Gestational surrogacy has spun the conventional concept of family planning in an entirely new direction. Prior to medical advancements in the area of assisted reproduction, if a woman was unable to carry a child to term, her only option was to adopt a child who was not biologically related to her. Today, there are options. It is now possible, with the assistance of modern medicine and a gestational carrier, for an infertile couple to have biologically related children and continue to build their family despite the prior barriers posed by infertility. The process is nothing short of miraculous, but there are legal issues along the way which must be properly addressed in order to ensure that the intent and rights of all parties are clearly protected. The body of legal authority, while growing, is still relatively sparse, and specific to each state. The judges and practitioners must carefully navigate through the authority of varying jurisdictions—sometimes contradictory, sometimes nonexistent—in an effort to protect all parties while furthering their desired result—building a family.

There are two generally accepted categories of surrogates: traditional surrogates and gestational surrogates. Prior to the introduction of in vitro fertilization, “traditional surrogacy” was the sole option available to an infertile woman. As a general concept, a traditional surrogate is artificially inseminated by, presumably, the intended father of the resulting child; thereby producing and carrying a fetus genetically related to the surrogate mother and intended father. After the birth of the child, the traditional surro-

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gate would relinquish all parental rights and duties with regard to the child to whom she gave birth, and the intended mother, along with the biological father, would serve as the child’s parents during his or her lifetime. A traditional surrogacy arrangement usually involved no more than three parties; therefore, the sole legal issue to resolve after the birth of the child usually centered on establishing parental rights in the intended mother.

Today, the benefits of a gestational surrogacy arrangement far exceed that of a traditional surrogacy arrangement for most couples. For example, as discussed in more detail below, the medical procedures take place in a clean, sterile environment which does not involve any physical orientation between the husband and a third party. Moreover, the child may be genetically related to both intended parents, whereas no biological connection to the intended mother could occur in a traditional surrogacy. For these reasons, in the family planning arena, the world has seen a substantial increase in the use of gestational surrogates, rendering the traditional surrogacy arrangement nearly obsolete.

I. ASSISTED REPRODUCTION TECHNOLOGY (ART): AN OVERVIEW

Since the area of assisted reproduction is a relatively foreign concept for many, a brief explanation of in vitro fertilization may be useful. Assisted reproduction refers to a number of advanced techniques used by physicians to aid in the fertility of a patient or couple with the intent of producing a child for those patients who are deemed to be infertile. The most basic of these techniques is artificial insemination, which has been practiced for quite some time. The more recent advent of in vitro fertilization (IVF) has greatly expanded the options available to infertile patients by allowing the doctors to create an embryo in a laboratory setting and then implant the embryo into a woman’s uterus in hopes of creating a child. Clearly, without IVF, gestational surrogacy would not be possible.

Although the IVF process is quite complicated from a medical standpoint, as a guide for general understanding, the process involves the following steps. First, the woman takes fertility drugs to stimulate her ovaries to produce more eggs. At the appropriate time, the eggs are extracted and mixed with the partner’s sperm
in a laboratory setting (usually a Petri dish). If fertilization occurs, the pre-embryo is allowed to develop outside the womb for a number of days, and one or more embryos are then transferred to the woman’s uterus in hopes that a pregnancy will occur. Any remaining embryos, at the request of the patient(s), may then be cryopreserved (frozen) and maintained by the fertility clinic for use in future IVF cycles, if necessary.

This general scenario may be altered to include a donor egg from a woman other than the person who intends to be the mother of the child, donor sperm from a man who will not serve as the child’s father, a surrogate carrier who intends to carry the child to term but relinquish her rights to the child after the birth, or any combination of the aforementioned. It is readily evident that there are many parties who may have an interest in the embryo as well as the child produced from IVF. In fact, it is possible for a combination of six parties to be involved in a gestational surrogacy arrangement. To illustrate, one or more eggs are extracted from either the intended mother (1) or any other woman who may wish to donate her eggs (2), the eggs are fertilized in the lab with either the sperm of the intended father (3), or any other man who wishes to donate his sperm (4), thereby creating an embryo which can then be placed in the uterus of a gestational surrogate (5) who will carry the child to term. If the surrogate carrier is married at that time, her husband must relinquish any rights he may have to the resulting child (6). Consequently, there may be two donors, two intended parents, one surrogate carrier, and the surrogate carrier’s husband who may feasibly have some parental interest in the child. As a result of these recent advancements, the term “collabo-

