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Abstract

Prebirth parentage orders are often sought by parties to surrogacy agreements to formalize the intent of the parties to the agreement before the child is born. Such orders declare the intended parents to be the legal parents of the child. This article discusses the benefits of such orders, as well as the difficulties in obtaining them. The availability and efficacy of prebirth parentage orders depends on many factors including the type of surrogacy arrangement, the state law that governs the proceeding, and whether the parties are in unanimous agreement. This article analyzes the various factors which impact whether obtaining a prebirth parentage order is possible and whether such an order is enforceable in several representative jurisdictions in the United States.

Keywords

Surrogacy, Assisted Reproductive Technologies, Family Law

Disciplines

Family Law

Comments

This article is co-authored by Steven H. Snyder.

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The Use of Prebirth Parentage Orders in Surrogacy Proceedings

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I. Introduction

The evolution of legal procedures to implement and ratify the intent of the parties to surrogacy¹ agreements across the United States has been patchwork, at best. Competing social, moral, and political interests regarding the use of third-party reproduction² have led to widely varied legal approaches and guidelines across the country, with each state having its own unique legal climate regarding such proceedings.³ Still, couples

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1. The terms used to identify women who act as surrogates are widely varied and can easily become confusing. Some professionals use the term “surrogate” only to refer to a woman who provides her own ovum (egg) and gestates a child for another woman who is the intended mother of the child (also referred to as “artificial insemination (or AI) surrogacy”). These professionals use the term “gestational carrier” to refer to a woman who gestates a child for another woman who is the intended mother of the child using either the intended mother’s or a donor’s egg (also referred to as “*in vitro* fertilization (or IVF) surrogacy”). For simplicity sake, we refer collectively to all women who gestate a child for another woman who is the intended mother as “surrogates,” distinguishing between the two types by referring to them as “traditional surrogates” (those who use their own egg) and “gestational surrogates” (those who use the intended mother’s or a donor’s egg).

2. “Assisted reproduction” refers to and encompasses any procedure by which an intended parent attempts to conceive a child by means (usually, but not necessarily, a medical procedure) other than sexual intercourse. “Third-party reproduction,” also referred to as “collaborative reproduction,” refers to such procedures in which the egg, sperm, or uterus of a third party is used to achieve a pregnancy.

3. Twenty-two jurisdictions have passed statutes that directly or indirectly address surrogacy or a surrogacy-related issue (such as issuance of birth records or the effect of compensation in surrogacy arrangements). Five other jurisdictions have appellate court decisions that address

and individuals in virtually every state are seeking out and entering into surrogacy arrangements. In addition, they are contacting attorneys in every state, either before or after they have entered into such an agreement or a pregnancy has occurred, for advice and assistance in implementing these agreements and ultimately establishing parentage and birth records as the parties originally intended. The legal procedures used and the law that governs these agreements depend on in which state(s) the respective parties reside, which state's law applies, and, sometimes, in which county the proceeding is venued and which judge is presiding over the matter. The legal posture and success of these cases is also significantly affected by whether the parties are in unanimous agreement or are contesting the matter.

As a result, attorneys practicing assisted reproduction law are much like the early aviation inventors during the advent of the twentieth century. Early aviators were approaching the challenge of human flight from many different observational and experiential backgrounds that resulted in many diverse aircraft designs, some of which worked to varying degrees and some of which did not. Similarly, today's family law practitioners are also approaching assisted reproduction from many different practice backgrounds and utilizing different legal procedures to accomplish the goals of participants in surrogacy proceedings in various jurisdictions, some of which work to varying degrees and some of which do not. Therefore, the legal procedures not only vary from state to state, but they often also vary from attorney to attorney, particularly in jurisdictions in which there are no statutes or precedent as to how to proceed in a surrogacy matter.

One legal procedure that some attorneys practicing assisted reproduction law are attempting to use to formalize the intent of the parties to a surrogacy agreement is to obtain a prebirth parentage order in which the intended parents are declared the legal parents before the child is born. There are numerous benefits to such prebirth orders. First and foremost, the intended parents are determined to be the legal parents of the child before the child's birth, thereby giving them immediate and sole access to and control over the child and its postnatal care and medical treatment when it is born. This also allows the names of the intended parents to go on the original birth records at the hospital and the governing department of health, avoiding the process of amending the birth certificate and the existence of a sealed

the validity or enforceability of surrogacy agreements. Of these twenty-seven jurisdictions with statutes and/or case law affecting surrogacy, twenty-two expressly or impliedly permit the enforcement of some sort of surrogacy arrangement, whereas only five generally prohibit them altogether. The remaining twenty-four jurisdictions have no statutes or case law regarding surrogacy, so such agreements are not expressly allowed, prohibited, or regulated in these states. These various jurisdictions will be discussed *infra*. See also Appendix.

original birth certificate.⁴ The determination of parentage before birth also allows the hospital to discharge the child directly to the intended parents rather than to the surrogate, thereby avoiding the awkward circumstance of the surrogate carrying the child out of the hospital only to deliver it into the physical custody of the intended parents at the curb. A prebirth determination of parentage may also have a solidifying effect on the child's insurance coverage under the intended parents' health insurance policies.⁵ Finally, from a purely emotional and psychological perspective, a prebirth determination of parentage permits the intended parents to participate in the delivery and hospital experience as much like the natural delivery of their own child as possible.

In spite of these benefits, it is the conclusion of this article that obtaining a prebirth parentage order is not appropriate in all surrogacy cases or in all jurisdictions. Instead, whether one can, or should, obtain a prebirth parentage order depends in part on the law that governs the proceeding and in part on what type of surrogacy proceeding is arranged. Given the diversity of precedent, practice, and procedure concerning surrogacy proceedings in general, it is not possible to present a clear and concise "how to" or "when to" draft prebirth parentage orders in surrogacy proceedings. Rather, we present relevant observations compiled from certain representative juris-

4. The intent of the many intended parents using third-party reproduction to disclose to their resulting children that surrogates and/or egg donors helped to bring about their births varies. For those parents who are inclined not to disclose such facts to their children, the elimination of an original birth certificate that reveals these facts is desirable. Although children of third-party reproduction are not now granted any legal right to access their original birth records, there certainly exists the possibility that, as that population of children grows in number and matures in political influence over the next several decades, they may gain access to these records in the same way that adopted children are currently obtaining this access in many states across the country. *See, e.g.*, WASH. REV. CODE ANN. §§ 26.33.330 – 26.33.345 (West 1990).

5. Insurance coverage for the surrogate's prenatal pregnancy expenses, labor, and delivery, and the postnatal care of both the surrogate and the child is a complicated issue. Intended parents frequently expect that the surrogate's health insurance will cover all of these expenses until they add the child to their insurance coverage after the birth. Unfortunately, because of the substantial increase in the number of high-order multiple births (triplets and quadruplets) that result from the assisted reproduction procedures employed in surrogacies and the resultant increase in the number of premature births and infant intensive care expenses, many health insurance companies are currently adding exclusions to their policies for surrogate pregnancies. Often such exclusions attempt to include adverse complications to the surrogate resulting from the pregnancy and delivery. Even without an express exclusion, the surrogate's health insurance policy may not cover the child's postnatal care expenses based on the parties' intent. To obtain coverage, the intended parents must expressly add the child to their own health insurance policy in a timely fashion pursuant to their own policy's terms and conditions, if possible. *See* *Mid-South Ins. Co. v. Doe*, 274 F. Supp. 2d 757 (D. S.C. 2003). Where the intended parents do not have their own health insurance available for the child or cannot immediately add the child to their coverage (as in the case of international intended parents without U.S. health insurance coverage), a pre-birth determination of parentage may actually be detrimental to the child's coverage under the surrogate's policy and may cause unintended adverse insurance consequences.

dictions to highlight the issues and concerns that arise related to such orders. It is our intention that each practitioner will then, in keeping with his or her experiential background and governing state law, be able to better evaluate and advise clients regarding such orders.

Part II of this article discusses the various types of third-party reproduction relationships and why prebirth orders of parentage are useful in surrogacy cases. Part III describes both traditional and gestational surrogacy arrangements and concludes that prebirth parentage orders are not appropriate in cases where any type of adoption proceeding is normally required to give effect to the parties' intent. Part IV outlines the various factors that should be considered whenever seeking a prebirth parentage order and analyzes these factors in several representative jurisdictions in the United States.

II. The Benefits of Prebirth Parentage Orders in Surrogacy Proceedings

Approximately 6.1 million women of reproductive age in the United States experience some sort of infertility that prevents them from having children without medical intervention and/or the assistance of third parties in order to achieve a successful pregnancy.⁶ For couples that have a viable sperm, ovum (egg), and uterus, but simply have trouble conceiving, medical procedures such as surgery, artificial insemination (AI),⁷ and various forms of *in vitro* fertilization (IVF)⁸ often help them overcome their infertility to successfully conceive and bear a child.

