

Comment,
**FREEDOM OF FAMILY: THE RIGHT TO
ENFORCEABLE FAMILY CONTRACTS**

“Any sufficiently advanced technology is indistinguishable from magic.”¹

As assisted reproductive technology advances toward becoming a societal norm, the miracle of life has become one that can be scientifically dictated and manipulated in numerous ways. Biological donors, gestational hosts, expected parents—all are parties most likely requiring representation prior to the time that any scientific step is made toward the conception of a child. The science is continually evolving and universally accepted, but the legal enforcement of any agreement entered between these parties depends entirely on the state in which the agreement is made or the child is born. This Comment will examine the legal framework surrounding surrogacy, and will include a survey of the legal landscape throughout the United States.

Part I of this Comment offers a historical view of surrogacy in the United States. Part II will discuss the current perceptions surrounding surrogacy, and the legal doctrines that reflect those views. Part III then discusses the Uniform Parentage Act’s 2017 update, which aims to provide a forward-looking and universal standard for states to adopt regarding gestational agreements, and Part IV shows the evolving nature of surrogacy law and the need for uniformity.

I. A Historical View of Surrogacy

The basic principles of surrogacy have been prevalent in society dating back to biblical times, with Abraham’s wife, after discovering her infertility, suggesting that her husband have their child with a servant girl.² The science behind surrogacy has evolved since then, one of the most notable steps being the birth of the first test-tube baby in 1977. This discovery paved the way for the more than three million in vitro fertilization (IVF) births

¹ ARTHUR C. CLARKE, *PROFILES OF THE FUTURE* 21 n.1 (rev. ed. 1973) (articulating Clarke’s Third Law of Science).

² Alan C. Milstein, *The Brave New World of Assisted Reproductive Technology*, 307 N.J. LAW. 42, 44 (Aug. 2017).

since, making gestational surrogates not only possible, but also accessible.³ This new science laid the groundwork for a gestational surrogate who is able to carry to term, and give birth to, a child to whom she has no biological connection. This is compared to traditional surrogacy where the surrogate mother donates her egg, and the use of her body, to the child and thus is the biological, and birth, mother of the child. As the science behind surrogacy became more widely used, and financially feasible for couples, it was only a matter of time until law would need to regulate the practice.

The first, and most well-known, surrogacy case in the United States took place in New Jersey in 1988 and featured a traditional surrogate who was under contract. Baby M, as she is most famously known, was born to Mary Whitehead in 1986, and after the surrogate refused to surrender the child back to the intended parents, the legal ramifications that followed travelled all the way to the New Jersey Supreme Court. The New Jersey Supreme Court would ultimately rule that the surrogacy contract was invalid, but still held it was in the child's best interests to be placed with the intended, and biological, father.⁴ The best interest standard utilized in Baby M's case is only one of the countless common law approaches utilized in courts, and in recent decades the law governing this process has slowly formed through litigation, as in the *Baby M* case, and codification, which will be discussed in detail in a later section.

Each state has handled its approach to surrogacy independently. Many states began forming a common law basis for surrogacy by applying different legal doctrine to these cases, but vastly different perspectives have formed. While the New Jersey court in the *Baby M* case determined that surrogacy contracts were invalid, the Supreme Court of California held two years later that in gestational surrogacies the true mother is determined by looking at who the intended parents are in a surrogacy contract.⁵ The validity and enforceability of a surrogacy contract is only one small area where states differentiate from one another. Like most issues in family law, outcomes in surrogacy disputes are determined on a state-by-state basis, and these laws often reflect

³ *Id.* at 42.

⁴ Matter of Baby M, 537 A.2d 1227 (N.J. 1988).

⁵ Johnson v. Calvert, 851 P.2d 776, 783-87 (Cal. 1993).

societal concerns. These concerns distinguish the legality of a gestational surrogacy as compared to a traditional surrogacy, commercial versus altruistic surrogacy, pre-birth parentage orders versus post-birth adoption methods, and countless other controversies, some of which will be discussed next.

