REDEFINING MOTHERHOOD: DETERMINING LEGAL MATERNITY IN GESTATIONAL SURROGACY ARRANGEMENTS

TABLE OF CONTENTS

I. INTRODUCTION

A mother is defined as "[a] woman who has given birth or legally adopted a child. The term is sometimes interpreted as including a pregnant woman who has not yet given birth."[1] This definition is illustrative of the fact that many legal and social perceptions of maternity fail to reflect the changing reproductive technologies available to women and men in today's world. It is fact that women's lives have changed dramatically over the course of history. The legal rights of women have gradually evolved to resemble those of men. Women now have the constitutionally protected right to make decisions regarding education, employment, marriage, and reproduction. Many women choose to have children outside of marriage or later in life. In response to these sociological changes, the lives of men have also changed. Men can also choose to have children outside of

1. BLACK'S LAW DICTIONARY 1031 (7th ed. 1999).

marriage. However men and women in contemporary society choose to live their lives, reproductive technological advances, in conjunction with changing notions of acceptable familial lifestyles, have given people greater freedom in deciding how to live their lives. Surrogacy is one such reproductive option that has gained popularity among those seeking alternative methods of conception.[2] The increasing acceptance and availability of surrogacy arrangements has given men and women new options allowing them to expand their families.

One assistive reproductive technology that is increasingly utilized by many hopeful parents is gestational surrogacy. In gestational surrogacy, the surrogate is artificially inseminated with the fertilized ovum of another woman.[3] This is compared with traditional surrogacy arrangements, in which the surrogate mother is also the biological mother of the child she gestates.[4] Many parents utilizing alternative reproductive technologies prefer this method of surrogacy because it allows both the intended mother and father to have a biological connection to the child.[5] Gestational surrogacy also creates a unique problem: Who is the legal mother of the child, the biological mother or the gestational mother? In many states, there is a presumption that the woman giving birth to the child is the legal mother of the child.[6] But should this presumption be allowed to displace the legal claim of the biological mother? Should the gestational surrogate be allowed to maintain a custody action for a child to whom she has no genetic link? Should a biological mother be required to legally adopt her own child? This Note analyzes the various methods courts and legal scholars have utilized in making a legal maternity determination.

While legal maternity is an important issue involved in surrogacy, there are many other complex moral and constitutional issues surrounding the use of surrogacy arrangements in the conception of children. Some people believe that surrogacy should be outlawed because it is "babyselling."[7] Others believe surrogacy is wrong because it exploits poor women who engage in the practice for financial reasons.[8] Some believe that surrogacy is a perfectly acceptable

---

2. Pamela Laufer-Ukeles, Essay, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 409 (2002).

3. *See* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 63 (1997).

4. *Id.*

5. Laufer-Ukeles, *supra* note 2, at 410.

6. *See infra* notes 167-70 and accompanying text.

7. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 17 (expanded ed. 1990) (noting that the conditions surrounding surrogacy are such that it "might be considered to violate prohibitions against baby selling").

8. *See id.* at 25 ("One of the most serious charges against surrogate motherhood is that they exploit women.").

procedure for conceiving children, and that the decision to engage in this practice is protected by the United States Constitution.[9]

The central issue this Note focuses on is a unique problem that arises in many gestational surrogacy arrangements: Whether a biological mother—the woman who has her ovum fertilized and implanted in a surrogate—should be considered the legal mother on the child's birth certificate, or whether the biological mother must legally adopt the child after birth. Part II of this Note will provide a general overview of traditional and gestational surrogacy arrangements. Part III will examine the arguments advanced by those opposed to the legality of surrogacy, as well as the counterarguments proposed by surrogacy advocates. Part IV of this Note will discuss how courts have conducted legal paternity determinations, and how this process could shed light on understanding legal maternity. Part V will discuss four different theories of determining legal maternity. Some of these approaches have been adopted by courts, or codified by state legislatures. However, Iowa courts have never decided a surrogacy case, and the state legislature has not regulated surrogacy practice. In Part VI, this Note discusses surrogacy laws that have been adopted throughout the United States and provides recommendations for dealing with legal maternity in Iowa.

II. OVERVIEW OF SURROGACY

The practice of using a surrogate mother to conceive a child has existed since biblical times.[10] The typical surrogacy arrangement involves a married, heterosexual couple that is unable to have a child because the woman is incapable of conceiving, or the woman's body is physically unable to sustain a pregnancy without significant risk to the woman's own life.[11] Surrogacy may also be an option for older women who are unable to have children.[12] As the

---

9. *See id.* at 46 (indicating that the surrogacy issue could be decided under the United States Constitution).

10. *See id.* at 5 (noting that "In the Bible, when Sarah, Rachel, and Leah were infertile, they gave their handmaids—Hagar, Bilhah, and Zilpah—to have babies for their husbands").

11. *See id.*

12. *See* DOLGIN, *supra* note 3, at 64 ("Surrogacy is sometimes considered by infertile couples who, for various reasons such as advanced age, may find it difficult to adopt."); *see also* Laufer-Ukeles, *supra* note 2, at 410. Laufer-Ukeles notes:

> Coupled with the growth in technologies, the increasing percentage of delayed child bearing by middle and upper class women has greatly increased the use of fertility treatments. It is well established that fertility declines with age. After thirty-five, fertility decreases dramatically, which greatly increases the desire and availability of funds for fertility treatments, including IVF and surrogate motherhood.

Id.

dynamics and social conceptions of the "typical" family unit have changed,[13] surrogacy has become an option for gay couples and single men who desire biological children.[14] Women serving as surrogate mothers are usually between twenty and thirty years of age, many are married, and many have had at least one child of their own.[15] Some women choose to become surrogates in order to receive the financial benefits that accompany the arrangement.[16] Commercial surrogacy, as opposed to informal arrangements between friends and family, "generally involve payments of between $10,000 and $15,000 to the surrogate."[17] These payments typically include reimbursement for living expenses incurred during the pregnancy, medical expenses, and premiums for a life insurance policy on the surrogate, should anything happen to the surrogate during the pregnancy.[18] However, under the laws of every state, the surrogate may *not* receive compensation for the child conceived.[19] While some are in it for the money, other women choose to be surrogates for purely altruistic motives, such as assisting others in the creation of a family out of a basic love for children.[20] Many surrogate arrangements are private and informal between family members or friends.[21] The regular, though not universal, use of formal contracts in surrogacy arrangements emerged in the United States around 1976.[22] The typical surrogacy contract usually contains provisions that require the surrogate to voluntarily terminate her parental rights to the child, and provides that the intended, or "social," parents will take custody of the child at birth.[23] In addition, the contract contains terms detailing the compensation for the surrogate, and elicits the rights and obligations of the parties during the pregnancy.[24] If the

---

13. DOLGIN, *supra* note 3, at 14.

14. FIELD, *supra* note 7, at 6.

15. *See id.* (noting that many of the attorneys and agencies that arrange surrogacy arrangements only recruit surrogates who have had at least one prior pregnancy) (footnote omitted).

16. *See id.* at 3.

17. DOLGIN, *supra* note 3, at 65.

18. Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 398 (1991) (footnotes omitted).

