"Mama's Baby, Daddy's Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact"

Darra L. Hofman

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“MAMA'S BABY, DADDY'S MAYBE:” A STATE-BY-STATE SURVEY OF SURROGACY LAWS AND THEIR DISPARATE GENDER IMPACT

Darra L. Hofman†

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I. INTRODUCTION

While biotechnology has been advancing apace in numerous areas, few of its advances spur as much controversy and passion as those concerning human reproduction. Modern reproductive technology can allow a complete split between various parental roles that once were necessarily bound in most circumstances. A child created through assisted reproductive technology (ART) might have a genetic mother, a genetic father, any number of social/intended parents, and a gestational mother. Society is now faced with the question of who the child’s parents are; mere biology can no longer answer that question. By allowing a person to become a parent regardless of his or her reproductive capacity, ART, in particular surrogacy arrangements, forces us to confront deeply held beliefs about what makes a “mother” or a “father,” and indeed, what makes a “woman” or a “man,” and perhaps most fundamentally, what makes a “family.” A survey of the vast diversity of laws governing surrogacy, which range from laws banning any surrogacy arrangement as “baby-selling” to those which take an almost pure contract approach, reveals that the legal terrain surrounding these agreements is as varied as the beliefs surrounding gender, sex, and reproduction. Surrogacy, more than any other ART technique, incites such heated feeling and such diverse legal responses because it calls into question our fundamental cultural assumptions about kinship, about who is a parent, and moreover, about who is a mother.

II. BACKGROUND

Traditionally, “families” have been defined to a large extent by biology. Genetic connection has been the major foundation of most families, and roles within families were as much a product of age and sex as of individual characteristics and aptitudes. The only options for a person to become a “mother” or a “father” were through sexual intercourse or adoption, and until quite recently in the Western world, social and often legal strictures limited both of those choices to married heterosexuals. The advent of the various ART techniques, and the seemingly sudden ability of non-traditional individuals and couples to become parents outside the

1. See, e.g., Fla. Stat. Ann. § 63.042 (West 2005). The current Florida law disallows homosexuals to adopt, although heterosexual single people are currently allowed to adopt. See id. § 63.042(2)(b), .042(3).
purview of legal regulation, has blown up a powder keg of questions about gender and family roles as well as when and whether ART is permissible.

Surrogacy arrangements, also known as gestational carrier arrangements, are perhaps the best example of the power of ART to alter radically and indeed fundamentally who may be considered a “family.” Surrogacy has numerous permutations; simply knowing a child was produced through surrogacy reveals nothing about its genetic ties to either the intended parents or the surrogate. Surrogacy’s permutations can include situations where:

- A surrogate serves solely as the gestational mother to a child who is the genetic offspring of both intended parents (often called “gestational surrogacy”);
- A surrogate serves solely as the gestational mother to a child who is the genetic offspring of one intended parent with a donor gamete;
- A surrogate serves solely as the gestational mother to a child who is the genetic offspring of neither intended parent, but rather was conceived with donor gametes;
- A surrogate serves as both the genetic and the gestational mother to a child who is the genetic offspring of the intended father (often called “traditional surrogacy”); or
- A surrogate serves as both the genetic and the gestational mother to a child conceived with donor gametes (although, this is rarely done, as the surrogate and her husband, if any, would be the only people with any legal claim to the child in a number of jurisdictions).

With so many different levels of genetic relationships possible between the intended parent(s) and the child, surrogacy allows a level of role-severing between the biological and the social that few other ART techniques parallel. This is in no small part because the common element in all surrogacy arrangements is that the element of pregnancy and giving birth is moved from the intended mother, if there is one, to the gestational mother.

While the role of “father” has never been exclusively based on biological kinship, inclusion in the category not just of “mother,“

2. See J.N.R. v. O’Reilly, 264 S.W.3d 587 (Ky. 2008). In O’Reilly, the Kentucky Supreme Court held that the biological father of a child born to another man’s wife during the marriage has no standing to seek parental rights to the child, who
but indeed in the category of “woman,” is and has been deeply tied to reproductive capacity, specifically pregnancy and birth. Beyond the ken of adoption, childlessness by choice, and other ART techniques, surrogacy arouses cultural and legislative ire because it challenges the fundamental categories of “woman” and of “mother” as something not tied to pregnancy.