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2 For purposes of this section, embryo and pre-embryo are used interchangeably. A pre-embryo is a four to eight cell zygote up to fourteen days old, and it is during this stage that implantation usually occurs or they are cryopreserved for future use. The available legal authority generally characterizes these as embryos; therefore, all references herein to embryos will refer to the same. THE AMERICAN HERITAGE MEDICAL DICTIONARY 660 (3d ed. 2007).
3 See What is involved with in vitro fertilization?, supra note 1.
4 Id.
rative reproduction” has come to light and is sometimes used to
describe arrangements such as these.

II. THE BASICS: STATE LAW, MODEL ACTS, CONTRACT
PRINCIPLES, AND COMMON LAW

The most pressing legal issue in a gestational surrogacy ar-
range ment involves the establishment and relinquishment of pa-
rental rights among the parties. The legal system throughout the
country is beginning to take notice and address some of the issues
that arise in this area. In addition to the acceptance and reli-
quishment of parental rights and duties, contractual issues relat-
ed to the validity of the surrogacy agreement must be addressed
by legislatures and courts. The lack of precedent provided in the
area of gestational surrogacy has caused great concern for law-
makers and practitioners around the country, which has led to
attempts to provide national uniformity on the subject by way of
proposed model acts and uniform laws. Given the current climate
as well as the speed at which the medical advancements are sur-
passing the available legal authority on the topic, a comprehensive
federal statute addressing the issues surrounding assisted repro-
duction law may be addressed in the future.

Currently, the laws of the state(s) where the parties reside
control the determination of the legal issues involved. A number of
states have enacted statutory law addressing surrogacy. State
legislatures have wide discretion with regard to the treatment of
various aspects of surrogacy law, such as general allowance or
prohibition, compensation, terms and validity of the surrogacy
agreement, and parental rights. Since Mississippi currently has
no statutory authority or case law that addresses the concept of
surrogacy or the issues surrounding surrogacy, it is especially im-
portant to closely consider the various guidelines provided by the
American Bar Association Model Act Governing Assisted Repro-
ductive Technology (the Model Act)\textsuperscript{5} and the Uniform Parentage

\textsuperscript{5} AM. BAR ASS’N MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008) [herein-
after ABA MODEL ACT], available at http://apps.americanbar.org/family/committees/
artmodelact.pdf.
Act (UPA). The Model Act and the UPA address the validity of surrogacy contracts as well as parental rights and duties of the parties, and attempt to provide basic models on which state legislatures may rely in promulgating statutes on the subject. They also provide substantial guidance in these areas to practitioners who have no state law on which to rely.

III. THE AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY

In 2008, the American Bar Association Section of Family Law’s Committee on Reproductive and Genetic Technology published a Model Act Governing Assisted Reproductive Technology (the Model Act). The Model Act specifically addresses the issues surrounding gestational surrogacy as well as parental rights in cases of collaborative reproduction, in an attempt to provide guidance to state governments when considering legislation focused on assisted reproduction technology. Articles 1 through 6 of the Model Act address the issues surrounding gamete (sperm/egg) donation and embryo donation, embryo transfer and disposition, and parental rights with respect to the resulting child. The main focus of this section centers on Articles 7 and 8 of the Model Act, which address the gestational agreement and compensation of gestational surrogates.

A. The ABA Model Act: The Two Alternatives

Article 7 of the Model Act provides two alternatives; both of which address and delineate the rights of surrogates and intended parents during and after the birth of the child, as well as the terms of a valid gestational agreement. Alternative A mirrors the provisions of the Uniform Parentage Act, which was initially approved by the National Conference of Commissioners on Uni-

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7 See ABA MODEL ACT, supra note 2. The American Bar Association Model Act Governing Assisted Reproductive Technology was approved by the ABA on February 11, 2008.
8 ABA MODEL ACT §§ 101-607.
9 Id. at §§ 701-802.
10 Id. at ALT. A §§ 701-712.
form State Laws in 2000, and was revised in 2002 to specifically deal with parentage issues created by assisted reproduction. Alternative B is modeled after the Illinois Gestational Surrogacy Act. While Alternative A requires at least one court proceeding to validate the gestational agreement and establish parental rights with regard to the child, Alternative B sets forth specific guidelines, which if followed, serve to validate a gestational agreement without court involvement; thereby establishing parental rights in the intended parents after the birth of the child.