Persons experiencing infertility who are unsuccessful with the foregoing medical techniques or for whom those techniques are, for various reasons, unavailable, have several alternatives available to them. They can elect to live without children, adopt a child, or pursue third-party reproduction using a sperm donor, egg donor, and/or surrogate carrier to provide whatever component(s) they are lacking in order to successfully reproduce. Those who opt for third-party reproduction are primarily motivated by their desire to procreate. Members of this group tend to deem it to be very important that their offspring be genetically related to at least one of the intended parents and typically want to recreate the natural process of reproduction as closely as possible.

For a woman who has a viable uterus, using a sperm donor and/or an egg donor allows her to create a natural pregnancy and to give birth to the

6. Center for Disease Control, National Center for Health Statistics, *available at* <http://www.cdc.gov/nchs/fastats/fertile.htm>.

7. The introduction of sperm into a female's uterus by any means other than a penis.

8. The removal of a viable egg from a female's ovary, its fertilization outside the uterus, and the transfer of the resulting embryo back into a uterus.

child. In these cases, the birth mother's name will normally and automatically go on the child's original birth record pursuant to hospital and state birth record procedures. If the birth mother in this situation is married, her husband's name will also normally and automatically go on the child's original birth record.⁹ Thus, when women use only sperm donors and/or egg donors to have children and give birth themselves, their children's birth records are typically in accord with the parties' intent and do not have to be amended.¹⁰ As a result, the intended parents often do not participate in any legal proceeding, either before or after the birth of the child, to affirm their parentage or settle potentially competing parental rights to the child.¹¹

For a woman who lacks a viable uterus or for a single man or gay couple, the only avenue available to them to have a child is the use of a surrogate carrier to gestate and deliver a child. When a surrogate is used,

9. See, e.g., IOWA CODE ANN. § 144.13 (West 1999).

10. In cases of lesbian couples, it is often only the birth mother who is listed on the original birth record, and the couple will need an additional proceeding, typically a second-parent adoption, to have the nonbiological mother's name placed on the birth certificate.

11. The fact that most intended parents having children through third-party reproduction where the intended mother actually gives birth to the child do not go through legal proceedings to formalize their parentage status does not mean that they should not do so. Some such proceedings are rendered unnecessary by express statutes governing such procedures that serve to legally establish or sever the parental relationships of the participating parties, such as sperm donation statutes that are in effect in virtually all states. See, e.g., COLO. REV. STAT. ANN. § 19-4-106 (West 2003). Typically, these statutes state that parents who use sperm donated by a man other than the husband under certain specified circumstances (e.g., a married couple, under the supervision of a licensed physician, with the written consent of the husband joined in by the wife, etc.) are the legal parents of the child upon its birth, whereas the sperm donor is not. These statutes serve to automatically establish the legal parentage of the intended parents and terminate any parental rights that the donor (whether known or anonymous) could otherwise claim based on genetic relationship. These statutes make the determination of parentage in such situations simple, clear, and inexpensive since no additional legal proceedings are necessary to effect resolution of the parentage issues. Unfortunately, there are only three states that have similar provisions for the use of egg donors, and such statutes do not apply to the many people who do not fit within or comply with the statutory requirements (e.g., unmarried persons, persons who inseminate without the assistance of a licensed physician, persons who fail to sign or join in the necessary consents, etc.). FLA. STAT ANN. §§ 742.11(a), 742.14 (West 1993); OKLA. STAT. ANN. tit. 10, §§ 554-555 (West 1990); VA. CODE ANN. §§ 20-156, 20-158 (Michie 2000). Therefore, in these cases in which the statutes do not apply, the donors of sperm or eggs may retain the legal right to assert paternity/maternity rights over the children born using their gametes based on their genetic relationship to the child pursuant to the provisions of the applicable paternity/maternity statutes in the relevant jurisdiction. These rights continue unless and until there is a legal proceeding initiated and completed to formally address establishment and severance of parental rights among the participating parties. Simply because donors in such cases (particularly anonymous donors) may be unlikely to try to establish parental rights to the child does not mean that they cannot legally do so. Whether legal proceedings to formally determine the rights of the various parties and prevent such claims are conducted in these circumstances depends on the informed choice and risk-tolerance of the intended parents, and they should be appropriately advised regarding these legal issues as part of the third-party-reproduction process.

the same hospital and state birth record procedures operate to put the surrogate's name on the original birth record as the child's mother simply because she gave birth to the child. If the surrogate is married, her husband's name is also normally put on the original birth record as the child's father. The surrogate's husband's name can be removed from the birth certificate if the law of the state in which the child is born allows the intended father to substitute his name on the original birth record upon the parents' execution of an acknowledgment of paternity or some similar state-authorized form.¹² There is usually no similar administrative form or procedure available, however, for the intended mother who does not give birth. As a result, the surrogate carrier must cooperatively participate in some sort of legal proceeding either before or after the child's birth to vary this usual course of events and place both intended parents' names on the child's original or an amended birth record and terminate her presumptive parental rights to the child. One proceeding to accomplish this result is to obtain a prebirth parentage order before the child is born.

III. Various Types of Surrogacy Relationships and Their Effect on Prebirth Parentage Orders

Before surrogacy arrangements became an available means to procreate, legal parentage of a child and the conformity of the child's birth records were generally determined and implemented under two separate statutory schemes, depending on the circumstances of the parties. If the parties included the birth mother, another genetic parent, and/or an alleged parent that had certain other preexisting or presumptive family relationships with the child, legal parentage and the related birth records were determined under the applicable paternity/maternity statutes. If the parties had no genetic or family relationship to or with the child, legal parentage and the related birth records could still be established pursuant to the applicable adoption laws.¹³ When it comes to determining parentage in surrogacy cases, however, the majority of jurisdictions have no statutes or case law governing surrogacy agreements or the court proceedings to implement them. In these jurisdictions, attorneys must use these same paternity/maternity and adoption statutes that are in effect, but were never originally intended to apply to surrogacy proceedings, to fashion *ad hoc* procedures to effect the parties' intent.

12. MINN. STAT. ANN. § 257.75 subd. 1a (West 2000).

13. Depending on the jurisdiction, the two types of proceedings necessary to effect the parties' intent may be venued in different divisions of the local court, with some venued in family court and others venued in juvenile court. If both types of proceedings are required in a particular surrogacy matter, whether these cases can be consolidated in front of the same judicial officer will depend on local court rules and procedures.

Typically, in order for the intentions of the parties to surrogacy agreements to be fulfilled, attorneys must find a way to vary or supersede the usual laws and regulations establishing parental rights. The normal presumptions in favor of the child's birth mother (the surrogate) and her spouse, if any, must give way to the intent of the parties that the intended mother and father become the child's sole legal parents on both the child's birth records and in legal effect. Since surrogacy arrangements are varied in nature, the type of surrogacy arrangement into which the parties have entered will often determine which statutory rules and procedures apply in each jurisdiction.

A. Traditional Surrogacy

Prior to medical advances in the use and reliability of IVF, the only available technology to initiate a surrogate pregnancy was artificial insemination, which was used to implement a "traditional," or AI, surrogacy in which the surrogate used her own egg to become pregnant. A traditional surrogacy can be initiated using either the intended father's or a donor's sperm. In a traditional surrogacy, the surrogate is both the child's birth and genetic mother. The intended mother has no genetic, preexisting, or presumptive family relationship to the resulting child under most paternity/maternity statutes, so her legal relationship to the child must be established through some sort of adoption proceeding after the birth of the child.¹⁴

If the intended father's sperm is used, both he and the surrogate's spouse have equivalent presumptions as the child's father. The intended father's paternity presumption is based on his genetic relationship to the child, and the surrogate's spouse's paternity presumption is based on his having been married to the surrogate during the gestation and birth of the child.¹⁵ Under these circumstances, the intended father usually can use his genetic relationship to the child to establish his sole paternity of the child and place his name on the child's birth certificate pursuant to the state's relevant paternity/maternity statutes and procedures.¹⁶ Once this is accomplished, the intended mother's legal relationship with the child can then typically be established through a relatively simple and efficient stepparent adoption proceeding. If a donor's sperm is used, both the intended mother's and intended father's legal relationship can technically only be established through a full adoption proceeding with all of its attendant home studies, procedural complexities, and delay.

14. There are no existing adoption statutes that contemplate the adoption of anything but a live child after birth.

15. This is the typical example of a paternity presumption from among a variety of other possible presumptions as set forth in various paternity/maternity statutes across the country.

16. See, e.g., MINN. STAT. ANN. § 257.55 (West 2001).

B. Gestational Surrogacy

The surrogate's genetic relationship to the child in traditional surrogacies virtually always allows her to retain her legal parental rights to the child if she elects to do so.¹⁷ As a result, this type of surrogacy arrangement has become disfavored as other medical options have become available.¹⁸ With the advent of reliable and successful IVF procedures, prospective intended parents can now implement a "gestational," or IVF, surrogacy in which the surrogate's egg is not used so that she is not genetically related to the child. Such pregnancies can result using the intended mother's egg or, when the intended mother cannot provide either a viable egg or uterus, a donor's egg. A gestational surrogacy can also be initiated using either the intended father's or a donor's sperm. These various surrogacy arrangements can change the standing of the parties in surrogacy proceedings, as well as the outcome of the proceedings.

