute that neither permits nor prohibits gestational surrogacy agreements.²⁴⁶ Rather, it simply acknowledges that they occur.²⁴⁷ It also acknowledges that the agreements include provisions in which the gestational carrier relinquishes parental rights so that the intended parents become the parents of the child.²⁴⁸

North Carolina

In North Carolina, there is no statute or case law addressing surrogacy. Therefore, surrogacy presumably may be permitted until a court declares otherwise.

Oklahoma

There are no statutes about surrogacy in Oklahoma. However, there is an Attorney General Opinion from 1983 in which the attorney general at the time, Michael C. Turpen, considered surrogacy illegal under the Trafficking in Children criminal statute.²⁴⁹ Ultimately, the opinion pronounced that surrogacy amounted to the exchange of compensation for the adoption of a child.²⁵⁰ Since it favored outlawing gestational surrogacy contracts that provided compensation beyond statutory limitations, it impliedly suggested that compensation generally is not prohibited until it exceeds a certain amount so as to act as a strong incentive.²⁵¹ Therefore, intended parents may provide compensation for the surrogate's medical expenses as well as fees from an attorney facilitating the adoption.²⁵²

Oregon

Oregon has no statutes about surrogacy. However, a criminal statute outlawing the purchase and sale of minors specifically states that it does not

²⁴⁶ N.M. STAT. ANN. § 40-11A-801 (2017).

²⁴⁷ *Id.*

²⁴⁸ *Id.* § 40-11A-801(A). In addition, it could be argued that subsection (B) implicitly allows gestational surrogacy agreements to occur because it states that if, pursuant to a gestational surrogacy contract, a birth occurs, then the agreement can be made unenforceable under any other New Mexico law. If this were the case, then the parent-child relationship shall be determined under Article 2 of the New Mexico Uniform Parentage Act. *Id.* § 40-11A-801(B).

²⁴⁹ 15 Okl. Op. Atty. Gen. 277 (1983), 1983 WL 174961 at *2.

²⁵⁰ *Id.* at *1 (evaluating the Oklahoma Trafficking in Children Statute, OKLA. STAT. tit. 21, § 866 (1981)).

²⁵¹ *See id.* at *3.

²⁵² *Id.* at *1.

apply to fees paid in an adoption pursuant to a surrogacy agreement.²⁵³ This statutory exception seemingly implies that surrogacy agreements are allowed.

Pennsylvania

In Pennsylvania, there is no statute about surrogacy. Yet, in *In re Baby S.*, the Superior Court of Pennsylvania acknowledged that surrogacy contracts are increasingly common in today's society.²⁵⁴ Moreover, the court clarified that until the legislature declares surrogacy contracts void, surrogacy contracts may be made and enforced.²⁵⁵

Rhode Island

Rhode Island has no statute or case law regarding surrogacy. Since there is no authority on the subject, surrogacy presumably may take place in Rhode Island until a court declares that it violates the state's public policy.

South Dakota

There is no statute or case law regarding surrogacy in South Dakota. Thus, until a court declares that surrogacy agreements contravene the state's public policy, surrogacy agreements may be permitted.

Vermont

Vermont's laws contain nothing about surrogacy. Because there is no statute or case law on the subject, the state presumably will allow surrogacy to take place until a court declares it as violative of the state's public policy.

West Virginia

In West Virginia, there is no statute that explicitly permits or prohibits surrogacy. But there is a criminal statute prohibiting the purchase or sale of a child.²⁵⁶ In its list of exceptions, the statute specifically states that it does not purport to prohibit or permit fees or expenses paid to a surrogate mother pursuant to a surrogacy agreement.²⁵⁷ This leads to the inference that until a court issues a judgment or the legislature explains this brief statement, surrogacy may take place in West Virginia.

²⁵³ See OR. REV. STAT. § 163.537(2)(d) (2017).

²⁵⁴ *In re Baby S.*, 128 A.3d 296, 306 (Pa. Super. Ct. 2015) (following the Supreme Court of Pennsylvania's holding in *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007), which acknowledged the enforceability of a surrogacy contract involving a sperm donor).

²⁵⁵ *Id.* at 306-07 (upholding the validity of the surrogacy contract at issue involving parentage among the intended parents, a gestational carrier, and an egg donor).