1. ABA Model Act Alternative A: Judicial Preauthorization

Under Alternative A, judicial approval is required to validate the gestational agreement and establish parental rights in the intended parents. The timing of the judicial proceeding is not specifically mentioned in the language of Alternative A, but references to the “prospective gestational carrier” throughout indicate the proceeding must take place prior to implantation of the embryo(s). Moreover, § 706 provides that if any party wishes to terminate the agreement after an Order validating the agreement is obtained, such termination must take place prior to the time the gestational carrier becomes pregnant. Therefore, under Alternative A, a party may terminate the agreement any time after the court approves the agreement but before the gestational carrier becomes pregnant.

a. The Gestational Agreement

Section 701 sets forth the requirements for a valid Gestational Agreement: All parties must enter into the agreement (including all donors, the gestational carrier, the gestational carrier’s spouse if she is married, and the intended parent(s)); the gestational carrier must agree to pregnancy by means of assisted re-

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14 See id. at Alt. A § 702; cf. id. at Alt. B § 702.
15 Id. at Alt. A § 701.
16 Id. at Alt. A § 706; see also UNIF. PARENTAGE ACT § 806, 9B U.L.A. 367-68 (2002).
production; the gestational carrier, her spouse if applicable, and all donors must relinquish all parental rights to the resulting child; and the agreement must state that the intended parents are to become the parents of the child.\textsuperscript{17} The agreement may provide for payment of reasonable consideration to the gestational carrier, but the agreement may not limit the right of the gestational carrier to make decisions to safeguard her health or that of the embryo or fetus.\textsuperscript{18}

\textit{b. Judicial Proceeding to Validate Gestational Agreement}

A petition to validate the agreement may be filed by the intended parents and the prospective gestational carrier in the state in which the carrier or the intended parents have resided for at least ninety days.\textsuperscript{19} If all requirements set forth in Alternative A of the Model Act are met, the court shall grant a hearing on the matter.\textsuperscript{20} Thereafter, the court shall issue an order validating the gestational agreement as presented to the court for approval and declaring that the intended parents will be the parents of a child born during the term of the agreement.\textsuperscript{21}

\textit{c. Post-birth Judicial Proceeding}

After the birth of the child, the intended parents must file notice with the court that a child has been born, and the court shall issue an order confirming that all parental rights lie with the intended parents and direct the issuance of a birth certificate naming the intended parents as the parents of the child.\textsuperscript{22} In the event the intended parents fail to file notice, the gestational carrier may

file such notice and the court will thereafter issue an order establishing parentage in the intended parents, declaring that the intended parents are thereafter financially responsible for the child.\footnote{ABA Model Act: Alt. A § 707; see also Unif. Parentage Act § 807(c), 9B U.L.A. 368 (Supp. 2010).}

d. Non-validated Gestational Agreement

The Act states that if the agreement is not judicially validated it is “not enforceable,” but it does not declare the agreement to be void.\footnote{ABA Model Act: Alt. A § 709; see also Unif. Parentage Act § 809(a), 9B U.L.A. 369 (2002).} If a child is born under a non-validated gestational agreement, the parent-child relationship is determined “as provided under other law.”\footnote{ABA Model Act: Alt. A § 709; see also Unif. Parentage Act § 809(a), 9B U.L.A. 369 (2002).} In addition, in such an instance, the intended parents may be held liable for support of the resulting child “under other law.”\footnote{ABA Model Act: Alt. A § 709; see also Unif. Parentage Act § 809(c), 9B U.L.A. 369 (2002).} This language alludes to the fact that each state may either address non-validated gestational agreements statutorily, or if not, a court of competent jurisdiction may determine the rights of the parties in accordance with the law it deems appropriate at that time.