19. DOLGIN, *supra* note 3, at 65.

20. FIELD, *supra* note 7, at 20.

21. *Id.* at 6; *see also* Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 560 (1999) (noting that many informal surrogacy arrangements between family or friends do not involve a contract and were completed with charitable motives) (footnotes omitted).

22. FIELD, *supra* note 7, at 5. The first surrogacy contract was drafted in California, and the use of such contracts has since become "a prominent practice in California and many other states." Behm, *supra* note 21, at 561-62.

23. FIELD, *supra* note 7, at 6.

24. *Id.* at 26.

surrogate is married, her husband will also enter into the contract.[25] This is done in order to explicitly rebut the legal presumption existing in most states that the husband of a woman giving birth to a child is the father of the child.[26]

While surrogacy arrangements typically involve a surrogate mother and a heterosexual couple, contemporary surrogate arrangements are being utilized by a variety of individuals. While surrogacy reached the forefront of the public eye in the 1980s, when several high-profile cases were heavily reported in the national press, recent cases have put surrogacy back in the news.[27]

A. *Traditional Surrogacy*

When surrogacy arrangements first emerged as an alternative reproductive option, the ovum of the surrogate mother was artificially inseminated with the sperm of the intended father—the man hiring the surrogate.[28] The resulting child was biologically related to the surrogate and the intended father.[29] The biological father and surrogate would then enter into an agreement, or contract, whereby the surrogate would surrender custody of the child to the biological father and terminate her parental rights.[30] After the birth of the child, the wife of the biological father would institute adoption procedures.[31] In some arrangements, the intended parents use the sperm of an anonymous donor to fertilize the surrogate's ovum, meaning that there is no biological connection between the child and the intended parents.[32] This requires the surrogate mother to terminate her parental rights, and both intended parents to legally adopt the child after

---

25. DOLGIN, *supra* note 3, at 65.
26. *Id.*
27. *See* Mary Riddell, *This Millionaire Bachelor Has Just Bought Three Babies for GBP 50,000*, LONDON DAILY MAIL, Sept. 21, 2001, at 36-37. The British press recently publicized a case in England—where surrogacy is illegal—in which a single man named Ian Mucklejohn arranged a surrogacy contract with a woman in California. *Id.* The arrangement resulted in the birth of triplets. *Id.* Mucklejohn, whose parenting skills have been highly criticized by the press, plans to raise the babies himself. *Id.*; *see also* Chris Taylor, *One Baby Too Many*, TIME, Aug. 27, 2001, at 55. In another case, a woman named Helen Beasley entered into a surrogacy contract that required her to have selective reduction in the event of multiple fetuses. *Id.* By the time she learned that she was pregnant with twins, it was too late to terminate one of the fetuses. *Id.* The couple refused to accept the twins, and the parties agreed that they would put the twins up for adoption upon birth. *Id.* However, the parties remain in a bitter dispute over the financial terms of the contract. *Id.*
28. FIELD, *supra* note 7, at 6.
29. DOLGIN, *supra* note 3, at 64.
30. *Id.*
31. *Id.*
32. *Id.*

birth.[33] A third option pursued by some hopeful parents is the use of an ovum donor and a surrogate mother.[34] This means that the genetic material of the ovum donor is implanted in the surrogate and artificially inseminated with the sperm of the intended father or a sperm donor.[35] Some intended parents choose this option because of their perception that the absence of a genetic connection between the surrogate and the child constitutes a legal advantage for the intended parents.[36]

The traditional surrogacy arrangement creates an especially high risk of conflict and legal controversy. Some surrogate mothers regret their decision, and after the birth of the child, refuse to relinquish custody of the child.[37] The biological connection between the surrogate and child sometimes creates an emotional bond and moral sense of responsibility in many surrogate mothers.[38] While most surrogacy arrangements include a contract that requires the surrogate to terminate her parental rights, such contracts are unenforceable under some states' laws.[39] Therefore, many conflicts resulting from surrogacy arrangements end only after a difficult child custody battle in state courts.

B. *Gestational Surrogacy*

Many contemporary social and legal issues surrounding surrogacy arrangements have developed as a result of the increased utilization of artificial insemination and in vitro fertilization technology.[40] The advent of reliable, advanced reproductive technological alternatives has resulted in an increased

---

33. *Id.*

34. Andrea Mechanick Braverman, *Surrogacy and Egg Donation*, *at* http://www.opts.com/surandegg.htm (last visited Jan. 21, 2003).

35. *Id.*

36. *Id.*

37. FIELD, *supra* note 7, at 7.

38. *See id.*

39. *See, e.g.*, LA. REV. STAT. ANN. § 9:2713 (West 1991) (defining a contract for surrogate motherhood, and declaring such contracts absolutely unenforceable); MICH COMP. LAWS ANN. § 722.855 (West 2002) (voiding surrogate parentage contracts); NEB. REV. STAT. ANN. § 25-21,200 (Michie 1995) (prohibiting the enforcement of surrogacy contracts, and declaring that the biological father has all the rights and obligations imposed by law); N.Y. DOM. REL. LAW § 122 (Consol. 1999) (declaring surrogacy contracts void and unenforceable); UTAH CODE ANN. § 76-7-204 (1999) (prohibiting parties from entering into an agreement whereby the surrogate agrees to terminate parental rights, and providing that the surrogate is the legal mother if such an arrangement should be realized); WASH. REV. CODE ANN. § 26.26.240 (West 1997) (declaring void as contrary to public policy, any surrogacy contract entered into for compensation).

40. *See* DOLGIN, *supra* note 3, at 67 ("Surrogacy is problematic for society and the law today, but not because it involves artificial insemination. Rather surrogacy questions traditional understandings of mother and commodifies and commercializes the creation of the parent-child bond.").

number of women choosing to have their ovum artificially fertilized by the sperm of their husband or an anonymous sperm donor, and implanted in the uterus of the surrogate.[41] This means that the surrogate, often called a "gestational carrier," has no genetic connection with the child.[42] This method, called "gestational surrogacy," is preferred by many couples because they desire a biological child, but for some reason, the intended mother is unable to complete the pregnancy.[43] In addition, the absence of a genetic link between the surrogate and child arguably creates a stronger legal position for the biological parents in the event of a legal custody battle.[44]

A discussion of the complex legal maternity issue created by gestational surrogacy arrangements is especially relevant in today's society. One recent Massachusetts case, *Culliton v. Beth Israel Deaconess Medical Center*,[45] was the catalyst for this Note. In *Culliton*, Marla and Steven Culliton donated their own genetic material for implantation in a gestational surrogate.[46] Prior to the birth of their twins, the Cullitons petitioned the court to declare them the legal parents so that their names would be placed on the childrens' birth certificates at the time of birth.[47] The alternative to the pre-birth parentage determination would have been a post-birth termination of the surrogate's parental rights, the legal adoption of the child by the biological parents, and the issuance of a new birth certificate.[48] The surrogate mother had no objections to the parent's petition, and at no time during the proceedings did she attempt to dispute the Culliton's parentage claim.[49] Because state law required birth mothers to wait four days before they could consent to terminate their parental rights, the probate judge decided that he did not have the authority to enter such a pre-birth order.[50] The Supreme Judicial Court of Massachusetts reviewed the case on appeal, and decided that the probate court's general equity jurisdiction gave the judge the authority to enter a pre-birth parentage order.[51] The court noted:

---

41. *See id.* at 136-37.
42. MARY ANN MASON, THE CUSTODY WARS 215 (1999).
43. *Id.*
44. EXPECTING TROUBLE: SURROGACY, FETAL ABUSE AND NEW REPRODUCTIVE TECHNOLOGIES 161 (Patricia Boling ed., 1995) [hereinafter EXPECTING TROUBLE].
45. Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001).
46. *Id.* at 1135.
47. *Id.* at 1136.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1138.