²⁵⁶ See generally W. VA. CODE § 61-2-14h (2017) (effective May 9, 2018).

²⁵⁷ See *id.* § 61-2-14h(e)(3).

Wyoming

Wyoming has a statute addressing surrogacy, but it does not prohibit or permit surrogacy to take place.²⁵⁸ Specifically, the statute states that “this act does not authorize or prohibit an agreement” in which a woman agrees to become a surrogate for a couple and relinquish all parental rights to the couple.²⁵⁹ Since the legislature did not expand on the permissibility or prohibition of surrogacy contracts, they may be made until a court declares that they violate the state’s public policy.

III. Pre-Birth Orders Enable Couples to Avoid Conflicts Among State Surrogacy Laws

After looking at the status of surrogacy in the fifty states, the confusion plaguing this area of the law becomes apparent. Different states have a variety of rules, and no guarantee ensures that the parents of a child conceived by ART and born via surrogacy will be considered the legal parents of that child throughout the United States.

Within the concept of conflict of laws, courts determining legal parentage do not solely base their decisions on whether the state recognizes surrogacy.²⁶⁰ Instead, the choice of the law to be applied depends on the parties and the transaction.²⁶¹ For instance, the residence of the parties, the location of the clinic where the ART procedure is conducted, or the location where the child will be born could determine the state law that governs.²⁶²

Consider a family moving to Indiana, which is an anti-surrogacy state. Would the parents, who lawfully entered into a surrogacy arrangement in California and became the parents of the resulting child, be considered the legal parents of that child? Perhaps this question sensationalizes a hypothetical that may never occur because the child’s parents will likely be regarded as the child’s parents wherever they go, especially if they bear a genetic connection with the child. Yet, this scenario bears serious thought, for surrogacy afflicts family law litigation with novel dilemmas.

Although this article considers surrogacy as a laudable endeavor, it does not advocate that all states should allow surrogacy. Autonomy forms the basic principles underlying federalism. A state should be able to promulgate its own public policy, and as such, that policy may differ from the public policies in other states. With this in mind, this article advocates

²⁵⁸ See WYO. STAT. ANN. § 14-2-403(d) (2017).

²⁵⁹ *Id.*

²⁶⁰ See KINDREGAN & MCBRIEN, *supra* note 16, at 351.

²⁶¹ *Id.*

²⁶² *Id.* (citing *Hodas v. Morin*, 814 N.E.2d 329 (Mass. 2004)).

for the widespread use of pre-birth orders to circumvent the issue of federalism and disparate treatment of surrogacy by the states. By requiring a pre-birth order, rather than simply allowing their use, states solve future problems when litigation over parentage arises.

A. What Are Pre-Birth Parentage Orders?

Because of the discrepancies existing in various surrogacy laws, many family law practitioners as well as prospective parents have sought to use pre-birth parentage orders.²⁶³ A pre-birth parentage order is a court-ordered judgment that declares the intended parents in a surrogacy arrangement to be recognized as the legal parents of the child in question.²⁶⁴ It is separate from a court's approval of a surrogacy agreement.

As a result of the issuance of a pre-birth order, the intended parents' names would be listed on the child's birth certificate.²⁶⁵ Additionally, the intended parents could be consulted about medical conditions regarding the child and issued hospital security bracelets, so they may have access to the child.²⁶⁶ The intended parents could also get a passport for the child without delay, and they could receive custody of the child upon discharge from the hospital.²⁶⁷ Basically, pre-birth parentage orders make it known to the world that the intended parents are the child's parents under law and should be treated as such.

It makes sense that intended parents place a certain degree of trust in their surrogacy arrangement. Surrogacy carries with it risks that encompass physical ailments and monetary costs, as well as psychological detriments to the surrogate mother and the intended parents.²⁶⁸ For instance, children born via assisted reproduction often suffer birth defects, but scholars remain divided about whether these defects stem from multiple births, early births, or in-vitro fertilization techniques.²⁶⁹

²⁶³ Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634 (2005).

²⁶⁴ See KINDREGAN & MCBRIEN, *supra* note 16, at 361.