Surrogacy arrangements have drawn public praise and furor ever since Kim Cotton gave birth to a baby girl in 1985 and was investigated by Scotland Yard for receiving payment for being a surrogate. Surrogacy arrangements riveted the United States, and in 1986 brought to the forefront the murky legal waters surrounding ART, with the Baby M case. In the twenty years since Baby M, there has been little resolution of the controversy surrounding surrogacy and similarly little resolution of the legal status of such arrangements.

Those who object to surrogacy give a litany of reasons: that it commodifies both women and life, that “women’s biologically based experience of pregnancy” is such that contracts cannot be fairly enforceable, that there is no way to know that a surrogate has truly and freely consented to the arrangement, that it reinforces class and racial strata (because poor and minority women are believed more likely to be induced by payment of a surrogacy fee), and, of course, that it is not natural. While some feminists and other scholars base their objections to surrogacy on concerns about human dignity, most of the controversy surrounding surrogacy stems from our “cultural ambivalence about families not based on genetic ties.”

5. See generally MARDY S. IRELAND, RECONCEIVING WOMEN: SEPARATING MOTHERHOOD FROM FEMALE IDENTITY (1993).
8. Id. at 107.
10. Jean Benward, Lecture at American Society for Reproductive Medicine
The court in *Baby M* highlighted the questions of “motherhood” and “parenthood” that haunt surrogacy arrangements today, stating: “[t]he intent of the contract is that the child’s natural mother will thereafter be forever separated from her child. . . . The contract providing for this is called a ‘surrogacy contract,’ the natural mother inappropriately called the ‘surrogate mother.’”

Thus, for the New Jersey Supreme Court, and for some courts and legislatures since, one’s status as a “natural” (which, in this instance, is taken to mean “biological”) parent has been accorded great credence.

It is this question of “naturalness” that frames most of the debate about surrogacy, and where various legislatures and courts fall regarding this question that has led to such inconsistent law around the topic. The naturalness question is also inevitably fraught with questions of sex and gender due to the fact that there is no male analog to surrogacy, because there is no male analog to pregnancy. In evaluating surrogacy, there has been a largely unspoken bias in favor of gestation as the defining element of “natural mother” at play in many courts and legislatures. While it is true that “natural mother” is by no means synonymous with “birth mother,” in a vast majority of states, the legal status of a woman who cannot carry a pregnancy is uncertain at best, even if the child is genetically hers.

Nonetheless, surrogacy has persisted and even thrived, in no small part because it often offers the best option for those faced with female infertility who either want a child that is biologically related to one parent or potentially both parents or for those who are unwilling or unable to go through the rigors of the adoption process.

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12. *Johnson v. Calvert*, 5 Cal. 4th 84, 93 (1993). The woman 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.” *Id.*
III. THE LAW AS IT IS: A STATE-BY-STATE SURVEY

The vast majority of states are silent or near silent on the issues of whether, when, and how surrogacy agreements are enforceable, void, or voidable. Of those states that do have laws on the books regarding such agreements, the responses range from relying heavily on the Uniform Parentage Act or party intent to outright bans or even criminalization of surrogacy. In many of the states that are “silent” on surrogacy, bills have been shot back-and-forth through the legislature but come to naught.

The following tables present the status of surrogacy in the states and the District of Columbia. In the tables, the acronyms used include: GLBT (Gay, Lesbian, Bisexual, Transgendered); IP (Intended Parent); G (Gestational Surrogacy); T (Traditional Surrogacy); U (Uncompensated); and C (Compensated):

<table>
<thead>
<tr>
<th>Surrogacy Contracts are...</th>
<th>Criminalized</th>
<th>Uncertain</th>
<th>Probably Unenforceable</th>
<th>Uncertain</th>
<th>Uncertain</th>
<th>Enforceable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama 14</td>
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<td>x</td>
<td>14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska 15</td>
<td></td>
<td></td>
<td>x</td>
<td>15</td>
<td></td>
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</tr>
</tbody>
</table>