II. Current Legal Landscape of Surrogacy

Family laws have typically embodied the societal norms of the time in which they are written, and laws regarding surrogacy follow this trend. The issues that surface in state family law rarely rise to the level of a federal constitutional concern, but as seen in the 1960s with anti-miscegenation laws, and even in *Obergefell v. Hodges*⁶ in 2015 which legalized gay marriage, the right to constitute a family is an important constitutional concern and having that right determined by state borders causes families a great deal of unnecessary stress. Still, as the legal landscape exists today, surrogacy is handled on a state by state basis, and much of the law reflects basic policy concerns.

A. Surrogacy Is a Form of Baby Selling

One of the main arguments against surrogacy is that some people consider it to be trafficking in human life, creating a gamut of issues ranging from exploitation of lower classes all the way to considering surrogacy as a potential eugenics issue.⁷ While an individual couple's choice of having a baby of a certain race may seem inconsequential, in the aggregate those choices can amount to large socio-political problems such as the entrenchment of racial caste systems.⁸ The choice of sexual partner, and thus race of the baby, has been historically left to a parent who biologically produced a child, so these sorts of regulations invoke broader social concerns rather than simply presenting as simple topics that are ripe for litigation or codification.⁹ The major concern with baby selling is mitigated in some jurisdictions

⁶ 135 S. Ct. 2584, 2589 (2015).

⁷ Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. RICH. L. REV. 419, 455 (2017).

⁸ *Id.* at 452.

⁹ *Id.* at 454.

through the legal distinctions between commercial and altruistic surrogacy.

Altruistic surrogacy is when the intended parents of a child find a surrogate who is willing to carry and give birth to the child with the only compensation being that the intended parents pay for medical treatment, prenatal care, and any other pregnancy-related costs. Commercial surrogacy, on the other hand, is the same as the above, but the surrogate is paid additional money as compensation for surrogacy services, and subsequently makes a profit from carrying a child. The concern about surrogacy as a profitable exchange is used to justify making the act of surrogacy illegal, but studies have shown that to the child born of these surrogacy arrangements there is no difference whether the surrogate made a profit or not.¹⁰

The vast differences in perspectives by states are mirrored by the range of laws dealing with the subject. Commercial surrogacy, or baby selling as some states see it,¹¹ is so offensive that some states will consider it a criminal act.¹² Other states distinguish compensated surrogacy agreements to be void and unenforceable, but permit agreements for altruistic surrogacy.¹³ While the number of states that outlaw surrogacy contracts is shrinking, this does not mean that there is a guarantee of contract enforceability. Many states are silent on the enforceability of the agreements¹⁴ and expect the courts to determine parentage on a case-

¹⁰ Diana Brahams, *The Hasty British Ban on Commercial Surrogacy*, 17 HASTINGS CTR. REP. 16, 17 (1987).

¹¹ David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulating of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 269 (2016).

¹² MICH. COMP. LAWS §§ 722.851-.863 (2017)(a party to a compensated surrogacy contract is guilty of a misdemeanor punishable by a fine of not more than \$50,000, or imprisonment for not more than one year, or both); N.Y. DOM. REL. LAW § 123 (2014)("[violators] shall be subject to a civil penalty" and any repeat offenders shall be guilty of a felony).

¹³ New Jersey case law finds compensated surrogacy for gestational surrogacy to be unenforceable. See *In re T.J.S.*, 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011), *aff'd*, 54 A.3d 263 (N.J. 2012); *V.A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000); See also KY. REV. STAT. § 199.590 (2005); LA. REV. STAT. § 9:2713 (2013)(voiding all compensatory surrogacy contracts).

¹⁴ Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 800 (2012).

by-case basis through the application of other legal doctrines; similar to the *Baby M* case mentioned above.¹⁵ The distinction between paid and unpaid surrogacy is much more inconsequential than the distinctions drawn between gestational and traditional surrogacy, and thus more states create a more in depth process to regulate the latter.

B. *Emotional Attachment Between the Surrogate and the Child*

While numerous states take issue with for-profit surrogacy, some states ban surrogacy contracts entirely, making them unenforceable.¹⁶ The original surrogacy case of *Baby M* is still the common law basis for New Jersey's universal denial of surrogacy contracts.¹⁷ Not all states distinguish between the two types of surrogacy,¹⁸ but many build their surrogacy laws by distinguishing between traditional and gestational surrogacy, justifying as public policy the distinction between a genetically related surrogate and one who merely birthed the child, which, in some jurisdictions, can serve as an independent distinction of its own.¹⁹

¹⁵ NEB. REV. STAT. § 25-21,200 (2007)(banning commercial surrogacy, but, if a dispute arises, offering a statutory default to give the biological father sole-parenthood of the child, a relief to some, but a complication for male sperm donors).