²⁶⁵ *Id.* By designating the intended parents as the parents on the child's birth certificate, a pre-birth order would reduce the number of legal hoops that intended parents must jump through after their child's birth, such as amending the birth certificate three days after birth. See e.g., IOWA ADMIN. CODE § 641-99:15(144) (2017); N.J. STAT. ANN. § 9:3-41(e) (West 2017).

²⁶⁶ *Id.*

²⁶⁷ *Id.* (No intended parent wants to have the surrogate wheeled out of the hospital in a wheelchair so that she can hand over the baby in the parking lot.)

²⁶⁸ See generally Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J. OF L. & MED. 337 (2003).

²⁶⁹ *Id.* at 343-46.

Without pre-birth orders, a surrogate must cooperate in a legal proceeding following the birth of the child she carried.²⁷⁰ Oftentimes, a surrogate who is the biological mother of the child will comply, but case law has shown the difficulties associated with severing a genetic connection.²⁷¹ Even if the surrogate merely serves as a carrier without bearing any genetic connection to the child, surrogates generally prefer a legal determination that relieves them from all responsibility, including financial responsibility.²⁷²

In fact, family law scholars suggest that parentage based on status improperly casts the boundaries of potential parents, often being over- or under-inclusive.²⁷³ For instance, the law considers a birth mother as the legal mother of the child, regardless of the genetic connection between them.²⁷⁴ Another example, status based on marriage conflates the already precarious surrogacy arrangement because not only is the birth mother legally considered the mother of the child, but her husband is also considered the father even though he did not biologically contribute to the conception of the child.²⁷⁵

Although it is easy to base parentage on status,²⁷⁶ it is not plausible in the age of biological and technological innovation. Typically, parents achieve their status as legal parents of a child by their intent. Pre-birth orders memorialize that intent and confer the protection of a court judgment.

B. Proposed Acts That Purport to Award Parental Rights in Surrogacy Arrangements Are Not Practicable

1. Uniform Parentage Act

There have been attempts to implement the use of pre-birth orders in surrogacy law. Specifically, the Uniform Law Commission promulgated the Uniform Parentage Act in 1973 and subsequently revised it two times, once

²⁷⁰ See Snyder & Byrn, *supra* note 263, at 638.

²⁷¹ See, e.g., *In re Baby M*, 537 A.2d 1227, 1236-37 (N.J. 1988).

²⁷² See Michelle A. Keeyes, *ART in the Courts: Establishing Parentage of ART Conceived Children (Part 2)*, 15 WHITTIER J. CHILD. & FAM. ADVOC. 189, 202 (2016). Although this article focuses on obstacles facing international intended parents, it provides useful context and references various practices among the states in the U.S.

²⁷³ Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFFALO L. REV. 465, 466 (2016) (discussing the tangled workings of determining a child-parent relationship).

²⁷⁴ *Id.* at 474.

²⁷⁵ *Id.* at 471.

²⁷⁶ *Id.* at 470.

in 2002 and a second time in 2017.²⁷⁷ Among the amendments in the latest version lies Article 8, which addresses surrogacy.²⁷⁸

The Uniform Law Commission noticed that states have been reluctant to adopt Article 8, so it updated the article in order to account for changes in state practices regarding surrogacy laws.²⁷⁹ For instance, the newly created Section 811 allows pre-birth orders to take place in which the intended parents are declared the legal parents prior to birth and designated as the parents on the birth certificate once the child is born.²⁸⁰ In addition, the surrogate and her husband, if she has one, are definitively declared not to be the parents.²⁸¹ Rather than biology or genetics, the UPA promotes the idea of intentional parenthood.²⁸²

However, the UPA has only been adopted by eleven states.²⁸³ Since the new version of the UPA has just been published, it is too soon to tell how many states will adopt it. The fact is that this uniform law is a suggestion, and states are not mandated to follow it. Moreover, states could adopt the UPA and exclude Article 8 entirely, just as five of the eleven states did with the 2002 version.²⁸⁴

Although a uniform law is an attractive solution, it is not plausible in an age where there are fifty different perspectives on one area of law. The UPA has merits, such as consistency and widespread, thoughtful coverage of parental rights, but it suggests that surrogacy be followed in every state.²⁸⁵ Although today's society accepts the practice of surrogacy more than past generations, it remains imperative that states decide to allow or prohibit surrogacy on their own.