15. See In re T.N.F., 781 P.2d 973 (Alaska 1989). In re T.N.F. is the only Alaska case to touch on surrogacy, but this case does not address the merits. Id. at 981–82. The Alaska Supreme Court decided the Petitioner’s petition for certiorari on procedural grounds. Id.
A RIZ. REV. STAT. ANN. § 25-218 (2007); See Soos v. Superior Court ex rel. County of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994). Section 25-218 states that “[n]o person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract” and makes explicit that it includes both gestational and traditional surrogacy in its purview. A RIZ. REV. STAT. ANN. § 25-218 (2007). In Soos, however, the Court of Appeals overruled this statute as being in violation of the Equal Protection Clause. Soos, 897 P.2d at 1359-61. No higher court has heard this matter, so presumably, the statute still stands in all Arizona counties outside the jurisdiction of the Court of Appeals of Arizona, Division One.

ARK. CODE ANN. § 9-10-201 (2008); See In re Samant, 970 S.W.2d 249 (Ark. 1998); See also In re Adoption of K.F.H., 844 S.W.2d 343 (Ark. 1993). Section 9-10-201 provides that a child conceived pursuant to a surrogacy arrangement shall be the child of: “(1) The biological father and the woman intended to be the mother if the biological father is married; (2) The biological father only if unmarried; or (3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor’s sperm was utilized for artificial insemination.” ARK. CODE ANN. § 9-10-201.


California’s case law concerning surrogacy is almost legend, it is so well-known. Although the state has yet to enact statutory language explicitly authorizing and regulating surrogacy, its case law addresses the issue extensively, with large reliance on the Uniform Parentage Act and emphasis on the intent of the parties. See CAL. FAM. CODE § 7540 (West 2004); Johnson v. Calvert, 851 P.2d 776, 778–83 (Cal. 1993); Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 283–90, 292–94 (Ct. App. 1998); In Re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 895–901, 903 (Ct. App. 1994).

<table>
<thead>
<tr>
<th>State</th>
<th>Surrogacy</th>
<th>GLBT Foster Parent Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>x</td>
<td></td>
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<tr>
<td>Arkansas</td>
<td></td>
<td>x</td>
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<tr>
<td>California</td>
<td></td>
<td>x</td>
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<tr>
<td>Colorado</td>
<td></td>
<td>x</td>
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<tr>
<td>Location</td>
<td>Status</td>
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<tr>
<td>Connecticut</td>
<td>x</td>
<td></td>
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<tr>
<td>Delaware</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>x (If IPs married)</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>x (T)</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>x</td>
<td></td>
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<tr>
<td>Iowa</td>
<td>x</td>
<td></td>
</tr>
</tbody>
</table>

20. See Doe v. Roe, 717 A.2d 706 (Conn. 1998); Doe v. Doe, 710 A.2d 1297 (Conn. 1998); Vogel v. Kirkbride, No. FA 02-0471850, 2002 WL 34119315 (Conn. Super. Ct. Dec. 18, 2002). Although no Connecticut court has explicitly stated that surrogacy contracts themselves are valid, in Vogel, the court held, in regards to a gestational surrogacy arranged by a gay couple that “[t]he egg donor agreement and the gestational carrier agreement [were] valid, enforceable, irrevocable and of full legal effect.” Vogel, 2002 WL 34119315, at *1. The court ordered both intended fathers’ names placed on the child’s birth certificate. Vogel, 2002 WL 34119315, at *1.


22. D.C. CODE ANN. §§ 16-401 to -402 (LexisNexis 2001). Both traditional and gestational surrogacy arrangements are void and unenforceable, and punishable by a fine of up to $10,000, a year in jail, or both. Id.

23. FLA. STAT. ANN. § 742.16 (West 2005). The terms of surrogacy agreement permissible under the Florida statute are discussed infra notes 62–65.

24. DeBernardi v. Steve B.D., 723 P.2d 829 (Idaho 1986). Under Idaho’s best-interest custody standard, a surrogate mother who relinquishes a child to the intended parents through adoption procedures can be obligated to abide by that relinquishment if it were not made under fraud or duress. Id.

25. 750 ILL. COMP. STAT. ANN. 47/1 to 47/75 (West Supp. 2008). The Illinois statutes set forth the (admittedly narrow) circumstances in which surrogacy arrangements will be approved in Illinois. Id.