> Delays in establishing parentage may, among other consequences, interfere with a child's medical treatment in the event of medical complications arising during or shortly after birth; may hinder or deprive a child of inheriting from his legal parents should a legal parent die intestate before a post birth action could determine parentage; . . . and may result in undesirable support obligations as well as custody disputes (potentially more likely in situations where the child is born with congenital malformations or anomalies, or medical disorders and diseases).[52]

In making its decision, the court relied on the fact that the Cullitons were the genetic parents of the babies, in addition to the fact that neither the gestational carrier nor the hospital contested the petition for the pre-birth order.[53] The court also noted that it had previously suggested that a protocol be established to provide guidance for people who take advantage of reproductive technologies.[54] The court noted that while the legislature had dealt with some issues relating to reproductive technologies, it had not prescribed the method to be used to determine parentage of children born of such methods.[55] Further, the court refused to determine parentage of children born of such methods, stating that the legislature was the most appropriate institution to deal with the medical, legal, and ethical aspects of these practices.[56]

The Superior Court of New Jersey decided another recent gestational surrogacy maternity case in *A.H.W. v. G.H.B.*[57] In *A.H.W.*, the commissioning couple and the surrogate agreed that the couple should be listed on the child's birth certificate, and the couple instituted a pre-birth petition for a parentage declaration.[58] The state attorney general opposed the request because state law provided a seventy-two hour waiting period before a mother could terminate her parental rights.[59] The court evaluated the various approaches for determining legal maternity, settling on the view that the waiting period should remain effective in surrogacy arrangements, and denied the pre-birth order.[60] The court held that the gestational mother's emotional and physical investment in the birth require a period during which she may rethink her previous decision to give up the child.[61] In essence, the court refused to recognize the biological differences

---

52. *Id.* at 1139.
53. *Id.* at 1138.
54. *Id.* at 1139 (citing Smith v. Brown, 718 N.E.2d 844 (Mass. 1999)).
55. *Id.*
56. *Id.*
57. A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).
58. *Id.* at 949.
59. *Id.*
60. *Id.*
61. *Id.* at 953-54.

between gestational surrogacy and traditional surrogacy. This case, in conjunction with *Culliton*, illustrates the legal difficulties facing surrogates, intended parents, and courts around the nation.

III. SURROGACY POLICY CONSIDERATIONS

Before one can analyze how legal maternity should be determined in gestational surrogacy arrangements, it is important to understand the ethical and constitutional context in which surrogacy exists. Proponents and opponents of surrogacy have developed different ethical, constitutional, and public policy arguments to support their positions regarding the legality of surrogacy arrangements. These various arguments will be considered in turn.

A. *Arguments for Banning Surrogacy Arrangements*

The most prominent argument advocated by surrogacy opponents is based on the ethical precept that the sale of one human to another is wrong.[62] The argument is based on the assumption that surrogacy is nothing more than the sale of a child, and therefore the practice is immoral.[63] The sale of babies, often seen in the earliest adoptions, was made illegal several decades ago.[64] Today, every state has made it a crime to surrender a child in exchange for money.[65] In order to circumvent state criminal penalties, most surrogacy contracts specifically provide that the money exchanged during the arrangement is for services—that is, the use of the surrogate's womb—rather than for the surrender of the child.[66] In addition, the surrogacy fee is contractually dedicated to the payment of medical fees, living expenses, and lost income during the pregnancy.[67] However,

---

62. *See* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 155 (1997) (acknowledging that opponents of surrogacy often put forth the argument that the right to contract is not absolute, and providing as examples that one cannot contract to sell oneself into slavery or sell one's children) (footnotes omitted); *see also* John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 682 (1994) ("[O]pponents of surrogacy urged state legislatures to prohibit all surrogate arrangements prospectively because they are exploitive.").

63. *See* Laufer-Ukeles, *supra* note 2, at 415 ("Commodifying children is considered morally reprehensible and is a practice that nations worldwide prohibit.").

64. FIELD, *supra* note 7, at 17.

65. *Id.*; *see also* Laufer-Ukeles, *supra* note 2, at 416 (noting that "all states prohibit prenatal arrangements for children by prohibiting agreements to relinquish parental rights prior to the child's birth").

66. FIELD, *supra* note 7, at 17-18.

67. *See, e.g.*, Walter J. Waldington, *Contracts to Bear A Child: The Mixed Legislature Signals*, 29 IDAHO L. REV. 383, 401 (1993) (noting that a surrogacy contract in New Hampshire must include a "statement of the fees that a surrogate will receive, which are limited to pregnancy-

many surrogacy opponents argue that the distinction between paying money for the surrogate's services, and paying money for the child, "seems hard to sustain when the fetus develops from the gestational mother's ovum. In such cases, the woman is contributing more than the labor of her womb; she is also selling her genetic material and it becomes difficult to see how the exchange escapes the charge of baby-selling."[68]

While the line between selling services and selling babies is arguably blurred in traditional surrogacy arrangements, the same cannot be said for gestational surrogacy arrangements. In the case of a gestational arrangement, the surrogate has no genetic link to the child involved, and therefore arguably has no interest or right to "sell" the child that is birthed. "When the childbearing woman has no genetic relationship with the fetus the assertion that the commissioning couple is purchasing only gestational services is stronger."[69] However, surrogacy opponents respond to this notion by arguing that the surrogate does have parental rights to the child because of the intimate relationship that develops between the surrogate and child during the nine months of pregnancy.[70] This proposition is explored further in Part V.C of this Note.

Radical feminism promotes the argument that surrogacy should be illegal because it exploits women's reproductive capacity.[71] This theory purports that surrogacy is akin to prostitution, as both practices involve the "sale" or "rent" of a woman's body for services to others.[72] This argument rests on the basic premise that women who enter into an agreement whereby they receive compensation for allowing another to use their bodies, do so *only* to benefit financially.[73] This is a choice between the lesser of two evils, effectively leaving the women without any real freedom of choice.[74] In addition, feminists liken surrogacy to slavery of lower class women.[75] The response to this argument is discussed below.

---

related medical expenses, actual lost wages, insurance, reasonable attorney's fees and court costs, and expenses of counseling and non-medical evaluation and home studies").

68. EXPECTING TROUBLE, *supra* note 44, at 161 (footnote omitted).

69. *Id.*

70. *Id.* at 163-64; *see also* discussion *infra* Part V.C.

71. Behm, *supra* note 21, at 578.

72. *Id.*

73. *See id.* (noting that radical feminists rationalize the woman's choice as either being poor or being exploited).

74. *Id.*

75. *See id.* at 579 (describing the feminist theory of Margaret Atwood).