1. USING AN EGG DONOR

When an egg donor is used, the surrogate is the child's birth mother, but neither she nor the intended mother is the child's genetic mother. The genetic mother is the egg donor, who is typically acting anonymously. As a result, the surrogate has a presumptive legal relationship with the resulting child as the birth mother while the intended mother has no genetic, pre-existing, or presumptive family relationship to the child. Thus, once again, the intended mother needs to complete some sort of adoption proceeding to establish her legal relationship with the child after the birth.¹⁹

In this situation also, the surrogate's spouse, if any, has a paternity presumption because he was married to the surrogate during the gestation and birth.²⁰ If the intended father's sperm is used, he shares paternity pre-

17. See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

18. Many infertility physicians and clinics now refuse to facilitate or perform AI surrogacies even in states where there is no statutory prohibition of or negative case law regarding AI surrogacy primarily because of the legal risks involved in such arrangements for the intended parents as established in other jurisdictions. Unfortunately, because IVF medical procedures and the attendant cost of ovum donors create substantially greater surrogacy program expenses than AI procedures, this creates a *de facto* economic bar to many intended parents who would otherwise use surrogacy to build their families but cannot afford the greater expense of the ovum donor and IVF procedures.

19. Anonymous egg donors are not typically joined in the paternity/maternity or adoption proceedings used to create the parental relationships that the known parties to the surrogacy agreement intend. It is axiomatic that a court proceeding cannot affect the legal rights of third parties who are not joined in the proceeding. In light of this legal principle, it is certainly possible that an anonymous donor's third-party rights to assert maternity based on genetic relationship continue unabated under the applicable paternity/maternity statutes unless there is an applicable egg donation statute that automatically acts to extinguish those rights or the donor is appropriately joined in a court proceeding.

20. MINN. STAT. ANN. § 257.55 (West 2001).

sumptions with the surrogate's spouse based on his genetic relationship to the child.²¹ Under these circumstances, the intended father's legal rights to the child can once again be established through a paternity proceeding, after which the intended mother can undertake a stepparent adoption proceeding. If a sperm donor is used, both the intended parents must participate in a full adoption proceeding.²²

2. USING THE INTENDED MOTHER'S EGG

Fertilization of the intended mother's egg with the intended father's sperm and transfer of the resulting embryo(s) into the surrogate's uterus for gestation is now the most preferred method of gestational surrogacy when the intended mother and father can provide both viable eggs and sperm. In this case, the surrogate and her spouse, if any, have existing presumptions for establishment of legal parentage under many paternity/maternity statutes as the birth mother and the birth mother's spouse at the time of gestation and delivery; however, both the intended mother and father have equal presumptions for establishment of legal parentage under most states' paternity/maternity statutes based on their genetic relationship to the child. As a result, the parties can often use a single paternity/maternity proceeding to obtain a court order establishing the intended parents' legal parentage and nullifying the competing parentage presumptions of the surrogate and her spouse, if any.²³

Where the parties are all in agreement in requesting the establishment of the intended parents' rights and the intended parents are both genetically related to the child, such postbirth orders are a matter of course in many jurisdictions. Even if the parties to such a surrogacy arrangement are in disagreement, the courts virtually always sustain the genetic parents' rights to the child over the surrogate's and her spouse's rights.²⁴ Depending on the court's analysis, this may be because of the greater weight of genetic

21. *Id.*

22. The paternity/maternity and adoption proceedings can be successfully completed in most jurisdictions even where an egg donor is used as long as all the parties are in agreement. The significant difference between this process and traditional surrogacy is the outcome of disputed gestational surrogacies. If a gestational surrogate disputes the establishment of the intended parents' legal parentage when she is not genetically related to the child, the courts will usually give effect to the intent of the parties and establish parentage in favor of the intended parents regardless of whether the intended father's or a donor's sperm is used. This makes a gestational surrogacy far preferable to a traditional surrogacy for reliably implementing the legal intent of the parties.

23. Availability of this type of proceeding hinges on whether the jurisdiction's statutes authorize a declaration of maternity on the same bases that support a declaration of paternity. Compare *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) with *Andres A. v. Judith N.*, 591 N.Y.S.2d 946 (Fam. Ct. 1992).

24. See, e.g., *Smith v. Brown*, 718 N.E.2d 844 (Mass. 1999); *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. C.P. 1994); *Johnson v. Calvert*, 851 P.2d 776 (Cal.1993).

relationship or the use of the parties' intent as a tiebreaker between otherwise equal paternity/maternity presumptions.²⁵

Whether a prebirth parentage order is available and appropriate in any particular surrogacy case depends on several factors. Primary among them, however, is the fact that adoption proceedings are historically intended and reserved only for postbirth establishment of parental relationships between children who have already been born and adults who are otherwise legally and genetically unrelated to them.²⁶ Thus, seeking a prebirth parentage order in either a traditional surrogacy or a gestational surrogacy using a donor where one or both intended parents are genetically unrelated to the child and a postbirth adoption proceeding of some sort is required seems procedurally inappropriate. On the other hand, seeking such an order in a gestational surrogacy using the intended parents' egg and sperm so that both intended parents are genetically related to the child and can establish their legal rights to the child in a single paternity/maternity proceeding seems procedurally appropriate. Therefore, the remainder of this article is predicated on the presumption that prebirth parentage orders are only appropriate in cases where both intended parents can assert a valid presumption of both paternity and maternity under the applicable paternity/maternity statutes, usually based on genetic relationship, or where there is specific statutory authorization in the specific jurisdiction for prebirth orders under other circumstances.

IV. Factors to Consider Before Seeking a Prebirth Parentage Order

Even when a gestational surrogacy in which both intended parents are genetically related to the child is arranged, there are still other factors that must be considered before seeking a prebirth parentage order. First, jurisdictions differ in their approaches to prebirth parentage orders in paternity/maternity proceedings. In some jurisdictions without specific statutes or case law regarding surrogacy, prebirth parentage orders in paternity/maternity proceedings are specifically permitted by statute. In other such jurisdictions, prebirth orders are expressly prohibited by statute. Moreover, some jurisdictions statutorily permit a determination of maternity on the same grounds and procedures as a determination of paternity, whereas others do not. Accordingly, the availability, validity, and long-term effect of such orders will differ in these respective jurisdictions.

25. *See id.*

26. Thus, the term "embryo adoption" is a misnomer, at best, since no adoption law provides for the adoption of a prebirth embryo or fetus. Embryos, like sperm and eggs, are more accurately construed as being donated, and the legal rules and procedures governing such transfers of embryos from one intended parent to another should be parallel to other gamete donation procedures and should make such transfers simple, efficient, and inexpensive for the parties.

Second, there are jurisdictions with specific enabling or prohibitory statutes governing certain types of surrogacy that have clear substantive and procedural requirements or restrictions as to if, when, and how the parties can obtain a parentage order that reflects their common intent. Depending on the statutory parameters in each of these jurisdictions, pre-birth parentage orders may or may not be available or appropriate.

Finally, the parties' success or failure in obtaining a prebirth parentage order may simply depend on whether they are cooperatively stipulating to such relief or are contesting the issuance of such an order. As many practitioners in this area have realized, it is amazing what can be accomplished when everybody in the courtroom agrees on the outcome.²⁷

Keeping these factors in mind, following is an analysis of how several representative jurisdictions in the United States are likely to handle pre-birth parentage orders in gestational surrogacy cases.

A. California

California is illustrative of jurisdictions that have no statutory provisions governing surrogacy but expressly allow prebirth parentage determinations.²⁸ California adopted the general provisions of the 1973 Uniform Parentage Act (UPA) in 1975.²⁹ California's parentage act includes two relevant provisions. As in many other jurisdictions, California's applicable law declares that the determination of maternity is governed by the same statutory rules, presumptions, and procedures that apply to the determination of paternity.³⁰ Furthermore, prebirth parentage determinations and orders are specifically authorized by California Family Code § 7633,

27. Contrary to common assumption, surrogacy is a reliable family-building option that rarely leads to legal disputes between surrogates and intended parents over parentage. It is anecdotally reported that, of the estimated 14,000 to 16,000 surrogacies completed through 2002, only 88 have resulted in disputes over parentage. Deborah Morgenstern Katz, *Womb for Rent*, PARENTING MAG., Dec./Jan. 2002, at 86. Remarkably, of those 88 cases, only 23 were reported to be surrogates who wanted to keep the child (often simply to leverage better contract terms), while the remaining 65 were intended parents who were unable or did not want to complete the agreement (because of divorce, death of one of the intended parents, nature or condition of the child, etc.). *Id.*

28. Twelve of the twenty-four jurisdictions that do not have any statutes or case law validating or invalidating surrogacy appear to permit uncontested prebirth parentage proceedings and orders, either expressly or implicitly: ALASKA STAT. §§ 25.20.050 (Michie 2002), .055 (Michie 1997); COLO. REV. STAT. ANN. § 19-4-107 (1994); CONN. GEN. STAT. ANN. § 46b-161 (West 1967); KAN. STAT. ANN. § 38-1115 (2000); ME. REV. STAT. ANN. tit. 19-A, § 1557 (West 1999); MD. CODE ANN., FAM. LAW § 5-1025 (1984); MISS. CODE ANN. § 93-9-19 (1962); N.C. GEN. STAT. § 49-5 (1981); OKLA. STAT. tit. 10, § 70 (2002); 23 PA. CONS. STAT. ANN. § 4343 (West 1997); R.I. GEN. LAWS § 15-8-10 (1979); and S.D. CODIFIED LAWS § 25-8-12 (Michie 1984).