e. Analysis of Alternative A of the ABA Model Act

There are many positive aspects to requiring a court proceeding when utilizing a gestational carrier. Judicial validation of the gestational agreement legally binds all parties to adhere to the terms of the contract, and in the case of a dispute, provides a forum for enforcement or interpretation of the contract. In addition, as a practical matter, having established parental rights by court order prior to the birth of the child reduces confusion and liability concerns which may take place at the hospital during and after the birth of the child. Alternative A also provides an efficient means by which the intended parents may obtain a birth certificate after the child is born. In most states, the birth mother is pre-
sumed to be the legal mother and, absent state law to the contrary, the birth (surrogate) mother is reflected on the birth certificate. In this instance, in order to properly establish parental rights, it would be necessary to obtain a court order after the birth of the child, and in some cases, perform a legal adoption. These actions will result in legal fees and expenses which are fairly comparable to those incurred in obtaining a pre-birth order as contemplated by Alternative A. Finally, the gestational surrogate is protected from being an unintended parent after the birth of the child should the intended parents have a change of heart. 27 All of these aspects provide predictability and peace of mind to all of the parties involved, which is extremely important given the emotional nature of the surrogacy arrangement.

In the alternative, judicial validation of the gestational agreement prior to implantation is a time consuming and expensive endeavor. The national success rate for in vitro fertilization is generally around thirty percent; 28 therefore, it is likely that the intended parents will be required to pay an attorney to draft a surrogacy agreement, and attend a hearing to validate the agreement, only to be disappointed if no pregnancy results from their efforts. If they decide to proceed with a second or third attempt, multiple court proceedings may be required before they achieve a pregnancy or decide not to continue. Also, as a practical matter, time is usually of the essence when dealing with in vitro fertilization due to a variety of factors. Hence, a court proceeding requires additional effort, cost, and time, which may be frustrating for some or all parties involved, especially if no child is born of the agreement.

2. ABA Model Act Alternative B: Administrative Model

This alternative establishes parental rights by virtue of a properly drafted gestational agreement, sets forth eligibility re-

quirements for gestational carriers, and addresses the duty to support the resulting child.\textsuperscript{29} If all factors are met, the gestational agreement is a self-executing contract without the necessity of a court validation.

\textbf{a. Parental Rights}

Alternative B first establishes the presumption that the birth mother is the mother of the child for purposes of state law. It then provides the framework by which the presumption may be overcome, thereby establishing parental rights in the intended mother rather than the surrogate carrier. If the gestational agreement meets all requirements set forth in § 703 of Alternative B, parental rights and sole custody rest with the intended parents upon the birth of the child.\textsuperscript{30}

\textbf{b. Eligibility of Gestational Carrier}

A gestational carrier must be at least twenty-one years of age, she must have given birth to at least one child, she must have completed a medical evaluation related to the anticipated pregnancy as well as a mental health evaluation related to the gestational carrier arrangement, she must be represented by independent legal counsel with regard to the arrangement, and she or the intended parents must obtain, prior to implantation of the embryo, a health insurance policy which extends throughout the pregnancy and for eight weeks after the birth of the child.\textsuperscript{31}

\textbf{c. Eligibility of Intended Parent(s)}

At least one intended parent must contribute a gamete (sperm or egg) toward the embryo which the gestational carrier intends to carry; the intended mother must have a medical need

\textsuperscript{29} ABA Model Act: Alt. B §§ 701-712.

\textsuperscript{30} \textit{Id.} at Alt. B § 701. Also note paragraph 3 of § 701, which addresses the possibility that, due to laboratory error, neither intended parent is genetically related to the intended child. In such case, the intended parents nonetheless enjoy all parental rights otherwise afforded under Alternative B, but § 701 allows one or more genetic parents to bring an action to establish parentage within sixty days of the child’s birth. \textit{Id.}