B. *Arguments in Support of the Legality of Surrogacy*

Proponents of surrogacy often defend the legality and legitimacy of the arrangement by making a constitutional argument supported by several United States Supreme Court cases that have expounded the constitutional rights of parents.[76] In *Griswold v. Connecticut*,[77] the Court held that certain constitutional amendments, in conjunction with the penumbral of rights found in the Bill of Rights, guarantees a parent's right to be free from government interference when making decisions concerning conception and child rearing.[78] The *Griswold* Court invalidated a Connecticut statute that banned the use of contraceptives by married couples.[79] *Griswold*'s progeny extended the constitutional protection to reproductive decisions made by unmarried individuals.[80] In 1973, the Court held that the right to privacy also included the right not to carry a fetus to term, thereby invalidating state abortion prohibitions.[81] The Court has also held that natural parents have a constitutional right to manage the education of their children without undue interference from the government.[82] In cases involving parental rights and reproductive freedom, courts often recite a principle that was first elicited in *Prince v. Massachusetts*:[83] "'It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary

---

76. Lawrence O. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL'Y 429, 434 (2001).

77. Griswold v. Connecticut, 381 U.S. 479 (1965).

78. *Id.* at 484-86.

79. *Id.*

80. *See* Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (invalidating a Massachusetts statute which prohibited the distribution of contraceptives to unmarried individuals).

81. Roe v. Wade, 410 U.S. 113, 164 (1973) (establishing the three-stage abortion test and holding that a Texas criminal statute declaring all abortions except life-saving abortions criminal, "without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment"); *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67, 75, 79-80 (1976) (upholding a Missouri statute provision requiring certain safeguards, including written informed consent and specific recordkeeping by physicians, before allowing a woman to obtain an abortion, but striking down a provision prohibiting the use of saline amniocentesis as a method of abortion after the first trimester).

82. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) ("Under the doctrine of *Meyer* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment guarantees the right to "establish a home and bring up children").

83. Prince v. Massachusetts, 321 U.S. 158 (1944).

function and freedom include preparation for obligations the state can neither supply nor hinder.'"[84]

Proponents of surrogacy argue that the constitutional right to privacy must also encompass an individual's or couple's right to hire a surrogate mother to conceive a child: "Surrogacy arrangements, then, deserve constitutional protection because of the private relationships and procreative intention of the parties, the woman's control over her own body, and the rights of genetic parents to association with their child."[85] Such proponents argue that the genetic—or intended—parents to a gestational surrogacy arrangement have a fundamental right to conceive and raise their child, regardless of the method by which the child was conceived.[86]

The surrogate mother has the right to undergo artificial insemination, regardless of who will ultimately raise the child. This right stems from her privacy interest in controlling her reproductive capacity.[87] Opponents of surrogacy argue that because of this constitutionally protected privacy interest, the surrogacy contract cannot effectively waive the surrogate's right to control the pregnancy or birth of the child.[88] The surrogate mother also has a constitutional right to the custody, care, and management of the child that she births.[89] Therefore, surrogacy opponents assert that the surrogacy contract cannot be enforced when the surrogate mother refuses to relinquish custody, as parental rights trump the contract rights involved.[90] This argument can be countered by pointing out that the surrogate mother enters into the agreement voluntarily, with full knowledge of her actions and rights, and that she necessarily waives her right to constitutional privacy in the particular procreative

---

84. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting Prince v. Massachusetts, 321 U.S. at 166); *see also* Troxel v. Granville, 530 U.S. 57, 65-66 (2000); Lehr v. Robertson, 463 U.S. 248, 257-58 (1983); Bellotti v. Baird, 443 U.S. 622, 638 (1979).

85. Gostin, *supra* note 76, at 435.

86. *Id.*

87. *See id.* (focusing on the private relationships involved in a surrogacy relationship as one reason to provide for constitutional protection).

88. *See id.* at 444 ("I will argue that to hold a woman to a promise to waive her human rights sometime in the future diminishes her constitutional entitlements.").

89. FIELD, *supra* note 7, at 69-70.

90. *Id.* Field notes:

> The infertile couple may have a fundamental interest in having a child, but the surrogate mother has a fundamental interest in keeping and raising the child she has borne. The argument that her deprivation is fundamental has particular force when the surrogacy contract calls for the mother to lose all contact with the child after transferring her to the father.

Id.

choice.[91] Moreover, attorneys often draft the surrogacy contract, and such professionals are responsible for ensuring that all parties enter into the agreement with a complete awareness of all possible consequences.[92] This provides support for the proposition that surrogate mothers ought to be held accountable for their decisions and the effect such decisions have on the other contracting parties. "Those who see contract pregnancy as an exercise of freedom particularly emphasize that consent is given prior to conception . . . ."[93] An assertion of a constitutional right by a gestational surrogate presents additional problems due to the lack of a genetic connection between the surrogate and child. A gestational carrier arguably has no constitutional right to custody of a child born under a surrogacy arrangement because biological parents have a superior interest in the child that was conceived from their own genetic material.[94]

Another constitutional argument used to defend surrogacy arrangements relies on the Fourteenth Amendment.[95] This equal protection argument attacks anti-surrogacy legislation because it discriminates against men and women who are infertile.[96] State laws generally do not forbid the use of artificial insemination in cases where the male is sterile.[97] By banning the use of

---

91. *Id.* at 73.

92. *See* Angela R. Holder, *Surrogate Motherhood and the Best Interests of Children*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 84 (Larry Gostin ed., 1990) (noting that an attorney who drafts a surrogacy contract "has an enforceable fiduciary obligation to both the prospective surrogate and the couple who wish to hire her").

93. EXPECTING TROUBLE, *supra* note 44, at 158.

94. *See, e.g.*, Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001). Appell states:

> The more thorny challenge reproductive technology poses for parental rights doctrine arises in the gestational surrogacy context when the woman who donates the egg and the woman who carries the pregnancy each seek parental rights. The prevailing view seems to privilege the ovum provider when she produced her ovum for the express purpose of reproducing a child for herself.

Id. at 741.

95. *See* FIELD, *supra* note 7, at 47 (asserting that one argument couples could make is that denial of surrogacy is a denial of equal protection).

96. *Id.*

97. *See, e.g.*, ALASKA STAT. § 25.20.045 (Michie 2002) (providing that a child, born to a married woman by means of artificial insemination, is considered the natural and legitimate child of both spouses); CAL. FAM. CODE § 7613 (West 2002) (providing that if a wife is "inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived"); COLO. REV. STAT. § 19-4-106 (2002) (providing that a woman's husband is the legal father of a child conceived by artificial insemination); CONN. GEN. STAT. § 45a-771 (2001) (declaring it the public policy of the state that all children born to a married woman is legitimate, regardless of whether artificial insemination was utilized to conceive the child); GA. CODE ANN. § 19-7-21 (2002) ("All children born within

surrogacy when the woman is sterile or unable to gestate a child, the state essentially treats infertile males and females differently.[98] One commentator has observed, "artificial insemination and surrogacy are the same except for 'the plumbing.'"[99] However, critics of this argument note that the actual burden put on the surrogate mother who donates her womb is much more than the burden put on the man who donates his sperm for artificial insemination, a difference that justifies disparate legal treatment.[100] However, this argument does not justify a complete legal bar to the practice of surrogacy. Instead, the differences between simple artificial insemination and surrogacy can be accounted for with an increased legislative sensitivity to these differences. Surrogacy could, and perhaps should, receive greater attention from state legislators who can act to provide guidance for those wishing to use the procedure. Such state laws would preempt many of the legal questions that arise in surrogacy arrangements.