26. IND. CODE. ANN. § 31-20-1-1 (2008) (“[T]he general assembly declares that it is against public policy to enforce any term of a surrogacy agreement that requires a surrogate to . . . [w]aive parental rights or duties to a child.”).
<table>
<thead>
<tr>
<th>State</th>
<th>Surrogacy Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas</td>
<td>x</td>
</tr>
<tr>
<td>Kentucky</td>
<td>x</td>
</tr>
<tr>
<td>Louisiana</td>
<td>x (T)</td>
</tr>
<tr>
<td>Maine</td>
<td>x</td>
</tr>
<tr>
<td>Maryland</td>
<td>x (C)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>x</td>
</tr>
<tr>
<td>Michigan</td>
<td>x</td>
</tr>
<tr>
<td>Minnesota</td>
<td>x</td>
</tr>
<tr>
<td>Mississippi</td>
<td>x</td>
</tr>
<tr>
<td>Missouri</td>
<td>x</td>
</tr>
<tr>
<td>Montana</td>
<td>x</td>
</tr>
<tr>
<td>Nebraska</td>
<td>x (G)</td>
</tr>
</tbody>
</table>


29. LA. REV. STAT. ANN. § 9:2713 (2005) ("[A] contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.").


31. Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (illustrating that Massachusetts case law indicates that uncompensated surrogacy arrangements will be upheld; however, the surrogacy has four days after the birth of the child to change her mind).


Nevada\textsuperscript{35} x (If IPs married)

New Hampshire\textsuperscript{36} x

New Jersey\textsuperscript{37} x (T) x (U G)

New Mexico\textsuperscript{38} x (C ) x (U)

New York\textsuperscript{39} x

North Carolina\textsuperscript{40} x (U)

North Dakota\textsuperscript{41} x (T) x (G)

Ohio\textsuperscript{42} x

Oklahoma\textsuperscript{43} x (C) x (U)

39. N.Y. Dom. Rel. Law § 123(1) (McKinney 1999) (“[N]o person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration . . . .”).
41. N.D. Cent. Code § 14-18-05 (Supp. 2007). In regards to surrogacy agreements:
   Any agreement in which a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate’s husband, if a party to the agreement, is the father of the child.
   Id.
### Oregon 44

Oregon *(x (C)) x (U)*

### Pennsylvania 45

Pennsylvania *(x)* *(x (U))*

### Rhode Island 46

Rhode Island *(x (T)) x (G)*

### South Carolina 47

South Carolina *(x (If IPs married))*

### South Dakota

South Dakota *(x)* *(x (If IPs married))*

### Tennessee 48

Tennessee *(x (If IPs married))*

### Texas 49

Texas *(x (If IPs married))*

### Utah 50

Utah *(x (If IPs married))*

### Vermont 51

Vermont *(x (Including GLBT IPs))*

### Virginia 52

With the notable exception of California, three issues most sharply divide legislatures and courts regarding whether the rights of intended parents under a surrogacy arrangement will be recognized: whether the surrogacy is traditional or gestational, whether the surrogate is compensated beyond expenses, and the marital status and sexual orientation of the intended parents. Of states that limit surrogacy arrangements to those situations where intended parents are married, a number limit marriage to heterosexuals. While most of the states that place such limits on surrogacy claim they act in the best interest of the child or for moral reasons, the strong undercurrent of traditional notions of biological kinship and gender primacy in determining what constitutes a “family” is apparent.

In states where surrogacy is banned or legally uncertain, paternity or parentage laws generally place parental rights in the surrogate; the intended father, the surrogate’s husband, both, or neither share parental rights, depending on the jurisdiction and the child’s genetic provenance. Intended mothers are the losers.