\textsuperscript{31} \textit{Id.} at Alt. B § 702(1).
for the gestational carrier arrangement as evidenced by a qualified physician’s affidavit attached to the gestational agreement; the intended parent(s) must complete a mental health evaluation related to the gestational carrier arrangement; and the intended parent(s) must be represented by independent legal counsel with regard to the gestational carrier arrangement.\footnote{Id. at ALT. B § 702(2). Note that this section of the Act contemplates that there may be only one intended parent who enters into the gestational carrier arrangement. Id.}

d. The Gestational Agreement

The agreement must be in writing, signed by the gestational carrier and her spouse if she is married, as well as the intended parent(s), and must be executed prior to the commencement of any medical procedures.\footnote{Id. at ALT. B § 703(2).} The gestational carrier and intended parent(s) must be represented by independent counsel and shall sign a written acknowledgment that he or she has been informed as to all aspects of the agreement.\footnote{Id. The parties should be advised as to the “legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational agreement.” Id. at ALT. B § 703(d)(2).} The agreement must be witnessed by two disinterested competent adults.\footnote{Id. at ALT. B § 703(2)(f).}

e. Terms of the Gestational Agreement

The following terms must be present in the agreement: the gestational carrier agrees to undergo embryo or gamete transfer and attempt to carry and give birth to the child, and upon the birth of the child, she agrees to surrender custody to the intended parent(s) immediately upon birth.\footnote{Id. at ALT. B § 703(3)(a).} If the gestational carrier is married, her spouse must agree to the terms of the agreement as stated above, and must specifically agree to surrender the child to the intended parent(s) upon the birth of the child.\footnote{Id. at ALT. B § 703(3)(b).} The gestational carrier must retain the right to choose her physician who will provide her care during the pregnancy.\footnote{Id. at ALT. B § 703(3)(c).} The intended par-
ents must accept custody of all resulting children immediately upon birth, and assume sole responsibility for the support of the child immediately upon his or her birth. The agreement may allow for compensation to the gestational carrier as well as reimbursement for reasonable expenses, but is not required to address these topics. If the gestational carrier is to receive compensation, the entire amount must be placed in escrow prior to commencement of any medical procedure.

f. Child Support

Any individual who is considered a parent under § 701 of Alternative B of the Act (generally, the intended parent(s) if the terms of the Act are followed, but if not, the birth mother by presumption) shall be obligated to support the child. If all parties enter into a valid agreement in accordance with the terms of Alternative B, and if the intended parent(s) breach the agreement, the intended parent or parents are liable for the support of the child. In the absence of an agreement in which a gamete (sperm or egg) donor relinquishes his or her rights to the gametes, embryo, or resulting child, and further, if the intended parent or parents have failed to assume, in writing, all rights and responsibilities of the resulting child, the gamete donor may be liable for the support of the resulting child.

g. Establishment of Parental Rights/Issuance of Birth Certificate

The parent-child relationship is established if, prior to or within twenty-four hours of the birth of the child, the attorneys for the gestational carrier and the intended parent(s) certify in writing that the parties entered into a gestational agreement in-
tended to satisfy the terms and conditions of the Act. If the attorney certification requirements are met, all hospital representatives or employees and the relevant state agency must complete all birth records in the name of the intended parents, and the original birth certificate shall be issued reflecting only the name of the intended parent(s). Unlike Alternative A, this attorney certification procedure negates the need for a court proceeding in order to establish parental rights.

h. Court Involvement

Alternative B of the Act sets forth clear guidelines by which a surrogacy arrangement may take place and parental rights established without the necessity of a court proceeding. However, if any party should breach the agreement or if the agreement should fail to meet the requirements of the Act, § 709 provides that a court may determine the rights of the parties based solely upon their original intent. Specific performance is specifically disallowed as a remedy to the intended parents where the gestational carrier has breached the agreement and impregnation is the remedy.

2. Payments To Donors and Gestational Carriers

The Model Act generally allows for compensation to a donor or gestational carrier if the compensation is reasonable and negotiated in good faith between the parties. Reimbursement of economic losses of the donor resulting from the retrieval or storage of gametes or embryos is allowed if the losses occur after the donor entered into a valid agreement.