29. CAL. FAM. CODE §§ 7600 – 7730 (West 1975).

30. *Id.* § 7650.

which states that “[a]n action under this chapter may be brought before the birth of the child.”³¹

California has applied these provisions to numerous contested surrogacy cases. In *Johnson v. Calvert*, a surrogate became pregnant using an embryo created with the intended parents’ egg and sperm, so both intended parents were genetically related to the child.³² During the pregnancy, the relationship of the parties deteriorated, and the surrogate threatened to keep the child.³³ The intended parents initiated a prebirth parentage proceeding asking the trial court to declare them to be the child’s legal parents prior to its birth.³⁴ In ultimately deciding the case, the California Supreme Court first determined that the relevant provisions of California’s parentage act did govern the determination of maternity in a surrogacy proceeding even though a surrogacy arrangement was never contemplated in 1975 when California first adopted the 1973 UPA.³⁵ The court then ruled that the surrogate and intended mother each had successfully established a valid presumption of maternity under the act—the surrogate as the child’s birth mother and the intended mother as the child’s genetic mother.³⁶ Finding that neither presumption outweighed the other, the court ruled that the original intent of the parties was the factor that resolved the legal impasse between the competing presumptions in the intended mother’s favor.³⁷

California also has case law precedent confirming the view that a prebirth paternity/maternity order in favor of an intended mother is inappropriate where she is neither the genetic nor the birth mother of the child.³⁸ In *Moschetta*, the California Court of Appeals was faced with litigation among the divorcing intended parents and the surrogate as to who was the child’s legal mother.³⁹ The court again applied the provisions of the California parentage statutes. The court first determined that there were no competing parentage presumptions between the surrogate and the intended mother since the intended mother was neither the birth nor genetic mother of the child. As a result, there was no dispute as to maternity for

31. *Id.* § 7633.

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

33. *Id.* at 778.

34. *Id.*

35. *Id.* at 779.

36. *Id.*

37. *Id.* at 782 (“We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, 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.”).

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

39. *Id.* at 895.

the court to decide in the case.⁴⁰ The court also alluded to the fact that the intended mother would have to adopt the child in order to become its legal parent, and that the surrogacy agreement cannot serve as an adoption agreement since it did not comply with the statutory consent requirements for adoption.⁴¹

Thus, prebirth parentage determinations are clearly permitted under California's statutory scheme, but only for two genetically related intended parents who have valid presumptions of both paternity and maternity under the applicable parentage statutes. Such parents who seek a prebirth determination of parentage in their favor in California with the acquiescence and cooperation of the surrogate would certainly succeed in light of the success of the intended parents in *Johnson v. Calvert*, which was a contested case. This would also presumably be the case in other jurisdictions in which there are no statutory provisions governing surrogacy and prebirth orders are permitted under the governing paternity/maternity statutes.

B. Delaware

In contrast to states like California that expressly permit prebirth parentage determinations, twelve states have no statutes or case law validating or invalidating surrogacy agreements that expressly prohibit prebirth parentage proceedings and determinations.⁴² A representative prohibitory statute in such states is as follows:

If an action under this section is brought before the birth of the child, all proceedings *shall* be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.⁴³

The intent of this statutory language is to prevent the entry of any final orders in parentage proceedings until after the birth of the child by statutorily depriving the court of the power to enter any such orders before that time. Intended parents and their counsel who ignore this prohibition may obtain void orders that any of the parties could subsequently collaterally attack and vacate. The potential detrimental effect of obtaining such a

40. *Id.* at 896.

41. *Id.* at 900.

42. DEL. CODE ANN. tit. 13, § 8-611 (2005); GA. CODE ANN. § 19-7-43(c) (2002); HAW. REV. STAT. § 584-6(d) (1991); IDAHO CODE § 7-1107 (Michie 1986); MINN. STAT. ANN. § 257.57 subd. 5 (West 1995); MO. ANN. STAT. § 210.826(4) (West 1998); MONT. CODE ANN. § 40-6-107(4) (1995); N.M. STAT. ANN. § 40-11-7(B) (Michie 1986); S.C. CODE ANN. § 20-7-952(D) (Law. Co-op. 1984); TENN. CODE ANN. § 36-2-305(3) (2001); VT. STAT. ANN. tit. 15, § 302(b) (1997); WYO. STAT. ANN. § 14-2-811 (Michie 2003).

43. HAW. REV. STAT. § 584-6(d); MINN. STAT. ANN. § 257.57 subd. 5; MO. ANN. STAT. § 210.826(4); MONT. CODE ANN. § 40-6-107(4); N.M. STAT. ANN. § 40-11-7(B) (emphasis added).

void parentage order is amply illustrated by the decision in the California case of *Kristine Renee H. v. Lisa Ann R.*⁴⁴

The court in *Kristine Renee H.* decided the parentage of a child born to a same-sex lesbian couple. The couple in this case mistakenly interpreted *Johnson v. Calvert* and its progeny to stand for the proposition that parentage in assisted reproduction cases could be established based merely on the intent of the parties even if that intent was not supported by any substantive provision of the applicable parentage statutes.⁴⁵ The genetic mother conceived and gave birth to a child through artificial insemination. One month before the child was born, the couple obtained a prebirth parentage order based on their cooperative stipulation that designated them to be the child's "joint intended legal parents."⁴⁶ Nothing in the California parentage statutes established any basis or presumption on which the court could substantively establish the unrelated lesbian partner as the child's parent. Nevertheless, because of the cooperative nature of the proceeding, a parentage judgment was issued to this effect.

Two years after the child's birth, the couple separated, and the child's legal mother sought to vacate the judgment alleging that the family court lacked the statutory authority to issue the order.⁴⁷ The appellate court ratified this argument:

As we will explain, we first conclude that the judgment is void. The family court could not accept the parties' stipulation as a basis for entering the judgment of parentage. A determination of parentage cannot rest simply on the parties' agreement. Rather, because the partner did not adopt the child, the sole basis upon which the family court could determine parentage is under the Act. Therefore, the judgment based on the parties' stipulation was in excess of the family court's jurisdiction and of no legal effect.⁴⁸

Lack of jurisdiction in the "most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." In a broader sense, lack of subject matter jurisdiction also exists when a court "makes orders which are not authorized by statute." "[I]t seems well settled . . . that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction . . ." As we discuss below, we hold that the judgment is void and of no legal effect as it was not authorized under the Act.⁴⁹

44. 16 Cal. Rptr. 3d 123 (Ct. App. 2004), *review granted and opinion superseded by* 18 Cal. Rptr. 3d 668 (2004).

45. *Id.* at 128.

46. *Id.*

47. *Id.* at 129.

48. *Id.* at 126.

49. *Id.* at 131 (citations omitted). After this article went to press, the California Supreme Court reversed the Court of Appeals and ruled that Kristine Renee H. was estopped from challenging the

Applying this same reasoning to prebirth parentage orders, any such judgment entered in a jurisdiction in which such orders are statutorily prohibited until after the birth of the child by applicable stay provisions under the relevant paternity/maternity statutes would be void and of no legal effect. This may be acceptable to the intended parents if the order initially accomplishes their administrative goals surrounding the birth of their child, but it would likely not be acceptable if any litigation subsequently developed among the parties over parentage.

Nevertheless, clients continue to ask for, attorneys continue to seek, and judges continue to grant such prebirth parentage orders in these jurisdictions in spite of the express statutory stay provisions and the potential for subsequent successful collateral attack on orders that are obtained in contravention of them. The potential administrative benefits of prebirth parentage orders are too tempting to resist, and the parties deem the risk of subsequent litigation too remote to deter them from obtaining such orders. For such avant-garde risk-takers, there is hope in the form of precedent from Massachusetts.

C. Massachusetts

Massachusetts was originally one of the states that had no statutory or case law validating or invalidating surrogacy agreements and an express statutory prohibition against final parentage judgments until after the birth of the child.⁵⁰ As such, the risk existed that any prebirth parentage orders issued in Massachusetts would be void. Parents and attorneys on their behalf, however, continued to seek such orders in spite of the risks, and the issue eventually came directly before the Supreme Judicial Court of Massachusetts in *Culliton v. Beth Israel Deaconess Medical Center*.⁵¹ In that case, the intended parents who were both genetically related to twins being gestated by a surrogate sought a prebirth parentage order.⁵² The lower court dismissed the action due to a “lack of clarity and certainty” as to its authority to grant relief.⁵³ The Massachusetts Supreme Court trans-

prebirth order because she invoked the jurisdiction of the court and stipulated to the judgment. *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005). The court explicitly stated, however, that it was not determining whether the prebirth order itself was valid. Therefore, it is still questionable whether, in jurisdictions that explicitly stay proceedings prior to the birth of the child, courts will hold prebirth orders to be invalid due to lack of jurisdiction or apply the California court’s estoppel analysis.