IV. ESTABLISHING LEGAL PARENTAGE OUTSIDE THE CONTEXT OF SURROGACY

The debate surrounding the legal determination of maternity became relevant only after the development of assistive reproductive technologies.[101] However, legal paternity has received extensive treatment in courts and state legislatures.[102] A brief discussion of legal paternity will shed light on the theories underlying the various maternity determination approaches.

---

wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."); 750 ILL. COMP. STAT. 40/2 (2003) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.").

98. FIELD, *supra* note 7, at 47.

99. *Id.* (quoting Bill Handel, a lawyer who arranges surrogacy arrangements).

100. *Id.* at 48.

101. *See* R. Alto Charo, *Legislative Approaches to Surrogate Motherhood*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 104 (Larry Gostin ed., 1990) ("For many years, a woman who bore a child was clearly the mother of that child: mater est quam gestation demonstrat. This relationship is no longer unequivocal."); *see also* DOLGIN, *supra* note 3, at 63. Dolgin notes: "Traditional surrogacy poses no challenges beyond that posed by artificial insemination to familiar notions of biological maternity, though it does upset expectations about the connection between biological and social maternity." *Id.*

102. *See* Randall P. Bezanson, *Soloman Would Weep*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 245 (Larry Gostin ed., 1990) ("The biological ambiguities of paternity have always existed . . . . Jurisdictions that have explored the question of paternity have often concluded—through legislation, it should be noted—that biology should not always be determinitive.").

In *Stanley v. Illinois*,[103] the Supreme Court invalidated an Illinois law that presumed unmarried fathers were unfit to have custody of their children.[104] The unwed father in *Stanley* had lived with the mother of his three children intermittently for eighteen years.[105] When the mother of the children died, the court denied a paternal fitness hearing, and put the children in foster care.[106] The Court held that the denial of a parental fitness hearing, while extending such a hearing to similarly situated married fathers, was a denial of equal protection under the Fourteenth Amendment.[107] The Court's recognition of parental rights of the unwed father was based on the fact that such fathers can and often do maintain the same paternal role as that of a married father.[108] To treat fathers differently simply because of their marital status, is to deny them both their rights as parents and equal treatment under the law.[109]

In *Lehr v. Robertson*,[110] the Court further explained that a mere biological relationship between father and child, without more, does not establish a constitutional basis for protection.[111] In *Lehr*, the Court refused to recognize an unwed father's constitutionally protected right to the companionship of his child because he had not established a substantial relationship with the child.[112] The Court stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possess to develop a relationship with his offspring. If he grasps the opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[113]

The Court also noted that fathers and mothers are not similarly situated as parents, as the mother's rights are rooted in the biological investment of gestation

---

103. Stanley v. Illinois, 405 U.S. 645 (1972).
104. *Id.* at 657-58.
105. *Id.* at 646.
106. *Id.* at 646-47.
107. *Id.* at 658.
108. *Id.* at 654-55.
109. *Id.* at 658.
110. Lehr v. Robertson, 463 U.S. 248 (1983).
111. *Id.* at 261.
112. *Id.* at 267-68.
113. *Id.* at 262 (citation omitted).

and birth.[114] Women who give birth are forced to either accept their role as the mother of the child or give up the child for adoption. By comparison, the unwed father of the child must take an affirmative step to accept the responsibilities associated with parenthood.[115] "'Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.'"[116]

The most recent Supreme Court decision on the rights of unwed fathers is *Michael H. v. Gerald D.*[117] In this case, the biological father of a child petitioned for visitation rights to his child.[118] The mother of the child was married to a different man at the time the child was born, and he was listed as the father on the child's birth certificate.[119] California law presumed that a child born to a married woman was a child of the marriage, and thus, that the woman's husband was the father of the child.[120] While the biological father, Michael, had established a relationship with the child, a plurality of the Court found that he did not have a constitutionally protected parental right.[121] Michael did not have the fundamental right to rebut the marital presumption that existed under California law.[122] The decision relied heavily on the fact that the mother and her husband constituted an established family unit, and that the state had a substantial interest in preserving this relationship.[123] The Court noted, "our traditions have protected the marital family . . . against the sort of claim Michael asserts."[124]

---

114. *Id.* at 260 n.16.

115. *See id.* at 261. The Court noted:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children."

Id. (quoting Caban v. Mohammed, 441 U.S. 380, 389 (1979)).

116. Lehr v. Robertson, 463 U.S. at 260 (quoting Caban v. Mohammed, 441 U.S. at 397).

117. Michael H. v. Gerald D., 491 U.S. 110 (1989).

118. *Id.* at 115.

119. *Id.* at 114.

120. *Id.* at 117.

121. *Id.* at 131-32.

122. *See id.* The court noted:

> We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power . . . is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case.

Id. at 125.

123. *Id.* at 124-25.

124. *Id.* at 124.

The foregoing discussion of legal paternity highlights the difference between legal maternity and legal paternity. A legal father is one who affirmatively establishes a role as a social father.[125] By contrast, the mother's rights are seemingly inherent in her role, as she establishes her social parentage during gestation and birth.[126] While the Court has never been confronted with a maternity dispute, the discussions of the parent-child relationship found in many paternity cases illustrates a possible judicial approach to gestational surrogacy arrangements.[127] But should the gestational maternity presumption discussed by the Court be applied under the special circumstances of the surrogacy arrangement? Are the maternal rights vested in the surrogate because she develops a relationship with the child during gestation and birth? Or should the maternal rights be vested in the intended mother because she also has an emotional investment in the child, in addition to a preconceived intent to rear the child?

V. ADJUDICATING LEGAL MATERNITY

Regardless of one's view on the legality of surrogacy, the fact remains that most states permit the practice[128] and many expectant parents utilize the practice, necessarily requiring the development of legal approaches to resolve disputes concerning legal maternity. Citizens are entitled to a sense of legal predictability when they make constitutionally protected decisions regarding their procreative lives. While it is true that most states have never addressed the legal issues of

---

125. *See* Lehr v. Robertson, 463 U.S. 248, 266-68 (1983). The Court noted:

> As we have already explained, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child . . . . Because appellant . . . has never established a substantial relationship with his daughter, . . . the New York statutes at issue in this case did not operate to deny appellant equal protection.

Id. at 266-67.

126. *See id.* at 262.

127. *See generally* Michael H. v. Gerald D., 491 U.S. at 110 (upholding a California statute that presumed a child born to a married woman was the legitimate child of the woman's husband); Lehr v. Robertson, 463 U.S. at 248 (finding that an unmarried father was not denied equal protection because he did not establish a relationship with his child); Stanley v. Illinois, 405 U.S. 645 (1972) (striking down an Illinois law that presumed an unwed father was unfit to have custody of his child).