46 Id. at ALT. B § 705(1). Section 704(2) requires that the attorney certification forms prescribed by the relevant state agency must be used, in a manner consistent with the state’s relevant parentage act, if any. Id. at ALT. B § 704(2).
47 Id. at ALT. B § 705(4).
48 Id. at ALT. B § 709(1).
49 Id. at ALT. B § 709(2).
50 ABA MODEL ACT § 802. Note that compensation may not be conditioned upon the purported quality of the gametes or embryos or the genome-related traits of the gametes or embryos, nor can it be based upon the actual genotypic or phenotypic characteristics of the donor or of the child. Id.
IV. An Overview of Diversity in State Laws Governing Surrogacy

While the majority of states have not enacted legislation addressing surrogacy, a significant number of states have addressed the subject, both positively and negatively. There is little uniformity among the states at this time; therefore, in the interest of simplicity, the states may be categorized into four general categories: (1) states which have enacted statutes allowing surrogacy arrangements; (2) states which have no statutory law addressing surrogacy but case law, other statutory law, or secondary sources such as Attorney General opinions indicate that surrogacy is permitted or prohibited; (3) states which clearly prohibit surrogacy agreements by statute; and (4) states with no authority on the subject.

A. States Which Allow Surrogacy

The following states have enacted statutory law allowing a surrogacy arrangement: Arkansas,\footnote{ARK. CODE ANN. § 9-10-201 (2009).} Florida,\footnote{FLA. STAT. ANN. § 63.212 (West 2005 & Supp. 2009); FLA. STAT. ANN. §§ 742.11-16 (West 2010).} Illinois,\footnote{Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. § 47 (West 2009).} Nevada,\footnote{NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010) (requiring that the intended parents be married at the time they enter into the surrogacy agreement).} New Hampshire,\footnote{N.H. REV. STAT. ANN. §§ 168-B:1 to 32 (LexisNexis 2010).} Texas,\footnote{T Ex. FAM. CODE ANN. §§ 160.754 to .762 (Vernon 2008).} Utah,\footnote{UTAH CODE ANN. §§ 78B-15-801 to -809 (2008).} Virginia,\footnote{VA. CODE ANN. §§ 20-159 to -160 (2008) (approving uncompensated surrogacy agreements).} and Washington.\footnote{WASH. REV. CODE § 26.26.101 (West 2005 & Supp. 2009); WASH. REV. CODE §§ 26.26.210 to .260 (West 2005 & Supp. 2009). Only uncompensated surrogacy agreements are enforceable. Compensated agreements are void and unenforceable as against public policy. Id.} It is beyond the scope of this article to articulate the treatment of surrogacy by each state, but each of these states have addressed—to some degree—some or all of the issues discussed in this article. The most comprehensive statutes address qualification of intended parents and surrogates, as well as the terms and validity of the agreement and the proper procedures for establish-
ing parental rights. All statutes, however, address and establish parental rights among the parties to the agreement.

**B. States with No Statute, but Case Law or Other Authority Exists**

Although the following states have not yet enacted a statute, their state courts and/or Attorneys General have addressed the issue and have issued opinions: Alabama, Alaska, California, Connecticut, Delaware, Idaho, Iowa, Kentucky, Louisiana.

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60 Brasfield v. Brasfield, 679 So. 2d 1091 (Ala. Civ. App. 1996). Although the validity of the surrogacy agreement was not addressed, the court awarded custody to the wife in a divorce action when the husband and wife had participated in a traditional surrogacy arrangement in which the surrogate was the biological contributor of the egg. Id. Custody in the wife was in the best interest of the child regardless of whether she was the biological mother. Id.; see Ala. Code §§ 26-10A-33 to -34 (LexisNexis 2009), which addresses placing children up for adoption and “baby-buying,” and specifically indicates that the statutes do not apply to surrogacy arrangements.

61 In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989). A surrogate mother challenged the adoption papers relinquishing custody after the birth of the child, but the court rejected her argument based upon a statute of limitations issue. Id.

62 See Uniform Parentage Act, Cal. Fam. Code § 7613 (West 2004); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (The intended parents in a gestational surrogacy agreement in which the gestational carrier was not the contributor of the egg were recognized as the natural and legal parents of the child. The woman who contributed her egg to the surrogate should be considered the natural mother); see also In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (establishing that parental rights were vested in the intended parents where a surrogate was implanted with an embryo produced by an egg and sperm donated by anonymous donors).