¹⁶ IND. CODE § 31-20-1-1 (2017); LA. STAT. ANN. § 9:2719; NEB. REV. STAT. § 25-21,200(1) (imposing no penalties, but affording no legal protections, and holding the contracts void).

¹⁷ *Baby M*, 537 A.2d at 1264.

¹⁸ FLA. STAT. ANN. § 63.213 (2017)(permitting both types of surrogacy, but reserving gestational surrogacy for married couples, and requiring non-married couple to perform post-birth legal action); GA. CODE ANN. § 19-8-41 (2010)(permitting both types of surrogacy, and requiring only a contract signed by all parties in front of a notary); 750 ILL. COMP. STAT. ANN. § 47/35 (2005)(permitting gestational surrogacy, but silent on traditional surrogacy, making it subject to step-parent adoption).

¹⁹ ARK. CODE ANN. § 9-10-201(2010) (stating that a child born to a surrogate mother is presumed to be the child of the intended parents); KY. REV. STAT. § 199.590(4) (prohibiting traditional surrogacy, but silent on gestational surrogacy); N.H. REV. STAT. ANN. § 168-B:10 (2014)(permitting gestational surrogacy, but remaining silent on traditional surrogacy); N.Y. DOM. REL. LAW § 123 (voiding traditional surrogacy contracts, naming the surrogate as the mother for having "birthed the child," and giving the breaching party a more legitimate claim than the intended parents); N.D. CENT. CODE ANN. § 14-18-08 (2017) (permitting gestational surrogacy); TEX. FAM. CODE ANN. § 160.754 (West 2017) (approving gestational surrogacy contracts, but stating the gesta-

Virginia also makes an additional requirement that at least one of the intended parents must be genetically related to the child born of a surrogacy contract for the contract to be enforceable.²⁰ One of the largest policy concerns underlying these different laws depending on the type of surrogacy is the effect that having a genetic relation will have both on the mother and the child.

Many opponents of surrogacy feel that the absence of a biological connection to the intended parents will cause problems for the child born of surrogacy, but these concerns have not been supported by any longitudinal studies.²¹ One study at Cambridge University, in fact, showed that behavioral issues from children born of surrogacy were only prevalent when the intended parents had displayed issues with the child's biological origin.²² Psychologists do differ on whether children will generally respond poorly or positively to finding out that their parents used a surrogate.²³ Some children may perceive that their parents went through a great deal of effort and money to have them, or they may alternatively perceive the situation as one in which their genetic mother gave them up or "sold them."²⁴

Another significant policy concern is the reaction of the surrogate to the child to whom she gives birth and with whom she has a biological connection. There is a wealth of psychological literature explaining why a surrogate underestimates the difficulty of surrendering a child at the end of its gestational period and birth—optimism bias, endowment effect, and cognitive dissonance—but the end result is usually the same: the surrogate contests custody.²⁵ A biological, and psychological, connection

tional mother cannot be the egg donor and the intended parents must be married).

²⁰ VA. CODE ANN. § 20-160(B)(8)(2017).

²¹ Arshagouni, *supra* note 14, at 834-36.

²² Susan Golombok et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 J. CHILD PSYCHOL. & PSYCHIATRY 653, 657 (2013).

²³ Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 549-50 (2007).

²⁴ *Id.*

²⁵ Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 330-31 (2005) ("Optimistic bias refers to an individ-

forms between the surrogate and the child she carries, and this connection is increased greatly if the surrogate is also the genetic mother of the child.²⁶ It is difficult to predict the connection a surrogate will have with her unborn child, and because of this, traditional surrogacies are treated differently from gestational surrogacies in certain states' laws, and also in the newest version of the Uniform Parentage Act (UPA), by giving women a temporary period post-birth before their relinquishment of parental rights will be accepted. While these issues are relevant, some legislatures hesitate to act paternally by stating women lack the capacity for independent judgment regarding one of the most significant decisions of their lives, and also to avoid infringing on their bodily autonomy.²⁷ States have different approaches in mitigating the issue of the surrogate's connection to the child, most of which involve the timing of the termination of the surrogate's parental rights.