50. MASS. GEN. LAWS ch. 209C § 14 (1998) (“In the case of any complaint brought prior to the birth of the child, no final judgment on the issue of paternity shall be made until after the birth of the child; provided, however, that the court may order temporary support or health care coverage.”).

51. 756 N.E.2d 1133 (Mass. 2001).

52. *Id.* at 1135.

53. *Id.*

ferred the case to itself on its own motion to determine the lower court's authority.⁵⁴ If the Supreme Court ruled that the Massachusetts' paternity/maternity statutes applied, the requested prebirth order would be in contravention of the express stay provision preventing such orders.⁵⁵ Moreover, if the court ruled that the Massachusetts' adoption statutes applied, a pre-birth order would be in contravention of the four-day waiting period required before a birth mother can give up her parental rights to her child.⁵⁶ In permitting the requested prebirth order for the unanimously consenting parties, however, the court in *Culliton* applied reasoning that avoided both of these statutes that otherwise would have governed the case.

First, the court determined that even though the surrogate was not married, the Massachusetts' paternity/maternity laws did not apply to the case.⁵⁷ The court stated that:

[w]hile the twins technically were born out of wedlock, because the gestational carrier was not married when she gave birth to them, it is undisputed that the twins were conceived by a married couple. In these circumstances the children should be presumed to be the children of marriage.⁵⁸

Because the surrogate was unmarried, the court used a presumption of legitimacy in favor of the married intended parents that took the case out of the paternity/maternity statutes. This avoided the problem posed by the stay provisions of those statutes. After noting that a married surrogate would present yet another problem because of the presumption of paternity that her husband would have, the court went on to state that

[i]t is apparent, after examining the paternity statute in detail, that the statute is simply an inadequate and inappropriate device to resolve parentage determinations of children born from this type of gestational surrogacy.⁵⁹

Thus, it appears that the court ruled that the paternity/maternity statutes would be inapplicable whether the surrogate is single or married even though it was only presented with the former factual situation.⁶⁰

Second, the court determined that the Massachusetts' adoption laws did not apply to the case.⁶¹ After observing that application of the adoption

54. *Id.*

55. See MASS. GEN. LAWS ch. 209C § 14.

56. *Id.* ch. 210 § 2 (1998).

57. *Culliton*, 756 N.E.2d at 1137.

58. *Id.*

59. *Id.*

60. This view is supported by the Supreme Judicial Court of Massachusetts' subsequent decision in *Hodas v. Moran*, 814 N.E.2d 320 (Mass. 2004), in which the court approved an uncontested prebirth parentage order in favor of two genetically related intended parents without further analysis of the legitimacy or illegitimacy of a child born to a married gestational carrier. Whether the court revisits the validity of its reasoning in this regard remains to be seen.

61. *Culliton*, 756 N.E.2d at 1137-38.

statutes to this case with the attendant waiting period would result in a potentially detrimental delay in the establishment of legal parentage of the twin children, the court simply stated, “[a]s is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements.”⁶²

With the way thus cleared of the substantive and procedural impediments of the otherwise applicable paternity/maternity and adoption statutes, the court in *Culliton* authorized the issuance of prebirth orders under the limited circumstances of such gestational surrogacies.⁶³ Once again, however, this precedent does not authorize the issuance of prebirth orders where either of the intended parents is not genetically related to the child. Even in Massachusetts, such cases still appear to be governed by the applicable adoption statutes.

In spite of the potential usefulness of the holding in *Culliton* in posturing legal arguments in other states about the availability and/or appropriateness of prebirth parentage orders in light of express stay provisions in the relevant paternity/maternity statutes, the effectiveness of such orders still depends on the adoption of the same legal reasoning by the appellate courts of these other states. Any optimism in this regard that the precedent in Massachusetts may engender is certainly tempered by the contrary reasoning of the appellate courts in New Jersey.

D. New Jersey

New Jersey is also a jurisdiction that has no statutes validating or invalidating surrogacy agreements, and its paternity/maternity statutes also contain language staying all proceedings in paternity/maternity determinations until after the birth of the child.⁶⁴ However, the New Jersey case of *In re Baby M*⁶⁵ established restrictive public policy regarding the enforcement of compensated traditional surrogacy agreements in New Jersey. This restrictive public policy has negatively affected the view and reasoning of New Jersey’s appellate courts regarding prebirth parentage orders.

In re Baby M confronted the Supreme Court of New Jersey with the first contested case involving a compensated traditional surrogate who did not want to surrender her parental rights to the resulting child.⁶⁶ As the

62. *Id.* at 1138.

63. *Id.*

64. N.J. STAT. ANN. § 9:17-45(e) (West 1998).

65. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

66. *Id.* *In re Baby M* was widely publicized because of the novelty of the issues it raised early in the evolution of surrogacy arrangements. It contributed heavily to the public misperception that most surrogates are at high risk of changing their minds and wanting to keep the child. It is noteworthy that the surrogate in that case was psychologically examined and tested and found

California appellate court did in *Moschetta*, the New Jersey Supreme Court determined that the New Jersey paternity/maternity statutes governed the determination of the child's mother and that, where the surrogate was both the genetic and birth mother of the child, she was the child's sole legal mother. As a result, the surrogacy agreement among the parties binding the surrogate to relinquish her parental rights and consent to the intended mother's adoption of the child was deemed unenforceable as contrary to public policy.⁶⁷ In so holding, the court observed that it was "no offense to our present laws where a woman voluntarily and without payment agrees to act as a 'surrogate mother,' provided that she is not subject to a binding agreement to surrender her child."⁶⁸

In re Baby M has resulted in the application of New Jersey's adoption laws to all surrogacy arrangements, including gestational surrogacies. In *A.H.W. v. G.H.B.*, the New Jersey appellate court was presented with a request for a prebirth parentage order in a gestational surrogacy arrangement in which both intended parents were genetically related to the child.⁶⁹ All of the parties, including both genetically related intended parents and the genetic mother's sister who acted as the surrogate in an uncompensated surrogacy arrangement, consented to the issuance of a prebirth order.⁷⁰ In spite of circumstances that could clearly distinguish the case from the traditional surrogacy in *In re Baby M*, the court ruled that no prebirth parentage order could issue because the adoption statutes still applied and precluded a birth mother from voluntarily surrendering her child for adoption within seventy-two hours of the child's birth.⁷¹ The court also noted that New Jersey's birth records regulations required that the birth mother's name be placed on the original birth certificate.⁷²

A.H.W. provides a stark contrast to the reasoning of *Culliton* and a very different result. Without knowing which line of reasoning a particular court will adopt in a jurisdiction that has express stay provisions barring the entry of prebirth parentage orders, the use and reliance upon any such orders remains risky, at best. If intended parents insist on obtaining such orders where they are available only in contravention of the applicable

to be at high risk of having difficulty separating from the child. The intended parents insisted on using the surrogate in spite of this clear warning signal, and, unsurprisingly, the dispute occurred. As a result of the lessons learned through the circumstances and result of *In re Baby M*, surrogacy procedures have been significantly improved to make the process much more reliable today.

67. *Id.* at 1240.

68. *Id.* at 1235.

69. *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

70. *Id.* at 949.

71. N.J. STAT. ANN. § 9:3-41(e) (West 1993).

72. N.J. ADMIN. CODE tit. 8, § 2-1.5(a) (2005).

stay provisions, they should only do so with full disclosure and awareness of the potential ramifications of their decision.

E. New Hampshire, Virginia, Texas, and Utah

A number of states have enacted statutes authorizing and regulating surrogacy agreements. Four of them, New Hampshire, Virginia, Texas, and Utah, have adopted varying statutory schemes that require the parties to submit qualifying surrogacy agreements to the court for judicial preauthorization before the pregnancy is initiated.⁷³

New Hampshire passed comprehensive legislation authorizing and regulating surrogacy agreements in 1990.⁷⁴ The statute provides procedures for judicial preauthorization of surrogacy agreements⁷⁵ and states that any agreement that is not judicially preauthorized is not “lawful.”⁷⁶ Nevertheless, the statute allows a surrogate to keep the child if she executes and delivers a signed statement of her intent to do so to the intended parents within seventy-two hours of the birth of the child.⁷⁷ The statute also expressly prohibits the issuance of the child’s birth certificate within the same seventy-two-hour period.⁷⁸ Although New Hampshire’s paternity/maternity statutes allow for prebirth consent proceedings to determine parentage,⁷⁹ the clear policy of the statute preventing the issuance of birth records in a

73. Many commentators on the law of surrogacy extol the virtues of judicial preauthorization of surrogacy agreements as an enlightened method of making such agreements reliable and predictable for the parties. Notwithstanding the fact that New Hampshire’s law specifically allows a surrogate to change her mind and keep the child after the birth of the child, making it far from reliable or predictable, judicial preauthorization is not necessarily the panacea that some assert it is. N.H. REV. STAT. ANN. § 168-B:25(IV) (1990). After many years of interacting with infertile persons participating in all kinds of fertility procedures, including, but not limited to, third-party reproduction, we are aware that such persons are universally short of two things—time and money. These persons have often gone through years of fertility procedures before resorting to third-party reproduction and are rapidly aging past their preferred parenting windows of opportunity; furthermore, the fertility procedures they have already attempted were expensive, uninsured, and unsuccessful, leaving them with limited assets for the rest of their fertility journey. In these cases, the potential for unregulated delay and the additional legal expense in connection with the court proceedings required for judicial preauthorization of their agreements is clearly undesirable. Based on conversations with practitioners in such jurisdictions, many intended parents and practitioners circumvent the judicial preauthorization procedures for just these reasons whenever possible.