²⁷⁷ Uniform Parentage Act, Prefatory Note, p. 1 (2017).

²⁷⁸ *Id.*

²⁷⁹ *Id.* 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, 557 (2001). Although Sheldon's article analyzes the 2000 version of the UPA, it addresses provisions that have substantively remained the same in the 2017 version. Sheldon acknowledges that the UPA favors looking at the intent of the parties to a surrogacy agreement, rather than biology or genetics, in order to determine parentage.

²⁸⁰ UPA 811(a)(1), (3) (2017). The Comment following Section 811 reveals that the Uniform Law Commission referenced pre-birth statutes in the District of Columbia, Maine, and New Hampshire while ascertaining its own provisions. *Id.*

²⁸¹ *Id.* at 811(a)(2).

²⁸² See Jacobs, *supra* note 273, at 482-83.

²⁸³ UPA, Prefatory Note p. 2 (2017)

²⁸⁴ *Id.*

²⁸⁵ *Id.*

2. The American Bar Association Model Act Governing Assisted Reproductive Technology

In February 2008, the American Bar Association Section of Family Law's Committee on Reproductive and Genetic Technology proposed a Model Act Governing Reproductive Technology.²⁸⁶ The Committee suggested two alternatives to the recognition of gestational agreements. Alternative A presents a structured process in which a gestational agreement is judicially authorized.²⁸⁷ Alternative B, on the other hand, is a self-enforcing agreement that does not require judicial interference.²⁸⁸ Because pre-birth orders are judgments rendered by a court, Alternative A presents the only alternative that is applicable in this situation.

However, to establish parentage under a gestational agreement that has been authorized, Alternative A requires that the intended parents file notice after the child's birth and within 300 days of assisted reproduction.²⁸⁹ This provision essentially obviates any possibility of obtaining a court order prior to a child's birth because it does not require orders before birth. Instead, parents will have a period of 300 days after birth to involve the courts.²⁹⁰ While intended parents, the parties who arguably want pre-birth orders the most, will likely seek to obtain these orders as early as they can, the hypotheticals run rampant as to why pre-birth orders may not be sought before the child's birth. For instance, the gestational carrier may not consent to be bound by a court order.

Regardless, the ABA Model Act contains information besides gestational surrogacy that imparts practical knowledge in terms of defining ART and explaining its parameters. It simply fails to provide the solution that this article proposes—requiring states that recognize surrogacy to issue pre-birth orders and states that do not permit surrogacy to recognize pre-birth orders. Thus, while the ABA Model Act contains potentially significant enactments, it does not solve parentage disagreements in surrogacy arrangements.

C. Pre-Birth Orders Solve Conflict of Laws Issues by Providing Clarity

1. The Full Faith and Credit Clause

Under Article IV, Section 1, of the Constitution of the United States,

²⁸⁶ Am. Bar Ass'n Model Act Governing Assisted Reprod. Tech. (ABA Model Act), art. 8, Prefatory Note (Feb. 2008).

²⁸⁷ *Id.* §§ 702-703 (Alternative A).

²⁸⁸ *Id.* § 703 (Alternative B).

²⁸⁹ *Id.* § 707(1).

²⁹⁰ *Id.*

the founding fathers mandated that certain procedures rendered in any one state be granted “full faith and credit” by the other states.²⁹¹ This particular provision states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”²⁹² Thus, if a pre-birth order is considered a judgment stemming from a judicial proceeding, it warrants “full faith and credit” by other states.

Though this conditional statement seems a bit elementary, it poses a problem that is not easily detected at first glance: what about anti-surrogacy states? Those states that have declared surrogacy as against their public policy will most likely refuse to recognize a parentage judgment resulting from a surrogacy arrangement. Also, those states could have a narrower view of the “Full Faith and Credit” solution to surrogacy. For instance, Indiana regards surrogacy contracts as violative of the state’s public policy²⁹³ and deems surrogacy agreements as void.²⁹⁴ Since Indiana is an anti-surrogacy state, it will likely refuse to honor orders that Indiana citizens obtained in other states.