C. Relinquishment of Parental Rights Before a Child Is Born

The easiest way states try to alleviate the issue of the untimely relinquishment of parental rights for the surrogate is to legislate pre-birth and post-birth parentage orders. Pre-birth agreements are to allow the intended parents to prepare documents to prove parentage ahead of the child's birth. The benefits of these pre-birth orders are numerous: they allow the intended parents to be declared the child's legal parents, require hospitals to list the intended parents on the child's birth certificate, allow the intended parents to make medical decisions on behalf of the baby immediately after the birth, help resolve insurance coverage issues, and allow the child to be discharged from the hospital to the intended parents.²⁸ While these pre-birth parentage orders

ual's tendency to underestimate risks or negative consequences down the road"; The endowment effect, as it pertains to surrogacy, is that surrogates, after carrying a child for nine months, will "value the child above and beyond what would be rationally predicted," and cognitive dissonance is created during the nine month period where a surrogate may become less sure of her decision to surrender the child at the end of the pregnancy, and then acts on these changes.).

²⁶ *Id.* at 340.

²⁷ Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 76 (1988).

²⁸ Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634-35 (2005).

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seem ideal for the intended parents, they are expressly forbidden in many jurisdictions, and depend on the specific laws that enable them.²⁹ Most states, and even the UPA, will require a certain period of time to pass after the gestational surrogate gives birth before her consent to a relinquishment of her parental rights will be considered legitimate.

Pre-birth orders can be found void due to a lack of capacity on the part of the surrogate who is unable to accurately imagine what the situation will be at the time of the child's birth, or appreciate the long-term effects of this promise made before conception.³⁰ This stay of termination of parental rights will allow the surrogate time to rescind the contract after the birth, contesting custody, and thus ultimately allowing the court to examine the matter, and rule on the case through existing law or by applying a different parentage standard, such as the child's best interests.³¹ Some states will become heavily involved in regulating surrogacy agreements by requesting judicial preauthorization before they are considered valid. These preauthorizations place a number of requirements on the surrogates and intended parents, and if those stipulations are met, the court will grant pre-birth parentage orders.³²

Post-birth orders essentially mirror the "adoption model" of surrogacy and thus lack the assurance of parentage embodied in a true surrogacy contract.³³ This temporary stay after the birth leaves parents unsure of whether the surrogate will turn over the child, and if the court will be able to demand specific performance in the instance that she doesn't. Every state has adoption as an available option for intended parents, and surrogacy with one genetic parent will streamline the process through step-parent adoption, but this does nothing to alleviate the concerns of intended parents with a surrogate demanding parental rights. Even in the instance where the statutes are straightforward regarding

²⁹ *Id.* at 642-43.

³⁰ Walker Wilson, *supra* note 25, at 329.

³¹ Snyder & Byrn, *supra* note 28, at 645.

³² TEX. FAM. CODE ANN. § 160.756; UTAH CODE ANN. § 78-45g-801(4)(2006).

³³ Zoe M. Beiner, *Signed, Sealed, Delivered—Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy*, 71 VAND. L. REV. 285, 295 (2018).

the type of surrogacy or eligibility of pre-birth orders, the lack of uniformity across state lines, and even internally, can lead to interstate and also intrastate conflicts.

D. *A Lack of Uniformity of the Law Leads to Uncertainty Regarding Intensely Personal Choices*

1. *Interstate conflict*

While many people assume that if people don't like the surrogacy laws in their home state, they can easily cross the border to create a surrogacy contract in a more friendly state, this alternative jurisdiction also can serve as a haven for surrogates who wish to terminate their contract. After a Connecticut couple had offered their surrogate \$10,000 to terminate the pregnancy of a child who had heart problems that would require expensive surgeries at birth, the surrogate fled to Michigan where surrogacy contracts are not recognized or enforced.³⁴ Ultimately the surrogate, unable to care for the child, gave "Baby S" up for adoption.³⁵