63 Doe v. Doe, 717 A.2d 1297 (Conn. 1998). In deciding a custody dispute, the wife was awarded custody of the child born through a traditional gestational arrangement because, even though the wife was not the biological mother, it was in the best interest of the child to award custody to the wife. Id. The court specifically declined to address the validity of surrogacy agreements. Id.

64 Hawkins v. Frye, No. 87-7-5CVS, 1988 Del. Fam. Ct. LEXIS 31 (May 25, 1988) (holding that the termination of parental rights through contractual agreement is forbidden).

65 DeBernardi v. Steve B.D., 723 P.2d 829 (Idaho 1986). Although the court did not specifically address surrogacy agreements, it found that a biological mother who relinquished her rights to the child in a valid adoption proceeding should not be awarded custody of the child as it was in the best interest of the child to remain with the adoptive parents. Id.

66 Iowa Code Ann. § 710.11 (West 2003) (criminalizing the purchase of a human being but specifically excluding surrogate mother arrangements).

67 Surrogate Parenting Ass’n v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986) (upholding a traditional surrogacy arrangement and distinguishing such


69 See Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (The compensated gestational mother, the biological mother, and the biological father joined in a petition requesting that the court issue the birth certificates of twins born of a gestational arrangement to the biological mother and father. Citing certain criteria, the court acquiesced.); see also R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (stating that two requirements must exist to validate a surrogacy agreement: the surrogate mother’s consent must last until four days after the birth, and the surrogate mother must receive no compensation).

70 Missouri has no law on the subject, but the language of the statute addressing child trafficking may exclude compensated surrogacy arrangements. See Missouri Surrogacy Laws, HUMAN RIGHTS CAMPAIGN (Sept. 9, 2009), http://www.hrc.org/issues/parenting/surrogacy/1128.htm.

71 Neb. Rev. Stat. § 25-21, 200 (1995). Compensated surrogacy agreements are void and unenforceable, and custody rights are vested in the biological father and gestational mother in a compensated surrogacy arrangement. Id. The fact that compensated agreements are specifically disallowed seems to indicate the allowance of uncompensated agreements.


73 N.M. Stat. Ann. § 32A-5-34 (West 2003 & Supp. 2009) (forbidding “payment to a woman for conceiving and carrying a child” but allowing payment for medical and other similar expenses incurred “by a mother or the adoptee,” which seems to contemplate a surrogacy arrangement).

74 N.C. Gen. Stat. §§ 48-2-301, 48-10-102 to -103 (2009) (Surrogacy arrangements may be allowed if no payment is made beyond the surrogate’s medical and related expenses.).


76 Ohio Rev. Code Ann. § 3111.89 (LexisNexis 2008) (addressing artificial insemination but specifically stating it does not deal with surrogate motherhood). The Ohio Supreme Court has held that a gestational surrogacy contract which prohibited the gestational surrogate from asserting parental rights did not violate public policy. J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007).
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ma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. As evidenced by the footnotes, each case is fact specific, and each jurisdiction, having no binding state authority, weighs the facts of the case against available authority from foreign jurisdictions. This results in an array of opinions across the coun-

77 Compensated surrogacy arrangements would likely violate the state child trafficking law, but the state adoption law allows for compensation for medical and other basic expenses, which indicates a surrogate carrier in an uncompensated arrangement may at least receive payment for such expenses. See OKLA. STAT. ANN. tit. 10, § 7505-3.2 (2007); OKLA. STAT. ANN. tit. 21, § 866 (2002); see also 15 Op. Okla. Att’y Gen. 277 (1983).


79 Ruth F. v. Robert B., Jr., 690 A.2d 1171 (Pa. Super. Ct. 1997) (citing the New Jersey Baby M case, supra note 70, the court indicated that any exchange of compensation or bargaining over parental rights and duties concerning a child is reprehensible, and an agreement evidencing the same would not be enforceable). But see J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006), in which the Superior Court of Pennsylvania, reversing a lower court, ruled that the surrogate mother did not have standing to seek custody of the triplets to whom she gave birth.