74. *Id.* §§ 168-B:1 to 168-B:32 (1990).

75. *Id.* § 168-B:21 (stating that the parties must petition the court for judicial approval of the surrogacy agreement after the agreement is signed but before the medical procedure(s) to initiate the pregnancy are performed).

76. *Id.* § 168-B:16(I).

77. *Id.* § 168-B:25(IV).

78. *Id.* § 168-B:26.

79. N.H. REV. STAT. ANN. § 168A:5 (1990) (stating that a proceeding can commence during the pregnancy of the mother if the father consents).

surrogacy arrangement until seventy-two hours after the birth makes the issuance of any prebirth parentage orders highly unlikely.

The National Conference of Commissioners on Uniform State Laws approved the Uniform Status of Children of Assisted Conception Act in 1988 (USCACA),⁸⁰ and Virginia adopted the USCACA's surrogacy provisions in 1991.⁸¹ The purpose of the USCACA was to create a system for determining parentage of children conceived through assisted reproduction.⁸² The USCACA had two alternative provisions applicable to surrogacy agreements: one that permits and regulates surrogacy agreements entered into by heterosexual married couples (Alternative A)⁸³ and one that makes all such agreements void and unenforceable (Alternative B).⁸⁴ Virginia adopted Alternative A.⁸⁵ No other states have adopted Alternative A to the USCACA.

Virginia's statutory scheme under the USCACA also provides for judicial preauthorization of surrogacy agreements.⁸⁶ While the statute does not give the surrogate the express right to rescind the agreement and keep the child after the birth, it allows for a postbirth court order placing the intended parents' names on the birth certificate only on the express condition that one of the intended parents is genetically related to the child.⁸⁷ There is a separate postbirth administrative procedure to amend the birth records for surrogacy agreements that the court has not preauthorized,⁸⁸ so agreements that are not preauthorized are not necessarily void or unenforceable. Although there is no clear prohibition against prebirth parentage orders in Virginia's paternity/maternity statutes, all parentage determinations in surrogacy arrangements have specific postbirth alternatives, so prebirth parentage orders are apparently unavailable in Virginia.

The National Conference of Commissioners on Uniform State Laws promulgated a new Uniform Parentage Act (UPA) in 2000.⁸⁹ The purpose of the 2000 UPA was, in part, to create an updated uniform system of determining parentage in keeping with recent medical and technological advances in genetic testing and assisted reproduction.⁹⁰ It also eliminated

80. UNIF. STATUS OF CHILDREN OF ASSISTED REPROD. ACT, 9C U.L.A. 363 (1988).

81. VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1991).

82. UNIF. STATUS OF CHILDREN OF ASSISTED REPROD. ACT prefatory note, 9C U.L.A. 365 (1988).

83. *Id.* §§ 5-9 at 373-82.

84. *Id.* § 5 at 383.

85. VA. CODE ANN. §§ 20-159 to 20-163 (1991).

86. *Id.* § 20-160.

87. *Id.* § 20-160(D).

88. *Id.* § 20-162.

89. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2000) (amended 2002).

90. *See id.* §§ 501-511 at 329-37 (entitled genetic testing); §§ 701-707 at 354-59 (entitled child of assisted reproduction); §§ 801-809 at 360-70 (entitled gestational agreement).

the state-by-state option to regulate or void surrogacy agreements and contained a new section permitting judicial preauthorization of surrogacy agreements for all intended parents, whether married or unmarried, thus superceding the USCACA.⁹¹ Texas adopted the 2000 UPA in 2001⁹² and added the surrogacy provisions by amendment in 2003.⁹³ Utah adopted the 2000 UPA, including the surrogacy provisions in 2005.⁹⁴ No other states have yet to adopt the surrogacy provisions of the UPA.

Judicial preauthorization of surrogacy agreements is required under both the Texas and Utah versions of the UPA.⁹⁵ If the court has not preauthorized an agreement, both statutes render the agreement unenforceable, with parentage of the resulting child to be determined under the other applicable provisions of the UPA relating to establishment of paternity/maternity.⁹⁶ If the court has preauthorized the agreement, the court will issue an order placing the intended parents' names on the child's birth certificate after the birth of the child and once the intended parents have filed a notice with the court within 300 days of the date of the assisted reproductive procedure stating that the child was born and is theirs.⁹⁷ This limits the parties to obtaining postbirth parentage orders in qualifying surrogacy arrangements.⁹⁸ The other provisions of each state's relevant paternity/maternity statutes govern and determine parentage under both unauthorized and nonqualifying agreements.⁹⁹ Neither Texas' nor Utah's paternity/maternity statutes appear to allow prebirth parentage orders,¹⁰⁰ so the preceding analysis that was set forth for states with no governing statute and stay provisions on such orders will dictate the availability and success of attempted consent proceedings to determine parentage pursuant to nonqualifying agreements.

Under all four states' surrogacy statutes, intended parents who preauthorize their surrogacy agreements may place their names on the child's birth certificate only through procedures that occur after the birth of the child.¹⁰¹

91. *Id.* § 801 at 362.

92. TEX. FAM. CODE ANN. ch. 160 (Vernon 2001).

93. *Id.* §§ 160.751 – 160.763 (Vernon 2003).

94. UTAH CODE ANN. ch. 45g (2005).

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

96. TEX. FAM. CODE ANN. § 160.762; UTAH CODE ANN. § 78-45g-809(2).

97. TEX. FAM. CODE ANN. § 160.760; UTAH CODE ANN. § 78-45g-807.

98. Both the Texas and Utah statutes limit judicial preauthorization of surrogacy agreements to those arrangements in which the intended parents are a married couple and the surrogate does not use her egg, among other qualifying factors. TEX. FAM. CODE ANN. § 160.754; UTAH CODE ANN. §§ 78-45g-801(3), 803(j).

99. *See generally* TEX. FAM. CODE ANN. ch. 160 (Vernon 2001); UTAH CODE ANN. ch. 45g (2005).

100. TEX. FAM. CODE ANN. § 160.611 (stating that a proceeding to determine parentage cannot be concluded until after the birth of the child); UTAH CODE ANN. § 78-45g-611 (same).

101. N.H. REV. STAT. ANN. § 168-B:26 (1995); TEX. FAM. CODE ANN. § 160.760 (Vernon 2003); UTAH CODE ANN. § 78-45g-807 (2005); VA. CODE ANN. § 20-160(D) (2000).

New Hampshire and Virginia appear to limit all surrogacy agreements to postbirth procedures, whereas Texas and Utah allow certain agreements to be governed by other provisions of their respective paternity/maternity statutes. Nevertheless, any prebirth parentage orders obtained in Texas or Utah, even with the consent of all parties, would suffer from the jurisdictional infirmities common to all such orders in states with express stay provisions on such orders. As a result, a prebirth parentage determination does not seem to be prudent or advisable in any of these states.

F. Illinois

Illinois passed its unique and revolutionary Gestational Surrogacy Act (Act) that authorizes compensated gestational surrogacy contracts in 2004.¹⁰² Unlike any other comprehensive surrogacy statutes in effect in other jurisdictions, the Illinois statute requires no judicial review, approval, or implementation of a surrogacy agreement.¹⁰³ As long as the intended parents and the surrogate satisfy the eligibility requirements of the Act¹⁰⁴ and enter into a contract that meets the Act's requirements,¹⁰⁵ the intended parents are the legal parents of the child "immediately upon the birth of the child."¹⁰⁶ Furthermore,

a parent-child relationship shall be established *prior to the birth* of a child born through gestational surrogacy if, in addition to satisfying the requirements of Sections 5 and 6 of the Illinois Parentage Act of 1984, the attorneys representing both the gestational surrogate and the intended parent or parents certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements of Section 25 of this Act with respect to the child.¹⁰⁷

Thus, gestational surrogacies that meet all of the Act's requirements easily obtain a prebirth determination of the parentage of the child in the intended parents' favor with no right of the gestational surrogate to change her mind after the pregnancy is initiated. Amazingly, this prebirth determination is obtained without the delay or expense of any court proceedings of any kind.