This legal uncertainty requires lawyers to advise clients who live in states with unclear, or anti-surrogacy, laws to consider two options: (1) Proceed in making a surrogacy contract in the intended parents' home state and use a choice of law provision stating that the parties agree to apply a certain state's law, or (2) Have the surrogate give birth in a state that does support and enforce surrogacy arrangements.³⁶ The first option is far more risky, because it asks the state court to disregard its own laws in favor of a contract, which, if the contract is contrary to that state's public policy, courts usually will not do.³⁷ The second option is much more commonly used, but it is still advisable to not only have the child born in the pro-surrogacy state, but also to contract and conduct most of the surrogacy and prenatal activity in that state as well, since where the child is born is typically where the custody battle will take place.³⁸

³⁴ *Id.* at 307.

³⁵ *Id.*

³⁶ Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 503 (2015).

³⁷ *Id.*

³⁸ *Id.* at 504-05.

2. *Intrastate conflict*

While neighboring states can have conflicting laws, and a number of states are entirely silent, two states, Arizona and Indiana, have internally conflicting laws by prohibiting surrogacy contracts by statute, and yet having common law that uses those contracts as evidence during litigation to establish parentage.

In Arizona surrogacy contracts are prohibited by Arizona Revised Statute section 25-218, and yet gestational surrogacy is still practiced.³⁹ In 1994, the Arizona Supreme Court held that, although the surrogate who gave birth could be considered the legal mother, a statute that allowed the father to prove paternity through biological testing, and didn't afford a mother the same opportunity violated the equal protection clause.⁴⁰ The Arizona law permits gestational surrogacies, but will not allow the contract to enforce them.

Indiana, while statutorily banning surrogacy contracts, is still home to gestational arrangements, and some courts even award these arrangements pre-birth parentage orders.⁴¹ The court of appeals in Indiana answered the question of gestational surrogacy by following logic similar to that used in Arizona. Arizona's statutory scheme permitted an establishment of paternity, but not the establishment of maternity.⁴² The court held that there is a state interest in allowing children and parents to determine biological connections, and thus the state should allow mothers to establish maternity through genetic testing.⁴³ While this is a step forward in gestational surrogacies, it leads to complications in traditional surrogacy, where the surrogate is the biological and birth mother.

Iowa statutorily allows gestational surrogacy, but only implicitly through other statutory interpretations. Iowa's statute regarding the purchase or sale of an individual has an explicit exception of criminal charges for surrogacy, but the surrogacy is defined as "where a female agrees to be artificially inseminated with the semen of a donor, to bear a child and to relinquish all

³⁹ ARIZ. REV. STAT. ANN. § 25-218 (2011).

⁴⁰ *Soos v. Super. Ct.*, 897 P.2d 1356 (Ariz. Ct. App. 1994).

⁴¹ IND. CODE § 31-20-1 (2017).

⁴² *See id.* §§ 31-14-1-1 to -21-13.

⁴³ *In re Paternity of Infant T.*, 991 N.E.2d 596, 598 (Ind. Ct. App. 2013).

rights regarding that child to the donor or donor couple.”⁴⁴ It is unclear whether artificial insemination includes all forms of surrogacy, but the exception for surrogates bodes well. Also under the Public Health Department’s Vital Records, there is an entire section dedicated to the establishment of a birth certificate for a birth by gestational surrogacy.⁴⁵ While not a very orthodox enablement by statute, the Iowa Supreme Court recently ruled to uphold a compensated surrogacy agreement.⁴⁶

Contrarily Kansas is silent on surrogacy, but under its parentage act an establishment of maternity can be founded on proof of the woman having given birth to the child, giving the surrogate an advantage in any developing litigation.⁴⁷ Kansas has a statute regarding artificial insemination, but the statute is limited to married couples who provide written consent, and does seem to extend to any type of surrogacy contract.⁴⁸

Alaska, Alabama, Colorado, Mississippi, and Montana have no statute or case law prohibiting gestational surrogacy.⁴⁹ There is also very little history regarding surrogacy in these states, leaving citizens in these states to either be a case of first impression and risk their child’s future or go to a jurisdiction where the law is established.