128. *See* Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1230-31 (1997) (noting that most states do not have legislation prohibiting surrogacy contracts).

surrogacy,[129] other state legislatures and courts have dealt with a variety of surrogacy issues.[130] State courts and legal scholars have developed four different approaches for determining legal maternity in gestational surrogacy arrangements: (1) intent-based theory;[131] (2) genetic contribution theory;[132] (3) gestational mother preference theory;[133] and (4) the "best interest of the child" theory.[134]

A. *Intent-Based Maternity*

When a court or legislature adopts the intent-based theory of maternity, the legal mother is defined as the mother that the parties intended to rear the child, or the commissioning mother.[135] This basis for finding legal maternity was developed by California, one of the first states to confront the issues involved in gestational surrogacy. In *Johnson v. Calvert*,[136] the Supreme Court of California was faced with the task of analyzing a statute that provided maternity could be proven by the person giving birth to the child or by the biological mother of the child.[137] *Johnson* involved a husband and wife who were physically able to produce the sperm and ovum necessary to conceive a child, but the woman was unable to gestate the embryo because she previously had a hysterectomy.[138] The couple contracted with a woman who agreed to be implanted with an embryo created by the couple.[139] The relationship between the gestational mother and the couple deteriorated, and both women petitioned the court for a determination of

---

129. *See* Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 132 (2000) (noting that "over half the states in the United States still have no legislation regarding surrogacy") (citations omitted).

130. *See* Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 686-88 (2000) (discussing the laws that various states have enacted to regulate certain aspects of surrogacy).

131. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 505-14 (1996) (identifying the facets of the intent-based theory).

132. *See id.* at 514-24 (noting that some courts have used the genetic contribution test to determine whether the gestational or biological mother would be the legal mother).

133. *See id.* at 524-25 (noting the common law presumption that the birth mother of the child is the legal mother of the child).

134. *See* Hurwitz, *supra* note 29, at 169-70 (advocating the commonly used "best interest of the child standard" as a method for determining whether the gestational surrogate or commissioning mother should have custody of the child).

135. *Id.* at 140.

136. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

137. *Id.* at 780-81.

138. *Id.* at 778.

139. *Id.*

legal maternity.[140] The California Civil Code provided that the woman who gave birth to the child could establish a parent-child relationship.[141] However, the Code also provided that "insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship."[142] Under the California Evidence Code, blood testing was admissible to prove paternity.[143] Therefore, the court found that such evidence would also be admissible to prove maternity.[144] Because the gestational surrogate and the biological mother both had a valid legal claim for maternity, the court was forced to create a new theory of maternity.[145] When the court looked to the surrogacy contract to determine the parties' intentions concerning maternity, it reasoned that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[146] This reasoning is based on the theory that, but for the commissioning couple, the child would not have come into being.[147] Therefore, the commissioning woman has a more "natural" claim to the child that is created.[148] Essentially, this idea of intent boils down to the basic fact that the mother who originally wanted the child is the mother that gets the child. This theory of establishing maternity is appealing because it is unambiguous, allowing couples entering into surrogacy arrangements the confidence that the terms of the contract will be upheld, and the child whom they sought to conceive will be in their care.[149]

This intent-based approach for determining legal maternity has been criticized for the lack of credence it gives to the genetics and gestation involved in conception.[150] In addition, as one commentator observed, "intent to become a parent is not a prerequisite for legal parenthood in usual circumstances . . . . If intent determines parenthood in cases of noncoital reproduction, will people who

---

140. *Id.*
141. *Id.* at 780 (citing CAL. CIV. CODE § 7015).
142. *Id.* (citing CAL. CIV. CODE § 7015).
143. *Id.* at 781 (citing CAL. EVID. CODE § 892).
144. *Id.*
145. *See id.* at 782 (holding that "[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions").
146. *Id.* (footnote omitted).
147. *Id.*
148. *Id.*
149. *See* Hurwitz, *supra* note 129, at 143 (noting that the intent-based approach "secures the commissioning couple's emotional and financial investment in the procreative process, thereby making collaborative reproduction a more attractive option for infertile couples").
150. *Id.* at 149-50.

become parents through coital means be able to sidestep parental responsibilities because parenthood was unintended?"[151] The intent-based approach also ignores the best interests of the child, and the ability of the intended parents to adequately care for the child.[152] The intent of the parties at the formation of the contract may not be the same as the intent of the parties later in the pregnancy, as when the commissioning couple divorces before the child is born, or when the surrogate forms the intent to keep the child after birth.[153]

While California was one of the first states to develop the intent-based approach to settle maternity disputes, it is not the only jurisdiction to adopt the method. Nevada law provides that a married couple may enter into a surrogacy contract, and that "[a] person identified as an intended parent in a contract described in subsection 1 must be treated in law as a natural parent under all circumstances."[154] Arkansas law also provides that a child born to a surrogate mother is presumed to be the child of the biological father and the woman intended to be the mother if the biological father is married.[155]

B. *Genetic Contribution Test*

The genetic contribution test determines maternity according to the biological connection between the child and the woman whose ovum contributed to the conception of the child.[156] Under this approach, where a child is conceived using genetic material from the commissioning couple, the commissioning mother will always be termed the legal mother.[157] Those who believe that genetics play the dominant role in shaping peoples' lives advocate this theory.[158] Additionally, some believe that "people have property rights in their gametes and, therefore, an ownership interest in any child resulting from their genetic material."[159] Regardless of one's reason for advocating the genetic test, it seems intuitively appropriate to award maternity to the genetic mother because the desire for the genetic bond was the catalyst that lead the parties to pursue surrogacy.

---

151. *Id.* at 142.
152. *Id.* at 143.
153. *Id.* at 146-47.
154. NEV. REV. STAT. 126.045 (2001).
155. ARK. CODE ANN. § 9-10-201 (Michie 2002).
156. Coleman, *supra* note 31, at 514.
157. *Id.*
158. *See* Hurwitz, *supra* note 29, at 149-50 (stating that "understanding one's genetic heritage and genealogical line is integral to shaping one's identity").
159. *Id.* at 150.

However, if one advocates for consistency in the application of legal principles, the genetic test may be tragically flawed. The genetic contribution test will produce contrary results when the commissioning couple must utilize a donor ovum for implantation in the gestational surrogate. Should the egg donor be allowed to make a claim for maternity simply because her genetic material was used to conceive a child? Instinctively, it is difficult to justify a maternal claim by a person who voluntarily donates their genetic material, having full knowledge of the consequences of the action. However, the premise of the genetic contribution test would allow an egg donor to make such a claim. If the genetic contribution test is to serve as a rational legal argument, it should only be applied to settle maternity disputes between the surrogate mother and the intended, or commissioning mother.