This is a valid hole in this article’s argument. However, the only other options available would be to overhaul each state’s surrogacy laws or to create a federal surrogacy law. Uniform law suggestions—the UPA and ABA’s Model Act—have already shown their shortcomings, and a uniform federal law does not seem plausible. The use of pre-birth orders poses an interim solution that gives a clear answer to those attorneys and parents who are lost in the winding, confusing patchwork of surrogacy law.

2. Legitimacy of Pre-Birth Orders

A pre-birth order carries with it the legitimacy of law because the order represents a court judgment approving a child’s parentage. In issuing a pre-birth order, judges look at a gestational surrogacy agreement and evaluate its provisions before declaring any definitive opinion on the matter.²⁹⁵ Once a judge declares parentage, no ambiguity surrounds the parentage of a child born from a surrogacy arrangement.²⁹⁶

²⁹¹ U.S. CONST. art. IV, § 1.

²⁹² *Id.*

²⁹³ See IND. CODE § 31-20-1 (2017).

²⁹⁴ See IND. CODE at § 31-20-1-2 (2017).

²⁹⁵ See Megan Seaton, *Contract Law*, 40 AM. J. TRIAL ADVOC. 627, 632-33 (2017) (citing *In re Baby*, 447 S.W.3d 807, 834 (Tenn. 2014)).

²⁹⁶ See *Intended Parents: Establishing Parentage in Surrogacy*, SURROGATE.COM, <http://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy/>.

Besides definitively establishing the intended parents as legal parents before their child is born, pre-birth orders receive reciprocity.²⁹⁷ So, because states recognize and enforce court judgments made in other states, a pre-birth order issued by a judge will receive like treatment. Once a court determines the parents of a child born via surrogacy, the pre-birth order is considered a final judgment upon the matter. While states typically enforce pre-birth orders as court judgments, courts will refuse to follow them if they find they are against public policy or fundamental rights.²⁹⁸ Further, since many states remain silent regarding pre-birth orders, “issues over pre-birth surrogacy contracts are determined on a county by county, or judge by judge, basis as a matter of first impression.”²⁹⁹ Pre-birth orders thus remain plausible options for prospective parents and their legal counsel.

3. Pre-Birth Orders May Not Be Easy to Obtain, But They Provide the Most Transparency

Just as every state does not recognize surrogacy as a lawful reproductive practice, every state does not permit pre-birth orders to be obtained. Prior to many states’ approval of surrogacy contracts, courts determined legal parentage under two different statutory schemes.³⁰⁰ If there was a genetic connection between the child and at least one intended parent, then a family relationship presumably existed, and legal parentage could be pursued under paternity and maternity statutes.³⁰¹ However, if no genetic connection existed between the child and the intended parents, then legal parentage could only be established through adoption.³⁰²

Today, some states explicitly allow or prohibit pre-birth orders while others remain silent. For those states that remain ambiguous, parents may be still bring an action under a state’s paternity statute.³⁰³ The problem parents face with paternity statutes is that paternity cannot be established until after a child’s birth. Perhaps parentage proceedings could be initiated

²⁹⁷ See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and *judicial Proceedings of every other State*. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” (emphasis added)).

²⁹⁸ Seaton, *supra* note 295, at 632.

²⁹⁹ *Id.* at 633 (inferring that no state statutes or holding from the state’s highest court means the states remain silent on the issue of pre-birth orders).

³⁰⁰ See Snyder & Byrn, *supra* note 263, at 638.

³⁰¹ *Id.*

³⁰² *Id.* See also *id.* fn. 13. Snyder and Byrn acknowledged that the proceedings in order to authorize the intended parents’ intent to become legal parents may take place in separate courts, such as family court and juvenile court. Depending on the local court rules, the proceedings could be consolidated.

³⁰³ Cf. KINDREGAN & MCBRIEN, *supra* note 16, at 363.

under the paternity statutes prior to a child's birth, but the proceedings cannot reach a conclusion until after a child's birth,³⁰⁴ which leaves intended parents with unanswered questions.

Another choice for intended parents is to seek a declaratory judgment by naming a hospital in a lawsuit. Because an actual controversy must exist, and the intended parents and surrogate agree that the child belongs to the intended parents, the complaint brought before a court requires an adversarial party.³⁰⁵ This does not really make sense because hospitals maintain no interest in a dispute between intended parents and a surrogate. Further, a court is unlikely to adjudicate that a hospital should have disobeyed state laws and declared the intended parents as the legal parents.