III. A Forward Looking Approach with the Uniform Parentage Act

The Uniform Parentage Act of 2017 is the most recent family-focused model legislation drafted by the Uniform Law Commission (ULC). The ULC is made up of lawyers, judges, and legislators, all of whom are certified to practice law, and whose collective goal is to “provide states with non-partisan, well-conceived and well drafted legislation that brings clarity and stability

⁴⁴ IOWA CODE ANN. § 710.11 (West 2018)

⁴⁵ Iowa Admin. Code R. 641-99.15(144).

⁴⁶ David Pitt, *Court Upholds Surrogacy Contracts as Enforceable in Iowa*, U.S.NEWS.COM (Feb. 16, 2018), <https://www.usnews.com/news/best-states/iowa/articles/2018-02-16/court-upholds-surrogacy-contracts-as-enforceable-in-iowa>.

⁴⁷ KAN. STAT. ANN. § 23-2207 (2018).

⁴⁸ *Id.* § 23-2301.

⁴⁹ *Gestational Surrogacy Laws Across the United States*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Apr. 5, 2018).

to critical areas of statutory law.”⁵⁰ The ULC is in its 125th year, and its goals have been consistently to “promote uniformity among the many diverse states for the benefits of individuals and businesses alike . . . [and to] update the law by addressing important and timely legal issues.”⁵¹

The Uniform Parentage Act of 2017 was an update from a previous version of the UPA drafted in 2002. The 2002 UPA was adopted in its entirety by eleven state legislatures: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.⁵² Three states, Rhode Island, Vermont, and Washington, have already introduced bills to adopt and enact the 2017 version of the Uniform Parentage Act.⁵³

Many things have changed in the years since the drafting of the 2002 UPA, necessitating the update. One of the major advances, as has been discussed, is the increasing use of ART. The extremely private nature of surrogacy leads to accurate statistics being difficult to produce; however, the Centers for Disease Control and Prevention (CDC) is required to publish an annual ART Success Rates Report, in accordance with the 1992 Fertility Clinic Success Rate and Certification Act.⁵⁴ These reports are compiled from fertility clinics throughout the United States, and according to these reports, between 1999 and 2013 about 2% (30,927) of all assisted reproductive technology cycles used a gestational carrier, and the number of gestational carrier cycles increased from 727 in 1999 to 3,432 in 2013.⁵⁵ As a result of these ART procedures, there were 13,380 deliveries, and since multiple births are quite common in ART, 18,400 infants were born.⁵⁶ As ART becomes more available and affordable, more people are seeing it as a viable option, and the law must adapt to reflect these changes. The UPA is trying to meet these needs by provid-

⁵⁰ UNIF. PARENTAGE ACT (Unif. Law Comm’n 2017).

⁵¹ *Id.*

⁵² Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 *YALE L.J. F.* 589, 598 (2018).

⁵³ *Id.*

⁵⁴ National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, *ART and Gestational Carriers* (Aug. 5, 2016), <https://www.cdc.gov/art/key-findings/gestational-carriers.html>.

⁵⁵ *Id.*

⁵⁶ *Id.*

ing model legislation that would provide uniformity to the states, and Article 8 of the 2017 UPA attempts to provide a strong legal framework for gestational agreements.

Gestational agreements were previously known as surrogacy agreements, but a desire for a more detached, scientific definition led to the shift in nomenclature. These agreements are meant to be between the prospective gestational mother, and if she is married then her husband, and the intended parents. The intended parents may be married or not, echoing the forward-thinking model legislation of the 2002 UPA, which aimed to treat marital and non-marital children equally.⁵⁷ The UPA also leaves room for any party who will be directly related to the gestational surrogacy.

Section 802 of the UPA discusses the requirements to be eligible to enter into a gestational or genetic surrogacy agreement. The surrogate and the intended parents must all be 21 or older, all must complete a physical and mental health exam, and the surrogate, and the intended parents, must have independent legal representation throughout the surrogacy arrangement, and for the potential legal consequences if the agreement is broken. There is also an additional requirement for the surrogate to have previously given birth to at least one child. The requirement of giving birth to at least one child was not included in the 2002 UPA, but was added in the new UPA to reflect a sentiment that surrogates are less likely to become attached to the child if it is not their first. This is a sentiment some states have adopted in their own legislation.⁵⁸

For the gestational agreement to be held valid under the UPA, the following conditions must be met: (1) The gestational mother agrees to pregnancy by means of assistive reproduction;⁵⁹ (2) The prospective mother, her husband if she is married, and any genetic donors, must relinquish all rights and duties as the parents of a child conceived through assistive reproduction; and (3) the intended parents agree to accept all rights and duties as the parents of the child conceived through assistive reproduction.