According to the table, the following states explicitly allow surrogacy: Arkansas, California, Florida, Illinois, Nevada, New Hampshire, New Jersey, North Dakota, Tennessee, Texas, Utah, Virginia, and Washington. In those jurisdictions, the procedures to make the intended parents the legal parents range from straightforward to arcane. In such jurisdictions, the rights of the

<table>
<thead>
<tr>
<th>State</th>
<th>If IPs married</th>
<th>Washington</th>
<th>West Virginia</th>
<th>Wisconsin</th>
<th>Wyoming</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
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<td>x (C)</td>
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<td>California</td>
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<td>Washington</td>
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</table>


54. *W.*VA. *CODE.* § 48-22-803(e)(3) (2004). Although the statute does not explicitly permit surrogacy agreements, it states that fees and expenses associated with surrogacy are not prohibited. *Id.*

55. *W.*IS. *STAT.* § 69.14(1)(h) (Supp. 2008).
intended mother tend to be firmest. In states with no explicit acknowledgement of surrogacy or with an absence of procedures for establishing the intended parents as the legal parents, both intended parents, but particularly the intended mother, risk losing rights to the child. Intended fathers often have the right to pursue parental rights through a paternity action, assuming they are the genetic father of the child; intended mothers often have no legal recourse in those jurisdictions without procedures for acknowledging surrogacy arrangements. Even in those states that are permissive of such arrangements, the procedure by which intended parents become legal parents remains largely within the purview of the judiciary.

A. Arkansas

The applicable Arkansas statute states: “[F]or birth registration purposes, in cases of surrogate mothers the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.” 56

Arkansas does not require any process, including adoption, nor does it provide an opportunity for the surrogate to change her mind. 57 Instead, the intended parents are made the legal parents of the child by operation of law. 58

B. California

Because California’s procedure relies on case law, it is quite flexible and has enabled California practitioners to obtain successfully parental rights for single men, single women, heterosexual couples and GLBT couples. 59 Listing the intended parent(s) on a child’s birth certificate requires a Superior Court judgment that acknowledges a surrogacy agreement and the individuals seeking to be listed on the birth certificate are indeed the intended parents of the child. 60 Upon such a judgment, the California Office of Vital Statistics will allow only the intended

57. See id. § 9-10-201.
58. See id. § 9-10-201(b)–(c)(1).
60. Id.
parents’ names on the birth certificate.61

C. Florida

Florida’s processes for making the intended parents the legal parents of the child are explicitly stated at FLA. STAT. section 742.16: The intended parents must petition the court within three days of the child’s birth for an “expedited affirmation of parental status,” at which point the court shall schedule a hearing on the matter.62 The intended parents must give notice to: the gestational surrogate, the treating physician of the assisted reproductive technology program, and any party claiming paternity in accordance with the Florida rules of civil procedure.63 The intended parents and their legal representative shall appear at the hearing; upon a finding that the intended parents and the surrogate entered into a valid, enforceable surrogacy contract, pursuant to FLA. STAT. section 742.15, and that at least one of the intended parents is the child’s genetic parent, the court shall enter an order finding the intended parents to be the legal parent of the child.64

Within thirty days after entry of the order, the clerk of the court shall prepare a certified statement of the order for the state registrar of vital statistics on a form provided by the registrar. The court shall thereupon enter an order requiring the Department of Health to issue a new birth certificate naming the commissioning couple as parents and requiring the department to seal the original birth certificate.65

D. Illinois

The applicable Illinois statute sets forth the very narrow circumstances in which surrogacy arrangements will be enforced in that state. Under the statute, the child is the legitimate child of the intended mother and father immediately upon birth,66 with sole custody vesting in the intended parents at that time.67 The requirements for a legitimate surrogacy arrangement under the

61. Id.
63. Id. § 742.16(2), (4).
64. Id. § 742.16(6).
65. Id. § 742.16(8).
67. Id. 47/15(b)(5).
statute, including medical and mental evaluations and proof of medical necessity for a surrogacy, however, are quite onerous. 68

E. Nevada

The Nevada statute states that two people whose marriage is valid under Nevada law (i.e., a married heterosexual couple) may enter into a surrogacy agreement. 69 Under the statute, a “person identified as an intended parent in [an enforceable surrogacy contract] must be treated in law as a natural parent under all circumstances.” 70

F. New Hampshire

To be enforceable, a surrogacy agreement in New Hampshire must be preauthorized by the probate court in the county in which the parties reside before any surrogacy procedures begin; either the surrogate or the intended parents must have been New Hampshire residents for six months prior to the filing of the petition. 71 The court shall hold a hearing within ninety days of the filing of the petition, at which Petitioners must be present. 72 Should the court find everything to be in conformity to the statutory requirements, the court shall enter a judicial order validating the surrogacy arrangement; such order automatically terminates the parental rights of the surrogate and her husband, with said rights to vest in the intended parents upon birth of the child. 73 It must be noted, however, that the New Hampshire law preserves the right of the surrogate to keep the child if, at any point before seventy-two hours after the child's birth, she notifies the intended parents of her intent to do so in writing. 74