Even though some states have no statutory enactments about pre-birth orders, it is possible for courts to issue them. In fact, it seems as if courts would regard them favorably because all parties agree to a specific outcome. Still, whether states allow, prohibit, or remain silent about pre-birth orders, all states should recognize these court judgments.

Pre-birth orders circumvent contract law and public policy differences in surrogacy among states, and they provide a universally recognizable adjudication about a child's parentage. Frankly, these orders clean up a messy area of family law litigation. With the growing use of technological advances that enable couples to become parents comes an increase in litigation about parentage. Pre-birth orders could save the judiciary time and money in the long run. While it is inappropriate to require all states to recognize surrogacy as a lawful reproductive practice, it is appropriate to require that all states implement pre-birth orders as mechanisms to determine parentage. Granted, mandating that states recognize pre-birth orders does encroach on the principles of federalism; however, it is far less intrusive than requiring all states to adopt a statute legitimizing surrogacy as a practice. Pre-birth orders provide an interim solution to an ever-growing issue of family law.

³⁰⁴ See e.g., MINN. STAT. ANN. § 257.57(5) (2017) (stating that actions brought before birth must be stayed until after the birth); OHIO REV. CODE ANN. § 3111.04 (West 2017) (stating that this provision is effective until 12/31/17); WASH. REV. CODE ANN. § 26.26.550 (2011) (stating that actions can be brought before birth, but cannot be concluded until after birth); WIS. STAT. ANN. § 767.80 (2017) (stating that all actions brought before birth must be stayed until after birth).

³⁰⁵ KINDREGAN & MCBRIEN, *supra* note 16, at 362-63 (obtaining a judgment from the court requires an actual controversy; when the intended parents and surrogate agree on the parentage of the child, an adversarial party must be added to the complaint in order to obtain a court judgement).

4. Survey of States that Allow Pre-Birth Orders

Since states remaining silent about surrogacy effectively allows surrogacy to take place until a court declares otherwise, that same argument holds true for pre-birth orders. Regardless of the methods to achieve issuance of pre-birth orders, it must be emphasized that a handful of states already legally permit their issuance explicitly or implicitly.

The following states expressly permit pre-birth orders by statute: California,³⁰⁶ Connecticut,³⁰⁷ Delaware,³⁰⁸ District of Columbia,³⁰⁹ Illinois,³¹⁰ Louisiana,³¹¹ Maine,³¹² Nevada,³¹³ New Hampshire,³¹⁴ Texas,³¹⁵

³⁰⁶ See 2017 Cal. Legis. Serv. 95 (A.B. 1396) (West) (amending CAL. FAM. CODE § 7962 (West 2017) to add language that requires courts to issue pre-birth orders immediately unless there is a good faith belief that the ART agreement for gestational carriers was not carried out according to this specific section of the code). (This amendment references CAL. FAM. CODE § 7962, which the legislature enacted on January 1, 2017. It requires certain information to be contained in gestational carrier agreements and lists terms that the agreement must meet, and it also provided the termination of the parental rights of the surrogate and her spouse or partner without further evidence or a hearing on the matter. The amendment listed above was made on September 27, 2017. However, there is a small caveat. The language of § 7962 states that the pre-birth orders are made subject to § 7633, which stays enforcement of the order until after the child's birth. CAL. FAM. CODE § 7633 (West 2007).)

³⁰⁷ See CONN. GEN. STAT. ANN. § 7-48a (2017) (describing the procedures to replace the birth certification of a child born pursuant to a gestational carrier agreement).

³⁰⁸ See DEL. CODE ANN. tit. 13 § 8-611(b) (2017) (allowing the issuance of an order establishing a parent-child relationship between the intended parents and a child conceived by ART but staying enforcement until after the child's birth).

³⁰⁹ See D.C. CODE ANN. § 6-408(a) (2017).

³¹⁰ See 750 ILL. COMP. STAT. § 47/35(a) (West 2016) (establishing a parent-child relationship prior to the birth of a child through gestational surrogacy, a form of pre-birth order).