⁵⁷ UNIF. PARENTAGE ACT (Unif. Law Comm'n 2002).

⁵⁸ See, e.g., D.C. CODE § 16-405(a)(2)(2018). See also ME. REV. STAT. tit. 19-a, § 1931(1)(B)(2017).

⁵⁹ Traditional surrogacy agreements involving any intercourse are not permitted by this section.

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These agreements can include payment of consideration to the gestational mother, as well as any donor. The agreement also must not limit the gestational mother's ability to safeguard her own health or that of the embryo or fetus. This idea is expanded further to state that the agreement must include information about each party's right to terminate the surrogacy agreement, and these rights are further explored in section 808 of the UPA.

The 2017 UPA also goes on to explain the proper procedure for the execution of these agreements, including how jurisdiction shall be established, and many other procedural points.⁶⁰ The procedure is also provided in section 811 for pre and post-birth orders of parentage, a less extensive process with results similar to adoption. The UPA also discusses the effects of these agreements, saying specific enforcement against the surrogate cannot typically be a remedy. Forced medical procedures of any kind are normally unenforceable.⁶¹

The 2002 UPA treated traditional and gestational surrogacies the same, but the 2017 version distinguishes between the two, as do many states. The 2017 UPA establishes additional requirements and safeguards for genetic surrogates, one of which is permitting a genetic surrogate to formally withdraw consent up until 72 hours after birth. The ability of a genetic surrogate to withdraw consent after the birth is very common, and even codified by certain states, but leads to further litigation.⁶²

The Uniform Parentage Act attempts to make gestational agreements simple matters of contract, but as surrogacy has shown in the past, it is anything but simple and there is no one right solution. The UPA lays the foundation of surrogacy contracts and synthesizes ideas from several states. Although every state has a different policy, most follow a basic legal structure, and then states, in implementing their own parentage laws, go on to prescribe these terms in more detail.

⁶⁰ UNIF. PARENTAGE ACT 2017 § 803.

⁶¹ *Id.* § 812.

⁶² *See, e.g.*, D.C. CODE § 16-411(4) (48 hours after birth); FLA. STAT. ANN. § 63.213 (48 hours after birth). *Cf.* VA. CODE ANN. § 20-161(B) (providing that in cases where the "surrogate . . . is also a genetic parent" the surrogate may "terminate the agreement . . . [w]ithin 180 days after the last performance of any assisted conception").

IV. The Unplanned Future for Surrogacy

While the UPA is a forward-looking approach to surrogacy, it only becomes relevant law if it is adopted by state legislatures. While several states adopt the UPA in part, most states create their own laws by either codifying statutes similar to the UPA, some more strict and some less, or waiting until a case that warrants attention travels to their supreme court.

New Jersey, one of the few remaining states with a surrogacy ban, has recently introduced a gestational carrying bill.⁶³ This shift comes thirty years after the New Jersey Supreme Court declared surrogacy contracts to be unenforceable in the landmark *Baby M* case. The bill adopts much of the same eligibility language and content of Article 8 of the 2017 UPA: the surrogate must be 21 years old and have given birth previously, the parties must have medical and psychological evaluations and retain independent counsel, and many other similar requirements.⁶⁴ This statute could potentially serve as the new legal foundation for overturning long-established case law in New Jersey against surrogacy contracts and pre-birth orders.⁶⁵

Virginia is an example of a state that has codified gestational surrogacy, and tailored it to meet specific policy concerns. Surrogacy contracts are not only allowed, but encouraged by Virginia statute.⁶⁶ The surrogacy contracts are subject to statutory provisions for enablement. Virginia's statute requires all active parties, including the surrogate's husband if she is married, to sign the surrogacy agreement before an officer or other person authorized by law to take acknowledgements. This contract is then attached to a petition to the court for approval, and then the court plays a very active role in the further proceeding of the petition.