G. New Jersey

Although New Jersey is perhaps most famous for banning surrogacy as baby-selling in the Baby M case, it has actually developed a common law whereby gestational surrogacy is

68. Id. 47/20, 47/25.
70. Id. § 126.045(2).
72. Id. §§ 168-B:22–23.
73. Id. § 168-B:25.
74. Id. §168-B:25.
enforceable, as long as it is uncompensated.\textsuperscript{75} The procedure forbids having the surrogate enter into any binding agreement before the child’s birth, and she indeed has seventy-two hours after the child’s birth to decide to keep the child.\textsuperscript{76} Assuming the surrogate relinquishes the child, the intended parents have two days to be placed on the child’s birth certificate.\textsuperscript{77}

\textbf{H. North Dakota}

The North Dakota Code provides “[a] child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier’s husband, if any.”\textsuperscript{78} The intended parents become the legal parents once the embryo is implanted.\textsuperscript{79}

\textbf{I. Texas}

Texas law authorizes a gestational agreement if the parties seek authorization of said agreement from the courts.\textsuperscript{80} Once the court has validated such an agreement, the intended parents are to file notice of the child’s birth within 300 days of the date on which the assisted reproduction occurred, at which point the court will enter an order that does the following:

- (1) confirms that the intended parents are the child’s parents;
- (2) requires the gestational mother to surrender the child to the intended parents, if necessary; and
- (3) requires the bureau of vital statistics to issue a birth certificate naming the intended parents as the child’s parents.\textsuperscript{81}

\textsuperscript{76} Id.
\textsuperscript{77} Id. at 948 (citing N.J. STAT. ANN. §§ 9:3–41 subdiv. e, 26:8–28 (2004)) (discussing that the gestational carrier must wait the requisite 72 hours before deciding to give up the child and the intended parents must sign the birth certificate within 5 days of the birth, thereby creating the 48 hour window in which the intended parents can act to enter a binding agreement).
\textsuperscript{78} N.D. CENT. CODE § 14-18-08 (Supp. 2007).
\textsuperscript{80} TEX. FAM. CODE ANN. § 160.755 (Vernon Supp. 2008).
\textsuperscript{81} Id. § 160.760.
J. Utah

The Utah Code allows gestational surrogacy upon validation by the court, as long as one of the intended parents is the child’s genetic parent.\(^{82}\) There is a residence requirement of at least ninety days for either the gestational mother or the intended parents.\(^ {83}\) Should the parties fail to seek pre-approval of the agreement from the court, the child’s parentage will be determined according to traditional parentage rules embodied in the Utah Parentage Act.\(^ {84}\)

K. Virginia

Sections 20-156 of the Virginia Code established the terms under which surrogacy agreements are enforceable in Virginia. A surrogate, her husband, if any, and the intended parents may enter into a surrogacy agreement provided that the parties receive approval from the circuit court of the county in which one of the parties resides prior to the commencement of any surrogacy procedures.\(^ {85}\) After making extensive required findings, the court will then “enter an order approving the surrogacy contract and authorizing the performance of assisted conception” procedures for “twelve months after the entry of the order.”\(^ {86}\) Within seven days of the child’s birth, the intended parents are to provide the court with written notice that the child was born; medical evidence substantiating that one of the intended parents is the genetic parent of the child must then be entered.\(^ {87}\) Finally, the court enters “an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended parents” as the child’s parents.\(^ {88}\)

\(^{82}\) See UTAH CODE ANN. §§ 78B-15-801 to -809 (Supp. 2008).

\(^{83}\) Id. § 78B-15-802(2).

\(^{84}\) See id. § 78B-15-809(2) (“If a birth results under a gestational agreement that is not judicially validated as provided in this part, the parent-child relationship is determined as provided in Part 2, Parent-child Relationship.”). Chapter 15 of the Utah Code Annotated is entitled “Utah Uniform Parentage Act.” Id. § 78B-15-101.