³¹¹ See LA. STAT. ANN. § 9:2720.5 (West 2017) (calling a pre-birth order an "Order Preceding Embryo Transfer"; the 2017 comments compare this order to adoption.) See also LA. STAT. ANN. § 2720.13 (West 2017) (allowing post-birth orders to be issued).

³¹² See ME. REV. STAT. ANN. tit 19A, § 1934(1) (2016) (allowing both pre-birth and post-birth orders to be obtained pursuant to gestational carrier agreements). See also ME. REV. STAT. ANN. tit 19A, § 1928(1) (2016) (allowing pre-birth orders to be obtained pursuant to ART births in general).

³¹³ See NEV. REV. STAT. § 126.720(4) (2016) (allowing pre-birth orders to determine the content of birth certificates when a birth occurs through gestational surrogacy).

³¹⁴ See N.H. REV. STAT. ANN. § 168-B:12(1) (2017) (permitting both pre-birth and post-birth orders to be issued).

³¹⁵ See TEX. FAM. CODE ANN. § 160.760(a) (2017) (requiring intended parents to file notice of their child's birth no later than 300 days after assisted reproduction, which essentially permits both pre-birth orders and post-birth orders; this mirrors the ABA Model Act's provision. See III.B.2.).

Utah,³¹⁶ and Washington.³¹⁷ Through case law, Massachusetts³¹⁸ and New York³¹⁹ allows pre-birth orders.

There are states that prohibit pre-birth orders, however. These states include: Florida,³²⁰ Georgia,³²¹ and Virginia.³²² By case law, New Jersey³²³ indicates that courts generally deny pre-birth orders

The following states do not address pre-birth orders at all: Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming.

Conclusion

Given the variations among states about whether surrogacy is a lawful practice and the reasons as to why or why not, there needs to be a solution to streamline this convoluted area of law. Surrogacy is a controversial topic, and this article does not advocate for its use, despite its widespread implementation and relative acceptance. Rather, this article introduced a different approach to surrogacy law litigation. By outlining the current status of surrogacy law throughout the United States, this article proposed a uniform method of establishing parentage.

Pre-birth orders definitively determine parentage before a child is born, which reassures both intended parents and surrogates of their roles in

³¹⁶ See UTAH CODE ANN. § 78B-15-807(1) (West 2017) (requiring intended parents to file notice of their child's birth no later than 300 days after assisted reproduction, which essentially permits both pre-birth orders and post-birth orders; this mirrors the ABA Model Act's provision. See III.B.2.).

³¹⁷ WASH. REV. CODE ANN. § 26.26A.750(1) (2019).

³¹⁸ See *Hodas v. Morin*, 814 N.E.2d 320, 325-26 (Mass. 2004) (holding that "Massachusetts has 'a substantial relationship' to the transaction" and that it has interests in children born through gestational carrier agreements).

³¹⁹ See *T.V. v. N.Y. State Dept. of Health*, 929 N.Y.S.2d 139, 151 (N.Y. App. Div. 2011) (holding that adoption would lead to considerable intrusions and would ignore the biological link between the intended mother and the child in a surrogacy agreement).

³²⁰ See FLA. STAT. § 742.16(1) (2017) (allowing "expedited affirmation" of parentage three days after birth, which is effectively called a post-birth order).

³²¹ See GA. CODE ANN. § 19-7-43(c) (2017) (staying all proceedings brought before birth except service of process, discovery, and depositions).

³²² See VA. CODE ANN. § 20-160(D) (2017) (requiring parents to file notice with the court of their child's birth seven days after birth and within 300 days of assisted reproduction).

³²³ See *A.H.W. v. G.H.B.*, 339 N.J. Super. 495 (N.J. Super. Ct. Ch. Div. 2000) (holding that public policy problems arise when a contract binds a gestational carrier to relinquish her parental rights).

a gestational surrogacy arrangement. A pre-birth order relieves surrogates and their spouses or partners of all financial responsibility and parental rights, while simultaneously imparting legal status upon the couple who are the intended parents. By arguing that states be required to recognize pre-birth orders and that states permitting surrogacy be required to issue such orders, this article clarifies parentage questions and gives courts a practicable way to look at surrogacy disputes.