The court orders a home study by a local department of social services or welfare or a licensed child-placing agency, to be

⁶³ Nicholas Pugliese, 'Gestational Carrier' Bill Advances, Restarting Surrogacy Debate in New Jersey, USA TODAY (Feb. 12 2018), <https://www.northjersey.com/story/news/new-jersey/2018/02/12/gestational-carrier-bill-advances-restarting-surrogacy-debate-new-jersey/329603002/>.

⁶⁴ No. 1704, 218th Sess. (N.J. 2018), www.njleg.state.nj.us/2018/Bills/A2000/1704_I1.htm.

⁶⁵ *In re T.J.S.*, 54 A.3d 263 (N.J. 2012); *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

⁶⁶ VA. CODE ANN. § 20-159 (West 2018).

completed prior to the hearing on the petition. At the hearing, the court will examine several elements prior to granting an order approving the surrogacy contract, some of which include: the results of the home study of all parties involved, all parties meet the standards of fitness applicable to adoptive parents, the parties have voluntarily entered into the surrogacy contract, and understand its meaning and terms, including the understanding that any compensation outside of the required assigned reasonable medical and ancillary costs will be void.⁶⁷ Similar to the 2017 UPA, all parties are also required to submit to physical and psychological evaluations by professional practitioners, the surrogate must have had at least one live birth, and the surrogate must prove medically that bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child.⁶⁸ An original statutory element to Virginia is that the intended mother is “infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child[, and t]his finding shall be supported by medical evidence.”⁶⁹ All parties to the surrogacy arrangement must also receive professional counseling concerning the effects of surrogacy, before an order making the surrogacy agreement enforceable will be granted.⁷⁰

If all of these requirements for a judicial order to enforce the surrogacy contract are not met, Virginia will still enforce the surrogacy agreement if the contract meets the more basic requirements set forth in Virginia Code section 20-162.⁷¹ For the unapproved surrogacy contract to be enforced, the following provisions must be met: (1) The surrogate, her husband if she is married, and the intended parents must be parties to any such surrogacy contract; (2) The contract must be in writing, signed by all the parties, and acknowledged before an officer or other person authorized by law to take acknowledgments; (3) The surrogate’s formal consent must be provided in accordance with the statute and may not be given until 72 hours after the birth; and

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* § 20-160.B.8.

⁷⁰ *Id.* § 20-160.B.11.

⁷¹ *Id.* § 20-162.

(4) The formal consent of the surrogate must be indicated, along with a statement from the physician who performed the assisted conception stating the genetic relationships between the child, the surrogate, and the intended parents.⁷² If this is all done within 180 days of the birth, then a new birth certificate must be issued naming the child as the child of the intended parents.⁷³ This same statute goes on to reiterate some of the same requirements as the approved contract: medical and ancillary costs are the only costs permitted in the contract, termination of rights by the surrogate, and acceptance of rights and responsibilities by the intended parents. If there is no contract pertaining to the costs of surrogacy, then those costs will be determined to be one-half of the all the costs if the surrogate terminates the agreement, and if the intended parents terminate the contract, they will pay all medical and ancillary costs, for a period of six weeks following the termination.⁷⁴

The extensive nature of court-approved surrogacy agreements can lead to individuals choosing the easier, less formalized options. This option however is only seamless with the participation of the surrogate post-birth, which is typically when most surrogates break these agreements. Virginia does have proposed legislation affecting the aforementioned statutes, but the shift is to gender neutral language, leaving the relevant provisions intact and enforceable.

V. Conclusion

While some states are completely silent on surrogacy, states like Virginia, according to some perspectives, swing too far toward the regulation of surrogacy. The primary issue with surrogacy in the United States is the lack of uniformity and clarity in the laws. While state laws like Virginia may be considered overly burdensome and paternalistic, they are at least clearly drawn requirements. The Uniform Parentage Act synthesizes many ideas from several states that are meant to allow security for the intended parents and the surrogate alike. While it is difficult to write legislation that does not favor one side over the other, the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

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issue of establishing parentage through surrogacy is going to be a continuing and growing issue in the United States requiring a uniformity of state laws, so that these intended parents are able to safely contract with surrogates for the creation of their family without worry about whether the contract establishing parentage is enforceable.

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