\(^{85}\) VA. CODE ANN. § 20-160(A) (2008).

\(^{86}\) Id. § 20-160(B).

\(^{87}\) Id. § 20-160(D).

\(^{88}\) Id.
L. Washington

Washington explicitly forbids compensated surrogacy, while implicitly authorizing uncompensated surrogacy. When there is a dispute between a surrogate and the intended parents as to the custody of the child, the child is left in the physical custody of the party having such custody. The court is to resolve the dispute in accordance with various child custody considerations.

Clearly, the path to legal parenthood through surrogacy is onerous and requires legal counsel even in those states which are friendly to surrogacy arrangements. New Hampshire’s preservation of the surrogate’s right to back out of the agreement indicates the high degree of deference shown towards gestation. Unlike men, who are typically guaranteed rights to their wives’ biological children under rebuttable presumptions of paternity, intended mothers’ rights are largely contingent upon the continued goodwill of the surrogate even in some pro-surrogacy jurisdictions.

In those jurisdictions where there is neither explicit recognition nor explicit prohibition of surrogacy agreements, the intended parents are usually made the legal parents of the child through adoption. If the intended father is the genetic father, he may initiate a paternity action and seek custody of the child. If the surrogate then relinquishes her rights to the child, the intended mother may become the child’s legal mother through second-parent adoption.

Even if the intended father is not the child’s genetic father, it is possible for the intended parents to become the legal parents of the child if the surrogate relinquishes her rights; at that point, the intended parents pursue the adoption process of the jurisdiction. Regardless of what process is pursued to secure the intended mother’s rights, the fact remains that her rights are a mere extension of her husband’s, no more than those of a step-parent, in the vast majority of jurisdictions.

The Kentucky Supreme Court, in Surrogate Parenting Associates,
Inc. v. Commonwealth ex. rel. Armstrong. wrote provocatively about the gender issues involved in reproductive technology:

[N]o one suggests that where the husband is infertile and conception is induced by artificial insemination of the wife that the participants involved, the biological father, the physicians who care for the mother and deliver the child, or the attorneys who arranged the procedure, have violated the statutes now in place. Although this is tampering with nature in the same manner as the surrogate parenting procedure here involved, we recognize "[t]he decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices."

It sounds good, but is the analogy sound? In cases of artificial insemination, we turn to another man’s biological materials to solve problems of male infertility. Although there is disunity between biological father and social father, the rebuttable presumptions of paternity afforded to married men resolve the disunity in favor of the mother’s husband. In the case of surrogacy, however, there is no such simple resolution of the disunity.

As stated before, there is no male equivalent to gestation; it is probably more apt to compare artificial insemination to the use of donor eggs. In regards to surrogacy, courts and legislatures are truly in uncharted waters. There is no male equivalent procedure upon which we can base our decisions. Instead, those deciding how to respond to surrogacy must face, either directly or indirectly, deeply held feelings and biases about which aspect of “motherhood”—genetics, gestation, or nurture—defines a particular woman as a particular child’s mother. As this survey of the current status of surrogacy shows, pregnancy is still seen as the pivotal experience that makes a woman a mother.

IV. CONCLUSION

Surrogacy arrangements offer infertile females and their partners an option that has been available to infertile males in a number of guises: the chance to parent a child without going through the adoption process. Yet it is surrogacy, more than any ART technique, other than perhaps IVF, that draws down the

95. 704 S.W.2d 209 (Ky. 1986).
96. Id. at 212 (quoting Carey v. Population Services, Int'l, 431 U.S. 678 (1977)).
culture’s wrath. Techniques that remedy male infertility, even if they result in a child that is not genetically related to its “father,” draw little to no comment, much less legislative prohibition. Even techniques that result in a child that is not genetically related to its “mother” are respected, as long as the gestation is kept with the “mother.”

The states that explicitly acknowledge and give rights to intended mothers are few and far between; the vast majority of states cannot or will not confront the questions that surrogacy has raised. Given the growing popularity of surrogacy in all of its forms, however, we will be forced to confront these questions sooner or later; one can only hope that we confront them with our eyes open to the cultural ideas of family, of mother and father, that color the debate whether we articulate them or not.