81 In Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757 (D.S.C. 2003), the court gave great deference to the terms of a surrogacy agreement in determining that the child was not covered by the insurance carrier of the surrogate’s husband as the child was not considered a “natural child” of the husband.

82 Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

83 The groundbreaking case of Baker v. State, which led to the acceptance of civil unions in Vermont, listed the goal of minimizing complications in surrogacy agreements in weighing whether to restrict marriage to different-sex couples, which seems to implicitly suggest an acceptance of such agreements. Baker v. State, 744 A.2d 864 (Vt. 1999).

84 W. VA. CODE ANN. § 48-22-803(e)(3) (LexisNexis 2009) prohibits the purchase and sale of a child, but allows “fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.”

85 WIS. STAT. ANN. § 69.14(h) (West 2003) states that a surrogate mother’s name is to be placed on the birth certificate of the child until “a court determines parental rights,” at which time the birth certificate may be changed to reflect the names of the intended parents.
try—sometimes conflicting—based solely upon the fact finder to whom the case is presented.

C. Surrogacy Agreements Prohibited

A handful of states prohibit surrogacy arrangements by statute. Arizona prohibits “surrogate parent contracts,” which include both traditional and gestational surrogacy agreements.\(^{86}\) Indiana declares all surrogacy agreements void and unenforceable as against public policy.\(^{87}\) The District of Columbia and Michigan not only prohibit surrogacy agreements, but impose fines or jail time upon those who enter into such agreements.\(^{88}\) Note that the Arizona and Indiana statutes address the enforceability of the actual contract, but do not prohibit a surrogacy arrangement.\(^{89}\) Michigan and D.C., by imposing fines or jail time upon the parties who enter into the unenforceable agreement, elevate the surrogacy arrangement to a quasi-criminal act. New York serves as a hybrid state, having a statute which prohibits surrogacy agreements and declares them void and unenforceable, while also having case law that recognizes the parental rights of intended parents in a surrogacy arrangement.\(^{90}\)

D. No Authority

States with no statutory authority or case law include Colorado, Kansas, Maine, Maryland, Mississippi, Montana, South Dakota, and Wyoming.


\(^{87}\) Ind. Code Ann. §§ 31-20-1-1 to -2 (LexisNexis 2007).

\(^{88}\) D.C. Code Ann. §§ 16-401 to 402 (LexisNexis 2001) (declaring surrogacy agreements unenforceable and imposing a fine of up to $10,000, or imprisonment for up to one year in jail, or both); Mich. Comp. Laws Ann. §§ 722.851-861 (West 2002) (declaring surrogacy agreements unenforceable and imposing a fine of up to $50,000, or jail time for up to five years, or both).

\(^{89}\) See supra, notes 83-84.

V. THE NEED FOR JUDICIAL UNIFORMITY

Clearly, there is a profound lack of uniformity among the states. Not only among state statutes, but also among states which have not promulgated statutes but have addressed the issue of surrogacy in the court system. In states which lack statutory guidance, the facts are considered by the courts on a case-by-case basis. The judges may be presented with a wide variety of authority on the matter from around the country; carefully chosen by opposing sides in order to persuade the court to provide a favorable ruling. In many cases, the court is left with common law principles, contract principles, and the state’s domestic laws in its toolbox when attempting to deal with the issues surrounding surrogacy agreements and parental rights. This places a heavy burden on the court system. To this effect, the prefatory note of the ABA Model Act quotes the following language of an appellate court in a decision involving a dispute about parentage:

We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of artificial reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.91

VI. THE FUTURE

What once was inconceivable is now a reality. Today, family planning options are available to infertile couples that otherwise would have none. As medicine advances, the options will increase, and the rate of surrogacy arrangements will likely increase accordingly. This is an emotional journey for all involved, and it is important that the legal aspects of the arrangement are clearly addressed every step of the way so that the intent of all parties is carried out during the pregnancy and after the birth of the baby. The law of surrogacy is still in its infancy but is growing rapidly.

It is my hope that as it grows, states will make every attempt to close the gaps of uncertainty and move toward a more unified and consistent body of law. Clearly, not everyone will agree on the issues surrounding surrogacy or the most appropriate way to address these issues from a legal standpoint; however, the issues are here to stay, on that we can all agree.