In addition to the absence of any court proceedings for qualifying surrogacies, the Act expressly implements an "intent of the parties" test for determining the parentage of any child born without full compliance with all of the Acts requirements.¹⁰⁸ Unlike the UPA as adopted in Texas and

102. 750 ILL. COMP. STAT. §§ 47/1 – 47/75 (2004).

103. *Id.* § 47/25.

104. *See id.* § 47/20.

105. *See id.* § 47/25.

106. *Id.* § 47/15(b)(1).

107. *Id.* § 47/35 (emphasis added).

108. *Id.* § 47/25(e).

Utah, which determines the parentage of a child born pursuant to a non-complying surrogacy agreement to the general provisions of the respective state's paternity/maternity law, Illinois imports the intent concept first elucidated in *Johnson v. Calvert*¹⁰⁹ and makes it the deciding factor for establishing legal parentage in surrogacy arrangements of any type.

Although that Act facilitates the issuance of birth records in keeping with the parties' intent only for gestational surrogacy arrangements that comply with the various restrictions on who can enter into a qualifying surrogacy contract,¹¹⁰ it deftly removes the potential delay and additional legal expense engendered by the judicial preauthorization statutes in effect in other jurisdictions to the significant benefit of the intended parents. The Act also truly makes all surrogacy arrangements, even nonqualifying arrangements that the Act does not procedurally govern, more reliable and predictable by expressly determining parentage in those cases in keeping with the proven intent of the parties. This ensures that each party will receive exactly what he or she expected prior to the initiation of the pregnancy after full disclosure and consultation regarding the proposed procedure and contract.

Although the Act ensures that the intent of the parties in surrogacy proceedings in Illinois will be effected, the availability of prebirth parentage orders in cases that do not comply with the requirements of the Act remains suspect. Illinois is a jurisdiction in which all paternity/maternity determinations are expressly stayed by statute until after the birth of the child.¹¹¹ As a result, any such prebirth orders would be subject to possible jurisdictional attack as discussed previously.

G. Florida

Florida also has an authorizing statute for certain types of surrogacy agreements.¹¹² Florida's statute authorizes uncompensated gestational surrogacies for married couples with intended mothers who cannot safely physically gestate a pregnancy.¹¹³ The statute, however, allows only for a postbirth determination of parentage and the subsequent amendment of the child's birth records.¹¹⁴ The postbirth amendment of the birth records requires a court hearing pursuant to a petition filed by the intended parents within three days of the child's birth and two separate court orders,

109. 851 P.2d 776 (Cal. 1993).

110. 750 ILL. COMP. STAT. § 47/20 (2005).

111. *Id.* § 45/7(e) (1984).

112. FLA. STAT. ANN. §§ 742.15–742.16 (West 1993).

113. *Id.* § 742.15.

114. *Id.* § 742.16.

one determining parentage and another directing the Department of Health to issue an amended birth record.¹¹⁵

Florida's paternity/maternity statutes do authorize paternity/maternity proceedings during the pregnancy and before the birth of the child.¹¹⁶ It may be possible to seek a prebirth parentage order under those statutes. However, given the statutory mandate that a binding and enforceable surrogacy agreement must be signed before any gestational surrogacy is started, it seems unlikely that a court would vary the postbirth parentage proceedings that apply to all other gestational surrogacy arrangements to allow a prebirth order simply because both the intended mother and father are the genetic parents of the child.

H. Arizona, the District of Columbia, Indiana, Michigan, and New York

Arizona, the District of Columbia, Indiana, Michigan, and New York each have statutes prohibiting any type of surrogacy arrangement, including gestational surrogacy. Arizona's statute states that any children born to surrogates pursuant to a surrogate parentage contract are the legal children of the surrogate and her husband.¹¹⁷ The law applicable in the District of Columbia states that surrogate parenting contracts are prohibited and unenforceable.¹¹⁸ It goes on to state that any person who "is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract," with or without a fee, can be fined up to \$10,000 and/or imprisoned for up to one year.¹¹⁹ Indiana law states that the enforcement of surrogacy agreements of any kind is against public policy¹²⁰ and all such agreements are void.¹²¹ Michigan's statute echoes that all surrogate parentage contracts are against public policy and void,¹²² and it provides penalties for the parties to compensated surrogacy arrangements and the third parties who may arrange them of \$10,000 and/or one year imprisonment and \$50,000 and/or five years imprisonment, respectively.¹²³ Finally, New York law also declares surrogate parenting contracts to be against public policy and void¹²⁴ and imposes a \$500 fine on a party to such an

115. *Id.*

116. *Id.* § 742.011.

117. ARIZ. REV. STAT. § 25-218 (1989) (held unconstitutional in *Soos v. Superior Ct.*, 897 P.2d 1356 (Ariz. Ct. App. 1994)).

118. D.C. CODE ANN. § 16-402(a) (1981).

119. *Id.* § 16-402(b).

120. IND. CODE § 31-20-1-1 (1997).

121. *Id.* § 31-20-1-2.

122. MICH. COMP. LAWS ANN. § 722.855 (West 1988).

123. *Id.* § 722.859.

124. N.Y. DOM. REL. LAW § 122 (McKinney 1992).

agreement for compensation.¹²⁵ The first-time fine for a third party who arranges a compensated surrogacy is \$10,000, but a third party is guilty of a felony if he or she violates the statute a second time.¹²⁶

Although these jurisdictions are unfavorable to surrogacy arrangements in general, each of them has a statute that allows prebirth parentage determinations in paternity/maternity proceedings with the consent of all concerned parties.¹²⁷ Nevertheless, in light of these jurisdictions' blanket adverse policy declarations and severe civil and criminal penalties, one would think that it would be impossible to obtain any ratifying parentage order in a surrogacy proceeding in any of these hostile jurisdictions. However, this may not be the case.

A case decided in New York in a surrogacy proceeding is illustrative of the unpredictable ebb and flow of the determination of parentage in such arrangements in the eyes of various courts in the same jurisdiction.¹²⁸ The case involved a gestational surrogacy in which both the intended father and the intended mother were genetically related to the resulting child.¹²⁹ The case was brought first before the family court for an uncontested determination and order that the genetically related intended parents were also the children's legal parents.¹³⁰ After the family court refused to enter the requested order, the intended parents appealed the ruling to the New York Supreme Court.¹³¹ Surprisingly (or, perhaps, unsurprisingly), the parties achieved opposite results in the two proceedings, illustrating some of the issues discussed earlier in this article.

The family court in *Andres A. v. Judith N.* was asked to enter an order declaring the genetically related intended mother in a surrogacy arrangement to be her child's legal mother.¹³² Unfortunately, the court was faced with Article 5 of the New York Family Court Act which, as the court specifically noted, "makes no provision for declarations of maternity."¹³³ In accord with our preceding discussion of the jurisdictional issues that arise when a court exceeds its statutory authority and the likely nullity of any resulting orders that are entered, the court refused to enter an order determining the maternity of the intended mother, stating:

Although the court is not unsympathetic to the plight of the petitioner, Luz A., the court cannot legislate judicially what is not contained within the statute.

125. *Id.* § 123(2)(a).

126. *Id.* § 123(2)(b).

127. See ARIZ. REV. STAT. § 25-804; D.C. CODE ANN. § 16-2342; IND. CODE § 31-14-4-1; MICH. COMP. LAWS ANN. § 722.715; N.Y. DOM. REL. LAW § 517 (McKinney 1985).

128. See generally *Andres A. v. Judith N.*, 591 N.Y.S.2d 946 (N.Y. Fam. Ct. 1992).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Andres A. v. Judith N.*, 591 N.Y.S.2d 946.

133. *Id.* at 949.

Accordingly, for the aforementioned reasons petitioner, Luz A.'s petitions for a declaration of maternity . . . are dismissed for lack of subject matter jurisdiction. The court notes that petitioner Luz A. is not without a remedy since she may seek to adopt the two children.¹³⁴

Two years later, New York Supreme Court was faced with the same case on appeal in *Arredondo v. Nodelman*.¹³⁵ The petitioning intended parents were still seeking an order declaring that the genetically related intended mother was the children's legal mother. With no analysis of its jurisdictional authority or limitations, the court simply held:

The City does not oppose the petition insofar as it seeks to change the name of the mother listed on the children's birth records to Luz Arredondo. No papers have been received from any other party. This Court concludes that Luz Arredondo is the mother of the petitioner children. From the affidavits submitted there is no dispute that the children borne by respondent Nodelman resulted from the eggs of Luz Arredondo which were fertilized by the sperm of her husband Andres Arredondo, and not from the eggs of Nodelman or the sperm of her husband. Indeed, the results of the genetic testing reveal that Nodelman could not be the mother of the children, and that it is highly probable that the Arredondos are the genetic parents of the children. Accordingly, the petition is granted. This Court declares that Luz Arredondo is the mother of the petitioner children and the respondent City is directed to issue new birth records for the children reflecting that fact.¹³⁶

Arredondo clearly illustrates the unpredictability of the analysis of any particular surrogacy case in any particular court, including different courts in the same jurisdiction with the same governing statutes and legal precedent. The family court carefully analyzed the statutory authority granting and governing its power to issue the requested relief and determined, rightly so, in all probability, that it lacked the jurisdiction to issue the order. Simply put, the family court focused on the law.