C. *Gestational Mother Primacy*

Prior to the emergence of assisted reproductive technologies, most jurisdictions followed the common law rule that presumed the woman giving birth to a child was the legal mother of the child.[160] Some commentators advocate this approach to surrogacy because it acknowledges the critical role of the woman who gestates the child.[161] "[The] surrogate has to her credit forty weeks of considerable 'sweat equity,' not to mention possibly grueling labor."[162] The gestational mother also establishes a unique physical and emotional bond with the child during the nine months prior to birth, a bond that the commissioning couple simply cannot attain.[163] In addition, the gestation presumption can serve as a judicial safeguard against unfair surrogacy contracts where surrogacy brokers or couples might attempt to exploit the woman hired to gestate the child.[164]

The fatal flaw with the gestational maternity presumption is that it "interferes with the private ordering of reproductive affairs."[165] When the court uses the gestational mother presumption, it discredits the constitutionally protected decision of the intended parents and the decision of the surrogate who voluntarily participates in the arrangement. The inadequacy of the presumption is illustrated by the plight of the Culliton family in Massachusetts, discussed

---

160. Coleman, *supra* note 31, at 524.
161. *Id.* at 525.
162. Hurwitz, *supra* note 29, at 157 (footnote omitted).
163. *See id.* at 158-64.
164. Coleman, *supra* note 31, at 525.
165. *Id.*

earlier.[166] This common law gestational mother presumption is a significant obstacle to the theory that states should allow the commissioning couple, rather than the surrogate, to be perfunctorily listed on the child's birth certificate.

The gestational mother presumption has been adopted by North Dakota[167] and Arizona.[168] These states declare that a surrogacy contract is void and unenforceable.[169] In the event a surrogacy arrangement results in a maternity dispute, the surrogate or the surrogate and her husband are presumed to be the legal parents of the child.[170]

D. *Best Interest of the Child Standard*

The final approach to legal maternity is the theory that the legal mother of the child should be decided according to the best interests of the child.[171] This legal standard is well-known by all family law attorneys and judges.[172] Under this approach, the interests of the child are controlling, and the court will ultimately "award" legal maternity to the party that will best care for the child.[173] In making this decision, the court considers the various parties' "ability to nurture the child physically and psychologically."[174] This approach to maternity is based on the notion that a single legal rule is insufficient to account for the variety of contexts in which surrogacy disputes occur.[175] The best interest standard allows a court to consider intent, genetics, and the interests of the gestational mother when it decides legal maternity. Most importantly, this theory is appealing because it ensures that the child will go to the mother best equipped for the job.

On the other hand, should the court decide legal maternity on the basis of the parties' qualifications as a parent? Mothers who do not use surrogacy are not subjected to the best interest standard to validate their status as legal mothers.

---

166. *See* text accompanying notes 45-56; *see also* Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1136 (Mass. 2001) (providing that the court's role is to determine whether the genetic mother or the surrogate is to be listed on the birth certificate despite the fact that the surrogate had no objections to the genetic mother's request for legal maternity).

167. N.D. CENT. CODE § 14-18-05 (1997).

168. ARIZ. REV. STAT. § 25-218 (2000).

169. *Id.*; N.D. CENT. CODE § 14-18-05.

170. ARIZ. REV. STAT. § 25-218 (surrogate); N.D. CENT. CODE § 14-18-05 (surrogate and her husband).

171. *See* Hurwitz, *supra* note 29, at 169.

172. *See id.*

173. *Id.* at 171.

174. *Id.* at 172.

175. *Id.* at 167-68.

Rather, parents who conceive through natural methods are automatically deemed legal parents, and their ability to care for the child is only at issue in custody disputes or in abuse and neglect proceedings. To require parties to a surrogacy contract to demonstrate their parenting abilities prior to the parentage determination is to deny these parents the equal protection of the laws. While it is true that the conception of a child in the context of a gestational surrogacy arrangement is materially different than the unassisted conception of a child, the genetic status of the parents in both scenarios remains equal. Therefore, the determination of maternity for genetic mothers cannot be governed according to two inconsistent and discriminatory principles.

At least two states have adopted the best interest of the child standard as a method for determining custody in the event of a dispute related to a surrogacy agreement,[176] rather than as an approach for determining legal maternity.[177] This demonstrates the fact that legal parentage, and parental-fitness standards are, or should be, mutually exclusive legal principles.

VI. RECOMMENDATIONS FOR SURROGACY REGULATION IN IOWA

The appellate courts in the State of Iowa have never been confronted with a surrogacy dispute. However, there is a somewhat obscure reference to surrogacy in the Iowa Code.[178] The statute reads: "A person commits a class 'C' felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement."[179] This law could be interpreted as providing for the enforceability of surrogacy contracts. It also could be interpreted as simply permitting people to enter into surrogacy contracts for compensation. Regardless of how one interprets the law, it is undisputable that nowhere does the law speak to the determination of legal maternity. In addition, a thorough search of the Iowa Code reveals a complete absence of any reference to the establishment of maternity under any circumstances. The rules of inheritance established in the probate code do provide that "[u]nless a child has been adopted, an illegitimate child shall inherit from the child's natural mother, and she from the child."[180]

---

176. MICH. COMP. LAWS ANN. § 722.861 (West 2002); UTAH CODE ANN. § 76-7-204 (1999).

177. *See* Hurwitz, *supra* note 29, at 171 ("States that adopt a 'best interests' analysis in surrogacy cases, now do so for custody determination but not for legal parenthood determination purposes.").

178. *See* IOWA CODE § 710.11 (2001) (making it a felony to purchase or sell an individual, but excepting "surrogate mother arrangement[s]").

179. *Id.*

180. *Id.* § 633.221.

This law may be interpreted as defining "mother" as the biological mother of the child. In the context of gestational surrogacy arrangements, such a definition would reinforce the legal rights of the intended mother. Despite the fact that a surrogacy dispute has never arisen in Iowa, what approach should the courts use if such a dispute were to arise? The increasingly frequent use of assisted reproductive technologies, in conjunction with the rapid increases in the technology, makes it likely that this issue will have to be addressed by an Iowa court in the near future.

This Note evaluated and discussed the merits and deficiencies of the four different approaches state courts and legislatures use to determine legal maternity. One way to resolve the deficiencies of the four individual approaches is for the Iowa State Legislature to adopt a comprehensive surrogacy regulatory scheme. Several states have created laws that regulate the arrangement and address the legal maternity issues that arise in surrogacy cases.[181]

Wisconsin has a birth registration statute by which the surrogate mother's name is placed on the birth certificate.[182] The father's information is not contained on the initial certificate.[183] Then, if a court terminates the parental rights of the surrogate mother, the clerk of court reports the court's determination to the state registrar, and the registrar issues a new birth certificate.[184]

In Illinois, a parent-child relationship may be established when the intended parents and the surrogate sign a voluntary acknowledgment of parentage.[185] The surrogate mother, the surrogate's husband, and the intended parents must all certify that the child was conceived with the sperm of the intended father and the egg of the intended mother.[186] The law also requires a physician to certify the biological parentage of the child.[187] If a parent-child relationship is established under this law, the state Vital Records Act requires that the name of the biological parents be entered on the birth certificate and the surrogate mother shall not be listed.[188]

---

181. N.H. REV. STAT. ANN. §§ 168-B:1-27 (2001); VA. CODE ANN. §§ 20-158-165 (Michie 2000); WIS. STAT. ANN. § 69.14 (West 2003).
182. WIS. STAT. ANN. § 69.14.
183. *Id.*
184. *Id.*
185. 750 ILL. REV. STAT. 45/6 (2003).
186. *Id.*
187. *Id.*
188. 410 ILL. REV. STAT. 535/12.