When the Superior Court analyzed the same case, it focused not on the law, but on the equity. It focused on the fact that the parties were all in agreement and no one, not even the City, was contesting the issuance of the requested order. Facing the practicality, not the legality, of those circumstances, the court did what was situationally efficient, but not necessarily legally appropriate.

Although there is no published case law exhibiting the issuance of any prebirth parentage orders in any of these prohibitory jurisdictions, given the permissiveness of the paternity/maternity statutes regarding prebirth parentage determinations in each of the jurisdictions and the frequent will-

134. *Id.* at 950.

135. *Arredondo v. Nodelman*, 622 N.Y.S.2d 181 (Sup. Ct. 1994).

136. *Id.* at 182.

ingness of courts in uncontested parentage proceedings resulting from surrogacy arrangements to give the parties what they ask for as long as everyone is in agreement, it would not be the least bit surprising if there were attorneys in each of these jurisdictions who were successfully obtaining such prebirth orders from sympathetic judges in uncontested proceedings. Nevertheless, the law in these jurisdictions clearly seems unresponsive of such orders, but not as unresponsive as the law in those jurisdictions where there are express statutory stay provisions prohibiting the prebirth entry of such orders.

V. Conclusion

Intended parents in surrogacy proceedings will always yearn for certainty regarding the outcome of the agreements into which they enter with their selected surrogates. They will also continue their efforts to make the experience at the hospital upon the birth of their child as reassuring and comfortable as possible with a minimum of potential conflict and administrative red tape. Prebirth parentage orders, which give the intended parents the certainty and control they are seeking, will increasingly sing their sirens' song, compelling many intended parents to seek such orders whether they are legitimately available in the relevant jurisdiction or not.

Fortunately, the highly prized prebirth parentage order is reasonably achievable in many surrogacies in many different jurisdictions: (1) if both intended parents are the progenitors of the child, supplying both the egg and sperm that created the embryo that was implanted into the surrogate's womb for gestation, so that a paternity/maternity proceeding is the legally appropriate mechanism to determine and establish parentage rather than an adoption proceeding; (2) if the jurisdiction's paternity statutes also allow its family courts to consider and determine maternity; (3) if there is no stay provision prohibiting the issuance of prebirth orders in appropriate paternity/maternity proceedings; (4) if there is no express statutory procedure prohibiting the prebirth procedure or mandating an alternate postbirth order in surrogacy matters; and (5) if the proceeding is uncontested and all parties are unanimously requesting the same relief, a prebirth order is available, appropriate, and effective.

As the factors set forth in the preceding paragraph ebb away in various cases and/or jurisdictions, the availability and reliability of prebirth parentage orders becomes more and more suspect. After all, if no one ever complains about or disputes an invalid order after it is entered, it still seems pretty effective for its intended administrative purposes. However, in that one rare case in which a dispute between the parties to a surrogacy arrangement does unexpectedly arise after the parentage order is entered,

it would be nice to have an order that the court actually had jurisdiction to enter and that is not subject to collateral attack.

The trump card in these proceedings will continue to be the unanimous and cooperative agreement of all parties. Some judges will continue to be lulled into a sense of security by the solidarity of the parties appearing before them in these cases. Intended parents will continue to militate for prebirth orders for their certainty and convenience. Attorneys will continue to seek appropriate ways to obtain the relief for which their clients are asking in surrogacy matters that were often never contemplated when the applicable statutes were enacted. Although it is always appropriate to advocate and build on existing precedent to create new legal solutions for cases that have not previously existed, as we venture out into this relatively uncharted legal landscape, attorneys must continue to evaluate and understand the potential ramifications of experimental legal designs and thoroughly disclose them to and discuss them with their clients.

Appendix

STATE	Law Affecting Surrogacy	Prebirth Order Proceedings
Alabama	§§ 26-10A-33, 26-10A-34	Stayed – § 26-17-6(d)
Alaska		Not Stayed – §§ 25.20.050, 25.20.055
Arizona	§ 25-218	Not Stayed – § 25-804
Arkansas	§ 9-10-201	Not Stayed – § 9-10-103
California	Family Code § 7648.9 <i>Johnson v. Calvert</i> , 851 P.2d 776 (1993); <i>In re Marriage of Moschetta</i> , 30 Cal. Rptr. 2d 893 (Ct. App. 1994); <i>In re Marriage of Buzzanca</i> , 72 Cal. Rptr. 2d 280 (Ct. App. 1998); <i>Kristine H. v. Lisa R.</i> , 117 P.3d 690 (2005)	Not Stayed – Family Code § 7633
Colorado		Not Stayed – § 19-4-107
Connecticut	<i>Doe v. Doe</i> , 710 A.2d 1297 (Conn. 1998)	Not Stayed – § 46b-161
Delaware	Tit. 13, § 8-103	Stayed – tit.13, § 8-611
District of Columbia	§ 16-402(a)	Not Stayed – § 16-2342
Florida	§§ 742.11 – 742.16	Not Stayed – § 742.011
Georgia		Stayed – § 19-7-43(c)
Hawaii		Stayed – § 584-6(d)
Idaho		Stayed – § 7-1107
Illinois	Ch 750, §§ 47/1 – 47/75	Stayed – ch. 750, § 457(e)
Indiana	§ 31-20-1-1	Not Stayed – § 31-14-4-1
Iowa	§ 710.11	Not Stayed – § 600B.9
Kansas		Not Stayed – § 38-1115
Kentucky	§ 199.590 (repealed)	Not Stayed – § 406.071
Louisiana	§ 9:2713	Not Stayed – By implication
Maine		Not Stayed – tit. 19-A, § 1557
Maryland	§ 5-327	Not Stayed – § 5-1025
Massachusetts	<i>R.R. v. M.H.</i> , 689 N.E.2d 790 (Mass. 1998); <i>Smith v. Brown</i> , 718 N.E.2d 844 (Mass. 1999); <i>Culliton v. Beth Israel Deaconess Medical Center</i> , 756 N.E.2d 1133 (Mass. 2001); <i>Hodas v. Moran</i> , 814 N.E.2d 320 (Mass. 2004)	Stayed – ch. 209C, § 14
Michigan	§ 722.855	Not Stayed – § 722.715
Minnesota		Stayed – § 257.57 subd. 5
Mississippi		Not Stayed – § 93-9-19
Missouri		Stayed – § 210.826(4)
Montana		Stayed – § 40-6-107(4)
Nebraska	§ 25-21,200	Not Stayed – § 43-1411
Nevada	§§ 126.045, 126.053	Stayed – § 126.071
New Hampshire	§§ 168-B:1 to 168-B:32	Not Stayed – § 168-A:5
New Jersey	<i>In re Baby M</i> , 537 A.2d 1227 (N.J. 1988); <i>A.H.W. v. G.H.B.</i> , 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000)	Stayed – § 9:17-45(e)
New Mexico		Stayed – § 40-11-7(B)
New York	Family Code § 122 <i>Andres A. v. Judith N.</i> , 591 N.Y.S.2d 946 (N.Y. Fam. Ct. 1992); <i>Arredondo v. Nodelman</i> , 622 N.Y.S.2d 181 (N.Y. Sup. Ct. 1994)	Not Stayed – Family Code § 517
North Carolina		Not Stayed – § 49-5
North Dakota	§§ 14-18-01, 14-18-05 * Amendment Pending	Stayed – § 14-17-05 (repealed)
Ohio	<i>Seymour v. Stotski</i> , 611 N.E.2d 454 (Ohio Ct. App. 1992); <i>Belsito v. Clark</i> , 644 N.E.2d 760 (Ohio Ct. C.P. 1994)	Not Stayed – § 3111.04
Oklahoma		Not Stayed – tit. 10, § 70
Oregon	§ 163.537	Not Stayed – § 109.125
Pennsylvania		Not Stayed – ch. 23, § 4343
Rhode Island		Not Stayed – § 15-8-10
South Carolina		Stayed – § 20-7-952(D)
South Dakota		Not Stayed – § 25-8-12
Tennessee	§ 36-1-102 (48)(A)	Stayed – § 36-2-305(3)

STATE	Law Affecting Surrogacy	Prebirth Order Proceedings
Texas	§§ 160.751 – 160.763	Stayed – § 160.611
Utah	§§ 78-45g-801 to 45g-809	Stayed – § 78-45g-611
Vermont		Stayed – tit. 15, § 302(b)
Virginia	§§ 20-156 to 20-165	Stayed – By implication
Washington	§§ 26.26.210 – 26.26.260	Stayed – § 26.26.550
West Virginia	§ 48-22-803(e)(3)	Stayed – § 48-24-101
Wisconsin	§ 69.14(1)(h)	Stayed – § 767.45
Wyoming		Stayed – § 14-2-811