Florida law contains an expedited affirmation of parental status for parents involved in a gestational surrogacy agreement.[189] Under this statutory scheme, the intended parents petition the court for a hearing.[190] At the hearing, the court determines whether or not a binding gestational surrogacy contract has been executed pursuant to Florida law.[191] When at least one of the intended parents is the genetic parent of the child, the intended couple is presumed to be the natural parents of the child.[192] The court then directs the department of health to issue a new birth certificate naming the intended parents as the legal parents.[193]

New Hampshire surrogacy arrangements are judicially enforceable only when the parties to the agreement comply with the statutory regulations.[194] The statute requires parties to submit to physical and psychological evaluations, and to petition the court for preapproval of the surrogacy contract.[195] The court will approve the contract only if, upon a finding that the contract is in the best interest of the intended child, the parties pass the evaluations and give informed consent.[196] The judicial approval of the contract has the effect of terminating the parental rights of the surrogate.[197] However, the statute also requires surrogacy contracts to contain a clause which allows the surrogate to decide to keep the child within seventy-two hours after the birth of the child.[198] The statute also addresses other legal issues, such as the surrogate's rights and obligations concerning abortion, and the parties' financial rights and responsibilities.[199]

Virginia has also created a system by which surrogacy contracts must be approved by a court.[200] In addition to requiring the parties to submit to physical and psychological examinations, Virginia law also requires the parties to participate in a social services home study.[201] In addressing legal parentage, the law requires the intended parents to file a post-birth notice with the court, and, if at least one of the intended parents is genetically linked to the child, the court

---

189. FLA. STAT. ch. 742.16 (2002).
190. *Id.*
191. *Id*; *see also id.* ch. 742.15 (establishing the requirements of a gestational surrogacy contract).
192. *Id.* ch. 742.16.
193. *Id.*
194. N.H. REV. STAT. ANN. § 168-B:16 (2001).
195. *Id.*
196. *Id.* § 168-B:23.
197. *Id.*
198. *Id.* § 168-B:25.
199. *See id.* §§ 168-B:8, B:23, B:25 (describing the child support responsibilities of the parents and surrogate, and the legally allowed surrogacy fees).
200. VA. CODE ANN. § 20-160 (Michie 2000).
201. *Id.*

shall direct the issuance of a new birth certificate that names the intended parents as the legal parents of the child.[202] The Virginia approach can be characterized as a combination of the intent-based test and the genetic contribution test. More importantly, the law addresses the potential points of dispute that may arise during the course of the arrangement, thereby providing the parties with full knowledge of the consequences of their actions.

The New Hampshire and Virginia statutes were modeled after Article 8 of the Uniform Parentage Act (UPA).[203] When the National Conference of Commissioners on Uniform State Laws took up the issue of gestational surrogacy agreements in 1988, they offered two approaches to the subject: "regulate such activities through a judicial review process or to void such contracts."[204] The UPA discusses a variety of legal issues that develop in surrogacy arrangements, such as whether a jurisdiction that bans surrogacy contracts must grant full faith and credit to a contract created in a state that allows surrogacy.[205] "[A] couple may return to their home State with a child born as the consequence of a gestational agreement entered into in a State recognizing that agreement. This presents a full faith and credit question if their home State has a statute declaring gestational agreements to be void."[206]

The UPA article on gestational agreements includes provisions that allow parties to enter into a written contract,[207] and requires the parties to the agreement to petition the court to validate it.[208] The court is then required to hold a hearing at which medical evidence must show that the intended mother is unable to bear a child without risk to her own health.[209] Additional terms require that a home study be conducted, the surrogate must have had a previous pregnancy and delivery of a child, the health care expenses of the arrangement must be provided for in the event the agreement terminates, and the consideration paid to the surrogate must be reasonable.[210] Upon the birth of the child, the intended parents must file notice of the birth with the court, and the court will issue an order directing that the intended parents be named the legal parents on the child's birth

---

202. *Id.*
203. *Compare* N.H. REV. STAT. ANN. §§ 168-B:1-27, *and* VA. CODE ANN. §§ 20-158-165, *with* UNIF. PARENTAGE ACT art. 8 (amended 2000), 9B U.L.A. (2001).
204. UNIF. PARENTAGE ACT art. 8 (amended 2000), 9B U.L.A. (quoting prefatory comment).
205. *Id.*
206. *Id.*
207. *Id.* § 801.
208. *Id.* § 802.
209. *Id.* § 803.
210. *Id.*

certificate.[211] An additional provision states: "If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child."[212] This provision places the genetic relationship at the forefront of a disputed parentage claim.

The regulatory approaches to surrogacy taken by the UPA, and states including Virginia and New Hampshire, are appealing because they aim to solve surrogacy problems before the arrangement is started. By requiring the parties to submit to psychological and physical examinations, and to present their case to a judge, the fairness of the arrangement is unchallengeable. The judicial approval process ensures that the surrogate fully understands her legal rights and responsibilities, forestalling claims of unconscionability and uninformed consent. The regulatory approach also gives the intended parents a sense of predictability regarding their reproductive decisions. In addition, the issue of legal maternity is predetermined, allowing all parties to maintain a relatively secure understanding of their legal responsibilities. However, the laws arguably retain a significant deficiency found in jurisdictions that do not have surrogacy regulations—that is, the New Hampshire and Virginia regulations allow the surrogate a waiting period after birth in which she may change her mind about terminating her rights.[213] But, unlike other jurisdictions, the New Hampshire and Virginia provisions requiring psychological evaluations mitigate the possibility of such a disruptive occurrence.[214]

VII. CONCLUSION

The legal issues surrounding gestational surrogacy arrangements are voluminous and complex. The conflicts that can arise during the arrangement are tragic and heart-wrenching. These difficulties are compounded by the fact that few states have provided guidance to those wishing to utilize reproductive technologies.

Some state legislatures and courts have addressed the issue of legal maternity in gestational surrogacy arrangements using the intent-based theory, genetics contribution theory, gestational mother presumption, or the best interests of the child theory. However, all of these theories contain weaknesses that discount their effectiveness as comprehensive approaches to determining legal maternity. The main flaw with all four approaches is the lack of predictability

---

211. *Id.* § 807.
212. *Id.*
213. N.H. REV. STAT. ANN. § 168-B:25 (2001); VA. CODE ANN. § 20-162 (Michie 2000).
214. *See* N.H. REV. STAT. ANN. § 168-B:18; VA. CODE ANN. § 20-160.

for people wishing to enter into a surrogacy agreement. The many difficulties encountered in surrogacy arrangements can be minimized by state adoption of surrogacy legislation. States, including Iowa, that have never addressed surrogacy issues should follow the guidelines laid out in the Uniform Parentage Act. The law should create a statutory presumption that the woman who intends to raise the child, as evidenced in a contract verified by a court of law, is the legal mother of the child. Without such a presumption, the intended mothers to some gestational surrogacy agreements must expend additional time, energy, and money to legally adopt their own biological children. The parties to the surrogacy arrangement and the children born under these circumstances are entitled to have their legal status clarified.[215]

*Amy M. Larkey**

---

215. *See* UNIF. PARENTAGE ACT art. 8, prefatory cmt. (amended 2000), 9B U.L.A.

* J.D. Candidate, Drake University Law School, 2003; B.A., University of Iowa, 2000.